

Advancing Criminal Reform Through Ballot Initiatives

Nicholas Ansel*

I. INTRODUCTION

2020 brought the world's attention to bear on American policing and the American carceral regime. After the murder of George Floyd on May 25, 2020, protests erupted in every state in America.¹ By early July, experts estimated that “about 15 million to 26 million people in the United States ha[d] participated in demonstrations,” representing “the largest movement in the country's history.”² As of mid-October, Black Lives Matter demonstrations still continue in many cities.³

America now cages more people than any other country in the history of Earth, incarcerating African Americans “at a rate six times that of South Africa during Apartheid.”⁴ The murder of George Floyd represented a crystallization of the American criminal project's treatment of black and brown communities, of marginalized communities, of indigent persons.

While the general contours of this crisis are consistent nationally, Americans now know that the proposed remedies must be diffuse. Policing is scattered among over 18,000 law enforcement agencies, many governed by

* J.D. Candidate, 2021. This is dedicated to my family. To friends. To my editors and colleagues at the *Arizona State Law Journal*. To the Movement for Black Lives. And to the courage required to organize and demand better from *our* public institutions.

1. Janie Haseman, Karina Zaiets, Mitchell Thorson, Carlie Procell, George Petras & Shawn J. Sullivan, *Tracking Protests Across the USA in the Wake of George Floyd's Death*, USA TODAY (June 18, 2020, 3:48 PM), <https://www.usatoday.com/in-depth/graphics/2020/06/03/map-protests-wake-george-floyds-death/5310149002/> [<https://perma.cc/VR8K-VSA4>].

2. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/4R9P-JKSS>].

3. See, e.g., *Black Lives Matter Protesters and Counter Protesters Clash at Prescott Rally*, AZCENTRAL (Oct. 11, 2020, 7:30 AM), <https://www.azcentral.com/picture-gallery/news/local/arizona/2020/10/11/black-lives-matter-protesters-and-counter-protesters-clash-prescott-rally/5948563002/> [<https://perma.cc/PJW9-B2SC>].

4. Alec Karakatsanis, *The Punishment Bureaucracy: How To Think About “Criminal Justice Reform,”* 128 YALE L.J.F. 848, 850 (2019) (citing LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 263 (2002)).

countless local and municipal governments.⁵ Likewise, criminalization and incarceration are almost entirely accomplished at the hands of state governments, each having established unique criminal codes and policies.⁶

So how should those involved in the criminal reform movement approach changing the punishment bureaucracy? If one were to find herself engrossed in the relevant academic literature, she might learn to form broad coalitions, lobby political bodies, strategically vote for representatives, engage media in her cause, and fund more academic studies and expertise in criminal policy.

While all this work has been invaluable, this formula omits a crucial—perhaps the crucial—vehicle for criminal reform in America. If, instead, reformers were to focus on how bold reform policies are being implemented, they may end up turning their attention somewhere else: direct democracy.

In many states, fundamental reforms have been driven in a patently American way—directly by the people. Particularly over the last decade, reformers have placed a growing number of policies directly on the ballot with compelling rates of success.⁷ As it turns out, placing trust in the people has been an extremely successful way to implement changes like policing reform, drug decriminalization, search and seizure protections, felon enfranchisement, jury unanimity, and bail reform.⁸ Coalition-building is certainly constitutive of transformative change, but maybe it is time that reformers appreciate the success their movement has already had in the minds of everyday Americans.

This Comment rebuts the traditional narrative that leaving criminal policy in the hands of average citizens necessarily results in an overly punitive system.⁹ It argues that direct democracy is a critical component of criminal reform because it serves as an effective vehicle for passing bold reform policies. Unique advantages inhere in direct democracy: it places reformers at the helm of policymaking without having to negotiate or dilute their goals, it bypasses the ruling bureaucrats who shaped mass incarceration and are thus unlikely to truly reform it, and it puts reform policies directly before the

5. DUREN BANKS, MATTHEW HICKMAN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUST., NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 1 (Oct. 4, 2016), <https://www.bjs.gov/content/pub/pdf/nsleed.pdf> [<https://perma.cc/E4WR-WVJY>].

6. Jeff Welty, *Overcriminalization in North Carolina*, 92 N.C. L. REV. 1935, 1937 (2014) (“[T]he vast majority of criminal prosecutions in the United States happen in state courts.”).

7. Press Release, Pub. Pol’y Inst. of Cal., Initiative Process: Money Doesn’t Buy Success at Ballot Box, <https://www.ppic.org/press-release/initiative-process-money-doesnt-buy-success-at-ballot-box/> [<https://perma.cc/T6FN-HTNF>].

8. Appendix B.

9. See, e.g., RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 1 (2019) (“[T]he typical voter lacks the requisite data and knowledge to make the best decisions in these areas.”).

actual people who are most affected by the lived experience of mass incarceration. And, to borrow the popular idiom, direct democracy provides the movement with a greater ability to strike while the iron is hot.

The Comment follows several lines of investigation to support its core assertion. Part II focuses on direct democracy, examining the process of getting a measure to the ballot, including the express and unspoken requirements for ensuring an initiative makes its way to the voters. It then reviews a series of restrictions state legislatures have placed on the initiative process. Part III examines criminal-focused ballot initiatives that have been proposed since 2000, finding that these measures are passing with increased frequency and cover a broad range of criminal injustices, while punitive-focused pro-criminalization measures are becoming more limited in scope. Finally, Part IV discusses how criminal reform is well-suited for direct democracy because it embraces its theoretical underpinnings while dispelling its traditional critiques.

II. UNDERSTANDING DIRECT DEMOCRACY

Before discussing direct democracy in the criminal context, this Comment analyzes direct democracy conceptually, as well as how it formally operates in modern society. This Part treats that material by dividing it into two Sections. Section A briefly discusses the foundational theory of direct democracy in America before examining its several forms and how a measure actually gets onto the ballot. Section B focuses on how state legislatures have sought to restrict direct democracy and undermine some enacted measures. Each Section represents an important piece in analyzing whether direct democracy is a suitable mechanism for criminal reform.

A. The Process

American direct democracy largely developed at the turn of the twentieth century in the American West, spurred by the Progressive movement and the enormous power exerted by corporate interest groups on state legislative bodies.¹⁰ Direct democracy originated and took shape in America primarily as a tool “for the majority to uproot powerful corporate interests.”¹¹ One

10. See generally Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL’Y REV. 11, 21–40 (1997).

11. *Id.* at 32.

might view direct democracy as an attempt to trifurcate state legislative bodies, serving as an additional check on representative legislative power.

There are several forms of direct democracy in America. The most common and widely understood form is the initiative, whereby citizens propose a law or a constitutional amendment.¹² There are two forms of initiatives: direct and indirect.¹³ A direct initiative sends a qualified proposal directly to the ballot for the voters to decide.¹⁴ An indirect initiative is first sent to the legislature, which has an opportunity to act on that measure.¹⁵ If the legislature fails to act, revises the proposal, or rejects it, the initiative then goes directly to the ballot for the voters to decide.¹⁶

Another form of direct democracy is the referendum, whereby voters may repeal a law already enacted by the legislature.¹⁷ Finally, legislative referrals (otherwise known as legislative measures or legislative propositions) involve the legislature placing a proposal onto the ballot for a public vote.¹⁸

Today, twenty-six states and the District of Columbia have some form of the initiative or referendum processes for statewide elections.¹⁹ The sheer quantity of states that employ direct democracy fails to adequately capture its widespread effect in America. While used by only half of the states, “over 70 percent of the population now lives in either a state or city where these tools of direct democracy are available.”²⁰

When a group of citizens decide to propose an initiative or referendum, it must follow several procedural requirements for their proposed measure to qualify for the ballot.²¹ The most critical requirement is gathering enough

12. *What Are Ballot Propositions, Initiatives, and Referendums?*, INITIATIVE & REFERENDUM INST., <http://www.iandrinstitute.org/quick-facts.cfm> [<https://perma.cc/YUZ5-3NTN>].

13. *Id.*

14. *Id.*

15. *Id.*

16. *See id.*

17. *Id.*

18. *See Recall (Political)*, BALLOTPEDIA, [https://ballotpedia.org/Recall_\(political\)](https://ballotpedia.org/Recall_(political)) [<https://perma.cc/ELA9-ARCS>]. Another form of direct democracy is the recall, where people vote on whether to recall a public official from their office. *Id.* The recall process is outside the focus of this Comment.

19. *States with Initiative or Referendum*, BALLOTPEDIA, https://ballotpedia.org/States_with_initiative_or_referendum [<https://perma.cc/5RSL-WUJM>]. For an analysis of which states use certain direct democracy processes, see *Initiative and Referendum States*, NAT'L CONF. OF ST. LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> [<https://perma.cc/BZ7P-A2LW>].

20. John G. Matsusaka, *Direct Democracy Works*, 19 J. ECON. PERSPS. 185, 185–86 (2005).

21. For example, states have individualized procedural requirements regarding how to notify the state that a group is pursuing a ballot measure and regarding the forms and language

signatures.²² While the percentages vary from state to state, usually signatures amounting to between 3% and 15% of the votes cast in the state's previous gubernatorial election are required.²³ The signature requirement ensures that measures have adequate public support.²⁴

Gathering enough signatures can be rather difficult, especially depending on the size of the state in which a ballot measure is sought.²⁵ In order to facilitate this process, organizers generally form a campaign²⁶ that then hires petition circulators to collect signatures. Since the inception of direct democracy, paid circulators have been a staple of these campaigns.²⁷ In the early twentieth century, there were already frequent critiques of petition peddlers.²⁸ Several states even banned the use of paid circulators, until those bans were ruled unconstitutional in 1988.²⁹ Today, a vast subculture of professional circulators exists to support campaigns.³⁰

States have implemented varying requirements for these circulators, including: in-state residency, prohibiting payment by signature collected, registration with the state, and swearing by affidavit as to the validity of the signatures they collect.³¹ Because signatures can be invalidated for many

that must be included on petitions. *See, e.g., Laws Governing the Initiative Process in Arizona*, BALLOTPEDIA, https://ballotpedia.org/Laws_governing_the_initiative_process_in_Arizona [https://perma.cc/7G88-KD83].

22. *See generally Signature Requirements*, BALLOTPEDIA, https://ballotpedia.org/Signature_requirements [https://perma.cc/3KDQ-TTWE] (listing the various signature requirement for each state).

23. Some states set their thresholds on the basis of votes cast in the previous presidential election; others look to the prior secretary of state election; and still others formulate the percentage based on the number of citizens or registered voters in their state. *Id.*

24. Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 44 (2003).

25. In 2000, the same 5% signature threshold required 420,000 signatures in California, while requiring only 20,000 signatures in Montana. *Id.* at 46.

26. *See, e.g., 3 CAL. FAIR POL. PRACS. COMM'N, BALLOT MEASURE COMMITTEES: CAMPAIGN DISCLOSURE MANUAL* (2020), http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Manuals/Manual_3/Final_Manual_3.pdf [https://perma.cc/9C7P-V2RZ].

27. Ellis, *supra* note 24, at 49 (citing JAMES BARNETT, *THE OPERATION OF THE INITIATIVE, REFERENDUM, AND RECALL IN OREGON* 59–60 (1915)).

28. *Id.*

29. *Meyer v. Grant*, 486 U.S. 414, 414 (1988) (overturning Colorado's ban on paid petitioners).

30. *See* Dan Frosch, *Professional Petitioners Aid Ballot Initiatives*, N.Y. TIMES (Oct. 23, 2010), <https://www.nytimes.com/2010/10/24/us/politics/24petition.html> [https://perma.cc/DXB3-UWVG]; Ellis, *supra* note 24, at 37.

31. *Laws Governing Petition Circulators*, NAT'L CONF. OF ST. LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/laws-governing-petition-circulators.aspx> [https://perma.cc/3D77-G3UN] (2012); *see also Petition Circulator*, BALLOTPEDIA, https://ballotpedia.org/Petition_circulator [https://perma.cc/J3KD-TM5Q].

reasons—including the lack of a matching signature, signatures by non-residents, or unverified signatures—far more signatures must be collected than the concrete requirements prescribed by each state, and successful ballot campaigns routinely collect far more than the threshold requirements.³²

Beyond the organizational tasks, campaigns must create the substance of the initiative.³³ A title need be given to the ballot measure for both the petition phase—where signatures are collected—and the ballot phase—where voting occurs.³⁴ A summary of the initiative, usually subject to a word limit, needs to be drafted for both petitions and the ballot.³⁵ Since most voters will never read the actual legislation, the results of these drafting processes are instrumental in the voting process.³⁶

Finally, the actual legislation must be drafted. This is, of course, only true when citizens are proposing an initiative, not a referendum.³⁷ There has been considerable scholarship devoted to critiquing the initiative process for lacking the deliberative qualities of formal governing bodies.³⁸ Today, though, this process is hardly haphazard. Successful ballot campaigns are typically comprised of robust collectives that are able to focus their attention on drafting a singular piece of legislation.³⁹ It is extremely common for these

32. “To ensure the measure qualifies for the ballot, the campaign’s signature goal should [be] 33–100% higher than the number of actual signatures required.” GREENBELT ALL., SUCCESSFUL CITIZENS’ INITIATIVES: A GUIDE TO WINNING LOCAL LAND-USE BALLOT MEASURE CAMPAIGNS 5 (2002), <http://www.greenbelt.org/wp-content/uploads/2012/01/Successful-Citizens-Initiatives.pdf> [<https://perma.cc/E4KW-GRZM>].

The Washington Secretary of State urges initiative campaigns to gather “as many signatures as possible” due to potential invalidations. *Frequently Asked Questions About Circulating Initiative and Referendum Petitions*, WASH. SEC’Y OF ST., <https://www.sos.wa.gov/elections/initiatives/faq.aspx> [<https://perma.cc/2Z9D-BJQY>].

33. See GREENBELT ALL., *supra* note 32, at 16.

34. In several states, the proponent may draft the petition title, sometimes subject to the approval of a state officer such as the Attorney General, Secretary of State, or Board of Elections. More commonly, proponents present their initiative, whereupon those state officials draft the title. A proponent can, in almost all initiative states, challenge the given title. See *Overview*, NAT’L CONF. OF ST. LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/preparation-of-a-ballot-title-and-summary.aspx> [<https://perma.cc/6GPZ-Q8TK>].

35. See *id.*

36. See *id.*

37. See *Initiative and Referendum Process*, NAT’L CONF. OF ST. LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/initiative-and-referendum-processes.aspx> [<https://perma.cc/JM6P-XQST>].

38. See, e.g., Matsusaka, *supra* note 20, at 186.

39. See, e.g., Cheryl Miller, *Sacramento Firm Drafts Ballot Initiative Challenging Landmark Labor Law*, LAW.COM (Oct. 29, 2019, 5:54 PM), <https://www.law.com/therecorder/2019/10/29/sacramento-firm-drafts-ballot-initiative-challenging-landmark-labor-law/> [<https://perma.cc/EF4H-S9LZ>]; *What We Do*, BALLOT INITIATIVE STRATEGY CTR., <https://ballot.org/> [<https://perma.cc/A7EY-G6BM>].

campaigns to hire experienced teams of drafters comprised of lawyers and even former legislators, or to hire outside firms that specialize in the initiative drafting process.⁴⁰ And, where a campaign lacks those resources, many states provide resources like the services of a legislative drafting body or a review period during which the campaign may adopt any recommended changes.⁴¹

Ballot campaigns must also be keenly aware of potential legal challenges to procedural deficiencies in their ballot measures. It is common for measures to be challenged for including vague or deceptive language,⁴² failing to gather enough signatures or follow filing requirements,⁴³ or not adhering to state-specific guidelines like single-issue requirements.⁴⁴ If vague language exists, instead of decertifying measures, courts can intervene to re-draft the ballot language in a less confusing manner or order state officials to do so.⁴⁵

However, once the voters have approved a measure, it is the state that is tasked with defending any substantive legal challenges to the enacted

40. See, e.g., Miller, *supra* note 39; BALLOT INITIATIVE STRATEGY CTR., *supra* note 39.

41. See, e.g., *Laws Governing the Initiative Process in California*, BALLOTPEdia, https://ballotpedia.org/Laws_governing_the_initiative_process_in_California [<https://perma.cc/8LDV-2NNQ>] (“Proponents may seek the assistance of the Office of the Legislative Counsel in drafting the measure prior to filing it . . .”).

42. See, e.g., *Stiritz v. Martin*, 2018 Ark. 281, at 3–8, 556 S.W.3d 523, 527–29 (holding that an initiative legalizing gambling was not misleading); *Dep’t of State v. Hollander*, 256 So. 3d 1300, 1302 (Fla. 2018) (reversing a lower court ruling that the ballot language for Florida’s Marsy’s Law measure was misleading); *Prevent Sanctuary Cities v. Haley*, No. 74966, 2018 WL 2272955, at *4–6 (Nev. May 16, 2018) (ruling that a Nevada initiative was “confusing and misleading to voters”); *Conway v. Martin*, 2016 Ark. 322, at 4–11, 499 S.W.3d 209, 212–15 (certifying a medical marijuana initiative because the language was not misleading and instead would “give voters a fair understanding of the issues presented”).

43. *Benca v. Martin*, 2016 Ark. 359, at 13–16, 500 S.W.3d 742, 751–52 (striking a medical marijuana initiative from the ballot because signature irregularities and missing canvasser information resulted in an insufficient number of signatures); *Birks v. Dunlap*, No. BCD-AP-16-04, 2016 Me. Bus. & Consumer LEXIS 9, at *32–34 (Apr. 8, 2016) (overturning the Secretary of State’s invalidation of signatures because the State had impermissibly invalidated all signatures by some circulators due to some signature variance).

44. *League of Women Voters of Pa. v. Boockvar*, No. 578 M.D. 2019, 2019 Pa. Commw. Unpub. LEXIS 623, at *6–7, *aff’d*, 219 A.3d 594 (Pa. 2019) (enjoining the Secretary of State from certifying the results of the Marsy’s Law Initiative while the court determines whether the measure satisfies the single subject requirement); *Mont. Ass’n of Cnty. v. State*, 2017 MT 267, ¶¶ 1–3, 389 Mont. 183, 185, 404 P.3d 733, 735 (preventing Marsy’s Law from reaching the ballot because it violated the single-issue and separate-vote requirements).

45. See, e.g., *Steele v. Pruitt*, 2016 OK 87, ¶¶ 17–19, 378 P.3d 47, 53–54; see also Bob Salsberg, *Pot Legalization Question Cleared for Massachusetts Ballot in November*, INS. J. (July 8, 2016), <https://www.insurancejournal.com/news/east/2016/07/08/419525.htm> [<https://perma.cc/BA8H-U8KR>] (explaining that where the current title and statement of Massachusetts’s Marijuana Legalization Initiative were “clearly misleading,” the court ordered state officials to change the wording but allowed it to proceed to the ballot).

measure, not the ballot campaign.⁴⁶ Once the voters enact or reject a measure, the sponsors' role in the initiative process is over.⁴⁷

B. Legislative Resistance to Direct Democracy

Generally, legislators aren't quite keen on the voters bypassing their authority. Accordingly, several states have recently enacted restrictive requirements for ballot initiatives resulting in less initiatives finding their way onto the ballot.⁴⁸ From 2006 to 2015, the number of measures that found their way onto the ballot consistently declined.⁴⁹ For a variety of reasons (i.e. low turnout in 2014 and a perception of legislative inaction), 2016 saw a significant increase in citizen initiatives.⁵⁰ That increase prompted legislatures across the country to pass more restrictive policies in order to curb the reach of direct democracy.⁵¹ According to the Ballot Initiative Strategy Center, "[Ten] states adopted legislation to make it more difficult to put citizen-led measures on the ballot" between 2017 and 2018.⁵²

Some states have worked to make it more difficult to gather the requisite signatures for ballot measures by creating geographic distribution requirements. In Michigan, the Legislature passed a bill capping signatures collected from a single district at 15% so that organizers must evenly distribute their signature collection efforts across the state.⁵³ Idaho passed a similar but more expansive bill requiring "signatures from 10 percent of registered voters in 32 of Idaho's 35 districts," and reducing the timeframe

46. *Hollingsworth v. Perry*, 570 U.S. 693, 693–94 (2013) (holding that ballot sponsors did not have Article III standing to appeal an adverse ruling when the state refused to appeal).

47. *See id.*

48. Vann R. Newkirk II, *American Voters Are Turning to Direct Democracy*, ATLANTIC (Apr. 18, 2018), <https://www.theatlantic.com/politics/archive/2018/04/citizen-ballot-initiatives-2018-elections/558098/> [<https://perma.cc/KP2V-MCLA>].

49. *Id.*

50. *Id.*

51. *Id.*

52. Ari Berman, *After Voters Passed Progressive Ballot Initiatives, GOP Legislatures Are Trying To Kill Future Ones*, MOTHER JONES (Dec. 20, 2018), <https://www.motherjones.com/politics/2018/12/after-voters-passed-progressive-ballot-initiatives-gop-legislatures-are-trying-to-kill-future-ones/> [<https://perma.cc/9L36-MVH3>].

53. Zachary Roth, *The Assault on Direct Democracy*, BRENNAN CTR. FOR JUST. (Mar. 27, 2019) [hereinafter Roth, *The Assault on Direct Democracy*], <https://www.brennancenter.org/our-work/analysis-opinion/assault-direct-democracy> [<https://perma.cc/BXR8-DP9A>]. This policy was subsequently overturned by the Court of Claims in Michigan, which held that Michigan "cannot restrict the number of signatures" that can be gathered from a single district. Cheyna Roth, *Court Rules on Ballot Initiatives Law*, MICH. RADIO: NPR (Sept. 27, 2019), <https://www.michiganradio.org/post/court-rules-ballot-initiatives-law> [<https://perma.cc/78TA-6F9C>].

for gathering signatures from eighteen to six months.⁵⁴ Legislators in Arizona also passed a geographic distribution requirement, setting signature thresholds for all thirty districts.⁵⁵ Other states have introduced bills seeking to raise the bar for passing initiatives. In Missouri and Florida, bills were introduced raising that threshold to 66% for voters to approve any initiative.⁵⁶

One of the most restrictive and strange requirements, though, was passed prior to the 2016 initiative resurgence by the Arizona Legislature. A 2014 bill added a “strikeout law” stipulating that all circulators can be subpoenaed to appear in court and verify the signatures they collected.⁵⁷ Oftentimes circulators are from out-of-state, so if they are unable to get to the court hearing, the signatures they collected are invalidated.⁵⁸ In recent litigation surrounding a clean energy initiative, 1,180 petition circulators were subpoenaed to court to verify the signatures they collected.⁵⁹ In what the Arizona Supreme Court called “[a] five-day trial of extraordinary logistical complexity,” the court was only able to call fifty of those circulators to testify.⁶⁰ Nevertheless, courts have upheld this restriction on the initiative process.⁶¹

In 2017, the Arizona Legislature passed House Bill 2404, which added a new spate of ballot-measure requirements.⁶² Now, ballot measures must

54. Cynthia Sewell, *GOP Senators Broke Rank To Vote Against Idaho’s ‘Ballot Bill,’ but It Narrowly Passed*, IDAHO STATESMAN (Mar. 22, 2019, 2:37 PM), <https://www.idahostatesman.com/news/politics-government/state-politics/article228288169.html> [https://perma.cc/6GTM-2TND].

55. Ryan Randazzo, *Arizona Lawmakers Vote To Make It Harder for Citizens To Change Laws Via Ballot Measures*, AZCENTRAL (May 9, 2019, 5:59 PM), <https://www.azcentral.com/story/news/politics/arizona/2019/05/08/citizen-initiatives-arizona-legislature-approves-bill-add-barriers-ballot-measures/1142430001/> [https://perma.cc/T98U-YTZA].

56. Roth, *The Assault on Direct Democracy*, *supra* note 53.

57. Howard Fischer, *Federal Lawsuit Challenges Law To Regulate Signature Gatherers*, ARIZ. CAPITOL TIMES (July 15, 2019), <https://azcapitoltimes.com/news/2019/07/15/federal-lawsuit-challenges-law-to-regulate-signature-gatherers/> [https://perma.cc/MNB3-UFRH].

58. *Id.*

59. *Id.*

60. Leach v. Reagan, 430 P.3d 1241, 1244 (Ariz. 2018); *Statement from NextGen Climate Senior Advisor Jamison Foser on NextGen’s Participation in a Lawsuit To Overturn Arizona’s Undemocratic Strikeout Law*, NEXTGEN AM., <https://nextgenamerica.org/statement-on-arizonas-undemocratic-strikeout-law/> [https://perma.cc/LPB5-JKNH].

61. Stanwitz v. Reagan, 429 P.3d 1138, 1140 (Ariz. 2018); Howard Fischer, *Judge Lets Arizona Law on Initiative Petitions To Stand*, ARIZ. CAPITOL TIMES (Dec. 16, 2019), <https://azcapitoltimes.com/news/2019/12/16/judge-lets-arizona-law-on-initiative-petitions-to-stand/> [https://perma.cc/FP78-3U72].

62. Howard Fischer, *Arizona Lawmakers Advance Bill To Limit Voter Initiatives*, ARIZ. DAILY STAR (Mar. 1, 2017), https://tucson.com/news/local/arizona-lawmakers-advance-bill-to-limit-voter-initiatives/article_9f951b03-ac64-5dcc-bdb1-af739b197362.html [https://perma.cc/6N76-MDKA].

strictly comply with all statutory regulations, a much more rigid standard than the prior substantial compliance.⁶³ In other words, ballot measures must follow to the tee every statutory requirement or face decertification.

States are not just resisting the initiative process by imposing strict procedural requirements—they are also directly fighting enacted initiatives by passing legislation to undermine or dampen their effects. While twenty-six states permit ballot initiatives, eleven of those states also grant their legislatures the authority to overturn them.⁶⁴ In fact, from 2017 to 2018, over one hundred bills were introduced across the country attempting to reverse ballot initiatives.⁶⁵ Among those hostile states is Maine, where the Legislature has fought to weaken progressive initiatives passed by voters in 2016.⁶⁶ In fact, the highest number of legislatively altered bills over the last decade occurred in 2016, when fourteen initiatives were subsequently altered by state legislatures.⁶⁷ One high-profile example is the Florida Legislature's distortion of the felon enfranchisement initiative.⁶⁸ Only two states, California and Arizona, require voter approval prior to any legislative alteration of voter-enacted initiatives.⁶⁹

The key takeaway regarding legislative alteration is that not all ballot measures are created equal. Some measures may have more staying power, depending on whether and to what extent they are insulated from legislative

63. *Id.* To be certain, it is unclear whether the strict compliance requirement is constitutional because courts in Arizona have traditionally applied substantial compliance, not strict, when reviewing citizen-initiated measures for procedural deficiencies. In the only two cases in which this strict compliance requirement has been challenged, Arizona courts have declined to rule on its constitutionality. *See Stanwitz*, 429 P.3d at 1142; *Madonna v. State*, No. 1 CA-CV 17-0550, 2018 WL 2111441, at *2–3 (Ariz. Ct. App. May 8, 2018) (ruling that appellants lacked standing).

64. Berman, *supra* note 52.

65. *Id.*

66. David A. Graham, *The Legislators Working To Thwart the Will of Voters*, ATLANTIC (Mar. 27, 2017, 9:57 AM), <https://www.theatlantic.com/politics/archive/2017/03/state-legislatures-overturn-ballot-initiatives/519591/> [<https://perma.cc/9DYQ-CFSA>].

67. *Legislative Alterations of Ballot Initiatives*, BALLOTPEDIA (Apr. 16, 2019), https://ballotpedia.org/Legislative_alterations_of_ballot_initiatives [<https://perma.cc/BT2A-ZJY9>] (select the “Alterations by state” tab located within the last section of the page). For a thorough analysis of the various mechanisms and statistics regarding legislative alteration of initiatives, see *id.*

68. After the voters enacted Amendment 4 permitting voting by former felons, the Florida Legislature passed a law requiring that all fines and fees associated with their convictions be paid prior to being eligible to vote. After robust litigation, the Eleventh Circuit ultimately upheld the legislative restriction as constitutional. *Jones v. Governor of Fla.*, 975 F.3d 1016, 1025 (11th Cir. 2020) (en banc).

69. BALLOTPEDIA, *supra* note 67. North Dakota, Washington, Nebraska, and Arkansas each require a two-thirds vote of the legislature to amend initiatives. In addition, North Dakota, Washington, Alaska, Nevada, and Wyoming each require the elapse of a specified period of time, typically two to three years, prior to any alteration. *Id.*

interference. Nevertheless, this feature of direct democracy paints a fascinating picture of the legislative dialogue that occurs between citizens and elected representatives.

III. CRIMINAL REFORM ON THE BALLOT

In order to analyze the effectiveness of criminal reform ballot measures, this Comment produces an empirical study by creating a compendium of all ballot measures that predominantly involve criminal law since 2000.⁷⁰ Section A parses the data on all ballot measures since 2000 with significant criminal implications, finding that criminal reform ballot measures have been extremely successful nationwide, especially recently. These measures cut across an array of issues affecting criminal law and mass incarceration. Section B investigates pro-criminalization measures since 2000, culling data from every ballot measure to show that they are appearing with less frequency and represent a shift in punishment theory.

A. Criminal Reform Measures

Twelve years ago in an article deriding direct democracy, Professor Erwin Chemerinsky made the following remark: “[W]hen was the last time that the voters passed an initiative to increase the rights of prisoners, or increase the rights of criminal defendants?”⁷¹ Since the publication of that article, the world has changed; voters have come to the ballot time and again to pass criminal reform policies.

Historically, several of the earliest ballot initiatives were attempts to enact criminal reform policies—namely abolishing the death penalty. The early

70. Because they do not constitute the core of mass incarceration, this study largely omitted from consideration ballot measures regarding election reform, which may include the imposition of some criminal sanctions, unless they are explicitly focused on criminalization. It also excluded measures that tangentially include a potential criminal sanction but are peripheral to core issues involved in criminalization. The primary focus here is criminal-related ballot measures since 2000 (apart from the analysis of death penalty measures, which reviews all historical measures).

It is worth acknowledging the inherent difficulties involved in any such statistical approach, including: multi-issue or dual-purpose measures with competing interests, lack of voter alternatives, tangentially criminal measures, qualitatively ambiguous measures, and the array of measures that were proposed but failed to make it onto ballots. Still, statistical review of these selected measures provides a worthwhile starting point in analyzing their effectiveness and frequency.

71. Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 297; see also Tanya M. Larrabee, *Vote “No” on Criminal Justice Ballot Measures*, 42 NEW ENG. J. CRIM. & CIV. CONFINEMENT 207, 208 (2016) (“[C]riminal justice matters should not be placed on an election ballot.”).

twentieth century saw a wave of abolitionist sentiment fueled by progressivism that led to many states abolishing the death penalty.⁷² Most of those states had very small populations of non-white persons, making them “conducive to lenient or less severe criminal penalties.”⁷³ Arizona’s first Governor, George W.P. Hunt, led the charge of abolition in Arizona.⁷⁴ He met fierce opposition from the state Legislature, which favored capital punishment and tried to pass laws circumscribing his powers.⁷⁵ Unable to achieve abolition through the Legislature, a citizen initiative was passed abolishing the death penalty in Arizona in 1916 by a mere 152 votes.⁷⁶ After several heinous crimes were widely covered by the newspapers in 1917,⁷⁷ Arizona reinstated the death penalty by legislatively referred initiative just two years later in a resounding vote.⁷⁸

The history of ballot initiatives concerning the death penalty has been extremely unfavorable to reformers. In the twenty-eight ballot initiatives from 1912 to 2016, voters cast ballots in favor of the death penalty 89% of the time.⁷⁹ The only two initiatives that entirely abolished the death penalty, in Arizona (1916) and Oregon (1914), were overturned by subsequent ballot initiatives (Arizona in 1918 and Oregon in 1920).⁸⁰

Death penalty reform has failed on the ballot in recent years as well. California voters rejected abolishing the death penalty twice, in 2012 and 2016, and instead passed a ballot initiative requiring a five-year period for post-conviction challenges.⁸¹ Voters in Nebraska and Oklahoma also came out in favor of the death penalty in 2016.⁸²

With respect to all other criminal reform initiatives and referenda, reformers have had increasing success over the past two decades. These measures have covered a startling array of reforms including the legalization

72. See John F. Galliher, Gregory Ray & Brent Cook, *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 538–39 (1992).

73. *Id.* at 542.

74. *Id.* at 551.

75. The Arizona Legislature passed laws restricting the Governor’s power to issue pardons and reprieves, laws that Governor Hunt then vetoed. *Id.*

76. *Id.* at 552.

77. First, there was the lynching of a murderer and rapist who had boasted that the state could not execute him. Then, on Christmas Eve, several men murdered a local proprietor, having discussed that the worst possible sentence they faced was life imprisonment. One of the men danced while being led away to serve his sentence. The *Tucson Citizen* published an article shortly thereafter advocating for the return of capital punishment and its deterrent effect. *Id.* at 563.

78. *Id.* at 562.

79. Appendix A.

80. Galliher et al., *supra* note 72, at 541.

81. Appendix A.

82. *Id.*

of marijuana, the decriminalization of drug convictions, policing reform, property forfeiture, DNA evidence admissibility, jury unanimity, felon voting rights, forced inmate labor, three-strikes laws, search protections for electronic devices, bail reform, addiction rehabilitation funding, decriminalization of assisted suicide, and gambling.⁸³

A significant proportion of these measures, 47 of 103, were related to medical marijuana, decriminalization of marijuana possession, or marijuana legalization.⁸⁴ These measures, while at surface level seem to only address a tangential criminal reform issue, are actually addressing one of the most expansive overcriminalization issues in America—just last year over 600,000 people were arrested for simple marijuana possession.⁸⁵

Some changes were led by state legislatures turning to the ballot. From 2000 to 2009, voters in Virginia approved permitting the state supreme court to consider exculpatory DNA evidence post-conviction, Pennsylvania voters expanded the right to confront witnesses, and New York voters approved allowing prisoners to perform volunteer work for nonprofit organizations.⁸⁶ And in Rhode Island, voters approved the restoration of voting rights upon release.⁸⁷

In that same decade, citizens were able to pass only a few criminal reform initiatives. Measure 3 in Oregon and Initiative B in Utah both restricted criminal property forfeiture, and Proposition 36 in California required probation and treatment for possession of certain controlled substances.⁸⁸ All three measures passed in 2000.⁸⁹

Few of the criminal reform measures, outside of marijuana measures, met success from 2000 to 2009. Reform ballot measures failed across the country, from mandatory minimums to funding treatment programs to changing three-strikes laws.⁹⁰ Still, when accounting for all criminal reform measures, 48% of criminal reform measures that were proposed passed between 2000 and 2009.⁹¹

That history makes the story of criminal reforms on the ballot over the last decade astonishing. From 2010 to 2020, 81% of reform measures passed when put before the voters.⁹² Several of these measures have come by way of

83. Appendix B.

84. *Id.*

85. *See* Karakatsanis, *supra* note 4, at 892.

86. Appendix B.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *See id.*

92. *See id.*

legislative referral. Colorado removed a constitutional provision permitting forced inmate labor, Missouri passed an initiative protecting electronic communications and data from unreasonable searches and seizures, and New Mexico and New Jersey passed bail reform, all through legislative referrals.⁹³ It was Louisiana's Amendment 2, though, that garnered the most public attention. Louisiana permitted non-unanimous jury convictions until the people voted by a two-thirds margin to require unanimous juries in 2018.⁹⁴ Passage of these measures suggests that sometimes even formalistic reform issues are neither too foreign nor too complicated for the voters.

Voters also came to the polls over the last decade to support gambling. New Jersey's Public Question 1 (2011) and Colorado's Proposition DD (2019) legalized sports betting.⁹⁵ Both measures were legislatively referred.⁹⁶ Arkansas passed Issue 4—legalizing gambling—in 2018 by a citizen-initiated measure.⁹⁷

The breadth of the criminal reform measures passed since 2010 through the initiative is hard to overstate. What's more, the incidence of citizens resorting to ballot initiatives to effectuate reforms has been steadily increasing alongside each ballot cycle.⁹⁸ For example, in 2012, California voters enacted a measure “modifying the state's three strikes law to require a life sentence only when a defendant's current conviction is for a violent or serious offense”; the initiative also permitted retroactive resentencing of those already incarcerated.⁹⁹ That same year, Washington, Colorado, and Massachusetts each passed marijuana initiatives.¹⁰⁰ Then in 2014, California passed Proposition 47, reclassifying most nonviolent property and drug crimes as misdemeanors, and Alaska, Oregon, and Washington, D.C., passed marijuana initiatives.¹⁰¹

2016 was a banner year for criminal reform initiatives. California passed Proposition 57, which increased parole and good-behavior opportunities for felons convicted of nonviolent crimes and “required [juvenile courts] to hold

93. *Id.*

94. *Id.*; *Louisiana Amendment 2, Unanimous Jury Verdict for Felony Trials Amendment (2018)*, BALLOTEDIA, [https://ballotpedia.org/Louisiana_Amendment_2,_Unanimous_Jury_Verdict_for_Felony_Trials_Amendment_\(2018\)](https://ballotpedia.org/Louisiana_Amendment_2,_Unanimous_Jury_Verdict_for_Felony_Trials_Amendment_(2018)) [<https://perma.cc/K5RB-LAK8>].

95. Appendix B.

96. *Id.*

97. *Id.*

98. Sarah Holder, *Where It's Legal To Reverse the Vote of the People*, BLOOMBERG: CITYLAB (Oct. 12, 2018, 7:00 AM), <https://www.citylab.com/equity/2018/10/where-its-legal-to-reverse-the-vote-of-the-people/572386/> [<https://perma.cc/JE3M-CRHX>].

99. Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 805–06 n.111 (2012).

100. Appendix B.

101. *Id.*

hearings before transferring a child to the adult court.”¹⁰² Oklahoma passed two initiatives. The first reclassified certain property offenses and simple drug possession as misdemeanor crimes, and the second used the money saved by reclassifying those offenses to fund rehabilitative programs.¹⁰³ In 2016 alone, marijuana initiatives passed in Arkansas, California, Florida, Maine, Massachusetts, Montana, Nevada, and North Dakota.¹⁰⁴

In 2018, more ballot initiatives were aimed at bold criminal reform. Louisiana voted to require unanimous juries; Florida restored the voting rights of felons and expanded the retroactive force of criminal rights; and Washington passed an initiative creating a good-faith test in reviewing police use of deadly force, requiring de-escalation and mental health training, and requiring law enforcement officers to provide first aid.¹⁰⁵ In addition, Michigan, Missouri, Oklahoma, and Utah passed marijuana initiatives.¹⁰⁶

Finally, in 2020, twenty-one decriminalization measures were placed on ballots, and nineteen passed.¹⁰⁷ Four more states—Arizona, Montana, New Jersey, and South Dakota—legalized marijuana.¹⁰⁸ Mississippi joined as well, adopting an expansive medical marijuana program.¹⁰⁹ Voters in Mississippi rejected the legislative alternative to the marijuana initiative, which would have limited medical use to terminal illnesses.¹¹⁰ And drug decriminalization reached new terrain in 2020: the District of Columbia voted to deprioritize law enforcement for entheogenic plants, and Oregon fully decriminalized possession of controlled substances, opting instead to treat addiction and substance abuse as public health matters requiring treatment, not

102. Marcy Mistrett & Jeree Thomas, *A Campaign Approach To Challenging the Prosecution of Youth as Adults*, 62 S.D. L. REV. 559, 568 (2017) (citing *California Passes Proposition 57; Direct File Abolished*, PAC. JUV. DEF. CTR. (Nov. 9, 2016), <https://www.pjdc.org/california-passes-proposition-57-direct-file-abolished/> [https://perma.cc/WM8Z-74V6]).

103. Appendix B.

104. *Id.*

105. *Id.*

106. *Id.*

107. *See id.* Two Alabama “stand your ground” measures were omitted from the analysis because they could not be fit in either decriminalization or pro-criminalization categories. *See Alabama 2020 Ballot Measures*, BALLOTPEdia, https://ballotpedia.org/Alabama_2020_ballot_measures [https://perma.cc/T9T6-66QY]. From one perspective, these measures support removing criminal penalties for certain conduct; alternatively, they support the private imposition of the most serious punishment against certain offenders.

108. Appendix B.

109. *Id.*

110. *See Mississippi Ballot Measure 1, Initiative 65 and Alternative 65A, Medical Marijuana Amendment (2020)*, BALLOTPEdia, [https://ballotpedia.org/Mississippi_Ballot_Measure_1,_Initiative_65_and_Alternative_65A,_Medical_Marijuana_Amendment_\(2020\)](https://ballotpedia.org/Mississippi_Ballot_Measure_1,_Initiative_65_and_Alternative_65A,_Medical_Marijuana_Amendment_(2020)) [https://perma.cc/UN5D-CNGY].

criminalization.¹¹¹ The success of Oregon's approach, shepherded forward by voters, may forecast a sea change in America's drug criminalization regime.

Of course, 2020 measures also focused on issues beyond drug decriminalization. Michigan voters passed—with 88.75% support—a requirement to obtain a search warrant prior to searching an individual's electronic data and communications.¹¹² California voters restored the voting rights of all persons not presently incarcerated.¹¹³ One of the only two measures to fail, California's Proposition 25, paints a complicated picture of how voters are approaching nuanced issues of criminal reform.¹¹⁴ The Legislature adopted a measure to replace cash bail with a risk assessment system in an effort to reduce the bail system's outsized influence on indigent defendants.¹¹⁵ Then the American Bail Coalition referred that legislation to the ballot, where it was rejected.¹¹⁶ At the same time, progressive organizations—like the ACLU and the Human Rights Watch—campaigns against the risk assessment alternative arguing that it relies on racially biased algorithms and can lead to even more pretrial detention.¹¹⁷ So even though California voters came out in overwhelming favor of other criminal reform measures, with this Proposition those same voters did the hard work that the state Legislature was unwilling to do, assessing the nuances of complicated reforms and public advocacy, and deciding that cash bail needed a better solution.¹¹⁸

Though not the focus of this Comment, local reform measures in 2020 pushed the boundaries of possible change. Among numerous successful measures, Philadelphia voters banned stop and frisk, Measure J in Los Angeles redirected 10% of county funds toward community investment, San Francisco voters eliminated a minimum threshold on the number of police

111. Appendix B.

112. *Michigan Proposal 2, Search Warrant for Electronic Data Amendment (2020)*, BALLOTPEdia, [https://ballotpedia.org/Michigan_Proposal_2,_Search_Warrant_for_Electronic_Data_Amendment_\(2020\)](https://ballotpedia.org/Michigan_Proposal_2,_Search_Warrant_for_Electronic_Data_Amendment_(2020)) [<https://perma.cc/L68L-S6BW>].

113. Appendix B.

114. *See id.*

115. *See id.*; Samantha Michaels, *California Votes To Keep Cash Bail*, MOTHER JONES (Nov. 4, 2020), <https://www.motherjones.com/crime-justice/2020/11/california-votes-to-keep-cash-bail/> [<https://perma.cc/P5ND-ETVD>].

116. *California Proposition 25, Replace Cash Bail with Risk Assessments Referendum (2020)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_25,_Replace_Cash_Bail_with_Risk_Assessments_Referendum_\(2020\)](https://ballotpedia.org/California_Proposition_25,_Replace_Cash_Bail_with_Risk_Assessments_Referendum_(2020)) [<https://perma.cc/UF3F-GEL8>].

117. Michaels, *supra* note 115.

118. *Id.*

officers, and many cities created and expanded police oversight boards.¹¹⁹ Almost all of these local measures passed with at least 75% support.¹²⁰

The proverbial cherry on top, however, is that only four statewide criminal reform ballot measures—not relating to marijuana—have failed since 2011.¹²¹ So while several reform measures were rejected in the preceding decade, these measures have been much more effective over the last decade.

Overall, 71% of measures proposing criminal reforms have passed since 2000.¹²² When accounting for iterative measures—those denied within a state in one election but later passed by a subsequent measure—the numbers are starker: 85% of criminal reform measures passed on the ballot.¹²³ And, as discussed above, the rate of adoption of reform measures is increasing. These increases are particularly noteworthy in light of the overall reduction in state ballot measures over the last decade—there were 15% fewer ballot measures after 2010 than there were in the preceding decade.¹²⁴ Perhaps the most interesting data concerning criminal ballot measures are where reform measures originate: 73% were citizen-initiated.¹²⁵

In aggregate, the data illustrate why ballot measures are such effective mechanisms: criminal reform initiatives are passed at high rates, and they are appearing with more frequency on ballots, despite a reduction in the initiative process writ large.¹²⁶ As an added bonus, courts typically broadly construe voter-enacted criminal reforms.¹²⁷ The sheer rate at which citizens are

119. See Ayanna Alexander, *Voters Back More Police Oversight After George Floyd's Death* (1), BLOOMBERG (Nov. 5, 2020, 2:44 PM), <https://about.bgov.com/news/voters-nationwide-ok-police-oversight-measures-after-floyd-death/> [<https://perma.cc/P5FL-CY83>].

120. *Id.*

121. In 2020, California voters rejected the controversial bail reform Proposition, and Oklahoma failed to pass State Question 805, which would have prohibited the use of sentence enhancements for past, non-violent felony convictions. See Appendix B. Ohio failed to pass Issue 1 in 2018, which would have made drug possession and use misdemeanors and prohibited incarceration for those on parole for such convictions. See *id.* And Idaho's Proposition 1, in 2018, which would have permitted betting on horse races at video terminals, also failed to pass. See *id.*

122. See *id.*

123. See *id.*

124. *Id.*; See *List of Ballot Measures By Year*, BALLOTPEdia, https://ballotpedia.org/List_of_ballot_measures_by_year [<https://perma.cc/3PD6-42Y4>] (aggregating data by reviewing ballot initiatives in each year from 2000 to 2020).

125. See Appendix B.

126. Roger A. Fairfax, Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597, 598 (2011).

127. In California and Arizona, this is often because after repeated interference, voters insulated their ballot measures from most legislative alteration. See, e.g., *State v. Jones*, 440 P.3d 1139, 1144 (Ariz. 2019) (construing Proposition 203 broadly to preclude a conviction based on hashish); *People v. Page*, 406 P.3d 319, 320, 325 (Cal. 2017) (holding that though Proposition 47 did not explicitly refer to the Vehicle Code, it was designed to allow resentencing for such

bringing these issues to the ballot, particularly in recent years, reveals the transformative potential of initiatives in bringing about criminal reform.

B. *Pro-Criminalization Measures*

The case for criminal reform on the ballot becomes stronger still by analyzing trends in pro-criminalization measures. While criminal reform measures over the past two decades have run the gamut, addressing a broad variety of reforms, pro-criminalization measures have waned in the past decade and have modestly shifted their focus to more informed theories of punishment.

Pro-criminalization measures have historically met overwhelming success. It would be remiss not to acknowledge how ballot measures contributed to our carceral state. Mass incarceration was at least partially fueled by California's three-strikes law, passed by the citizen-initiated Proposition 184 in 1994¹²⁸—not to mention the spate of tough-on-crime initiatives that emanated from public sentiment and political fervor in the 1980s and 1990s.¹²⁹ At the same time, ballot initiatives are far from solely responsible for our current carceral state.

Still, even since 2000, 82% of pro-criminalization measures have passed when put to the voters.¹³⁰ Prior to 2010, a wide range of pro-criminalization measures passed on the ballot. Several of these measures dealt with expanding sentences for offenders:

- Proposition 18 in California, expanding the special circumstances that can aggravate a first-degree murder

charges); *People v. Conley*, 373 P.3d 435, 439 (Cal. 2016) (applying the decriminalization-focused Proposition 36 broadly to the benefit of criminal defendants). But even in the absence of strong state constitutional protections, the Massachusetts Supreme Court has repeatedly upheld the broad social policies attached to the ballot measure that decriminalized marijuana. Joseph N. Schneiderman, *Smokers, Dealers and Growers: The Supreme Judicial Court Hashes Out the Marijuana-Reform Ballot Initiative*, 58 BOS. BAR J. 24, 24 (2014) (citing cases).

128. Matt Taibbi, *Cruel and Unusual Punishment: The Shame of Three Strikes Laws*, ROLLING STONE (Mar. 27, 2013, 11:00 AM), <https://www.rollingstone.com/politics/politics-news/cruel-and-unusual-punishment-the-shame-of-three-strikes-laws-92042/> [https://perma.cc/5VNW-VML6].

129. Judith Greene, *Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act*, in SENTENCING AND SOCIETY 1, 11–28 (Cyrus Tata & Neil Hutton eds., 2002), <https://www.justicestrategies.org/sites/default/files/Judy/GettingToughOnCrime.pdf> [https://perma.cc/SSC3-DBXC].

130. Appendix C.

conviction, and mandating that any such conviction will result in a sentence of death or of life in prison;

- Proposition 21 in California, expanding the crimes for which juveniles must appear in adult court, increasing certain sentences, and reducing case confidentiality;
- Proposition 301 in Arizona, permitting those convicted of methamphetamine use or possession to be sentenced to jail or prisons terms; and
- Measure 57 in Oregon, increasing sentences for certain repeat property crimes, including theft against the elderly.¹³¹

A second category of these measures established new crimes: animal cruelty and cockfighting, payment to ballot canvassers by signatures collected, and barring unmarried cohabitants from providing foster care.¹³²

Third, a number of measures prior to 2010 created significant procedural hurdles for criminal defendants. Several of these measures regarded denying bail to categories of defendants: those charged with sexual assault crimes (Proposition 103 in Arizona), those undocumented persons who had been charged with enumerated “serious” offenses (Proposition 100 in Arizona), those who had violated a condition of release (Proposition 4 in Texas), and those who had violated certain court orders (Proposition 13 in Texas).¹³³ Two Hawaii ballot measures were passed that permitted the initiation of a felony criminal charge by written information (Question 3 and Question 4).¹³⁴ Other measures dealt with expanding the grounds and uses of civil forfeiture (Measure 12 in Louisiana and Measure 53 in Oregon) and requiring DNA collection for certain offenses (Proposition 69 in California).¹³⁵ In addition, states enacted measures that revised procedural protections for criminal defendants, including:

131. *Id.* After Measure 57’s passage, the Oregon Legislature passed a bill counteracting that measure, and the Oregon Supreme Court upheld the legislative bill over the measure, permitting the reduced sentencing scheme. *State v. Vallin*, 434 P.3d 413, 421–22 (Or. 2019).

132. Appendix C. The Arkansas Supreme Court invalidated the initiative preventing unmarried cohabitants from fostering children for violating the right to privacy and lacking an individualized assessment. *Ark. Dep’t of Hum. Servs. v. Cole*, 2011 Ark. 145, at 26, 380 S.W.3d 429, 443.

133. Appendix C. Arizona’s Proposition 100 and 103 were both invalidated by courts. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 775 (9th Cir. 2014) (en banc); *State v. Wein*, 417 P.3d 787, 789–90 (Ariz. 2018).

134. Appendix C.

135. *Id.*

- Question 1 in Indiana, requiring that criminal appeals from life sentences or extremely long terms must follow the same path through the court system as civil appeals;
- Amendment 2 in Pennsylvania, allowing the Legislature to enact laws circumscribing the testimony of children in criminal proceedings;
- Proposition 7 in Texas, reducing the number of jurors in misdemeanor cases to six; and
- Question 3 in Hawaii, rendering privileged communications between a crime victim and a health professional inadmissible.¹³⁶

Fourth, states enacted a series of more generalized measures leveling miscellaneous infirmities at those accused or convicted of crimes. For example, Massachusetts passed Question 2, limiting the voting rights of felons while they are incarcerated; Washington passed SJR 8212 authorizing state-operated inmate labor programs by private entities; and California and Oregon passed victims' rights initiatives.¹³⁷ All of these measures, passed between 2000 and 2009, represent the far-reaching pro-criminalization ethos endorsed by voters during that decade.

However, after 2010, that ethos seemed to subside as fewer pro-criminalization measures made it to the ballot and passed. Between 2000 and 2009, thirty-seven pro-criminalization measures appeared on ballots; that number decreased to thirty-four between 2010 and 2020.¹³⁸

The measures that did pass shifted in focus from a holistic punitive ideology to a more informed theory of criminality. Take, for example, the few particularly substantive pro-criminalization measures that passed this decade:

- Initiative 1501 in Washington, increasing criminal identity-theft penalties;
- Amendment 2 in Alabama, recognizing rights of unborn children;
- Measure 73 in Oregon, requiring an increased minimum sentence for certain sex crimes and repeat DUI offenses;

136. *Id.*

137. *Id.* A federal district court struck down several aspects of California's Proposition 9, otherwise known as Marsy's Law. *Valdivia v. Brown*, No. CIV. S-94-671, 2012 U.S. Dist. LEXIS 8092, at *21, *27–28, *30 (E.D. Cal. Jan. 24, 2012) (failure to provide prompt hearing).

138. *See* Appendix C.

- Proposition 35 in California, increasing prison terms for human traffickers, requiring them to register as sex offenders, and requiring sex offenders to disclose internet browsing history; and
- Amendment 2 in Missouri, permitting the admissibility of relevant evidence of prior criminal acts in cases of sex crimes committed against minors.¹³⁹

While several of these enactments are grossly punitive, these measures (with the exception of Alabama's Amendment 2)¹⁴⁰ show a concerted shift in focus toward more harmful societal ills with widespread effects, such as sex crimes, human trafficking, DUIs, and identity theft. Other laws that passed in this decade also evidence this public shift, including laws aimed at curbing animal cruelty and the misconduct of public officials.¹⁴¹

A much narrower range of procedural pro-criminalization measures have passed since 2010. HJR 4220 in Washington was a response to highly publicized shootings of officers; it authorized the denial of bail only in cases where the public is at risk.¹⁴² In addition, measures in Louisiana and North Carolina involved the circumstances in which defendants may waive their right to a jury trial.¹⁴³ Each was legislatively referred and passed prior to 2015.¹⁴⁴

The bulk (54%) of pro-criminalization measures passed since 2010 were Marsy's Law Initiatives.¹⁴⁵ These measures, spurred by the eponymous measure California passed in 2008, were aimed at expanding the rights of crime victims in the criminal adjudicatory process. While each was uniquely tailored, they generally focused on expanding the role of victims throughout prosecution, conviction, and postconviction, and changing the process of

139. *Id.*

140. In any event, Amendment 2 was overturned as unconstitutional. Kim Chandler, *Judge Dismisses Wrongful Death Lawsuit over Abortion*, ASSOCIATED PRESS (Sept. 3, 2019), <https://apnews.com/fce7dc5bfd3a491aab191ad5e6b46596> [<https://perma.cc/KL5E-SYTM>].

141. Measure 100 in Oregon and Initiative 1401 in Washington were both aimed at animal cruelty. *See* Appendix C. Proposal 2 in New York authorized the revocation of pensions for officials convicted of felonies related to their official duties, and Amendment 1 in Louisiana prohibited felons from holding office until five years after completion of their sentences. *Id.*

142. *Id.*

143. *Id.* The Tenth Circuit Court of Appeals upheld a district court ruling that Oklahoma's ban on judicial consideration of international and Sharia law, passed by State Question 755, represented disfavored treatment of Muslims in violation of the Establishment Clause. *Awad v. Ziriax*, 670 F.3d 1111, 1133 (10th Cir. 2012).

144. Appendix C.

145. Again, in the last decade, eleven out of these fifteen measures were legislatively referred. *Id.*

parole hearings and parole revocation.¹⁴⁶ Marsy's Laws represent the largest block of pro-criminalization measures over the last decade.¹⁴⁷

What can be easily overlooked in the pure statistical analysis of pro-criminalization bills is that, when reviewing the actual legislation, the measures represent a modest victory in the fight for criminal reform. While many measures between 1980 and 2009 contributed to the atmosphere of overcriminalization, since 2010 the ideology undergirding that movement has waned. Almost 60% of these measures were legislatively referred;¹⁴⁸ initiatives hardly even press pro-criminalization issues anymore. Recently passed measures shifted their attention to represent a reshaping of what we ought to punish, including animal rights, #metoo advocacy, and public accountability.¹⁴⁹ Courts might be shifting too; six pro-criminalization bills were invalidated by courts over the last decade.¹⁵⁰ The bulk of pro-criminalization ethos that survived this past decade is accounted for by victims' rights measures.

Taking each Section of Part III together, reformers should be encouraged that reform measures pass at an exceedingly high rate and cover a large swath of issues in criminal law. What's more, measures to enact criminal reform are gaining traction. In the decade spanning 2000–2009, 46% of criminal-related ballot measures were decriminalization reform measures.¹⁵¹ Since 2010, 68% of ballot measures regarding criminalization were reform efforts.¹⁵²

146. Ryan S. Appleby, Note, *Proposition 9, Marsy's Law: An Ill-Suited Ballot Initiative and the (Predictably) Unsatisfactory Results*, 86 S. CAL. L. REV. 321, 322 (2013).

147. There has been at least some debate on the propriety and criminalization posture of these measures. Compare *id.* (arguing that Marsy's Laws are violative of due process, lead to an increase in the number of those incarcerated, and present ex post facto violations), and Sophie Quinton, *'Marsy's Law' Protections for Crime Victims Sound Great, but Could Cause Problems*, PEW RSCH. CTR.: STATELINE (Oct. 12, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/12/marsys-law-protections-for-crime-victims-sound-great-but-could-cause-problems> [<https://perma.cc/HZ6B-NTLZ>] (explaining that crime victims are already sufficiently protected by state laws and these initiatives will unduly influence prosecutors and cause inconsistent interpretations and due process violations), with Kathryn M. Young, *Parole Hearings and Victims' Rights: Implementation, Ambiguity, and Reform*, 49 CONN. L. REV. 431, 434–35 (2016) (arguing that while there needs to be a better tailoring of victims' rights proposals to impactful and meaningful representation, victims' rights should be decoupled from traditional punitive measures).

148. See Appendix C.

149. *Id.*

150. See *supra* notes 132, 133, 137, 140, and 143. This might be because courts are more skeptical of punitive measures approved by popular vote. Cf. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1507 (1990) (“[J]udicial review of direct democracy frequently calls for *less* rather than more restraint.”).

151. Appendix B; Appendix C.

152. Appendix B; Appendix C. When discounting Marsy's Law Initiatives as neither reform nor pro-criminalization measures, this number jumps from 68% to 79%.

Meanwhile, pro-criminalization measures have generally shifted toward a more progressive view of criminalization, shedding some of the gross excises of the tough-on-crime sentiment that fueled prior decades. Nevertheless, reformers must always vigilantly guard against the novel and pernicious ways that twenty-first century pro-criminalization efforts may take shape.

IV. WHY DIRECT DEMOCRACY IS A STRONG VEHICLE FOR CRIMINAL REFORM

This Comment seeks not to resolve the intractable debate over the merits of ballot initiatives generally. Instead, it makes the claim that direct democracy is uniquely situated for advancing criminal reform. Specifically, criminal reform measures are necessary because: (1) criminalization is a deeply personal issue, which demands direct advocacy by affected persons; (2) criminal reform inherently advances minority rights; (3) broad public support exists for reform; (4) legislative action has been insufficient to tackle the criminalization crisis; and (5) initiatives can serve as bellwethers for bold policy. The biggest hurdle facing initiatives is (6) funding.

A. Voter Competence

Are citizens capable of legislatively redressing criminal injustice? Critics of citizen-led legislation decry the lack of a sufficiently deliberative process.¹⁵³ Proponents of direct democracy dispute that account,¹⁵⁴ arguing that voters are empowered by the transformative informational access of modern technology,¹⁵⁵ and that the voters themselves are neither more nor less deliberative than standard legislators.

When it comes to crafting legislation, scores of theorists have derided the initiative process for lacking the institutional safeguards of traditional

153. Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 22, 33 (1997). Voters, critics say, are “easily baffled by the complexities of the issues” and are often unduly influenced by advertising campaigns that can be highly deceptive. Shaun Bowler, *When Is It OK To Limit Direct Democracy?*, 97 MINN. L. REV. 1780, 1783 (2013); Chemerinsky, *supra* note 71, at 299.

154. Bowler, *supra* note 153, at 1784; *see also* SHAUN BOWLER & TODD DONOVAN, DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY 165–73 (2000).

155. Technological advancements in communications have made for a more informed and participatory electorate. Jane S. Schacter, *Digitally Democratizing Congress? Technology and Political Accountability*, 89 B.U. L. REV. 641, 643 (2009); *see also* Matsusaka, *supra* note 20, at 186.

lawmaking.¹⁵⁶ In reality, modern initiatives are often drafted by specialized attorneys, outside law firms, and former legislators who have a keen grasp of how to draft legislation.¹⁵⁷ So many stakeholders spend so much time drafting a single initiative that successful initiatives are often extremely well-crafted; whereas with traditional legislation, a legislative council composed of a select group of people is tasked with drafting and revising hundreds, if not thousands, of pieces of legislation every year.¹⁵⁸

Perhaps it is precisely this untethering of the traditional levers of power that makes the initiative process appealing to criminal reform groups.¹⁵⁹ By bringing a range of affected voices together, criminal reform initiatives can manage to capture the range of experiences of scholars, legal advocates, activists, and reformers by mediating their input into targeted reforms.

When reformers pursue lobbying efforts or draft model legislation for representatives, there are more opportunities for criminalization advocates, such as obstinate district and county attorneys or prison profiteering enterprises—who have privileged access to the legislative process—to dilute the original goals. Unlike legislative action, initiatives restrict those pro-criminalization perspectives from being factored into the actual legislation, instead directing those parties to pursue public advocacy in the form of ballot materials or advertisements against the measures.¹⁶⁰ By exclusively targeting perspectives on the reform spectrum, initiatives can enhance the deliberative process without diluting the goals of reform.

When it comes to voting, criminal law is unique; it does not fall into the traditional categories of ballot measures because it involves more

156. Critics largely point to process to make this point: in legislative chambers, laws are first drafted by professional staff and make their way through committees to the entire legislative body. Along the way, the language of the legislation is changed as legislators deliberate over key issues. This results in political compromise reflecting the will of the majority of voters. In contrast, it is argued, ballot initiatives need not be vetted, and often result in extreme positions that do not represent the electorate at large. *See, e.g.,* Chemerinsky, *supra* note 71, at 297–98.

157. *See infra* Part II.A.

158. *See* Kim Eckart, *New, UW-Developed Data Tool Tracks State Legislative Process, from First Draft to Final Law*, UNIV. WASH. NEWS (Feb. 20, 2020), <https://www.washington.edu/news/2020/02/20/new-uw-developed-data-tool-tracks-state-legislative-process-from-first-draft-to-final-law/> [<https://perma.cc/4ZRT-3NY7>].

159. Labeling legislative bodies as deliberative without scrutinizing their true behaviors is antithetical to the highly suspect view direct-democracy critics take on voter deliberation. *See* ANDREW STENGEL, LAWRENCE NORDEN & LAURA SEAGO, *STILL BROKEN: NEW YORK STATE LEGISLATIVE REFORM* 27 (2008), <http://www.brennancenter.org/sites/default/files/legacy/publications/Still.Broken.pdf> [<https://perma.cc/ZMS6-N9X3>]. Legislators, like voters, can be influenced by advertising materials, outside money, and special interests. Bowler, *supra* note 153, at 1787.

160. *See* Bowler, *supra* note 153, at 1788.

straightforward issues than, for example, the complexities of zoning.¹⁶¹ Criminal issues generally involve public values, so it is less clear that legislative bodies are privy to an obvious information advantage.¹⁶²

Part of the appeal of criminalization on the ballot is that its effects are deeply personal to so many people. Because over seventy million Americans have criminal records,¹⁶³ mass incarceration's destructive effects have evolved into a majoritarian issue perfectly suited for direct democracy. Voters may be more highly attuned to criminalization than legislators, whose status¹⁶⁴ shields them from the pervasive effects of mass incarceration, and alternatively, from the traumatic effects of crime itself.

B. Minority Rights

Considerable scholarship has been dedicated to critiquing direct democracy as a vehicle for disadvantaging minority communities.¹⁶⁵ While it is true that many types of ballot measures have worked to the disadvantage of minority communities, this is not the case for criminal reform. Mass incarceration is a phenomenon that disproportionately affects minority communities.¹⁶⁶ The criminalization of many types of drugs—such as peyote, marijuana, and crack cocaine—was fueled by associations of those drugs with minority communities.¹⁶⁷ When ballot measures are aimed at criminal reform, they inherently protect minority communities who have been

161. *See id.* at 1784.

162. Matsusaka, *supra* note 20, at 193.

163. *Americans with Criminal Records*, HALF IN TEN, <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> [<https://perma.cc/3TKV-5FF9>].

164. *See, e.g., By the Numbers: Wealthiest State Lawmakers in Florida*, NEWS SERV. FLA. (Sept. 10, 2019), <https://news.wjct.org/post/numbers-wealthiest-state-lawmakers-florida> [<https://perma.cc/Z5YV-Z8PA>].

165. Scores of ballot measures have systematically targeted racial and language minorities, LGBTQ persons, and other political minorities. Some initiatives expressly curtailed marriage and other rights for same-sex couples or deprived undocumented immigrants from access to public benefits. Chemerinsky, *supra* note 71, at 294–97; *see also* Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730 (2013) (discussing initiatives curbing minority rights in housing, discrimination, desegregation, and employment contexts); David Schultz, *Liberty v. Elections: Minority Rights and the Failure of Direct Democracy*, 34 HAMLIN J. PUB. L. & POL'Y 169, 171 (2012) (“[T]he Progressive Era experiment with direct democracy has failed . . .”).

166. *See generally* Karakatsanis, *supra* note 4.

167. *See, e.g.,* Adryan Corcione, *America's War on Drugs Has Been Racist for a Century*, LEAFLY (Oct. 5, 2018), <https://www.leafly.com/news/politics/americas-war-on-drugs-has-been-racist-for-a-century> [<https://perma.cc/8GB5-35VL>].

disproportionately affected by mass incarceration.¹⁶⁸ Initiatives are better suited to factor in the lived experiences of marginalized voices affected by mass incarceration by giving those locked out of the legislative process the power to override legislators when laws treat their communities unfairly.

Florida's Amendment 4 helps illustrate this phenomenon. When Desmond Meade realized his prior conviction prevented him from voting for his wife's legislative candidacy, he began campaigning across Florida to re-enfranchise former felons.¹⁶⁹ He joined others who had felony convictions to create the Florida Rights Restoration Coalition, the group that created and worked to pass Florida's historic Amendment 4.¹⁷⁰ In a sense, it was only through the initiative process that Meade and 1.4 million others regained a political voice.¹⁷¹ But the initiative process offered more; it put those affected by the carceral regime at the center of political change and gave them the opportunity to create an organization and to build coalitions that offer lasting political power. Where reforms originate is just as important as the reforms themselves. Initiatives are often the only mechanism that can put marginalized voices affected by mass incarceration at the center of politics, giving those locked out of the legislative process the power to override legislators when laws treat their communities unfairly.

C. Public Support

But the ability to craft focused legislation is toothless without a showing of actual support for criminal reform. Polling has found support for criminal reform stretches across the political spectrum. As a broad category, the amount of support for criminal reform ranges from 75% of Americans at the

168. *But see* Kristen Clarke, Opinion, *Cannabis Industry Shouldn't Expand Until We Fix Marijuana's Racial Inequities, Injustices*, USA TODAY (Feb. 22, 2019, 6:00 AM), <https://www.usatoday.com/story/opinion/2019/02/22/marijuana-legalization-exposes-cannabis-industry-racial-injustice-incarceration-minorities-column/2836449002/> [<https://perma.cc/Z5KD-VHA8>] (stating that minorities who were directly affected by marijuana laws are cut out of the entrepreneurial benefits of its legalization and denied expungement of their records).

169. Kathryn Fink & Kaity Kline, *Blocked from the Ballot: Meet Desmond Meade, Who Has a Felony Conviction*, WAMU (Mar. 10, 2020), <https://the1a.org/segments/blocked-from-the-ballot-individuals-with-felony-charges/> [<https://perma.cc/JL2X-ZXGT>].

170. Karen Duffin, *Who Gets To Vote in Florida?*, NPR: PLANET MONEY (Oct. 28, 2020, 7:30 PM), <https://www.npr.org/2020/10/26/927846676/who-gets-to-vote-in-florida> [<https://perma.cc/9PSP-CJ7R>]; *About Desmond Meade*, FLA. RTS. COAL., <https://floridarrc.com/desmond-meade/> [<https://perma.cc/T6NF-F2AT>].

171. FLA. RTS. COAL., *supra* note 170.

lower end¹⁷² to as high as 90%.¹⁷³ Even when presented with the nuances of criminal reform, Americans are undeterred. Eighty-seven percent disapprove of mandatory minimums and express support for alternatives to incarceration.¹⁷⁴ Eighty-five percent believe that the goal of the criminal justice system should be rehabilitation, as opposed to punishment or deterrence.¹⁷⁵ And 90% are in favor of removing barriers to employment, education, and other opportunities for the formerly incarcerated.¹⁷⁶

The strong support for criminal reform cuts across a range of issues, from racial bias recognition to mental health alternatives to incarceration, and from mandatory minimums to reducing the overall prison population.¹⁷⁷ What's more, public support remains high not just nationally but also at the state level, including states with the initiative process.¹⁷⁸

Better than all this polling, though, is results. Over the last two decades, citizens in states across the country have come to the polls to pass a wide array of criminal reform initiatives. More than 80% of the proposed reforms were passed.¹⁷⁹ Both polling and the successful initiatives underscore the broad-based support for reform.

D. Legislative Inaction

Somehow widespread public support among diverse cross sections of the American public has not translated into fundamental reforms at the legislative

172. *Overwhelming Majority of Americans Support Criminal Justice Reform, New Poll Finds*, VERA INST. OF JUST.: THINK JUST. BLOG (Jan. 25, 2018), <https://www.vera.org/blog/overwhelming-majority-of-americans-support-criminal-justice-reform-new-poll-finds> [<https://perma.cc/QT5K-Y243>]; *Poll Shows Americans Overwhelmingly Support Prison, Sentencing Reforms*, COMM. ON THE JUDICIARY (Aug. 23, 2018), <https://www.judiciary.senate.gov/press/rep/releases/poll-shows-americans-overwhelmingly-support-prison-sentencing-reforms> [<https://perma.cc/6LGB-Z7N5>].

173. *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [<https://perma.cc/YPC8-M8A4>].

174. VERA INST. OF JUST., *supra* note 172.

175. *Id.*

176. *Id.*

177. ACLU, *supra* note 173; *see also* Matthew Clarke, *Polls Show People Favor Rehabilitation over Incarceration*, PRISON LEGAL NEWS (Nov. 6, 2018), <https://www.prisonlegalnews.org/news/2018/nov/6/polls-show-people-favor-rehabilitation-over-incarceration/> [<https://perma.cc/G7YU-ZS5Z>] (collecting studies).

178. *See, e.g.*, Press Release, FWD.us, *New Poll Shows Arizona Voters Support Bold Criminal Justice Reforms* (Feb. 8, 2019), <https://www.fwd.us/news/new-poll-shows-arizona-voters-support-bold-criminal-justice-reforms/> [<https://perma.cc/6UQ8-FWSQ>] (finding that over 80% of registered voters in Arizona support reform and “only one percent want to spend additional tax dollars on jails and prisons”).

179. This figure reflects the iterative passage figure. *See supra* text accompanying note 123.

level. Arizona's most recent legislative session is one among countless examples. The 2019 session yielded almost no movement on criminal reform; only one of the seventeen bills proposed actually passed.¹⁸⁰ Many bills were killed without a single hearing, there were allegations that Arizona's District Attorney exercised outsized influence in preventing legislation, and in some instances the Governor's veto thwarted legislation.¹⁸¹

In contrast, Oklahoma's reform politics are worth examining. Kris Steele, a long-serving member of the Oklahoma House of Representatives and former Speaker of the House, used his position to shepherd criminal reform bills through the Legislature.¹⁸² After passage, however, the Legislature refused to fund those plans. So instead of seeking change through traditional legislative action, he decided that "[t]he best way . . . to ultimately change the path that we have been on forever was to bypass the political gridlock."¹⁸³

He then led a coalition of criminal justice reform groups in placing criminal reform measures directly on the ballot in 2016.¹⁸⁴ Those measures sought to reclassify certain drug and property crimes as misdemeanors and redirect any savings to fund rehabilitation programs.¹⁸⁵ Both measures passed in Oklahoma with almost 60% support from the voters.¹⁸⁶

Though merely anecdotes, both stories present an important piece of the argument for ballot initiatives. It is much more difficult to influence all the various levers of institutional power than to capture the will of the popular majority. Since elected representatives aren't myopically committed to a single issue, counting on critical reforms by placing an extra degree of

180. Vanessa Ontiveros, *Despite Passage of Arizona Criminal Justice Reform Bill, More Work Needs To Be Done, Advocates Say*, ARIZ. DAILY STAR (Aug. 8, 2019), https://tucson.com/news/local/despite-passage-of-arizona-criminal-justice-reform-bill-more-work/article_909d9829-b64d-5fab-b005-61f5485d9341.html [<https://perma.cc/5GDD-4824>].

181. *Id.*; Steven Hsieh, *One Bill Shows Why Arizona Hasn't Passed Any Criminal Justice Reform This Year*, PHX. NEW TIMES (Apr. 15, 2019, 10:56 AM), <https://www.phoenixnewtimes.com/news/one-bill-shows-why-arizona-criminal-justice-reform-this-year-11269619> [<https://perma.cc/DS9Y-SDAM>]; see also 2019 #MSLEG Tracking: *Criminal Justice Reform*, ACLU MISS., <https://www.aclu-ms.org/en/legislation/2019-msleg-tracking-criminal-justice-reform> [<https://perma.cc/KK8R-75QY>] (showing that almost all criminal reform bills died in committee); Steven Zeidman, *The State Legislature's Criminal Justice Reform Failures*, N.Y. DAILY NEWS (July 8, 2019, 12:29 PM), <https://www.nydailynews.com/opinion/ny-oped-the-state-legislatures-criminal-justice-reform-failures-20190708-hs6rk7xw3zcpze7z567k7dl3vy-story.html> [<https://perma.cc/SB74-YJN9>].

182. Graham, *supra* note 66.

183. *Id.* (quoting Kris Steele, member of the Oklahoma House of Representatives).

184. *Id.*

185. *Id.*

186. See K. Query, *Oklahoma Voters Pass Criminal Justice Reform State Questions*, KFOR (Nov. 8, 2016, 9:34 PM), <https://kfor.com/news/oklahoma-voters-pass-criminal-justice-reform-state-questions/> [<https://perma.cc/MD8S-HSPW>].

separation between the voter and the reform only complicates criminal reform efforts. Legislatures have not embraced the mantle of criminal reform; it may be wise to put more trust in our people than in our politicians.

E. The Bellwether Advantage

Representative government is geared toward compromise, not transformative politics. This is all too familiar to the reform movement. For example, New York attempted to enact a progressive bail reform program, which “would have reduced the jail population by at least [forty] percent.”¹⁸⁷ After pressure from the typical pro-criminalization contingent, the Legislature balked and significantly walked back its original proposal three months later.¹⁸⁸ Big changes are hard to achieve through legislatures captured by institutional actors and averse to programmatic change.

But mass incarceration is an urgent crisis that demands more than piecemeal legislation. Initiatives, by design, are audacious policies; they arise where the legislative process fails. This allows them to act as a bellwether for progressive criminal policy. It also takes time before an initiative can be revisited by the people, giving the policy more space to breathe and the populace more time to reflect. When a state adopts a criminal reform policy through the initiative process, its effectiveness can serve as a powerful signal to other states.¹⁸⁹ As transformative ballot measures are implemented, tested, and proven highly effective in forerunner states, they can serve as a bellwether for other states by triggering later policy changes elsewhere.¹⁹⁰ By following the models of marijuana legalization, felon enfranchisement, and sanctuary programs at the city level, the reform movement can use direct democracy to generate more national attention for the urgency of bold criminal reform.

187. Taryn A. Merkl, *New York's Latest Bail Law Changes Explained*, BRENNAN CTR. FOR JUST. (Apr. 16, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained> [https://perma.cc/YU4S-TVZ8].

188. *See id.*

189. *See* Press Release, All. for Safety & Just., *Leading into Democratic Presidential Debate, Advocates Point to CA as Model of Criminal Justice Reforms that Candidates Have Proposed* (Dec. 19, 2019), <https://allianceforsafetyandjustice.org/press-release/leading-into-democratic-presidential-debate-advocates-point-to-ca-as-model-of-criminal-justice-reforms-that-candidates-have-proposed/> [https://perma.cc/MF7N-QKUC].

190. Matsusaka, *supra* note 20, at 194.

F. Money, Money, Money

The strongest critique of using ballot measures to pursue criminal reform is the cost. Political expense is not unique to direct democracy. Initiatives are naturally expensive projects helmed by a robust supervisory committee and campaign effort. The sixty-eight citizen-initiated measures placed on the ballot in 2018 cost, in total, around seventy-five million dollars.¹⁹¹ Simple math will tell you that, on average, citizen-initiated measures cost over a million dollars each.¹⁹² This number is highly dependent upon the specific state; a campaign will need more money in California than, say, Oklahoma.¹⁹³

The costs begin with a filing fee and organizational start-up costs, but the single-most expensive aspect of initiatives is signature gathering.¹⁹⁴ Initiative campaigns must hire hundreds, if not thousands, of professional signature gatherers to reach the threshold necessary for appearing on the ballot.¹⁹⁵ Initiative campaigns must also anticipate the costs of pre-ballot litigation in the event that any group challenges their initiative for failure to meet statutory requirements.¹⁹⁶ Consequent to these costs, the critique goes, there are limits on who can use the initiative process.¹⁹⁷

Funding is about priorities. Right now, the reform movement is hardly cash poor. After the George Floyd protests, the Minnesota Freedom Fund—a bail fund—received thirty million dollars in donations.¹⁹⁸ It was so much money they struggled to spend even 1%.¹⁹⁹ That same influx of money could have placed a reimaged bail system on ballots in half the states in America, with change to spare. Technological advancements and public attention have

191. *Ballot Measures Cost Per Required Signatures Analysis*, BALLOTPEDIA, https://ballotpedia.org/Ballot_measures_cost_per_required_signatures_analysis [https://perma.cc/UN55-8UHP].

192. *See id.*

193. *See id.*; *see also* Meghan McCarty Carino, *How California Initiatives Went from 'Power to the People' to a Big Money Game*, CAP PUB. RADIO (Nov. 1, 2018), <http://www.capradio.org/articles/2018/11/01/how-california-initiatives-went-from-power-to-the-people-to-a-big-money-game/> [https://perma.cc/FNF2-H48K]; Chemerinsky, *supra* note 71, at 298.

194. Carino, *supra* note 193.

195. *Id.*

196. *See supra* Part II.B.

197. *See* Chemerinsky, *supra* note 71, at 298.

198. Sigal Samuel, *Racial Justice Groups Have Never Had So Much Cash. It's Actually Hard To Spend It.*, VOX (June 19, 2020, 11:00 AM), <https://www.vox.com/future-perfect/2020/6/19/21294819/minnesota-freedom-fund-donations-police-protests> [https://perma.cc/BY4B-J96A].

199. *Id.*

enhanced the ability for prospective groups to attract fundraising;²⁰⁰ focusing more funds on initiatives might maximize the return on investment.

V. TOWARD A CONCLUSION

2020 may be an inflection point in this movement. People organized, lined up outside the halls of power across our nation, and demanded justice. They did this despite the devastating challenges and risks associated with the COVID-19 outbreak. Several ballot campaigns were forced to postpone their 2020 measures.²⁰¹ Public closures made it rather difficult to gather signatures in time for the election. This makes it inspiring that so many criminal reform measures still qualified for the ballot and passed. If anything, the profound turnout in the 2020 election raised the stakes of future initiatives that will now require even more signatures.

At this very moment, ballot campaigns across the country are likely preparing a new slate of initiatives to bring directly to the people in upcoming elections. Maybe 2020 marked the crossing of a Rubicon in the fight for criminal justice, and we will see even bolder reforms passed by the next election cycle. Regardless, there is much work to be done. After all, lasting criminal reform depends on the power of people, not politicians.

Black Lives Matter

200. Digital reproducibility allows donation-gathering to be infinitely reproducible at little to no marginal cost; the internet has buoyed this small donor revolution. See Joe Ready, *Small Dollar Donors Are Winning! (for Now)*, U.S. PUB. INT. RSCH. GRP. (Aug. 21, 2019), <https://uspig.org/blogs/blog/usp/small-dollar-donors-are-winning-%C2%A0now> [https://perma.cc/5JFE-U2A6].

201. Sarah Holder, *How Coronavirus Is Killing Off Ballot Measures*, BLOOMBERG: CITYLAB (Apr. 9, 2020, 9:00 AM), <https://www.citylab.com/equity/2020/04/coronavirus-election-campaign-ballot-measure-signature-voter/609232/> [https://perma.cc/78TE-25VG].

APPENDIX A²⁰²**Death Penalty Ballot Measures**

Year	State	Measure Number	Description	Pass/Fail
1912	Oregon	Measure 33	Abolishing death penalty.	Failed
1912	Ohio	Amendment 2	Abolishing death penalty.	Failed
1914	Arizona	Questions 308 and 309	Abolishing death penalty.	Failed
1914	Oregon	Measure 18	Abolishing death penalty.	Passed
1916	Arizona	Questions 300 and 301	Abolishing death penalty.	Passed
1918	Arizona	Proposition 8	Reinstating death penalty.	Passed
1920	Oregon	Measure 3	Restoring the death penalty as a punishment for first degree murder.	Passed
1958	Oregon	Measure 4	Removing the death penalty as a punishment for first degree murder.	Failed
1964	Oregon	Measure 1	Abolishing the death penalty for first degree murder.	Passed
1966	Colorado	Measure 7	Abolishing death penalty.	Failed
1968	Massachusetts	Question 6	Advising the state government to retain capital punishment.	Passed
1970	Illinois	Death penalty Amendment	Abolishing death penalty.	Failed
1972	California	Proposition 17	To provide that all state statutes in effect Feb. 17, 1972 requiring, authorizing, imposing, or relating to death penalty are in full force and effect.	Passed
1975	Washington	I-316	Shall the death penalty be mandatory in the case of aggravated murder in the first degree?	Passed
1978	Oregon	Measure 8	Death penalty for murder, specific conditions.	Passed

202. *Death Penalty on the Ballot*, BALLOTPEDIA, https://ballotpedia.org/Death_penalty_on_the_ballot [https://perma.cc/Y9YC-D6KX]; BALLOTPEDIA, *supra* note 124.

1978	California	Proposition 7	Reinstates the death penalty. Changes minimum sentence for first degree murder from life to 25 years to life. Increases penalty for second degree murder. Prohibits parole of convicted murderers before service of 25 or 15 year terms, subject to good-time credit. During punishment stage of cases in which death penalty is authorized: permits consideration of all felony convictions of defendant; requires court to impanel new jury if first jury is unable to reach a unanimous verdict on punishment.	Passed
1982	Massachusetts	Question 2	Affirming that no constitutional provision shall be construed as prohibiting the death penalty.	Passed
1984	Oregon	Measure 6	Death penalty is exempt from guarantees against cruelty.	Passed
1984	Oregon	Measure 7	Penalty for aggravated murder shall be death or life imprisonment with 30 year minimum sentence.	Passed
1992	New Jersey	Public Question No. 3	Providing that the death penalty is not cruel and unusual punishment.	Passed
2000	California	Proposition 21	Increases punishment for gang-related felonies; death penalty for gang-related murder; indeterminate life sentences for home-invasion robbery, carjacking, witness intimidation and drive-by shootings.	Passed
2002	Florida	Amendment 1	Authorizing the death penalty for capital crimes and authorizing retroactive changes in the method of execution.	Passed
2006	Wisconsin	Question 2	Whether the death penalty should be enacted upon conviction of first degree intentional homicide if the conviction is supported by DNA evidence.	Passed
2012	California	Proposition 34	Repealing the death penalty and applying retroactively.	Failed

2016	California	Proposition 62	Repealing the death penalty and making life without parole the maximum punishment for murder.	Failed
2016	California	Proposition 66	Required a five-year period for post-conviction challenges to death sentences.	Passed
2016	Nebraska	Referendum 426	Repealing a state law that eliminated the death penalty.	Passed— law repealed
2016	Oklahoma	State Question 776	Amending the State Constitution to guarantee the state's power to impose capital punishment.	Passed

APPENDIX B²⁰³**Decriminalization Ballot Measures**

Year	State	Initiative or Legislative Referral	Measure Number	Description	Pass/Fail
2000	Alabama	Legislative Referral	Amendment 11	Allowing nonprofit organizations in the Town of Whitehall could hold bingo games to support charitable and educational programs	Passed
2000	Alaska	Indirect Initiative	Measure 5	Removing civil and criminal penalties for persons over 18 who use marijuana.	Failed
2000	California	Initiative	Proposition 36	Requires that people convicted of possession, use or transportation of controlled substances receive probation and treatment.	Passed
2000	Colorado	Initiative	Initiative 20	Medical Marijuana Initiative	Passed
2000	Maine	Indirect Initiative	Question 1	Allowing informed adults with terminal illnesses to request and receive medications to end their lives from their attending physician	Failed

203. BALLOTEDIA, *supra* note 124.

2000	Nevada	Initiative	Question 9	Medical Marijuana Act	Passed
2000	Oregon	Initiative	Measure 94	Repealing mandatory minimum sentences for certain violent felonies.	Failed
2000	Oregon	Initiative	Measure 3	Requiring conviction before property forfeiture.	Passed
2000	Utah	Initiative	Initiative B	Restricting the government's ability to confiscate property taken from innocent owners in drug arrest and other crimes.	Passed
2002	Arizona	Initiative	Proposition 203	Medical Marijuana initiative that also reduced possession to a civil fine.	Failed
2002	Arizona	Legislative Referral	Proposition 302	Expanding Proposition 200 to prohibit incarceration of persons convicted of possession or use of drug paraphernalia.	Passed
2002	Nevada	Initiative	Question 9	Supporting legalizing recreational marijuana.	Failed
2002	Ohio	Initiative	Amendment 1	Authorizing the state to spend money to fund drug treatment programs for criminal who otherwise would have been incarcerated for	Failed

				nonviolent, drug possession related crimes.	
2002	South Dakota	Initiative	Amendment A	Allowing criminal defendants to argue the merits, validity, and applicability of the law, including the sentencing laws.	Failed
2002	South Dakota	Initiative	Initiative 1	Making it legal to use in any way hemp or its by-products.	Failed
2002	Tennessee	Legislative Referral	Amendment 2	Prescribing the maximum fine that may be prescribed without a jury.	Failed
2002	Virginia	Legislative Referral	Amendment 1	Supreme Court may consider claims of actual innocence presented by convicted felons in cases involving exculpatory DNA evidence.	Passed
2003	Pennsylvania	Legislative Referral	Amendment 1	Granting a right to persons accused of crimes to confront the witnesses against them.	Passed
2004	Alaska	Indirect Initiative	Measure 2	Supporting legalizing recreational marijuana.	Failed
2004	California	Initiative	Proposition 66	Amending the three strikes laws to only permit a life sentence where the third felony is violent or serious.	Failed

2004	Montana	Initiative	I-148	Medical Marijuana Initiative	Passed
2006	Colorado	Initiative	Initiative 44	Legalizing marijuana possession.	Failed
2006	Nebraska	Initiative	Measure 421	Authorizing the use of video keno gaming devices.	Failed
2006	Nevada	Initiative	Question 7	Supporting legalizing recreational marijuana.	Failed
2006	Rhode Island	Legislative Referral	Question 2	Restoring the voting rights of the convicted after release.	Passed
2006	South Dakota	Initiative	Initiative 4	Medical Marijuana Initiative	Failed
2008	California	Initiative	Proposition 5	Expanded treatment programs, limits court authority to incarcerate certain offenders who commit drug crimes or violate parole, shortens parole for drug offenses.	Failed
2008	Massachusetts	Indirect Initiative	Question 2	Replacing previous criminal penalties for marijuana possession with civil penalties.	Passed
2008	Michigan	Initiative	Proposal 1	Medical Marijuana Initiative	Passed
2009	Maine	Indirect Initiative	Question 5	Medical Marijuana Initiative	Passed
2009	New York	Legislative Referral	Proposal 2	Allowing prisoners to perform	Passed

				volunteer work for nonprofit organizations.	
2010	Arizona	Initiative	Proposition 203	Medical marijuana Initiative	Passed
2010	California	Initiative	Proposition 19	Supporting legalizing recreational marijuana.	Failed
2010	Colorado	Initiative	Proposition 102	Allowing defendants arrested for a first-time nonviolent misdemeanor to be recommended for release or released to pretrial service program instead of being subjected to a cash or property bond.	Failed
2010	South Dakota	Initiative	Initiative 13	Medical Marijuana Initiative	Failed
2011	New Jersey	Legislative Referral	Public Question 1	Legalizing sports betting.	Passed
2012	Arkansas	Initiative	Issue 5	Medical Marijuana Initiative	Failed
2012	California	Initiative	Proposition 36	Revised the three strikes law to impose life sentence only when the new felony conviction is "serious or violent." Authorized re-sentencing for offenders serving life sentences if their third strike conviction was not serious or	Passed

				<p>violent and if the judge determines that the re-sentence does not pose unreasonable risk to public safety.</p> <p>Continued to impose a life sentence penalty if the third strike conviction was for “certain non-serious, non-violent sex or drug offenses or involved firearm possession.”</p> <p>Maintained the life sentence penalty for felons with “non-serious, non-violent third strike if prior convictions were for rape, murder, or child molestation.”</p>	
2012	Colorado	Initiative	Amendment 64	Supporting legalizing recreational marijuana.	Passed
2012	Massachusetts	Indirect Initiated	Question 3	Medical Marijuana Initiative	Passed
2012	Oregon	Initiative	Measure 80	Supporting legalizing recreational marijuana.	Failed
2012	Washington	Veto Referendum	Initiative 502	Supporting legalizing recreational marijuana.	Passed
2014	Alaska	Indirect Initiative	Ballot Measure 2	Supporting legalizing recreational marijuana.	Passed

2014	California	Initiative	Proposition 47	Classified certain crimes, most nonviolent property and drug crimes, as misdemeanors instead of felonies unless the defendant has prior convictions for murder, rape, certain sex offenses or gun crimes. Also permitted re-sentencing for those currently serving a prison sentence for any offense that the initiative reduced to misdemeanors.	Passed
2014	Florida	Initiative	Amendment 2	Medical Marijuana Initiative	Failed
2014	Kansas	Legislative Referral	SCR 1618	Authorizing the legislature to permit charitable raffles or other forms of charitable gaming by certain nonprofit organizations, which had previously been illegal.	Passed
2014	Missouri	Legislative Referral	Amendment 9	Adding electronic communications and data to the Missouri Constitution's prohibition against unreasonable searches and seizures.	Passed

2014	New Jersey	Legislative Referral	Public Question No. 1	Amending the state Constitution to allow a court to order the pretrial detention of a person in a criminal case.	Passed
2014	Oregon	Initiative	Measure 91	Supporting legalizing recreational marijuana.	Passed
2014	South Carolina	Legislative Referral	Amendment 1	Permitting nonprofit organizations to conduct raffles for charitable purposes.	Passed
2014	South Dakota	Legislative Referral	Amendment Q	Permitting certain gambling practices within Deadwood, SD.	Passed
2014	Washington D.C.	Initiative	Initiative 71	Supporting legalizing recreational marijuana.	Passed
2015	Ohio	Initiative	Issue 3	Supporting legalizing recreational marijuana.	Failed
2016	Arizona	Initiative	Proposition 205	Supporting legalizing recreational marijuana.	Failed
2016	Arkansas	Initiative	Issue 6	Medical Marijuana Amendment	Passed
2016	California	Initiative	Proposition 57	Supporting increasing parole and good behavior opportunities for felons convicted of nonviolent crimes and allowing judges, not prosecutors, to decide whether to try	Passed

				certain juveniles as adults in court.	
2016	California	Initiative	Proposition 64	Supporting legalizing recreational marijuana.	Passed
2016	Colorado	Legislative Referral	Amendment T	Removing from the Colorado Constitution a provision that allows forced, unpaid labor by convicted criminals.	Failed
2016	Colorado	Initiative	Proposition 106	Making assisted death legal among patients with a terminal illness who receive a prognosis of death within six months.	Passed
2016	Florida	Initiative	Amendment 2	Medical Marijuana Initiative	Passed
2016	Maine	Indirect Initiative	Question 1	Supporting legalizing recreational marijuana.	Passed
2016	Massachusetts	Indirect Initiative	Question 4	Supporting legalizing recreational marijuana.	Passed
2016	Montana	Initiative	I-182	Expanding the Medical Marijuana Initiative and removing legislative restrictions.	Passed
2016	Nevada	Indirect Initiative	Question 2	Supporting legalizing recreational marijuana.	Passed
2016	New Mexico	Legislative Referral	Amendment 1	Permitting courts to deny bail for felonies where	Passed

				the defendant poses a threat to the public, while also providing that a defendant cannot be denied bail because of a financial inability to post a bond.	
2016	North Dakota	Initiative	Measure 5	Medical Marijuana Initiative	Passed
2016	Oklahoma	Initiative	State Question 780	Proposing reclassifying certain property offenses and simple drug possession as misdemeanor crimes.	Passed
2016	Oklahoma	Initiative	State Question 781	Using money saved by reclassifying the above crimes as misdemeanors to fund rehabilitative programs.	Passed
2018	Arkansas	Initiative	Issue 4	Legalizing gambling, and authorizing four different casinos in Arkansas.	Passed
2018	Colorado	Legislative Referral	Amendment A	Removing from the Colorado Constitution a provision that allows forced, unpaid labor by convicted criminals.	Passed
2018	Florida	Initiative	Amendment 4	Restoring the voting rights of some convicted felons.	Passed
2018	Florida	Legislative Referral	Amendment 11	Repealing constitutional prohibition	Passed

				property ownership for foreign-born persons ineligible for citizenship; removing a constitutional provision requiring that an amendment to a criminal statute not affect the prosecution of a crime committed before the amendment.	
2018	Idaho	Initiative	Proposition 1	Legalizing the use of video terminals for betting on historical horse races.	Failed
2018	Louisiana	Legislative Referral	Amendment 2	Requiring a unanimous jury verdict for felony trials.	Passed
2018	Michigan	Indirect Initiative	Proposal 1	Supporting legalizing recreational marijuana	Passed
2018	Missouri	Initiative	Amendment 2	Medical Marijuana Initiative	Passed
2018	North Dakota	Initiative	Measure 3	Supporting legalizing recreational marijuana legalization and providing for expungement of records for marijuana convictions.	Failed
2018	Ohio	Initiative	Issue 1	Making drug possession and use misdemeanors and prohibiting	Failed

				incarceration for those on parole for such convictions.	
2018	Oklahoma	Initiative	State Question 788	Medical Marijuana Initiative	Passed
2018	Utah	Initiative	Proposition 2	Medical Marijuana Initiative	Passed
2018	Washington	Initiative	Initiative 940	Creating a good faith test in reviewing police use of deadly force, requiring police to receive de-escalation and mental health training, and requiring law enforcement officers to provide first aid.	Passed
2019	Colorado	Legislative Referral	Proposition DD	Authorizing sports betting in Colorado.	Passed
2020	Arizona	Initiative	Proposition 207	Supporting legalizing recreational marijuana.	Passed
2020	California	Legislative Referral	Proposition 17	Restoring the voting rights of those on parole for a felony conviction.	Passed
2020	California	Veto Referendum	Proposition 25	Replacing cash bail with risk assessments.	Failed
2020	Maryland	Legislative Referral	Question 2	Authorizing sports and events wagering.	Passed
2020	Michigan	Legislative Referral	Proposal 2	Requiring search warrants to search an individual's electronic data and electronic communications.	Passed

2020	Mississippi	Indirect Initiative	Measure 1	Medical Marijuana Amendment	Passed
2020	Montana	Initiative	CI-118	Allowing the legislature or the citizens, by initiative, to establish a minimum age for possession, use and purchase of marijuana.	Passed
2020	Montana	Initiative	I-190	Marijuana Legalization Initiative	Passed
2020	Nebraska	Legislative Referral	Amendment 1	Removing state constitutional language that had allowed slavery and involuntary servitude to be used as punishment for crimes.	Passed
2020	Nebraska	Initiative	Initiative 429	Changing the state constitution to allow racetrack gambling.	Passed
2020	Nebraska	Initiative	Initiative 430	Allowing, authorizing, and regulating racetrack gambling and games of chance.	Passed
2020	Nevada	Legislative Referral	Question 3	Requiring the State Board of Pardons to meet twice as often per year, and allowing for pardons without the Governor's approval.	Passed
2020	New Jersey	Legislative Referral	Public Question 1	Marijuana Legalization Initiative	Passed

2020	Oklahoma	Initiative	State Question 805	Prohibiting the use of sentence enhancements for past non-violent felony convictions.	Failed
2020	Oregon	Initiative	Measure 109	Legalizing and permitting licensed providers to administer psilocybin mushroom and fungi products to individuals over 21.	Passed
2020	Oregon	Initiative	Measure 110	Decriminalizing possession of controlled substances and establishing an addiction treatment program to receive funding from the state's marijuana tax revenues and state prison savings.	Passed
2020	South Dakota	Initiative	Measure 26	Medical Marijuana Amendment	Passed
2020	South Dakota	Initiative	Constitutional Amendment A	Marijuana Legalization Initiative	Passed
2020	South Dakota	Legislative Referral	Constitutional Amendment B	Legalizing sports betting in the city of Deadwood.	Passed
2020	Utah	Legislative Referral	Constitutional Amendment C	Removing state constitutional language that had allowed slavery and involuntary servitude to be used as	Passed

				punishment for crimes.	
2020	Washington D.C.	Initiative	Initiative 81	Declaring that police treat cultivation, distribution, possession and use of entheogenic plants and fungi as the lowest law enforcement priority.	Passed

APPENDIX C²⁰⁴**Pro-criminalization Ballot Measures**

Year	State	Initiative or Legislative Referral	Measure Number	Description	Pass/Fail
2000	California	Legislative Referral	Proposition 18	Expanding a finding of special circumstance in first degree murder to include lying in wait, arson, or kidnapping, and mandating any conviction to a sentence of death or life without parole.	Passed
2000	California	Initiative	Proposition 21	Significantly expanding crimes for which juveniles must appear in adult court, reducing case confidentiality, and increasing sentences.	Passed
2000	Indiana	Legislative Referral	Question 1	Amending the constitution so that criminal appeals from a sentence of life imprisonment or a prison term of more than fifty years follow the same path through the Court of Appeals to the Indiana Supreme Court that civil appeals do.	Passed
2000	Massachusetts	Legislative Referral	Question 2	Limiting the voting rights of incarcerated felons.	Passed
2000	Washington	Initiative	Initiative 713	Making it a gross misdemeanor to hunt animals with body-gripping traps or poison.	Passed

204. *Id.*

2002	Arizona	Legislative Referral	Proposition 103	Preventing courts from granting bail for certain crimes, including sexual assault, sexual conduct with a minor under 15, or molestation.	Passed
2002	Arkansas	Initiative	Proposed Initiated Act 1	Making acts of aggravated animal cruelty Class D felonies.	Failed
2002	California	Initiative	Proposition 52	Increasing the criminal penalties for voter fraud.	Failed
2002	Hawaii	Legislative Referral	Question 3	Allowing the initiation of felony prosecutions by written information.	Passed
2002	Oklahoma	Initiative	State Question 687	Making it illegal to hold or encourage a cockfight, to be a spectator at a cockfight and to keep birds for fighting purposes.	Passed
2002	Oregon	Initiative	Measure 26	Making it unlawful to pay canvassers by the number of signatures collected for initiative and referendum petitions.	Passed
2003	Louisiana	Legislative Referral	Measure 12	Approving the seizure of property identified as illegal contraband.	Passed
2003	Pennsylvania	Legislative Referral	Amendment 2	Granting the legislature authority to enact laws regarding the testimony of children in criminal proceedings.	Passed
2003	Texas	Legislative Referral	Proposition 7	Reducing the number of jurors in misdemeanor cases to six.	Passed
2004	California	Initiative	Proposition 69	Requiring collection of DNA samples from all felons, and from all adults and juveniles charged with specific crimes.	Passed

2004	Hawaii	Legislative Referral	Question 4	Permitting criminal charges for felonies to be initiated by a legal prosecuting officer through the filing of a signed, written information.	Passed
2004	Hawaii	Legislative Referral	Question 3	Providing for the inadmissibility of privileged confidential communications between a crime victim and their physician, psychologist, counselor or mental health professional.	Passed
2004	Hawaii	Legislative Referral	Question 2	Granting a public right of access to the sex-offender registry.	Passed
2004	Hawaii	Legislative Referral	Question 1	Providing that the legislature may define what behavior constitute a continuing course of conduct in sexual assault crimes.	Passed
2004	Maine	Indirect Initiative	Question 2	Making it a crime to hunt bears with bait, traps or dogs.	Failed
2005	Texas	Legislative Referral	Proposition 4	Authorizing district judges to deny bail to a person accused of a felony if bail had been revoked or forfeited as a result of a violation of a condition of release related to safety of the victim or the community.	Passed
2006	Arizona	Legislative Referral	Proposition 100	Preventing bail for those charged with a serious felony offense who could not prove they were in the US legally.	Passed
2006	Arizona	Legislative Referral	Proposition 301	Allowing persons convicted of methamphetamine use or possession to be	Passed

				sentenced to jail or prison term.	
2006	California	Initiative	Proposition 83	Jessica's Law, requiring sex offenders to be monitored via GPS while on parole, and increasing legal penalties for specified sex offenses.	Passed
2006	Hawaii	Legislative Referral	Amendment 4	Authorizing the legislature to define what behavior constitutes a continuing course of conduct for sexual assault crimes.	Passed
2006	Nebraska	Legislative Referral	Amendment 4	Authorizing supervision of individuals on probation and released on parole by the executive and judicial departments.	Passed
2006	South Dakota	Veto Referendum	Referendum 6	Prohibiting anyone from providing abortions.	Failed
2007	Texas	Legislative Referral	Proposition 13	Denying bail to those that violated certain court orders or conditions of release in a felony or family violence case.	Passed
2007	Washington	Legislative Referral	SJR 8212	Authorizing state-operated inmate labor programs by private entities.	Passed
2008	Arizona	Initiative	Proposition 202	Expanding the definition of identity theft to include those who knowingly accept false identification in order to curb employment of undocumented aliens.	Failed
2008	Arkansas	Initiative	Proposed Initiative 1	Making it illegal for any individuals cohabiting outside of a valid marriage to adopt	Passed

				or provide foster care to minors.	
2008	California	Initiative	Proposition 6	Increasing penalties for crimes relating to “gang participation and recruitment, intimidation of individuals involved in court proceedings, possession and sale of methamphetamines, vehicle theft, firearms possession, and removing or disabling a GPS device”; Expanding the circumstances under which hearsay evidence is admissible in court, “especially in cases where someone has intimidated or otherwise tampered with a witness”; Making violation of court-ordered injunctions a new and separate crime punishable by fines, prison, or jail; Allowing “counties with overcrowded jails to operate temporary jails and treatment facilities to house inmates”; Prohibiting “a person charged with a violent or gang-related felony from being released on bail” or his or her own recognizance pending trial if he or she is illegally in the United States; Expanding the circumstances under which juveniles would be eligible for trial in an adult criminal	Failed

				court, rather than the juvenile court system, for certain gang-related offenses.	
2008	California	Initiative	Proposition 9	Marsy's Law Crime Victims' Rights Amendment. "Victims and their families are to be notified during all aspects of the justice process, including bail, sentencing and parole. Authorities must take a victims' safety into concern when assigning bail or conducting a parole review."	Passed
2008	Oregon	Legislative Referral	Measures 51 and 52	Victims' Rights Initiative granting victims the right to assert a claim in a pending case or seek a writ of mandamus if no case is pending.	Passed
2008	Oregon	Legislative Referral	Measure 53	Permits law enforcement's use of proceeds of civil forfeiture for crimes prior to and without conviction.	Passed
2008	Oregon	Initiative	Measure 61	Created mandatory minimum prison sentences for certain theft, identity theft, forgery, drug, and burglary crimes.	Failed
2008	Oregon	Legislative Referral	Measure 57	Increased term of imprisonment for persons convicted of theft against the elderly and property crimes under certain circumstances.	Passed
2010	Louisiana	Legislative Referral	Amendment 10	Allowing judges or prosecutors of a criminal case to make the final determination	Passed

				as to whether or not the accused could forgo a jury trial.	
2010	Oklahoma	Legislative Referral	State Question 755	Prohibiting courts from using international law or Sharia law when issuing rulings.	Passed
2010	Oregon	Initiative	Measure 73	Requiring an increased minimum sentence for certain sex crimes and repeat DUI offenses.	Passed
2010	Washington	Legislative Referral	HJR 4220	Authorizing judges to deny bail in any cases where they deem the public is at risk, including murder, rape, armed robbery and assault with a deadly weapon.	Passed
2012	California	Initiative	Proposition 35	Increases prison terms for human traffickers; requires convicted sex traffickers to register as sex offenders; requires all registered sex offenders to disclose their internet accounts.	Passed
2012	North Dakota	Initiative	Measure 5	Making it a Class C felony for an individual to maliciously harm a dog, cat, or horse.	Failed
2014	Colorado	Initiative	Amendment 67	Including an unborn human under the definition of person in the criminal code, and permitting wrongful death act to include unborn human beings.	Failed
2014	Illinois	Legislative Referral	N/A	Marsy's Law Victims' Bill of Rights.	Passed
2014	Missouri	Legislative Referral	Amendment 2	Allowing relevant evidence of prior criminal acts as admissible in prosecutions of sexual	Passed

				crimes involving minors.	
2014	North Carolina	Legislative Referral	N/A	Permitting criminal defendants who are not facing the death penalty to waive their right to trial by jury, with consent from the judge.	Passed
2015	Washington	Initiative	Initiative 1401	Increasing penalties for trafficking certain endangered species or their products.	Passed
2016	Montana	Initiative	CI-116	Marsy's Law Crime Victims' Rights Bill	Passed
2016	North Dakota	Initiative	Measure 3	Marsy's Law Crime Victims' Rights Initiative	Passed
2016	Oregon	Initiative	Measure 100	Prohibiting the sale of products and parts of twelve types of animals in Oregon.	Passed
2016	South Dakota	Initiative	Amendment S	Marsy's Law Crime Victims' Rights Amendment	Passed
2016	Virginia	Legislative Referral	Question 1	Making it illegal for workplaces to require mandatory labor union membership.	Failed
2016	Washington	Initiative	Initiative 1501	Increasing criminal identity-theft penalties.	Passed
2017	New York	Legislative Referral	Proposal 2	Authorizing judges to reduce or revoke the public pension of a public officer convicted of a felony related to their official duties.	Passed
2017	Ohio	Initiative	Issue 1	Marsy's Law Crime Victims' Rights Initiative	Passed
2018	Alabama	Legislative Referral	Amendment 2	Recognizing the sanctity of unborn life and the rights of unborn children.	Passed
2018	Florida	Commission Referral	Amendment 6	Marsy's Law Crime Victims' Rights Amendment	Passed

2018	Georgia	Legislative Referral	Amendment 4	Marsy's Law Crime Victims' Rights Amendment	Passed
2018	Kentucky	Legislative Referral	N/A	Marsy's Law Crime Victims' Rights Amendment	Passed
2018	Louisiana	Legislative Referral	Amendment 1	Prohibiting convicted felons from holding office until five years after completing their sentences.	Passed
2018	Nevada	Legislative Referral	Question 1	Marsy's Law Crime Victims' Rights Amendment	Passed
2018	North Carolina	Legislative Referral	N/A	Marsy's Law Crime Victims' Rights Amendment	Passed
2018	Oklahoma	Legislative Referral	State Question 794	Marsy's Law Crime Victims' Rights Amendment	Passed
2018	Oregon	Initiative	Measure 105	Repealing Oregon law which limits cooperation of local law enforcement with federal immigration enforcement.	Failed
2018	South Dakota	Legislative Referral	Amendment Y	Proposing changes to Marsy's Law Crime Victims' Rights Amendment.	Passed
2019	Pennsylvania	Legislative Referral	N/A	Marsy's Law Crime Victims' Rights Amendment	Passed
2020	California	Initiative	Proposition 20	Adding crimes to the list of felonies for which early parole is prohibited, enhancing specific theft and fraud crimes so they become eligible to be charged as felonies, and requiring DNA collection for certain misdemeanors.	Failed
2020	Colorado	Initiative	Proposition 115	Instituting a 22-week abortion ban, after which performing an abortion would be	Failed

				classified as a Class 1 misdemeanor.	
2020	Kentucky	Legislative Referral	Amendment 1	Marsy's Law Crime Victims' Rights Amendment	Passed
2020	Wisconsin	Legislative Referral	Question 1	Marsy's Law Crime Victims' Rights Amendment	Passed