GETTING TO THE ROOTS OF JUDGES’ OPPOSITION TO DRUG TREATMENT INITIATIVES

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One of the first judges to interpret California’s drug treatment initiative called the law “a bunch of bull, B-U-L-L, capitalized and underlined.”1 Most of his colleagues on the bench seem to agree. This article explores why judges—who traditionally have fought long and hard for rehabilitation and the ability to avoid mandatory minimum sentences—have vociferously opposed drug treatment statutes.

In 2000, Californians enacted Proposition 36 (Prop. 36), a law similar to one approved by voters in Arizona four years earlier.2 Voters in the District of Columbia recently enacted an initiative virtually identical to Prop. 36, and Florida will have a chance to adopt a similar statute in 2004.3 The initiatives represent a new tack in the “War on Drugs.”4 Rather than punishment, the laws require that individuals convicted of use or possession of drugs for personal use must be given probation and drug treatment.5 Under no circumstances may a jail or prison term be imposed when the defendant is initially sentenced to probation.6

Given these salutary purposes, why would any judge oppose such a law? The simplest answer is that the drug initiatives decrease judges’ power. Judges have traditionally reacted with hostility to such laws because past statutes deprived them of the power to reduce punishment, whereas the current treatment initiatives force a reduction in punishment. Although in this respect the drug treatment initiatives are unique in Anglo-American history, the current reactions of judges have antecedents stretching back to the Middle Ages.

A more complex answer requires an examination of precisely what power was taken from judges—the authority to impose imprisonment. It is the deprivation of this power, above all, that lies at the root of judges’ opposition to drug treatment initiatives.

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4. Former President Richard Nixon is credited with coining the term “War on Drugs” in 1973 when he declared an “all out global war on the drug menace.” Douglas B. Marlowe, Effective Strategies for Intervening with Drug Abusing Offenders, 47 Vill. L. Rev. 989, 992 n. 15 (2002).
6. Id. “[A] court may not impose incarceration as an additional condition of probation.” Id. Even after a defendant violates probation, a custodial sentence generally may not be imposed until the defendant’s third violation. Id. § 1210.1(e).
The United States pioneered imprisonment as a sanction, and it is almost heretical to judges today that they should be stripped of the power to jail. Additionally, the inability to incarcerate is fundamentally at odds with many judges’ preferred method of rehabilitation: Drug courts. By barring judges from imposing jail sentences as “shock incarceration,” an essential weapon in drug courts, drug initiatives deprive judges of their sword of Damocles. This hostility is exacerbated by the fact that the initiatives also require judges to admit into treatment severely addicted persons whom they would have found unamenable to drug court, and then restrict the ability of judges to kick drug addicts out of programs when they relapse.

The first part of this article will examine the historical reactions of judges to encroachments on their power, both in England and America. Judges have always found a way to stake out independence in sentencing defendants, providing current judges with a rich background to strive for freedom in decision-making. Also covered will be how judges in the United States became accustomed to having jail as an available punishment, making its subsequent elimination by the drug initiatives seem almost un-American.

The second part of the article will review how judges’ power over sentencing was reduced starting in the 1970s, focusing on California, home of the biggest battlefield over judicial discretion in administering Prop. 36. Although the diminution of power was uniformly directed at judges’ authority to reduce sentences, this set the stage for the drug initiatives, which take away the judges’ power to increase sentences.

The third part of the article will trace the development and enactment of the drug treatment initiatives—in particular Prop. 36. The perceived need for the new law, judges’ spirited opposition to its approval, and the successful campaign that got the voters to endorse the initiative will be analyzed. The judges’ objections to the law during the campaign provided an accurate preview of their subsequent efforts to evade the statute once it was enacted.

The fourth part of the article will discuss judges’ attempts to avoid the restrictions foisted on them by Prop. 36. Actual cases litigated in Los Angeles County courts will be used as vivid examples of judges struggling to break free from the new limits on their power. From interpreting the statute’s disqualifying factors broadly to exclude defendants from treatment, to using the subterfuge of refusing to release defendants on bail as a substitute for “shock incarceration,” judges have resorted to ingenious devices to preserve their power—schemes of which their common law ancestors would have been proud. Currently, judges’ attempts to tailor the drug initiative into the drug court model are largely tied up in the appellate courts, with the outcome dictating the degree to which judges’ power has been effectively corralled by the drug initiative.

Finally, the fifth part of the article will elaborate on judges’ motivations for opposing the initiatives, concentrating on the judicial tradition of independence in sentencing, judges’ addiction to imprisonment as a sanction, and the drug court hostility to the new laws. This section will also assess what the future holds for the drug initiatives.

The article will conclude that the drive for independence is so ingrained in the judiciary that temperance of judges’ opposition to the initiatives does not appear to be in the offing. Likewise, as long as drug court judges are assigned to administer drug-treatment-initiative-courts, as has been the practice in California, the judges’ dissatisfaction with the initiatives’ constraints will continue. In the end, however, if the drug initiatives are successful in rehabilitating addicts without incarceration, this will go a long way toward assuaging opposition. Because the early indications of the initiatives enacted in Arizona and California point to success, considerable hope exists for the future of the laws in these states, and in any other jurisdictions where similar statutes are enacted.

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7. California’s Prop. 36 has been characterized as the “granddaddy” of the drug treatment initiatives because of its vast impact. Peter Schrag, Declaring War on the Drug War [¶ 4] <http://www.prospect.org/print/V11/21/schrag-p.html> (accessed Nov. 16, 2003). This article will thus concentrate on California’s experience with judges’ power and the reaction of judges to Prop. 36.