

End of An Era?

The Impact of Drug Law Reform in New York City

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SUBSTANCE USE AND MENTAL HEALTH PROGRAM



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FROM THE PRESIDENT

With the establishment of the Rockefeller Drug Laws in 1973, New York State was among the first jurisdictions in the nation to require long mandatory minimum sentences for a range of drug offenses. These laws marked the beginning of the War on Drugs, which fueled a dramatic growth in prison populations. More than four decades later, a growing chorus of voices across the political spectrum has concluded that the War on Drugs has been lost.


In recent years, New York State is once again in the vanguard—this time, of states taking steps to roll back compulsory harsh sentences. In April 2009 the state legislature eliminated mandatory minimums for low-level drug offenses and increased the availability of diversion to treatment. The goals were ambitious: decrease the use of incarceration, increase the use of treatment, reduce recidivism rates, reduce racial disparities in sentencing, and reduce costs.

With funding from the National Institute of Justice, researchers at Vera, John Jay College of Criminal Justice, and Rutgers University examined the early implementation of these reforms, using New York City as the laboratory.

The results point in the right direction: overall, diversion from prison to treatment has increased, and racial disparities and recidivism have decreased, all at a marginal increase in costs.

Yet there is still a ways to go. While diversion increased, only one out of five defendants eligible under the new laws actually enrolled in treatment. In addition, significant disparities among the boroughs in the use of diversion suggest that there is room for improvement in the procedures used by courts and district attorneys to identify eligible defendants—including ensuring that they are clinically assessed. And, while racial disparities in sentencing outcomes have decreased, blacks and Latinos are still more likely to be sent to prison following arrest on a felony drug charge than their white counterparts.

Vera is committed to reducing the nation's over-reliance on incarceration and expanding access to treatment and other necessary supports for people who come into contact with the criminal justice system. We hope the insights that *End of an Era? The Impact of Drug Law Reform in New York City* provides—into both the successes of drug law reform in New York City as well as the opportunities for mid-course corrections—will empower efforts underway to reshape the state's drug treatment and incarceration landscapes and serve as a national model.



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Introduction

Just as the laws that Governor Rockefeller championed were a sign of his times—particularly fear of rising crime—the new laws are also iconic, emblematic of the current sea change in public policy and opinion.

In 1973, New York Governor Nelson Rockefeller signed into law a series of measures that mandated lengthy prison sentences for people convicted of a range of felony drug offenses. Under the new laws, which came to be known as the Rockefeller Drug Laws, a person convicted of possessing as little as four ounces of a narcotic faced a mandatory minimum sentence of 15 years and up to life in prison. These laws foreshadowed a wave of mandatory sentencing statutes that swept the nation during the next 20 years, contributing to dramatic increases in state and federal prison populations and fueling the racial disparities that have come to characterize the U.S. criminal justice system.

In 2009, New York state lawmakers passed the latest in a series of reforms that essentially dismantled the Rockefeller Drug Laws. Just as the laws that Governor Rockefeller championed were a sign of his times—particularly fear of rising crime—the new laws are also iconic, emblematic of the current sea change in public policy and opinion. After decades of costly mass incarceration and persistently high recidivism rates that have been especially detrimental to communities of color, advocates, policymakers, and others across the political spectrum are calling for approaches to crime and punishment that are fairer, more effective, and a better use of public funds.

While this landscape of reform has many facets, eliminating mandatory-minimum sentences for the possession, use, or small-scale sale of illegal drugs and expanding the possibility of diversion to treatment stand out. It's easy to understand and intuitive: provide people with the support they need to address a drug or alcohol problem and they are less likely to commit crimes.

While adapting to new rules and procedures is not easy for any institution, the new drug laws pose a particular set of challenges to large metropolitan court systems, in part because reform requires multiple entities to do business differently and coordinate their efforts. Seen through this lens, drug law reform is still in its infancy. It is premature to draw firm conclusions about the long-term impacts of the laws passed in 2009. But it is not too soon to assess the laws in practice and use the findings that emerge to adjust policy and practice in ways that are likely to lead to even better outcomes for the general public and for people in the justice system who need treatment for a substance use disorder.

With this goal in mind, researchers at the Vera Institute of Justice (Vera) received funding from the National Institute of Justice to examine how the 2009 drug law reforms were implemented in New York City and the early outcomes in terms of taxpayer costs and reoffending rates. Vera partnered with John Jay College of Criminal Justice and the School of Criminal Justice at Rutgers University to conduct the study. Although the 2009 laws apply statewide, this research and its findings are limited to New York City.

A SHORT HISTORY OF THE ROCKEFELLER DRUG LAWS

During the first half of the 20th century, the response in the United States to illicit drug use focused on treating addiction. Even in the late **1960s** when facing a sharp rise in heroin use, New York Governor Nelson Rockefeller responded by increasing access to methadone and other forms of drug treatment. But as crime rates continued to rise and that approach was perceived by many to be ineffective, the governor championed a new set of strict laws.

Under those statutes, which were passed in **1973** and have been referred to ever since as the Rockefeller Drug Laws, a person convicted of selling two ounces or possessing four ounces of heroin, morphine, “raw or prepared opium,” cocaine, or marijuana received a mandatory minimum sentence of 15 years and could be sentenced to life in prison. The Rockefeller Drug Laws became a model for many other states that subsequently passed legislation mandating lengthy prison sentences for drug offenses.

Thousands of New Yorkers received long sentences for drug crimes under the Rockefeller Drug Laws, helping to fuel an explosion in the state prison population. Over roughly three decades, the total prison population in New York State increased approximately sixfold and the number of people incarcerated for drug offenses grew by a factor of nearly 15—skyrocketing from 1,488 people in 1973 to 22,266 people in **1999**.^a Furthermore, by **2001** there were striking racial disparities in the state prison population. For every white male between the ages of 21 and 44 incarcerated for a drug offense, there were 40 African American males, also in the prime of life, behind bars for the same reason.^b

Overturning the Rockefeller Drug Laws became a rallying point for people within and outside government and the movement took shape most visibly in the Drop the Rock Coalition. Both the coalition and others pushed for deep and meaningful reform. In January **2009**, during his State of the State address, Governor David Paterson said, “I can’t think of a criminal justice strategy that has been more unsuccessful than the Rockefeller Drug Laws.”^c

A little more than two months later, lawmakers in Albany had reached an agreement that reflected a sharp change in philosophy and actual policy. The new laws that took effect in **2010** removed many of the mandatory minimum sentences established under the Rockefeller Drug Laws, expanded the circumstances under which diversion to treatment could be

offered, and gave judges more discretion in making this decision. Following the advent of what's loosely called "drug law reform," researchers have begun to examine how these laws are functioning in practice and their effects.

^a New York State Division of Criminal Justice Services (DCJS), Office of Justice Research and Performance, *Felony Drug Arrest, Indictment and Commitment Trends 1973-2008*, Drug Law Reform Series, Report 1 (Albany, NY: DCJS, 2010), p. 6, http://criminaljustice.state.ny.us/pio/annualreport/baseline_trends_report.pdf.

^b Ernest Drucker, "Population impact of mass incarceration under New York's Rockefeller drug laws: An analysis of years of life lost," *Journal of Urban Health* 79, no. 3 (2002): 434-435; and Ernest Drucker, *A Plague of Prisons: The Epidemiology of Mass Incarceration in America* (New York NY: The New Press, 2011).

^c Governor David Paterson, "New York State of the State Address," Albany, NY, January 7, 2009, <http://www.c-span.org/video/?283171-1/new-york-state-state-address> (accessed January 7, 2015).

Findings from the study—which compared matched samples of arrestees from 2008 (pre reform) and 2010 (post reform)—show that drug law reform, as it functioned in New York City soon after the laws were passed, did indeed make diversion to treatment available to a somewhat larger proportion of criminal defendants citywide. These are people with a history of substance use who most likely would have been facing time behind bars following an arrest for a nonviolent felony crime. Moreover, diversion to treatment is associated with reduced recidivism rates. There was also a narrowing of the gap in how the criminal justice system punishes black and Hispanic defendants compared with white defendants over the period covered by the study, which is significant since racially disproportionate sentences for drug-related crimes were a major concern motivating the reforms.

The remainder of this summary report describes these outcomes in some detail and explores other findings that reveal aspects of the laws in practice that could be refined to further expand access to treatment and potentially realize the financial savings that the framers of drug law reform anticipated and that may still be within reach.

TREATMENT OPTIONS



There are three main types of substance abuse treatment available to eligible defendants in New York City: inpatient, outpatient, and residential treatment. **Inpatient treatment** includes detoxification and rehabilitation interventions provided in medical settings. **Outpatient treatment** emphasizes regular counseling sessions, with limited use of medication, while clients live in their communities. **Residential treatment** programs in New York State typically follow the "therapeutic community" model, which stresses abstinence and aims to change the lifestyle of drug users through a long-term communal experience and the influence of peers. Residential treatment programs tend to be offered in non-medical settings.

Expanding access to treatment

Drug law reform eliminated mandatory prison sentences and expanded the possibility of diversion to treatment for all felony drug charges, except the most serious Class A felonies.¹ Also excluded under the 2009 laws are defendants who have been convicted of a violent felony offense at some point in the 10 years preceding their current arrest. Before drug law reform, for example, a defendant convicted of a B felony drug offense who had prior felony convictions,

Summary of sentencing and diversion options pre and post-drug reform*

	B felony with no prior felony conviction	B felony with prior nonviolent felony conviction	C felony with prior nonviolent felony conviction	D felony with prior nonviolent felony conviction	E felony with prior nonviolent felony conviction
Pre-reform sentencing and diversion options	<ul style="list-style-type: none"> • 1 to 9 years in prison 	<ul style="list-style-type: none"> • 3½ to 12 years in prison 	<ul style="list-style-type: none"> • 2 to 8 years in prison 	<ul style="list-style-type: none"> • 1½ to 4 years in prison OR • Willard** 	<ul style="list-style-type: none"> • 1½ to 2 years in prison OR • Willard**
Post-reform sentencing and diversion options	<ul style="list-style-type: none"> • 1 to 9 years in prison, • Willard,** • SHOCK,+ • jail term (1 year or less), • probation, OR • treatment diversion (with or without prosecutor's consent) 	<ul style="list-style-type: none"> • 2 to 12 years in prison, • SHOCK,+ OR • treatment diversion (with or without prosecutor's consent) 	<ul style="list-style-type: none"> • 1½ to 8 years in prison, • Willard,** • SHOCK,+ • jail term (1 year or less), • probation, OR • treatment diversion (with or without prosecutor's consent) 	<ul style="list-style-type: none"> • 1½ to 4 years in prison, • Willard,** • SHOCK,+ • jail term (1 year or less), • probation, OR • treatment diversion (with or without prosecutor's consent) 	<ul style="list-style-type: none"> • 1½ to 2 years in prison, • Willard,** • SHOCK,+ • jail term (1 year or less), • probation, OR • treatment diversion (with or without prosecutor's consent)

* New York State categorizes the seriousness of a felony drug offense using a sliding scale, with Class A felonies representing the most serious crimes and Class E felonies, the least serious. Although unavailable under statute before drug law reform, in practice all jurisdictions in New York City had at least one type of prosecutor-led treatment diversion program, including Felony Drug Court, Drug Treatment Alternative-to-Prison (DTAP), Screening and Treatment Enhancement Part (STEP), and other Alternative to Incarceration (ATI) programs. After drug law reform, these pre-existing options were expanded to include more classes of offenses, and a new path for treatment diversion was created—Judicial Diversion—which allows judges to divert eligible defendants to treatment without the approval of the prosecutor. (See the appendix for brief descriptions of diversion types.)

** Willard is a sentence of parole supervision, with the first 90 days spent in an intensive residential drug treatment program.

+ SHOCK is a 6-month boot camp program.

The impact of drug law reform in New York City was not only to divert more people but also to extend diversion to treatment to offenders with higher levels of need.

but had never been convicted of a violent felony offense, received a mandatory minimum sentence of three-and-a-half years and could be sentenced to up to 12 years in prison. After the new laws took effect, a judge could divert that same person to treatment or require a shorter custodial sentence—in this instance, at least two years in prison.

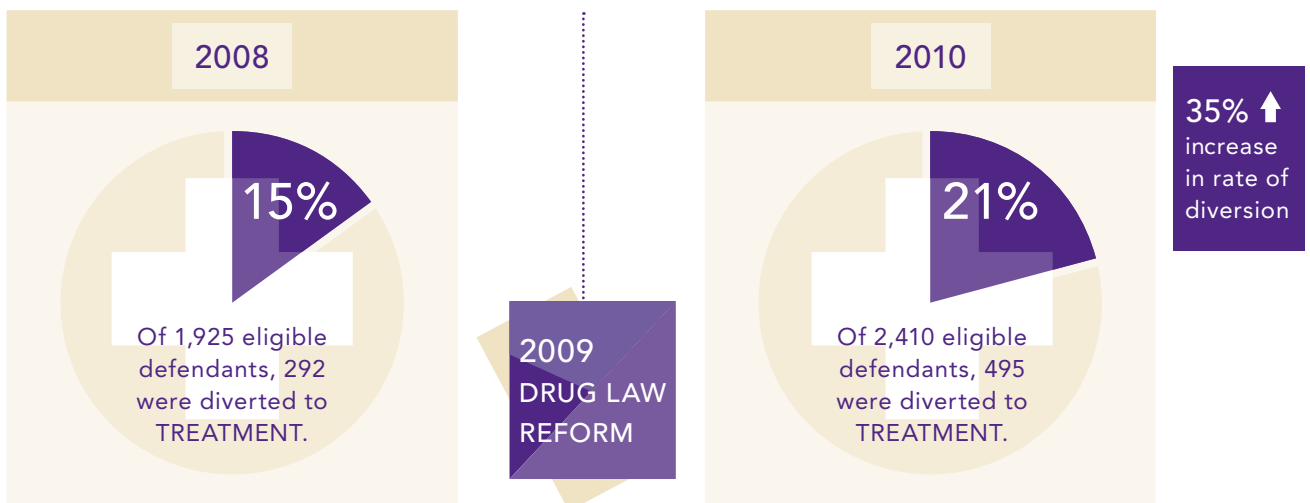
Historically in New York, and in many other jurisdictions nationally, diversion to treatment required the approval of the local prosecutor’s office. By empowering judges to divert people without the consent of prosecutors, removing mandatory minimum sentences for a significant number of specific crimes, and expanding eligibility for diversion to treatment, drug law reform clearly intended to move people away from prison and jail and into treatment programs that might address their underlying problems. But did that happen in reality?

Findings from this study show that diversion was more common citywide after the new laws went into effect, as researchers found a 35 percent rise in the rate of diversion among eligible defendants.² To capture that effect in terms of individual lives, 495 people—just in this limited sample of 2,410 eligible cases from 2010—were diverted to treatment, compared to 292 defendants who were diverted to treatment in the matched sample of 1,925 eligible cases from 2008.

Defendants diverted to treatment after drug law reform were more likely to self-report heroin and cocaine use and to have more extensive criminal histories.³ So the impact of drug law reform in New York City was not only to divert more people but also to extend diversion to treatment to offenders with higher levels of need.

When considering the magnitude of the increase in treatment diversion citywide, it is notable that diversion options for felony drug defendants were already widely available in New York City, especially compared to jurisdic-

Opening the gate to treatment



STUDY METHODOLOGY



To evaluate the implementation and impact of drug law reform in the city, researchers compared two matched samples of criminal defendants: people arrested for felony drug offenses or indicted on specified property charges in 2010, the year after drug law reform took effect, and people arrested in 2008 for the same types of offenses.^a

To examine the implementation of drug law reform, researchers used a statistical technique known as propensity score matching to select defendants from 2008 and 2010 with similar demographic characteristics, charges, and histories of justice system involvement.^b The researchers identified 15,331 matched pairs (14,410 felony drug cases and 921 specified property cases from each period). The methodology is described in detail in the study's technical report available on Vera's website at www.vera.org/end-of-an-era.^c To gain additional insight, the researchers also conducted 35 interviews with judges, prosecutors, and public defenders in three New York City boroughs—Brooklyn, the Bronx, and Manhattan.

To explore the impact of drug law reform on reoffending, researchers compared re-arrest data for two equivalent groups of 638 cases, selected using propensity score matching: defendants indicted on reform-eligible charges and diverted to treatment post-reform and a sample of defendants arrested on the same charges who received corrections sentences (jail, prison, probation, or "time-served") pre-reform. Researchers determined differences in time to re-arrest between the two samples and compared overall re-arrest rates.

Vera also conducted two sets of cost-benefit analyses to explore the cost implications of reform: 1) using data from the implementation analysis to examine the impact of reform on taxpayer and victim costs; and 2) using data from the reoffending analysis to describe the costs associated with diverting a defendant to treatment.

^a In the case samples from both years (2008 and 2010), the arrests occurred between January 1 and September 30 and were closed ("disposed") before April 7 of the following year. In addition to felony drug offenses, the 2009 laws also created the possibility of treatment diversion for people accused of certain felony property crimes, including but not limited to some burglary offenses, some criminal possession of stolen property offenses, some forgery offenses, and a subset of criminal mischief offenses.

^b Drug felony cases were matched on a total of 51 variables. For details, please see the technical report: Jim Parsons et al., *A Natural Experiment in Reform: Analyzing Drug Policy Change in New York City*, Final Report to the National Institute of Justice under Grant No: 2010-IJ-CX-0030, January 2015, p. 235, available at www.vera.org/end-of-an-era.

^c *Ibid.*, p. 231.

Although a 35 percent increase in the proportion of eligible defendants diverted to treatment is encouraging... only one out of five eligible defendants in New York City was actually enrolled in treatment.

tions elsewhere in the state. Given the existing landscape, the laws passed in 2009 were expected to have less impact in the city than in many upstate counties where diversion to treatment options were very limited prior to drug law reform.

In terms of raw numbers, the effects of the reform were also tempered by a decline in arrests citywide. Arrests for felony crimes in New York City began falling before the new laws were passed and continued to decrease thereafter.

While there were 8,556 such arrests in the first quarter of 2007, the tally in the first quarter of 2011 was 5,723—a 33 percent drop.

Although a 35 percent increase in the proportion of eligible defendants diverted to treatment is encouraging, the study found that even after the advent of drug law reform, only one out of five eligible defendants in New York City was actually enrolled in treatment. The pie chart on page 11 illustrates case outcomes for all eligible defendants.

Two underlying dynamics need to be understood to put these findings in context. The first is the attrition that occurs from arrest to indictment in terms of eligibility for diversion. Among the total sample of 14,410 pairs of felony drug cases, selected and matched based on the charge at arrest, some of those people were indicted on Class A felony charges or had criminal histories that rendered them ineligible for diversion under the law. Others were removed from the eligibility pool following decisions by prosecutors or judges early on in their cases: some were charged with a misdemeanor crime instead of a felony, others were conditionally discharged, and in some cases, all charges were dropped and their cases dismissed. Among the 14,410 matched pairs of cases, fully 12,000 (83 percent of the total) were removed, so the treatment enrollment rate reflects case outcomes for 2,410 *eligible* cases in 2010 and 1,925 *eligible* cases from 2008. (Note: as the pie chart on page 11 shows, a small proportion of cases was discharged or dismissed even later in the process, following indictment.)

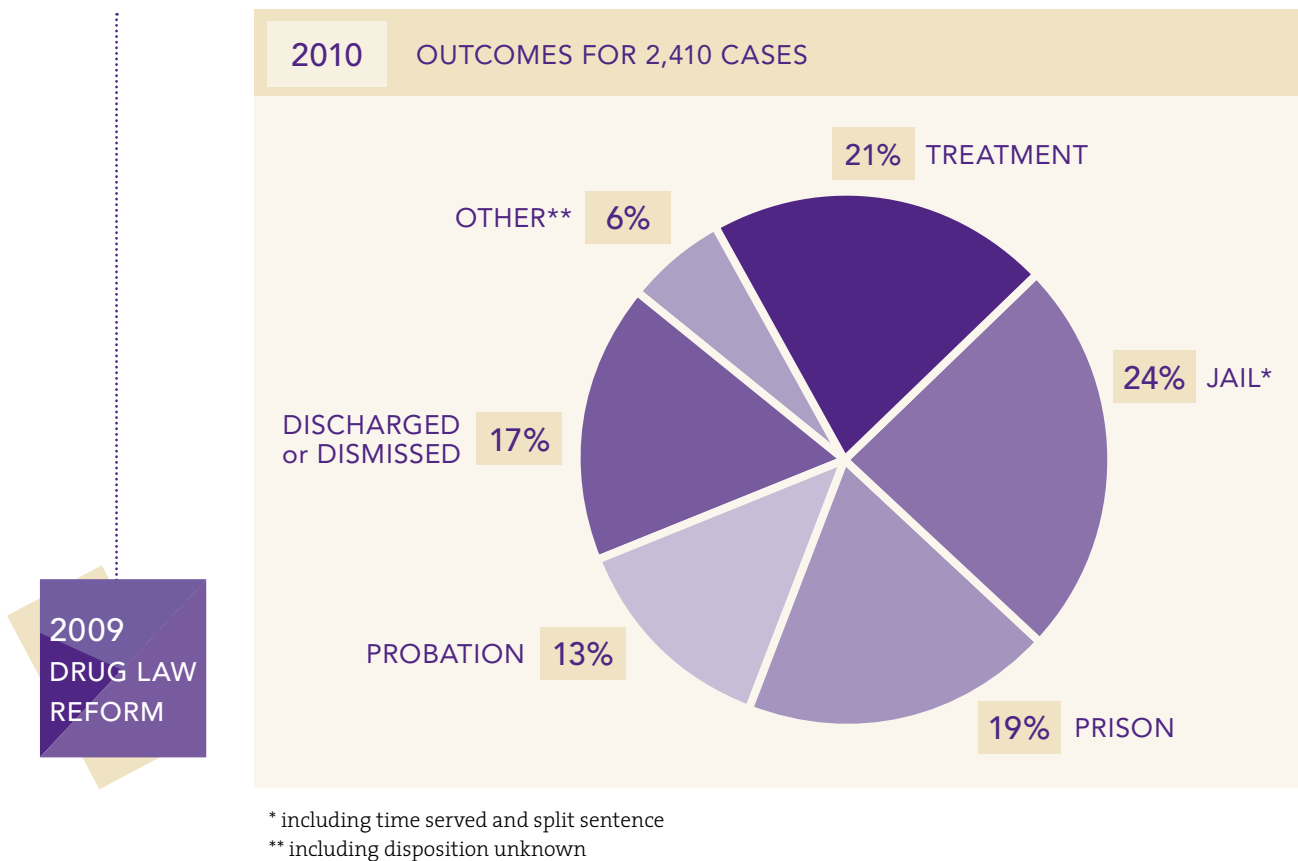
The second dynamic is whether an eligible defendant is offered diversion to treatment and whether he or she accepts that offer. The laws passed in 2009 only provide for the *possibility* of diversion, assuming a defendant is eligible; they don't require it. And there are legitimate reasons why some defendants might not be offered substance abuse treatment or might refuse it, even if that means going to prison or jail—most significantly, because they do not have or do not believe they have a problem with drugs or alcohol.

The present study was limited in its ability to understand why many defendants who are eligible for treatment under the 2009 laws were not being

diverted. But those limited findings from records maintained by the courts suggest that many eligible defendants are not referred for assessment to determine their suitability for diversion. Of those who were assessed, the reason they were not diverted was rarely clinical. Rather, there is evidence that prosecutors often recommended against diversion and that many defendants declined treatment. The underlying motivations in both situations are unclear. Anecdotal reports suggest that some defendants are dissuaded by the possibility of having to remain in treatment for a longer period of time than they would be incarcerated.

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Case outcomes for eligible defendants arrested in 2010, after drug law reform



FROM PAPER ELIGIBILITY TO DIVERSION



Following an arrest, the process in New York City of identifying whether someone is eligible for treatment diversion involves two main steps. First, representatives from the court or the prosecutor's office check the current charges and criminal history to determine if a defendant meets the statutory requirements under the 2009 laws. This is often referred to as "paper eligibility."

Because a defendant's initial charge rarely matches the crime for which he or she is eventually convicted—largely due to plea negotiations—the majority of defendants who initially appear eligible on paper are later removed from the eligibility pool. Reasons vary: the charge might be reduced from a felony to a misdemeanor, the defendant might receive a conditional discharge, or the charge against the person might be dropped entirely and the case dismissed.

If a defendant remains eligible on paper, the second step is to screen or assess the person to determine if he or she meets clinical criteria for a substance use disorder—also a requirement for diversion under the law. In practice, a large proportion of paper eligible defendants are not assessed and the underlying reasons are not clear.

Finally, even if a defendant is eligible for diversion based on the current charge and criminal history *and* is determined to have a substance use disorder, diversion is not guaranteed. Prosecutors may recommend against diversion for any number of reasons. Also, the defendant may refuse the offer of treatment, anticipating a noncustodial sentence, or may prefer to spend time in jail or prison as opposed to entering a mandatory treatment program in which compliance may be difficult and lack of sufficient progress would extend the duration of mandated treatment.

Differences in diversion within the city

Based on this sample of cases, rates of diversion differed significantly within New York City before and after the implementation of drug law reform. Each of the city's five boroughs and the Office of the Special Narcotics Prosecutor (SNP) has its own district attorney and courts that handle defendants who might be diverted to treatment.⁴ Trends in the Bronx (Bronx County), Brooklyn (Kings County), and Manhattan (New York County) are particularly important since the vast majority (81 percent) of all felony drug arrests citywide in 2010 were handled by courts in these three boroughs. The potential for identifying eligible defendants and enrolling them in treatment, as the framers of drug law reform intended, is greatest in the three boroughs that handled the majority of cases in the city. The findings show wide variation among these boroughs in both the proportion of defendants screened for a potential substance use disorder and the proportion actually diverted to treatment. (See Appendix for a brief description of diversion practices pre and post reform in the Bronx, Brooklyn, and Manhattan.)

Courts in Brooklyn appear to have been the most proactive in terms of screening “paper eligible” defendants in 2010 to determine if they had substance use disorders, with a screening rate of 46 percent. (As discussed earlier, to be eligible on paper means that the person's current charge and criminal history fit the eligibility criteria under the law.) Screening rates in the Bronx (22 percent) and Manhattan (17 percent) were significantly lower. The data available on screening, however, were incomplete. As a result, these findings under-represent actual screening rates. Courts in the Bronx were the most likely to actually divert a person to treatment. Within the universe of eligible cases in the 2010 sample, the diversion rate in the Bronx was 29 percent. The rates in Brooklyn and Manhattan were 22 percent and 10 percent, respectively.

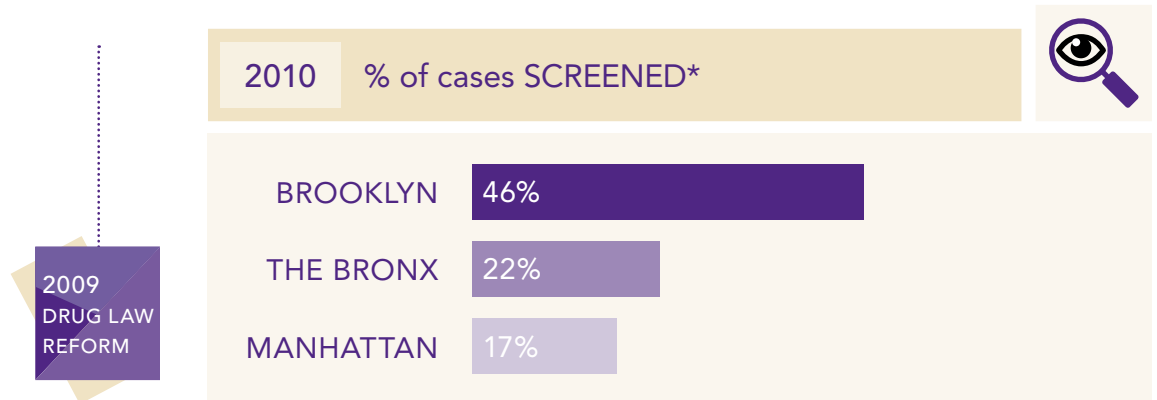
As mentioned earlier, drug law reform gives judges more discretion by eliminating mandatory sentences and permitting them to offer a defendant treatment without the approval of the presiding prosecutor. When it became clear that reform was inevitable—if not yet enshrined in law—Jeffrion L. Aubry, an assemblyman from Queens who was a veteran of the reform effort, told a reporter from the *New York Times*, “We’re putting judges in the position to determine sentences based on the facts of a case and not on mandatory minimum sentences. To me, that is the restoration of justice.”⁵

This study reveals, however, that judges rarely exercised their expanded authority. Among the 495 eligible defendants diverted to treatment in the sample of eligible drug felony cases from 2010, the newly created “judicial diversion” mech-

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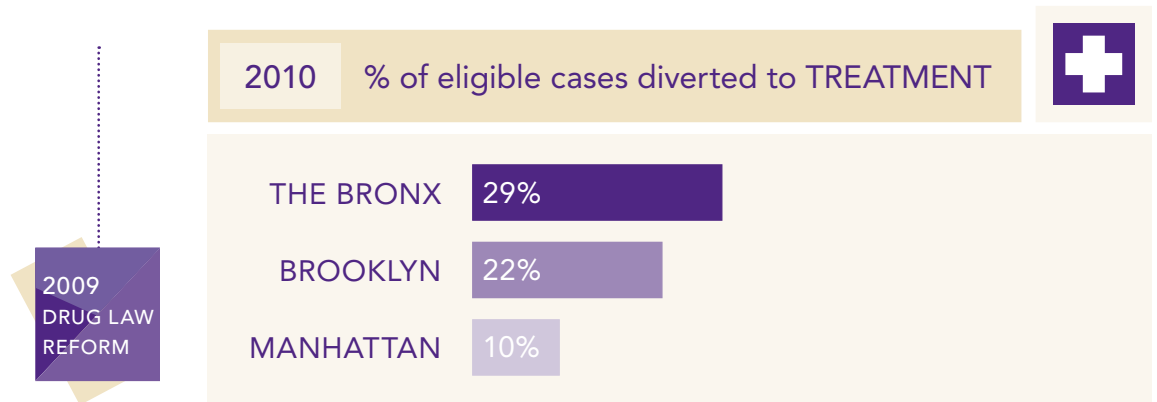
anism was used in just 110 of these cases, suggesting that prosecutors still exert more influence over case outcomes. The only judges that used the newly created mechanism to any significant degree presided over cases in Manhattan and those handled by SNP. This is interesting because the rate of diversion overall was lower in these jurisdictions when compared to the citywide average.

Screening rates by borough, 2010



* The data available on screening were incomplete. As a result, findings under-represent the actual screening rates.

Diversion rates by borough, 2010



Beyond diversion: broader consequences of drug law reform

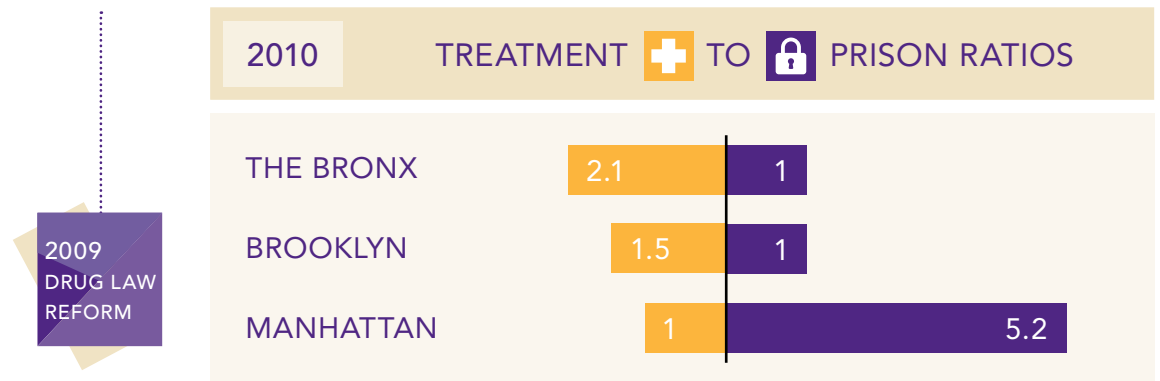
In addition to assessing changes in the rate of diversion among eligible defendants citywide, the study describes case outcomes for the entire sample of defendants who were arrested in 2010, after the advent of drug law reform, and for the matched sample of defendants arrested in 2008. This analysis is important since only a minority of these defendants was eligible for diversion under the new laws and also because changes to the law may have unanticipated consequences for a wide range of cases. For example, as described below, removing mandatory prison sentences can alter the dynamics of plea bargaining and result in an uptick in the number of felony convictions. In the case of drug law reform, it is particularly important to understand the impact of changing mandatory minimum sentencing laws on the use of prison and jail.

The analysis reveals an overall decrease in the use of custodial sentences for felony drug offenses in New York City, just as the framers of drug law reform intended. Specifically, the number of defendants arrested on felony drug charges who were sentenced to prison declined by 7 percent, although this change is not statistically significant. More encouraging are statistically significant declines in the number of defendants sentenced to jail (down 10 percent) and time served (down 16 percent), and the number who received a “split sentence,” which is a combination of jail and probation, which dropped by 27 percent.

While these findings provide additional evidence that drug law reform is having a positive effect in New York City, it is important to view them in context. Even after drug law reform, defendants arrested in 2010 who were eligible for diversion were still more likely to receive a custodial sentence than be diverted to treatment. And there are important borough-level differences in the use of prison, the most punitive sentence. Looking only at the three boroughs where the vast majority of defendants in this study were arrested—Brooklyn, the Bronx, and Manhattan—the ratio of treatment to prison differs substantially. For every 1.5 people in Brooklyn arrested in 2010 and diverted to treatment, one person went to prison. The ratio in the Bronx favors diversion even more: for every 2.1 people diverted to treatment, 1 person went to prison. In Manhattan, however, the balance was reversed: for every one person diverted to treatment, 5.2 people went to prison.

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Ratio of treatment to prison in the Bronx, Brooklyn, and Manhattan, 2010



The analysis of the entire sample of defendants also reveals two concerning trends. The first involves sentence lengths for people who were not diverted to treatment and whose cases were not discharged or dismissed. Prison sentences increased from an average of 29.6 months among defendants arrested in 2008 to an average of 32.5 months among defendants arrested in 2010. The increase in average sentence length for people sent to jail was even greater, from 95.7 days among defendants arrested in 2008 to 118.5 days among defendants arrested in 2010. It is not at all clear that the 2009 laws actually caused these increases—other factors might be at work—but the trend itself clearly merits further exploration given the substantial human and financial costs of longer prison and jail sentences.

Finally, according to data analysis conducted as a part of this study, removing mandatory minimum sentences changed plea bargaining practices in the city. This is significant in a system where more than 90 percent of defendants who are ultimately convicted plead guilty. Defendants arrested in 2010 for a B felony drug offense—the most common charge by far—were much more likely to be indicted and convicted of that crime when compared to cases originating from 2008 arrests. In 2008, prosecutors were more likely to offer defendants arrested for the same crime a lesser charge, possibly in an effort to persuade them to plead guilty and avoid a mandatory minimum sentence. In the samples of matched cases analyzed as part of this study, the number of people convicted of a B felony drug crime after the reforms were in place increased by a factor of 2.6, a change that is statistically significant. This trend raises concerns because of the effect that having such a serious criminal record may have, for example, on housing or employment opportunities or for future sentencing decisions, if the person is re-arrested.

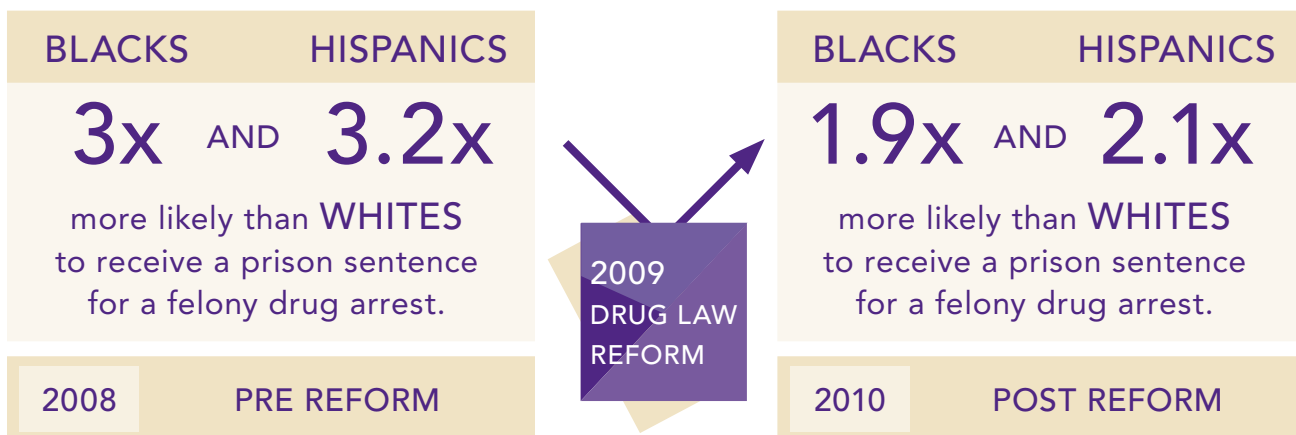
Narrowing racial disparities

One of the primary criticisms of the Rockefeller Drug Laws was their disparate impact on communities of color. Not only were blacks and Hispanics being arrested more often than whites for drug crimes—far more often than their share of the population would suggest, especially given similar rates of self-reported drug use across races—they were being prosecuted and sentenced more severely and thus were more likely to end up in prison.⁶ Drug law reform was meant to correct the punishment portion of the equation.

This study shows that racial disparities in sentencing did diminish in the early period following drug law reform. Black and Hispanic defendants included in the sample of felony drug arrests from 2008 were three times more likely than white defendants to receive a prison sentence. After drug law reform, based on the sample of cases from 2010, they were twice as likely as whites to go to prison following a felony drug arrest—and multivariate statistical analysis shows that this disparity was not fully explained by other factors, such as the person’s age, gender, criminal history, or current charge. Halving racial disparities in just two years is a notable accomplishment. At the same time, the significant disparities that persist are evidence of harmful biases in the criminal justice system.

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Racial disparities in sentencing, before and after drug law reform



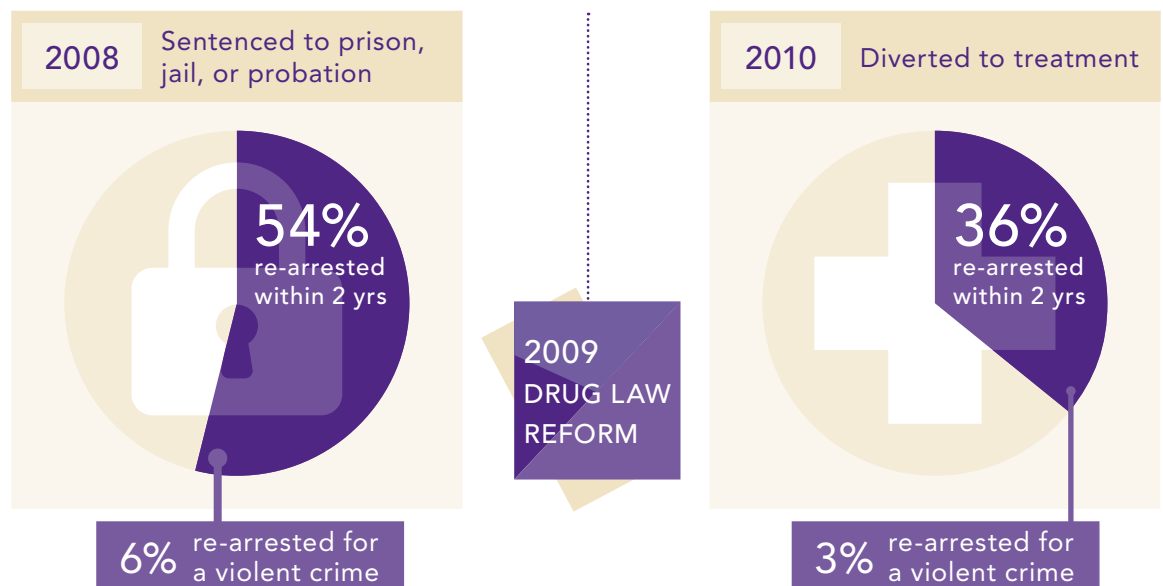
Improving public safety

Nearly two-thirds (64 percent) of the treatment sample remained arrest-free over a two-year follow-up period.

Efforts to expand diversion to treatment are often countered with claims that such programs put the public at risk by releasing criminals back onto the streets. Findings from this study add to the growing body of research that proves otherwise. Using propensity score-matching techniques, researchers selected a sample of 638 defendants who were arrested in 2008 and sentenced to prison, jail, probation, or time served and a matched sample of 638 defendants arrested in 2010 and diverted to treatment. Researchers compared the two groups, counting number of re-arrests, time to re-arrest, and types of new charges.⁷

Nearly two-thirds (64 percent) of the treatment sample remained arrest-free over a two-year follow-up period. In other words, their recidivism rate was 36 percent. In comparison, the recidivism rate among the matched sample of defendants sentenced to prison, jail, probation, or time served was significantly higher, at 54 percent. Moreover, defendants diverted to treatment were re-arrested fewer times on average and had fewer arrests for felony offenses compared to those who were sentenced to prison, jail, probation, or time served. Perhaps most important from a public safety perspective, only 3 percent of people who enrolled in treatment were re-arrested for a violent crime compared to 6 percent of the 2008 sentence group.

Recidivism rate: pre-reform prison, jail, or probation compared to post-reform treatment

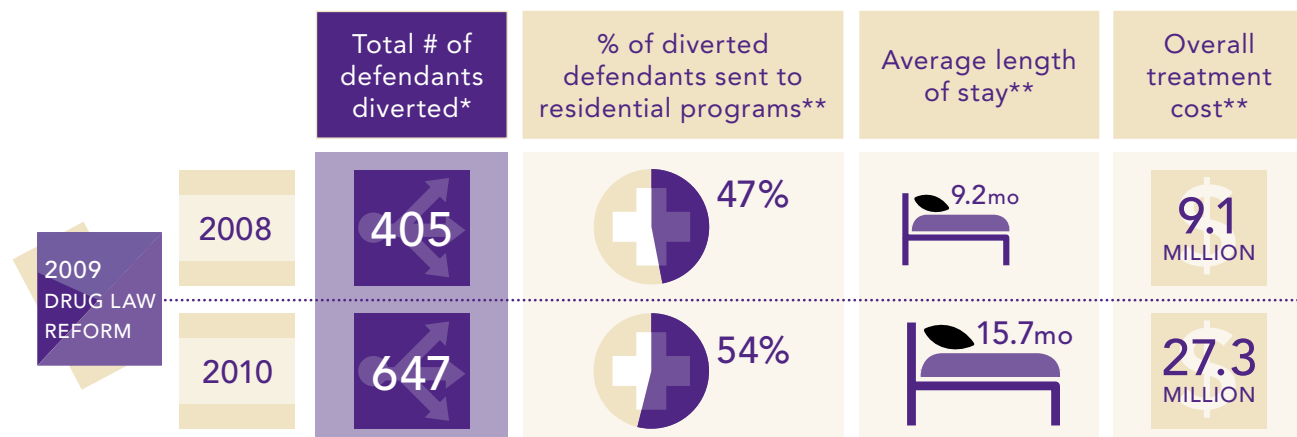


The cost of drug law reform

The laws that went into effect in 2009 were understood to be costly to implement, but the view at the time was that they would ultimately save money. Treatment was expected to be less expensive than incarceration and to be rehabilitative in ways that would reduce recidivism rates—saving even more money in the long run. While the belief that treatment would lead to lower recidivism rates and thus reduce criminal justice costs proved to be true, the assumption that delivering treatment would be less expensive than incarceration was not borne out in the early days of implementation, and the net result was a marginal increase in cost. This estimate does not include costs savings related to reduced rates of reoffending that may accrue beyond the evaluation period or savings related to increased participation in the labor market, family stability, and other benefits associated with reducing rates of substance abuse.

Understanding the high cost of treatment requires a closer look at what happened after drug law reform. First, the overall number of defendants diverted to treatment increased. Second, more than half (54 percent) of defendants who were arrested in 2010 and diverted to treatment spent at least some time in a residential program. In comparison, fewer defendants arrested in 2008 were diverted to treatment and a smaller proportion of them—47 percent—were mandated to a residential program. Even more important, defendants mandated to participate in residential treatment following drug law reform spent much longer in these therapeutic communities: an estimated 15.7 months on average compared to an average of 9.2 months prior to drug law reform.⁸

Increase in use of residential treatment



* These figures include both eligible defendants and others who were diverted via other mechanisms.

** Analysis based on drug court participants—the only group of diverted defendants for which complete data were available pre and post reform.

Residential treatment providers are paid a daily rate of \$71 per person, so greater use of these programs and longer stays in them lead to increased costs. The cost of residential treatment tripled following drug law reform, rising from \$9.1 million for the sample of defendants arrested in 2008 to \$27.3 million for those arrested in 2010.

Using a statistical method known as regression analysis, researchers controlled for a range of factors that might have influenced treatment decisions. They found that longer histories of drug offending and the type of drugs people reported using only partially explain the greater reliance on residential treatment. Several interviews conducted as a part of this study suggest that residential treatment may have been used as a punitive sanction and as a way to restrict a person's liberty, rather than as a response to a clinical assessment of his or her treatment needs. Whether or not the use of residential treatment was warranted—and this study cannot answer that question—the heavy reliance on residential programs made these cases more expensive than anticipated.

Cost-benefit analysis—an evaluation technique that compares the costs of programs with the benefits they deliver—was used to compare cases from 2008 and 2010. This analysis revealed that the additional treatment costs exceeded the cost savings to the criminal justice system. Specifically, diversions from prison and the decline in recidivism reduced justice system costs by \$6.4 million and victimization costs by \$9.5 million. This combined \$15.9 million in benefits, however, is exceeded by \$23.2 million in additional treatment costs. The result is a net cost of \$7.3 million.

To put this cost in context, \$7.3 million represents less than a 2 percent increase over the costs associated with the sample of cases from 2008. The burden on the city and state budgets is also less than it might appear considering nearly half of the cost of treatment is reimbursed by the federal government.

There are a couple of limitations to this cost-benefit analysis. First, potential longer-term savings associated with the continued avoidance of criminal behavior among people who enrolled in treatment are not captured given the duration of the follow-up period. But even more important, this study did not measure the financial value of the many potential benefits associated with someone turning his or her life around—from increased employment, earnings, and contributions to the tax base, to the value of becoming a better spouse and parent.

Conclusion and recommendations

The Rockefeller Drug Laws made New York one of the first states to mandate lengthy prison sentences for felony drug offenses, setting a precedent that would have influence nationally. Thirty-six years later, New York joined other states in repealing harsh mandatory minimum sentences and embracing treatment as a more appropriate response to nonviolent felony offenders with substance use disorders. The new laws passed in 2009 were widely applauded, if not universally endorsed, and seemed to hold great promise. The results of this study comparing matched pairs of people arrested and prosecuted in New York City before and after drug law reform reveal aspects of the law in practice that are worthy of celebration as well as shortcomings and unintended consequences that merit attention and can be remedied.

The increase in use of diversion, from 15 percent of eligible drug felony cases in 2008 to 21 percent in 2010 following drug law reform is encouraging. So is the fact that the new laws opened the gate to treatment for people with more extensive histories of drug use and crime. At the same time, however, just one out of five defendants eligible for diversion under the new laws actually enrolled in treatment. City officials should build on the progress documented in this study to further expand access to treatment. To do that, courts and district attorneys must establish routine procedures for identifying cases that meet the criteria for diversion based on the defendant's current charge and criminal history and also ensure that all "paper eligible" defendants are clinically assessed to identify possible substance use disorders. This would be a marked improvement over current screening practices.

In addition to these administrative improvements, judges could make greater use of their authority under the 2009 laws to divert defendants who appear to be good candidates for treatment, even if that means overruling the prosecutor's recommendation. District attorneys should examine internal policies and the culture of their offices, and make adjustments as necessary, to recommend diversion to treatment in more cases.

Given the racially disproportionate sentencing practices that persist even after drug law reform, it is essential to establish metrics to track the racial impact of decisions at each stage of the process, find practical ways to decrease bias in decision making, and hold prosecutors and judges accountable for following these good practices. The fact that drug law reform is associated with an increase in sentence length for defendants who are not diverted into treatment is concerning on its face and merits further review to understand what has caused this shift. Of equal importance, district attorneys need to carefully examine plea bargaining practices and reinstate the flexibility that seems to have been lost when the lengthy mandatory minimum sentences were repealed.

Courts and district attorneys must establish routine procedures for identifying cases that meet the criteria for diversion...and also ensure that all "paper eligible" defendants are clinically assessed to identify possible substance use disorders.

Both justice system officials and treatment providers need to better understand why many defendants decline offers of treatment and instead choose to serve out their time in jail or prison. And for those defendants who do enroll in treatment, it is important to explore how to build on the good outcomes revealed in this study. Courts need to re-examine policies that get in the way of recovery in the larger sense. In particular, the use of medication-assisted treatment, such as methadone maintenance, has been shown to be effective for patients who are opiate dependent. Yet current rules prevent participants in diversion programs from graduating from court-mandated treatment while they are taking opiate substitutes. These rules should be re-evaluated.

For several reasons, it would be prudent to explore whether it is possible to be more discriminating in the use of residential treatment programs without compromising outcomes. This study raises questions about whether the use of residential treatment in the sample of 2010 cases was always clinically appropriate. Moreover, residential treatment restricts a person's liberty in ways that are punishing and that inhibit personal growth, family unity, employment, and other aspects of a stable, productive life in the community. And finally, as this study shows, residential treatment is expensive—the additional cost associated with drug law reform is largely attributed to greater reliance on this treatment option.

One obvious step to ensure residential treatment is used appropriately would be to adopt policies that require decisions about type of treatment and length of stay to be based solely on a person's clinical needs as assessed by a trained treatment professional. In addition, courts might find ways to better support and monitor some defendants in outpatient programs so that this less costly form of treatment might be mandated with more confidence and thus used more often. But if reforms like these fail to bring down the cost of diversion, the public should view the marginal additional expense as a wise investment. As this study demonstrates, helping people address an underlying substance use disorder can reduce rates of reoffending and will have long-term benefits for the health of individuals and the well-being of their families and the communities where they live.

STUDY LIMITATIONS



While this research provides the most detailed analysis of the 2009 drug law reforms in New York City to date, it is also important to note a number of limitations, many of which are inherent to studies that track the impact of policies using quasi-experimental designs. These are discussed in detail in the full study technical report. First, to allow sufficient opportunity to assess case outcomes and track rates of recidivism, it was necessary to select a cohort of cases from 2010, and the operation of the courts may have changed since this time. Based on ongoing analysis conducted by the New York State Division of Criminal Justice Services, rates of admission to drug court have fluctuated between 2011 and 2013.^a Second, a significant proportion of defendants in the post-reform sample were under correctional supervision or court-mandated treatment at the end of the tracking period, and it was necessary to estimate the total length of stay for these cases. Third, to assess the impact of reform, researchers compared 2010 cases with a matched sample of defendants arrested in 2008. While the analysis included a series of checks to ensure that these two samples were comparable, it is possible that there are important differences that may have affected the outcomes of their cases independently of the drug law reforms. Finally, the criminal history and re-arrest data that provides a basis for much of the analysis was provided by the New York State Division of Criminal Justice Services and does not include information on arrests that occurred outside of the state or by federal agencies.

^a New York State Division of Criminal Justice Services (DCJS), Office of Justice Research and Performance, 2009 Drug Law Reform Updates (Albany, NY: DCJS, 2013), <http://www.criminaljustice.ny.gov/drug-law-reform/documents/drug-law-reform-presentation-june2013.pdf> (accessed December 31, 2014).

Appendix A

COURT-MANDATED TREATMENT DIVERSION PROGRAMS IN NEW YORK CITY DURING STUDY PERIOD

DRUG COURT

In New York City, all five counties (boroughs) have designated drug courts that connect defendants with treatment for both felony and misdemeanor cases. In most cases, felony drug courts focus on defendants facing first-time, nonviolent felony charges, typically for drug-related offenses. In some jurisdictions, such as Queens, defendants charged on first-time, nonviolent property offenses are also eligible for treatment diversion through drug court; in other jurisdictions, property cases are eligible for treatment diversion through a designated docket, distinct from drug court (for example STEP in Brooklyn). Although there is some variation in the way that drug courts are used in each jurisdiction, the typical process for drug court diversion begins with a paper eligibility screening at arraignment, during which court clerks determine if the case meets the statutory criteria for drug court. Assistant district attorneys (ADAs) then review all cases that meet the paper eligibility requirements and approve or reject each case for referral to treatment diversion. For those cases that are approved, a clinical assessment is conducted to determine if treatment is suitable for the defendant in a given case. If the ADA provides approval for diversion and the individual is deemed clinically suitable for treatment, the judge will make a treatment offer to the defendant, which requires the defendant to enter a guilty plea and sign a treatment contract. Enrollment in a drug court program typically involves mandated treatment for a period of 12 or 18 months and ongoing court oversight. Following a deferred sentencing model, if a participant complies with the obligations laid out in the treatment contract, the participant's charges can be dismissed. On the other hand, a participant may "fail" the program if he or she is repeatedly noncompliant with treatment conditions or commits a new crime. In this instance, the participant may have to serve a jail or probation sentence, in accordance with the stipulations of the treatment contract.

DRUG TREATMENT ALTERNATIVE TO PRISON (DTAP) PROGRAMS

DTAP programs are widely-used in New York City. Unlike drug courts, DTAP programs are geared towards defendants with prior ("predicate") convictions on nonviolent felony charges. The district attorney (DA) both initiates referrals to DTAP and monitors compliance with requirements. ADAs screen felony cases for DTAP eligibility either "pre-indictment," at the NYC Criminal Court arraignment or after the charge has been filed, or "post-indictment," at the Supreme Court arraignment following grand jury indictment. ADAs then select eligible defendants to refer for a clinical assessment. If the defendant is deemed suitable for the DTAP program, the judge approves, and the defendant enters a guilty plea, the ADA will make a treatment offer. Once enrolled, the DA provides oversight for DTAP cases, receiving progress reports from service providers and consulting with the court regarding appropriate sanctions and rewards on an ongoing basis. Participation in DTAP typically involves a period of residential treatment and may include graduation requirements related to obtaining employment, education, and housing. Upon graduation, charges are either dismissed or, in some situations, felony charges are downgraded to misdemeanors. If participants fail to complete treatment, they may be required to serve prison sentences as per the stipulations of the DTAP contract.

SCREENING AND TREATMENT ENHANCEMENT PART (STEP)

Distinct from other New York City jurisdictions, STEP is a designated part of the Kings County Criminal Court created to handle treatment diversion for first-time, nonviolent property cases. At arraignment, court staff screen felony property cases for eligibility for STEP. Defendants who meet paper eligibility and are assessed to have a clinical need for treatment may be diverted if the assistant district attorney, judge, and defense attorney can reach an agreement.

ALTERNATIVE TO INCARCERATION (ATI) PROGRAMS

Prosecutors may offer defendants diversion opportunities through ATI programs. Eligibility criteria for ATI programs are generally more flexible than those for drug courts and DTAP programs, and many defendants who have a substance use disorder but are ineligible for drug courts or DTAP programs may be diverted to treatment through ATIs. For example, defendants charged on violent felony offenses in Queens—who are ineligible for drug court and DTAP—may be diverted to treatment through a Treatment Alternatives for Safer Communities (TASC) conditional plea, an ATI program run by the Queens County DA’s Office. Defense attorneys can request diversion to ATI programs on behalf of the defendant after an ADA has reviewed and referred those cases that they deem eligible for clinical assessment. ATI programs are operated by a wide range of nonprofit organizations across the city, largely under the umbrella of TASC, a nonprofit criminal justice case management organization. TASC provides clinical assessments, seeks appropriate treatment options, and oversees ATI, drug court, and DTAP cases in all jurisdictions in New York City, except for cases handled by Manhattan and the Special Narcotics Prosecutor, serving as a liaison between the prosecutor’s offices and the service provider. Upon completion of ATI programs, felony cases may be dismissed or downgraded to misdemeanors and sentenced. If defendants fail to complete ATI programs, they may be required to serve prison, jail, or probation sentences, in accordance with the treatment contract.

JUDICIAL DIVERSION

After drug law reform, a new path for treatment diversion was created, by which defendants can request treatment diversion from the judge after indictment. Specifically, drug law reform required that each jurisdiction establish a judicial diversion court docket to handle cases meeting criteria listed in Article 216. Staff employed by the judicial diversion courts conduct eligibility screenings and clinical assessments for potential participants. Based on the results of screening and evaluation, the presiding judge in the judicial diversion court docket determines if treatment is an appropriate option for the defendant. If either the defendant or the ADA contests the results of the treatment

evaluation, an Article 216 hearing may be scheduled to resolve the disagreement. Unlike pre-existing diversion models (drug court, DTAP, etc.), the judge may over-rule the prosecutor’s objection and offer diversion. Similar to traditional drug courts, the judicial diversion court operates on a deferred sentence model and usually requires a defendant to submit a guilty plea in order to enroll in treatment. (In accordance with drug law reform, in some cases a defendant may not be required to enter a guilty plea, if the judge believes that it would lead to severe collateral consequences.) Upon completion of the required treatment, the guilty plea is withdrawn and felony charges are either dismissed or downgraded to misdemeanors. As with other diversion models described above, treatment failure results in the deferred sentence outlined in the contract, such as a prison or jail term.

ENDNOTES

- 1 For a detailed description of changes to the New York State sentencing statutes, see Jim Parsons et al., *A Natural Experiment in Reform: Analyzing Drug Policy Change in New York City*, Final Report to the National Institute of Justice under Grant No: 2010-IJ-CX-0030, January 2015, p. 11, available at www.vera.org/end-of-an-era.
- 2 The rate of treatment diversion increased from 15 percent of 1,925 eligible defendants before drug law reform to 21 percent of 2,410 eligible defendants after. “Eligible” defendants include everyone in the sample of cases indicted on B through E felony drug charges who had not been convicted of a violent felony offense in the 10 years prior to their current arrest.
- 3 Compared to drug court participants from the pre-reform sample of 2008 cases, post-reform drug court participants had a greater number of prior felony convictions (0.9 vs. 0.4) and prior drug convictions (2.9 vs. 1.2). Post-reform drug court participants were also more likely to report heroin (24 percent vs. 18 percent) or cocaine (11 percent vs. 8 percent) as their primary drug of choice. For further details, see Parsons et al., 2015, p. 85.
- 4 The Office of the Special Narcotics Prosecutor is located in Manhattan and handles felony narcotics cases originating from arrests across the city. The majority of cases handled by this office (80 percent) are referred by New York Police Department precincts in Manhattan.
- 5 Jeremy W. Peters, “Albany reaches deal to repeal ‘70s drug laws,” *New York Times*, March 25, 2009. <http://www.nytimes.com/2009/03/26/nyregion/26rockefeller.html> (accessed December 31, 2014).
- 6 Based on the 2012 National Survey on Drug Use and Health conducted by the Substance Abuse and Mental Health Services Administration (SAMHSA), among people aged 12 or older, the rate of substance dependence or abuse was 8.7 for whites, 8.8 for Hispanics and 8.9 for blacks. <http://www.samhsa.gov/data/NSDUH/2012SummNatFindDetTables/NationalFindings/NSDUHresults2012.pdf> (accessed December 31, 2014).
- 7 The analysis focused on behavior when people were at liberty in the community—in other words, after completing a residential treatment program or following release from prison or jail. For a discussion of techniques used to control for differences in the follow-up period, see Parsons et al., 2015, p. 137.
- 8 These findings include estimated lengths of stay for defendants who were still in court-mandated treatment at the end of the data collection period. For more details, see Parsons et al., 2015, p. 261.

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