

A SIGN OF THINGS TO COME? DRUG POLICY REFORMS IN ARIZONA, CALIFORNIA, AND NEW YORK

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INTRODUCTION

Sentencing schemes, both state and federal, have increasingly come to reflect the public's changing views on punishment.¹ Legislators have created sentencing schemes that are representative of their constituents' views regarding the types and lengths of sentences that are appropriate for specific crimes.² During the 1980s and 1990s, this responsiveness led to progressively harsher sentences, as state and federal governments reacted to public concerns about the rise in crime rate.³ Sentences for many crimes increased dramatically⁴ but nowhere more so than in drug sentencing.⁵ These harsh drug laws have pushed hundreds of thousands of people into prisons for long periods of time.⁶ Over the past three decades, sentences for drug offenses have been rising steadily as the public demands severe punishments for both the users and dealers of illegal substances.⁷

However, since 2000, some states have begun to roll back sentences for low-level drug offenses.⁸ These states have not just re-

1. See Michael A. Simons, *Sense and Sentencing: Our Imprisonment Epidemic*, 25 ST. JOHN'S J. C.R. & ECON. DEV. 153, 158 (2010).

2. See Rudolph J. Gerber, *On Dispensing Justice*, 43 ARIZ. L. REV. 135, 154 (2001) ("[G]roups vigorously demanded that something be done about hard drugs Politicians, typically, responded by demanding increased punishment. . . . This political posturing generates a succession of escalating cycles.").

3. See generally Simons, *supra* note 1 at 158–60 (noting that, in the 1980s and 1990s, the public perceived an increase of crime, which prompted legislators—wishing to appear “tough on crime”—to create harsher sentencing schemes that led to a higher incarceration rate).

4. See Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons 1980–1996*, 26 CRIME & JUST. 17, 17 (1999) (“State and federal incarceration rates grew by over 200 percent between 1980 and 1996”); *id.* at 34 (stating that the ratio of commitments to arrest [a determiner of sentence length] rose 257% for drug offenses over 1980–1996).

5. See generally Robert G. Lawson, *Drug Law Reform—Retreating from an Incarceration Addiction*, 98 KY. L. J. 201 (2009–2010) (“The most striking pattern . . . is the growth in the incarceration of drug offenders. Over the seventeen year range of our analysis, drugs evolved from being an offense with nearly the fewest prisoners to the one with by far the most prisoners”).

6. See RYAN S. KING & MARC MAUER, *THE SENTENCING PROJECT, DISTORTED PRIORITIES: DRUG OFFENDERS IN STATE PRISONS 1* (2002), http://www.sentencingproject.org/admin/documents/publications/dp_distortedpriorities.pdf (“Since the early 1980s, government officials at all levels have dramatically increased the scale of criminal justice responses for drug offenses through stepped up law enforcement and the enactment and implementation of harsh sentencing policies.”); Lawson, *supra* note 5.

7. See KING & MAUER, *supra* note 6.

8. See Simons, *supra* note 1, at 165.

duced sentences; they have also created large-scale treatment programs for addicted offenders.⁹ Such reforms raise a question about whether they signal a reversal of the trend toward increasingly severe sentences both for drug crimes specifically and crimes more generally.

The movement toward treating, instead of incarcerating, low-level drug offenders can be attributed to fiscal concerns, changing views on drug use, and to a reaction to previous sentencing schemes. New laws in Arizona, California, and New York¹⁰—three states that have enacted dramatic drug policy reforms in the past fifteen years—reflect these concerns.

Many states, including Arizona, California, and New York, have encountered the need to address the tension between the rising costs of incarceration and shrinking state budgets.¹¹ Lacking the resources to incarcerate those convicted of crimes, lawmakers began to look for ways to decrease their prison population and the costs associated with it.¹² Sending addicted drug offenders to drug treatment programs was one such way to reduce the prison population and the high costs associated with it.¹³

In contrast to the focus on punishment that characterized the 1980s and 1990s, the more recent policy debate in all three states recognized the idea that addiction is a disease and that the crimes committed by drug offenders are symptoms of this disease.¹⁴ Many observers concluded that simple incarceration, without rehabilitation, could not address addiction effectively.¹⁵ Proponents of reform argued

9. See generally Ryan S. King, *Changing Direction? State Sentencing Reforms 2004–2006*, 19 FED. SENT'G. REP. 253, 253–60 (2007) (describing various sentencing schemes).

10. This article focuses on New York, Arizona, and California because each state had well-documented public debates about reform to their drug laws. While other states have made similar reforms to their drug sentencing schemes, these reforms were less comprehensively debated and covered in the media. Moreover, focusing on these states gives chronological diversity to the present assessment; Arizona represents a state that enacted reforms early on, New York represents more recent reforms and California falls in between. Overall, the three states are representative examples of how and why the reforms were made.

11. See *infra* Part II.

12. See Simons, *supra* note 1, at 162.

13. See King, *supra* note 9, at 253 (“Between 2004 and 2006, at least 22 states enacted legislative reforms to their sentencing policies . . . focused on: diversion of drug offenders from incarceration through expanded treatment options . . .”).

14. See *infra* Part II.

15. See Jonathan Lippman, *How One State Reduced Both Crime and Incarceration*, 38 HOFSTRA L. REV. 1045, 1050 (2010) (“Many of these offenders ended up being incarcerated. Yet, most of them were not serious felons or criminal masterminds, but non-violent offenders with chronic problems like drug addiction, joblessness, mental illness, and homelessness.”).

that treating offenders would decrease recidivism and reduce the burden on state budgets.¹⁶ The overwhelming voter support for these reforms demonstrated that the public agreed.¹⁷ A new era of sentencing for drug crimes committed by addicted offenders seems to have begun—one based on treating the addiction rather than punishing the addict.

It is unlikely that this shift away from punishment will extend to sentences for other crimes. The central importance of the addiction-as-disease model to New York, Arizona, and California's reforms suggests that low-level drug offenses will likely be the only crimes for which sentences are reduced – that, despite its cost and dubious efficacy, long periods of incarceration will remain the default for crimes that do not result from addiction. The laws passed by New York, Arizona, and California set up a bright-line rule: offenders who are addicted deserve treatment, but all other offenders deserve only punishment.¹⁸ As a result, these reforms do not signal a changing sentencing landscape, but instead suggest the public views addicted offenders as fundamentally different from their non-addicted counterparts and believes they should be treated accordingly. Changes in sentencing regimes for sex offenders and juvenile offenders—two populations similarly viewed to have mental incapacities—illustrate that these reforms will likely be limited to drug-addicted offenders.

Part I of this Note discusses the previous sentencing regimes in New York, California, and Arizona and the perceived problems with those regimes. Part II presents the motivations for the new laws. Part III will focus on the laws that resulted from the push for reform. Part IV describes sentencing for other types of crimes with populations viewed as having similar mental issues as drug offenders: sex and juvenile offenders. This section will also compare reforms in sentencing for these crimes to reforms to sentencing for low-level drug crimes. Part V demonstrates that the arguments that succeeded in reforming sentences for addicted offenders cannot be easily applied to sentencing regimes for other crimes.

16. *See infra* Part II.

17. *See infra* Part II.

18. *See infra* Part III.

I.

PRIOR LAWS IN ARIZONA, CALIFORNIA, AND NEW YORK
AND THE IMPETUS FOR CHANGE

Before reform, the sentencing schemes for minor drug-related offenses in Arizona, California, and New York corresponded with those for other crimes—increasingly harsh and focused on retribution. Examination of pre-reform laws reveals why and how these reforms occurred and helps to inform why the reforms will not extend to other criminal offenses.

A. *Arizona's Previous Sentencing Scheme*

Prior to 1996, Arizona's drug laws mirrored those of most other states and the federal sentencing scheme.¹⁹ Like many states, Arizona had ratcheted up sentences for drug crimes in response to the perceived narcotics problem and the "war on drugs."²⁰ Beginning in the 1980s, sentences for drug-related crimes were harsh, with some narcotics sentences identical to those for homicide.²¹ This sentencing scheme led to an explosion in the prison population.²² Eventually, Arizona's incarceration rate outpaced the United States as a whole.²³ Arizona's prison population grew from 3,377 to 40,472 between 1979 and 2010, an increase of nearly 1,200 percent.²⁴ As a comparison, the total population of Arizona increased during the period from 1990 to 2000 by just 40 percent—clearly not enough to explain this dramatic increase in incarceration.²⁵ Of these incarcerated offenders, 50 percent

19. Gerber, *supra* note 2, at 137.

20. The number of incarcerated people in the U.S. as a whole grew from 139 people per 100,000 to 478 people per 100,000 between 1980 and 2000—a 344-percent increase. BUREAU OF JUSTICE STATISTICS, *Key Facts At A Glance: Incarceration Rate, 1980–2009*, <http://bjs.ojp.usdoj.gov/content/glance/tables/incrttab.cfm> (last visited Oct. 16, 2011). In contrast, Arizona experienced a prison population growth of 1198 percent from 1979 to 2010. ARIZ. OFFICE OF THE AUDITOR GEN., PRISON POPULATION GROWTH 3 (2010).

21. See ARIZ. REV. STAT. ANN. § 13-3410 (2011) (indicating those drug offenses identical in severity to some classes of homicide).

22. Gerber, *supra* note 2, at 137 ("In Arizona, as in the United States generally, the law-and-order politics of the last two decades has produced a penal system of a severity unmatched in the Western world.").

23. In 1995, the Arizona incarceration rate was 503.0 inmates per 100,000 people, while the national incarceration rate was 390.4 in the same year. ARIZ. CRIMINAL JUSTICE COMM'N, ARIZONA CRIME TRENDS: A SYSTEM REVIEW 83 (2003).

24. ARIZ. OFFICE OF THE AUDITOR GEN., *supra* note 20, at 3.

25. MARC J. PERRY ET AL., U.S. CENSUS BUREAU, POPULATION CHANGE AND DISTRIBUTION: 1990–2000, 2 (2001), <http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf>.

were convicted of non-violent drug offenses.²⁶ Despite this marked increase in incarceration and sentences for drug crimes, the rates of drug crimes did not fall.²⁷ For example, from 1991 to 2001, the rate of arrests for dangerous, non-narcotic drug sale and manufacture increased 138 percent, and the rate of drug use and possession arrests increased 127 percent over the same time period.²⁸

B. California's Previous Sentencing Scheme

Unlike Arizona, California has had a relatively extensive drug court system in place since 1991.²⁹ The drug courts were established in order to "reduce recidivism of drug related offenses and to create options within the criminal justice system that tailor effective and appropriate responses for offenders with drug problems."³⁰ Despite this goal, the limited availability of drug courts likely curbed their impact.³¹ Drug courts were not available in many counties, and, even in counties with drug courts, only a small number of offenders gained access to them.³² In addition, observers began to note the disparities in the sentences given by drug court judges as opposed to judges in traditional courts.³³ While the purpose of drug courts was in part to foster individually tailored sentences, citizens and observers of the justice system were concerned that the disparate sentences handed down for similar drug offenses were unfair.³⁴

26. In 1995, drug offenses and crimes against property composed 50 percent of offenses for committed adults. *Id.* at 92.

27. See ARIZ. CRIMINAL JUSTICE COMM'N, *supra* note 23, at 50.

28. *Id.*

29. Meghan Porter, Note, *Proposition 36: Ignoring Amenability and Avoiding Accountability*, 21 BYU J. PUB. L. 531, 533 (2007). See also Arnold Schwarzenegger, *Drug Court Month Proclamation* (May 1, 2004), <http://www.adp.ca.gov/DrugCourts/pdf/DrugCourtsProclamation.pdf> (applauding the success of drug courts).

30. JUDICIAL COUNCIL OF CAL., *Drug Courts*, <http://www.courts.ca.gov/5979.htm> (last visited Oct. 16, 2011).

31. See Gregory A. Forest, Comment, *Proposition 36 Eligibility: Are Courts and Prosecutors Following or Frustrating the Will of Voters?*, 36 MCGEORGE L. REV. 627, 633 (2005) (noting that, previously, only one of twenty drug offenders was eligible for drug court).

32. CTR. ON JUVENILE & CRIMINAL JUSTICE & DRUG POLICY ALLIANCE, A MODEL DESIGN FOR THE IMPLEMENTATION OF SACPA: MAKING PROP. 36 WORK IN YOUR COUNTY 15 (2002), http://modelplan.org/fulltext/sacpa_model_design.pdf.

33. See Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1231 (1998).

34. See Lisa Rosenblum, Note, *Mandating Effective Treatment for Drug Offenders*, 53 HASTINGS L.J. 1217, 1237 (2002) (demonstrating how Arizona and California voters rejected discretionary disparate sentences by adding uniform rules to constrain judicial discretion).

Even before the establishment of drug courts, California utilized a diversion program, established in 1972,³⁵ that offered treatment instead of jail time for certain drug offenses.³⁶ In its most recent version, the diversion program required offenders to plead guilty to the charge and enter treatment, after which their charge would be dismissed.³⁷ Diversion was not available after the first offense, and repeat offenders were sentenced to prison without treatment.³⁸ Even with diversion programs and drug courts in place, the immense increase in the number of drug cases since the 1980s overwhelmed the capacity of these programs.³⁹ Seeing no abatement in drug convictions or prison populations, it became clear to some California voters and politicians that neither program was sufficient to deal with California's problem with low-level drug users.⁴⁰

C. New York's Previous Sentencing Scheme

New York holds a unique position among the reforming states because its previous set of drug laws, the Rockefeller Drug Laws, were the most severe in the nation.⁴¹ The Rockefeller Drug Laws were passed in 1973 to help the state combat the burgeoning drug problem that began in the 1960s.⁴² The purpose of these laws was to severely

35. See Bryant L. Young, Note, *Diversion of Drug Offenders in California*, 26 STAN. L. REV. 923 (1974).

36. CAL. PENAL CODE § 1000 (West 2010).

37. § 1000.1(3).

38. § 1000(a)(1).

39. See V. Dion Haynes, *California Rethinks Drug War Strategy*, CHI. TRIB., July 5, 2000, at 1, available at http://articles.chicagotribune.com/2000-07-05/news/0007050202_1_drug-courts-drug-offenders-drug-users ("Though more than 450 drug courts have opened in the past five years, experts say they reach only about 3 percent of arrested drug users who qualify to be handled by this court system."). See also Jing Tsang, Note, *California's Drug Reform Policies: Past, Present, and Future*, 30 WHITTIER L. REV. 887, 887 (2009) (detailing dramatic increases in drug offender rates).

40. See Peter Banys, Richard Polanco & Kay McVay, *Argument in Favor of Proposition 36*, in CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE 22, 22 (2000), available at <http://vote2000.sos.ca.gov/VoterGuide/pdf/36.pdf> (last visited Sept. 12, 2011) (Peter Banys, President, California Society of Addiction Medicine; Senator Richard Polanco, Majority Leader, California State Senate; Kay McVay, President, California Nurses Association).

41. AARON WILSON, PARTNERSHIP FOR RESPONSIBLE DRUG INFORMATION, *Rockefeller Drug Laws Information Sheet* (2000), <http://prdi.org/rocklawfact.html> (last visited Oct. 10, 2011).

42. See AM. CIVIL LIBERTIES UNION, THE ROCKEFELLER DRUG LAWS: UNJUST, IRRATIONAL, INEFFECTIVE 3–6 (2009), http://www.nyclu.org/files/publications/nyclu_pub_rockefeller.pdf; see also Edward J. Maggio, *New York's Rockefeller Drug Laws, Then and Now*, 78 N.Y. ST. B. J. 30, 30 (Sept. 2006) ("Thirty years ago, tougher sanctions and more severe penalties for drug offenders were seen as the solu-

punish those more deeply involved in the sale of drugs.⁴³ Accordingly, the laws were structured so that as the quantity of drugs in the offender's possession increased, the mandatory sentence also increased.⁴⁴ However, even for first-time, non-violent offenders in possession of a small amount of drugs, the sentence could be fifteen years to life—the same sentence given for a murder conviction.⁴⁵ The types of offenders who were most often convicted and sentenced under these laws were not drug kingpins; rather, they were street-level workers selling small amounts of drugs.⁴⁶ Moreover, higher-level drug dealers were often able to bargain their way to lower sentences by providing information to the prosecution.⁴⁷ As a result, low-level dealers were sometimes given harsher sentences than their bosses, a clear contravention of the laws' goals.

While initially lauded as essential to combat what was perceived as a major drug crisis, the Rockefeller Drug Laws have come to symbolize the “failure of the war on drugs,” according to some commentators.⁴⁸ Over the past thirty years, these laws have increasingly been viewed as ineffective and costly at best and as a human rights violation for the individuals sentenced under the laws at worst.⁴⁹ As the war on drugs raged through the 1980s and 1990s, many believed that the Rockefeller Drug Laws were being used to incarcerate hundreds of thousands of offenders without producing any perceivable lasting suc-

tion to the drug epidemic and perceived to be rampaging throughout the nation . . . New York was no exception.”).

43. See DRUG POLICY ALLIANCE NETWORK, *Reform in New York: 2009 Legislative Agenda*, <http://www.drugpolicy.org/statebystate/newyork/> (last visited Sept. 12, 2011).

44. WILSON, *supra* note 41.

45. See ASSEMBLY OF THE STATE OF N.Y., THE DRUG LAW REFORM, DRUG TREATMENT, AND CRIME REDUCTION ACT OF 2001, <http://assembly.state.ny.us/Reports/2001drugreform/>; see also WILLIAM GIBNEY, LEGAL AID SOC'Y, ONE YEAR LATER, NEW YORK'S EXPERIENCE WITH DRUG LAW REFORM 3 (2005), http://www.drugpolicy.org/docUploads/DLRA_2005_Report.pdf.

46. Maggio, *supra* note 42, at 31.

47. See N.Y. PENAL LAW § 65.00(1)(b)(iii) (McKinney 2010) (allowing the court to impose probation rather than incarceration if the prosecutor testified that the offender provided them with material assistance).

48. See Editorial, *End the Rockefeller Drug Laws*, N.Y. TIMES, Mar. 10, 2009, at A26; Keith B. Richburg, *N.Y. Governor, Lawmakers Agree to Soften Drug Sentencing Laws*, WASH. POST, Mar. 28, 2009 at A2; DRUG POLICY ALLIANCE, *New York Victories*, <http://www.drugpolicy.org/new-york/victories> (last visited Sept. 12, 2011).

49. AM. CIVIL LIBERTIES UNION, *supra* note 42, at 6.

cess in the war on drugs,⁵⁰ making change to this severe and ineffective sentencing structure necessary.⁵¹

Arizona, California, and New York dealt with the surge of drug use and related crimes differently throughout the 1980s and 1990s. The history of ineffectiveness in all three states makes clear why citizens and politicians concluded that reform was necessary, and why these changes are specific to minor drug offenses.

II.

THE PUSH FOR REFORM

In the 1990s, lawmakers and citizens in all three states began to address the evidence that their drug laws had failed. Reforms in Arizona and California came in the form of ballot measures, while a new statute was required in New York. The motivations behind each new measure must be examined in order to determine if the same arguments made by the proponents of these reforms could be made to overhaul sentencing more generally.

A. State Reforms

1. Reform in Arizona

In 1996, Arizona voters considered Proposition 200, which would dramatically change the state's drug laws.⁵² Arizona, traditionally a solidly Republican state, seems like an unlikely place for the reform of the war on drugs to begin.⁵³ "There is irony in the fact that Arizona . . . now finds itself in the national limelight for a more liberalized approach to the war on drugs."⁵⁴ That Arizona was the first state to initiate sweeping reforms of their drug policy surprised many

50. There is some dispute among politicians in New York concerning how effective the Rockefeller Drug Laws were. Some district attorneys, in their opposition to reforming the laws, argued that the laws had accomplished their objective. However, this perspective is the minority opinion. See Press Release, Dist. Atty's Ass'n of the State of N.Y., Statement of NYSDAA President Daniel M. Donovan, Jr. on the State Senate's Passage of Changes to the New York State's Drug Laws (Apr. 3, 2009), available at <http://rcda.nyc.gov/pdf/Press/2009/pr04032009.pdf>.

51. See DRUG POLICY ALLIANCE, NEW YORK'S ROCKEFELLER DRUG LAWS: EXPLAINING THE REFORMS OF 2009 2 (2009), http://www.avvasa.org/images/Explaining_the_RDL_reforms_of_2009_FINAL.pdf.

52. *Proposition 200: Text of Proposed Amendment*, in ARIZ. SEC'Y OF STATE, ARIZONA BALLOT PROPOSITION GUIDE (1996), available at <http://www.azsos.gov/election/1996/General/1996BallotPropsText.htm> [hereinafter *Proposition 200*].

53. See Howard Stansfield, *Tokin' Resistance; Proposition 200—The Drug Medicalization Act—is Causing High Anxiety Among Politicians and Lawmen*, PHX. NEW TIMES, Dec. 12, 1996.

54. *Id.*

observers.⁵⁵ However, the fact that Barry Goldwater, a nationally prominent conservative Republican, joined the push for Proposition 200 suggested that the reasons for reforming Arizona's drug policy extended beyond party lines.⁵⁶

Proposition 200 mandated treatment in lieu of incarceration for addicted offenders, legalized medical marijuana, and eliminated parole for violent drug offenders.⁵⁷ Although much of the debate and controversy surrounding Proposition 200 concerned the legalization of medical marijuana, the broader purpose of the law was to "steer people arrested for possessing drugs into treatment programs and away from overcrowded prisons."⁵⁸ Proponents⁵⁹ of the measure framed the reform as a push to "get-tough" on violent offenders while providing treatment for offenders who were arrested for non-violent, personal possession.⁶⁰ To accomplish both objectives, the ballot measure called for drug dealers to serve the entirety of their sentence without parole or "any form of early release,"⁶¹ while mandating that addicted offenders convicted of personal possession be placed on probation and diverted to treatment programs.⁶² Arguments in favor of Proposition 200 focused on the high social and economic costs of incarceration and on the idea that addiction is a medical problem, rather than a criminal justice problem.⁶³ These strong arguments in favor of Proposition 200 persuaded many Arizona voters, who passed the ballot measure with a vote in favor of 65 percent.

55. *Id.*

56. See *Arizonans to Vote on Drug Decriminalization and Control Measure*, NAT'L DRUG STRATEGY NETWORK (Oct. 1996), www.ndsn.org/oct96/arizona.html. See generally *Proposition 200*, *supra* note 52.

57. See *Proposition 200*, *supra* note 52.

58. See Stansfield, *supra* note 53.

59. "Proponents" or "supporters" in this context is used to refer to organizations, citizens and politicians who supported the measure through campaigning, donating or voting for the measure. Supporters of the measure include, for example, Arizonans for Drug Reform, retired Senator Dennis DeConcini, Judge Rudolph Gerber, former Assistant US Attorney Steve Mitchell and a number of physicians. See *Proposition 200*, *supra* note 52.

60. See Stansfield, *supra* note 53.

61. *Proposition 200*, *supra* note 52, § 3.1.

62. *Id.* § 10.

63. *Id.* §§ 2, 4 ("The drug problems of non-violent persons who are convicted of personal possession or use of drugs are best handled through court-supervised drug treatment and education programs. These programs are more effective than locking non-violent offenders up in a costly prison. Pilot programs in Arizona that provide treatment alternatives to prison for low level drug offenders have a 73 [percent] success rate and cost roughly 1/8 as much as prison. Over the next decade hundreds of millions of dollars can be saved by using mandatory drug treatment and education programs as an alternative to prison.").

2. Reform in California

After the passage of Proposition 200 in Arizona and its subsequent success, California also began to consider reform.⁶⁴ The result was Proposition 36, a ballot measure enacted in 2000.⁶⁵ The ballot measure was sponsored by the California Campaign for New Drug Policies.⁶⁶ Its major funders included George Soros, who also funded Proposition 200.⁶⁷ Proposition 36 was similar to Arizona's Proposition 200 in its language and intent. The ballot measure mandated that offenders convicted of personal possession be put on probation and sent to treatment programs: "[Proposition 36] requires probation and drug treatment, not incarceration."⁶⁸ Similar to the reform movement in Arizona, the arguments for reform fell along the same two lines—to save money and to treat addicted offenders.⁶⁹

3. Reform in New York

As the 1990s drew to a close, it became increasingly obvious to many observers that incarceration alone was not going to solve the drug problem in New York.⁷⁰ As a result, there were a number of intermittent pushes for the reform of the Rockefeller Drug Laws in the past two decades.⁷¹ Many bills passed the Democratically-controlled State Assembly only to be voted down by the Republican majority in

64. See *Text of Proposed Law, Proposition 36* § 2(c), in CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE (2000), available at http://www.adp.ca.gov/sacpa/Proposition_36_text.shtml (last visited Sept. 13, 2011) [hereinafter *Proposition 36—Text of Proposed Law*]. "In 1996, Arizona voters by a 2-1 margin passed the Drug Medicalization, Prevention, and Control Act, which diverted nonviolent drug offenders into drug treatment and education services rather than incarceration. According to a Report Card prepared by the Arizona Supreme Court, the Arizona law: is resulting in safer communities and more substance abusing probationers in recovery, has already saved state taxpayers millions of dollars, and is helping more than 75 percent of program participants to remain drug free." *Id.*

65. *Ballot Measure Summary, Proposition 36*, in CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE (2000), available at http://vote2000.sos.ca.gov/VoterGuide/text/text_summary_36.htm (last visited Sept. 13, 2010) [hereinafter *Proposition 36—Ballot Measure Summary*].

66. *Id.*

67. See *George Soros*, BALLOTOPEDIA.ORG, http://ballotopedia.org/wiki/index.php/George_Soros (last modified Aug. 8, 2001); see also *Summary of Arizona Proposition 200*, NATIONALFAMILIES.ORG, <http://www.nationalfamilies.org/guide/arizona200.html> (last updated Aug. 1, 2008).

68. See *Proposition 36—Ballot Measure Summary*, *supra* note 65.

69. See *Proposition 36—Text of Proposed Law*, *supra* note 64, §§ 2–3.

70. See *DRUG POLICY ALLIANCE*, *supra* note 51, at 2.

71. Maggio, *supra* note 42, at 32–33.

the State Senate.⁷² However, one such effort at reform, the Drug Law Reform Act, was passed in 2004.⁷³ While this law was a step toward abolishing the Rockefeller Drug Laws, it was nonetheless seen by some organizations as a weak attempt at meaningful reform.⁷⁴ Under the law, sentences were lowered slightly and prison-based drug treatment programs were expanded.⁷⁵

When Democrats took control of the State Senate in January, 2009, it seemed that the time was finally right to really reform the Rockefeller Drug Laws.⁷⁶ A newly proposed law focused on reducing sentences for addicted offenders and increasing the availability of treatment for them.⁷⁷ This new round of reforms was founded on economic concerns as well as on the basis that drug addiction is properly classified as a public health issue rather than as a criminal justice issue.⁷⁸ As New York State Assembly Speaker Sheldon Silver noted, “[U]nless we begin treating drug addiction as the public health crisis that it is and put serious resources into drug treatment and rehabilitation, we will not win this fight.”⁷⁹ The changes were passed by the Assembly and Senate, and signed into law by Governor Paterson on April 24, 2009.⁸⁰

B. *The Goals of Drug Law Reform*

Two themes motivated the reforms in Arizona, California, and New York: treating drug offenders as addicts in need of medical rehabilitation and saving money for state taxpayers.

72. Jeremy W. Peters, *Albany Takes Step to Repeal '70s-Era Drug Laws*, N.Y. TIMES, Mar. 5, 2009, at A25. For example, the 2001 Drug Law Reform, Drug Treatment and Crime Reduction Act of 2001 sought to introduce more drug treatment programs into the New York Criminal Justice System, though this effort ultimately failed. See generally ASSEMBLY OF THE STATE OF N.Y., THE DRUG LAW REFORM, DRUG TREATMENT, AND CRIME REDUCTION ACT OF 2001, available at <http://assembly.state.ny.us/Reports/2001drugreform/>.

73. GIBNEY, *supra* note 45, at 1.

74. *Id.* at 4–5.

75. *Id.* at 3–4.

76. See Peters, *supra* note 72.

77. See generally Press Release, David Paterson, Governor, Governor Paterson Signs Rockefeller Drug Reforms Into Law, Press Release (Apr. 24, 2009), available at <http://www.commondreams.org/newswire/2009/10/07-8>.

78. Peters, *supra* note 72.

79. Press Release, Sheldon Silver, N.Y. State Assembly Speaker, Assembly Hail Progress in Ten-year Battle to Reform Rockefeller Drug Laws (Mar. 27, 2009), available at <http://www.assembly.state.ny.us/Press/20090327a/>.

80. See Press Release, David Paterson, *supra* note 77.

1. *The Treatment of Addicted Offenders*

The first major theme running through the reforms in all three states was the need to treat, rather than incarcerate, addicted offenders. This new push was based partly on the premise that addiction is a disease, not a personal choice made by the addicts.⁸¹ Addiction alters the brain function of users, turning their once-voluntary habit into an involuntary one.⁸² Drug use affects pathways for dopamine, a chemical that produces feelings of pleasure.⁸³ Over time, alternate, drug-free pathways for dopamine are disrupted, meaning that drug users cannot feel the pleasure brought on by dopamine without drugs.⁸⁴ Moreover, triggers like stress can increase the craving for the drug.⁸⁵ As a result of the chemical changes that take place in the body, individuals need “biological interventions,” including medications and withdrawal care, in order to cure the addiction.⁸⁶ In addition to undoing addicts’ chemical reliance on drugs, cognitive and behavioral therapy is also used to address the psychological factors that contribute to addiction, such as emotional and mental problems.⁸⁷

While the science of addiction is not entirely settled, many people in both the public and medical sectors believe that the only way to stop the cycle of addiction is to treat it as a disease that must be cured.⁸⁸ In order to do so, treatment facilities, support groups and therapy are necessary.⁸⁹ The idea that addicts suffer from a medical illness has become widely accepted, and Arizona, California, and New York sought to utilize this idea to solve their fiscal and overcrowding problems by treating addicted offenders instead of jailing them.

a. *Arizona*

Although the proponents of Proposition 200 characterized their initiative as “tough on crime,” the availability of treatment for ad-

81. See Richard Bonnie, *The Virtues of Pragmatism in Drug Policy*, 13 J. HEALTH CARE L. & POL’Y 7, 20 (2010) (“That addiction is tied to changes in brain structure and function is what makes it, fundamentally, a brain disease.”) (quoting Alan Leshner, Dir., Nat’l Inst. on Drug Abuse).

82. *Id.* (“Initially, drug use is a voluntary behavior but when the switch is thrown, the individual moves into the state of addiction, characterized by compulsive drug seeking and use.”) (quoting Alan Leshner, Dir. of the Nat’l Inst. on Drug Abuse).

83. See JAMES HANSELL & LISA DAMOUR, *ABNORMAL PSYCHOLOGY* 344 (2d ed. 2008).

84. *Id.*

85. *Id.*

86. See generally *id.* at 345–47.

87. See generally *id.* at 342, 346–47, 350.

88. Lippman, *supra* note 15, at 1052.

89. Bonnie, *supra* note 81, at 120–21.

dicted offenders won over compassionate voters as well.⁹⁰ These supporters were primarily concerned with providing rehabilitation and support for offenders who needed such services in order to overcome their addictions and stop offending.⁹¹ Much of the discussion on this aspect of Proposition 200 centered on the shift from viewing drug addiction as a criminal problem to viewing it as a medical problem.⁹² The view of addiction as a disease provides a potentially more effective alternative to incarceration—treat the addiction and the addict will have no reason to re-offend.⁹³

Another positive result of keeping addicted offenders out of jail is avoiding the propensity for prison to worsen the addictions of prisoners.⁹⁴ Supporters of Proposition 200 noted that corrections personnel have long argued that incarcerated individuals often increase their drug use while in jail due to the easy availability of drugs and the lack of other activities.⁹⁵ Keeping addicts out of jail removes them from an environment that might aggravate their addictions and decrease their chances of re-entering society as productive and healthy individuals.

b. California

Supporters of Proposition 36 in California made similar arguments in their push for the passage of the ballot initiative in their state. Many medical professionals signed on as supporters of Proposition 36, arguing that addiction must be treated medically in order to have any chance of eradicating it.⁹⁶ This view of addiction found wide support with the public as well—one study found that sixty-three percent of citizens agreed with the statement that drugs are a “medical problem that would be better addressed by treatment than by incarceration.”⁹⁷

90. See Stansfield, *supra* note 53.

91. See Dominica Minore Bassett, Note, *Legislative Review Medical Use and Prescription of Schedule I Drugs in Arizona: Is the Battle Moot?*, 30 ARIZ. ST. L. J. 441, 444 (1998).

92. *Proposition 200*, *supra* note 52, § 2(1) (“In addition to actively enforcing our criminal laws against drugs, we need to medicalize Arizona’s drug control policy: recognizing that drug abuse is a public health problem, and treating abuse as a disease.”).

93. The notion of addiction as an illness did not originate in the 1990s. This medical model has been through cycles of popularity since the American Revolution. See HANSELL & DAMOUR, *supra* note 83, at 341; Bonnie, *supra* note 81, at 10–11.

94. See *Analysis of Legislative Council*, in ARIZ. SEC’Y OF STATE, ARIZONA BALLOT PROPOSITION GUIDE (1996), available at <http://www.azsos.gov/election/1996/General/1996BallotPropsText.htm>.

95. See Stansfield, *supra* note 53.

96. See Banys, Polanco & McVay, *supra* note 40.

97. Christine Watson, *California’s Proposition 36 and the War on Drugs*, 9 BOALT J. CRIM. L. 3, 4 (2005).

The popular opinion is further bolstered by studies demonstrating that drug offenders are not deterred by threats of increased incarceration.⁹⁸

Moreover, supporters of Proposition 36, like the reformers in Arizona, argued that the nature of drug addiction is such that incarceration does not effectively prevent recidivism.⁹⁹ More specifically, supporters claimed that “non-violent offenders who receive drug treatment are much less likely to abuse drugs and commit future crimes, and are likelier to live healthier, more stable and more productive lives with the benefit of treatment.”¹⁰⁰ Utilizing the criminal justice system to administer these programs would provide an established infrastructure within which offenders could be assigned to the most appropriate program and noncompliant offenders could be punished.¹⁰¹ In this way, supporters contended, Proposition 36 provided an effective way to treat addiction and help end the resulting recidivism.

c. *New York*

While the Arizona and California reforms focused largely on the importance of treating addicted offenders instead of punishing them, political rhetoric in New York was dedicated almost entirely to this aspect of the new law. Many state legislators and sponsors of the bill adopted the emerging view of addiction as a disease, which, in turn, focused the aim of the new law on treating addiction rather than punishing the addict.¹⁰² The new law sought to cut off the demand for drugs, reduce its profitability, and thus end the supply of illegal drugs.¹⁰³

2. *Economic Concerns*

Along with the desire to provide addicted offenders with an effective and efficient way to overcome their illness, economic concerns also aided the push for reform in all three states. Many states, including Arizona, California, and New York, struggled with the high cost of incarcerating drug offenders. One way to alleviate the burden of

98. See Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement*, 74 NOTRE DAME L. REV. 439, 466–68 (1999).

99. See generally *id.*

100. K. JACK RILEY ET AL., RAND CORP., DRUG OFFENDERS AND THE CRIMINAL JUSTICE SYSTEM: WILL PROPOSITION 36 TREAT OR CREATE PROBLEMS? 6 (2000), http://www.rand.org/pubs/issue_papers/IP204/IP204.pdf.

101. LITTLE HOOVER COMM’N, FOR OUR HEALTH & SAFETY: JOINING FORCES TO DEFEAT ADDICTION 65 (2003), <http://www.lhc.ca.gov/studies/169/report169.pdf>.

102. See Press Release, David Paterson, *supra* note 77.

103. *Id.* (“Our ability to reduce the flow of drugs in our communities is depending on our ability to reduce demand.”) (quoting N.Y. State Sen. Ruth Hassell-Thompson).

incarceration was to provide treatment instead of incarceration for offenders whose crimes arose from their addictions.

a. Arizona

Supporters for Proposition 200 in Arizona contended that the costs associated with treatment would be approximately half of the cost of incarceration—\$17,000 versus \$35,000 per year per offender.¹⁰⁴ Like many states, Arizona had felt the budgetary pinch caused by high rates of incarceration.¹⁰⁵ Providing a system by which the state would save money on each conviction and which would likely result in decreased recidivism for those offenders was simply viewed as good math.¹⁰⁶

Closely tied to fiscal worries, concerns about prison overcrowding were also cited during the debate about Proposition 200.¹⁰⁷ Arizona was faced with severe overcrowding in its prisons, largely due to the increased number of drug arrests during the 1980s and 1990s.¹⁰⁸ Supporters of the ballot measure claimed that prison overcrowding was having a “chilling effect” on sentences because judges were concerned about jail capacities.¹⁰⁹ Since the budget and space for prisoners is limited, violent offenders were being given lighter sentences in order to ensure space for all incarcerated criminals, including minor drug offenders.¹¹⁰ Diverting low-level drug offenders to treatment programs instead of prison would ensure that prison beds would be available for violent offenders.¹¹¹

b. California

Reducing the cost of the criminal justice system was frequently mentioned as a primary goal of Proposition 36 in California.¹¹² State spending on prisons increased 30 percent between 1987 and 1995, straining an already tight budget.¹¹³ California spends \$32.7 billion per year on alcohol and drug abuse costs.¹¹⁴ As prison populations and

104. See Stansfield, *supra* note 53.

105. See Gerber, *supra* note 2, at 166.

106. *Proposition 200*, *supra* note 52, § 2 Declaration 4.

107. *Id.* § 2 Declaration 5.

108. ARIZ. OFFICE OF THE AUDITOR GEN., *supra* note 20, at 3.

109. See *Analysis of Legislative Council*, *supra* note 94.

110. *Proposition 200*, *supra* note 52, § 2, Declaration 5.

111. See *Analysis of Legislative Council*, *supra* note 94.

112. *Proposition 36—Text of Proposed Law*, *supra* note 64, § 3(b).

113. DOUGLAS A. McVAY, COMMON SENSE FOR DRUG POLICY, DRUG WAR FACTS 228 (2007), available at <http://www.drugwarfacts.org/factbook.pdf> (citing NAT'L ASS'N OF STATE BUDGET OFFICERS, 1995 STATE EXPENDITURES REPORT (1996)).

114. See LITTLE HOOVER COMM'N, *supra* note 101, at 40 (2003).

costs grew without any discernible decrease in drug-related crime, the argument for incarceration as the most cost-effective solution to the drug problem became increasingly contested. Proposition 36 was thus touted as an alternative to wasteful spending on incarcerating low-level drug offenders.¹¹⁵

Related to the fiscal issues facing California's criminal justice system, prison overcrowding was another problem Proposition 36 looked to solve. The prison population of California quadrupled during the 1980s and 1990s, largely due to the increasingly severe sentences imposed for drug offenses.¹¹⁶ Moreover, a high rate of recidivism meant that the number of inmates would keep compounding.¹¹⁷ Drug offenders constituted an increasingly large share of the state prison population, amounting to twenty percent of state prisoners and thirty-one percent of parolees.¹¹⁸ The burden of supporting such an extensive prison system weighed heavily on taxpayers, and by the end of the 1990s, many were looking for a solution.¹¹⁹

Proponents of Proposition 36 also stressed that reducing the number of offenders in prison for simple possession would increase space for violent offenders.¹²⁰ Similar to Arizona, many more serious offenders had been granted early releases due to a lack of prison beds.¹²¹ Supporters of the ballot measure maintained that keeping non-violent drug offenders out of prison would end this practice, and violent offenders could remain in prison for their full sentence.¹²² Additionally, having fewer inmates convicted of minor drug offenses would also reduce the cost of parole services, as non-violent drug offenders cost about a third as much.¹²³ Finally, treating offenders would reduce re-

115. *Proposition 36—Text of Proposed Law*, *supra* note 64, § 3(b).

116. FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 162 (1995).

117. SKAIDRA SMITH-HEISTERS, REASON FOUND., *THE NONVIOLENT OFFENDER REHABILITATION ACT: PRISON OVERCROWDING, PAROLE AND SENTENCING REFORM (PROPOSITION 5)* 6 (2008), <http://www.reason.org/files/fca481a6c38c69c7f9ae9761e97bb053.pdf>.

118. *Id.*

119. See Vincent Schiraldi, *Digging Out: As U.S. States Begin to Reduce Prison Use, Can America Turn the Corner on its Imprisonment Binge?*, 24 *PACE L. REV.* 563, 574 (2004).

120. JAMES DABNEY ET AL., CAL. DIST. ATT'YS ASS'N, *IMPLEMENTING PROPOSITION 36, B-2*, http://www.cdca.org/prop_36.pdf.

121. *Id.*

122. *Id.*

123. CAL. DEP'T OF CORR. & REHAB., *California Prisoners and Parolees 2009*, at 63 (2010).

cidivism by ensuring that people who leave the criminal justice system are prepared to live a crime-free life and stay out of prison.¹²⁴

c. New York

Economic concerns and jail overcrowding were also cited as central reasons to reform the Rockefeller Drug Laws.¹²⁵ In his campaign to pass the law, State Senator Eric Schneiderman noted the fact that it cost \$45,000 to incarcerate a drug offender for one year, but cost just \$15,000 for one year of residential drug treatment.¹²⁶ New York State Assembly Speaker Sheldon Silver stated that transitioning to a system that utilizes treatment for even a small portion of offenders represents a huge savings to the state. “Think of the resources that have been expended fighting this war, money that could have been used on education, rehabilitation, job training, investments that would have saved countless lives.”¹²⁷ Moreover, the reduced incarceration of low-level drug offenders would result in a lower prison population overall.¹²⁸ Due to the possibility that lower populations would increase prison safety, individuals in the corrections field supported the reform as well.¹²⁹ The increased prison space for violent offenders and increased resources for corrections would, supporters argued, result in safer communities.¹³⁰

3. *State-Specific Arguments for Reform*

There were other, state-specific concerns that motivated reform to a lesser degree. For example, in California, supporters of the ballot measure seized upon the success of the drug courts to argue that Pro-

124. See generally Jing Tsang, Note, *California’s Drug Reform Policies: Past, Present, and Future*, 30 WHITTIER L. REV. 887, 889 (2009) (noting that the goal of reform is to reduce prison populations and, in turn, enable offenders to “meaningfully address their problem”).

125. See generally Keith B. Richburg, *N.Y. Governor, Lawmakers Agree to Soften Drug Sentencing Laws*, WASH. POST, Mar. 28, 2009, at A2.

126. See Press Release, Sheldon Silver, N.Y. State Assembly Speaker, Rockefeller Drug Law Press Conference (Apr. 24, 2009), available at <http://assembly.state.ny.us/Press/20090424a/>.

127. Press Release, Sheldon Silver, N.Y. State Assembly Speaker, The Remarks of Speaker Sheldon Silver: 2009 is the Year to Finally Reform the Rockefeller Drug Laws (Jan. 22, 2009), available at <http://assembly.state.ny.us?Press/20090122/>.

128. See Richburg, *supra* note 125.

129. See Erroll Louis, Editorial, *Dems at War—& GOP Wins*, DAILY NEWS, Mar. 26, 2009, at 25.

130. Press Release, Eric T. Schneidermann, N.Y. State Senator, Senate Passes Rockefeller Drug Law Reforms and Invests in Community Safety, Apr. 1, 2009, available at <http://www.nysenate.gov/news/senate-passes-rockefeller-drug-law-reforms-and-invests-community-safety-0>.

position 36 would serve to support and expand the drug courts.¹³¹ Proposition 36 would provide an annual \$120 million that would help judges reach more addicted offenders and send them to better facilities.¹³² In this way, Proposition 36 was presented in part as a way to expand on the success of drug courts while eliminating their most controversial aspect, judicial discretion.¹³³

Meanwhile in New York, some of the reformers focused on the restoration of judicial discretion in drug cases, the lack of which was viewed by many as a serious deficiency of the Rockefeller Drug Laws.¹³⁴ New York State Assemblyman Jeffrion L. Abury stated simply, “returning discretion to judges is really the heart of where we want to go.”¹³⁵ More fundamental, perhaps, was the notion that it is the rightful role of judges, not prosecutors or legislators, to make the sentencing decisions based on the facts of the crime, as well as relevant mitigating or aggravating factors.¹³⁶

4. *Opposition to Reform*

Just as the reasons for reform were fairly uniform across the three states, the nature of the opposition to the reforms was also consistent. Critics in all three states viewed the laws as another step toward legalizing the use and sale of illicit substances.¹³⁷ Because drug users could not be jailed for personal possession, use, or transport, opponents of Proposition 36 extrapolated that the measure effectively legalized the use of such drugs.¹³⁸ Arguments against Proposition 200 centered mainly on concerns about the problems associated with what was viewed as the “legalization of drug use” as well as on questions about whether this change was being effected by individuals with Arizona’s

131. Porter, *supra* note 29, at 531 (“Since 1991 and the implementation of California’s first drug court, the state has continued to expand on the idea of rehabilitation for drug-offenders. . . . One of the most revolutionary reforms was implemented by Proposition 36—a ‘treatment instead of incarceration’ initiative.”).

132. *Proposition 36—Text of Proposed Law*, § 7 (adding § 119995.5, “Funding Appropriation”).

133. See Porter, *supra* note 29, at 534 (noting that Proposition 36 was “intend[ed] to . . . expand the scheme of treating and rehabilitation first and second time non-violent drug possession offenders”).

134. Press Release, Sheldon Silver, N.Y. State Assembly Speaker, Rockefeller Drug Law Press Conference, *supra* note 126.

135. Jeremy W. Peters, *Legislation to Overhaul Rockefeller Drug Laws Moves Ahead Swiftly*, N.Y. TIMES, Mar. 1, 2009, at A20.

136. Editorial, *End the Rockefeller Drug Laws*, N.Y. TIMES, Mar. 10, 2009, at A26.

137. RILEY ET AL., *supra* note 100.

138. See CAL. SEC’Y OF STATE, CALIFORNIA OFFICIAL VOTER INFORMATION GUIDE 26 (2000), available at <http://vote2000.sos.ca.gov/VoterGuide/pdf/ballotpamphlet.pdf>.

best interests in mind. Critics of the proposed bill in New York focused mainly on the perceived safety risk of keeping addicted offenders on the streets, political considerations, and the appropriateness of judicial discretion in sentencing.¹³⁹

Ultimately, however, there were two primary reasons for drug policy reform in Arizona, California, and New York: to treat addicted offenders and to save money spent on the criminal justice system. Arizonans voiced a range of differing opinions on Proposition 200. Some viewed the measure as a way to “get smart” on the war on drugs—a way to treat addicted offenders effectively and save millions in taxpayer money in the process. The supporters of Proposition 36 in California focused on three lines of reasoning for the measure: effectively treating addiction, lowering the costs of the criminal justice system, and increasing the safety of California’s streets. New York’s push for the reformation of its drug policy reflected, to a great degree, its unique position of having transitioned from one of the most severe sentencing schemes for drug offenses to a more liberal system.

III.

FROM PROPOSITION TO LAW

The reforms championed by the citizens and legislators of Arizona, California, and New York demonstrate a general unhappiness with the previous sentencing scheme for low-level drug crimes. Although some reasons for reform seem applicable to sentencing for other crimes, it is clear from the laws enacted that voters and lawmakers intended the reforms to be limited to addicted offenders who had committed a more minor, but drug-related, offense.

A. *Arizona*

On November 7, 1996, Arizona voters passed Proposition 200 by 65.4 percent to 34.6 percent, a margin celebrated by supporters of the measure.¹⁴⁰ After its passage, state legislators still had to transform the ballot measure into law. Legislators in Arizona are given wide latitude in enacting the laws that result from ballot measures, and are able to

139. See Press Release, Dale M. Volker, N.Y. State Senator, *Drugs, Drugs, Everywhere!* (Mar. 26, 2009), available at <http://www.nysenate.gov/press-release/drugs-drugs-everywhere.html>.

140. Summary of Arizona Proposition 200, *Ballot Measures Database*, NAT’L CONFERENCE OF STATE LEGISLATURES, www.ncsl.org/LegislaturesElections/ElectionsCampaigns/BallotMeasuresDatabase/tabid/16580/Default.aspx (last visited Sept. 9, 2011) (search “Arizona Proposition 200”).

change the laws significantly, particularly in funding the proposal.¹⁴¹ However, given the clear mandate for the proposition from the voters, legislators respected the opinion of their constituents and drafted a bill very similar to the ballot measure.¹⁴²

The sponsor-legislators of the Drug Medicalization, Prevention and Control Act of 1996 (DMPCA) were both Republicans and Democrats and represented both urban and rural districts,¹⁴³ suggesting that support for Proposition 200 transcended political or regional divides.¹⁴⁴ With the clarity of the voters' will and arguments that appealed to both sides of the aisle, there was very little debate about whether to implement treatment programs.¹⁴⁵ Indeed, the majority of the discussion concerned the implementation of the medical marijuana provision, rather than the implementation of treatment for addicted drug offenders.¹⁴⁶ The Arizona House of Representatives Judiciary Committee did seek out the advice of medical and criminal justice professionals when it considered the bill; however, when these treatment programs were discussed, it was mainly to ensure that the provisions enacted were in line with the voters' intent.¹⁴⁷

In its final form, the Drug Medicalization, Prevention and Control Act mandated probation and treatment for people convicted of personal possession of a controlled substance.¹⁴⁸ However, if the conditions of either treatment or probation were violated, judges were given the discretion to impose additional punishment, though they did not have the ability to incarcerate the individual under any circumstances.¹⁴⁹ Moreover, an individual must be rendered eligible by the

141. See Stansfield, *supra* note 53 (reporting a source's opinion "that the Arizona Constitution gives legislators broad powers when it comes to interpreting the draft legislation contained in ballot initiatives and making it jibe with laws already on the books").

142. See Joyce Price, *Marijuana Initiative Poses Legal Quandary*, WASH. TIMES, Dec. 1, 1996, at A1.

143. See Meeting Minutes Before the Ariz. H. Comm. on the Judiciary, 43rd Leg., 1st Sess. (Feb. 21, 1997), available at http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/43leg/1R/comm_min/House/0221%2EJUD.html.

144. See *id.*

145. See Jon Wool & Don Stemen, *Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003*, 16 FED. SENT. R. 294, 304 (2004) (discussing the widespread support for rehabilitation-focused criminal justice reform in Arizona).

146. See generally Meeting Minutes Before the Ariz. H. Comm. on the Judiciary, *supra* note 143.

147. See *id.*

148. Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 831 (2004).

149. *Id.*

court in order to receive more lenient treatment.¹⁵⁰ The bill also created re-entry programs for offenders who have completed treatment.¹⁵¹

In order to address the fiscal concerns that drove the passage of Proposition 200, the state legislators created a self-sustaining funding system.¹⁵² The system works by mandating that offenders who participate in treatment programs be released three months earlier than if they had been incarcerated.¹⁵³ The money saved by reducing the length of time spent in the criminal justice system is then directly deposited into funding for further rehabilitation and transitional programming.¹⁵⁴

B. California

California voters overwhelmingly passed Proposition 36 in the 2000 election, and the state legislature enacted the proposition as the Substance Abuse and Crime Prevention Act of 2000 (SACPA).¹⁵⁵ SACPA mandates that judges place “those persons whose only offenses were nonviolent drug possession offenses” on probation and send them to one of a variety of drug treatment programs.¹⁵⁶ Possession and transportation for the purpose of personal use are included as eligible offenses.¹⁵⁷

Eligible offenders are selected based on evidence of personal use, as demonstrated on the basis of “clear and convincing evidence,”¹⁵⁸ as well as a desire and amenability to enter a drug treatment program.¹⁵⁹ Offenders are eligible regardless of prior drug convictions on their record.¹⁶⁰ However, those who are convicted of a concurrent misdemeanor unrelated to the drug offense are not eligible to enter a drug

150. ARIZ. REV. STAT. § 13-901.01 (2011). Under the Drug Medicalization, Prevention, and Control Act’s sentencing scheme, before a person convicted of personal possession of drugs may be subjected to imprisonment, the State must both allege and prove the existence of any statutory factor that renders the person ineligible for disposition.

151. Wool & Stemen, *supra* note 145, at 304.

152. *See id.* (“The bill’s most innovative aspect is a funding mechanism that created a self-sustaining link between providing enhanced rehabilitative services and a reduced emphasis on incarceration.”).

153. *Proposition 200*, *supra* note 52, § 2 Declaration 6.

154. Wool & Stemen, *supra* note 145, at 304.

155. *About Prop 36*, PROP36.ORG, <http://www.prop36.org/about.html> (last visited Jan. 12, 2011).

156. *People v. Goldberg*, 30 Cal. Rptr. 2d 192, 196 (Ct. App. 2003).

157. *See* CAL. PENAL CODE § 1210(a) (West 2006).

158. § 1210.1(b)(5).

159. *See id.*

160. *See* § 1210.1(c)(2).

treatment program, nor are offenders who have committed a violent or serious felony at any time.¹⁶¹ Lastly, defendants charged with use or intent to use a deadly weapon are also excluded.¹⁶²

The judge's role in sentencing changed significantly as a result of the mandatory placement of offenders on probation and in treatment. Judges are given extremely limited discretion to revoke probation and convict the offender to prison time if they fail treatment or offend again.¹⁶³ Upon an offender's second offense, the judge must find that the offender is a danger to the public or that the offender is fundamentally incapable of successfully completing treatment in order to remove the offender from the SACPA programs.¹⁶⁴ Only when the offender violates his probation on a third occasion can the judge order a hearing to discuss the possibility of prison time—though the judge can keep the offender in the treatment program if she feels it is appropriate.¹⁶⁵

Although the law applies equally to the entire state, counties are responsible for the implementation of their own drug programs according to their communities' particular needs.¹⁶⁶ Consequently, funding for programs is prorated by county to ensure that those with a higher volume of drug offenses receive a larger portion of the \$120 million allotted to implement the measure.¹⁶⁷ Once a county receives its share of funding, it is given full discretion to distribute it as needed.¹⁶⁸ Additionally, issues involving the types of programs to initiate, the level of interaction between the offenders and the court, and the specific sorts of drug testing and the punitive measures to be taken for non-compliance are all largely left to the counties, subject to the confines of the language of the ballot measure.¹⁶⁹ Overall, the SACPA was consistent with the language and intent of Proposition 36, and courts quickly went to work implementing the law's mandates.

161. See § 1210.1(b)(5).

162. See § 1210.1(b)(3).

163. See generally § 1210.1.

164. See § 1210.1(f)(3)(A).

165. See § 1210.1(f)(3)(C).

166. See CRAIG CORNETT & DAN CARSON, CAL. LEGISLATIVE ANALYST'S OFFICE, IMPLEMENTING PROPOSITION 36: ISSUES, CHALLENGES, AND OPPORTUNITIES 1 (2000), available at http://www.lao.ca.gov/2000/prop36/121400_prop_36.pdf; Christine Watson, *California's Proposition 36 and the War on Drugs*, 9 BOALT J. CRIM. L. 3, 3–4 (2005).

167. See Watson, *supra* note 166, at 3.

168. See CORNETT & CARSON, *supra* note 166, at 4.

169. See *id.*

C. New York

Governor David Paterson signed the drug reform act into law on April 24, 2009.¹⁷⁰ Substantively, the law contained dramatic changes to the Rockefeller Drug Laws. First, and most importantly, the new law eliminates mandatory prison sentences for offenders with a first-time class B,¹⁷¹ C,¹⁷² D,¹⁷³ and E¹⁷⁴ drug felonies, so long as the offenses were nonviolent and were instigated by a substance addiction.¹⁷⁵ Second-time offenders convicted of a class C, D, or E drug felony will not be subjected to mandatory prison terms. Individuals convicted for a second time of a B felony can have their sentence set aside at the discretion of the court, so long as the court deems that they are dependent on drugs or alcohol and the statutorily-mandated mini-

170. See Press Release, David Paterson, *supra* note 77.

171. Class B felony drug offenses are defined in section 220 of New York Penal Law and include: criminal possession of a controlled substance in the third degree (§ 220.16), criminal sale of a controlled substance in the third degree (§ 220.39), criminal sale of a controlled substance in or near school grounds (§ 220.44), and criminal sale of a controlled substance to a child (§ 220.48). N.Y. PENAL LAW § 220 (McKinney 2011). Other class B felonies include: gang assault in the first degree (§ 120.07), grand larceny in the first degree (§ 155.42), manslaughter in the first degree (§ 125.20), and rape in the first degree (§ 130.35).

172. Class C drug offenses are defined in sections 220 and 221 of New York Penal Law and include: criminal possession of a controlled substance in the fourth degree (§ 220.09), criminal sale of a controlled substance in the fourth degree (§ 220.34), criminal sale of a prescription for a controlled substance (§ 220.65), criminal possession of marijuana in the first degree (§ 221.30) and criminal sale of marijuana in the first degree (§ 221.55). N.Y. PENAL LAW §§ 220–21 (McKinney 2011). Other class C felonies include: aggravated sexual abuse in the second degree (§ 130.67), robbery in the second degree (§ 160.10), bribery in the second degree (§ 200.03) and manslaughter in the second degree (§ 125.15).

173. Class D felony drug offenses are defined in Sections 220 and 221 of New York Penal Law and include: criminal possession of a controlled substance in the fifth degree (§ 220.06), criminal possession of a controlled substance in the fifth degree (§ 220.31), criminally using drug paraphernalia in the first degree (§ 220.55), criminal possession of marijuana in the second degree (§ 221.24), and criminal sale of marijuana in the second degree (§ 221.50). N.Y. PENAL LAW § 220 (McKinney 2011). Other class D felonies include: bribing a juror (§ 215.19), assault in the second degree (§ 120.05), and sexual abuse in the first degree (§ 130.65).

174. Class E felony drug offenses are defined in sections 220 and 221 of New York Penal Law and include: use of a child to commit a controlled substance offense (§ 220.28), criminal injection of a narcotic drug (§ 220.46), criminal possession of precursors of controlled substances (§ 220.60), criminal possession of marijuana in the third degree (§ 221.20), and criminal sale of marijuana in the third degree (§ 221.45). N.Y. PENAL LAW §§ 220–221 (McKinney 2011). Other Class E felonies include: abandonment of a child (§ 260.00), computer trespass (§ 156.10), eavesdropping (§ 250.05), and tampering with a consumer product in the first degree (§ 145.45).

175. See N.Y. PENAL LAW § 70.70(2)(b)–(c); Press Release, Sheldon Silver, N.Y. State Assembly Speaker, Announcing Agreement on Reform of the Rockefeller Drug Laws (Mar. 27, 2009), available at <http://assembly.state.ny.us/Press/20090327>.

mum findings for probation are met.¹⁷⁶ In lieu of mandatory terms, judges now have the discretion to choose among prison, probation, drug treatment, and other alternatives depending on the defendant's particular circumstances and needs.¹⁷⁷ Should the judge decide that prison time is appropriate for the offender, the law reduces the minimums for B and C felonies even if the offender has a nonviolent prior conviction.¹⁷⁸ The new law also makes approximately 1,500 convicted individuals eligible for resentencing.¹⁷⁹

To receive treatment instead of incarceration, the offender must plead guilty to the felony, unless doing so is likely to have "severe collateral consequences," such as deportation or the loss of a professional license.¹⁸⁰ Upon successful completion of treatment programs, judges will have the discretion to seal the arrest and conviction records of offenders.¹⁸¹ Judges also have the ability to supervise treatment, including frequent drug testing,¹⁸² and the ability to incarcerate offenders who do not complete treatment.¹⁸³

To make these reforms successful, the law also provides for the expansion of drug treatment programs and re-entry services.¹⁸⁴ Treatment programs had previously been unified in one program, the Drug Treatment Alternative to Prison (DTAP) program, which remains an option for judges to impose.¹⁸⁵ Moreover, the law included tens of millions of dollars in funding to establish new treatment facilities and programs.¹⁸⁶

Despite the general relaxation of sentences under the new law, not all drug offenders will have their sentence reduced. First of all, prison time is still mandatory for those convicted of a class B, C, D, or E felony if they were previously convicted of a violent felony.¹⁸⁷

176. See N.Y. PENAL LAW § 70.70(3); N.Y. CRIM. PROC. LAW §§ 216.00, 216.05(3)–(4) (McKinney 2011); Press Release, Sheldon Silver, N.Y. State Assembly Speaker, Announcing Agreement on Reform of the Rockefeller Drug Laws, *supra* note 175; see also N.Y. PENAL LAW § 65.00(a).

177. See generally DRUG POLICY ALLIANCE, *supra* note 51.

178. See *id.*

179. See *id.*

180. See N.Y. CRIM. PROC. LAW § 216.05(4)(b); see also Kenneth Lovett, *Fear Rocky Law Change Aids Illegal Immigs.*, N.Y. DAILY NEWS, Apr. 1, 2009, at 42.

181. See N.Y. CRIM. PROC. LAW § 216.05(10).

182. See § 216.05(5).

183. See § 216.05(9)(c).

184. See DRUG POLICY ALLIANCE, *supra* note 51.

185. See Press Release, Sheldon Silver, N.Y. State Assembly Speaker, Rockefeller Drug Law Press Conference, *supra* note 126.

186. See Press Release, N.Y. State Sen. Malcolm A. Smith, Governor and Assembly Announce Three-Way Agreement to Reform Rockefeller Drug Laws (Mar. 27, 2009).

187. See N.Y. PENAL LAW § 70.70(4)(b).

Moreover, those convicted of A-I¹⁸⁸ and A-II¹⁸⁹ felonies must receive prison time.¹⁹⁰ The law actually adds a new class of A-I¹⁹¹ felonies for drug kingpins and gang members,¹⁹² which carries a mandatory term of 15 years to life.¹⁹³ The law also creates a new class B felony for individuals who sell drugs to a minor under the age of 17.¹⁹⁴ Individuals convicted under this change will not be eligible for probation but can be deferred to treatment if the judge determines that the convict is dependent on alcohol or drugs.¹⁹⁵ These provisions reflect the desire to punish those who profit from the addiction of others.¹⁹⁶

Overall, the provisions laid out in the 2009 reforms reflect the intentions and concerns of those who pushed for the reforms. Treatment will be widely available for addicted offenders, and the addition of more severe sentences demonstrates a continued concern about punishing individuals who commit drug offenses not to feed their own addictions but to fill their pockets. The purpose of the reform then clearly appears to be to help those suffering from addiction while continuing to punish people who profit from others' addiction through the sale of drugs or who have pursued drug crimes violently.

IV.

SENTENCING FOR OTHER CRIMES

To determine if the reforms discussed above are in fact unique to drug offenses, comparing sentences imposed on addicted offenders with those imposed on other populations of offenders is useful. These reforms for drug offenses could signal a reversal of the trend of increasing punishment for offenders who are considered either less morally culpable for their actions or who have a mental issue that

188. A-I felony drug offenses are defined in section 220 of New York Penal Law and include: criminal possession of a controlled substance in the first degree (§ 220.21) and criminal sale of a controlled substance in the first degree (§ 220.43). N.Y. PENAL LAW § 220.

189. Class A-II felony drug offenses are defined in section 220 of New York Penal Law and include: criminal possession of a controlled substance in the second degree (§ 220.18) and criminal sale of a controlled substance in the second degree (§ 220.41). N.Y. PENAL LAW § 220.

190. See N.Y. PENAL LAW § 70.71(2)(b).

191. Before the passage of the reform, class A-I felonies included: arson (§ 150.20), conspiracy (§ 105.17), criminal possession of a controlled substance (§ 220.21), criminal sale of a controlled substance (§ 220.43), kidnapping (§ 135.25) and murder (§ 125.27) all the first degree, along with murder in the second degree (§ 125.25).

192. See Press Release, Eric T. Schneiderman, *supra* note 130.

193. See DRUG POLICY ALLIANCE, *supra* note 51.

194. See *id.*

195. See *id.*

196. See Press Release, David Paterson, *supra* note 77.

complicates their culpability. Examining the sentencing trends for two populations who are viewed in a similar manner—sex offenders and juvenile offenders—demonstrates that this is not the case.

The idea of sex offenders as mentally ill has been debated but remains a major theme in scholarly work on sex offenses.¹⁹⁷ Sex offender civil commitment laws are premised on the idea that sex offenders have a mental defect that must be “cured” before they can be safely released back to society.¹⁹⁸ Despite this similarity to the idea of drug abuse as addiction, the punishments for sex offenses have only increased in severity over the past two decades.¹⁹⁹

The sentencing structure for sex offenses has become increasingly complex and severe since 1990.²⁰⁰ Both state governments and the federal government have been steadily ramping up the sentences prescribed for sex offenses.²⁰¹ In 2006, Congress passed the Adam Walsh Child Protection and Safety Act, which increased the punishments for a range of sex offenses as well as created new laws under which sex offenders can be prosecuted.²⁰² The harsh treatment of these offenders does not stop at incarceration. Every state, as well as the federal government, has a sex offender registry in place.²⁰³ Many states have restrictions on where sex offenders can live after they are released.²⁰⁴ Their access to computers is sometimes limited or barred.²⁰⁵ They can be forced into civil commitment²⁰⁶ and can even be chemically castrated.²⁰⁷ The dissimilarities between the manners in which state legislatures and Congress have dealt with sex offenders

197. See Karol Lucken & Jessica Latina, *Sex Offender Civil Commitment Laws: Medicalizing Deviant Sexual Behavior*, 3 BARRY L. REV. 15 (2002).

198. See *id.*

199. See generally Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 450–51 (2010).

200. See Andrea E. Yang, *Historical Criminal Punishments, Punitive Aims and Un-“Civil” Post-Custody Sanctions on Sex Offenders: Reviving the Ex Post Facto Clause as a Bulwark of Personal Security and Private Rights*, 75 U. CIN. L. REV. 1299, 1300 (2007).

201. See Yung, *supra* note 199 at 450-51.

202. See *id.* at 451–52.

203. See *id.* at 447.

204. See JILL LEVENSON, NAT’L ASS’N. OF CRIM. DEF. LAWYERS, *Sex Offender Residence Restrictions: Report to the Florida Legislature* (2005).

205. New Jersey, for example, bans sex offenders from using the Internet if the original crime was committed with the use of a computer. See *Sex Offenders are Barred From Internet by New Jersey*, N.Y. TIMES, Dec. 28, 2007, at B5.

206. See VA. CODE ANN. § 37.2-901 (2005).

207. Florida, for example, passed a law in 1997 mandating the chemical castration of some repeat sex offenders. See Larry Helm Spalding, *Florida’s 1997 Chemical Castration Law: A Return to the Middle Ages*, 25 FLA. ST. U. L. REV. 117 (1998).

and drug abusers are striking, especially in light of the similarities between the views of the two populations.

Juvenile offenders are another population that often receives more leniency in the criminal justice system. Similar to drug abusers, juveniles are thought to need rehabilitation rather than punishment in order to prevent recidivism.²⁰⁸ Many legal scholars believe juveniles have a diminished capacity for rational thinking and impulse control as a result of their age, rather than a mental illness.²⁰⁹ This diminished capacity means that children think about, recognize, and appreciate the consequences of their actions in a way that makes them less morally and legally culpable for the crimes they commit.²¹⁰

Despite the notion that juveniles are less culpable for their crimes, juvenile offenders have been subject to increasingly severe punishments for their crimes. The primary manner by which juvenile offenders have their sentences increased is by being transferred to adult criminal courts.²¹¹ For example, California voters passed Proposition 21 in 2000, the same year that they passed Proposition 36.²¹² Proposition 21 decreased the age of eligibility for transfer into adult criminal courts from 16 to 14, and gave prosecutors increased discretion to file a case in adult court in the first instance.²¹³ As a result of these new laws, more juveniles are given longer sentences, without the

208. See Erin H. Flynn, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post Roper v. Simmons*, 156 U. PA. L. REV. 1049, 1055 (2008) (“The implication of the last difference, the transitory nature of juvenile character traits, is that children and adolescents have a greater propensity for rehabilitation than adults.”).

209. See, e.g., *id.* at 1050 n. 7; Aaron Kupchik et al., *Punishment, Proportionality, and Jurisdictional Transfer of Adolescent Offenders: A Test of the Leniency Gap Hypothesis*, 14 STAN. L. & POL’Y REV. 57, 61 (2003) (arguing that the reduced mental capabilities of juvenile offenders reduce their culpability); Allison Powers, *Cruel and Unusual Punishment: Mandatory Sentencing of Juveniles Tried as Adults Without the Possibility of Youth as a Mitigating Factor*, 62 RUTGERS L. REV. 241, 254–57 (2009) (describing courts that have acknowledged that “diminished culpability that accompanies youth because of ‘immaturity’ and ‘irresponsibility’ [a]s clearly well-documented in recent scientific analysis).

210. The Supreme Court, for example, noted this view of juvenile offenders: “Today society views juveniles, in the words Atkins used respecting the mentally retarded, as “categorically less culpable than the average criminal.” *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (quoting *Atkins v. VR*, 536 U.S. 304, 316 (2002)). Moreover, the Court attributed this diminished culpability to, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1982)).

211. See, e.g., Kupchik et al., *supra* note 209, at 58.

212. See *id.*

213. See *id.*

chance for the rehabilitation that occurs in juvenile facilities.²¹⁴ While this trend has been widely criticized,²¹⁵ it dominates sentencing schemes for juvenile offenders. The increasingly harsh sentences given to juvenile offenders, including their transfer to adult criminal courts, contrasts sharply with the trend toward increasingly lenient treatment of addicted offenders. As with sex offenders, this difference highlights the disparate treatment of addicted offenders.

V.

CAN WE EXTRAPOLATE THESE REFORMS TO THE LARGER SENTENCING SCHEME?

The United States underwent a major shift in sentencing policy throughout the 1980s and 1990s.²¹⁶ Sentences increased for most crimes and especially for drug offenses.²¹⁷ This “tough on crime” tactic resulted in the incarceration of hundreds of thousands of offenders and the expenditure of millions of dollars.²¹⁸ However, citizens, politicians, academics, and advocates have recognized over the last twenty years that this policy has not reduced crime or decreased drug use.²¹⁹ Moreover, the cost of maintaining a prison system to hold all of these offenders was severely taxing many states’ budgets.²²⁰ While these concerns were successfully raised in the push for drug policy reform in Arizona, California, and New York, the same effort has not been made for sentencing reform for other crimes. The following material will explore why the drug policy reform movement does not necessarily portend more general, sweeping sentencing reforms.

214. Federal, Arizona, and New York laws all allow for transfer of juveniles to criminal court in some circumstances. See 18 U.S.C. § 5032 (1996); ARIZ. CONST. Art. IV, Pt. 2, § 22; N.Y. CRIM. PROC. LAW § 180.75 (McKinney 2011).

215. See, e.g., Kupchik et al., *supra* note 209, at 61; Powers, *supra* note 209.

216. See Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1207 (1998). See generally Lisa Rosenblum, Note, *Mandating Effective Treatment for Drug Offenders*, 53 HASTINGS L.J. 1217 (Jul. 2002) (“Over the past twenty years, . . . federal and state governments have significantly increased prison sentences for those convicted of drug possession and use.”).

217. See David C. Leven, *Curing America’s Addiction to Prisons*, 20 FORDHAM URB. L.J. 641, 653 (1993).

218. See *New Solutions Campaign: Mandatory Minimums Hurt Families, Children and Communities*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/resource/new-solutions-campaign-mandatory-minimums-hurt-families-children-and-communities> (last visited Oct. 22, 2011).

219. See *supra* Part IV.

220. See Symposium, *Confronting the Crisis: Current State Initiatives and Lasting Solutions for California Prison Conditions*, 43 U.S.F.L. REV. 87, 125 (2008).

The drug reform debates in Arizona, California, and New York presented many of the most compelling arguments for drug policy reform. While much of the substance of the debates was similar, there were differences in how these reforms took shape and became law in each state. The differences reflect, in large part, the unique political and social situations of each particular state. For example, reform in New York was largely based on restoring judicial discretion, the lack of which was seen as a major problem with the Rockefeller Drug Laws. On the other hand, California sought to limit judicial discretion in its drug courts because such discretion had resulted in inconsistent sentencing for similarly situated defendants. In this way, many of the disparities between the laws can be attributed to voters' and legislators' reactions to their state's previous drug policy.

The most significant similarity between the laws passed by Arizona, California, and New York over the last decade has been the focus on treating drug offenders not as criminals but as individuals suffering from a disease. The emerging view of addiction as a public health issue, instead of a criminal justice issue, was discussed at length in all three states, and the discussions concerning addiction were quite similar. Proponents for reform argued against incarceration as an effective way to end addiction, the underlying cause of drug offenses. By treating the addiction instead of punishing the crime, they could help the particular offenders cease their drug use as well as end the crimes that result from the need to feed their addictions. Although this view is compelling and well-reasoned, it also demonstrates that the reforms achieved for drug offenses will not be extended to other crimes. The narrow focus on the nature of addiction in these reforms likely means that the reforms do not signal a larger rollback in sentencing. The debates focused heavily on the medical and scientific facts of addiction, with voters and legislators voicing their view that addicted offenders are unique from other offenders because of their addiction.

The resistance to reducing the harsh sentencing regimes is further demonstrated by the fact that the drug policy reforms were very narrow. These reforms only apply to two types of individuals: those who were convicted of solely personal possession, as in Arizona and California, or those convicted of a low-level drug offense, as in New York. These laws specifically exempt individuals whose crimes could be attributed to anything other than their addiction, including people who sell drugs or who possess them other than for personal use. All of the laws contained provisions by which the court needed to confirm that the offense was committed as a result of addiction. Clearly, the voting

public and legislators focused exclusively on addicted offenders, not on reducing the sentences of criminals more generally.

Furthermore, in the cases of Arizona and New York, the same laws that called for treatment of addicted offenders actually *increased* sentences for individuals involved in higher-level drug crimes—either those who profited from the sale of drugs or those who committed their crimes violently. In this way, it is clear that the supporters and legislators behind these reforms were aware that, in order to persuade the public that diversion was appropriate for addicted offenders, they would have to be explicit that the new proposal would punish “deserving” offenders to the fullest extent of the law. The emphasis placed on maintaining severe punishment for violent or large-scale drug crimes suggests that a general softening of sentences is not on the horizon.

These debates’ focus on the nature of addiction as a disease and the decreased culpability of addicted offenders sets the issue of drug reform apart from a larger discussion on sentencing. The success of these reforms strongly suggests that the public agreed with the proposition that addicted drug offenders should not be imprisoned as a form of punishment; rather, addicted drug offenders should be treated for their disease. Some of the arguments for drug policy reform could be easily adapted to advocate for a decrease of the general sentencing scheme for all crimes. However, the arguments about the culpability of addicted offenders and the possibility for rehabilitation cannot be as easily applied to non-drug related crimes. Consequently, legislatures and voters have not moved to reform the other types of sentencing structures.

While sentencing for crimes more generally will likely not be reduced, one could argue that the drug policy reforms signal that sentences with offenders with a mental incapacity will be reduced. However, the above discussion demonstrates that the sentencing trend for addicted offenders has not been extended to other populations of offenders, including those considered by many to be less culpable for their crimes. Instead of providing more rehabilitative opportunities for groups like sex offenders and juveniles, these groups have been subject to increasingly severe punishments in recent years. By comparing the reforms for drug-addicted offenders to the sentencing trends for juvenile offenders and sex offenders, it becomes clear that the reforms do not portend the revival of the rehabilitative ideal for all offenders who are viewed as mentally incapacitated in some manner. Rather, the examination of the increasingly harsh sentences for sex offenders and juvenile offenders again demonstrates that these reforms will likely be limited to drug addicted offenders.

Another potential counter-argument is that these reforms were truly motivated by fiscal concerns, not the desire to rehabilitate addicted offenders. It is true that much of the debate about reform, especially in Arizona and California, centered on budgetary concerns as well as prison overcrowding. However, if these reforms were motivated solely by fiscal issues, we would presumably have also seen a simultaneous rollback of sentences for other types of low-level crimes, a phenomenon that has not occurred. Thus, it seems that, though money was a crucial consideration for many supporters and voters of the reforms, it was not the sole motivator. Rather, it is the uniqueness of the nature of addiction that drove voters and legislatures to reduce sentences for this particular population.

The exclusion of non-addicted offenders and the increased punishment for violent offenders or high-level drug dealers demonstrates that lawmakers are unwilling to ease the harsh sentencing regimes that have led to the incarceration of so many individuals over the course of the last three decades. Moreover, comparisons to other types of offenders reveals that these reforms do not indicate that sentencing even for mentally incapacitated offenders is going to decrease in severity. It does not ultimately appear that the reformation of drug policies in Arizona, California, and New York foreshadows a wider overhaul of the severe sentencing schemes perpetuated throughout the 1980s and 1990s.