

## One Step at a Time: Reforming Drug Diversion Programs in California

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### INTRODUCTION

In 1972, California allowed nonviolent drug offenders to complete treatment and rehabilitation as a substitute for jail time.<sup>1</sup> Since then, California has expanded its drug diversion programs<sup>2</sup> in a couple of ways.<sup>3</sup> Recently, Californians had an opportunity to expand and improve drug diversion programs by voting in favor of the Nonviolent Offender Rehabilitation Act (hereinafter “Proposition 5”).<sup>4</sup> Proposition 5 sought to build upon the foundation laid by the Substance Abuse and Crime Prevention Act of 2000 (hereinafter “Proposition 36”) and also further improve and fund drug diversion programs in California.<sup>5</sup>

While the existing diversion programs are generally successful, the programs need help to further treatment goals and alleviate the state’s current budgetary and prison population

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<sup>1</sup> Meghan Porter, Comment, *Proposition 36: Ignoring Amenability and Avoiding Accountability*, 21 *BYU J. PUB. L.* 531, 533 (2007).

<sup>2</sup> Drug diversion programs divert a drug offender from prison and place him into a treatment program. California Campaign for New Drug Policies, Drug Courts/Deferred Entry and Proposition 36, Nov. 2000, <http://www.drugreform.org/prop36/pdf/drugcourts.pdf>.

<sup>3</sup> California expanded drug diversion programs with the creation of adult drug courts in 1991. California Department of Alcohol and Drug Programs, Fact Sheet: Drug Court Programs, Apr. 2009, available at <http://www.adp.ca.gov/FactSheets/DrugCourtPrograms.pdf> [hereinafter *Fact Sheet: Drug Court Programs*]. In 2000, California further expanded drug diversion programs with the passage of the Substance Abuse and Crime Prevention Act of 2000 (Proposition 36). CAL. PENAL CODE § 1210 (Deering 2008).

<sup>4</sup> The Nonviolent Offender Rehabilitation Act of 2008 appears on the California ballot on the November 2008 election as “Proposition 5.” See generally Proposition 5: Official Title and Summary, available at <http://voterguide.sos.ca.gov/past/2008/general/analysis/pdf/prop5-analysis.pdf#analysis> [hereinafter *Proposition 5 Voter Information Guide*] (providing an overview, analysis and full text of Proposition 5).

<sup>5</sup> Proposition 5, Text of Proposed Laws 86, available at <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf> [hereinafter *Text of Proposition 5*].

crises.<sup>6</sup> Proposition 5 would have helped solve some of these issues. However, on November 4th, Californians voted against Proposition 5 which, for the time being, leaves drug diversion programs in California struggling until new legislation is enacted to solve the current problems.<sup>7</sup> In order for drug diversion to continue to aid California in alleviating prison overpopulation and the budget crisis, California needs legislation much like Proposition 5 that will restructure and adequately fund drug diversion programs, saving money and allowing California to focus on truly dangerous criminals.

Beginning with a general history of drug diversion in the United States, Part I puts this issue in a historical and national context as it delves into how and why drug diversion evolved in the 1960s. It also touches upon the roots of California's drug diversion programs and introduces the three current programs at work in the California criminal justice system.

Part II describes in detail each drug diversion program currently operating in California. These programs are: Proposition 36, drug court, and deferred entry of judgment. The differences between the three programs are illuminated to enhance the understanding of the drug diversion system in California.

Part III examines the successes and failures of the current drug diversion system. It focuses on Proposition 36 because it encompasses more defendants and resources than drug court and deferred entry of judgment. Part III also discusses areas where the current system needs improvement.

After describing and discussing the current drug diversion system, Part IV introduces the latest effort to reform and update the drug diversion programs in California. It begins with a background of Proposition 5 and describes the changes that Proposition 5 would make to the current programs. Part V then discusses how Proposition 5 could have improved the current diversion programs, mainly through increased funding and organization. Finally, this comment offers a few suggestions explaining why Proposition 5 failed to garner enough support at the polls and proposes how similar legislation could pass in the future.

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<sup>6</sup> *Id.* at 87.

<sup>7</sup> Statement of Vote: November 4, 2008, General Election, *available at* [http://www.sos.ca.gov/elections/sov/2008\\_general/sov\\_complete.pdf](http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf).

## I. BACKGROUND

### A. History of Drug Diversion Programs in the United States

In 1962, the landmark case of *Robinson v. California* prompted a change in the United States judicial system's approach to drug addicted offenders.<sup>8</sup> In *Robinson*, the Supreme Court struck down a California statute which made the status of drug addiction a criminal offense.<sup>9</sup> The majority opinion noted that the statute "[was] not one which punishes a person for the use of narcotics, for their purchase, sale or possession . . . [r]ather, we deal with a statute which makes the 'status' of narcotic addiction a criminal offense."<sup>10</sup> Building upon this, the court analogized penalizing drug addiction to criminalizing a person's disease, which would essentially be cruel and unusual punishment under the Eighth and Fourteenth Amendments.<sup>11</sup> Justice Douglas noted in his concurrence that the statute's purpose was "not to cure, but to penalize."<sup>12</sup> *Robinson* helped prove that drug addiction was a disease requiring treatment and not deserving of punishment.<sup>13</sup> In 1966, Congress followed the judiciary's lead by passing the Narcotic Addict Rehabilitation Act of 1966,<sup>14</sup> giving courts the authority to sentence drug addicts who violated Federal criminal laws to treatment programs as an alternative to imprisonment.<sup>15</sup> These two events paved the way for states to handle drug offenders in ways other than incarceration.

### B. California's History With Drug Diversion

After Congress enacted the Narcotic Addict Rehabilitation Act,<sup>16</sup> California began its foray into drug diversion programs with the codification of sections 1000–1000.4 of the California Penal Code in 1972.<sup>17</sup> The court in *People v. Superior Court (On Tai Ho)* explained that sections 1000–1000.4 "authorize[d] the courts to 'divert' from the normal criminal process persons who are formally charged with first-time possession of drugs, have not yet gone to trial, and are found to be suitable for treatment and

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<sup>8</sup> *Robinson v. California*, 370 U.S. 660 (1962).

<sup>9</sup> *Id.* at 667.

<sup>10</sup> *Id.* at 666.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 676 (Douglas, J., concurring).

<sup>13</sup> JAMES L. NOLAN, JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* 35 (2001).

<sup>14</sup> 42 U.S.C. § 3401 (2006) (establishing the Congressional policy that narcotic addicts should be rehabilitated and returned to society rather than prosecuted).

<sup>15</sup> NOLAN, *supra* note 13, at 35.

<sup>16</sup> 42 U.S.C. § 3401.

<sup>17</sup> Porter, *supra* note 1.

rehabilitation at the local level.”<sup>18</sup> Sections 1000–1000.4 eventually became known as Deferred Entry of Judgment,<sup>19</sup> (“DEJ”), when the California legislature amended sections 1000–1000.4 in 1997.<sup>20</sup>

Building upon the seeds planted by DEJ, California began its first adult drug court<sup>21</sup> program in Alameda County in 1991.<sup>22</sup> By 1996, drug related crimes continued to plague California at an even greater level as California’s rate of incarceration for drug offenses climbed to the highest in the nation at 134 per 100,000 prisoners.<sup>23</sup> Although California had a program in place to deal with nonviolent drug offenders,<sup>24</sup> the amount of offenders overwhelmed the system and California needed an answer.<sup>25</sup> In response to the growing problem, Californians approved Proposition 36 in November of 2000.<sup>26</sup> Together, DEJ, drug court, and Proposition 36 have provided options for many drug

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<sup>18</sup> *People v. Superior Court (On Tai Ho)*, 520 P.2d 405, 407 (Cal. 1974). The court further stated:

The purpose of such legislation, which has recently been adopted with variations in several of our sister states, is two-fold. First, diversion permits the courts to identify the experimental or tentative user before he becomes deeply involved with drugs, to show him the error of his ways by prompt exposure to educational and counseling programs in his own community, and to restore him to productive citizenship without the lasting stigma of a criminal conviction. Second, reliance on this quick and inexpensive method of disposition, when appropriate, reduces the clogging of the criminal justice system by drug abuse prosecutions and thus enables the courts to devote their limited time and resources to cases requiring full criminal processing.

*Id.*

<sup>19</sup> CAL. PENAL CODE § 1000.1 (West 2008) (requiring that in a deferred entry of judgment case, the defendant pleads guilty to the charges and, pending successful completion of a drug treatment program, the charges against the defendant are dismissed).

<sup>20</sup> *People v. Davis*, 93 Cal.Rptr. 2d 905, 907 (Cal. Ct. App. 2000).

<sup>21</sup> See California Department of Alcohol and Drug Programs and the Judicial Council of California, Drug Court Partnership Act of 1998 Final Report at 8, Mar. 2002, [http://www.adp.ca.gov/Drug\\_Courts/pdf/DCP\\_FinalReport\\_March2002.pdf](http://www.adp.ca.gov/Drug_Courts/pdf/DCP_FinalReport_March2002.pdf) for a definition of drug courts:

Drug courts are a specially designed court calendar, the purposes of which are to achieve a reduction in recidivism and substance abuse among offenders and to increase their likelihood of successful return to the community through early, judicially supervised treatment, mandatory periodic drug testing, and use of appropriate sanctions and other continuous rehabilitation services.

<sup>22</sup> *Fact Sheet: Drug Court Programs*, *supra* note 3.

<sup>23</sup> Peter Banys, California Society of Addiction Medicine, Recommendations for Improvements to Proposition 36, at 3 (2007) (presentation for the Little Hoover Commission on Aug. 23, 2007), <http://www.csam-asam.org/pdf/misc/Prop36-LDC-2007.pdf> (stating that California’s drug incarcerations increased by more than 250 percent during a ten year span from 1986 to 1996).

<sup>24</sup> Prior to drug courts, DEJ was the only drug diversion program in California.

<sup>25</sup> Banys, *supra* note 23, at 3 (noting that in 1999, 52.9 percent of new drug imprisonments in California were for possession rather than sale or manufacture).

<sup>26</sup> 42 U.S.C. § 1210 (2006); Banys, *supra* note 23, at 3 (noting that California voters passed Proposition 36 by a vote of 61 percent to 39 percent).

offenders who may otherwise have faced incarceration. In order to more fully understand the current structure of California's drug diversion programs, an introduction to DEJ, drug court, and Proposition 36 follows.

## II. DRUG DIVERSION PROGRAMS IN CALIFORNIA

### A. Deferred Entry of Judgment

DEJ allows a nonviolent drug offender to avoid a sentence imposing jail time.<sup>27</sup> In a DEJ case, the defendant pleads guilty to the charges, waives time for the pronouncement of the judgment,<sup>28</sup> and, pending successful completion of a drug treatment program, the sentence will not be imposed and the court will dismiss the charges.<sup>29</sup> However, if the defendant does not complete the treatment program, or the court deems the defendant no longer suitable for DEJ, the court will enter judgment and sentencing will proceed as normal.<sup>30</sup> Before a court may grant DEJ, the defendant must fulfill certain eligibility requirements.<sup>31</sup>

First, the defendant's offense must fall into the listed charges in section 1000(a).<sup>32</sup> The defendant must then satisfy six additional requirements making him eligible for DEJ.<sup>33</sup> These requirements include: 1) that the defendant has no conviction for an offense involving drugs prior to the charged offense; 2) that the charged offense was nonviolent; 3) that there was no

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<sup>27</sup> CAL. PENAL CODE § 1000(a) (West 2008) (including offenses eligible for DEJ: use, possession, or under the influence of a controlled substance, unlawful possession of paraphernalia used for unlawfully injecting or smoking a controlled substance, unauthorized possession of marijuana, and unlawfully being present in an area where controlled substances are being used with knowledge of its occurrence).

<sup>28</sup> When a defendant waives time for the pronouncement of the judgment, sentencing is essentially delayed until the defendant completes a drug treatment program; or, if the defendant does not complete the drug treatment program, judgment would be entered upon his failure to do so.

<sup>29</sup> CAL. PENAL CODE § 1000.1(3) (West 2008) (requiring that the drug treatment program must last at least eighteen months).

<sup>30</sup> CAL. PENAL CODE § 1000.3 (West 2008) (stating that a defendant would be deemed no longer suitable for participation in DEJ if he was performing unsatisfactorily, not benefiting from treatment, or the defendant had been convicted of a misdemeanor showcasing his propensity for violence).

<sup>31</sup> CAL. PENAL CODE § 1000(a) (West 2008).

<sup>32</sup> *Id.* The violations that are eligible for DEJ are: sections 11350, 11357, 11364, 11365, 11377, as well as 11550 of the Health and Safety Code, section 23222(b) of the Vehicle Code, section 11358 of the Health and Safety Code if the marijuana is for personal use, section 11368 of the Health and Safety Code if the drug was procured by a fake prescription and is for the personal use of defendant, section 653(f)(d) of the Penal Code if the solicitation was for acts directed to personal use only, section 381 and 647(f) of the Penal Code if for being under the influence of a controlled substance, and section 4060 of the Business and Professions Code. *Id.*

<sup>33</sup> CAL. PENAL CODE § 1000(a)(1)–(6) (Deering 2008).

violation relating to drugs other than a violation of section 1000; 4) that the defendant has never had probation or parole revoked without completion; 5) that the defendant has not completed or been terminated from diversion or DEJ within five years of the charged offense; and 6) that the defendant has no prior felony conviction within five years of the charged offense.<sup>34</sup> These requirements severely limit the pool of eligible defendants for participation in DEJ.

Perhaps the most important of these requirements is contained in section 1000(a)(1)—that the defendant has no prior conviction for any offense involving controlled substances.<sup>35</sup> This provision bars all criminals with a drug history other than a first time offender from participation in DEJ. Although eligibility for DEJ requires the satisfaction of many requirements, there are tangible and important benefits to the program. Primarily, that the charges can be dismissed and the arrest expunged from the defendant's record.<sup>36</sup>

## B. Drug Courts

The first drug court in California welcomed clients<sup>37</sup> in 1991.<sup>38</sup> In a drug court, “[T]he emphasis shifts away from placing blame and administering appropriate punishment, toward identifying the underlying causes of the offending behavior, and working to address those causes through treatment.”<sup>39</sup> Rather than serving jail time, an offender in drug court participates in a court-monitored treatment program.<sup>40</sup> A defendant's opportunity to participate in a drug court depends on the existence of a drug court within the county in which he committed his crime.<sup>41</sup> Counties are not required to have drug court programs; rather, section 1000.5 of the California Penal Code grants the authority to the presiding judge of a superior court to establish a drug court program.<sup>42</sup> Each county's drug

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<sup>34</sup> *Id.*

<sup>35</sup> CAL. PENAL CODE § 1000(a)(1) (Deering 2008).

<sup>36</sup> CAL. PENAL CODE § 1000.4(a) (Deering 2008).

<sup>37</sup> Offenders in drug court are routinely referred to as clients, rather than defendants or offenders. This trend reflects the overall ideology of drug court as a therapeutic and ameliorative program, rather than one based simply in punitive measures.

<sup>38</sup> *Fact Sheet: Drug Court Programs*, *supra* note 3.

<sup>39</sup> Sara Steen, *West Coast Drug Courts: Getting Offenders Morally Involved in the Criminal Justice Process*, in *DRUG COURTS: IN THEORY AND IN PRACTICE* 51, 54 (James L. Nolan, Jr. ed., 2002).

<sup>40</sup> NOLAN, *supra* note 13, at 39.

<sup>41</sup> *Fact Sheet: Drug Court Programs*, *supra* note 3 (reporting that in April of 2009 all but five counties in California had an adult drug court; counties without drug courts are: Alpine, Colusa, Imperial, Mono, and Trinity).

<sup>42</sup> CAL. PENAL CODE § 1000.5(a) (Deering 2008).

court is run according to standards set by the presiding judge in the county, or a judge appointed by the presiding judge, along with the district attorney and public defender.<sup>43</sup> For example, in Los Angeles County the standards require that the defendant have no prior convictions involving violence or the sale, manufacturing, or trafficking of drugs.<sup>44</sup> County drug programs also typically have a mission statement that outlines the goals and hopes of the program in rehabilitating its participants.<sup>45</sup>

Drug courts in California use several different models, one of which is the pre-plea model of diversion.<sup>46</sup> When a defendant is arrested and charged with a nonviolent drug offense, and drug court is an available option, a defendant must be deemed suitable for participation in drug court through an intake interview done by a member of the drug court team.<sup>47</sup> If the defendant is found suitable, it is ultimately the defendant's choice if he wants to opt into the drug court program as opposed to enduring the traditional punishment.<sup>48</sup> In court, the defendant does not enter a plea of guilty, and criminal proceedings are suspended pending successful completion of drug court.<sup>49</sup> A drug court program typically consists of:

[A] regimen of graduated sanctions and rewards, individual and group therapy, urine analysis testing commensurate with treatment needs, close court monitoring and supervision of progress, educational or vocational counseling as appropriate, and other requirements as agreed to by the presiding judge or his or her designee, the district attorney, and the public defender.<sup>50</sup>

If the defendant satisfactorily completes the drug court program, the criminal charges will be dismissed and the arrest will be deemed to have never occurred.<sup>51</sup> However, if the court finds that the defendant is not performing satisfactorily, or has

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<sup>43</sup> *Id.*

<sup>44</sup> Standards & Practices, Los Angeles County Drug Court Program, May 23, 2006.

<sup>45</sup> The Los Angeles County Drug Court Program's mission statement is:

The mission of the Los Angeles County Drug Court Programs is to provide the non-violent substance abuse defendant who recognizes his/her problem and voluntarily chooses to enter into a contract with a court-supervised treatment program and participate in all phases of treatment an opportunity to improve his/her quality of life and possibly further benefit by the reduction and/or dismissal of criminal charges.

*Id.*

<sup>46</sup> *Fact Sheet: Drug Court Programs*, *supra* note 3.

<sup>47</sup> Glade F. Roper & James E. Lessenger, *Drug Court Organization and Operations*, in *DRUG COURTS: A NEW APPROACH TO TREATMENT AND REHABILITATION* 284, 290–91 (James E. Lessenger & Glade F. Roper eds., 2007).

<sup>48</sup> Steen, *supra* note 39, at 51–52.

<sup>49</sup> CAL. PENAL CODE § 1000.5(a) (Deering 2008).

<sup>50</sup> *Id.*

<sup>51</sup> CAL. PENAL CODE § 1000.5(b) (Deering 2008).

subsequently engaged in or been convicted of certain types of criminal conduct, the court will then reinstate the criminal charges.<sup>52</sup>

### C. Proposition 36

Proposition 36 is California's most recent drug diversion program.<sup>53</sup> Arising in response to issues with the existing diversion programs,<sup>54</sup> the California legislature enacted Proposition 36.<sup>55</sup> Section 1210.1 requires "any person convicted of a nonviolent drug possession offense [to] receive probation."<sup>56</sup> As a condition and requirement of probation, the defendant must complete a drug treatment program.<sup>57</sup> A key difference between previous diversion programs and Proposition 36 is the point in the judicial process at which the defendant is assigned to a treatment program.<sup>58</sup> Unlike DEJ and drug court, Proposition 36 participants enter a treatment program post-conviction.<sup>59</sup>

A defendant eligible for Proposition 36 has a conviction for a nonviolent drug possession offense.<sup>60</sup> As defined by the California Penal Code, a nonviolent drug possession offense is

the unlawful personal use, possession for personal use, or transportation for personal use of any controlled substance identified in [Sections 11054–58] of the Health and Safety Code, or the offense of being under the influence of a controlled substance in violation of Section 11550 of the Health and Safety Code. The term 'nonviolent drug possession offense' does not include the possession for sale, production, or manufacturing of any controlled substance.<sup>61</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> CAL. PENAL CODE § 1210 (Deering 2008).

<sup>54</sup> The problem with the existing system was that there was a lack of legislation requiring the diversion of a defendant from jail and into a treatment program. Porter, *supra* note 1, at 534.

<sup>55</sup> *Id.* See also Gregory A. Forest, Comment, *Proposition 36 Eligibility: Are Courts and Prosecutors Following or Frustrating the Will of Voters?*, 36 MCGEORGE L. REV. 627, 639–40 & nn.109–10 (2005) (discussing how Proposition 36 requires an offender eligible for Proposition 36 treatment be given probation, not be sent to prison).

<sup>56</sup> CAL. PENAL CODE § 1210.1(a) (Deering 2008).

<sup>57</sup> *Id.*

<sup>58</sup> CAL. PENAL CODE § 1000 (Deering 2008) (stating that a defendant enters DEJ after a guilty plea); § 1000.5(a) (stating that a defendant enters drug court before entering a plea); § 1210.1(a) (stating that a defendant enters a treatment program after conviction).

<sup>59</sup> CAL. PENAL CODE § 1210.1(a) (Deering 2008).

<sup>60</sup> *Id.*

<sup>61</sup> CAL. PENAL CODE § 1210(a) (Deering 2008). The court in *People v. Goldberg* noted that "[t]he manifest purpose behind Proposition 36 was to divert into treatment those persons whose *only* offenses were nonviolent drug possession offenses." *People v. Goldberg*, 105 Cal. App. 4th 1202, 1208 (Cal. Ct. App. 2003).



In addition to the conviction, the defendant must fulfill certain prerequisites specified by Penal Code section 1210.1.<sup>62</sup>

Upon successful completion of the drug treatment program and compliance with the terms of the defendant's probation, the court dismisses the indictment, and the arrest and conviction are deemed to have never occurred.<sup>63</sup> Defendants essentially have three chances at getting their case dismissed, as section 1210.1(f)(3)(C) provides three opportunities for a defendant to complete the requirements of Proposition 36.<sup>64</sup> If the defendant fails to complete a drug treatment program or comply with probation, the probation can be modified or revoked and the defendant will be incarcerated according to his conviction.<sup>65</sup>

### III. ADVANTAGES AND DISADVANTAGES OF THE STATUS QUO

#### A. Success of the Current Drug Diversion System

Proposition 36 and drug courts provide the majority of the statistics for evaluating the success of drug diversion programs in California. Because DEJ is limited to a small amount of offenders due to its statutory requirements,<sup>66</sup> it does not affect as many drug offenders as Proposition 36 and drug courts, and consequently will not be analyzed to the same extent as the aforementioned programs. In its sixth year of operation (July 2006–June 2007), approximately 34,702 offenders were placed in Proposition 36 treatment.<sup>67</sup> Estimates place drug court populations between 3,000 and 4,000 people.<sup>68</sup>

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<sup>62</sup> CAL. PENAL CODE § 1210.1(b)(1)–(5) (Deering 2008) (specifying that in order to qualify for Proposition 36, a defendant may not fall under the following categories: (1) defendants who were previously convicted of one or more violent felonies, unless the non-violent drug possession occurred after a period of five years in which the defendant was free of prison custody and the commission of the felony, or a misdemeanor conviction involving physical injury or the threat of physical injury to another; (2) defendants who are convicted of a non-drug related misdemeanor in the same proceeding as the non-violent drug possession offense; (3) defendants who were armed with a deadly weapon, with the intent to use the deadly weapon, while in possession of or under the influence of a controlled substance; (4) defendants who refuse drug treatment as a condition of probation; (5) defendants who have two separate convictions for non-violent drug possession offenses and have participated in two separate courses of drug treatment and have been found by the court to be unamenable to treatment).

<sup>63</sup> CAL. PENAL CODE § 1210.1(e)(1) (Deering 2008).

<sup>64</sup> CAL. PENAL CODE § 1210.1(f)(3)(C) (Deering 2008).

<sup>65</sup> CAL. PENAL CODE § 1210.1(f)(1) (Deering 2008).

<sup>66</sup> See *supra* note 33 and accompanying text.

<sup>67</sup> UCLA INTEGRATED SUBSTANCE ABUSE PROGRAMS, EVALUATION OF PROPOSITION 36: THE SUBSTANCE ABUSE AND CRIME PREVENTION ACT OF 2000 REPORT 19 (2008), [http://www.adp.cahwnet.gov/SACPA/PDF/2008\\_Final\\_Report.pdf](http://www.adp.cahwnet.gov/SACPA/PDF/2008_Final_Report.pdf) [hereinafter UCLA REPORT 2008].

<sup>68</sup> Drug Policy Alliance, Comparing Drug Courts and Prop. 36 1 [http://www.prop36.org/pdf/summary\\_comparison.pdf](http://www.prop36.org/pdf/summary_comparison.pdf) (last visited Jan. 11, 2008). Because there is a lack of statewide data on drug courts, the drug court population can only be

Proposition 36 treats the largest amount of nonviolent drug offenders in California.<sup>69</sup> Due to its size, Proposition 36 has the ability to make the most significant impact upon the California budget and criminal justice system. Since Proposition 36 passed in 2000 and came into effect in 2001, the drug possession prison population in California prisons has fallen.<sup>70</sup> Not only has Proposition 36 decreased the drug possession prison population, Proposition 36 also stunted the overall prison population growth in California.<sup>71</sup> Before the passage of Proposition 36, the California Department of Corrections projected that the prison population would reach 180,000 by June of 2005.<sup>72</sup> In June 2005, four years after the implementation of Proposition 36, the prison population was just over 164,000, and ended the year at 166,000, well below the projected 180,000.<sup>73</sup> While Proposition 36 reduced prison populations during its first few years of existence, it also had a hand in reducing violent crimes in California.<sup>74</sup> Between 2000 and 2004, the violent crime rate in California dropped 11.2 percent.<sup>75</sup> The effect of Proposition 36 on California's prisons and crime rates cannot go unnoticed.

Proposition 36 has also resulted in a number of financial benefits to California since its inception.<sup>76</sup> By reducing the amount of prisoners in the prison system, Proposition 36 saved California over \$350 million in the past eight years.<sup>77</sup> Along with the savings from a decreased amount of prison admissions, California has been able to put off the costly venture of constructing new prisons.<sup>78</sup> The California Legislative Analyst's Office noted in February of 1999 that:

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estimated. *Id.* See also Banys, *supra* note 23, at 4 (noting that drug courts in California handle only about 3 percent of at-risk offenders).

<sup>69</sup> In 2006–2007, 48,996 offenders were referred to Proposition 36, 41,925 offenders were assessed, and 34,702 offenders were placed into treatment. UCLA REPORT 2008, *supra* note 67, at 19.

<sup>70</sup> SCOTT EHLERS & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, PROPOSITION 36: FIVE YEARS LATER 4 (2006), <http://www.csam-asam.org/pdf/misc/Prop36-fiveyears-later.pdf> (noting that the number of drug offenders in California prisons went from 19,736 in December of 2000 to 14,325 in December of 2005).

<sup>71</sup> *Id.* at 8.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 14.

<sup>75</sup> *Id.* (noting that violent crime rate drop in California exceeded the national violent crime rate drop by 3 percent).

<sup>76</sup> UCLA REPORT 2008, *supra* note 67, at 218, 223, 227.

<sup>77</sup> EHLERS & ZIEDENBERG, *supra* note 70, at 24 (estimating based on the assumptions that the offenders diverted from prison would have served the average prison sentence for drug possession, 1.48 years, at the cost of incarceration for a single inmate in the year of 2005).

<sup>78</sup> *Id.* at 25.

[T]he state will run out of bed space by as soon as 2001 and would need additional space for as many as 27,000 inmates by June 30, 2004. That is the equivalent of five to six state-operated prisons carrying a one-time construction cost of \$1.6 billion and annual ongoing operational costs of more than \$500 million.<sup>79</sup>

California has constructed only one prison since the passage of Proposition 36, and that prison received approval prior to Proposition 36.<sup>80</sup>

Along with saving state money in terms of prisons and the amount of prisoners, Proposition 36 saves money for California based on participants in the program.<sup>81</sup> For each dollar allocated to Proposition 36, the program generates two dollars of savings.<sup>82</sup> In addition, for each offender who completes Proposition 36 treatment, the state saves \$5,836, approximately four dollars for every one dollar spent.<sup>83</sup> Furthermore, Proposition 36 saves California money even when an offender does not enter treatment, or fails to complete it.<sup>84</sup> Offenders referred to Proposition 36 but who do not enter treatment save approximately \$4,037,<sup>85</sup> and offenders who fail to complete Proposition 36 treatment save approximately \$1,792.<sup>86</sup> Simply comparing the costs of drug treatment compared to the cost of incarceration proves the money-saving achievements of Proposition 36. Currently, the average yearly cost per inmate in a California prison is \$49,000.<sup>87</sup> The average cost for a drug treatment program ranges from \$1,800 to \$6,800 per client.<sup>88</sup>

Proposition 36 also provides benefits to both the state and its participants as participants in Proposition 36 receive valuable education and information for changing their addictive behaviors and recovering from drug addiction.<sup>89</sup> The California Society of

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<sup>79</sup> *Id.* (citing the California Legislative Analyst's Office, Feb. 16, 1999).

<sup>80</sup> *Id.* (noting that only one prison has been built since the passage of Proposition 36, the Kern Valley State Prison, which had been approved for construction prior to the passage of Proposition 36).

<sup>81</sup> UCLA REPORT 2008, *supra* note 67, at 225–27.

<sup>82</sup> *Id.* at 225.

<sup>83</sup> *Id.* at 227 (noting that much of the savings originate from avoiding incarceration costs).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> California Department of Corrections and Rehabilitation, Fourth Quarter 2008 Facts and Figures, [http://www.cdcr.ca.gov/Divisions\\_Boards/Adult\\_Operations/Facts\\_and\\_Figures.html](http://www.cdcr.ca.gov/Divisions_Boards/Adult_Operations/Facts_and_Figures.html) (last visited Jan. 19, 2010) (reporting that with a prison population of 171,085, the cost of incarceration for all prisoners is over \$10 billion) [hereinafter *Facts and Figures*].

<sup>88</sup> Drug Courts/Deferred Entry and Proposition 36, *supra* note 2.

<sup>89</sup> See Hundreds of Prop 36 Graduates Form Chain of Recovery at State Capitol, Celebrate Program's Success, PROP36.ORG, Apr. 18, 2007, <http://www.prop36.org/pr041807.html>.

Addiction Medicine found that “nearly three out of four clients entering [Proposition] 36 treatment make substantial progress and reach positive outcomes.”<sup>90</sup> 34.4 percent of offenders complete Proposition 36 treatment with positive results.<sup>91</sup> As of April 2007, over 70,000 offenders have graduated from Proposition 36 treatment.<sup>92</sup> Graduates of Proposition 36 often credit the program with changing and saving their lives.<sup>93</sup>

While Proposition 36 has successfully treated a large group of substance abuse offenders, drug courts have also found success, albeit with a smaller proportion of drug offenders.<sup>94</sup> Drug courts have a completion rate of 55 percent statewide,<sup>95</sup> but also deal with a significantly smaller portion of nonviolent drug offenders as compared to Proposition 36.<sup>96</sup> While drug courts serve a small amount of offenders, they are still capable of saving significant amounts of taxpayer dollars.<sup>97</sup> One year in jail for a single offender costs \$49,000,<sup>98</sup> while the cost of a full drug treatment program averages \$3,000 per client.<sup>99</sup> Over the long term, drug courts save California an average of \$11,000 per client.<sup>100</sup> In total, drug courts save California over \$18 million

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<sup>90</sup> *Proposition 36 Revisited*, 30 CAL. SOC'Y OF ADDICTION MED. 1 (Spring 2005), <http://www.csam-asam.org/pdf/misc/Spring2005.pdf> (noting that while some offenders may not complete treatment, they receive what is called a “standard dose” of treatment, meaning that they spend the same amount of time in treatment as those who complete treatment).

<sup>91</sup> *Id.*

<sup>92</sup> Prop36.org, *supra* note 89. See also Dave Fratello, *Jail Won't Cure Drug Users*, L.A. TIMES, July 17, 2006, at B11 (acknowledging that Proposition 36 not only saves money, but also saves lives).

<sup>93</sup> Substance Abuse and Crime Prevention Act of 2000, Success Stories, [http://www.prop36.org/successStories\\_TammyB.php](http://www.prop36.org/successStories_TammyB.php) (last visited Nov. 16, 2009) (reporting that a graduate of Proposition 36 wrote that Proposition 36 allowed her “to become a parent again, a daughter, a sister, an aunt, a cousin, a neighbor”).

<sup>94</sup> See Proposition 36 Revisited, *supra* note 90.

<sup>95</sup> *Id.* See also CALIFORNIA DEPARTMENT OF ALCOHOL AND DRUG PROGRAMS, COMPREHENSIVE DRUG COURT IMPLEMENTATION ACT OF 1999, FINAL REPORT TO THE LEGISLATURE MARCH 2005 9 (2005), [http://www.adp.cahwnet.gov/DrugCourts/pdf/CDCI\\_FinalReportToLegislature\\_March2005.pdf](http://www.adp.cahwnet.gov/DrugCourts/pdf/CDCI_FinalReportToLegislature_March2005.pdf) (reporting that in June 2004, of the 6,966 adult offenders who exited the drug court program for the previous year, 3,849 successfully completed drug court treatment).

<sup>96</sup> See *supra* note 68 and accompanying text. See also BANYs, *supra* note 23, at 4 (noting that drug courts in California handle only about 3 percent of at-risk offenders).

<sup>97</sup> Drug Courts/Deferred Entry and Proposition 36, *supra* note 2.

<sup>98</sup> *Facts and Figures*, *supra* note 87.

<sup>99</sup> C. WEST HUDDLESTON, III, DOUGLAS B. MARLOWE, & RACHEL CASEBOLT, NATIONAL DRUG COURT INSTITUTE, PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES, at 8 (May 2008) [hereinafter PAINTING THE CURRENT PICTURE] available at <http://www.ndci.org/publications.html>.

<sup>100</sup> *Id.*

dollars per year, proving that money spent on drug courts is a sound investment.<sup>101</sup>

#### B. Where the Current System Needs Improvement

In spite of the successes of the current drug diversion programs,<sup>102</sup> the system is not perfect, and California is still burdened with high prison populations,<sup>103</sup> a budget crisis,<sup>104</sup> and a general need for coordination between the current diversion programs.<sup>105</sup> Funding issues threaten the ability of drug diversion programs to effectively operate and provide valuable services for California.<sup>106</sup> Decreased funding for treatment programs often results in limited treatment options for offenders with varying needs.<sup>107</sup>

When Proposition 36 became law, funding provisions accompanied it in the form of the Substance Abuse Treatment Trust Fund.<sup>108</sup> The trust fund provided for an initial \$60 million for the fiscal year of 2000–2001 and \$120 million for the following years ending in 2005–2006.<sup>109</sup> After the end of the 2005–2006 fiscal year, re-funding Proposition 36 proved to be a contentious issue in the California legislature.<sup>110</sup> Supporters of Proposition 36 fought for a budget increase but were defeated.<sup>111</sup> Funding for Proposition 36 remained at \$120 million.<sup>112</sup> In 2006–2007, although requests for increased funding were made, Governor Schwarzenegger threatened to reduce funding to the original amount of funding, \$60 million.<sup>113</sup> Through the Offender Treatment Program,<sup>114</sup> an additional \$20 million was available

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<sup>101</sup> See Caitlin Liu, *Drug Courts Worth the Cost, Report Says*, L.A. TIMES, Apr. 16, 2003, at B3.

<sup>102</sup> These programs are DEJ, Proposition 36, and drug courts.

<sup>103</sup> The population in California prisons as of the fourth quarter in 2008 was 171,085. *Facts and Figures*, *supra* note 87.

<sup>104</sup> George Skelton, *Lavish spending not the culprit*, L.A. TIMES, Dec. 25, 2008, at B1.

<sup>105</sup> Currently, deferred entry of judgment, proposition 36, and drug courts are not linked by a statutory law.

<sup>106</sup> Banys, *supra* note 23, at 10.

<sup>107</sup> Judith Appel, Glenn Backes, & Jeremy Robbins, Drug Policy Alliance, *California's Proposition 36: A Success Rip for Refinement and Replication*, 3 CRIMINOLOGY & PUB. POL'Y 585, 589 (2004), available at [http://www.drugpolicy.org/docUploads/ CPP410\\_Appel\\_1st.pdf](http://www.drugpolicy.org/docUploads/ CPP410_Appel_1st.pdf).

<sup>108</sup> HIGHLIGHTS OF PROPOSITION 36, (Feb. 20, 2001), <http://www.courtinfo.ca.gov/programs/drugcourts/documents/highlights.pdf>.

<sup>109</sup> *Id.*

<sup>110</sup> Proposition 36 Revisited, *supra* note 90.

<sup>111</sup> Porter, *supra* note 1, at 551 & n.114 (discussing the failure of Senate Bill 1137 which would have added \$25 million to Proposition 36 funds).

<sup>112</sup> *Id.*

<sup>113</sup> Prop36.org, About Prop 36, <http://www.prop36.org/about.html> (last visited Nov. 16, 2009).

<sup>114</sup> The Offender Treatment Program was established in 2006–2007 to enhance the Substance Abuse and Crime Prevention Act. Substance Abuse and Crime Prevention Act

for 2006–2007, but only for counties with the ability to match the funds.<sup>115</sup> While funding for Proposition 36 has remained essentially the same throughout its existence,<sup>116</sup> the demonstrated need for more funding cannot be ignored.<sup>117</sup> Since the enactment of Proposition 36, purchasing power has decreased 25 percent due to inflation; simply stated, \$120 million dollars will not buy the same treatment as it bought in 2001.<sup>118</sup>

Another area where Proposition 36 could use help lies with a group of defendants who are particularly difficult to treat.<sup>119</sup> These defendants, identified by the term “criminal recidivists,”<sup>120</sup> should be handled differently by Proposition 36 as compared to the average Proposition 36 participant. Criminal recidivists are those defendants with five or more convictions in the past thirty months.<sup>121</sup> Using up ten times the resources as the average defendant, criminal recidivists place an undue burden on the system.<sup>122</sup> While only a small portion of Proposition 36 defendants are criminal recidivists,<sup>123</sup> the amount of valuable resources consumed by recidivists is a waste. These defendants need to be handled differently as they pose unique and different challenges to the Proposition 36 system.<sup>124</sup>

While the success of the current drug diversion system cannot be diminished, it is important to recognize that improvements can always be made and as California changes, the drug diversion system must change along with it. Motivated by a need for greater organization and improved funding, the Nonviolent Offender Rehabilitation Act, also known as Proposition 5, was introduced to take Proposition 36, DEJ, and drug courts to the next level.

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(SACPA), California Department of Alcohol and Drug Programs, <http://www.adp.state.ca.us/SACPA/index.shtml> (last visited Nov. 16, 2009).

<sup>115</sup> Banys, *supra* note 23, at 10.

<sup>116</sup> About Prop 36, *supra* note 113.

<sup>117</sup> A UCLA study on Proposition 36 estimated that the minimum amount of necessary funding was \$230 million, while a survey of counties revealed that the actual need was \$270 million. Banys, *supra* note 23, at 10.

<sup>118</sup> *Id.* See also NORA and Treatment, Drug Policy Alliance Network, <http://www.prop5yes.com/wp/wp-content/uploads/fact-sheets/nora-treatment.pdf> (last visited January 22, 2010) (noting that funding is not adequate for the 35,000 clients who enter Proposition 36 each year).

<sup>119</sup> These types of defendants are those who refuse treatment, those who do not show up to treatment, and those who are inherently at more of a risk than the average defendant. Banys, *supra* note 23, at 8.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See *id.*

<sup>123</sup> *Id.*

<sup>124</sup> One suggestion that seems prudent is to place the criminal recidivists directly into a drug court rather than into Proposition 36 treatment. *Id.* at 8–9.

## IV. THE NONVIOLENT OFFENDER REHABILITATION ACT OF 2008

## A. Background of Proposition 5

The three drug diversion programs in California have never functioned together in a coordinated effort to alleviate substance abuse.<sup>125</sup> The Nonviolent Offender Rehabilitation Act of 2008,<sup>126</sup> sought to fluidly combine the three existing drug diversion programs in California for the first time.<sup>127</sup> Proposition 5 was meant to be a “major reorientation of state policies to provide greater rehabilitation, accountability and treatment options for youth, nonviolent offenders and nonviolent prisoners and parolees.”<sup>128</sup> While DEJ, Proposition 36, and drug courts would have remained a part of Proposition 5 in practice, Proposition 5 sought to bring the programs together and create guidelines and standards that would universally apply and create a system in which drug offenders could seamlessly transfer from one program to another.<sup>129</sup>

Proposition 5 created a three-track system designed to provide clarity in determining eligibility and appropriateness in terms of treatment level.<sup>130</sup> The three tracks sought to “expand the types of offenders who are eligible for diversion, and expand and intensify the services provided to offenders mainly by increasing the funding available to pay for them.”<sup>131</sup> In addition to revamping the drug diversion programs, Proposition 5 sought to introduce funding provisions designed to better support drug diversion and rehabilitation programs in California.<sup>132</sup>

Funding for the three drug diversion programs in California exist independent of each other.<sup>133</sup> Proposition 36 received its funding from the Substance Abuse and Crime Prevention Act.<sup>134</sup> Defendants in DEJ often paid for their own treatment programs,<sup>135</sup> and drug courts relied on funding from the state

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<sup>125</sup> *Id.* at 2, 4. *See supra* note 120 and accompanying text.

<sup>126</sup> The Nonviolent Offender Rehabilitation Act of 2008 appears on the California ballot on the November 4th 2008 election as “Proposition 5.” *See Text of Proposition 5, supra* note 5, at 86.

<sup>127</sup> *See id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Proposition 5 Voter Information Guide, supra* note 4.

<sup>130</sup> *Id.* (reporting that Track I is the lowest level of treatment and oversight while Track III comprises the highest level of treatment and oversight).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> DEJ, Proposition 36, and drug courts all received their funding through different sources. *Id.*

<sup>134</sup> CAL. HEALTH & SAFETY CODE § 11999.4 (Deering 2009) (stating that The Substance Abuse Treatment Trust Fund was established to carry out the purpose of Proposition 36).

<sup>135</sup> *Proposition 5 Voter Information Guide, supra* note 4.

independent of any Proposition 36 funds.<sup>136</sup> This often resulted in all three programs being underfunded.<sup>137</sup> Proposition 5 sought to improve the funding of drug diversion programs through annually allocating \$460,000,000 to improve and expand treatment programs.<sup>138</sup> In terms of division amongst the three tracks, 15 percent of the funds were apportioned to Track I, 60 percent to Track II, and 10 percent to Track III.<sup>139</sup>

Track I of Proposition 5 essentially resembled DEJ.<sup>140</sup> Eligible offenders for Track I were those charged with a nonviolent drug possession offense.<sup>141</sup> Offenders with a current or prior conviction for a violent or serious felony, an offender with a prior conviction for any felony within the past five years, or an offender charged with a non-drug related offense in conjunction with the nonviolent drug possession offense would have been excluded from Track I.<sup>142</sup> However, unlike DEJ where a defendant is ineligible if he has a prior conviction for any offense involving controlled substances,<sup>143</sup> a defendant was eligible for Track I if he had one prior conviction for a nonviolent drug possession offense.<sup>144</sup> Similar to DEJ, the defendant's participation in Track I was designed to last approximately six to eighteen months,<sup>145</sup> and after successful completion of the treatment program the criminal charges would be dismissed and the case records and files permanently sealed.<sup>146</sup> If a defendant failed to begin treatment in Track I, judgment would be entered and the defendant would then be transferred to Track II treatment.<sup>147</sup>

Track II treatment was similar to Proposition 36.<sup>148</sup> Under the eligibility requirements of Track II, a defendant is convicted

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<sup>136</sup> Drug Courts are funded through the California Department of Alcohol and Drug Programs and any county appropriations. California Department of Alcohol and Drug Programs, Laws & Regulations: California Drug Courts, <http://www.adp.ca.gov/DrugCourts/laws.shtml> (last visited Jan. 25, 2010).

<sup>137</sup> See *supra* note 106 and accompanying text.

<sup>138</sup> *Proposition 5 Voter Information Guide*, *supra* note 4.

<sup>139</sup> *Text of Proposition 5*, *supra* note 5, at 103.

<sup>140</sup> The title of Track I is "Treatment Diversion with Deferred Entry of Judgment." *Id.* at 90.

<sup>141</sup> *Id.* at 90–91.

<sup>142</sup> *Id.* at 91. Although a judge has the discretion to allow an ineligible offender to participate in Track I, if the only reason for ineligibility is that the offender has a concurrent charge for another offense, the court may determine that it is in the interest of the defendant and in the furtherance of justice to permit deferred entry of judgment.

<sup>143</sup> CAL. PENAL CODE § 1000(a)(1) (Deering 2008).

<sup>144</sup> *Text of Proposition 5*, *supra* note 5, at 91.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Like Proposition 36, Track II is the middle level of treatment and oversight. *Id.* at 86.



of a nonviolent drug possession offense and sentenced to treatment and probation.<sup>149</sup> Defendants considered ineligible are those with previous convictions for a violent and serious crime,<sup>150</sup> those in possession of certain drugs while armed with a deadly weapon,<sup>151</sup> those with five or more convictions for any types of offenses in the prior thirty months,<sup>152</sup> a defendant convicted of other felonies or misdemeanors at the same time as a new drug charge,<sup>153</sup> a defendant with two separate convictions for nonviolent drug possession offenses and participation in two separate courses of drug treatment and is found by the court to be unamenable to any and all forms of drug treatment,<sup>154</sup> and a defendant who refuses drug treatment as a condition of probation.<sup>155</sup> If a defendant's probation is terminated due to the failure to begin treatment, the defendant could be transferred to Track III treatment at the discretion of the court.<sup>156</sup> A defendant's probation under Track II can also be revoked due to the commission of a new crime that is not a nonviolent drug possession offense or by violating a non-drug related condition of probation.<sup>157</sup> The court then has the discretion of sentencing the defendant to Track III diversion treatment or to incarceration in county jail for no longer than one year.<sup>158</sup>

However, if the defendant violates probation by committing a nonviolent drug possession offense or a misdemeanor for simple possession or the use of drugs or drug paraphernalia, the court will conduct a hearing to determine whether probation should be revoked.<sup>159</sup> The court should only revoke probation in situations where the alleged violation is proven and the state can prove by a preponderance of the evidence that the defendant poses a danger to others.<sup>160</sup> If the court does not revoke probation, it can either intensify or change the drug treatment plan and also impose a

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<sup>149</sup> *Id.* at 92.

<sup>150</sup> *Id.* (stating that unless the nonviolent drug possession offense occurred after a period of five years in which the defendant remained free of both prison custody and the commission of an offense that results in a felony conviction other than a nonviolent drug possession offense, or a misdemeanor conviction involving physical injury or the threat of physical injury to another person).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* (stating that a defendant ineligible for Track II solely on this basis will be eligible for Track III treatment diversion).

<sup>153</sup> *Id.* (stating that with respect to a misdemeanor conviction, a judge may allow an offender to participate in Track II treatment diversion).

<sup>154</sup> *Id.* (requiring the court to find this by clear and convincing proof).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 93.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

graduated sanction.<sup>161</sup> Similar to Proposition 36,<sup>162</sup> a defendant has a few chances under Track II to complete drug treatment before termination from the program.<sup>163</sup> If a defendant has for the second or third time potentially violated probation, the court will hold a hearing to determine whether probation should be revoked.<sup>164</sup>

The most intense and supervised program in Proposition 5 was Track III.<sup>165</sup> Track III brought drug courts into the statutory scheme of Proposition 5.<sup>166</sup> Proposition 5 sought to “strengthen California’s drug courts by adequately funding those courts, permitting those courts to fashion their own eligibility criteria and operating procedures, and holding them accountable by requiring those courts, for the first time, to systematically collect and report data regarding their budgets, expenditures, and treatment outcomes.”<sup>167</sup> Defendants eligible for Track III were offenders who committed a nonviolent drug possession offense but were ineligible for Track II, a defendant who participated unsuccessfully in Track II, or a defendant who committed a nonviolent offense and appeared to have a serious problem with substance abuse or addiction.<sup>168</sup> Proposition 5 increased the funding of drug courts to nearly double the current amount.<sup>169</sup> This would have provided the adequate funding that drug courts require to function properly.

Along with creating the three-track system, Proposition 5 also included provisions that would have changed parole rules.<sup>170</sup> Proposition 5 sought to make changes to state parole programs including new limits on parole terms and new rules for the revocation of parole violators.<sup>171</sup> Proposition 5 would have reduced the amount of parole for some offenders to six months,<sup>172</sup> and increased parole terms for an offender whose most recent

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<sup>161</sup> *Id.*

<sup>162</sup> CAL. PENAL CODE § 1210.1(f)(3) (Deering 2008) (allowing a defendant essentially three opportunities under Proposition 36 to get his case dismissed).

<sup>163</sup> *Text of Proposition 5, supra* note 5, at 94.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 95.

<sup>166</sup> *Id.* at 100.

<sup>167</sup> *Id.* at 88.

<sup>168</sup> *Id.* at 95.

<sup>169</sup> The current funding for drug courts is approximately \$24 million and through Proposition 5, that amount will increase to \$45 million. NORA and Drug Courts, Yes on Proposition 5 the Nonviolent Offender and Rehabilitation Act, <http://www.prop5yes.com/wp/wp-content/uploads/fact-sheet/nora-drug-courts.pdf>.

<sup>170</sup> *Proposition 5 Voter Information Guide, supra* note 4, at 33.

<sup>171</sup> *Id.*

<sup>172</sup> Offenders who would receive a reduced parole term include those whose most recent term in prison was for a drug or nonviolent property crime and no serious, violent, gang, or sex crimes on his record. *Id.*

term in prison was for a violent or serious felony.<sup>173</sup> Along with different parole terms, Proposition 5 would have created a Parole Reform Oversight and Accountability Board to set state parole policies and to direct rehabilitation programs.<sup>174</sup> Proposition 5 thus enveloped two areas of change for the California criminal justice system—diversion programs and parole reforms.<sup>175</sup>

#### B. How Proposition 5 Could Have Improved the Status Quo

Had Proposition 5 passed, the drug diversion system in California would have changed for the better. First, Proposition 5 would have brought all three drug diversion programs under one umbrella.<sup>176</sup> The significance of this would have been that instead of failing out of DEJ or Proposition 36, a defendant could simply be transferred to a higher level of treatment. This would correct the criminal recidivist issue with Proposition 36.<sup>177</sup> In section 17(f)(6) of the proposed text of Proposition 5 a defendant is ineligible for Track II treatment if that defendant, in the previous 30 months, has five or more convictions for any offense.<sup>178</sup> These defendants, the criminal recidivists who plagued Proposition 36 with their excessive consumption of funds,<sup>179</sup> would be immediately eligible for Track III treatment.<sup>180</sup> This provision would identify at-risk defendants and appropriately place them in a higher and more intensive level of treatment.

Proposition 5 also sought to properly fund drug diversion programs.<sup>181</sup> As previously discussed, drug diversion programs cannot function at their most efficient level unless there is adequate funding.<sup>182</sup> Since the initial funding for Proposition 36 expired in 2006,<sup>183</sup> requests for increases in funding have been denied, much to the detriment of the program.<sup>184</sup> While Proposition 5 allocated \$460,000,000 to improve and expand treatment programs, it could have also saved California over \$1 billion.<sup>185</sup> Proposition 5's funding provisions could also increase access to drug treatment programs. In DEJ, defendants

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<sup>173</sup> Parole would be increased from 3 to 5 years for these offenders. *Id.*

<sup>174</sup> *Id.* at 34.

<sup>175</sup> *Id.* at 30.

<sup>176</sup> *Text of Proposition 5, supra* note 5, at 87.

<sup>177</sup> Banys, *supra* note 23, at 4.

<sup>178</sup> *Text of Proposition 5, supra* note 5, at 92.

<sup>179</sup> *See* Banys, *supra* note 23, at 8.

<sup>180</sup> *Text of Proposition 5, supra* note 5, at 92.

<sup>181</sup> *Id.* at 101.

<sup>182</sup> *See* Banys, *supra* note 23, at 10.

<sup>183</sup> HIGHLIGHTS OF PROPOSITION 36, *supra* note 108, at 3.

<sup>184</sup> About Prop 36, *supra* note 113.

<sup>185</sup> *Proposition 5 Voter Information Guide, supra* note 4 at 30.

often are required to pay for their own treatment and this excluded many who could not afford the funds for treatment.<sup>186</sup> Proposition 5 allocates more funds to Track I and gives access to treatment programs for people who previously could not participate due to financial restrictions.<sup>187</sup> As Proposition 36 proved to be a worthwhile investment,<sup>188</sup> it seems that Proposition 5 would also have been a sound investment in terms of the drug diversion programs.

### C. What Caused the Failure of Proposition 5?

After Proposition 36 passed by a 61 percent to 39 percent margin in 2000,<sup>189</sup> it may have seemed obvious that an electorate, which had previously supported drug diversion, would show the same support for similar legislation. However, eight years after Proposition 36, Californians proved that theory wrong as Proposition 5 failed to win at the polls.<sup>190</sup> A variety of reasons may account for Proposition 5's failure, including anti-Proposition 5 propaganda and voter discomfort with the parole sections of Proposition 5.<sup>191</sup>

The parole sections of Proposition 5 may have been the driving force behind Proposition 5's failure. Proposition 5 is essentially a double-edged sword for fighting prison overcrowding and budget concerns. On one side is the nonviolent offender rehabilitation portion which seeks to initially keep offenders out of prison.<sup>192</sup> On the other side are the proposed changes to the state parole and probation system.<sup>193</sup> Because Californians overwhelmingly supported Proposition 36,<sup>194</sup> they may have supported Proposition 5's drug rehabilitation, if not for the parole provisions.

The parole section may have alienated voters in a couple of ways. First, voters may have been averse to allowing criminals to serve shorter terms of parole. The parole provisions of Proposition 5 would have decreased parole terms for certain

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<sup>186</sup> NORA 5 and Treatment, *supra* note 118.

<sup>187</sup> *Id.*

<sup>188</sup> See UCLA REPORT 2008, *supra* note 67, at 225.

<sup>189</sup> Banys, *supra* note 23, at 3.

<sup>190</sup> The results of Proposition 5 were almost the exact opposite of the results for Proposition 36 as Proposition 5 was defeated 59.7 percent to 39.3 percent. Election Results *supra* note 7. Proposition 36 was passed by 61 percent to 39 percent. Banys, *supra* note 23, at 3.

<sup>191</sup> See, e.g., Editorial Endorsements 2008, *Good intentions, but . . .*, L.A. TIMES, Sept. 26, 2008, <http://articles.latimes.com/2008/sep/26/opinion/ed-5prop26>.

<sup>192</sup> *Proposition 5 Voter Information Guide*, *supra* note 4 at 86.

<sup>193</sup> *Id.*

<sup>194</sup> See *supra* note 26 and accompanying text.

offenders.<sup>195</sup> Voters also may not have felt comfortable with the “minimum supervision” provisions of Proposition 5.<sup>196</sup> This may have made voters feel as though parolees would not be adequately monitored and supervised. Along with actual changes to parole terms, voters may have been apprehensive to green-light a piece of legislation that created two new state agencies for parole and treatment oversight.<sup>197</sup> In a year where the budget crisis was at the forefront of almost every citizen’s mind,<sup>198</sup> it was a difficult time to propose the creation of new agencies requiring serious amounts of funding.

Along with the alienating effect of the parole provisions of Proposition 5, the anti-Proposition 5 campaign likely repelled many voters. Many opponents and advertisements against Proposition 5 argued that it was a “drug dealer’s bill of rights”<sup>199</sup> and would give criminals a “get-out-of-jail-free” card.<sup>200</sup> Casting Proposition 5 in this light made it appear that Proposition 5 would allow violent criminals and drug dealers to roam free. However, simply reading the text of Proposition 5 shows that these statements are untrue.

The very first, and most important, requirement for participation in the three-track system of Proposition 5 is that the defendant is charged with or convicted of a *nonviolent* drug possession offense.<sup>201</sup> Proposition 5 defines a nonviolent drug possession offense as “the unlawful personal use, possession for personal use, or transportation for personal use, or being under the influence, of any controlled substance . . . the term nonviolent drug possession offense does not include the possession for sale, transportation for sale, production, or manufacturing of any controlled substance.”<sup>202</sup> Through its definition of a nonviolent drug possession offense, Proposition 5 clearly excludes drug dealers or offenders who have committed a violent crime. Because most voters likely did not read the actual text of

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<sup>195</sup> The offenders who would receive shorter parole terms are offenders whose most recent term in prison was for a nonviolent drug possession or nonviolent property crime and without a serious, violent, gang related, or sex crime on their record. *Proposition 5 Voter Information Guide*, *supra* note 4 at 33.

<sup>196</sup> These provisions provided for parolees to be placed on parole for six months. *Id.*

<sup>197</sup> Proposition 5 sought to create the Treatment Diversion Oversight and Accountability Commission and Parole Reform Oversight and Accountability Board. *Text of Proposition 5*, *supra* note 5, at 98, 102.

<sup>198</sup> See, e.g., Skelton, *supra* note 104.

<sup>199</sup> Jeff Denham, *Prop 5: Drug Dealer’s Bill of Rights*, Flashreport.org, Oct. 20, 2008, <http://www.flashreport.org/featured-columnslibrary0b.php?faID=2008102002091010>.

<sup>200</sup> See *Proposition 5 Voter Information guide*, *supra* note 4, for a summary of arguments against Proposition 5 and rebuttals to arguments in favor of Proposition 5.

<sup>201</sup> *Text of Proposition 5*, *supra* note 5, at 89.

<sup>202</sup> *Id.*

Proposition 5, and voted against it based on the propaganda on television or on websites, the anti-Proposition 5 campaign may have deceived uninformed voters to vote against Proposition 5.

#### D. Proposition 5 Failed—Now What?

Eight years after Proposition 36 changed the way the criminal justice system dealt with nonviolent drug offenders, California had a chance to further improve and expand the treatment programs that have had over 70,000 success stories.<sup>203</sup> Because voters did not approve Proposition 5, California faces the budget and prison crises without a plan for solving these problems.<sup>204</sup> While Proposition 36 has had success in diverting nonviolent drug offenders from prisons, Proposition 36 and the other drug diversion programs need improvements in order to function properly and provide benefits to California. Proposition 5 would have made significant progress for the current drug diversion system.<sup>205</sup> Even though Proposition 5 failed to pass in November of 2008, the issue cannot be put on the back burner.

Advocates for the reform of the current drug diversion programs in California should continue to propose legislation that brings together Proposition 36, DEJ, and drug courts. This legislation should also seek to better fund the drug diversion programs as they have proven their worth to California's economy by saving taxpayer's money.<sup>206</sup> However, in the future, legislation seeking to reform and improve the drug diversion system should remain separate from efforts to change the parole system. The two-part nature of Proposition 5 likely contributed to its defeat as the parole provisions may have alienated voters who in the past had supported nonviolent offender rehabilitation (through the support of Proposition 36). Proposition 5 may have been an example of legislation attempting to do too much at once. Perhaps separating drug rehabilitation and parole reforms would make it easier for one, or both, types of reforms to pass.

### CONCLUSION

California's history of drug diversion programs has not been without challenges and hardships. In times of great financial strife, it is even more difficult to convince voters to allocate resources toward rehabilitation programs. However, the

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<sup>203</sup> Hundreds of Prop 36 Graduate, *supra* note 89.

<sup>204</sup> Ethan Nadelmann, *Prop. 5 vs. the Prison-Industrial Complex*, L.A. TIMES, Nov. 3, 2008, <http://www.latimes.com/news/opinion/la-oe-nadelman3-2008nov03,0,3924232.story>.

<sup>205</sup> See discussion *supra* Part IV.B.

<sup>206</sup> See discussion *supra* Part III.A.

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diversion programs in California have proven their value and are worthy of improvements and increased funding. In order for voters to approve future reforms, it is imperative to drum up the same support that voters showed for Proposition 36 in 2000.<sup>207</sup> This could be accomplished through attempting to pass the nonviolent offender rehabilitation provisions of Proposition 5, without the hindering effects of the parole sections. Like the path toward recovery from substance abuse, progress is made one step at a time, and it would be wise for legislation seeking to reform the diversion programs in California to follow a similar course.

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<sup>207</sup> See *supra* note 26.

