

Issue 1 Died, Ohio's Criminal Justice Reform Lives

I. Introduction

After a contentious campaign, Issue 1, Ohio's proposed constitutional amendment to reform the state's criminal drug and sentencing laws, was defeated resoundingly last November in a statewide ballot initiative. If adopted, Issue 1 would have made several significant changes to Ohio law, including: reclassifying low-level felony drug-possession crimes as misdemeanors with no chance of incarceration for a person's first two offenses within two years; eliminating probation revocations for technical probation violations; providing for a 25 percent earned credit for those serving time in prison (with exceptions for certain heinous crimes); and investing realized savings from reforms into drug treatment programs.¹

By amending the state constitution, Issue 1 reforms would have become an all-but-permanent part of Ohio law, effectively immune to the discretion or policy preferences of governors, judges, or even future legislatures. As such, Issue 1 became an all-or-nothing proposition that, unlike legislation, left no room to compromise or negotiate details.

The gravity of the cause raised the stakes for both sides of the debate. Issue 1 advocates routinely argued that Ohio needed a constitutional amendment to reform its drug sentencing and criminal justice laws because state leaders and the General Assembly had failed to take meaningful steps to address those issues.² As one Issue 1 proponent put it, "The leadership in Ohio throughout the last decade had their head in the sand on this issue and have done not much of anything."³ And without the amendment, supporters contended, innocent people would continue to die.⁴

Issue 1 opponents, on the other hand, claimed that the amendment would signal to drug cartels that Ohio is open for business; that heroin and fentanyl traffickers would get the proverbial "slap on the wrist," and face the equivalent of a speeding ticket; that someone possessing enough fentanyl to kill 10,000 people would be charged with a misdemeanor; and that the amendment's earned credit provision was little more than a "get-out-of-jail-free card" for dangerous criminals.⁵ Some warned that if Issue 1 passed, "lives will be lost."⁶ Judges and prosecutors across Ohio campaigned against Issue 1, and Maureen O'Connor, the Chief Justice of the Ohio Supreme Court, toured the state for months warning of the "catastrophic consequences" of the initiative.⁷

For their part, gubernatorial candidates Richard Cordray and Mike DeWine held polar opposite views on the issue, with Cordray endorsing the amendment while DeWine

railed against it.⁸ At some points it seemed that the entire gubernatorial race turned on Issue 1.⁹ As *Politico* observed, "DeWine himself has blasted Cordray over Issue 1 so often it's become a central part of his campaign, often relying on a claim that the new rules would let a drug dealer carry as much as 19 grams of fentanyl—enough to kill roughly 10,000 people—without the worry of jail time."¹⁰

Distinguishing the rhetorical facts from fiction may have proven exhausting for voters, but accusing the legislature and state leadership of playing ostrich on such a significant issue proved a serious charge, and as campaign-targeted members of the state judiciary and General Assembly were quick to point out, it simply was not true.¹¹ The Issue 1 campaign downplayed or ignored the General Assembly's real record on criminal justice reforms, including several significant measures that legislators had passed recently in the face of stiff, politically powerful opposition. Instead of giving state leaders credit where credit was due, Issue 1 advocates repeated the mistaken and misleading refrain of a "do-nothing" leadership, earning a harsh rebuke from state officials eager to defend their records.¹²

Issue 1 may have died at the polls in November, but the spirit of sentencing and criminal justice reform is alive and well in the Ohio statehouse. Although some reform-minded advocates rightly may have worried that Issue 1's defeat would make criminal justice issues a political and legislative non-starter for years to come, Ohio legislators seem poised to take up criminal justice reform almost immediately in the coming session. This is encouraging news. Even though Ohio has been among the most proactive states on criminal justice, more work remains to be done and it seems that the General Assembly stands prepared to do it.

II. Ignoring the Obvious: Ohio Is a Criminal Justice Reform Leader

Virtually lost in the hyperbole and enflamed rhetoric of the campaign was Ohio's real record as a criminal justice reform leader. It is fair to say, as Issue 1 supporters argued, that Ohio can do more work on criminal justice reform. But it is not fair or accurate to say, as Issue 1 supporters also argued, that the Ohio General Assembly has hidden its head in the sand or done nothing about the issue for years. On the contrary, Ohio legislators have taken bold action on drug sentencing and criminal justice reform over the past ten years, often in the face of heavy and politically powerful



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opposition from Ohio prosecutors and the law enforcement community.

The Ohio legislature has achieved major criminal justice reforms during the last decade that have helped reduce the state's prison population to below 50,000 inmates for the first time in years.¹³ Meaningful initiatives have included, for example, Ohio's Justice Reinvestment Act (House Bill 86), reentry reform, criminal intent reform, civil asset forfeiture reform, Targeted Community Alternatives to Prison, record sealing, and the expansion of intervention programs. In addition to such measures, the General Assembly continues to allocate substantial sums to drug and mental health treatment, as well as to the various drug courts established across the state.

In 2011, legislators designed Ohio's House Bill 86 to keep first-time low-level non-violent offenders from going to prison to serve short sentences, believing that such offenders would be better served by local correction and probation. House Bill 86 was not without its critics. Prosecutors adamantly opposed the bill, and the Ohio Prosecuting Attorneys Association—a powerful lobby in the legislature and representing the elected county prosecutors from across the state—charged that the reform would make a “mockery of our sentencing laws.”¹⁴ State legislators generally respect the work done and role played by prosecutors and try to assuage their opposition. So, it was no small political risk for the General Assembly to pursue and pass House Bill 86 over the prosecution lobby's strenuous objection.

Similarly, the legislature's attempt to fix civil asset forfeiture—a procedure that allows law enforcement to take possession and ownership of property without charging anyone with a crime—met with harsh opposition from prosecutors and law enforcement officials, who argued that the reform would invite drug traffickers into the state and deprive law enforcement of valuable crime-fighting tools.¹⁵ After some compromise, the General Assembly passed comprehensive civil asset forfeiture reforms that better protect due process and property rights in Ohio.

More recently, during an intense budget battle in 2017, the state legislature passed the Targeted Community Alternatives to Prison (T-CAP) program, which requires counties to locally rehabilitate those convicted of non-violent felonies and sentenced to less than one year rather than sending them to prison. The money saved by the Department of Rehabilitation and Correction under the program is given to the counties to help cover their own increased costs. The Ohio Prosecuting Attorneys Association, the Ohio Judicial Conference,¹⁶ law enforcement officials, and a very influential statewide office holder¹⁷ all opposed T-CAP. Despite such opposition, T-CAP was included in the state budget.

In 2018, the Ohio legislature again enacted meaningful criminal justice reform through Senate Bill 66, which expands eligibility for treatment-in-lieu-of-conviction and gives judges more discretion to seal criminal records for those who have demonstrated an ability and willingness to

stay on the straight-and-narrow. The Ohio Prosecuting Attorneys Association opposed the reforms, arguing that the bill was too lenient.¹⁸

The General Assembly has shown courage and fortitude when enacting smart reforms in the face of constant opposition from powerful organizations. Those reforms may have taken smaller strides or have had less of an impact than reform advocates would prefer, but those initiatives helped lay the groundwork for many of the bolder measures that Issue 1 proponents support, and with Ohio tackling more areas of criminal justice reform than any other state over the past seven years, the charge of a “do-nothing” legislature rings hollow.

III. After Issue 1: Criminal Justice Reform To Be Continued

After Issue 1's defeat, some working on criminal justice reform worried that the campaign rhetoric warning of drug dealer safe havens and “get-out-of-jail-free cards” had made criminal justice issues too politically toxic for the General Assembly to consider. Thus far, however, those fears seem unfounded.

Ohio Senate President Larry Obhof, a harsh critic of Issue 1, has already announced that smart criminal justice reform will be a legislative priority in the upcoming session, introducing in the lame duck session a bill that reads (in its entirety): “It is the intent of the General Assembly to develop and enact legislation to reform Ohio's drug sentencing laws.”¹⁹ Mr. Obhof sponsored the bill and the Senate Judiciary Committee has held two hearings on it in order to get organizations on the record supporting the concept of reform.

Governor-elect Mike DeWine, perhaps Issue 1's most vocal critic, has also expressed interest in addressing sentencing reform in the next legislative session.²⁰ Although he opposed Issue 1, Mr. DeWine's support for sentencing reform is not surprising. As Ohio's Attorney General he repeatedly observed that we cannot “arrest our way out of” the drug epidemic and has called for a multi-pronged solution to the problem.²¹

President Obhof's bill suggests that drug sentencing reform may be the first reform that the legislature tries to tackle in the forthcoming session, with reclassifying low-level possession crimes as misdemeanors as the most likely centerpiece. Reclassifying low-level drug possession as misdemeanors is a natural next step for Ohio and may not be the sea change that some expect. Because of the steps already taken, Ohio's prisons are not overwhelmed by low-level drug possessors. In January 2018, those whose most serious crime is drug possession took up only 2,688 of almost 50,000 prison beds.²² That group of 2,688 inmates includes serious Felony 1, Felony 2, and Felony 3 offenders, as well as the lower-level offenders that would be impacted by potential reforms.

During the Issue 1 campaign, judges and prosecutors repeated over and over that because of House Bill 86, T-CAP, drug courts, and other reforms, very few offenders

go to prison for low-level drug possession. In many ways, Ohio's system already treats low-level drug possession like misdemeanors. With earlier reforms and the infrastructure in place, officially making those crimes misdemeanors would not have nearly the impact to the system that such a proposal would have had just eight years ago. A larger impact of such reform and reclassification might be on the workload of municipal courts, but additional reforms could give common pleas courts concurrent jurisdiction over those cases so as to not overwhelm the already heavily burdened municipal courts.

Looking beyond the broad, undefined scope of Mr. Obhof's stated "intent . . . to enact legislation to reform Ohio's drug sentencing laws," there are already at least two competing proposals for drug-crime reclassification worth considering. Franklin County Prosecutor Ron O'Brien and Columbus City Attorney Zach Klein have proposed that Ohio simply make current Felony 4 and Felony 5 drug-possession crimes misdemeanors, with exceptions for crimes involving date rape drugs and fentanyl.²³ The other proposal, proffered by Ohio's Criminal Justice Recodification Committee—comprised of judges, prosecutors, defense attorneys, victim advocates, legislators, and law enforcement, and convened to suggest revisions that would make Ohio safer and fairer²⁴—has released a 4000-page proposed rewrite of Ohio's criminal code.²⁵ The Committee worked with researchers, academics, and health care professionals to determine the appropriate amount of drugs in possession that reliably distinguishes personal use from trafficking. As part of its proposed rewrite, the Committee recommended a completely revamped drug code.

The Ohio Sentencing Commission has suggested that the legislature take up the Recodification Committee's proposed sentencing structure, but make the lowest levels of possession unclassified misdemeanors rather than felonies.²⁶ Adopting such a proposal would solidify Ohio as a national leader in reforming drug sentencing policy.

Even in the wake of Issue 1's demise, Ohio should still consider increasing earned credit availability for offenders who successfully complete education and rehabilitative programs. Successful participation in earned credit programs can drastically reduce recidivism.²⁷ And because 95 percent of those who go to prison will rejoin their communities at some point,²⁸ there is a vested interest in people coming out of prison better than when they went in. Ohio currently offers a mere 8 percent earned credit to a small subset of its prison population—ranking near the bottom nationally. Indiana, by contrast, offers 33 percent earned credit for most offenses,²⁹ and Connecticut offers a whopping 50 percent earned credit for inmates convicted of non-violent offenses.³⁰

Going forward, Ohio policymakers should also take a serious look at the state's pretrial detention policy, which still relies heavily on money bail rather than an evidence-based assessment of the risk that accused individuals pose to the community. Ohio's outmoded pretrial detention policy means that 56 percent of those in county jails are not

actually serving a sentence, but are either awaiting trial or being held for a technical probation violation.³¹ Some Ohio counties have begun moving toward a risk-based pretrial detention model and are releasing more defendants before trial with better outcomes. Implementing such policies statewide may relieve some of the stress that T-CAP and reclassification may put on jails.

IV. Conclusion

After a hard-fought campaign, Issue 1 may have failed to gain enough voter support to amend the Ohio constitution, but the state has been and remains a national leader on drug sentencing and criminal justice reform. Ohio has adopted savvy reform measures in recent years, and state legislators have done courageous yeoman's work to turn the tide of a rapidly rising prison population and to make the state's criminal justice system fairer and more just. Credit should be given where and when credit is due. The current system remains far from perfect and important work remains to be done, so reform advocates should welcome the overtures from the General Assembly promising that the work will indeed continue.

Notes

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- ⁵ Jeff Barron, *Fairfield County commissioners join other elected officials in opposition to Issue 1*, Lancaster Eagle Gazette (Oct. 16, 2018), <https://www.lancastereaglegazette.com/story/news/politics/elections/2018/10/16/fairfield-county-commissioners-opposition-issue-1/1658350002/> (last visited Dec. 14, 2018).
- ⁶ Maureen O'Connor, *Look closely at state Issue 1. It's a disaster*, Akron Beacon Journal (Aug. 30, 2018), <https://www.ohio.com/akron/editorial/maureen-oconnor-look-closely-at-state-issue-1-its-a-disaster> (last visited Dec. 13, 2018).
- ⁷ *Id.*
- ⁸ Jim Siegel, *DeWine says Issue 1 impact 'devastating,' Cordray calls it smart policy*, the Columbus Dispatch (Sep. 11, 2018), <https://www.dispatch.com/news/20180910/dewine-says-issue-1-impact-devastating-cordray-calls-it-smart-policy> (last visited Dec. 14, 2018).
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