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California's Proposition 36 and the War on Drugs

By Christine Watson

I. Introduction

In the past two decades, state and federal prison populations have quadrupled.¹ This increase is attributable in part to law enforcement's war on drugs.² California, which has the nation's largest prison system, has one of the most extensive drug treatment programs in the nation.³ California law mandates that punishment is the principal purpose of incarceration.⁴ On November 7, 2000, California voters passed Proposition 36, also known as The Substance Abuse and Crime Prevention Act (SACPA), by 61% of the vote.⁵

This initiative authorizes first and second time non-violent, drug possession offenders the opportunity to participate in substance abuse treatment in lieu of incarceration.⁶ Probationers and parolees who violate the conditions of their release by using drugs are also eligible for the program.⁷ The statute does not apply to offenders convicted of illegal drug sales or drug manufacturing. It also excludes those who have past serious or violent felony convictions within the last five years, or those whose drug charges are concurrent to any unrelated misdemeanor or felony.⁸

By law, \$120 million of state money is allocated around the state based on each county's population, its number of drug arrests, and the number of individuals receiving treatment.⁹ This initiative is expected to save California taxpayers \$1.5 billion over its initial five-year term.¹⁰ The

¹ Judith Appel, *Dealing With Drug Use: Treatment (Not Jail Time) Saves Lives*, San Francisco Chronicle, Nov. 15, 2004, at B5, available at <http://www.drugpolicy.org/library/judy111504.cfm>.

² Daniel Forbes, *Prop 36: The Devil Is in the Details*, High Times, July 25, 2001, available at <http://www.mapinc.org/drugnews/v01/n1383/a07.html>.

³ Judith Appel, *Proposition 36 – Three Years and Going Strong*, available at <http://www.sfms.org/sfm/sfm504g.htm> (last visited Dec. 12, 2004).

⁴ Barry Krisberg et al., *Attitudes of Californians toward Effective Correctional Policies*, available at http://www.nccd-crc.org/nccd/pubs/2004_corrections_attitudes.pdf (June 2004).

⁵ Press Release, Drug Policy Alliance, California Still Winning with "Drug Treatment, Not Jail" Initiative, available at <http://www.prop36.org/pr092304.html> (Sept. 23, 2004).

⁶ Josh Susong, *Prop 36 Proving Costly*, San Jose Mercury News, Aug. 17, 2003, at B1, available at <http://www.mapinc.org/drugnews/v03/n1278/a05.html?215>.

⁷ *Id.*

⁸ Craig Cornett & Dan Carson, *Implementing Proposition 36: Issues, Challenges, and Opportunities*, available at http://www.lao.ca.gov/2000/prop36/121400_prop_36.html (Dec. 14, 2000).

⁹ Susong, *supra* note 6.

¹⁰ Press Release, Drug Policy Alliance, California Still Winning with "Drug Treatment, Not Jail" Initiative, available at <http://www.prop36.org/pr092304.html> (Sept. 23, 2004).

funding for Proposition 36 is scheduled to end in the 2005-2006 fiscal year, and petitions for further funding will be submitted to the state legislature in 2005. In this article, I review the substance of the program, its effectiveness, and highlight some points of contention.

II. History

The social cost of drug addiction is substantial, involving state resources for incarceration, child protective services, and hospitals.¹¹ As noted by Douglas Marlowe, the cycle of drug use is only destroyed through treatment, rather than “pushing [drug addicts] through the revolving door of prison.”¹² Reliance on imprisonment has done little to stem the tide of illicit drug use. Studies indicate that about 85% of drug-abusing offenders returned to drugs less than a year after their release from prison and 95% relapsed within three years.¹³ In 2001, a poll by Peter D. Hart Research Associates found that 63% of Americans “view drug abuse as a medical problem that would be better addressed by treatment than by incarceration.”¹⁴

To address this problem, the voters of California passed Proposition 36. This statute entered into effect in July of 2001. Generally, Proposition 36 allows offenders convicted of illegal drug possession or use, who have not committed violent crimes, to participate in drug abuse treatment instead of jail. Under Proposition 36, after sentencing, the offender is assessed and assigned to outpatient or residential treatment. Probation officers supervise the offenders. Offenders' probation is generally not revoked until they commit two drug related violations.¹⁵ After the first violation, the state may only revoke probation if it can show by a preponderance of the evidence that the defendant is a danger either to self or to others. However, after a second drug-related violation, the state can revoke probation if it shows that the offender is either a danger to the safety of others or is "unamenable to drug treatment".¹⁶ Ideally, the Act will reduce jail expenditures, reform drug addicts, and reduce crime.

Although drug testing was debated intensely during the Proposition 36 drive, mandatory testing is not required by the Proposition.¹⁷ However, due to the concerns raised by critics of the

¹¹ Appel, *Dealing With Drug Use*, *supra* note 1.

¹² *Id.*

¹³ Douglas Marlowe et al., *Amenability to Treatment of Drug Offenders*, 67 Fed. Probation 40 (2003).

¹⁴ Appel, *Proposition 36*, *supra* note 3.

¹⁵ Cornett & Carson, *supra* note 8.

¹⁶ Marlowe, *supra* note 13, at 40.

¹⁷ Cornett & Carson, *supra* note 8..

program and the recognition of experts that testing is necessary for monitoring both the progress of treatment and compliance, a compromise was reached in the form of SB 223.¹⁸ Passed by the legislature in 2001, SB 223 provides funding for testing but mandates that test results only be used for treatment purposes. Under the bill, magistrates can order drug testing and may require defendants to pay for it.¹⁹

To accomplish the objectives of Proposition 36, \$120 million from the state budget is provided to the 58 counties of California for the implementation of drug rehabilitation programs.²⁰ The funds are dispersed on an annual basis over five years, but that funding ends in fiscal year 2005-2006.²¹ Petitions for future funding will be submitted in the 2005 legislative session.²²

To ensure that its goals were being effectively met, Proposition 36 mandated an evaluation of the program by the University of California at Los Angeles.²³ The study encompasses all of California for the fiscal year ending June 30, 2003, with the objective of helping state legislators to decide the future of the program.²⁴ The researchers concluded that Proposition 36 had been very successful during its initial two years of implementation.²⁵

III. Treatment

Each county individually oversees its own program to comply with the requirements of Proposition 36. Although SACPA mandates directives to each California county, implementation differs considerably from county to county.²⁶ These differences result from varying population needs, available treatment options, political disposition, and responsiveness to therapy in each county.

In several California counties, treatment organizations have taken on a quasi-law enforcement role, reporting positive drug test results directly to probation or parole officials, which can result in incarceration or sanctions against the offenders. This dual role can create

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Press Release, Drug Policy Alliance, California Still Winning with "Drug Treatment, Not Jail" Initiative, available at <http://www.prop36.org/pr092304.html> (Sept. 23, 2004).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Press Release, Drug Policy Alliance, California Still Winning with "Drug Treatment, Not Jail" Initiative, available at <http://www.prop36.org/pr092304.html> (Sept. 23, 2004).

²⁶ Cornett & Carson, *supra* note 8.

barriers between clients and treatment providers; lack of confidentiality discourages honesty, which hinders the recovery process.

Reformers object to this methodology. They argue the individual's attendance and participation in treatment is more important than a failed test.²⁷ In San Francisco, for example, if a client tests positive, the treatment provider will offer supplemental counseling and assessment focusing on the elements that led to the drug use.²⁸ In addition, the provider and the client may augment a plan for relapse prevention to aid the client in fulfilling the SACPA commitment. In many cases a positive drug test signifies the necessity for more intensive treatment. Discharge from a treatment program occurs only after a second positive drug test. Instead of sending these clients back to court, the Treatment Access Program reevaluates them.

The UCLA report shows that more than 66,000 offenders were diverted to drug treatment in the first two years of the initiative.²⁹ Comparing costs of a year of drug treatment and probation supervision to the ever-increasing costs of incarceration, the Drug Policy Alliance estimates Proposition 36 saving hundreds of millions of dollars during the five year program.³⁰ Client treatment enrollment rates were similar during SACPA's first two years. Most clients were placed in outpatient drug-free programs (84.1% in the second year) or long-term residential programs (10.9%).³¹

IV. Effectiveness

The effectiveness of SACPA can be seen in two different respects: economic effectiveness and treatment effectiveness. Economic effectiveness is represented by the savings to the State of California from reduced prison populations and lower enforcement costs. Treatment effectiveness, by contrast, is measured by the number of repeat violations of drug offenders.

²⁷ Forbes, *supra* note 2.

²⁸ *Id.*

²⁹ Douglas Longshore et al., *Evaluation of the Substance Abuse and Crime Prevention Act 2003 Report*, available at <http://www.uclaisap.org/Prop36/documents/112344%20SACPA%20FINAL%202003%20REPORT%20092304.pdf> (Sept. 23, 2004) (Prepared for the Department of Alcohol and Drug Programs, California Health and Human Services Agency).

³⁰ Press Release, Drug Policy Alliance, California Still Winning with "Drug Treatment, Not Jail" Initiative, available at <http://www.prop36.org/pr092304.html> (Sept. 23, 2004).

³¹ Longshore, *supra* note 29. In its second year, about half of those entering treatment reported methamphetamine as their primary drug (53%), followed by cocaine/crack (13%), marijuana (12.1%), heroin (10%), and alcohol (9.8%). A majority of Proposition 36 clients (72.7%) were men. About half (48%) were non-Hispanic Whites, while 31.4% were Hispanics, 13.8% African Americans, 2.6% Asian/Pacific Islanders, and 1.7% Native Americans. Their average age was 35. *Id.*

Further, the effectiveness of the program is mirrored in jurisdictions outside California.

A. Economic Effectiveness

The economic effectiveness since the implementation of SACPA may be seen in the reduced prison population. The UCLA report shows that in the first year of the Act, 82% of eligible drug offenders chose to participate in treatment programs.³² Of those, 81% actually entered treatment. The study noted that even if only 69% of drug offenders in court who opt for a treatment program, actually enter treatment, this would be a promising rate compared to other substance abuse treatment referral studies. Douglas Longshore, who led the analysis for Integrated Substance Abuse Programs at UCLA, said the typical show rate for other treatment programs -- those that lack the force of law -- is generally less than 50%.³³

Far fewer offenders are serving time for drug use and possession. At the end of 2003, there were 7,055 less prisoners incarcerated for simple drug possession than in 2000, when the largest total was recorded at 20,116 before passage of SACPA.³⁴ The Act has effected a reduction in female prisoners in California, resulting in the closure of the Northern California Women's Facility in February 2003.³⁵ When SACPA was on the ballot in 2000, California was planning to construct two new prisons by 2003 to accommodate growing inmate populations. Since Proposition 36 was enacted, one of two planned prisons was built, however plans for another have been scrapped, resulting in a savings of \$500 million.³⁶ Even though there has been a rise in property crimes, the prison population rose only 0.7% after SACPA was enacted, from 160,655 at the end of 2000 to 161,785 at the end of 2003.³⁷ Californians are now saying that punishment alone does not deter crime and that they favor a correctional system that includes rehabilitation as a core operating principle.³⁸

B. Treatment Effectiveness

The treatment effectiveness of SACPA has been less clear cut than the economic effectiveness of the program. Several studies suggest that clients who are forced to enter

³² *Id.*

³³ Susong, *supra* note 6.

³⁴ *Id.*

³⁵ Appel, *Proposition 36*, *supra* note 3.

³⁶ *Id.*

³⁷ Press Release, Drug Policy Alliance, Prop. 36 Has Cut Prison Costs, Populations -- Fact Sheet, *available at* http://www.prop36.org/prop36_fact_sheet.html (Sept. 2004).

³⁸ Krisberg, *supra* note 4.

substance abuse treatment by the criminal justice system succeed as often as those who enter treatment voluntarily.³⁹ Advocates of coerced treatment maintain that coercion does not subvert treatment effectiveness. Various studies state legal coercion increases treatment program admission rates and promotes treatment retention.⁴⁰ These studies support the argument that substance abusers can benefit from treatment even if legally compelled to enter. Many have argued that very few habitual addicts will participate in treatment without some sort of external provocation and that judicial coercion is as justified as any other treatment motivator. However, others argue against coerced treatment based on the rationale that treatment can only be effective when the addict wants to reform.

Data compiled by the state's Department of Alcohol and Drug Programs comprised of the first six months of the program in 2000 revealed that drug offenders directed into treatment programs instead of incarceration under Proposition 36 were more apt to be re-arrested for drug-related crimes than defendants who participated in non-Proposition 36 treatments.⁴¹ The data also showed during the six month period that recidivism rates for Proposition 36 participants were even worse (65% more) when compared with the non-criminal cases of people who entered treatment voluntarily.⁴² Although the figures encompassing the first six months of the program are disconcerting, it is imperative to note that out of the 66,000 Proposition 36 participants, 50% of them have received treatment for the first time.⁴³

Additionally, the later UCLA report revealed a more positive rate of rehabilitation. After entering treatment, 50% of offenders on probation had no drug violations recorded; 27% had one drug violation; 14.3% had two violations; and 9.7% had three.⁴⁴ A fifth of the probationers had probation revoked. Although the first drug-related probation violation will not result in revocation, multiple drug violations may. Probation may also be revoked for any non-drug violation, regardless of timing. A recent nationwide study showed that 29% of all adult probationers had their probation revoked and were sent to jail.⁴⁵ About 60% of the program's

³⁹ Press Release, NCADI, Planning for Alcohol and Other Drug Abuse Treatment for Adults in the Criminal Justice System (TIP) Series 17, available at <http://www.health.org/govpubs/bkd165/17e.aspx>.

⁴⁰ *Id.*

⁴¹ Longshore, *supra* note 29.

⁴² Cicero A. Estrella, *Drug treatment grads more likely to reoffend*, San Francisco Chronicle, Nov. 26, 2004, at B1, available at <http://www.mapinc.org/newsprop/v04/n1741/a11.htm>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

parolees were re-incarcerated one year after their referral to Proposition 36.⁴⁶ This rate is typical of drug users who participate in treatment while on parole.

SACPA clients are prospering in treatment at rates comparable to those in other diversion programs like drug courts. Approximately 50% of all of the program's participants entered drug treatment for the first time.⁴⁷ A majority of outpatient clients received at least three months of treatment. Treatment experts generally start seeing positive results after 90 days.⁴⁸ Gaining access to treatment, as numerous clients have for the first time, is an immense hurdle in conquering drug addiction.

C. Economic and Treatment Effectiveness in Other States

The potential cost savings, crime reduction, and public health issues of Proposition 36 are of interest to policy-makers nationwide. The Drug Policy Alliance is touting Proposition 36 as a model for other states to emulate. As states strain to balance cumbersome budgets, there is an increased need for criminal justice reform that is cost effective and ensures public safety. The emergence of a national movement in favor of treating, rather than incarcerating, nonviolent drug offenders has garnered the attention and support of legislators and the public across the country.

Several states have already followed California's example by enacting similar measures. In 1996, Arizona passed Proposition 200, the Drug Medicalization Prevention and Control Act of 1996, which places first and second time non-violent drug offenders in treatment instead of incarceration.⁴⁹ A recent report conducted by the Supreme Court of Arizona disclosed that Proposition 200 had saved Arizona taxpayers \$6.7 million in 1999 alone. Also 62% of the probationers successfully completed drug treatment.

A new treatment law in Maryland promptly diverts thousands of offenders into drug rehabilitation programs, saving taxpayers millions of dollars a year.⁵⁰ It also grants \$3 million in additional funding for therapy and assigns magistrates new discretion in sentencing.

New York recently announced plans to close three prisons as a result of the state moving close to 7,000 non-violent drug offenders out of prison and into treatment. The projected savings

⁴⁶ *Id.*

⁴⁷ Appel, *Dealing With Drug Use*, *supra* note 1.

⁴⁸ *Id.*

⁴⁹ Press Release, Drug Policy Alliance, Addressing Your State's Budget Crisis: Treatment Instead of Incarceration, available at http://prop36.org/treatment_instead.html.

⁵⁰ *Id.*

over a three-year period would total approximately \$18 million.⁵¹ The plan proposed by the governor has thus far faced opposition in the legislature.

Texas, which also boasts one of the largest prison populations in the nation, recently passed reform legislation allowing treatment instead of incarceration for first-time drug offenders.⁵²

Kansas too has noted the success in other states. As of November 1, 2003, low-level, first-time drug offenders in Kansas are given community based treatment for 18 months instead of incarceration.⁵³ Prior to the new law, Kansas had the strictest marijuana laws in the country. Marijuana possession of any quantity was subject to a \$2,500 fine and imprisonment for up to a year.⁵⁴ Kansas's taxpayers are currently saving approximately \$21,000 a year for each offender not sent to prison.⁵⁵ Many other states are contemplating passing similar legislation as they have realized that incarcerating non-violent drug offenders has failed to prevent drug use and has cost the states millions of dollars annually.

V. Current Assessment

A statewide poll backed by the National Council on Crime and Delinquency and administered by the Field Research Corporation reveals that even more California voters say they would vote for Proposition 36 than actually did in November 2000.⁵⁶ The poll found that nearly eight of every nine California voters now favor using state funds to rehabilitate prisoners both during and after their prison sentence, as opposed to punishment only.⁵⁷ Proposition 36 will continue to save money and save lives as long as state government continues to faithfully implement and fund this successful program.⁵⁸

Despite the overall success of the program, the UCLA study stressed several areas where implementation of SACPA could be improved. For example, many clients are not being referred

⁵¹ *Id.*

⁵² Press Release, Drug Policy Alliance, Reform in Texas, *available at* <http://www.drugpolicy.org/statebystate/texas/> (May 6, 2004).

⁵³ Press Release, Drug Policy Alliance, Reform in Kansas, *available at* <http://www.drugpolicy.org/statebystate/kansas/> (April 14, 2004).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Krisberg, *supra* note 4.

⁵⁷ *Id.*

⁵⁸ Appel, *Proposition 36*, *supra* note 3.

to the most appropriate treatment program for their specific needs. Only a few SACPA clients receive methadone maintenance treatment, which is regarded as the most effective treatment for heroin addiction. Residential treatment, often required to treat addictions to methamphetamine, adds to the cost since residential spaces can cost 10 times as much as outpatient treatment.⁵⁹ Even though Proposition 36 has resulted in a considerable increase (25.7%) in the number of residential treatment beds, the report illustrates that more spaces in these treatment programs are still needed.⁶⁰ Proposition 36 advocates are in consensus with the report's recommendations that treatment results may be enhanced for severe drug addicts if funding is increased for residential treatment programs. Also, the Drug Policy Alliance is calling for an increase in funding per client for treatment, literacy, and job training to ensure that individuals are offered the type of help that is most likely to help them reduce or quit drug use.⁶¹

The future increments of the study will detail the comprehensive impact that the program will have socially and financially. Although the initial UCLA study did not estimate the initiative's fiscal impact, the Drug Policy Alliance attempted to do so. It estimated that about 75% of the 37,495 people assessed for treatment would have otherwise been incarcerated in county jails for an average of 23 days, and the remaining people would have been placed in state prisons for an average of 16 months.⁶² Based on an annual cost of incarceration of \$28,000, it concluded that Proposition 36 helped avoid about \$399 million in incarceration costs, but incurred \$120 million in treatment costs, yielding a net savings of about \$279 million.⁶³ The program has also produced a one-time savings of \$500 million by eliminating the need to build a new prison that was already in the planning stage.⁶⁴ The state Legislative Analyst's Office had predicted savings would not reach \$250 million until the law's third or fourth year.⁶⁵

VI. Conclusion

⁵⁹ Susong, *supra* note 6.

⁶⁰ Appel, *Dealing With Drug Use*, *supra* note 1.

⁶¹ Press Release, Drug Policy Alliance, Study Creates Waves for Prop. 36 in California, *available at* http://www.drugpolicy.org/news/11_30_04prop36.cfm (Nov. 30, 2004).

⁶² Josh Richman, *Drug treatment law gets high marks*, Oakland Tribune, July 17, 2003, *available at* <http://www.drugreform.org/news.tpl?action=2&newsid=105846967522061>.

⁶³ *Id.*

⁶⁴ Appel, *Proposition 36*, *supra* note 3.

⁶⁵ Press Release, Drug Policy Alliance, California Still Winning with "Drug Treatment, Not Jail" Initiative, *available at* <http://www.prop36.org/pr092304.html> (Sept. 23, 2004).

The success of Proposition 36 has led to increased approval of drug treatment over incarceration in California. At the end of the third year of the program's implementation, the results of the policy initiative are very encouraging. However, it is not perfect; criminal justice agencies, public health officials, and clients must continue to work toward its advancement. The collaboration between these entities has led to a substantial shift in how they interact, compelling a switch from a criminal justice centered view to one of public health. As funding for Proposition 36 expires in 2005, with the widespread public support evident, the legislature would do well to increase funding for the initiative.