

Rational Drug Policy Reform

A Resource Guide by Judge Jeffrey S. Tauber, ret.



Center for
Problem-Solving
Courts

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Introduction

A Resource Guide ought to provide the tools necessary to build a conceptual model of the described topic. When the subject is the advancement of a Drug Policy Reform agenda in the U.S., there are plenty of informational resources available. It is unfortunate that almost all have the same point of view; they favor the legalization of dangerous drugs. My point of view is different. I am a proponent of Rational Drug Policy Reform.

My reform agenda was shaped by over twenty years of experience in the California criminal justice system; as a young public defender in Santa Clara and Alameda counties, my years of trial work as private defense counsel, and my tenure as both a commissioner and judge in Oakland California. Additionally, I spent seven years as founding President of the National Association of Drug Court Professionals (NADCP), and most recently, as Executive Director of the Center for Problem Solving Courts (CPSC).

I have always had a fascination for the way different societies deal with its outcasts, its misfits and its criminals. In 1973, just out of Boston University Law School and a period working for Ralph Nader's "Nader's Raiders", I spent nearly a year and a half traveling around the world, visiting over forty countries, mostly in Africa and Asia. Again, in 1988, I spent four months traveling through the South Pacific, on a "busman's holiday" visiting the courts and prisons in the Fiji Islands, Western Samoa, the Cook Islands, Togo and American Samoa. In all my travels, I tried to understand the ways different cultures dealt with their so-called "criminal element". What was always very clear, was that there was more than one approach to criminal justice systems, and therefore more than one approach to the reform of those criminal justice systems.

Somehow legalization proponents have come to so dominate the drug policy reform agenda in the United States, we hardly ever hear of any other reform approach. Drug policy reform and legalization have come to mean pretty much the same thing to the media and a significant part of the public. What is even more astonishing is that most legalization proponents have been able to accomplish this, while denying being in favor of drug legalization. Some proponents will even be offended if you describe their position as being pro-legalization. How we got to this state of affairs and how we might change it is a story that I hope to help illuminate through this guide.

In my nearly thirty years as a drug policy reform proponent, I have met few legalization advocates with any significant experience working in treatment, rehabilitation, prevention, supervision or any other related field. Their lack of practical experience does not disqualify them from speaking their minds, but neither does it qualify them as drug policy experts, drug policy reform "leaders" or spokespersons for Drug Policy Reform.

This Resource Guide however, is not a polemic against legalization. Pro-legalization proponents are passionate about doing the right thing: unfortunately, they have a limited perspective on a very complex issue. Those who believe in Rational Drug Policy Reform are pro-reform, just as assuredly as legalization proponents believe they are. We are simply for reform we know that works, for the drug abuser, for the practitioner, for their families and most importantly, for the community.

It is my greatest desire to see all elements of the drug policy reform movement come together to devise an agenda and strategy that we can all move forward on. Nothing could stop the momentum of a movement that converted the spectrum from prevention specialists to drug court practitioners to treatment providers to legalization proponents. I truly hope this Resource Guide will help make that collaboration a reality.

Why Another Resource Guide?

This Resource Guide began as an attempt to understand the success of legalization initiatives around the country, particularly in my home state of California. It was my original intent to chronicle the drug legalization initiatives in California, and describe the lessons that other states could learn from that experience. During that process, I visited Arizona and California (numerous times), as well as Hawaii, where the Hawaiian State Legislature was actively considering a California-style legalization initiative.

I came away from that experience with the perception that there is an extremely well-organized legalization campaign being waged in this country by a small group of highly skilled public relations, media experts, and academics funded by a few wealthy patrons. At that point, my purpose changed from writing a limited description on legalization initiatives to providing a Resource Guide with an alternative vision of drug policy reform. There are volumes of prose written from the legalization point of view, on the web, in the media, and in publications. In contrast, this Resource Guide will provide information that will be of assistance to those interested in promoting a *rational* drug policy reform agenda.

Section 1 of this Resource Guide is comprised of a series of short Policy Papers, each dedicated to illuminating one small part of the drug policy reform issue. It is not intended to cover all aspects of Drug Policy Reform, nor to fully document each position taken, but to provide thoughtful analysis and supporting documentation that will assist readers in taking action.

Policy Papers 1 and 2 attempt to analyze the drug policy reform movement in the United States. Policy Paper 1 describe it antecedents, how it became a powerful force in this country, and who ultimately defines drug policy reform. Policy Paper 2 reviews the roots of *rational* drug policy reform and suggests practical goals for such a reform agenda. Policy Paper 3 describes how a *rational* drug policy reform agenda can be developed and implemented in your state. Policy Papers 4 and 5 describe and analyze the success of the California legalization initiative and provide recommendations to states threatened with similar initiatives. Finally, Policy Paper 6 attempts to summarize the preceding five policy papers and provide a strategy for the development and implementation of a statewide *rational* drug policy reform agenda.

Section 2 consists of resource documents that may be of use to those seeking to implement *rational* drug policy reform. For example, it provides the scientific literature supporting court ordered treatment and Drug Courts specifically, a paper describing the organization and intent of major legalization proponents and their funders, a look at the anti-Drug Court propaganda distributed by Legalization proponents, an analysis of the impact of Arizona's legalization initiative, Proposition 200 on the California ballot initiative, and a description of how *rational* reform advocates were able to successfully challenge legalization legislation moving on a fast track through the Hawaiian Legislature,. This Resource Guide provides the first practical guide to developing a *rational drug policy reform* agenda.

The Rational Reform Project

The Center for Problem Solving Courts (CPSC) is proud to introduce its **Rational Reform Project (RRP)**. CPSC's new project will work towards the establishment of a *Rational* Drug Policy Reform Agenda, one supported by the vast majority of reform-minded drug abuse worker/practitioners; that promotes drug treatment for all who need it, the reduction of penalties for drug possessors, the creation of Drug Court systems to deal with all drug offenders, and a more just and humane approach to the drug abuser.

The Rational Reform Project will also publish, *Rational Reform*, a monthly newsletter on CPSC's website. *Rational Reform* will report on new development in the drug policy field. It will provide information on how to advance a *rational* drug policy reform agenda and keep the reader abreast of rational reform projects, as well as legalization proposals being promoted across the country.

The Rational Reform Project will provide a special focus on legalization efforts to remove the court and judge from monitoring the drug abuser's treatment in our communities. The Rational Reform Project will provide a clearinghouse for information on legalization proposals, both legislative and initiative-based, providing, information, technical assistance and training when requested.

It will then be up to you, the public, to provide information on active rational reform efforts or legalization proposals in your state, to CPSC's "Rational Reform," at the earliest possible stage of the initiative or legislative process, when we have the best opportunity to be of assistance. Email us at: rationalreform@problemsolvingcourts.com

The Center for Problem Solving Courts (CPSC)

A Place for Education, Training, and Technical Assistance

The Center for Problem Solving Courts (CPSC) is dedicated to the development of community-focused, rehabilitation-based court programs, called problem-solving courts, which are proving themselves effective in communities across the nation.

As evidence of that fact, on August 2, 2000, The Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) passed a joint resolution (all 50 State Chief Justices and their State Court Administrators) unanimously endorsing Drug Courts and other Problem Solving Courts, and urging their integration into the mainstream of courts nationwide.

The Center for Problem Solving Courts (CPSC) will work to make the promise of that resolution a reality. CPSC will provide the technical assistance, training, and education for existing Drug Court-based models such as Domestic Violence, Mental Health, and DUI/Drug Courts, as well as new Drug Court based models, such as, Re-Entry, Homeless and Teen courts.

CPSC sees in Problem Solving Courts an extraordinary opportunity to move toward effective, humane, and accountable community-focused, rehabilitation-based court systems in every state of the union. It is CPSC's goal to help integrate these court programs into community and statewide systems that reach all offenders in need of court and community-based rehabilitation.

CPSC Directors, Jeff Tauber and Susan Finlay, bring extraordinary backgrounds to their new organization. Judge Tauber (ret.) is a pioneer in the Drug Court field, having presided over the development of the Oakland Drug Court in 1990, and written and lectured extensively on court-based rehabilitation programs. He was the founding President of the National Association of Drug Court Professionals. Judge Susan Finlay (ret.) is a past Dean of the California Judicial College and a recognized national authority on the development of educational curriculum for rehabilitation-based court programs.

CPSC has an exceptional faculty made up of the most accomplished and experienced practitioners in the problem-solving court field. Their expertise provides the Center with the capacity to educate and train across a wide continuum of problem solving court programs. The faculty will also act as a think tank, in conceptualizing, defining and analyzing the problem-solving courts to come.

About the Author

The Honorable Jeffrey S. Tauber (ret.) is the Executive Director of the Center for Problem Solving Courts (CPSC). Judge Tauber is a pioneer in the development of Drug Courts and past President of the National Association of Drug Court Professionals (NADCP) and Director of the National Drug Court Institute (NDCI). He has advised federal, state and local governments on the implementation of Drug Courts and other rehabilitation-based court systems. Judge Tauber directed NDCI's educational programs as well as NADCP's Mentor Court System, which provided regionally focused, practitioner-based technical assistance and training nationwide.

In June of 1999, the newly founded International Association of Drug Court Professionals (IADCP) elected him as their first chairperson of their Board of Directors. In that capacity, he has consulted with and provided technical assistance to over a dozen foreign nations, a number of whom have started Drug Court programs of their own.

Judge Tauber has written extensively on drug court and court-ordered rehabilitation systems, including "Drug Courts: A Judicial Manual," published by the California Center for Judicial Education and Research (CJER, 1994). In addition, he has written and presented on the importance of partnership between the treatment community and the courts and the critical need for the drug user's accountability to the court in effective drug treatment programs.

He initiated and presided over the design and implementation of the Oakland Drug Court Program, one of the first in the nation, and was also the first chair of the California Association of Drug Court Professionals (CADCP). While he presided in Oakland, his court received the Public Employees Roundtable Award for "Outstanding County-Run Public Service Program in the Nation," in 1992 and the California Administration Office of the Courts' "Ralph G. Kelps Award for Outstanding Court Innovations," in 1993.

Judge Tauber was a member of the California Judiciary from 1985-1996. He is a graduate of the City University of New York, and Boston University Law School.

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I have been blessed with friends and colleagues who have given their time and energy to help create this Resource Guide. My partner in CSPC, Judge Susan Finlay, ret., who has been my mentor since I, as a new judge, met her in her capacity as Dean of the California Judicial College, once again was a guiding hand in the writing of this book.

Frank Tapia who has been a close friend and collaborator (and probation officer) from the time I first met him in 1990 to plan the Oakland Drug Court. Madeleine Gallo, a friend that I have made since moving to Alexandria, has added her talents as an editor to this project.

I want to thank the staff of the National Association of Drug Court Professionals (NADCP), who have been a part of my life since I arrived from California in 1996, for their many contributions. I also wish to express my gratitude to Judge Melanie May, Chairperson of NADCP, the Honorable Karen Freeman-Wilson, the extraordinary new Executive Director of NADCP and National Drug Court Institute Director, West Huddleston, for their support and counsel during the writing of this book.

Since I began writing, I have been fortunate to make new friends, who have provided guidance and support for this project. Beverly Watts Davis, Executive Director of San Antonio's "Fighting Back" community program, encouraged me to take this project on and provided important insights into the community's perspective on the issue of drug policy reform. Sue Rusche, Executive Director of National Families in Action (NFIA), contributed to my understanding of the legalization movement, its organizations and leaders, and provided an article on that very subject for this publication.

Finally I want to acknowledge my very good friend, Diana Allen, who has worked long hours over many months, providing me with the moral, tactical, and editorial support, without which this Resource Guide would never have been possible.

Who Speaks for the Drug Policy Reform Movement?

Introduction

This Policy Paper, the first in a series dealing with contemporary drug policy reform, will attempt to analyze the present movement toward reform in the drug policy field, describing its antecedents, its development, and current status.

It is generally thought that the Drug Policy Reform Movement is of recent origin (perhaps just a few years old), growing out of the public's belief that the war on drugs has failed. It is believed by some, that the only alternative to the status quo is the legalization of dangerous drugs in the United States. Media news and entertainment, such as the award-winning film, 'Traffic' seem to support the supposition that the present situation is hopeless and legalization inevitable. Those who claim to lead the drug policy reform movement say there is only one alternative to present policies; that drug abuse is a health problem and therefore can only be dealt with by health professionals. Ultimately, it is the position of these 'leaders', that there is no rational place for the courts in dealing with drug abusers.

The position of this Policy Paper is: that major reform is needed in present Drug Policies; that the Drug Court movement through its acknowledged success and positive media image has laid the ground work for the current drug policy reform movement; that that movement has become a powerful force through the expansion of progressive prevention, treatment, supervision and rehabilitation communities, and that it is those drug abuse worker/practitioners who should ultimately determine the direction of rational drug policy reform.

Background

As there have been previous crackdowns on illegal drug use, there have been attempts at reform in the past as well. Without commenting on their merits, I propose to briefly review our last serious attempt at drug policy reform, to put the present reform movement in perspective.

In the 1970s and early 1980s, reforms were both statutory and non-statutory, reflecting the cultural climate, the perceived seriousness of the threat, and the limited resources and information available at the time. Statutes were passed in many states that reduced the penalties for what were considered less serious drugs such as marijuana, with many states reducing the penalty from a felony to a misdemeanor or to a citable offense. California was one such state that made possession of less than an ounce of marijuana a hybrid misdemeanor, that was citable only and punishable by a one hundred dollar fine (at least, for the first two convictions).

Laws were passed that offered the possibility of diversion from the criminal justice process and supervised treatment in the community, for those either with limited criminal justice records, less serious charges, and/or little evidence of serious drug abuse. California was one of many states that passed a Diversion Statute that attempted to decriminalize the process for less serious drug offenses committed by generally younger offenders. California's diversion programs, like many others, had mixed success because of inadequate treatment resources, drug testing and supervision services.

On a national level, the Nixon and Carter Administrations embraced the concept of treatment in collaboration with criminal justice supervision, through the implementation of TASC programs. TASC programs and their caseworkers were thought of as a bridge between the treatment and criminal justice communities that enabled the offender to be treated and supervised out of custody, within a community-based setting.

Growing scientific research began to point to the possibility of permanent brain damage and other serious threats to the individual's health and well-being from so-called soft drugs, especially cocaine.

During this same period, there was a movement toward the reduction of arrests and penalties for possession of less serious drugs. These changes were significantly the result of the widespread use of what were considered soft drugs at the time (marijuana, powder cocaine, LSD, etc.) and the general perception that these drugs did not threaten the individual's health nor the community's well-being.

This softening of the approach to drug use might have continued and expanded had it not been for a confluence of factors. Growing scientific research began to point to the possibility of permanent brain damage and other serious threats to the individual's health and well-being from so-called soft drugs, especially cocaine. Based on that scientific research, a national coalition of prevention groups led by parent organizations, such as National Families In Action, helped shift public tolerance away from these soft drugs.

The Reagan Administration's hard line against the drug abuser left little federal assistance for treatment initiatives or treatment/criminal justice collaborations. It also signaled a tougher, more conservative environment, exemplified by Nancy Reagan's signature prevention slogan, "Just Say No." Finally, the reform movement was stopped in its tracks by the appearance of crack cocaine, which by the mid-eighties seemed to be an unambiguously dangerous and addictive drug that destroyed the individual's moral bearings, the family's integrity and the community's safety.

By the mid-1980s, it could be said that there was no longer any movement toward drug reform. Initiatives to legalize/medicalize marijuana were floated from time to time, but there was little public interest in dealing humanely with the serious drug user. As a matter of fact, the slogan "Nothing Works" became the standard response from law enforcement and the public in general when it came to the possibility of treatment for the drug abuser.

During the period from 1984 through 1994, those persons sent to prison for drug offenses went from 31,700 to 193,500, an increase of over six hundred percent. (*Drug and Crime Facts, Bureau of Justice Assistance, 1994*). Prison building became one of the nation's largest capital expenditures, with spending on prisons in some states exceeding that spent on education.

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Drug Courts: The Beginnings of the Present Drug Policy Reform Movement

It was during the Reagan era that a Department of Justice initiative was begun that was to spawn the present drug policy reform movement. Special Drug Courts were developed to streamline the processing of drug cases in courts overwhelmed by the explosion of crack cocaine-related cases. They were less than successful, since they merely moved the drug offenders to the custodial system which proved as inadequate to the task of holding onto the drug abuser as the courts had been in processing them. Federal caps on the numbers of those incarcerated in overcrowded facilities made many serious offenders, who were not necessarily drug users, short timers. Less serious drug offenders were often returned quickly to the community, typically without significant probation or court oversight, and almost certainly without treatment prospects.

However, within the 'Drug Court' concept lived the seed of a far different approach to the drug abuser. The special Drug Court relied upon the consolidation of drug cases in a single court, before a single

judge, and the development of a team of dedicated practitioners with the expertise to deal with the flood of drug-related cases before it. The new evolving Drug Court relied on the same specialized team-oriented approach, but with treatment and rehabilitation providers as partners, it was to become a treatment-focused Drug Court. Based in part on effective TASC and Probation models, the rehabilitation-based Juvenile Courts, and new Community-Policing programs, the Drug Court model was to have an enormous impact on the criminal justice system, bringing a renewed appreciation of the effectiveness of treatment in criminal justice settings.

The first Drug Courts implemented were in Miami, Fla. and Oakland, Ca., but in virtually every community that started one, Drug Courts were heralded as an extraordinary breakthrough. Many of the Drug Court judges became local community heroes, with the media doing their first positive criminal justice stories in a decade or more about the success of their community's Drug Court. While the first Drug Courts were started in 1989/1990, the Drug Court movement itself came of age when the twelve existing Drug Courts formed their own association, The National Association of Drug Court Professionals (NADCP) in 1994. Another important factor in their expansion was the creation of the Drug Court's Program Office at the Department of Justice in 1995, which soon began funding new Drug Courts.

Today the Department of Justice reports that there are over one thousand Drug Courts, either existing or being planned, probably the most extraordinary growth of a rehabilitation-based court program or any court program, for that matter, in history.

There are now Drug Courts in seven foreign nations and a fledgling International Association of Drug Court Professionals (IADCP). NADCP, which hosted its national conference for 2,800 attendees last year, trains thousands of Drug Court practitioners every year. The Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) have unanimously endorsed the concept of Drug Courts and other problem-solving courts modeled after Drug Courts, and have described them as a central part of their vision for the criminal courts a decade from now. [See Resource Document F; Conferences of Chief Justices and State Court Administrators Joint Resolution, August 2, 2000.]

Few would argue, whether they like them or not, that Drug Courts have become the most important innovation in the criminal justice system in a generation. Nor that the goodwill generated by Drug Courts have encouraged greater community acceptance of drug treatment and compassion for the drug abuser, helping to create the positive environment that the present drug policy reform movement enjoys.

Who Owns The Drug Policy Reform Movement?

To read the available literature and listen to the media, one would think that there is only one drug reform agenda in the U.S., and it can be best described as *legalization, as drug policy reform*. Why have a relatively small group of public relations and media professionals been able to dominate the discussion on drug policy reform?

To begin with, we know that there has been a huge infusion of money over the past several years to support legalization organizations and initiatives from a few multimillionaire funders. As much as twenty million dollars was spent last year alone to build support for legalization and pass over twenty statewide propositions. In California, almost, five million dollars was spent to pass a legalization initiative; some twenty times the amount the opposition was able to raise. The legalization movement's leadership leans heavily on the expertise of public relations and media professionals to run their initiative and legislative campaigns and to reach out to the working media. It is estimated that several

dozen state and national organizations have been created and/or supported with resources from those same funders, helping to create the “perception” of widespread activity and public involvement in the legalization movement. [See Resource Document B, Background on Pro-Legalization Organizations, Their Leadership, and Funding, NFIA, 2001]

On the other hand, there are literally millions of people who work with drug abuse issues on a daily basis and many have for a generation or more. They belong to major national organizations, prevention coalitions and local community rehabilitation programs. They are doctors, probation officers, judges, treatment counselors, rehabilitation experts, both defense and prosecuting attorneys, and yes the drug abusers themselves. They have been on the front lines fighting for legitimate reform objectives for years; every thing from the humane treatment of the drug abuser, treatment for all who need it, to the reduction of penalties for drug offenses.

Aren't they, in the final analysis, the best witnesses and experts and ultimately “our true leaders” in determining what drug policy reform is or ought to be? Yet somehow, their goals and objectives have been lost or obscured by the media attention generated by a few “drug policy reform leaders and their organizations”.

What are the goals of Drug Policy Reform for the Next Decade?

Anyone who cares about drug policy reform would agree that there are enormous changes that need to be made, and made now. The specifics will depend, of course, on whom you talk to. If you ask legalization proponents you would hear that drug abuse is a health issue that should be the province of treatment professionals and not judges. On the other hand, if you were to ask treatment providers or other practitioners or even ex-drug abusers what they mean by drug policy reform, you would likely get a very different answer.

You would probably hear them say that drug treatment ought to be available to everyone, without exception. But you would probably also hear them add that the court, and Drug Courts, in particular, are an essential component in the successful treatment of many drug abusers. They would admit that nearly everyone who successfully completes treatment is coerced into doing so, some by their spouses or other relatives, some by their employers or religious leaders, and many by the judge in a criminal courtroom.

Without the judge, those without families, or jobs, those down on their luck with nothing to look forward to, except their drugs, would probably never quit.

Without the judge, those without families, or jobs, those down on their luck with nothing to look forward to, except their drugs, would probably never quit. Some could quote you the scientific literature on how coerced treatment, and Drug Courts in particular, are far more effective than voluntary treatment and some just know it in their gut. [See Resource Document A, The Scientific Research on Coerced Treatment, NDCI, 2000]

But that hopefully wouldn't end the discussion. The drug policy reformer would want to talk about making the time fit the crime. By that I mean, the reduction of all drug possession for personal use offenses to misdemeanors. For what justification could there ever be to label someone a felon because of a medical/health condition. And of course, along with that reduction to a misdemeanor level, would come the elimination of possessors for personal use ever being sent to state prison. The court would still have the authority to hold the drug abuser accountable and use coercion therapeutically to keep the drug abuser in treatment, but only with a possible jail sentence as a consequence (typically a term of up to one year). They would probably also say that there is a critical need for treatment facilities in custodial settings, so that all those sent to jail or prison on new offenses or probation or parole failures would have the opportunity to use their time in custody as a stepping stone toward sobriety.

Conclusion

Of course, the previous description of a dialogue with a drug policy reformer is fictional, based on discussions with drug abuse worker/practitioners and what seems rational, humane, and effective to me. I don't know exactly what the vast majority of reform minded practitioners want. And that is exactly the point.

Unfortunately, I do know, as most of us know, what a few well-paid public relations and media professionals or 'drug policy reform leaders' want us to believe drug policy reform is. I also know what a few academics and ideologues think it ought to be. What we don't know is what the vast number of practitioners; whether they are involved in prevention, treatment, rehabilitation or supervision believes it is.

The next step is of course easier to describe than to achieve. The creation of a coalition of reform-minded drug prevention, rehabilitation, treatment, and supervision practitioners and the organizations that represent them, meeting to define for themselves in their own states what they want drug policy reform to be; then take their agenda to their legislative representatives, or to the people through an initiative process, for enactment into law. It is called the democratic process, and it means that the many, and not the few should determine what drug policy reforms are enacted in their communities.

What is Rational Drug Policy Reform?

Introduction

What is it that we mean when we use the term *rational drug policy reform*? Before we can answer that question, it is important to understand the roots of the criminal justice approach to the drug abuser and how the drug court movement has radically altered it. It will be necessary to understand something of the philosophical foundations of the drug court movement and its evolution into the present drug policy reform movement. It will also be important to understand why the courts have both an ethical and moral obligation to remain a part of the treatment process for drug abusers.

We will then discuss reforms that I believe the majority of practitioners who work with drug abusers support. Those described reforms flow naturally and inexorably from the roots of the *rational* drug policy reform approach to the drug abuser. I base these recommendations on informal and formal discussions that I have had over a twelve year period with treatment counselors, probation officers, medical workers, drug court judges, rehabilitation specialists, prevention workers, attorneys and the drug abusers themselves; all those who deal with the problems of drug abuse on a daily basis.

What Went Before: The Historical Criminal Approach

Before the advent of the Drug Court movement, reform of our drug laws had been an untouchable subject for a decade or more. Most of us had understood that being punitive was neither cost-effective nor productive, nor humane. But, there was little interest or concern with dealing more effectively or humanely with the drug abuser. Treatment was an afterthought in most cases and generally considered a waste of time by criminal justice professionals and a public who didn't believe it would work. The treatment providers, themselves, were starved for resources and, without much judicial support. [See Policy Paper No. 1, Who Speaks for the Drug Policy Reform Movement?]

Part of the equation was the notion that these people were different, that this doesn't happen to good families or good communities or good people. It was a moral issue that separated those who were bad, or decadent, from the rest of us. Those more compassionate, would see the drug abuser as not morally repugnant so much as weak, and without the character to get clean and stay that way. All the while, there was the fear that if we were in their shoes, we couldn't handle drugs any better than they did.

A Humanistic, Medical View of the Current Reform Movement

As described in Policy Paper No.1, the Drug Court movement created an environment in which the present drug policy reform movement could thrive. Through the success of the drug court movement, the general public has come to see the drug abuser as worthy of compassion and, when successful in treatment, even something of a heroic figure. I have stood in packed courthouses across the United States, next to mayors, police chiefs, governors and chief justices, and watched as they and every one in the courtroom stood and applauded the graduates of their community's drug court.

It reminded me of what an anthropologist might describe as a tribal ritual, where society welcomes back an outcast into the community. For what is a drug abuser, if not an outcast? In essence, drug abuse and its necessary companion, possession for personal use (one cannot use without previously possessing), are crimes against self and community. They bring down the wrath of society, not so much because of the damage that the disease inflicts on the person, but because of the potential danger to the community. There is a long acknowledged societal right to quarantine those who might spread serious disease within the community. The community fears that the affliction of drug abuse will spread to others, particularly the young, who may have neither the maturity nor the judgment to reject it. So we agree, in a sense, to quarantine the drug abusers for their and our own good, in a jail or in a residential program or an outpatient treatment program until the disease has passed.

Drug Court Philosophy: The Pragmatic Foundations of Reform

From the beginning, the drug court movement understood that drug abuse was neither a moral issue, nor one of character, but a problem that the court could positively impact if it acted in a realistic and pragmatic way. Imbedded in that approach was the knowledge that drug abuse was primarily a medical and health issue.

Blaming the abuser for his or her lack of control was exaggerating the power of the court to impact a medical condition. Taking offense at the offender's inability to comply with the court's order to stay clean was assuming that the offender had the capacity to do so.

The court neither condemned the abuser nor made excuses for him or her. For the first time, the court recognized the reality of the abuser's condition and attempted to create a program that worked with that reality. The Drug Court did this by requiring the abuser to drug test, report to a probation officer and attend regularly scheduled drug court progress hearings, but also by providing treatment and rehabilitation services. Part of that reality, was imposing sanctions for non-compliance, and awarding incentives for compliance with the court's probation conditions.

Drug Courts anticipated the Therapeutic Jurisprudence movement, which sees in the courts the potential for being a part of solutions to societal problems. Drug Court Judges, in particular, understood that the courts in the modern world needed to be more than arbiters of right or wrong, or finders of fact. In that sense too, Drug Courts provided the philosophical foundation for the present drug policy reform movement, because drug courts recognized that drug abuse was not primarily a criminal justice issue, but that the courts were a necessary component in its solution.

When incarceration is resorted to at all, it is the minimal amount of coercion necessary to accomplish the twin goals of reducing drug usage and criminality.

As a consequence, the judge in a drug court uses incarceration as a therapeutic tool, to motivate the drug abuser to comply with treatment requirements. Punishment is never the goal of incarceration, nor is long-term incarceration. When incarceration is resorted to at all, it is the minimal amount of coercion necessary to accomplish the twin goals of reducing drug usage and criminality. Typically, drug courts use incarceration to respond to willful failures to comply with court orders rather than treatment failures. By making that distinction, the court acknowledges that there is certain conduct over which the drug abuser may have limited control, but other conduct that is appropriately sanctioned by the court with incarceration.

The Ethical Issue: Why Legalization is Not Rational Reform

It is argued by some, that it would be far easier to go along with the inevitable legalization of drugs, accept that drug abuse is here to stay, and cede the field to legalization proponents. I would argue that that would be dereliction of duty and that drug abuse worker/practitioners have an ethical responsibility to the community, but also to the drug abuser to facilitate his or her recovery from drug abuse. If we were to walk away from that responsibility, we would be condemning generations of the poorest, most vulnerable, least educated, most underemployed and least connected with family and community, to lives of drug abuse.

The science is clear, though there are those who deny it. Coerced treatment works better than voluntary treatment, and drug court treatment works far better than either. [See Resource Document A: The Scientific Research on Coerced Treatment, NDCI, 2000]

The Drug Court judge uses his or her authority to cajole, entice, threaten, and encourage the participant into staying in treatment. The average drug court participant is hardly an amateur at drugs or crime, typically having ten years or more of active drug usage and at least one prior episode of significant incarceration. Yet it appears that the Drug Court judge is doing quite a good job working with this difficult drug abuse population. According to a survey done by American University's Drug Court Clearinghouse, Drug Court participants agree; seventy-seven percent of participants surveyed reported that the judge's monitoring of their progress was a very important difference between drug court and prior treatment programs. Additionally, Drug Courts report an impressive nationwide retention rate of sixty-seven percent. [Drug Court Activity Update: Summary Information American University Drug Court Clearinghouse. 2001.]

Legalization proponents would like you to believe that theirs is the middle way, the reasonable, rational resolution to an intractable problem. However, the only thing rational about the legalization position is that it recognizes, as we do, that drug abuse is a health problem. But they would not require treatment, though we know that drug abusers rarely succeed in treatment without coercion, whether it is from a spouse, a parent, an employer or a judge. If one really examines their philosophy, legalization proponents do not necessarily favor drug treatment, as it would violate the individual's right to personal liberty at all costs. And what a cost that would be. They would not quarantine the diseased nor would they force them into treatment. They would allow the disease to spread because it would be the individual's right to use dangerous drugs. I would suggest that the legalization position is ultimately irrational for any civilized society concerned for the welfare of the diseased and the community alike.

What is a Rational Drug Policy Reform Agenda?

I have attempted above to briefly lay out the foundations of Rational Drug Policy Reform through an historical, humanistic, philosophical, pragmatic and ethical perspective. I believe that the components of a rational drug policy reform agenda would reflect each of those concepts.

But I would go further; that a Rational Drug Policy Reform Agenda can only be defined by the people who know the drug abuse problem on a practical and personal level; the worker/practitioners in the treatment, prevention, rehabilitation and supervision communities. [See Policy Paper No. 1, Who Speaks for the Drug Policy Reform Movement?] After twelve years working in the field and visiting practitioners/workers across the United States and around the world, I would suggest the following goals as being consistent with the concepts described above.

Treatment for all Drug Abusers

A Rational Reform Agenda would recognize that in a civilized society, all those with a disease have the right to treatment. . Rational Reform proponents must be willing to demand the money needed to provide treatment for all who require it.

It would state that all drug abusers should be given an opportunity for effective treatment on a voluntary basis or in a court ordered treatment program if charged with an offense.

The costs may at first appear substantial, but the benefits, both financially and in terms of the health and well being of society are overwhelming. American University reports that the average savings in jail and prison costs alone is approximately one million dollars per year per program. [Drug Court Activity Update: Summary Information American University Drug Court Clearinghouse, 2001]

Within the Criminal Justice System: A Therapeutic Approach

A Rational Reform Agenda would recognize that the threat of custody is necessary for many drug abusers to take treatment seriously. However it would also state that custody is only one of many therapeutic tools to be used. It would understand that small doses of medicine can be more effective than large ones, and that less intervention is generally better (and less expensive) than more.

It would argue that those with a serious disease sometimes need to be quarantined to preserve the health of the individual and the community. But it would also recognize that all who have a contagious disease should be given treatment for that disease...

It would argue that those with a serious disease sometimes need to be quarantined to preserve the health of the individual and the community. But it would also recognize that all who have a contagious disease should be given treatment for that disease, (as a person with contagious tuberculosis may have his or her personal rights restricted, so too does that person have an absolute right to treatment.). That means that drug abusers in our jails and prisons also have the right to effective drug treatment.

It would understand that what is needed is a pragmatic approach, involving partnerships between all concerned government agencies and community organizations, and importantly, involving the courts because we know that they are necessary components of successful treatment for many of our most serious drug abusers and criminals.

Reduction of Felony Possession to Misdemeanors: Elimination of Prison Sentences

It is now generally recognized by the medical, research and health communities, that drug dependence is a chronic illness. According to a recent meta analysis of the relevant scientific literature written by four eminent doctors and researchers, Thomas McLellan, David Lewis, Charles O'Brien and Herbert Kleber, "Drug Dependence should be insured, treated, and evaluated like other chronic illnesses." (Journal of the American Medical Association, Oct.4, 2000-Vol.284, No.13,1689)

A Rational Drug Policy Reform Agenda would recognize that a person, who is drug dependent has a chronic illness and should not be labeled a felon for life. Therefore, it follows that putting such a person in prison for a felony conviction, is a practice that is no longer acceptable in a civilized society with a rational drug policy reform agenda

Drug Court Systems: A Community-Wide Approach to the Drug Abuser

Recognizing that drug abuse is a contributing factor in most crimes and that criminals are often also drug abusers, a rational reform agenda would develop drug court systems that involve teams of specialized personnel to work with drug abusing populations (as courts have done with juvenile, probate, and other specialized calendars). According to recent national surveys conducted by the Bureau of Justice Statistics' Arrestee Drug Abuse Monitoring Program (ADAM) and published by the Department of Justice in 1999, over one half of all adult males arrested in thirty four cities are under the influence of illegal drugs when taken into custody.

Tracks that reflect different levels of drug abuse and criminality, as well as criminal history, would provide appropriate sanctions, incentives, and treatment for all drug offenders living in the community. With the success of treatment in a drug court setting and the accountability of its monitoring components, all drug abusers released into the community on probation or parole after significant periods of incarceration would be handled through Re-entry Drug Courts, a drug court systems approach.

Probation Without An Initial Condition of Custody for Possession of Dangerous Drugs

Under our Rational Drug Policy Reform Agenda, unless there is some extraordinary circumstance that requires it, a possessor for personal use would not be placed in custody as a condition of his or her initial probation. That does not mean that the drug possessor would not be arrested, nor spend a period of time in custody before his or her conviction and placement on probation. In many instances, a brief period in custody is an important wake up call for the first time offender and allows the more serious drug abuser to undergo medically supervised detoxification before being released back into the community.

In the final analysis, treatment sessions, rehabilitative services, drug testing, probation supervision and frequent judicial monitoring of the drug abuser are far more effective and far less expensive than incarceration. Of course, depending on the individual's compliance with the terms of probation, jail may be ordered for violations of probation conditions. But even then, incremental periods of custody, called graduated sanctions, would be used, typically starting with a single day's incarceration for a probation violation and only gradually increasing (i.e. 1, 2, 4, 6, 8, 10-days), before residential treatment is seriously considered.

Conclusion

It is not difficult to construct a *rational* drug policy agenda. If you follow the historical, medical, humanistic, pragmatic, and ethical considerations implicit in a *rational* drug policy reform agenda and then take those considerations to their logical conclusions. What you will come up with is an effective and humane approach to a difficult, but not unsolvable problem. Trust the drug abuse worker /practitioners to define those reforms that demand action, and let them lead.

Implementing a Drug Policy Reform Agenda

Introduction

This, the third Policy Paper in a series on drug policy reform issues, will attempt to lay out how a statewide *rational* drug policy reform agenda can be achieved. Policy Paper No.1 argued for the establishment of a coalition of drug abuse worker/practitioners taking the lead in developing such an agenda. This Policy Paper will explain how a coalition can effectively make that agenda a reality.

It is my belief that we are in a period when those who best define and articulate a drug policy reform agenda will see it become national policy

These are extraordinary times. The Pew National Trust's recent survey described how nearly three quarters of the public believe that the drug war is being lost, but also that the criminalization or arrest of drug abusers, the decriminalization of drug offenses, as well as drug treatment itself are not supported by a majority of the American

people. What this confusing and contradictory data may express more than anything else is the profound sense of frustration the American people feel about the problem of drug abuse. It could be argued that the public is now ripe for a real reform agenda.

It is my belief that we are in a period when those who best define and articulate a drug policy reform agenda will see it become national policy. [Survey on Public Opinion on Drug War, The Pew Research for the People and the Press, March 22, 2001.]

The Building of a Drug Policy Reform Coalition

Is there any doubt that there are literally millions of individuals working on a daily basis with the problems of drug abuse? These workers/practitioners and the organizations that represent them are the natural leaders of the drug policy reform movement. [See Policy Paper No. 1, Who Speaks for the Drug Policy Reform Movement?]

If someone has doubts as to the need for system-wide reform, tell them that recent surveys show that three quarters of the public are fed-up with the war on drugs; that we are imprisoning more of our people than any nation on earth; that those imprisoned for drug offenses alone increased six-fold between the years 1984 and 1994, and in many states, spending on prison building and maintenance has been greater than that for education.

For those who believe that reform is not their concern, remind them, Drug Courts may become a footnote to history if legalization proponents succeed in their agenda. Remember, California's one hundred plus Drug Courts are in jeopardy, partially because many Drug Courts practitioners' and their allies thought that they could sit the legalization initiative campaign out. [See Policy Paper No. 5, Lessons Learned From California's Prop.36, 2001]

There are important building blocks to put into place before creating a statewide *rational* drug policy reform agenda. Develop a coalition of drug abuse workers/practitioners, from the treatment, prevention, rehabilitation, and supervision communities, committed to reforming the existing system. Contact organizations that represent worker/practitioners and hold community-wide meetings to define the reforms that you agree on while educating your communities as to why those reforms are needed.

Consider holding a statewide conference with the explicit purpose of setting a *rational* reform agenda. Know what initiatives or legislation are advocated by every part of the reform spectrum. Simply put, get to know the drug policy reform advocates in your community. But, don't limit yourself to those who wear their advocacy on their sleeves, but seek out organizations and individuals who have worked in related

fields and have personal and practical experience dealing with the drug abuse problem. Don't exclude anyone from your outreach attempts. Legalizers and criminalizers ought to be represented and have their say. But learn what the vast majority of reform-minded worker/practitioners believe needs to be accomplished.

Remember that you are building to change the system, not to defeat legalization. Consider what reforms are needed to make the system more just and humane. Identify those legalization proponents who are willing to work with you in good faith. Learn what you can about their views and concerns and attempt to respond to them. Indicate your willingness to sit down and work together to devise a reform strategy, legislative or initiative-based. Tell those willing to listen of the innovative aspects and importance of Drug Courts and the Therapeutic Jurisprudence concepts they rely on.

You will want to contact sympathetic legislators and work toward introducing your reform agenda into law through the legislative process. Or if there is insufficient support in the legislature, you may have the resources necessary to take the agenda directly to the people through an initiative process, a process available in almost half the states. Either way, you will be taking immediate action, galvanizing and motivating the drug policy reform movement in your state to act on a *rational drug policy reform* agenda.

Legalization as the Opponent of Rational Reform

In approaching the task of building a drug policy reform movement in your state, don't ignore existing reform-oriented organizations. But at the same time, don't assume that they represent the will of the people simply because they have an organization and a website. Literally dozens of state and national "drug policy reform organizations" are being supported with money from a few multi-millionaire donors, creating the illusion of widespread public involvement.

Meet with all reform-minded persons, but understand that some legalization proponents are adamantly against the involvement of the criminal justice system, and especially the judge's participation in the treatment process. If you can, negotiate with legalization proponents and create a compromise that all can live with. But understand that without an organizational structure and the reform movement behind you, there may be little reason for legalization proponents to compromise. For one thing, they have far superior financial resources to rely on. If you are going to do the organizational and coalition-building necessary to establish *rational* drug policy reform, you will need to begin now. Many observers of the Drug Policy field predict substantial de facto drug legalization in a number of states within five to ten years. [See Resource Document B, Background on Pro-Legalization Organizations. Their Leadership, and Funding, NFIA, 2001]

Drug Courts: The Target of Legalization Proponents

Interestingly, at a time when Drug Courts have evolved into the most important criminal justice reform movement in generations, legalization proponents are challenging their very existence. On August 2, 2000, a joint resolution was passed by the Conferences of Chief Justices and State Court Administrators, (all fifty chief justices and all fifty state court administrators) unanimously endorsing problem solving courts, based on the Drug Court model and urging their integration into the judicial mainstream. [See Resource Document F, Conferences of Chief Justices and State Court Administrators Joint Resolution, 2000]. In the final analysis, Drug Court programs are probably the one criminal justice reform embraced by liberals and conservatives, defense attorneys and prosecutors, law enforcement and treatment communities, alike. Yet many legalization proponents attack Drug Courts at every opportunity. Why?

The legalization movement argues that Drug Courts don't really work, and even if they did, that they trample on the rights of the accused; that they turn a purely medical and health problem into a criminal issue, and that judges don't have the time or the interest or the training to be a part of a treatment process. [See Resource Document C, Anti-Drug Court Propaganda in the Media, 2000]

But mostly, the unspoken message is that if Drug Courts do work, if there are thousands and thousands of potential Drug Court graduates out there, then there is a middle way between criminalization and legalization, and that legalization isn't the inevitable solution to the drug abuse problem that some would like us to believe it is.

Legalization initiatives and legislation are being pushed hard by their proponents because they would remove the judge and, by implication, the court system from holding the drug abuser accountable for his or her actions. The court would no longer have the opportunity to use its influence and power to guide the participant toward sobriety with creditable sanctions, as well as incentives. And the judge for all intents and purposes will no longer be in the loop, either as a leader of the therapeutic team in the Drug Courts setting, or as the final arbiter in the traditional probation process. Treatment would become the criminal justice system failure it was during the 1980s, before the advent of Drug Courts. For if "Nothing Works", as was believed then, there is no purpose in expending the resources or effort to try. The stage would then be set for the final step in the legalization proponent's agenda, the de facto legalization of dangerous drugs in America.

Developing An Early Warning System: Monitoring Legislative and Initiative Processes

At one time, it was thought that legalization challenges would come exclusively from initiative processes available in approximately half the states. That myth was exploded by the near success of the 'Campaign for New Drug Policies' attempt to pass a Proposition 36-style bill through the Hawaiian legislature.

There are probably at least a dozen states where there will be serious attempts to pass legalization legislation in the coming year. [See Resource Document E, Hawaii: A Case Study of a Successful Challenge to Legalization Legislation, 2001].

It will be necessary to begin monitoring those government agencies responsible for the law-making process in your state immediately. Of course, that means becoming knowledgeable about how the legislative process works, who are the important players, in government, the media and the business community. Individuals from responsible organizations will need to make monitoring legislative proposals a major priority. And most importantly, legislators will need to be educated both as to the dangers of legalization, and even more importantly, the need for *rational* drug policy reform, now.

As to the initiative process, states are clearly most vulnerable where well-financed initiative proposals go before an unsuspecting, and in most cases oblivious public, easily swayed by ballot descriptions and thirty second media sound bites. It means learning how that process works, and most importantly what procedures need to be complied with to satisfy the law before an initiative may be introduced. There will be an application process, where state agencies review the initiative's ballot language, and ballot descriptions, which may include its anticipated financial impact. (In many states, ballot pamphlets with these descriptions are distributed to every registered voter.)

It has to be the responsibility of every practitioner to learn as much as possible about legalization initiatives before they are submitted to the state government for approval. A single individual or organization needs to accept the responsibility of checking regularly - monthly, if not weekly - with the appropriate agencies to learn if such applications have been made.

This may be just the beginning of the application process, as many states allow for the challenge of everything from the initiatives' provisions, to its ballot name, to its ballot description (and financial impact statement if applicable) to its ballot pamphlet language. Obviously, this may demand extensive

administrative as well as legal proceedings. Establish your contacts with sympathetic law firms and individual lawyers who will be willing to help take on these matters if they do become an issue in your state.

This is not about spying on your adversaries. It is about being aware, at the earliest possible time, of legalization proposals when you can have the most impact on their contents or their passage. In California, legalization opponents were largely unaware and uninvolved in the government review process until after the ballot initiative had been approved, and were never able to catch up. [See Policy Paper No. 5, Lessons Learned From California's Prop.36.]

Introducing the Media to Rational Drug Policy Reform

The legalization campaign probably has had its greatest success in winning over the media. Many journalists and reporters have accepted the notion that the legalization campaign being waged is the *only* drug policy reform agenda; that the drug reform movement consists of those who favor legalization. The media has been assiduously solicited by numerous pro-legalization organizations, set up by that same small group of multi-millionaires, and the media, mostly believe that those organizations and their representatives are the legitimate leaders of the drug policy reform movement.

On the entertainment front, movies like the Academy Award winning movie 'Traffic', convey the idea that there is no way out of the drug abuse dilemma. Both the news media and its colleagues in the entertainment industry have created a public climate where most believe the situation is hopeless and many believe, against their wishes, that legalization will ultimately win out. That this media-created environment does not reflect reality hardly matters. Perception is the name of the game, and for the time being, at least, legalization proponents seem to have the upper hand.

It is up to the *rational* drug reform movement to be heard above the clamor of the legalization campaign and to insist on being recognized by the media as the true leaders of the drug reform movement. It will not be easy to get your version of drug policy reform the visibility it deserves, but it can be done. Media committees made up of drug abuse worker/practitioners as well as current and former drug abusers need to be formed. Contact needs to be made with the working media to explain the *rational* reform agenda that represents the beliefs of the mass of drug reform proponents.

The importance of Drug Courts and their successful use of coercion as a therapeutic tool to get drug abusers to stay in treatment should not be underestimated. It is not being ignored by legalization proponents who attack Drug Courts at every opportunity. The press is being told that Drug Courts don't work and even if they do, they don't reach enough people in need. Fortunately, Drug Courts are well known and generally well liked by the media who have been writing about the success of Drug Courts and doing stories on Drug Court practitioners and graduates for years. It is here that we have our greatest advantage.

We will need to tell our story through the scientific research that substantiates our successes and incidentally decimates the legalization proponents' alleged ones. We will need to get the television cameras back into the Drug Court, where the reporters can see the human success stories up close and personal. We must get the Drug Court practitioners; the judges and probation officers, treatment personnel and rehabilitation specialists, prosecutors and defense attorneys to talk about the larger *rational* drug policy reform agenda in their state and become its strongest proponents.

Making Your Case Before The Court of Public Opinion

Ultimately, it is the public and the politicians that represent them, that will need to be convinced that *Rational* Drug Policy Reform is needed and that legalization goes too far. I have heard legalization proponents describe their proposals as the rational, middle ground. It's a good try and they will try to paint themselves as moderate and reasonable.

It is clear to those that know the issues best, the drug abuse workers/practitioners, that legalization is not in the center of the movement but on the radical fringe.

As with the media, it will take a serious educational effort to make your case to politicians. Politicians generally will be reluctant to move aggressively in any direction. Your challenge is to convince them that if a *rational* drug policy reform is not adopted, far worse consequences may result. For both conservative politicians and their progressive brethren, *rational* drug policy reform offers a middle ground that they can both live with.

Look to other organizations, both local and statewide, not generally involved in drug abuse issues for both financial and political support. There was no reason that labor unions generally supported California's Proposition 36, except that they were courted by its proponents, fed one-sided arguments, and only approached by proposition opponents late in the game.

There are political organizations of the right and left, fraternal and community-based organizations, and labor and business groups that can make a difference. They are your public, and for the most part have not taken a position on drug policy reform or legalization issues. It will be your job to reach out to them and educate them.

In terms of funding, don't look for a sugar daddy to support your efforts. This is likely to require a grass roots effort in most states. Look to your participating organizations and your allies for funding. Get your contributions in kind (phone calls, sign distribution, going door to door pamphleting, etc.). There may be national assistance on the way, hopefully technical assistance, training, educational materials and funding. [See CPSC's introductory section - iv. The Rational Drug Policy Reform Project]

Conclusion

Ultimately, it will be your ability to organize yourself and others around a rational drug policy reform strategy that will make the difference. If you can create a true *rational* reform agenda, organize drug abuse workers/practitioners in your state in support of it, make your case to the media and politicians as the leaders of that drug policy reform movement, and build alliances with other organizations concerned with the drug problem, you will succeed. You are dealing with experienced pros, who have deep pockets and strong connections with the media, but they won't have a chance. And in the process, you will have created a more humane and just drug policy, one that provides treatment to all that need it, and a national system of Drug Courts providing effective and humane treatment for all charged with drug offenses.

How California's Proposition 36 Came to Pass

Introduction

It is important to note that the recent California (and to some extent the Arizona) initiative heralds a new era in the history of drug reform. By successfully avoiding the legislative process, proponents of California's Proposition 36 (Prop.36) have created an avenue for drug policy change that might not have been possible working through traditional political means.

In California, Prop.36 passed in November 2000, with over 60 percent of voters approving the initiative. Implementation is to occur in July 2001, but little is known about the scope of the new law's impact on the state. What is known is that judicial discretion to order even limited custody for those on probation for possession of drugs for personal use has been severely limited. Additionally, a complicated series of probation hearings is required to violate an offender for drug use or other possession-related conduct, with 30 days as the ultimate sentencing penalty on a third or subsequent conviction.

To investigate the circumstances surrounding the passage of Prop.36, I visited California during the first week of December 2000, traveling to Oakland, San Francisco, Sacramento, and Los Angeles (where I met with one of the authors of the ballot initiative). In all, I met with several dozen judges, prosecutors, defense attorneys, sheriffs, probation and corrections officers, treatment providers, elected officials, citizens, and paid political proponents on both sides of the initiative, individuals with both a limited and a keen interest in the initiative and its passage.

Most observers are in relative agreement as to how and why Prop.36 passed. It was described as a combination of a public fed up with 'the war on drugs', well-organized proponents with vastly superior resources and a large head start in the initiative process, and the creation of a message of reform that was never effectively countered.

The California Public

If you ask most Californians, they would say that the state has been losing the war on drugs for a long time. The public knows that there are tens of thousands of drug users in prison and that the cost to the state runs to billions of dollars. In contrast, spending for education has stagnated over the same period, and has been overtaken by spending for prisons. Approximately 20,000 people are in prison for simple drug possession for personal use [California Department of Corrections Data Analysis Unit, 1999].

The reality is that an overwhelming majority of those in prisons for personal possession of dangerous drugs are there because they were plea-bargained down from a more serious charge (often sales of dangerous drugs). Nevertheless, the message heard loud and clear by the public was that Prop.36 offered "treatment, not prison" for drug users, an almost irresistible proposal on its face.

The arguments against Prop.36, and where it stood vis-à-vis Drug Courts and effective court-based treatment, were clearly not being made effectively to the California voter.

Clearly, the public relations battle was lost almost from the start. Even the active support of popular TV actor Martin Sheen as honorary chairman of the NO ON 36 COMMITTEE had little impact on the public (although lack of financing of his anti-Prop.36 TV spots was also a factor).

Friends from California called me a few days after the November election to report that they had voted for Prop.36, believing that they were supporting Drug Courts. I heard similar stories from others as I traveled across California.

The arguments against Prop.36, and where it stood vis-à-vis Drug Courts and effective court- based treatment, were clearly not being made effectively to the California voter.

The Politics of Reform

By the year 2000, there was reason to believe that the anti-crime issue had lost some of its momentum. We know that crime figures are down to their lowest levels in nearly 30 years. At the same time, those entering prisons continue to increase in numbers.

Opponents of Prop.36 found themselves in the unenviable position of being outflanked in every direction. The most conservative and the most liberal of individuals found themselves sharing the same position - as libertarians - opposed to the state's interference in an individual's activities. Progressives and their allies in labor found their loyalties to minority and ethnic groups, who claimed that the drug laws unfairly discriminated against their members, pulled them into the pro-Prop.36 column. Those most concerned about the costs of imprisonment and the building of new prisons (often the most conservative anti-tax groups) also threw in with the proponents. Finally, those who genuinely believed that more treatment dollars were needed were pro-Prop.36.

Perhaps the most interesting place to see these factors at work was with major state politicians, many of whom acted as if Prop.36 wasn't even on the ballot. If a position was taken by a major political leader it was generally low profile and at the very end of the campaign, when it was barely visible.

Resources

Proponents reached out to the media early and often and won them over to their position.

Evidence suggests that the proponents of Prop.36 outspent their opponents by as much as twenty to one. I would argue that money had less of an impact on the initiative's passage than some opponent's would suggest. Resources were spent early on to conduct focus groups and administer polls to determine the public's perceptions of

drug penalties and criminal justice reform efforts. Significant monies were spent on the collection of the 750,000 petition signatures necessary to put the initiative on the ballot. Typically, in California, petition signature collectors receive one dollar for each signature they obtain.

Relatively little money was spent on media advertising, as most media were already pro-Prop.36. Proponents reached out to the media early and often and won them over to their position. Interestingly, nearly every major California newspaper editorial board came out against Prop.36 after hearing both sides of the argument. Those who write the front-page news articles, however, saw it differently. The California media working the story believed that the war on drugs was lost and that Prop.36 represented the face of needed drug policy reform.

Proponents allegedly spent as much as five million dollars on the campaign, with much, if not all of that funding coming from a few out-of-state multi-millionaires. Opposition forces could not match those monies. If one considers the dimensions of the policy changes created by the initiative, the proponents would appear to have received more than their money's worth.

It's interesting to consider the reasons for lack of opposition funds. Those you would expect to care about this issue, the corrections union, the D.A.'s Association, conservative groups, and anti-crime/anti-drug coalitions generally stood on the sidelines. Some claimed it was because their active financial support would undercut the opponent's position and suggest to the public that they were merely attempting to protect their own financial interests. On the other hand, knowledgeable individuals seem to suggest that

these groups really didn't care enough to invest their own resources in the issue. Which brings up an important issue: is there a natural constituency to fight initiatives like Prop.36? [See Policy Paper No.1, Who Speaks for The Drug Policy Reform Movement?]

Getting It Wrong

The political realities described above put the anti-Prop.36 forces in a very narrow box, with little room to maneuver. Their public relations firm, McNally Temple Associates, Inc., came up with a time honored but somewhat vague anti-drug slogan, "Dangerous and Misleading." In their defense, they were operating with extraordinarily little financial support, and they did not have the staff necessary to organize communities statewide against Prop.36.

Unfortunately, many organizations had joined the pro-Prop.36 bandwagon before the opposition forces ever got off the ground. Treatment organizations, enticed by the promise of 120 million dollars a year, were the first to climb on board. The defense bar and public defender organizations, while strongly supportive of Drug Courts in general, could not say no to Prop.36's benefits, including non-incarceration for probation violations, a 30-day cap for third time offenders, and avoidance of the "three strikes" statute for a significant number of their clients.

Many of the arguments propounded by the anti-Prop.36 forces relied on traditional scare tactics, such as the threat of releasing date rape drug offenders into the community and allowing serious offenders with multiple convictions into treatment.

At the same time, opponents also relied on the supposed popularity of California's one hundred plus Drug Courts. In the end, the Drug Courts and their practitioners were probably the strongest advocates the anti-Prop.36 forces had. Judges from across the state took the lead in organizing around the issue and significantly, Drug Court graduates proved to be among the most effective spokespersons against the proposition.

Drug Court practitioners and their partisans argued vociferously that they provided the only substantial and effective treatment for the drug-using offender in the criminal justice system. Unfortunately, relatively few drug-using offenders were in Drug Courts (estimates range from five to ten percent of those charged with drug possession), while the majority of Californians were unaware that Drug Courts even existed.

Proponents initially argued that Prop.36 and Drug Courts were on the same side and that Prop.36 would assist Drug Courts and only expand their reach. Unfortunately, no one made overtures to California's Drug Courts, and an opportunity to work together to create an acceptable initiative representing common criminal justice reform goals was lost. Instead, most Drug Court proponents learned about Prop.36 through the news media, after the ballot initiative qualified. They understandably reacted strongly against a proposition that co-opted the success of Drug Courts statewide, distorted the principles of Drug Courts, and seemingly threatened to dismantle Drug Court programs across the state. [See Resource Document C: Anti-Drug Court Propaganda in the Media, 2000]

Getting There First

The initiative process offers one of the most powerful tools for public involvement in the law making process in the nation. In California, initiatives passed have the force of constitutional amendments.

In the case of Prop.36, the ballot initiative had gathered the required 750,000 petition signatures before most opponents became aware of its contents. The non-partisan staff of the Legislative Analyst's Office (LAO) adopted the proponents' analysis of the financial impact of Prop.36, without ever hearing from opponents. That analysis and the description of the initiative as it appeared on the ballot (and the ballot pamphlet distributed to all voters, days before the election) were devastating. Before a voter could read the proponents' or opponents' positions on the initiative ballot, they would be confronted with the

legislative analyst's conclusion that at a cost of \$120 million in treatment services, Prop.36 would save California \$200-250 million annually in prison costs, \$450-\$550 million in one-time prison construction cost avoidance, \$25 million in annual parole savings, and \$40 million in annual jail operations. Even the title of the initiative and the ballot description were determined by the California Attorney General's Office before opponents were mobilized. The title ("Diversion and Treatment Initiative") and ballot description suggested that, under the provisions of Prop.36, those charged with drug use would receive treatment and supervision, not imprisonment.

By the time Prop.36 opponents began to mobilize, treatment and defense proponents had largely signed on, the legislative analyst's conclusions were all but set in stone, and only minor changes to the ballot initiative's title and pamphlet were possible.

The respected statewide Field Poll, published in many California newspapers shortly before the election, found that only 20 percent of the electorate held any position on the initiative. When the ballot pamphlet description (with the legislative analyst's conclusions up front) was read to voters, however, those polled split two to one in favor of the initiative. This was one election that was truly over before it ever began.

Conclusion

The passage of Proposition 36 presents important insights into the drug policy reform battle being waged across the nation. It shows how a small, highly focused campaign effort can avoid the legislative process and impose major changes on the criminal justice system and the public, at a significant, but minimal cost.

Lessons Learned from California's Proposition 36

Introduction

This Policy Paper is the fifth in a series that will be presented on the need for *Rational Drug Policy Reform* in the United States. It will attempt to analyze the potential impact of Proposition 36 (Prop.36) and look for lessons to be learned by other jurisdictions facing similar challenges.

Background

In discussing Prop.36 and similar initiatives, it is easy to overlook their importance and true intent. *In a sense, they are not legalization initiatives per se, but pre-legalization initiatives.* Their passage does not legalize drugs, but brings us that much closer to the ultimate reality of drug legalization. By limiting the involvement of the court in the treatment process, these initiatives are way stations on the road to legalization; setting the stage for the further erosion of the court's control over illegal drug use.

In dealing with drug policy issues, we have inherited a new game with a new set of rules. What was thought of as safe policies, that the public polity would never change (i.e. judicial responsibility for probation treatment conditions) have become fair game for those capable of playing the initiative process. Traditional power brokers, such as law enforcement officials, legislators and other political leaders are taking a back seat to media consultants, public relations professionals, and multi-millionaire funders.

Some will try to ignore the passage of Prop.36 in California, describing it as an anomaly (as they might be inclined to describe California in other respects), but the fact is that the new game can be played and will be played in every state with an initiative process. For example, Arizona, which is usually considered a conservative bastion, passed its drug policy initiative, not once but twice in a three-year period. Proponents openly admit their intention to put two or three initiatives on the next ballot (some observers suggest as many as a dozen).

It should also be noted that with legalization proponent's continued success at the ballot, we can expect more ambitious and aggressive initiative versions of Prop.36. For example, Massachusetts' voters last year barely rejected an initiative that would have mandated non-custodial probation for possession of up to 16 grams of cocaine, by a 53% to 47% margin.

The Potential Impact of Proposition 36

While Prop.36 proponents have been successful at the ballot box, what is less certain is the ultimate impact of Prop.36 on its intended beneficiaries. One view of Prop.36 is that it is eminently reasonable, even laudable, for its willingness to fund treatment for drug using offenders. The initiative commits one hundred and twenty million dollars (\$120,000,000) a year for five years, for treatment-related services for those charged with possession of dangerous drugs for personal use.

From that perspective, Prop. 36 has great potential to advance the cause of treatment for all drug offenders and the reduction of the use of incarceration as a response to drug abuse.

It could provide the impetus for improved collaboration between treatment and criminal justice communities across the state and sensitize judges unfamiliar with the human issues of drug abusers.

Unfortunately, there are serious problems emerging along with Prop.36's passage. Prop.36 proponents never consulted with drug court and other criminal justice leaders as to potential problems with the initiative's language. In failing to do so, an extraordinary opportunity was lost to create an initiative that would have been truly effective and at the same time been supported by all reform minded drug abuse worker/practitioners in the state.

As it stands now, it will take practitioners of extraordinary good will, with a willingness to be part of a team, a commitment to treatment goals, and an ability to embrace innovative approaches to the initiative to successfully implement Prop.36

We know that Prop.36 is poorly written, painfully vague in aspects and perplexingly complex. In talks with judges, treatment providers, probation officers, legislators and others close to the implementation process, there is an inescapable feeling that no one has the same understanding of Prop.36's meaning and that it's impact may be substantially different across the state. There are various legal challenges in the planning stages and the strong probability that the appellate courts will ultimately define the law. On the other hand, the proponents may decide to return to the voters with a new initiative if the courts or the legislature try to limit it's impact (or if the implementation of the initiative is not to their liking).

To add to the confusion, under Prop.36 probation hearings are designed to be extraordinarily complex and extended affairs, with as many as three separate adversarial hearings required before an individual may have his or her probation revoked and be sentenced on that revocation. The sentence itself is limited to thirty days in custody on a third or subsequent Prop.36 conviction, but up to three years in prison for the first two Prop.36 probation revocations (This is the equivalent of defacto legalization for those with three or more Prop.36 convictions).

Prop.36 can be read as a paradox, where the court is virtually excluded as an active participant during the probationary treatment period, without the authority to order three days in custody for drug related violations, but with the power to order a three-year prison term if the individual's probation is revoked because of treatment failure.

An individual maintains Prop.36 eligibility and its non-custodial probation status, whether he or she goes to trial and is convicted by a jury or pleads guilty to the offense immediately after arrest. That means there is little incentive for a defendant to plead guilty early on and every reason to put off trial, conviction, and treatment almost indefinitely, especially as far more serious cases take up almost all the available trial capacity on California's crowded court dockets.

There is also a concern that there are insufficient monies made available under Prop.36 to adequately fund treatment providers and probation staff, to name just two critical programs. Nor may Prop.36 funding be used to fund drug testing. Finally, California's highly thought of Drug Courts (128 courts at last count) may be in jeopardy as money that might otherwise be made available to them may be drained off into Prop.36 funding.

We cannot foretell many of the ramifications of implemented legalization initiatives. But the experience of Arizona and New Mexico may provide an important insight. Since Prop.200 was implemented in Arizona in 1997 (a similar, but more benign version of Prop.36), only one new Drug Court has been added to the five existing at the time of passage. In neighboring, but far less populated New Mexico, ten Drug Courts have been added to the five existing in 1997. The initiative process clearly has the potential to blunt the spread of Drug Courts and their effective treatment regimens.

Practitioners Trying to Make It Work

Having said all that, I am enormously impressed with the commitment of many of the drug abuse worker/practitioners to making Prop.36 work in their communities. Many jurisdictional teams are taking the best elements of successful drug courts and injected them into the Prop.36 process; including a collaborative, non-adversarial team approach, involvement of the judge as the leader of a dedicated special Prop.36 court, adequate probation supervision in close cooperation with treatment providers, necessary drug testing resources to make supervision meaningful, regular though limited progress reports before the Prop. 36 judge, and the limited use of coercion as a therapeutic tool. Ultimately what many jurisdictions are creating is a pre-drug court treatment system that hopefully will succeed with participants, and send others less successful on to more comprehensive and accountable drug court programs. What remains to be seen, is whether Prop.36 sponsors are going to allow drug abuse worker/practitioners to go about the business of implementing the initiative, without debilitating legal challenges.

Whatever happens under Prop.36, we know from past experience (i.e., Arizona, Massachusetts) that legalization proponents will constantly tighten and extend their initiatives' language, to further limit the role of the criminal justice system. If anyone doubts that, they should look at the proposition that is before the Florida Secretary of State for approval as a ballot initiative. It would create Article 1, Section 26 Subsection (c) of the Florida Constitution (among other provisions), and require that the "**...methods of monitoring the individual's progress while in treatment, shall be made by a qualified [treatment] professional...**" Whatever flexibility and limited role California's criminal justice system may have found in Prop.36, is apparently already being squeezed out of this new improved initiative.

Learning to Work The Initiative Process

At the turn of the century, the initiative process developed out of the progressive reform movement's desire for more direct democracy. In all, there are some twenty-four (24) states with some form of initiative process. While they started out as a genuine attempt at reform, over the past thirty years they have often turned into a tool used by special interest groups to bypass the legislative process.

Every major interest group, from insurance companies to real estate interests, has benefited from the initiative process. Cause-related movements such as the environmental and tax reform movements have been equally successful in working this process. Perhaps no one has been more successful in changing the law through the initiative process than the law enforcement community. In California alone, at least four major initiatives sponsored by law enforcement groups have passed easily over the past twenty years.

Minimal attention is typically given to initiatives by the voting public. Few voters take the time to read an initiative that can run to many pages of small print. So more attention is paid to the brief, often cryptic, but symbolically charged descriptions attached to the proposition. Some of these descriptions are reviewed under state law (in California, the proposition name and ballot description are reviewed by the Attorney General and the economic impact is determined by the Legislative Analyst's Office).

All this is stated to affirm the fact that the initiative process is an excellent vehicle for proponents of drug policy reform. California's respected Field Poll found only twenty percent of the voting population had an opinion on Prop.36 just days before the election. Few people read the initiative, and the catchy phrases and superficial analysis sufficed for all but the most discerning voter

There is no reason that proponents of *Rational* Drug Policy Reform cannot learn to play the initiative game, from the spotting of initiatives early on, to defining the cryptic descriptions that attach to a proposition, to organizing a coalition of drug abuser worker/practitioner organizations early on and working towards legislative enactment of *rational* reform or the drafting of one's own reform initiative. Once you understand the rules of the game, anyone can play.

Retrieving the Mantle of Drug Policy Reform Leader

For ten years, Drug Courts had led the fight for drug policy reform in California. Until Proposition 36 appeared, California was the center of a criminal justice revolution in dealing with drug abusers. Over one hundred (100) Drug Courts had been established in California, in just five years, providing treatment, drug testing and supervision through regular judicial monitoring of a drug user's treatment compliance. These courts are enormously popular with the media and those among the public who are aware of their existence. Drug Courts have become national phenomena as well, with 2,800 Drug Court practitioners representing nearly one thousand U.S. Drug Courts convening the annual National Association of Drug Court Professionals conference in San Francisco, June 2000.

Early on, initiative proponents attacked the Drug Court's reform credentials for not being effective, for not reaching out to minorities, or taking only those with less serious drug problems. At least one criticism had some validity, that Drug Courts did not reach enough drug offenders to make a difference. Though there were a few counties (San Diego, San Bernadino, and Alameda counties among them) that reached substantial numbers of drug offenders, most estimates would put the number of drug using offenders in California Drug Courts at five to ten percent. Too many Drug Court practitioners were satisfied with having a limited impact on the drug using population in their own communities, and had little interest in system wide reform.

Most Drug Court practitioners in California were not even aware of the initiative's existence, even though over 700,000 signatures had been collected for ballot approval.

For the most part, Drug Court practitioners never took the time to organize or even communicate with initiative proponents who had similar goals. Because of that, practitioners had few friends or colleagues among proponents when the initiative first appeared. There was never the opportunity to weigh in with comments or suggestions, let alone be a part of the dialogue that shaped the initiative or have a hand in the writing.

Most Drug Court practitioners in California were not even aware of the initiative's existence, even though over 700,000 signatures had been collected for ballot approval.

Drug Court practitioners never put themselves squarely on the front line of Drug Policy Reform, nor did they accept the mantle of leadership in the reform movement. Theirs was an agenda limited to the implementation of Drug Courts. There was, of course, good reason for their reticence. To continue to operate, Drug Court Judges and other practitioners had to convince their colleagues as well as their boards of supervisors and other skeptics that Drug Courts were effective and beneficial, and would not rock the boat.

On the other hand, initiative proponents had no problem in claiming leadership of the drug policy reform movement by making monetary demands on the system that no one inside the system dared to make. When the initiative called for one hundred and twenty million dollars a year for treatment related services, the California Drug Court field was caught flatfooted.

Everyone knew that treatment dollars were desperately needed; yet because the initiative proponents got there first, Drug Court practitioners who opposed the initiative were attacked as being selfish and against the expansion of treatment for the drug-using offender population. This happened even though many Drug Court practitioners had spent years fighting for increased state funding. Strong supporters of Drug Courts in the treatment and defense communities broke with Drug Courts for the first time because of the funding promised by the initiative.

Many Drug Court practitioners and leaders in the field shied away from directly confronting their protagonists, preferring not to get involved in a messy initiative campaign. Drug Court Judges felt constrained from speaking out directly on the issue, even though an ethics panel had cleared such activities. Even though a considerable numbers of Drug Court practitioners took a strong position

against the initiative, they never organized across the state or used their political leverage to full advantage.

The reality is that the Drug Court movement was coopted by initiative proponents. If Drug Court professionals had been clearer as to their own reform agenda and looked beyond the needs of the Drug Court, there might have been a different outcome. Expansion of Drug Courts and their treatment programs to all non-violent drug-using offenders living in the community would have been a good start. The development of systemic approaches to the drug-using population would have sent a signal to all that Drug Courts were prepared to lead.

The reduction of the charge of possession of dangerous drug for personal use from a felony to a misdemeanor might have made an enormous difference. Initiative proponents constantly beat opponents over the head with Department of Corrections data showing that twenty thousand persons were in prison for possession of drugs for personal use. No matter that the vast majority were there on pleas, negotiated down from far more serious charges, such as sales of dangerous drugs. Even though treatment and law enforcement practitioners involved in Drug Courts mostly agreed that such reforms would have a beneficial impact to the drug user and the community, the reforms were never seriously considered. The initiative proponents had successfully tainted the Drug Court field's reform credentials.

Reaching Out to Policy Makers In Time

In California, there was virtually no organization, coalition, or structure of any kind in place to challenge the legalization initiative. The extraordinary thing is that everyone should have seen this initiative coming. California had already experienced a successful medical marijuana initiative and had watched as its neighbor Arizona twice passed drug legalization initiatives over a three-year period. From Arizona came unsubstantiated statistics and anecdotal claims that non-coercive treatment of drug-using offenders was successful under Arizona's Prop.200. [See Resource Document D, The Arizona Experience and Its Impact on California's Prop.36. 2001]

It should have been clear to everyone that the law enforcement mentality that had swept the nation for the past twenty years had largely spent itself. Crime statistics hovered at a thirty year low. And yet our prisons continued to pack over a hundred thousand prisoners away at astronomical costs. And the talk in the media focused on how we were all victims of the war on drugs, a war that according to the media had already been lost. It is no wonder then that politicians, the media, labor unions, some influential business leaders, and other policy makers, desperate for a solution, would seize on any drug reform initiative presented as the answer to the problems presented by drug abusers.

The environment described above cried out for a progressive and rational response to the drug abuse problem. Unfortunately, the time for organizing such a response (or even anticipating the initiative with one more rational) was long gone by the time the California initiative was approved as a ballot measure. The time to reach out to policy makers with data and arguments is before an initiative appears on the horizon.

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The media and politicians need to be fed the facts, not propaganda. In California, scare tactics and drug war rhetoric fell mostly on deaf ears. Therapeutic jurisprudence and the need for coercion as a therapeutic tool needed to be explained by the scientific research available. A strong case can be made that the passage of legalization initiatives in California and Arizona represent a radical experiment on an immense scale that should not be duplicated until we know definitively through scientific evaluation and research that they have been successful.

Resources need to be procured from local, state, and national sources to provide the information, training, technical assistance, and funding necessary to face the challenge ahead. An organization needs

to be formed that is willing to develop an early warning system, ready to respond aggressively when an initiative surfaces. It will not be necessary to match proponents dollar for dollar, but minimal funds to organize must be found. [See *Rational Drug Policy Reform Project and Legalization Watch*, a national CPSC initiative, described in the introductory section.]

Reform proponents are hardly of one mind when it comes to legalization initiatives or other objectives for that matter. A coalition of reform-minded and middle of the road organizations needs to be formed now to explore rational drug policy reform and come up with its own legislative and/or initiative strategy. By joining together, we can find ways to accommodate each other's needs, in instituting rational drug policy reform.

An open dialogue with other drug policy reform proponents and a willingness to join with all reform advocates in developing a rational drug policy reform agenda is critical.

Conclusion

The future of national drug policy is likely to be decided in states where legalization initiatives are on the ballot. It is also where national public opinion will be shaped. Today, initiative proponents buoyed by their success in California, are led by public relations and media professionals who are well-financed, focused on their task, with a national strategy to reach into every state with an initiative process (and beyond).

I believe that the battle can only be won if we seize back the mantle of drug policy reform leadership. The choice is ours. Change will come through the initiative process, as it has in Arizona and California, or through our own *rational* efforts to create a fair, just, and humane drug policy that provides effective drug treatment for all who need it, while guaranteeing the safety of our communities.

A Strategy for a Rational Statewide Drug Policy Reform Agenda

Introduction

The previous five Policy Papers have provided a framework through which one can understand the concepts of drug policy reform. In the sixth and final Policy Paper, I will lay out the major components of a strategy that can be used in the development of a *Rational* Drug Policy Reform Agenda. In so doing I will summarize the major points discussed in this compendium on *rational* drug policy reform.

I. The Drug Policy Reform Movement is made up of all those persons interested in the reform of existing drug policy.

- A. Drug abuse worker/practitioners make up the mass of drug policy reformers
- B. Drug Courts created the positive environment that has enabled the present Drug Policy Reform movement to thrive
- C. Those who “claim” the mantle of leadership for the drug reform movement are not representative of the reform-minded practitioners/drug abuse workers.
 1. Most legalization proponents have never had practical experience with drug abuse, and their leaders are often public relations and media experts
 2. A few multi-millionaires are behind legalization initiatives and legislation
 3. Organizations across the nation have been set up with that same funding

II. Drug Policy Reform is an immediate and critical need

- A. The Pew Foundation reports that three-quarters of the public is fed up with the “war on drugs”
 1. Imprisonment for drug offenders increased by six-fold between 1984-1994
 2. Reform minded drug abuse worker /practitioners cannot afford to stand on the sidelines while a new drug policy reform agenda is adopted
- B. Consider reforms that are needed to make sanctions more just and appropriate
 1. Possible reduction of simple possession charges to misdemeanors
 2. No possessors for personal use sent to prison
 3. Treatment without custody as an initial condition of Probation
 4. Treatment for all who require it, both voluntary and court based
- C. Drug courts need to take the leadership in creating systemic responses to drug abuse that are comprehensive, therapeutic, and diverse
 1. Drug courts and their practitioners must reach substantial numbers of drug users and need to reflect the racial and cultural makeup of their communities
 2. The scientific literature establishes that coerced treatment is more effective than voluntary treatment, and drug court treatment is far more effective than either
 3. Drug Court Systems need to be established in every jurisdiction, providing treatment and accountability for every drug abuser on probation or parole and living in the community

III. Develop a coalition of reform minded drug abuse worker/practitioners in creating a rational drug policy reform agenda

- A. Meet with other Drug Policy Reform proponents on both the state and local level
 - 1. Learn who is involved in the reform movement in your state
 - 2. Identify reform minded drug abuse workers/practitioners who are from the prevention, treatment, rehabilitation and supervisor fields
 - 3. Build relationships with local and state organizations
 - 4. Build a broad coalition across the political spectrum
 - a. Law enforcement groups can be important allies
 - b. Reform groups will be attracted to your reform message especially that drug court treatment will reach a larger, more diverse population.
 - c. Anti-drug coalitions and community organizations will want to see drugs kept away from children and off the street corners
- C. Bring together those individuals and organizations dedicated to the therapeutic use of the criminal justice system.
 - 1. Look to reform as well as mainstream organizations
 - 2. Look to the local affiliates of committed national organizations.
 - 3. Start now; legalization proponents have a big lead on you already
- D. Start a dialogue with potential legalization proponents
 - 1. Learn what you can about the proponents views and interests
 - 2. Collaborate with those interested in *rational* drug policy reform
 - 3. Become a part of the writing of initiatives and legislation
 - 4. Make those interested in reform aware of the effectiveness of Drug Courts and Therapeutic Jurisprudence

IV. Develop an Early Warning System Against a Legalization Challenge

- A. Be aware that legalization legislation is being introduced in many states
 - 1. Become familiar with your state's legislative process
 - 2. Get to know legislators, their aides and other legislative decision-makers
 - 3. Educate your legislators on the need for drug policy reform as well as the dangers of legalization
- B. Learn the details of your states initiative process
 - 1. Know what agency is first notified of an initiative's filing
 - 2. Know what agency or agencies pass on financial or other impacts
 - 3. Know what agencies approve of ballot language and descriptions
- C. Have responsible individuals and/or organizations monitor the initiative process
 - 1. Have persons responsible for checking on the filing of any initiative
 - 2. Develop a relationship with a sympathetic law firm, which may assist

V. Reach out to Policy Makers

- A. Build relationships with the media
 1. Drug Courts have had an excellent relationship with the media
 2. Make sure the media has relevant information regarding drug court
 3. Provide anecdotal and data based evidence on the need for coercion
 4. Access information from national organizations specializing in media
- B. Build relationships with Politicians
 1. Give politicians the background information they need to understand that you represent the true face of *rational* reform in your state
 2. Show the politicians that drug courts are effective through statistical data and by introducing them to drug court graduates and your court itself
 4. Make sure that the politicians understand that coercion is used as a therapeutic tool, never to simply punish
- C. Build relationships with funders
 1. Do not expect a single funder to provide all your funding
 - a. Look to your participating organizations
 - b. Raise money at the grass roots
 - c. Get your contributions in kind (phone calls, sign distribution, etc.)
 2. Develop a network of fundraisers capable of going to persons and organizations of means for substantial, multiple contributions.
 3. Help develop a national resource pool that can be utilized for support of drug policy reform activities in the states that are likely to be the target of initiatives in any given year.

VI. Creating the Momentum to Win

- A. Perception is everything in politics.
- B. Explain yourself in twelve words or less, “Drug Courts treat people, keep them out of prison and away from drugs.”

VII. Organize Across your State and in Every Community

- A. Rely on information, resources, and assistance from the national level
 1. A national clearinghouse is needed to provide critical information
 - a. Evaluation data on effective coercive treatment models
 - b. Information on the California and Arizona experiences
 2. Experience elsewhere may be available in facing an initiative
 - a. Trainings on how to deal with legalization proposals
 - b. Assistance and consultations with experts in the field

VIII. Alternative Initiatives and Legislation

- A. Consider developing your own initiative that could be placed on the ballot in competition with a legalization initiative
 - 1. If it is possible to collaborate with legalization proponents and other reform minded persons on the development of a ballot initiative, do so
 - 2. If legalization proponents intend to put an initiative on the ballot that is counterproductive, be prepared to promote a *rational* alternative initiative
- B. Legislation can be proposed and carried by your organization or coalition of organizations that can win the support of your state legislature
 - 1. Legislation to reduce simple possession of illegal drugs to a misdemeanor
 - 2. Treatment funding for all who require it, voluntary or court based
 - 3. Treatment without incarceration as an initial condition of Probation
 - 4. No Prison Sentences for those convicted of Possession for Personal use
 - 5. Drug Court Systems working with all drug offenders, on probation or parole, and living in the community

The Scientific Research on Coerced Treatment

Resource
Document

A

Introduction

The two documents provided under this section provide a comprehensive, if brief overview of scientific literature on the efficacy of coerced treatment in general, and drug court treatment specifically, as compared to voluntary treatment. Below is a summary of some of its highlights.

In the first document, Dr. Sally Satel of Yale University's School of Medicine lays out the critical premise:

“A massive amount of data, assessing roughly 70,000 patients since 1967, emerged with two clear findings. First, the length of time a patient spends in treatment is a reliable predictor of his or her post-treatment performance. The second major finding was that coerced patients tended to stay in treatment longer.” [See attached, Drug Treatment: The Case For Coercion, Dr. Sally Satel, National Drug Court Institute Review, Vol. III, 1, pp.2-3, 2001.]

The second document, “The Critical Need for Jail as a Sanction in the Drug Court Model”, provides a review of scientific literature from twelve different referenced sources. One of those sources, Dr. Steven Belenko, of Columbia University, the National Center on Addiction and Substance Abuse (CASA), reports:

“Retention rates for drug courts (which by definition imply retention in drug treatment) are much greater than the retention rates typically observed for criminal justice offenders specifically, and treatment clients in general.... It is estimated that about 60% of those who enter drug courts are still in treatment (primarily outpatient drug-free) after one year.... In contrast, [a] recent national evaluation of treatment outcomes found that half of those admitted to outpatient drug-free programs stayed less than three months”. [Research on Drug Courts: A Critical Review, Dr. Steven Belenko, National Drug Court Institute, Vol. I,1,pp.21-22,1998]

Returning to the conclusion of Dr. Satel in the first document, the scientific evidence appears irrefutable:

“Clearly, coerced treatment, at least as used by Drug Courts, is more effective in retaining participants for substantially longer periods than voluntary treatment and therefore is far more effective in reducing criminality and drug abuse.”

Drug Treatment: The Case for Coercion

By Sally L. Satel, M.D.
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The Effectiveness of Coerced Treatment

Data consistently show that treatment, when completed, is quite effective. Indeed, during even brief exposures to treatment, almost all addicts will use fewer drugs and commit fewer crimes than they otherwise would, which means that almost any treatment produces benefits in excess to cost. But most addicts, given a choice, will not enter a treatment program at all.

Moreover, evidence shows that addicts referred to treatment through court order or employer mandates benefit as much as or more than their counterparts who enter treatment voluntarily. Research over the past thirty years has firmly established that individuals who remain in treatment for longer periods of time are more successful, maintaining sobriety and committing fewer crimes.

A massive amount of data, assessing roughly 70,000 patients since 1967, emerged with two clear findings. First, the length of time a patient spends in treatment is a reliable predictor of his or her post-treatment performance. Beyond a 90 day threshold, treatment outcomes improved in direct relationship to the length of time spent in treatment, with one year generally found to be the minimum effective duration of treatment (Pescor, 1943; Simpson and Sells, 1983; Hub-bard, et al., 1989; Simpson and Curry, eds., *Psychology of Addictive Behaviors* vol. 11; Center for Substance Abuse Treatment, 1996). The second major finding was that coerced patients tended to stay in treatment longer.

Looking at the most recent studies brings home how effective coerced treatment is (specifically that found in drug courts) compared to voluntary treatment.

Drug courts, which are coercive in nature, have proven especially successful in sustaining participants in treatment. An American University survey of the 200 oldest drug courts found that 70 percent of those offenders who entered the pro-grams remained active in treatment at the end of one year (American University, 1998). Steven Belenko, of Columbia University's Center on Addiction and Substance Abuse, came to a similar conclusion finding that "about 60 percent of those entering drug courts are still in treatment (primarily out patient drug-free) after one year" (Belenko, 1998).

In comparison, those addicts who do enter a program voluntarily rarely complete it. About half drop out of the treatment program in the first three months (Langenbucher, et al., 1993). Further, 80 to 90 percent of voluntary participants leave treatment by the end of the first year (Langenbucher, et al., 1993). Among such dropouts, relapse within a year is generally the rule (Langenbucher, et al., 1993).

Clearly, coerced treatment, at least as used by drug courts, is more effective in retaining participants for substantially longer periods than voluntary treatment and therefore is far more effective in reducing criminality and drug abuse.

In short, if treatment is to fulfill its considerable promise as a key component of drug control policy, whether strict or permissive, addicts must not only enter treatment but stay in treatment for substantial periods of time. Clearly, the coercion provided through drug courts is proving a more effective treatment modality than voluntary treatment.

[Editor's Note: The above text extends from pages two to three of Dr. Satel's Article]

[From:Drug Court Practitioner Fact Sheet, Vol. III, No. 3, National Drug Court Institute]

The Critical Need for Jail as a Sanction in the Drug Court Model

The Critical Importance of Jail as a Treatment Tool

The use of sanctions in drug court, including the use of jail time, is instrumental in the change in behavior among drug court participants. Sanctions are most effective in reducing drug use and criminal behavior, when they are immediate, of increasing severity, and predictable (Anglin, et al., 1998; Apospori & Alpert, 1993; Brennan & Mednick, 1994; Byrne, et al., 1992; Marlowe, 1999).

In the evaluation of the D.C. drug court program, sponsored by the National Institute of Justice, “defendants on the sanctions docket [where penalties of up to 7 days in jail could be imposed] were more than three times as likely to be found drug free when tested than those on the control docket” (emphasis added) Harrell, 1998). Sanctions program participants were significantly less likely than the standard docket sample to be arrested in the year following sentencing. Further, the sanctions docket saved the program approximately \$2 for every \$1 in program costs, due to the significantly fewer number of arrests for participants in the sanctions docket (Harrell, 2000).

“The use of sanctions in drug court, including the use of jail time, is instrumental in the change in behavior among drug court participants.”

Interestingly, program participants in the sanctions track “said [that] agreeing in advance to the sanctions and the rules for applying penalties gave them a feeling of control.” (Harrell, 2000). Further, in a survey conducted by American University Drug Court Clearinghouse and Technical Assistance Project in 1997, 82% of drug court participants reported that the possibility of sanctions being imposed for non-compliance with the program requirements was a very

important distinction between drug court and prior treatment programs.

Drug testing is also critical to drug court programs in identifying when a participant has relapsed and allowing the drug court to respond to the relapse immediately, both with intensified treatment and services, as well as sanctions. (Marlowe, 1999).

Coerced Treatment as a Recognized Therapeutic Strategy

Drug treatment courts use the leverage of the criminal justice system to improve treatment outcomes. This idea of coerced treatment is not new; the use of civil commitment has been accepted for the treatment of mental illness dating back to British common law. In the 1960’s the civil law was first used to coerce addicts into treatment under the presumption that most addicts are not motivated to seek treatment on their own, and that it is necessary to coerce them into treatment (Inciardi, 1996.) Further expanding the role of civil commitment, the Supreme Court found in *Robinson v. California* (1962) that the state has a right to develop programs involving coerced treatment and that non-compliance could be dealt with using involuntary confinement, including the use of penal sanctions.

As a result of the 1962 Supreme Court decision, numerous programs developed using coercion and the leverage of the criminal justice system in treating drug addicts. The first of these programs, the California Civil Addict Program (CAP) started in 1962. Research found that participants in the CAP were less likely to use drugs and commit crimes than comparison groups even ten years after participation in the program (Anglin, 1988).

In 1997, a dozen drug court practitioners and experts from the drug court and related fields, developed (over a period of eighteen months) *Defining Drug Courts: The Key Components*, establishing practitioner

guidelines recognized and accepted by the drug court field, and adapted in the rules of court in California, Florida and other states. Key Component Number 6 establishes that sanctions are not used to punish participants, or as an end in themselves, but as part of a therapeutic strategy to move participants toward a sober lifestyle through a motivational system of escalating sanctions. These graduated sanctions are ultimately supported by the threat (and imposition where necessary) of short periods of escalating jail time (generally 1 to 7 days), and are critical to the credibility of the “graduated sanctions” model.

Retention Rates for Drug Court are Higher than for Traditional Treatment Programs

The research literature overwhelmingly indicates that retention and completion of treatment programs have a tremendous affect in reducing drug use and criminal behavior (Belenko, 1998; Hubbard, et al., 1989; Nemes, et al.; 1998, Simpson, et al., 1997; Taxman, 1999). Drug courts, where sanctions and incentives play an essential role, are far more successful in retaining participants in treatment for longer periods of time than traditional treatment.

“Retention rates for drug courts (which by definition imply retention in drug treatment) are much greater than the retention rates typically observed for criminal justice offenders specifically, and treatment clients in general... [I]t is estimated that about 60% of those who enter drug courts are still in treatment (primarily outpatient drug-free) after one year... In contrast, [a] recent national evaluation of treatment outcomes found that half of those admitted to outpatient drug-free programs stayed less than three months” (emphasis added) (Belenko, 1998).

Dr. Steven Belenko of Columbia University, the National Center on Addiction and Substance Abuse (CASA), in a revision of his 1998 seminal study of drug courts, reviewed 48 drug court evaluations, and concluded that “drug courts, compared to other treatment programs, provide more comprehensive supervision and monitoring, increase rates of retention in treatment, as well as reduce drug use and criminal behavior while participants are in the drug court program” (Belenko, 1999).

“[T]hree factors appear to separate the successful [treatment] programs from the unsuccessful [treatment] programs. First, successful [treatment] programs employ a therapeutic emphasis on assisting the offender change his/her behavior. Second, successful [treatment] programs are longer in duration, with multiple levels of care, which gives the offender ample time to change his/her behavior. Finally, successful [treatment] programs use the leverage of the criminal justice system to retain the client in treatment and improve outcomes” (emphasis added) (Taxman, 1999).

Drug treatment courts include these three critical factors and have even been identified, along with other coercive treatment programs, by the U.S. Department of Health and Human Services as one of four successful drug and crime [treatment] prevention programs.

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Resources/Contacts:

National Drug Court Institute
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Drug Court Program Office
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www.ojp.usdoj.gov/dcpo/

Background on Pro-Legalization Organizations, Their Leadership and Funding

[The Author, Ms. Sue Rusche is Executive Director of National Families in Action (NFIA), a drug-prevention organization that helps parents prevent drug abuse in their families and communities. This article is adapted from the introductory commentaries of NFIA's Guide to the Drug Legalization Movement, NFIA's Guide to Drug-Related State Ballot Initiatives, available online at www.nationalfamilies.org.]

For just about a decade, a trio of wealthy ideologues have been financing a movement to legalize drugs. These individuals, New York hedge-fund billionaire and philanthropist, George Soros, for-profit University of Phoenix-owner John Sperling, and Progressive Insurance Company CEO Peter Lewis, have contributed large sums of money to the Drug Policy Foundation (DPF), The Lindesmith Center (TLC), the National Organization for the Reform of Marijuana Laws (NORML), and a profusion of similar organizations that have sprung up with grants from DPF, TLC, and NORML via gifts from their generous donors, as well as an initiative campaign to overturn state drug laws. Absent from any of their dialogue is the admission that legalization is their goal.

In the early 1990s Soros began funding the drug-legalization movement, contributing some \$500,000 in 1992-93 to the Drug Policy Foundation. With polls showing that 4 out of 5 Americans oppose drug legalization, however, Soros publicly denied that legalization was his goal. He denies it to this day.

After his initial gifts to the Drug Policy Foundation, he set forth conditions to obtain additional funding from his Open Society Institute: "Come up with an approach that emphasizes treatment and humanitarian endeavors" he said, "hire someone with the political savvy to sit down and negotiate with government officials, and target a few winnable issues, like medical marijuana and the repeal of mandatory minimums." (1)

Legalization leaders got the message. The word "legalization" disappeared from their vocabulary, and a short time later, George Soros gave the first of many multi-million dollar donations to legalization groups. Thus began the reframing of the issue: Advocates no longer want to legalize drugs. They just want to end the drug war.

They no longer want to legalize drugs. They just want us to learn to live with drugs and reduce the harm they do. (2)

They no longer want to legalize heroin. They just want to maintain addicts on heroin, indefinitely. (3)

They no longer want to legalize drugs. They just want to normalize drug use.

They no longer want to legalize drugs. They just want to teach children how to use drugs "safely". (4)

They no longer want to legalize drugs. They just want to recall elected officials in medical marijuana states who prosecute growers for cultivating 100 marijuana plants or more. (5)

Advocates no longer want to legalize drugs. "But behind closed doors," then-Drug Policy Foundation spokesman Dave Fratello told Rolling Stone in 1994, "they're talking about Legalization 2000". (6)

Did they make it? Not yet, but they're well on their way. Between 1994 and the present, Soros hired Ethan Nadelmann to establish The Lindesmith Center at Soros' Open Society Institute. (The Lindesmith Center and the Drug Policy Foundation recently merged.) Soros and Nadelmann viewed the state ballot initiative process as the vehicle to advance their newly reframed goals.

Soros persuaded two long-term funders of legalization groups, John Sperling and Peter Lewis, to help him finance the initiative drive. (Sperling and Lewis say they are doing this because they "hate the drug

laws.”) These three men formed Californians for Medical Rights and hired political operative, Bill Zimmerman, to run it. They contributed some \$3 million to sponsor the nation’s first two medical marijuana initiatives in 1996, California’s Proposition 215 and Arizona’s Proposition 200.

With the success of these first two initiatives, Californians for Medical Rights became Americans for Medical Rights. The latter sponsored medical marijuana initiatives in several states in the 1998, 1999, and 2000 elections. It also created a companion organization, Campaign for New Drug Policies, which began drives to decriminalize all drugs in some states like California and to attack the forfeiture laws in other states. Through these organizations, the funding trio of Soros, Sperling, and Lewis have almost single-handedly financed every drug-related initiative that has passed to date – in states none of them live in (with the exception of Sperling who lives in Arizona).

The extent to which they are willing to manipulate voters to achieve legalization can be seen in remarks made by Americans for Medical Rights’ Bill Zimmerman to the annual conference of the National Organization for the Reform of Marijuana Laws in April 2000. “Our polling shows that only a small minority of Americans wants to change drug policy. . .20 percent at best when you talk about legalizing drugs,” says Zimmerman. “So you need to educate them, help them understand that the position they’re taking is wrong, ill-informed, misguided, whatever.”

Zimmerman, chief strategist behind the successful passage of ballot initiatives that overturn one provision or another of the nation’s drug laws, admonishes others who sponsor more obvious legalization initiatives. Given public opinion, he says, these more straightforward initiatives are not only doomed to fail, but also make his job tougher.

The way “to move people where we want them to go,” he explains is to put forward initiatives that “have been crafted by public opinion polling and focus group research so that we know exactly how far people are willing to go.”

Approaching legalization incrementally, he argues, works. It allows us “to project that ‘we win every time on this issue,’” which is important, he says, “because that puts increasing pressure on the federal government (to repeal the drug laws).”

Today, it takes a minimum of \$1 million to hire consultants to collect enough signatures to place an initiative on the ballot, more to promote it. Americans for Medical Rights and Campaign for New Drug Policies have spent at least that much on each initiative that has passed.

The new tact these groups have taken embraces the public’s support for treating addicts, as seen in the Campaign for New Drug Policies’ successful passage of Proposition 36 in California in November 2000. By playing on this support, Soros and colleagues were able to craft an initiative that expanded provisions of Arizona’s 1996 initiative. [See Policy Paper No. 4, How California’s Prop. 36 Came to Pass, and Policy Paper No. 5, Lessons Learned From California’s Proposition 36, 2001]

Notes

1. Cynthia Cotts, "Smart Money", Rolling Stone, May 5, 1994.
2. Ethan Nadelmann, in a debate at the Vail Valley Institute, 1997.
3. Bill Weinberg, "Challenging the Prohibition Regime: An Interview with Ethan Nadelmann, High Times Magazine, October 1995.
4. Marsha Rosenbaum, Ph.D., Safety First: A Reality-Based Approach to Teens, Drugs, and Drug Education. Ms. Rosenbaum is Director of the Lindesmith Center-West. In a presentation at a Drug Policy Foundation conference in the early 1990s, she told conferees that she does not understand why teachers bring recovering addicts into classrooms to speak to students. "They are failed drug users," she claimed. "We need to bring successful drug users in to speak to students because they can serve as good role models for young people."
5. "Medical Marijuana Backers Target D.A.s with Recalls," Los Angeles Times, February 12, 2001.
6. Cynthia Cotts, Rolling Stone.

Anti Drug Court Propaganda in The Media

Resource
Document



Introduction

The first document is the product of “Common Sense for Drug Policy”, a national pro-legalization organization. It has appeared in the National Review, The New Republic, The Nation, Reason Magazine and The Progressive and the sponsoring organization’s website. The second document is a highly vitriolic advertisement from the “Campaign for New Drug Policies” aimed at actor/activist Martin Sheen for his high-profile defense of Drug Courts and court-ordered rehabilitation programs, as chair of the “NO on Prop.36 Committee” in California.

Legalization proponents have become major critics of Drug Courts and much of what they stand for. This can be seen in the statements made by legalization organization leaders, but also in their publications and their web sites. At first, it is difficult to understand why legalization proponents are so critical of a reform movement that has brought successful treatment to hundreds of thousands of drug abusers. The answer is of course, that if Drug Courts do work, then there is a middle way between criminalization and legalization of the drug abuser, and that legalization isn’t the inevitable solution to the drug abuse problem that some would like us to believe it is.

The two documents enclosed are fair examples of the rhetoric of many national legalization organizations when it comes to Drug Courts. Theirs appears to be a preoccupation with the issue. For example, in “Drug Court Wars”, a 111 page resource book published by “Common Sense for Drug Policy” only two topics out of thirty five have the maximum of seven pages devoted to their subject. Drug Courts is one of the two.

One should not underestimate the legalization movement’s capacity to damage the Drug Court field. They have vast financial resources, excellent public relations skills, and an extraordinary rapport with much of the media. In Hawaii, a recent legalization proposal rejected by the legislature would have prohibited those seeking treatment under the statute from being sent to Drug Court for treatment services. [See Resource Document E: Hawaii: A Case Study of a Successful Challenge to Legalization Legislation, 2001]

In California, Prop.36 proponents, led by the “Campaign for New Drug Policies” attacked Drug Courts on many different fronts. They claimed that Drug Courts were ineffective. They charged that Drug Courts reached proportionately few minorities. They argued that Drug Courts were destroying the adversarial system with its checks on judicial discretion. They claimed that Drug Courts were irrelevant as relatively few drug abusers received treatment through Drug Courts. Many Drug Court practitioners pointed out that these allegations badly distorted the truth, but that did not seem to effect the outcome of the ballot initiative. Prop.36 won by a 20% margin.

Drug Courts: Can We Make Them More Effective?



In recent years, Drug Courts have become a popular, widely praised and rapidly expanding alternative for dealing with drug offenders and sometimes with people charged with nonviolent crimes who are drug users. Drug Courts are an evolving approach that substitutes mandatory treatment for incarceration. Because drug courts are new, much of the research on their effectiveness is recent, incomplete and inconclusive.

There are 700 Drug Courts in operation across the nation. Concerns about their fairness and effectiveness have been raised.

- Providing coerced treatment, at a time when the needs for voluntary treatment are not being met, creates the strange circumstance of someone needing to get arrested to get treatment.
- People who are forced into treatment may not actually need it. They may just be people who use drugs in a non-problematic way who happened to get arrested.
- Drug Courts only rely on abstinence-based treatment. For example, methadone is not available to heroin addicts. In addition, they rely heavily on urine testing rather than focus on whether the person is succeeding in employment, education or family relationships.
- Drug Courts often mandate twelve-step treatment programs that some believe to be an infringement on religious freedom.
- Drug Courts invade the confidentiality of patient and health care provider. The health care provider's client is really the court, prosecutor and probation officer, rather than the person who is receiving drug treatment.
- Drug Courts are creating a separate system of justice for drug offenders not based on the time honored adversarial roles of defense attorney, prosecutor and judge. Therefore, a relapsed patient may end up with much harsher penalties than from a regular court.
- Drug Courts may result in more people being prosecuted than ever, thus expanding harm caused by the drug laws.

The intent to emphasize treatment is commendable. Let's work together to mitigate potential harm.

For more information, visit: www.csdp.org.
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The Arizona Experience and Its Impact on California's Proposition 36

Arizona and California are very different states, with a common experience. Both have been successful targets of initiatives that have limited the judge's traditional control of the probation process and his or her responsibility for overseeing the drug abuser's treatment. Both states are still in the process of sorting out the consequences of those changes and reacting to them. In the case of Arizona, passage of Proposition 200 (Prop.200) took place in 1996, but its implementation is still being challenged in the courts.

My intention here is not to attempt a comprehensive analysis of the Arizona experience, but to suggest how misinformation coming from one state, in this case Arizona, can play an influential role in creating momentum for similar initiatives elsewhere. In January 2000, I visited Phoenix, Arizona, and had the opportunity to talk to criminal justice and treatment professionals concerning Prop.200. I visited several courts impacted by the initiative and over the next year had numerous conversations with individuals involved in the implementation of Prop.200. Anecdotal information from judges, treatment providers probation officers, state judicial officials and others seemed to suggest that mandatory probation without the threat of incarceration was a failure, and that many participants regarded the judge and justice system as irrelevant when they are without the authority to order custody for probation violations.

I also came away with the belief that the Arizona ballot initiative provided little relevant evaluative data for California's initiative debate. Arizona's Prop. 200 was implemented slowly, only after legislative, legal, and ballot challenges had been fought, so very little data was available when Prop.36 was placed on the California ballot. However Prop.200 was still used to mislead California policy makers and voters. Later, the same arguments were to be used in Hawaii with different results. [See Resource Document E, Hawaii: A Case Study of a Successful Challenge to Legalization Legislation, 2001.]

For example, Prop.36 proponents relied heavily on a March 1999 Progress Report of the Arizona Supreme Court, in claiming that the Arizona initiative resulted in cost savings and reductions in drug usage and criminality among Prop. 200 probationers. They even put a statement in the introductory section of the California Prop. 36 ballot initiative, quoting the Arizona Supreme Court's Progress Report that the initiative is "resulting in safer communities and more substance abusing probationers in recovery."

Prop.36 proponents aggressively touted the aforementioned Arizona Supreme Court report, even though the Supreme Court repudiated its own data and alleged cost savings derived from that data one week later in an official News Release. [See attached document, The Arizona Supreme Court News Release.]

Even if one were to accept Prop 36 proponent's claims for Arizona's Prop.200 at face value, they would have little if any relevance for California voters. That same Arizona Supreme Court News Release " dated April 29, 2000, states "There were 2,622 probationers who began participation in DTEF-funded substance abuse treatment during Fiscal Year 1998. Of those, 21 percent or 551 probationers were mandatorily sentenced to probation as prescribed by Proposition 200". [See Arizona Supreme Court News Release, p.1] That means that 79% or four times as many probationers were in coercion based treatment than non-coercion based treatment, under Prop.200. If that were the case, a comparison of the two groups would be critical to making any rational judgement on the success of Prop. 200's non-coercive probation strategy.

Incredibly, the Arizona Supreme Court Progress Report upon which Prop.36 proponents relied made no distinction whatsoever for evaluation purposes between the 21% of probationers "mandated to non-jail sentences" under Prop.200 (569 participants) and the remaining 1,690 probationers in traditional "coercion-based treatment" sent to treatment services enhanced by an infusion of Prop.200 funds. If anything, any success of Arizona's Prop.200 treatment strategy, is attributable to the 79% percent of

Prop.200 probationers who were in traditional “coercion based treatment programs”.

Furthermore, according to the aforementioned progress report, “fifty percent (50%) of Prop.200 funds were put aside for programs that increase and enhance parental involvement and increase education about the serious risks and public health problems caused by the abuse of alcohol or controlled substances”. [Arizona Supreme Court, Administrative Office of the Courts; *Drug Treatment and Education Fund, Legislative Report, Fiscal Year 1997-1998, p.4, March 1999*].

Of Course, that did not prevent California ballot initiative proponents from declaring in their own introduction to Prop.36, that Prop.200 has “already saved state tax payers millions of dollars, and is helping more than 75% of program participants to remain drug free”. And that may be true, but it says nothing about the effectiveness of Arizona’s non-coercive probation strategy. Once again, any success claimed by the aforementioned Arizona progress report reflects more on the effectiveness of the 90% of Prop. 200 funding dedicated to prevention programs and traditional coercion based probationary treatment, than on those relatively few non-coerced probationers receiving approximately 10% of Prop.200 funding.

The use and misuse of information from states allegedly embracing legalization laws is a major concern and one that will need to be addressed if policy makers and the public are to make informed decisions about drug policy reform issues. California was a victim of misleading information from a neighboring state. It will be important in the future that investigative inquiries and scientific evaluations be made into the status of allegedly successful legalization initiatives before any conclusions are reached.



NEWS RELEASE

ARIZONA SUPREME COURT ♦ ADMINISTRATIVE OFFICE OF THE COURTS

For Immediate Release

April 29, 1999

**Contact: John MacDonald
(602) 542-9636**

Follow-Up to Drug Treatment Report

The Drug Treatment and Education Fund (DTEF) Legislative Report, Fiscal Year 1997-1998 recently issued by the Arizona Supreme Court, Administrative Office of the Courts, has generated extensive media coverage. The report relates to the implementation of the treatment provisions required under the Drug Medicalization, Prevention and Control Act passed by a citizen initiative in 1996 (Proposition 200).

The DTEF report is one step in a continuing evaluation process, and it is too early to draw definite conclusions. Caution is in order when considering public policy changes based on the preliminary data contained in the report.

The DTEF report discussed an estimated cost savings figure in some detail, including its calculation. However, the assumptions made when arriving at this figure need to be made clear.

The savings figure was calculated using the cost of prison versus the cost of treatment for 551 probationers who were afforded drug treatment without incarceration pursuant to Proposition 200. There were 2,622 probationers who began participation in DTEF-funded substance abuse treatment during Fiscal Year 1998. Of those, 21 percent – or 551 probationers – were mandatorily sentenced to probation as prescribed by Proposition 200. Probationers from each of Arizona's 15 counties were included in this number, and it should be noted that counties differ in their charging practices concerning the prosecution and adjudication of crimes.

In calculating the cost savings figure, it was assumed that the 551 probationers would have otherwise been sentenced to prison. There is no absolute way to determine exactly what percentage would have been initially prison-bound, or put in prison because of failure to complete probation, absent Proposition 200.

Different assumptions would obviously lead to different cost savings figures. This underscores the fact that, though the DTEF report shows positive results for probation combined with treatment services, caution should be used when basing public policy on the reported cost savings.

Second, some media have misreported the cost of probation supervision, treatment and counseling for drug offenders pursuant to Proposition 200 as \$16.06 per day, per offender. That figure is incorrect.

The report clearly states that in addition to the cost of *probation supervision* of \$16.06 per day for those on intensive probation and \$1.76 per day for those on standard probation, the cost of *treatment and counseling* for the 551 probationers of \$2.1 million must be included in any ultimate cost projection. Some news accounts failed to include the \$2.1 million figure in their analysis.

Arizona's citizens, through the initiative process and the state Legislature, have made it clear that for some drug offenders, incarceration is appropriate, while the rest should be given effective treatment. The DTEF report, when coupled with a March 1999 performance audit by the Arizona Auditor General's Office on adult probation services throughout Arizona, suggest that drug treatment is preferable to incarceration for certain offenders, and that probation combined with effective drug treatment works well.

While the preliminary data contained in the DTEF report is encouraging, there is legitimate concern that the provision prohibiting incarceration upon a violation of probation, such as when a person fails or refuses treatment, may be detrimental to the overall objective.

It is too early to reach any definite conclusions about the benefits or problems of the DTEF program. The report issued last week is preliminary, and the Administrative Office of the Courts will continue to analyze the results of the DTEF program in coming months, and will publish those results as soon as they are available.

HAWAII: A Case Study of a Successful Challenge to Legalization Legislation

Hawaii was recently the target of a legalization proposal that was put forward by the state's Governor, modeled after California's Proposition 36 and strongly supported by national legalization organizations and their leaders. It is a good example of the tactics and strategies that legalization proponents can be expected to resort to in their efforts to pass legalization proposals through state legislatures. It is also a strong reminder of the extraordinary resources available to legalization proponents and their willingness to invest large sums in their quest to pass legalization legislation.

As has been the case with other legalization proposals, the Hawaiian legislation attempted to take the judge out of the treatment and rehabilitation process. The proposal in question limited the discretion of the judge to put an eligible offender in custody, even for a brief period. More importantly, it denied drug courts the right to work with eligible defendants. In the past, prohibitions against the use of Drug Courts have been aimed at keeping more serious offenders out of a Drug Court treatment program, and typically keeping them in custody. This is perhaps the first affirmative prohibition of the use of Drug Courts for participants placed in rehabilitation and intended for treatment. [See attached legislative language, SB NO. 1188, Section 706-C, Exemption from Drug Court.]

The initial legislative proposal was accompanied by a barrage of propaganda, from both state and national legalization organizations aimed at the media, touting the success of the Arizona and California legalization initiatives. This was followed by visits to Hawaii by two of Proposition 36's main spokespersons. They came to Honolulu for press conferences, public rallies and a joint hearing before the legislature.

They relied heavily on reports of alleged successes in Arizona and California after ballot initiative victories. They claimed that according to a 1999 Arizona Supreme Court progress report, Arizona's Proposition 200 was saving the state vast amounts of money while reducing criminality and drug abuse. As to California's Prop.36, they claimed that even the strongest former opponents lauded its benefits. In most cases, their words were taken at face value. Even those who knew better had no information about the Arizona and California propositions to refute their statements.

It was clear from the start, that opponents of the bill faced a severe uphill battle. By late February 2001, different versions of the Governor's bill had passed both houses of the legislature. At that point, both Hawaii's Drug Courts and Peter Claire, Honolulu's District Attorney requested that CPSC visit Hawaii to set the record straight. I spent five days talking to the media, legislative leaders, members of the judiciary, and a joint committee of the legislature. Fortunately a joint committee of the Hawaiian Senate finally rejected the legislation based on the testimony that others and I were able to provide.

As it turned out, the Arizona Supreme Court Progress Report, so vigorously promoted by the legalization proponents had been followed a week later with a press release that all but repudiated the claims of the progress report. Both the data reported, the assumptions made, and the conclusions reached were described as unsubstantiated or preliminary [See Resource Document D, The Arizona Experience and Its Impact on California's Prop.36, 2001]

What could be said about California's Prop.36's impact except that it would not even be implemented until July of 2001, several months away. Questions about the financial soundness of the State Legislative Analyst's projections continue to be raised by many. The Hawaiian State Senate rightly concluded that it was too early to reach any conclusions based on the evidence before it. Further, they noted that the Hawaiian Judiciary and related agencies were scheduled for a major review of their sentencing protocols and alternatives to treatment over the summer. The Hawaiian Judiciary was proposing the establishment of a state wide Drug Court System that would deal with all drug offenders and provide treatment services and accountability for all drug offenders living in the community. They had every

confidence that that exercise, to be overseen by national experts, would help craft a bill satisfactory to everyone. And that is how it stood, two weeks before the legislative session was to close on April 30th, 2001. The House supported the Governor's bill and the Senate opposed it. The bill was effectively dead for the legislative session.

All of a sudden, legalization proponents launched an extraordinary campaign in the media to force the hand of Senate opponents of the bill. Television advertisements saturated the Honolulu airwaves, demanding that the legislature pass the bill as written. Letters to the editor appeared in local newspapers and individual legislators were flooded with phone calls, letters, and emails demanding that they follow the people's will. Senators felt the full force of legalization proponent's vast resources targeted against them. In all, \$30,000 was spent in a matter of days on an almost unheard of media blitz that almost won the day for media proponents. Fortunately, the Senate held firm, the bill was not resurrected, and the review of Hawaii's sentencing policies, still scheduled for the summer, will likely yield a substantial reform bill by next year's legislative session.

However, what was learned by the nation was equally important. Legalization proponents will take their challenge to state legislatures. They will mass their allies, and flood the media with propaganda, and then if all else fails, will attempt to use extraordinary funding to overpower their opponents. It almost happened in Hawaii, and will no doubt be attempted in many states in the coming years.

Hawaii S.B. No. 1188 Section 706-C

Exemption from drug court.

(1) Notwithstanding any law to the contrary, any person who is required to be sentenced to probation under section 706-A shall not be placed in drug court unless that person has violated a term of probation. Any person who is not subjected to or is exempted from section 706-A may be placed in drug court.

(2) For purposes of this section, "drug court" means the process by which prosecution is deferred based on stipulated facts and by which the case is dismissed prior to the prosecution with the agreement of the prosecutor if the defendant adequately complies with the supervision of the court.

Conferences of Chief Justices & State Court Administrators Joint Resolution

Resource
Document

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An extraordinary document has taken its place in the history of the *Rational* Drug Policy Reform Movement. It is the work of both the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators. CCJ Resolution 22 and COSCA Resolution 4 jointly endorse the concept of Drug Courts and Problem-Solving Courts structured on the Drug Court model. In unanimously passing the joint resolution, all fifty Chief Justices and State Court Administrators have made clear their intention of making the Drug Court concept the lynchpin of the criminal courts in the future.

CCJ and COSCA recognized through their resolution that “well-functioning Drug Courts represent the best practice” of the problem-solving court model and resolved to “advance the application and methods of Drug Courts into ongoing court operations”. With that declaration, the judicial leadership of this nation put itself on record as supporting the integration of Drug Courts and Drug Court systems into mainstream court operations.

Further the Chief Justices and State Court Administrators resolved to promote “the broad integration over the next decade of the principles and methods employed in Problem-Solving Courts into the administration of justice...” and to “advocate for the resources necessary to advance and apply the principles of Problem-Solving Courts in the general courts systems of the various states”.

The Department of Justice reports that there are over eleven hundred (1100) Drug Courts, both existing and in the planning stages across the United States. American University’s Drug Court Clearinghouse reports that some 225,000 individuals have entered Drug Court programs and their retention rate in Drug Court is a remarkable 67%. It would seem that Drug Courts are well on their way to fulfilling the joint resolution’s vision of them as the mainstream approach to the drug abuser, and to other criminal populations as well, over the next decade.

Conference of Chief Justices Conference of State Court Administrators

CCJ Resolution 22
COSCA Resolution 4

In Support of Problem-Solving Courts

WHEREAS, the Conference of Chief Justices and the Conference of State Court Administrators appointed a Joint Task Force to consider the policy and administrative implications of the courts and special calendars that utilize the principles of therapeutic jurisprudence and to advance strategies, policies and recommendations on the future of these courts; and

WHEREAS, these courts and special calendars have been referred to by various names, including problem-solving, accountability, behavior justice, therapeutic, problem oriented, collaborative justice, outcome oriented and constructive intervention courts; and

WHEREAS, the finding of the Joint Task Force include the following:

- The public and other branches of government are looking to courts to address certain complex social issues and problems, such as recidivism, that they feel are not most effectively addressed by the traditional legal process;
- A set of procedures and processes are required to address these issues and problems that are distinct from traditional civil and criminal adjudication;
- A focus on remedies is required to address these issues and problems in addition to the determination of fact and issues of law;
- The unique nature of the procedures and processes encourages the establishment of dedicated court calendars;
- There has been a rapid proliferation of drug courts and calendars throughout most of the various states;
- There is now evidence of broad community and political support and increasing state and local government funding for these initiatives;
- There are principles and methods grounded in therapeutic jurisprudence, including integration of treatment services with judicial case processing, ongoing judicial intervention, close monitoring of and immediate response to behavior, multidisciplinary involvement, and collaboration with community-based and government organizations. These principles and methods are now being employed in these newly arising courts and calendars, and they advance the application of the trial court performance standards and the public trust and confidence initiative; and
- Well-functioning drug courts represent the best practice of these principles and methods;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators hereby agree to:

1. Call these new courts and calendars “Problem-Solving Courts,” recognizing that courts have always been involved in attempting to resolve disputes and problems in society, but understanding that the collaborative nature of these new efforts deserves recognition.
2. Take steps, nationally and locally, to expand the principles and methods of well-functioning drug courts into ongoing court operations.

3. Advance the careful study and evaluation of the principles and methods employed in problem-solving courts and their application to other significant issues facing state courts.
4. Encourage, where appropriate, the broad integration over the next decade of the principles and methods employed in the problem-solving courts into the administration of justice to improve court processes and outcomes while preserving the rule of law, enhancing judicial effectiveness, and meeting the needs and expectations of litigants, victims and the community.
5. Support national and local education and training on the principles and methods employed in problem-solving courts and on collaboration with other community and government agencies and organizations.
6. Advocate for the resources necessary to advance and apply the principles and methods of problem-solving courts in the general court systems of the various states.
7. Establish a National Agenda consistent with this resolution that includes the following actions;
 - a. Request that the CCJ/COSCA Government Affairs Committee work with the Department of Health and Human Services to direct treatment funds to the state courts.
 - b. Request that the National Center for State Courts initiate with other organizations and associations a collaborative process to develop principles and methods for other types of courts and calendars similar to the *10 Key Drug Court Components*, published by the Drug Courts Program Office, which define effective drug courts.
 - c. Encourage the National Center for State Courts Best Practices Institute to examine the principles and methods of these problem-solving courts.
 - d. Convene a national conference or regional conferences to educate the Conference of Chief Justices and Conference of State Court Administrators and, if appropriate, other policy leaders on the issues raised by the growing problem-solving court movement.
 - e. Continue a Task Force to oversee and advise on the implementation of this resolution, suggest action steps, and model the collaborative process by including other associations and interested groups.