July 14, 2000

An Analysis of Proposition 36:
The Drug Treatment Diversion Initiative

Introduction

The Drug Treatment Diversion Initiative ("Initiative") is yet another attempt to solve the drug problem through a single comprehensive plan. It replaces the current system of treating drug offenders, where offenders are diverted from punishment to drug treatment at the discretion of district attorneys and judges, with a mandatory system that applies to almost all low-level drug offenders without regard to their amenability to treatment or potential danger to society.

Although diversion of low-level offenders to drug treatment programs can be beneficial, this virtual decriminalization of drug possession and personal use does more harm than good. This proposition is based upon a flawed interpretation of prior drug treatment efforts. It will waste resources on undeserving participants at the expense of public safety and more deserving individuals with drug problems. The many serious problems with this proposal outweigh any incidental advantages.

1. The Initiative is based upon faulty research.

The Initiative places great emphasis on the ability of drug treatment programs to prevent future drug use and other criminal behavior. Section 2, subdivision (a) states that "nonviolent, drug dependent criminal offenders who receive drug treatment are much less likely to abuse drugs and commit future crimes ...." Subdivision (c) of Section 2 cites a 1996 Arizona drug treatment initiative as support for this proposition.

While drug treatment programs are useful in reducing some crime and suffering, the Initiative's claims are extravagant in light of current experience. As there has not been enough time to make an appropriately rigorous analysis of this program (see Arizona Supreme Court Administrative Office of the Courts, Drug Treatment and Education Fund Legislative Report, Fiscal Year 1997-1998 (1999) p. 6) Arizona's experience cannot justify the Initiative. The Arizona program shows that in the first year of its mandatory treatment program, only 35.5% of the offenders completed their treatment program. Of those 35.5% only 61.1% completed their treatment program successfully (see id. at p. 9), a rate of 21.6%. Any indicators of success, such as the seemingly high rate of negative drug tests (see id. at p. 6), thus must be placed in the context of the small number of successful completions and the preliminary state of the data. (See ibid.)
Drug treatment programs can help reduce drugs and crime. Specialty drug courts have proven useful in lowering the recidivism and drug use of drug offenders. (See Hora, Schma & Rosenthal, (Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America) (1999) 74 Notre Dame L. Rev. 439, 531.) This is not, however, a miracle cure for drugs and crime. Drug addiction and the associated criminality are both very difficult habits to break. Thus while some well-designed, carefully monitored programs will help lessen the drug-crime cycle, too many poorly implemented programs have little effect on reducing addiction or recidivism. (See Vito & Tewksbury, The Impact of Treatment: The Jefferson County (Kentucky) Drug Court Program, Federal Probation (Dec. 1998) p. 48.) For example, in a Maricopa County, Arizona drug court program that occurred before the Arizona initiative, offenders in the drug program had slightly more new arrests than those in the control group that did not participate in the program. (Ibid.) Poorly supervised programs can even be fronts for criminal activity. (See Hora, Schma & Rosenthal, supra, 74 Notre Dame L. Rev. at p. 524.) Therefore, strong oversight is essential to any successful treatment program. (See ibid.) Unfortunately, the Initiative weakens the monitoring systems for drug treatment. Wasted resources and broken promises are almost inevitable.

Promising more than it can deliver has been the bane of the drug treatment movement. Reality brings with it inevitable public disappointment, which has in turn undercut support for drug treatment programs. (See Anglin & Hser, Treatment of Drug Abuse in Drugs and Crime (Wilson ed. 1990) pp. 444-445.) The Initiative poses a similar threat to drug treatment, by making promises that cannot be kept — it may result in harming the cause it seeks to help.

2. The Initiative’s mandatory diversion threatens public safety and wastes resources.

The most important difference between the Initiative and current practice is one of the Initiative’s greatest flaws: mandatory diversion. The current system allows for diversion but vests considerable discretion in the court to determine whether the accused should be diverted. Under California law, the district attorney must first find that the accused is eligible for diversion. (See Pen. Code, § 1000.) The trial court then holds a hearing to determine whether diversion would benefit the accused. (Id., § 1000.2). Diversion is granted only if this standard is satisfied at the trial court’s discretion.

The Initiative replaces this carefully guided discretion with a system of mandatory diversion with few minimal eligibility requirements. This is a serious mistake. Although some may be helped by diversion, others should not be placed in the program. Many drug offenders pose a real threat to public safety. Thus, a spousal abuser whose victim will not file a complaint should not be given the benefit of diversion; jailing him for a minor drug crime may be the best chance to break the
abuse cycle. The Initiative's protections are not enough. Although the Initiative bars from diversion some who have been previously convicted of serious or violent felonies, this does not extend to out-of-state convictions. Therefore someone with out-of-state convictions for rape or drug-related murders must be diverted without regard to the obvious threat to public safety of keeping such a person on the streets. Even those with in-state prior convictions can be eligible for diversion if they stay free of prison and keep a clean record for five years. Once again, some of these people pose a real threat to public safety. The only way to separate the reformed wheat from the dangerous chaff is by a judge's assessment of the individual, a practice that the Initiative categorically forbids.

This inflexibility is wasteful as well as dangerous. Not all drug offenders are amenable to treatment. Yet the Initiative would place all offenders in treatment, even if the shock of prison may be a better therapeutic alternative, or more appropriate punishment. Placing people in therapy they do not deserve wastes resources. Even though the Initiative may increase funding for drug treatment, it will also substantially increase the demand for treatment. Resources are never infinite. Diverting scarce treatment resources to undeserving convicts will inevitably deprive some deserving offenders of necessary treatments.

Deciding who should be eligible for treatment is the single most difficult problem facing any drug treatment program. (See Hora, Schma, & Rosenthal, supra, 78 Notre Dame L. Rev. at p. 507.) This is how a program preserves public safety while diverting scarce resources to those who can best utilize them. (See ibid.) The Initiative, by opening the treatment center's doors to almost everyone, hopelessly compromises this principle, thus threatening the integrity of this state's drug treatment programs.

3. The Initiative's effective decriminalization of drug offenses seriously undermines the effectiveness of diversion programs.

The Initiative makes it extraordinarily difficult to imprison someone for drug possession or use. An offender under the program has to violate probation three times before it is automatically revoked. (See Section 5, subd. (e)(3)(C).) Before that, the State must prove that he is a danger to society for the first violation (see id., subd. (e)(3)(A)), or dangerous or not amenable to treatment after the second violation. (See id., subd. (e)(3)(B))

Authorities agree that the threat or coercion of jail time is a necessary part of any successful treatment program for drug offenders. (See Hora, Schma, & Rosenthal, supra, 64 Notre Dame L. Rev. at p. 50; Anglin & Hser, supra, at p. 438.) While an occasional relapse may not warrant immediate imprisonment, the threat of real punishment is too remote under this plan. This can only harm drug offenders by undermining this necessary incentive to rehabilitate.
4. In certain circumstances, the Initiative gives lower jail sentences to repeat drug offenders, than first-time offenders.

The Initiative contains a contradiction that can only be described as absurd. If an offender is terminated from the program, then he can be imprisoned for the original drug offense. (See Section 5, subd. (e)(1).) The punishment can be as long as one year in prison or jail. (See, e.g., Health & Saf. Code, § 11350, subd. (a).) Under the Initiative, an offender who has two separate minor drug convictions, has undergone two separate diversion treatments, and is found unamenable to treatment by the court, is not eligible for diversion. (See Section 5, subd. (b)(5).) In this case, “notwithstanding any other provision of law, the trial court shall sentence such defendants to thirty days in jail,” (ibid) a potentially lower sentence than first and second time offenders may receive for violating their probation. Although courts will avoid statutory interpretations that lead to absurd results (Horwich v. Superior Court) (1999) 21 Cal.4th 272, 280), it is hard to see how courts can get around the plain language of “notwithstanding any other provision of law…” Since the Initiative displays a uniform hostility to jailing nonviolent drug offenders, this result is likely to stand. Thus, enacting the Initiative would lead to a first in American law, punishing the repeat offender less severely than the first-timer. This irrational result will surely be the basis of a constitutional challenge by the first-time offender.

5. The Initiative may close one gap in the current diversion system.

Presently, California’s diversion statutes do not authorize courts to impose offenders to submit to searches as a condition to diversion. See (People v. Fleming) (1994) 22 Cal.App.4th 1566, 1571.) The Initiative allows the trial court to impose any conditions not specifically forbidden by the Initiative. (See Section 5, subd. (a).) Since the Initiative does not specifically forbid search conditions, this very useful tool would now be available.

6. The danger to neighborhoods posed by the Initiative has been enhanced by a recent federal court decision.

In (Bay Area Addiction Research v. City of Antioch) (9th Cir. 1999) 179 F.3d 725, the Ninth Circuit Court of Appeals held that the Americans with Disabilities Act is very likely to prevent cities from using their zoning power to keep drug rehabilitation centers out of residential areas. Since the Initiative will significantly increase demand for treatment, it is likely that many more centers will be built. Many of these new centers will be in residential areas, given the relatively low rents of residential space in comparison to commercial areas. Since the Initiative makes only minimal provisions for excluding dangerous offenders, the threat to neighborhoods is much higher than under current law. If the Initiative passes, many Californians may find new neighbors, such as a methadone clinic or a methamphetamine treatment center full of insufficiently screened drug offenders. This can only compound the danger posed by the Initiative’s rigid inclusion.
Summary

Although well-intended, the Initiative is a poisoned chalice for both the drug treatment movement and Californians. It uses faulty research to overexpand a somewhat useful program for treating some low-level offenders into a therapeutic leviathan. Its mandatory inclusion is both dangerous and wasteful. If there are deserving individuals who are currently not receiving diversion, it is more likely due to a lack of resources than any deficiencies in California law. Drug addicts, public safety, and fiscal sensibilities, would all be better served by simply allocating more resources into current programs and passing legislation allowing searches as a condition to diversion. The dramatic changes to current law are at best unnecessary, and most likely counterproductive. A public reaction to the Initiative’s unfulfilled promises and public danger is almost inevitable. This reaction will almost certainly compound the harm done to drug rehabilitation by this misguided initiative.

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