NDCI COMMENTARY

BALLOT INITIATIVES — WOLVES IN SHEEP'S CLOTHING

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This isn't a debate over whether drug abusers should be given jail or treatment. It's a choice between treatment that works and treatment that doesn't.[1]

—Martin Sheen

Despite the fact that drug courts have proliferated throughout the country for more than a decade and have successfully enabled substance abusing offenders to reclaim their lives, proponents of legalization believe the use of therapeutic jurisprudence is too harsh and unwarranted. This commentary provides the reader with background information on three such proponents who founded the Drug Policy Alliance and the Campaign For New Drug Policies to further their agenda of legalization through the introduction of initiatives and propositions in multiple states throughout the country. Additionally, this commentary examines not only the propositions and initiatives that have passed in states such as Arizona and California but also those that were introduced and were either defeated or withdrawn from the ballots in a host of other states.

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[1] Sheen, M. (2000, August 7). Prop. 36 would devastate the drug court system. *The Los Angeles Times.* Los Angeles, CA.

ARTICLE SUMMARIES

STATE BALLOT INITIATIVES THREATEN DRUG COURT

[13] Several recent state ballot initiatives offer treatment without judicial oversight or offender accountability, effectively eviscerating drug courts.

SPECIFIC INITIATIVES ADDRESSED

[14] Initiatives have been passed in Arizona, California, and the District of Columbia; and defeated or delayed in Florida, Michigan, Missouri, and Ohio.

INTRODUCTION

Drug courts have proliferated throughout the country since 1989 and have successfully injected compassion into the criminal justice system without compromising its ability to ensure that judicial monitoring and offender accountability are administered effectively. They provide communities across the nation with an exceptional opportunity to reduce drug abuse and its concomitant crime substantially and are committed to increasing public safety, reducing recidivism rates and supporting the fair administration of justice. A defendant is required to submit to random drug testing several times each week, and immediate accountability and a one-on-one relationship with the judge are used to ensure compliance within the drug court system. Through all of these hallmarks of drug courts, substance-abusing defendants are able to become productive members of society, while public safety is increased dramatically.

Drug court programs are holistic in nature, treating not only a defendant's drug-using lifestyle but also offering a host of ancillary services which may include therapy sessions, educational and vocational classes, housing assistance and parenting seminars. The success of drug courts has been well documented; according to a National Institute of Justice study released in 2003, from a nation-wide sample of 1,700 drug court graduates, only 16.4 percent had been rearrested and charged with a felony offense within one year of program graduation (Roman, Townsend, & Bhati, 2003). They are the original form of therapeutic jurisprudence and drug reform policy.

Not only have drug courts succeeded in reducing recidivism rates nationwide, but they also have proven to be more cost-effective than the traditional system because there is an early investment in treatment that obviates the need for repeated investments in incarceration precipitated by

recidivism. A study of six drug courts in Washington State estimated that the average drug court participant produced $6,779 in benefits that stemmed from the estimated 13 percent reductions in recidivism (Washington State Institute for Public Policy, 2003). In a study of New York State's drug courts, an estimated $254 million in incarceration costs were saved by diverting 18,000 non-violent drug offenders into treatment (Rempel, et al., 2003). A study of three adult drug courts in California documented avoided costs averaging $200,000 annual per court per 100 participants (NPC Research, Inc. & Judicial Council of California, 2002). Finally, a cost benefit analysis of the Multnomah County, OR drug court program indicated that the drug court model saved an average of $2,328.89 per year for each participant, when compared with "doing business as usual" (Carey & Finigan, 2003).

Since a primary goal of drug court is to treat rather than incarcerate defendants, immediate sanctions (including jail) and incentives are critical to ensuring the success of the drug court participant. In fact, evaluations have shown that the immediacy with which sanctions for non-compliance are employed is a key factor in motivating the participant to become substance abuse and crime free (Satel, 1999).

[13] "We know that drug courts outperform virtually all other strategies that have been attempted for drug-involved offenders" (Marlowe, DeMatteo, & Festinger, 2003). Yet, as with any effective program, there are critics. Consequently, these critics are now seeking to replace drug courts with various state ballot initiatives and propositions across the country. These initiatives, while admirable in their attempts to infuse compassion into the criminal justice system by allowing substance-dependant defendants to seek help for their addictions, mistakenly do so under the guise of therapeutic jurisprudence. The language of the initiatives is couched in artfully dangerous and misleading terms and falls short on accountability and sanctions. "Without

accountability and consequences, drug abusers have little incentive to change their behavior or take treatment seriously" (Sheen, 2000). These are veiled attempts at legalization, and the public should be alerted to the true motives of those who are backing them.

Financed by a trio of wealthy businessmen, these initiatives are extraordinarily misleading as to their scope and application. The trio consists of George Soros, a financier from the east coast, John Sperling, the founder of the University Phoenix and George Lewis, an insurance executive from the mid-west, and they have formed the Drug Policy Alliance and the Campaign for New Drug Policies to further their agenda. They have publicly waged a "war on the war on drugs" (Bank, 2001). They believe that "people should not be punished for what they put in their bodies" and have admitted that these initiatives are an incremental approach to the legalization of drugs (Staff writer, 2002; National Families in Action).

The Bush Administration, through Office of National Drug Control Policy (ONDCP) Director John Walters and then-Drug Enforcement Administration Administrator Asa Hutchinson, has denounced these initiatives and has taken every opportunity to reveal their true aim. Administrator Hutchinson announced that the initiative movement effectively undermines the drug court movement and removes any judicial discretion that would hold offenders accountable for non-compliance with their treatment regimen and that the ultimate goal of the backers is drug legalization (Staff writer, 2002). Similarly, members of the former Clinton Administration also have condemned the initiative movement and have criticized the campaign as a "disingenuous effort to promote drug use." Former ONDCP Director General Barry McCaffrey (ret.) stated that "whether they want to admit it or not, the wealthy trio are trying to normalize drug use in America" (Bank, 2001).

True therapeutic jurisprudence implies that defendants are monitored by the judicial system and that consequences are invoked for any failure to comply with the regimented treatment programs. This, however, is not the case where the initiatives are concerned. In fact, the initiatives are void of the critical judicial monitoring, graduated sanctions and mandatory drug testing that have proven to be the keys to success in drug court, helping more than 400,000 drug-dependant criminal defendants in the United States regain their lives and become healthy, productive citizens.

Soros, Sperling and Lewis would have the public believe that jails and prisons throughout each state are overflowing with those who are being punished for simply being addicted to drugs. They would also have the public believe that the only viable option to ensure that substance-abusing defendants charged with drug or drug-related crimes receive the treatment they need is to forego prosecution. In fact, their assertion is that a majority of those in prison or jail for drug offenses are non-violent, first-time offenders, convicted of possession of minuscule amounts of illegal substances (See generally, Bank, 2001).

However, what they fail to divulge is that the percentage of those initially incarcerated for drug possession charges is actually very minute, as most are habitual offenders and traffickers who have plea bargained down to a possession charge. In 1999, more than 32,000 suspected drug offenders were referred to U.S. Attorneys' Offices throughout the country. Of these, 97 percent were investigated for drug trafficking. Clearly, a majority of those in the prison system are not the recreational, non-violent drug users that these legalizers would have the public believe (McDonough, 2002).

Yet, these wealthy backers will continue to further their legalization agenda by introducing ballot initiatives to various states throughout America. One by one, they plan to

spend millions of their own dollars spreading false information to citizens who do not want to punish, but rather treat, drug-dependant, non-violent offenders. The following are some of the success and failures of ballot initiatives in the recent past.

INITIATIVES

Arizona – "Drug Medicalization, Prevention and Control Act of 1996" (Proposition 200), Senate Bill 1373, "Drug Medicalization, Prevention and Control Act of 2002" and House Concurrent Resolution 2013

[14] In 1996, Arizona was the first state to implement a statewide treatment initiative mandating treatment over jail. This initiative, the Drug Medicalization, Prevention and Control Act, also known as Proposition 200, essentially decimated the traditional drug court system by preventing judges from using incarceration as a sanction. Moreover, Proposition 200 requires that any first or second-time, non-violent offender convicted of personal possession or use of a controlled substance be sentenced to a term of probation and participate in a drug treatment or education program as a condition of probation. If the offender violates the terms of his probation and continues to use a controlled substance, the court is permitted to add additional conditions to his probation, including intensified drug treatment, home arrest or any other appropriate condition, with the exception of incarceration.

Despite the fact that the voters passed Proposition 200, the Arizona legislature attempted to circumvent the Proposition by passing Senate Bill 1373, which would have restored the court's ability to use incarceration as a sanction for first-time drug offenders who have violated the terms of their probation. While the legislature did pass this bill, a citizens' group, "The People Have Spoken," ultimately prevented it from being codified into law by placing two

referenda on the 1998 ballot. These measures received a majority of the votes.

While Proposition 200 prevented the courts from incarcerating those convicted of personal possession or use of a controlled substance, it did not bar them from incarcerating those offenders charged with possession of drug paraphernalia. Prosecutors across the state capitalized on this omission and those convicted of possession of drug paraphernalia were incarcerated. As a result, "The People Have Spoken" placed another referendum on the November, 2002 ballot, entitled "An Initiative Measure: Drug Medicalization, Prevention and Control Act of 2002."

This initiative, among other things, amended Proposition 200 to state that any first or second-time, non-violent offender convicted of personal use or possession of a controlled substance or drug paraphernalia is eligible for probation and cannot be incarcerated. It also provided that a civil penalty, rather than a criminal penalty, would be imposed for possession of up to two ounces of marijuana. In direct opposition to this initiative, the 45th legislature in the State of Arizona added a referendum, House Concurrent Resolution 2013, to the 2002 ballot that would allow the courts to impose a sanction of incarceration for those offenders who refuse to participate in drug treatment programs as a condition of probation. In a victory for drug courts, House Concurrent Resolution 2013 was passed while the Drug Medicalization, Prevention and Control Act of 2002 was rejected.

California – "The Substance Abuse and Crime Prevention Act" (Proposition 36)

In 2000, 61 percent of the voters in California approved Proposition 36, amid heated opposition from many fronts that included treatment, drug court, law enforcement and other allied professionals. Although some drug courts

have been able to co-exist with these courts, a handful have closed and some have been almost completely eviscerated by them. Proposition 36 courts are for first and second-time, non-violent, drug possession offenders, where they will get treatment instead of incarceration. One thing to note is that the term, "first or second-time offenders" refers to convictions for offenses occurring after July 1, 2001, blatantly disregarding a potential host of prior criminal offenses committed prior to that date.

The court cannot impose incarceration as a sanction for non-compliance. Moreover, the Proposition reads that if an offender does not "complete" two courses of treatment and is convicted for a third time, he or she may be subject to an immediate jail sentence. However, what it fails to indicate is that the jail sentence that can be imposed is limited to a mere 30 days. The offenders really do not have to "complete" a course of treatment but rather must participate in a course of treatment and if arrested for yet a third offense, only face a 30-day jail sentence.

Finally, the Proposition fails to establish minimum treatment criteria, guidelines and standards, and the monies for it are not to be used to drug test offenders in the program. Fortunately, those opposed to the Proposition have been successful in securing state funding to drug test Proposition 36 participants.

Early reports of Proposition 36 courts' effectiveness indicate that the Proposition fails at least one-half of those it purports to help. One survey indicated that 50 percent of drug offenders in Proposition 36 court either never appeared for treatment or did not complete treatment. "They're back out on the street using drugs again, committing crimes again, being re-arrested and recycled through" the system (Rusche, 2002). For example, the *LA Times* reported that an offender enrolled in a Proposition 36 court in Burbank ran a red light while under the influence of methamphetamines, his drug of

choice, killing a woman and her two-year old child (Carter, 2002).

District of Columbia – "Treatment Instead of Jail For Certain Non-violent Drug Offenders Initiative of 2002" (Initiative 62)

In November of 2002, 78 percent of the citizens in the District of Columbia voted to approve Initiative 62 entitled, "Treatment Instead of Jail For Certain Non-Violent Drug Offenders." Initiative 62 reads that any defendant charged with possession or use of a controlled substance, or who is on parole or probation for a drug-related offense, shall be afforded the opportunity to opt for substance abuse treatment, which cannot last for a period longer than 18-months, in lieu of jail.

While this Initiative is similar to those listed above in that it delineates that incarceration can never be used as a sanction, it has a marked contrast, as those who are charged with possession or use of a Schedule I narcotic, which includes marijuana and heroin, are not eligible for this program. However, those charged with possession or use of a Schedule II narcotic, which includes cocaine, are eligible for this program.

Defendants opting to receive treatment under Initiative 62 may be subject to random drug testing but are not required to waive any confidentiality rights, and, therefore, the treatment provider cannot inform the court of the test results. However, if the treatment provider finds that the defendant is not complying with the prescribed treatment plan, he or she may bring this to the attention of an ombudsman's office, which will handle any dispute that the defendant and treatment provider may have. The defendant will only appear in court again if a successful mediation cannot be reached through the ombudsman's office. At this time, the court is permitted to modify the treatment program,

or expel the defendant from the program, but, again, at no time can incarceration be used as a sanction. Additionally, there are no guidelines to determine what kind of behavior warrants being expelled from the program. Expulsion is ultimately up to the discretion of the judge, who is not involved extensively with each case, as the Initiative only provides that a defendant may be removed if he or she poses a danger to society, has disrupted the program or is not amenable to treatment.

While there is no standard that defines successful completion, Initiative 62 provides that if the defendant successfully completes the treatment program, the charges against him or her will be dropped and his or her record will be expunged.

Again, while there certainly are similarities between Initiative 62 and the other propositions and initiatives, perhaps the most startling difference was brought to light in the court hearing that the District of Columbia brought against the District of Columbia Board of Elections and Ethics. The central issue in this hearing hinged upon whether or not Initiative 62 required the District of Columbia to appropriate funding and whether or not the summary statement which appeared on the ballot misled the voters.

The District of Columbia Board of Elections and Ethics contended that the Initiative does not state that the District is required to allocate any funds to support the implementation of Initiative 62. If an eligible defendant requests treatment but the District does not have the resources to pay for this treatment, then the defendant is simply entitled to forego incarceration without receiving treatment.

The District of Columbia, on the other hand, contended that because the summary statement provided that certain non-violent offenders are entitled to treatment instead of incarceration, that the District is therefore forced to pay for

this treatment. Otherwise, the rights of those non-violent offenders who are eligible for treatment have been violated. Further, the District of Columbia asserted that the summary statement did not state that if the District could not allocate funding toward Initiative 62 that the defendant would simply go free without treatment and therefore misled the voters.

Despite the fact that Initiative 62 was passed by an overwhelming majority, D.C. Superior Court judge, Jeanette Clark ruled in favor of the District of Columbia and rejected the legality of the Initiative.

Florida – "Right to Treatment and Rehabilitation for Nonviolent Drug Offenses"

Voters in the State of Florida narrowly escaped having to vote on the ballot initiative in their state, since there were a host of legal challenges that ultimately prevented it from getting on the ballot. All initiatives in Florida must be presented as constitutional amendments, requiring the Florida Supreme Court to review them before placing them on the ballot. Because of the length of time that it took the supreme court to rule on the matter, ultimately declaring that the initiative was constitutional, the proponents could not collect enough signatures to place the initiative on the state's ballot. Although the initiative was not on the ballot in 2002, proponents have vowed to be back in that state in 2004.

Modeled after California's Proposition 36 (see above), the Florida initiative provided that first and second-time, non-violent offenders could opt for treatment instead of incarceration. Similar to California, offenders who had violence in their pasts may have been eligible since the term, "first or second-time offenders" refers to convictions for offenses occurring after the date that the program was to have begun (*i.e.*, July 1, 2003). Additionally, like the California Proposition, the Florida initiative did not establish minimum treatment criteria, guidelines and standards, and the monies

for it were not to be used to drug test offenders in the program.

Michigan – "Drug Treatment Ballot Initiative"

The initiative that proponents hoped to have slated for the State of Michigan's ballot in 2002, also modeled after California's Proposition 36, did not make it on the ballot. Although the sponsors of the initiative secured the required number of signatures, the Michigan Court of Appeals ruled that it contained a "technical error," making it ineligible for inclusion on the 2002 ballot. Opponents of the initiative, many of whom were drug court practitioners, pursued this technical violation based on the fact that the law requires petitions for constitutional amendments to list the section of the constitution that will be altered by the proposed amendments. The proponents of the initiative had failed to follow this procedure. However, much like the case in Florida, the proponents have vowed to return to the state in the near future.

The initiative is virtually identical to California's Proposition 36 (see above) except that the offender would, within a judge's discretion, be eligible to face a jail term of no more than 90 days, as opposed to 30 days in California, for a third offense while in treatment. Furthermore, Michigan's initiative would have eviscerated most of the state's mandatory minimum sentences for drug offenders and would have set only a 20-year minimum for major traffickers.

Missouri – "Drug Addiction Treatment Initiative"

Voters in the state of Missouri were never faced with the Missouri Drug Addiction Treatment Initiative, as it was withdrawn from the November, 2002 ballot. The underlying premise for this initiative was similar to that of the other initiatives and propositions in that it stated that any first and second-time non-violent offender charged with illegal

possession or use of a controlled substance could request treatment rather than incarceration. In the event that the defendant did not successfully complete the treatment program, he or she would have ultimately faced a maximum of 90 days of incarceration, regardless of the original charges. It also specifically provided that a person's parole could not be revoked for illegal possession of a narcotic, unless the parolee plead guilty to, or was convicted of, a violent felony, had committed more than one possession offense *and* concurrently committed a misdemeanor that was not related to drug use.

Despite its apparent similarities, there is also a stark contrast between this and other initiatives that appeared on the 2002 ballots. The Missouri Drug Addiction Treatment Initiative is the only one of its kind that would have permitted a judge to use a maximum of two days of incarceration as a sanction for the third instance of relapse.

Due to the fact that proponents of this initiative did not obtain enough signatures, the initiative was not certified and they were forced to withdraw it from the 2002 ballot. In spite of this defeat, however, proponents plan to reintroduce the referendum in the next general election.

Ohio – "The Ohio Drug Treatment Initiative – Issue 1"

The proposed constitutional amendment in Ohio, Issue 1, was rejected by 70 percent of the voters on the November, 2002 ballot, due in large part to the efforts of the Ohioans Against Unsafe Drug Laws, a coalition of more than 18 organizations that banned together to combat this initiative. Had this amendment passed, it would have allocated $38 million every year, for six years, regardless of the effectiveness of the program. This amendment did not require that any of the funds allocated be used for drug testing and nothing short of another constitutional amendment would allow any changes to be made.

Issue 1, like the other initiatives and propositions, provided that any first or second-time, non-violent offender facing charges of possession or use of an illegal substance would have been eligible for, and could have requested, treatment in lieu of jail. After the judge would have deemed the offender eligible, the offender would have been admitted to a treatment program and subsequently assessed. If the offender failed to adhere to his or her treatment program, the judge would have been permitted to amend the treatment regimen but would have been precluded, by law, from incarcerating the defendant as a sanction for non-compliance, unless the defendant was removed from the treatment program.

Like the other initiatives, there were no standards in place that would have dictated when the defendant could have been removed from the program. If a defendant was terminated from the treatment program, the judge would only have been permitted to sentence him or her to a maximum of 90 days of incarceration, regardless of the original offense. Conversely, if a defendant successfully completed the treatment program – and, again, there was nothing that defined successful completion – his or her record may have been expunged and sealed.

CONCLUSION

Clearly, the initiatives and propositions limit the power and effectiveness of drug courts, which have been proven to be successful in the fight against drug abuse and crime, and the fact that the proponents will not work with drug court professionals in drafting the initiatives, shows their true goal, legalization. Drug courts provide precisely what the propositions fail to deliver – court-supervised treatment with regular drug testing and consequences to those offenders who do not comply with treatment. This is the proper combination to rehabilitate offenders, increase public safety and restore human dignity.

It takes several millions of dollars to hire consultants to collect enough signatures to place an initiative on the ballot and to promote it. Citizens, like those in the drug court movement, without those means have lost their voice, while being forced to cede to those who have the power of the purse.

There are a host of issues that the initiatives fail to address. However, without the means to effectively get the word out to the public, the wealthy backers of the initiatives leave citizens in the various jurisdictions with the distorted impression that nothing, short of passing the proposed initiatives, can be, and is being, done to treat the needs of substance-abusing offenders while reducing the cost to the public and keeping drug offenders out of jail. Rather than dealing with the immediate problem at hand, which is to deal with, and treat, the substance-abusing offender while keeping the community safe, these initiatives are ultimately a disguised attempt to legalize drugs, cost the taxpayers in the respective states more money, ignore public safety issues and provide addicts with yet another excuse to escape facing their addictions.

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