

Is Proposition 36 the Answer
California Was Looking For?

Article

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It is clear that we cannot arrest our way out of the problem of chronic drug abuse and drug-driven crime. We cannot continue to apply policies and programs that do not deal with the root causes of substance abuse and attendant crime. Nor should we expect to continue to have widespread societal support for our counter-drug programs if the American people begin to believe these programs are unfair.

Barry R. McCaffrey (U.S. Drug Czar)

Is Proposition 36 The Answer California Was Looking For?

The estimated cost of drug abuse to the United States today is \$246 billion a year (Torr, 1999). The high cost associated with fighting drug crime in America, coupled with our inability to reduce the number of substance abusers in the United States, has led many to conclude that we are losing our war on drugs. Of further concern are U.S. demographics for the coming decade that indicates a population spike of 14 to 25 year old Americans. Historically, this age group accounts for a large majority of America's drug related offenses.

In the California Department of Justice's Crime and Delinquency Report 2000 we find that 128,142 felony drug arrests were made by law enforcement in California in the year 2000. These drug felonies accounted for 28 percent of all California felony arrests. Of 925,729 reported misdemeanor arrests in California in the same year, almost half, over 420,000, were for drug or alcohol abuse. As many as 200,000 of the remaining misdemeanors were committed by persons under the influence of drugs or alcohol, or committed to support drug addiction. Clearly, drug and alcohol abuse account for a huge portion of California's crime.

While estimates are very rough, it is believed that as many as 17 percent of California's residents today use illicit drugs and approximately 10 percent have an alcohol problem that may require professional treatment (Profile of Substance Abuse). Further complicating the issue is the difficulty of controlling California's border with Mexico. More than half of the Nation's illicit

drugs enter the U.S. across the Mexican border, making California substance abusers some of the best supplied consumers in the country (U.S. Department of Justice, 2000).

California law enforcement, the courts, and medical and mental health professionals have all begun to look at alternative strategies to deal with the issues of drug and alcohol abuse. Today's discussions focus on finding more effective treatment and aftercare as opposed to more severe punishment for offenders. Recommended alternatives to incarceration range from community-based treatment centers to simply legalizing drugs.

One opponent of punishing drug offenders argues that marijuana use should be treated no differently than alcohol or tobacco and that the revenue generated from regulated sales and federal money saved by not waging war on drugs could easily offset the costs associated with addiction (Treatment vs. Jail). Some believe all drugs should be decriminalized, clean needles should be provided, and public education should be the priority (Barbour, 2000).

Law enforcement and court professionals continue to fear that legalizing drugs and/or reducing the criminal status of drug abuse will result in more young people trying drugs and suffering the life altering consequences of drug use. While the costs associated with drug law enforcement would decrease, many believe the costs associated with communicable diseases, injuries and accidents, prenatal exposure, chemical addiction, and crimes committed to support drug habits will increase.

Most experts today are willing to strike a compromise, believing that, while drug use should remain a crime, it must also be dealt with by treatment. They understand that drug-use recidivism and the crimes committed to support drug habits are significantly reduced by treatment programs (Profile on Substance Abuse). Conservative experts believe the treatment must be a condition of probation, but concede that record purging of select charges may be a

reasonable incentive for successful completion of the program. Much of the controversy surrounding court imposed treatment options revolves around the theory that a substance abuser must hit bottom before they are truly receptive to change, and that without some jail time or, at minimum, incarceration as a threat, the abuser will not feel an abiding need to change (Wills & Carona, 2000).

Beginning in 1980 California courts began using out-of-custody drug treatment programs to provide help to offenders they perceived were ready to benefit from such treatment. Selected judges and courtrooms known as Drug Courts were established in several California counties to determine whether individuals who plead guilty to drug use were more suitable for out-of-custody treatment programs or straight jail time. In the Drug Court program, the judge, probation officer, district attorney, and arresting agency work together to select a course of treatment and sentencing for an offender. The judge retains control over the period of treatment, seeing the offender every two weeks for a progress review. The drug court program generally lasts from six to twelve months, followed by a period of formal probation. Participants know that failure at any point can result in a jail sentence.

Some have described the relationship that develops between a judge and the offender in drug court as that of a parent and a child (Wills & Carona, 2000). Judges listen to the participants, provide encouragement, and express disappointment. Small rewards are given to participants who are progressing well in their treatment programs, seeking and/or maintaining employment, and providing for their families. A formal graduation ceremony is held in open court for successful participants who complete their programs. Persons who have tested dirty since their last review session are sometimes cuffed in front of their peers and taken back to jail.

The Drug Court program has been very successful in reducing recidivism in those jurisdictions where it is being used and boasts that it blends the best of what the treatment community offers with the full weight of the criminal justice system. A study using 440 drug court clients in Multnomah County, Oregon found a two-year savings to the state of \$10.2 million (Physician Leadership on National Drug Policy). This includes the savings in the criminal justice system, victimization, theft reduction, public assistance and medical claims.

In-custody treatment centers in the California counties of Sacramento, Los Angeles and Orange, and the California Dept. of Corrections are also enjoying great success in treating substance abusers. In 2000, Orange County, California opened a 64-bed in-custody treatment community inside the Theo Lacy Jail, a maximum-security facility in Orange, California. In that cellblock, inmates live and participate in classes as a group. Substance abusers in this program receive an intensive full range of medical and psychiatric treatment services, coupled with extensive educational offerings in job and life skills development. While facility security is provided by Sheriff deputies, treatment services are delivered by a private contractor. Aftercare placement upon release from jail is an integral component of this program's success. The program's first report indicates that 90 percent of the participants released into aftercare are attending 8 to 9 recovery meetings, 70 percent are employed, and 95 percent are meeting their monthly probation conditions (CHE Correctional Services Report, 2000/01).

Participation in the pilot program is voluntary. Housing, discipline, recreation and all other jail conditions are identical to those offered to non-participants. Completion of the treatment program does not reduce the length of the inmate's sentence or alter their criminal record. Orange County plans to expand their lock-down treatment program to a 500-bed facility within the next 5 years.

Legislating Change

In 1996, two thirds of the voters in Arizona approved Proposition 200 that medicalized Schedule I drugs including marijuana, heroin, and LSD, and prohibited the incarceration of non-violent drug offenders. In 1998 the voters re-approved the measure, and non-violent drug offenders began receiving mandatory probation and treatment rather than jail time. The new Drug Medicalization, Prevention and Control Act created a Drug Treatment and Drug Education Fund (DTEF) that applied liquor taxes to placing drug offenders into specially targeted programs. It also established a Parents Commission on Drug Education and Prevention that channels savings from the Act into drug education programs.

The Arizona Supreme Court Report generated after the first year the Act was in effect showed very favorable and in some areas remarkable results. The report indicated that in the first year under the Act, the State of Arizona diverted 2,622 non-violent drug offenders into treatment rather than jail and saved the State \$2,563,062. More than 78 percent of these probationers tested drug free after program completion and 77.1 percent made at least one payment toward the cost of their treatment (Arizona Supreme Court, Legislative Report, 1997/98).

Many criminologists believe it is too early to declare Arizona's program a success. They agree that Arizona's high rate of program completion is impressive, but that the true measure of success will be lower recidivism and fewer new drug users.

Not to be outpaced by Arizona, California was quick to put a similar measure on their 2000 ballot. Like Arizona's Proposition 200, Proposition 36 mandated that non-violent first and

second offenders receive drug treatment in lieu of incarceration. Successful completion of the program results in the dropping of criminal charges.

Supporters of the measure claimed that an average of \$4,000 a year spent for the treatment of a substance abuser would be a far better investment of precious state revenues than the current \$20,000 a year spent to incarcerate a drug offender. They estimate the programs will divert approximately 24,000 offenders and save the State \$200,000,000 a year. They also believe it to be a more humane way to deal with persons suffering from drug dependence and would deliver more lasting results than mere punishment of these offenders.

The California Department of Corrections, law enforcement agencies and the courts in California had not made the public aware of the highly successful Drug Court programs and numerous drug and alcohol treatment programs already utilized in our jails. These agencies failed to perceive the public's growing desire to reduce California's costly drug problem and made little effort to harness the public's collective will to enhance existing programs. No campaign was launched to secure improvements in in-custody treatment programs, expand the use of Drug Court programs or create public/private partnerships for lock-down treatment communities. By the time law enforcement realized the public would support Prop 36 it was too late to launch a meaningful counter offer.

California's Proposition 36 passed by almost two thirds of the votes in November 2000 with implementation to occur July 1, of 2001. Concerns quickly arose among both government and private agencies that insufficient treatment facilities would be available to handle the increased treatment load. In 2000, California's out of custody drug treatment programs served approximately 70,000 patients each year. Experts believed Prop 36 would add another 36,000 patients to that demand.

Residential care, outpatient services, halfway houses, and drug education programs can all be used to satisfy treatment services specified in Prop 36. The State's Department of Alcohol and Drug Programs, however, is only responsible for licensing residential treatment programs. It has no legal authority to certify other community drug treatment programs. As a result the department had to adopt other methods in each county to certify and monitor non-residential programs.

Another widely held concern is that State funding for court mandated treatment programs have not been adequately addressed. Should this result in insufficient program space to place all qualifying drug abusers, those users who cannot be placed could be turned loose without treatment. Furthermore, Prop. 36 prohibits using treatment money for drug testing of program participants. Experts consider drug testing an essential element in measuring program compliance and success.

Numerous other concerns have arisen since passage of Prop 36. Traditional criminal justice and correctional treatment providers fear that monies once used for Drug Courts and for inmate programs will begin to dry up as the State concentrates its efforts on complying with Prop 36 mandates. Law enforcement also fears that the two get out of jail free cards provided by Prop 36, eliminating the threat of jail time or a criminal record, will encourage more young people to experiment with drugs.

Keeping the Scales Balanced

All evidence gathered in the past three decades points to one rather simple realization. Individuals use drugs when their motivation, or perceived need to use drugs, outweighs the inhibitors that previously deterred them from using drugs. When this scale tilts in favor of using

drugs, and an opportunity presents itself to obtain drugs, drug use will occur. Law enforcement has been relatively ineffective in preventing opportunities to obtain drugs in America. In a recent study by the U.S. Department of Justice, participants in the Arrestee Drug Abuse Monitoring Program reported that police actions interfered with only three percent of their efforts to purchase narcotics on the street.

With so much opportunity to obtain narcotics, it is fortunate that other inhibitors against drug use have remained relatively high. Most individuals fear that using drugs would be unhealthy and could result in an overdose, a bad drug reaction, transmission of a communicable disease, or an injury accident. Many are concerned that drug use will result in an arrest, a costly legal battle, time in jail and a permanent criminal record. Other potential drug users fear that discovery of their drug use would cost them their job, the respect of their loved-ones, or self respect. Even the high purchase price of drugs can be an inhibitor to their use.

Motivation to use drugs also takes many forms. Most will say they are recreational users who do so to feel euphoric, creative, funny or uninhibited. Some use drugs to be sociable and feel accepted by their peers or to fully participate in the party atmosphere. Self-medicators take drugs to eliminate stress, get a good night's sleep, manage their moods, or forget about their problems. Additionally, some users began to use drugs as a personal statement; as a form of rebellion against the rules; a means of saying to themselves and to others, "I'm in control of my own life."

A high-risk individual is someone whose scale is about to tilt toward drug use. Teenagers who are not getting enough attention at home are especially high-risk. Feeling that they are not loved or accepted at home, coupled with their biological need to be social, makes it easy for young people to be drawn into a group of similarly needy individuals. Teens who do not receive

meaningful and caring encouragement from their parents to do well in school, participate in sports and other organizations, prepare for careers and pursue their dreams will often fall in with other young people who lack direction and self worth. Teens who come from drug abusing families or endure other forms of abuse are also at risk.

Where Should California Go From Here?

A lasting victory in the war on drugs will require a considerable commitment of resources and attention in three critical areas: 1) prevention, 2) intervention, and 3) consequences. The battle against drugs begins with a strategy for prevention. Additional funding is needed for education programs that teach children and adults about the dangers and consequences of drug use. The prevention component must also include community programs that provide healthy social outlets for young people and job development for adults. The greatest preventive measures, however, will start at home. Parents must be educated on the importance of setting a good example, encouraging goal setting, and steering their children toward healthy, growth oriented activities. Parents must make an effort to communicate with their children and show interest in what their children are learning at school. Just as importantly, parents must get to know their children's friends and always know where their children are.

Intervention is the component receiving the most attention today. California's Proposition 36 is a good example of society's desire to treat the underlying problem rather than simply punish misconduct. Drug users must be helped to understand why they are using drugs and how to substitute healthier alternatives to fill the voids in their lives. Intervention must include early recognition of drug problems and low cost opportunities for professional counseling. It must be an ongoing process and cannot end upon release from jail or completion

of a treatment program. Recovering substance abusers will be a high risk for recidivism and society would be wise to invest heavily in aftercare programs for these individuals.

Consequences refer to the negative results of drug and alcohol abuse. They play a huge role in the prevention component as they provide the inhibitors that many people need to stay away from drug use. Criminal records, loss of freedom, health consequences, poverty and loss of respect are all real consequences to drug use. Unfortunately, as more funding and sentiment is invested in prevention and intervention, the consequences component may look less important to society. Many already believe this component to be unjust or cruel and are looking for ways to minimize it. Legalizing drugs, providing clean needles, insisting that society forgive and forget, and calling substance abuse a medical condition rather than a crime are all efforts to reduce the consequences of substance abuse. While these efforts are well intended, they seriously devalue the consequence component. If drug use was not a crime, and government regulations made drugs safer to use and more affordable, and society was accepting of responsible recreational drug use, how many otherwise drug-free young people would be inclined to engage in this dangerous practice?

An Alternative to Proposition 36

With the passage of Proposition 36, the courts have found they must release people into the community who are not suited for non-criminal handling. Some of these persons may be a danger to themselves or to society and yet the courts are bound, under Proposition 36, to find community-based programs for their treatment. Many of these serious addicts are returning to the system before completion of their programs and needlessly use additional court time.

A one-size-fits-all approach to behavior modification assumes that all first and second arrest substance abusers are the same. In reality we know that a young college student detained

during their first cocaine party experience may not require the same costly intervention as a long-term heroin addict experiencing their first arrest. Because each offender enters the judicial system at a different level of dependence, a more subjective and scientific method of evaluating their dependence is required. In this regard, there can be no substitute for thoughtful jurisprudence backed by the advice of trained medical and psychiatric professionals.

While well intended, Proposition 36 made it more difficult for the courts to assign the best course of treatment for individual substance abusers and lost a good deal of their power over offenders. On the other hand valuable court time is often spent finding treatment for persons whose level of drug or alcohol use may not yet rise to the need for judicial intervention. In these cases, judges are asked to make assessments that could easily have been made by other professionals with more expertise in chemical abuse. If these low level offenders could be referred to treatment prior to a criminal filing, county jail beds, investigative resources, and public defender expenses could be applied to more serious offenders.

A practical alternative to Proposition 36 would be to enact new legislation that requires a peace officer with probable cause to arrest an individual for drug and alcohol charges to transport the individual to a drug and alcohol triage center for pre-arrest processing by the district attorney. Triage centers can be located adjacent to or within a county jail. At the triage location, a lab technician will draw and test the individual's blood and/or urine. Individuals that are determined to be under the influence shall be either: 1) detained under PC 849(b)2 and released once sober, 2) booked into the jail and held for criminal/court processing, or 3) detained at the triage center and screened for a non-criminal referral to private treatment.

An individual whose offense is limited to a misdemeanor drunk driving, drug possession or under the influence (and who is not to be released 849b2) may be offered screening for a non-

criminal referral to private treatment. For these individuals a representative of the District Attorney's Office will examine the police report, a complete records check and the result of blood and/or urine testing; and if the minimum criteria are met, the individual will be afforded the opportunity to voluntarily participate in the private referral screening process.

The detained individual would be advised that they may elect to continue their detention for a two to 24 hour medical and psychiatric evaluation at the triage location, and that the screening process could result in a finding that they are eligible for release to private treatment with no criminal charges being filed. Detainees participating in the medical and psychiatric screening process would be required to sign a waiver permitting their statements and test results to be used for that limited purpose. The information cannot be used by the district attorney should a criminal filing be sought.

Consenting qualified detainees would be thoroughly evaluated to determine their level of dependence on drugs or alcohol and to determine if other medical or mental health conditions may be contributing to their drug use. Using criteria agreed to by the local courts and permitted by statute, the on-site representative of the district attorney's office reviews the individual's criminal record and the findings of the medical and psychiatric evaluation team, and decides whether to release the detainee to private treatment or to file criminal charges. Disqualifiers for referral might include:

- The incident included property damage, injury, assault, resisting or evading arrest, or an allegation of additional non-drug related crimes.
- The individual refused to voluntarily participate in the screening process.
- The individual has a prior arrest or treatment referral for an alcohol or drug related offense.
- The individual has a felony conviction within the last 5 years.
- The individual has a criminal history of theft, assault, narcotics sale or trafficking, etc.
- The individual is on parole or probation.
- The individual has outstanding warrants for their arrest.

- Medical or psychiatric professionals determine that the individual's condition of dependence is too advanced to safely release them into the community.

If the district attorney believes the individual is not suitable for a non-criminal referral, sheriff's personnel will arrest the detainee and book them into the county jail for criminal processing. Information obtained as a result of the individual's voluntary participation in the screening process cannot be used in any criminal proceeding.

All persons who are found by the triage team and district attorney to be eligible for a referral to private treatment must sign an agreement to participate in a prescribed course of treatment and a waiver that permits the private treatment provider to report the individual's completion of the program or failure to participate in the program to the district attorney.

Participants must also agree to pay for the referral screening and a portion of their treatment, and provide a post-graduation critique of their treatment program provider. Should an individual referred by the district attorney to a private community-based treatment program refuse treatment or fail to complete the prescribed treatment program, the district attorney may file the criminal charges and issue a warrant for their arrest.

This drug and alcohol triage/detention strategy places emphasis on the condition of the individual and provides the following benefits: 1) Participants in the screening and referral process are given an opportunity to get meaningful help and avoid a criminal record for their first offense/arrest, 2) the courts, county agencies and taxpayers expend fewer resources for low-level first-time offenders, 3) chemical recovery professionals make clinical assessments for program suitability, and 4) the district attorney maintains criminal jurisdiction over the individual until the program is completed.

In addition to establishing a drug and alcohol triage center, each county should be encouraged to create a Chemical Recovery Agency (CRA) responsible for providing education programs to the public on the dangers of drug and alcohol use. The CRA will target at-risk youth and adults with special training and community programs designed to prevent drug use and help chemically dependent individuals find professional help.

The CRA can also provide vision and oversight for a countywide Chemical Dependence Task Force and should act as a collection point for countywide statistical data measuring the success of private and public drug treatment programs as well as law enforcement, court and public health intervention efforts. The CRA can use this badly needed information to assist them in the selection of local treatment providers and resource allocations and can forward standardized statistics to the State for inclusion in a statewide Chemical Dependence Database.

Californians are ready to explore new chemical abuse strategies and need a strong leader for the fight. To assume that leadership role, law enforcement and corrections institutions must publicly recognize that treatment is essential for serious behavior modification, and the battle to stop drug trafficking can only be won by reducing the market demand. Failure to compromise on this issue could result in a loss of public confidence and this, in turn, may relegate law enforcement and corrections institutions to a supporting role in someone else's plan. By demonstrating a sincere willingness to shift strategies, we can win the public and legislative support needed to maintain an influential position on this important topic.

Bibliography

Arizona Supreme Court, Administrative Office of the Courts, Adult Services Division, Drug Treatment and Education Fund, Legislative Report, Fiscal Year, 1997-1998

Barbour, S., 2000. Drug Legalization, San Diego: Greenhaven Press.

CHE Correctional Services, LLC, BEST Choice Jail Substance Abuse Treatment & Community Aftercare Program First Year Report, Nov 2000 to June 2001

Crime & Delinquency in California, available from <http://caag.state.ca.us/search.htm> Internet accessed
04 December 2001.

Physician Leadership on National Drug Policy, available from <http://caas.biomed.brown.edu>
Internet
accessed 10, December 2001

Profile on Substance Abuse, available from <http://www.ncadd-sfv.org> Internet accessed 10
December
2001.

Torr, J. D., 1999. Opposing Viewpoints, Drug Abuse, San Diego: Greenhaven Press.

Treatment v. Jail, available from <http://www.cannabisnews.com> Internet accessed 14 December
2001.

U.S. Department of Justice, ADAM Preliminary 2000 Findings on Drug Use & Drug Markets.

Wills, M. & Carona, M., 2000. Save My Son, Center City, Minnesota: Hazeldon.