REACTION ESSAY

CALIFORNIA'S PROPOSITION 36: A SUCCESS RIPE FOR REFINEMENT AND REPLICATION

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On November 7, 2000, California voters mandated that first- or second-time nonviolent drug possession offenders be offered drug treatment rather than incarceration. The voters, by a margin of 61%, provided for $660 million dollars over five and half years to fund drug treatment, probation, and ancillary services for such offenders. This mandate was accomplished through the passage of Proposition 36, the Substance Abuse and Crime Prevention Act of 2000.

On the day Proposition 36 passed, the situation confronting Californians who misuse drugs had reached a level of crisis. During the two decades preceding the passage of Proposition 36, the nation as a whole had experienced a profound increase in the rates of incarceration for drug use, with California leading the way. In 1980, only 7.5 of every 100,000 Californian's were imprisoned for drug-related crimes, comfortably below the national average. Just 20 years later, in 2000, 130.5 per 100,000 Californian's were imprisoned for drugs, an increase of over 1600%, well above the national average (Males et. al., 2002). During this same period, the percentage of people imprisoned for drugs who were guilty of mere possession jumped from 35.2% to 54.4%, and in 1999 alone, 6,191 Californian's (11% of all people sent to prison) were imprisoned for possession of a small amount of drugs with no other current offenses and no prior serious or violent offenses (Males et al., 2002). These dramatic increases in incarceration were the product of changes in drug policy, not changes in drug use prevalence (Office of National Drug Control Policy, 2002).

At the same time that legislatures were ratcheting up the sentences for drug possession offenses and funding more and more prisons, millions of Americans lacked access to drug and alcohol treatment, psychiatric care, housing and other crucial services. According to the National Survey on Drug Use and Health, conducted by the Substance Abuse and Mental Health Services Administration, over 800,000 Californians needed but did

not receive treatment for an illicit drug problem in 2002 (Substance Abuse and Mental Health Services Administration, 2004).

The fiscal costs of such punitive policies were staggering. According to the California Department of Corrections, each new incarceration costs the state an average of $30,929 per year, plus $3,364 for every year the individual is on parole (California Department of Corrections, 2004). The social costs are also severe, lasting far beyond the length of the actual sentence. Succeeding in the outside world after discharge from prison with a felony drug conviction is extremely difficult, given employer biases and the statutory bars to public housing, welfare benefits, financial assistance for higher education, and many forms of vocational or professional licensure.

Californians recognized that imprisoning nonviolent drug users had both failed to deter drug use and was costing the state hundreds of millions of dollars. Tired of these staggering costs, the voters decided to try something new. The result was Proposition 36, one of the most significant pieces of sentencing reform anywhere in the country since the end of Alcohol Prohibition.

We cannot overstate the magnitude of this change in policy — both in its direct practical effects and in the way it changed public conceptions of drug use and treatment throughout the country. Four states have already followed in California's footsteps by implementing similar measures, and at least three other states have considered such action.[1]

The local county-by-county implementation of Proposition 36 has meant a significant overhaul not just in the criminal justice system and in the substance abuse treatment delivery system, but also in the way in which these two systems interact. Prior to Proposition 36, the criminal justice actors (judges, prosecutors, probation officers, defense counsel) and the public health systems (county public health administrators and treatment providers) acted for the most part independently. Although some drug courts forced these parties together to a limited extent, in those instances, the power rested first with the judge and then with the prosecution and probation. Proposition 36 shifted the balance, vesting public health and alcohol and drug professionals with greater budget and decision-making power; in all but two of California's 58 counties, the county alcohol and drug administrator or another health office was chosen to administer the Proposition 36 programs.

The economic impact of Proposition 36 has also been profound. A

1. Hawaii (2002), Kansas (2003), Texas (2003), and Maryland (2004) have all implanted similar legislation. Michigan, New Mexico, and Ohio have all proposed similar measures, although they were not enacted. A similar voter initiative passed in the District of Columbia in 2002 but is currently under judicial review.

prospective analysis of Proposition 36 conducted by California's nonpartisan Legislative Analyst's Office (LAO) before passage of the initiative predicted an annual net savings of between $140 and $190 million to the state from implementing the initiative (California Legislative Analyst's Office, 2000). As this figure was based on an estimated 24,000 Proposition 36 participants per year, and not the over 30,000 persons referred in each if its first two years, it likely significantly underestimates the actual savings. Over 60,000 people who previously would have been incarcerated have been sent to treatment in just these first two years of the initiative's implementation (Longshore et al., 2004). In response to these numbers, California scrapped plans for a $500 million prison that was in its planning stages before the initiative went into place.

The first year after Proposition 36 passed was spent in planning for implementation and adjusting to the new program. As a result, it is impossible to draw any real conclusions, as Farabee et al. attempt to do from data derived during this initial period of program development. Even with the predictable hurdles that must be overcome in the establishment of a massive new program, Proposition 36 gives every appearance of success. Although it is impossible to predict trend data from information derived during this initial period, it is worth noting that in the first year, 30,469 people were diverted into treatment through Proposition 36, with this number increasing to 35,947 during the second year (Longshore et al., 2004).

Roughly half of Proposition 36 participants in each the first and second year had never before received access to treatment, despite drug use careers that spanned, on average, more than a decade (Longshore et. al., 2004). To proponents of drug treatment, a systems change that resulted in provision of treatment to a large number of high-need, underserved patients should be in of itself a great achievement, provided that the new patients received quality care.

Some in the treatment field were surprised at the larger than anticipated number of diversions and the severity of addiction among the population. They had assumed that first- and second-time offenders would be younger, with shorter drug use histories than proved to be the case. Proposition 36 allowed everyone to start with a clean slate with respect to their nonviolent drug offenses. Thus, even if a person had prior convictions for drug possession, absent other violent felony convictions, this person would be eligible for Proposition 36 unless and until they were convicted of a third drug related offense after July 1, 2001. The result is that a higher number of Proposition 36 clients have long histories of drug misuse than was anticipated, many of whom require residential care.

Of course, a massive systems overhaul of this sort was not without kinks. In addition to lengthy drug treatment histories, a sizable minority of

Proposition 36 offenders suffered from psychiatric illnesses and/or were homeless at the time of arrest. Additionally, the most commonly misused drug among this population was methamphetamine, a drug whose use syndromes and treatment regimens were not universally understood even by drug and mental health professionals.

But even with these challenges, Proposition 36 participants are as likely to complete treatment as participants in other systems of court coerced treatment. The recently published study by the University of California Los Angeles, based on statewide data collected over the first two years of Proposition 36, found that program participants were retained in drug treatment for periods roughly similar to those diverted by other criminal justice/drug treatment collaborations, including drug courts (Longshore et al., 2004). Long-term comparisons of the recidivism between Proposition 36 and the more costly drug court model are not yet available.

Farabee et al. chronicle the success that adequate treatment had on those—the majority—that received the treatment they needed. Their article also highlights the problems of discordant placement, in which program participants with significant drug use histories were provided with a "dose" of treatment that was inferior to that for which they were originally assessed. Farabee et al. note that a significant number of those participants that were assessed for long-term residential care were not provided such treatment, but rather they were referred to less costly outpatient services. They conclude that inadequate treatment may result in recidivism to drug use, and result in arrests in the future that might have been avoided had the participant been given a residential treatment slot.

In recognition of the vital importance of residential capacity, counties across the state have worked hard to expand their total number of residential treatment beds in the less than four years since Proposition 36 was passed. There were only 15,927 residential treatment beds available in California in fiscal year 1999/2000, and there were 20,016 beds available in fiscal year 2002/2003, which is a dramatic 25.7% increase in just three years (California Department of Alcohol and Drug Programs, 2003). In terms of patients that can be treated in residential treatment per year, the numbers are even more impressive. Over this same three-year span, California counties added enough residential treatment beds to treat an additional 13,766 patients annually, which brought the total capacity for residential treatment to around 37,000 patients a year. This is roughly equivalent to the total number of clients that participated in Proposition 36 during each if its first two years in existence.[2] This capacity is over and

2. Compilation of information submitted in annual plans for Proposition 36 implementation submitted by each of California's 58 counties to the California Department of Alcohol and Drug Programs.

above the most impressive expansion of outpatient treatment programs in the state.

As proponents of treatment instead of incarceration, we of course support improved treatment matching, through increased funding of drug treatment, as well as provision of methadone or other narcotic replacement therapies to treat opiate addicts (a type of discordance not addressed by Farabee et al.). Furthermore, greater emphasis needs to be given to voluntary treatment access – persons should not have to get arrested to get drug treatment.

Despite widely discussed concerns that people are not getting the levels of treatment they need through Proposition 36, it is interesting to note that only one county out of all 58 reported that Proposition 36 funding constraints forced it to shift from long-term residential to short-term residential treatment for patients in need (Ford, 2004). Furthermore, by the third year, only one county reported that the intensity of treatment levels increased because they had underestimated the severity of addiction, and only one county reported that the higher than expected number of clients challenged the agency's ability to give adequate treatment (Ford, 2004).

Celebration of Proposition 36's successes must go hand in hand with recognition of its shortcomings. First and foremost, treatment is not a one-size-fits-all solution, and community-based treatment systems must provide real and appropriate treatment options. Different people will respond to different treatment cues, and we must make efforts to ensure the greatest variety of adequate treatment options possible. In addition to improvements in treatment matching, additional resources must be put into addressing mental illness, providing stable housing, as well as literacy, job training, and aftercare for participants who need these supports.

However, there is scant evidence to support Farabee et al. and other supporters of drug courts in their assertion that we need to apply "legal pressure to increase treatment retention and maximize potential treatment benefits." Nothing in Farabee et al.'s article or a review of the literature demonstrates that the threat of jail would improve the treatment outcomes for Proposition 36 offenders.

Proposition 36 is similar to drug court in that it directs people caught in the criminal justice system into treatment to avoid incarceration, whereas the court holds the ultimate threat of incarceration over the head of the drug defendants. The difference in detail that has excited much debate is that Proposition 36 does not allow judges to incarcerate people who are involved in substance abuse treatment the first two times they relapse, miss an appointment, or otherwise display the normal behaviors of people suffering from addictions, or for that matter of anyone who lacks basic resources such as childcare, transportation, or skills in time management.

This allowance is consistent with Proposition 36's basic purpose to divert persons out of jail and into treatment, and to do so within a public health model. In Proposition 36, it is treatment professionals and not judges who are charged with making decisions about treatment. Carefully crafted comparison studies of drug courts and Proposition 36 are not yet available, but thus far, Proposition 36 clients appear to be graduating at similar rates to drug court supervised offenders (Guydish et al., 2001; Longshore et al., 2004).

To fill the gaps in Proposition 36 implementation, what we should do is demand more funding so that no treatment need goes unaddressed. Additionally, we need to train judges and other criminal justice personnel about addiction, relapse, and a diversity of treatment options, so that they are not tempted to overrule the recommendations of drug treatment professionals who are better qualified to assess a participant's progress in treatment, and whether the participant is getting the type of treatment needed.

Additionally, given the now-proven success of treatment over incarceration, we must create more incentives for participation, such as allowing more clients to enter treatment before pleading guilty. If we are truly committed to treatment, we must make treatment a viable option to as many patients as possible before they get caught up in the criminal justice system.

Now well into the fourth year of Proposition 36 implementation, the program has really begun to hit its stride. In this period of relative calm, we must plan for the future rather than rest on our laurels. Our three priorities going forward must be (1) the reauthorization and increase of Proposition 36 funding to continue providing treatment to those in need; (2) the improvement and expansion of services to increase the likelihood of successful treatment; and (3) the increase of incentives for participation to encourage those who need treatment to opt in.

The supporters of Proposition 36 are not alone in their belief that drug policy must be changed. The October 6-8, 2003 Gallup Poll found that only 38% of Americans believe that the United States has made any progress in dealing with the problem of illegal drugs (Carroll, 2003). To have a successful national drug policy, we need to discard policies that have been shown to be ineffective and emphasize those that have been proven to mitigate the harm caused by drug use and punitive drug policies on our communities. Californians been national leaders in accomplishing this through the passage and implementation of Proposition 36, and we can only hope that other states will now follow our lead.

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