

# A CRITICAL ANALYSIS OF BALLOT ISSUE 1

## *Part I: Issue 1 Ignores Ongoing Reforms*

On a daily basis the Judges of Ohio's Common Pleas Courts see the ravages of addiction in our communities. We struggle with the pressures of prison crowding. And we are acutely aware of the multiple shortcomings of the decades-long war on drugs. But the poorly drafted constitutional mandate of Ballot Issue 1 will defeat the shared goals of the Ballot Issue proponents and all Ohioans concerned about public safety, addiction and prison overcrowding.

First and foremost, the Issue 1 proponents ignore the ongoing reforms of the criminal justice system that are addressing the concerns they raise. The commitment to treatment over incarceration is a primary focus of Ohio policy makers and stakeholders in the community.

Specialized court dockets are an example of treatment-focused judicial reforms. There are 245 Supreme Court certified specialized dockets in the state serving juvenile and adult felony offenders. Specialized dockets allow low-level felony offenders to have their charges dismissed upon completion of court-monitored treatment. Multiple studies have demonstrated the effectiveness of specialized docket programs in avoiding incarceration and reducing recidivism while protecting the community.

State sentencing reforms and grant programs also are addressing the concerns identified by Issue 1 proponents. Intervention in Lieu of Conviction statutes allow for dismissal of charges in exchange for successful completion of treatment. A new law allowing multiple opportunities for Intervention in Lieu of Conviction comes into effect on October 29, 2018. The Targeted Community Alternatives to Prison (T-CAP) legislation passed in 2017. Nonviolent fifth degree felony offenders may no longer be sentenced to prison. Effective July 1, 2018, none of the courts in Ohio's ten largest counties are sending these T-CAP offenders to prison. The Ohio Department of Rehabilitation and Corrections (ODRC) has offered Justice Reinvestment and Incentive Grants (JRIG) to assist counties in maintaining fourth degree felony offenders in local communities. Probation violation statutes were amended in 2017 to limit incarceration of low-level offenders for non-crime probation violations. State legislative sentencing reforms continue to be developed and implemented.

Issue 1 abandons the county-state criminal justice partnership created to reduce prison overcrowding and to provide drug treatment. Issue 1 creates immediate constitutional rights for felony offenders without first developing a municipal court infrastructure and funding framework. Issue 1 was drafted by out-of-state interests without consultation and input from Ohio stakeholders. Social engineering and policy fiat by constitutional amendment is a dangerous and short-sighted path to criminal justice reform.

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## *Part II: Issue 1 Threatens Public Safety*

Issue 1 prison sentencing reforms jeopardize public safety. While the public focus of the Issue 1 promotion is drug offenses, there are major provisions in the constitutional amendment that are completely unrelated to Ohio's drug laws. The provisions mean that more violent offenders and career criminals will be released into our communities.

Subsection (C) of the Ballot Issue mandates that ODRC reduce the prison sentences imposed by judges and grant early releases to offenders who participate in prison rehabilitation programs. The early release mandate applies even if the offender does not complete the specified rehabilitative programs. Judicially imposed sentences will be administratively reduced by up to 25%. The mandatory early release includes offenders sentenced for violent and dangerous crimes including: Attempted Murder, Felonious Assault, Terrorism, Aggravated Robbery, Aggravated Burglary, Human Trafficking, Child Endangering, Kidnapping, Drug Trafficking, and Aggravated Arson (to name a few). The early release mandate also eliminates mandatory sentencing for offenses involving gang activity, major drug offenders, violent career criminals, offenses in school safety zones, sexually violent predators, and human trafficking (to name a few). Issue 1 drafters predict that 3,628 of these imprisoned felons will be released to Ohio's 88 counties regardless of whether they completed any rehabilitation services while incarcerated.

Judges base their sentencing determination on the circumstances of each individual case. Victim impact statements, prior records, and likelihood to reoffend are a few of the twenty-three sentencing factors the Judges must consider under law to protect the public and rehabilitate the offender. The Issue 1 early release mandate makes the judicial sentencing process meaningless. And it eliminates truth in sentencing. Even though a judge will specify a specific term of imprisonment in the courtroom, that sentence will be administratively shortened by the prison.

Subsection (E) of the amendment is also applicable to all felony offenders – not just drug offenses. It prohibits incarceration of convicted felony offenders in prison for “non-criminal violations of the terms of their probation.” This population of probation violators includes sex offenders, violent offenders, predators, stalkers, drug traffickers, and every other category of felony offender. Issue 1 proponents estimate that an average of 4,019 probation violators currently sentenced annually to prison will remain in our communities.

Issue 1 makes felony probation supervision a hollow and ineffective tool to monitor and supervise offenders in the community. So long as they have no new convictions, these offenders can act with impunity. Our neighborhoods will become significantly more dangerous.

Passage of Issue 1 will threaten public safety by the prison release of thousands of violent felony offenders into our neighborhoods. Addicts will not receive promised treatment. And municipal taxpayers will be saddled with unfunded mandates that are set in constitutional cement. Ohio Supreme Court Chief Justice Maureen O'Connor was blunt in her assessment of Issue 1: “...it will have catastrophic consequences for our state.”

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## *Part III: Reclassification of Drug Offenses Threatens Public Safety*

The Issue 1 constitutional amendment reclassifies felony drug possession offenses as misdemeanors. While normally a first-degree misdemeanor may be sentenced to up to 180 days of local jail incarceration, Issue 1 prohibits any jail sentence for first and second drug convictions. This effectively makes penalties for drug offenses the equivalent of a traffic ticket, whether it be marijuana, heroin, cocaine, meth, hallucinogens, or prescription medications.

Two particular drugs illustrate the public safety threat with this broad reclassification of drug offenses. First is fentanyl. Ohio Supreme Court Chief Justice Maureen O'Connor explained this threat to public safety:

“Issue 1 would make the possession of powdered fentanyl in amounts less than 20 grams a misdemeanor with only probation as the consequence... no possibility of jail time... 19 grams of fentanyl is enough to kill approximately 10,000 people... This is unconscionable.

The second example of dangerous drug offense reclassifications are “date rape” drugs. Unless there is independent evidence that the drugs are possessed for intended sexual assaults, the holder of date rape drugs can only be charged with a misdemeanor with no possible jail time under the constitutional amendment.

The Ohio Prosecuting Attorney's Association and the Ohio Common Pleas Judges' Association have officially taken positions in opposition to Issue 1, arguing that it would leave Ohio with some of the nation's most lenient drug laws. The Ohio Prosecuting Attorney's Association is also concerned that the amendment will make it more difficult to prosecute drug traffickers.

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## *Part IV: Issue 1 Undermines the Drug Treatment Infrastructure*

Issue 1 will undermine drug treatment. The threat of incarceration has proven to be a strong incentive for probation and treatment compliance. And Issue 1 would effectively end the empirically effective specialized docket approach of drug court diversion programs.

The Issue 1 funding framework is fundamentally flawed. The mathematics employed by Issue 1 proponents do not add up. The projected savings are grossly overstated. Their prison savings statistics do not assume the 2017 sentencing reforms. Their projections do not assume the prison reductions from the 2017 probation violation reforms. Their projections do not assume the 5% drop in state prison population in 2017.

The Issue 1 multi-step funding formula is uncertain. There is an up-front funding gap. The earliest the community funds will be available is fall 2019 – a full year after the constitutional protections for felony offenders become effective. And it will no doubt take several months to implement the grant application process, taking the criminal justice system into 2020 with no funds for Issue 1 implementation and treatment. There is no allocation formula for distribution of the freed-up prison funds. Entire counties and rural areas may go without Issue 1 funds. And without a formula based on geography, population, or crime data, it will be an open scramble for funds. Municipalities will be competing against each other and juvenile courts to obtain the Issue 1 money. Projected savings have not materialized in California and Oklahoma, where similar ballot initiatives were passed.

Issue 1 mandates are likely to increase incarceration in local jails. The increased burden on local jails is an unfunded Issue 1 mandate. And releases due to jail overcrowding present a threat to public safety.

Issue 1 provisions for funding of crime victim trauma programs appear to be a cynical political attempt to portray the amendment as a compassionate response to crime victims. It appears to have been added to the Ohio initiative because crime victim groups are taking to the streets in California to protest a similar sentencing reform initiative passed in that state. But the veneer of concern about crime victims is shallow window dressing. The funds are not targeted to victims of felons receiving mandated early releases from prison. Issue 1 funds are not targeted to victims of crimes committed by the increased Issue 1 probation violators remaining in local communities. The funds are not targeted to victims of drug-driven crimes committed by reclassified offenders. The funds are not earmarked to pay restitution for the losses that crime victims have suffered.

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## *Part V: The California and Oklahoma Experiences*

The backers of Ohio Ballot Issue 1 have successfully backed similar initiatives in California and Oklahoma. The experiences of those states should be examined when assessing the promises made about Issue 1.

***Crime Increased.*** Several years ago, California passed three ballot initiatives that are combined in Ohio's Issue 1. The initiatives were promoted as cost-saving measures that would preserve public safety. The result? From 2015 to 2016, violent crime in California increased 4%.

Michele Hanisee, president of the Association of Los Angeles Deputy District Attorneys, believes the increase in violent crime rates has one primary cause – release of offenders from prison under sentencing reforms. She says early release and drug crime reclassifications led to the release of 20,000 inmates. Additionally, 60,000 felony parole violators a year were shifted from state prison to county control. Hanisee asked: "...why are the violent crime rates going up? You have to stick your head in the sand like an ostrich to think that maybe releasing thousands of felons to local probation doesn't have something to do with it."

***Treatment Failed.*** Ballot Proposition 36 in California mandated drug treatment rather than incarceration. A UCLA study of drug arrests found that convicted drug users in California were more likely to be arrested on new drug charges after implementation of Proposition 36. The research underscored the difficulty the state had in getting drug offenders into treatment.

California Ballot Proposition 47 in 2014 reclassified several nonviolent drug felonies as misdemeanors. Recent studies of the impact of the ballot issue do not bode well for Ohio. A Los Angeles Times investigation reported that the reclassification emboldened repeat offenders, especially drug addicts who steal to pay for their habits. The California Police Chiefs Association says that participation in drug rehabilitation programs has decreased because of the law."

Only about 25% of California defendants sentenced to drug treatment under the decriminalization law actually completed their court-ordered programs. A separate UCLA study that examined over 200,000 Proposition 36 cases over a four-year period found that nearly a third of the sentenced offenders did not even report for treatment. They knew that there were no consequences for a failure to appear for treatment.

***Funding Projections Flawed.*** In November 2016 **Oklahoma** voters passed two criminal justice ballot reform measures similar to the provisions in Issue 1. The Oklahoma initiatives were projected to save \$63 million. But in August 2018, Director Joe Allbaugh of the Oklahoma Corrections Department said the cost savings report was fundamentally flawed. The cost savings report incorrectly calculated inmate numbers and made inaccurate assumptions about inmates serving sentences.

Oklahoma Ballot Question 780 specifically reclassified the crime of drug possession from a felony to a misdemeanor. It came into effect in early 2017. In spring 2018, the Oklahoma Department of Corrections requested a \$1 billion budget increase, in part to help build two new prisons. The anticipated prison savings from reclassification of drug offenses did not materialize.