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## The Failure of Ohio's Drug Treatment Initiative

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## THE FAILURE OF OHIO’S DRUG TREATMENT INITIATIVE

I.	INTRODUCTION .....	203
II.	A HISTORY OF THE INITIATIVE POWER .....	205
	<i>A. The History of Initiatives in         the United States</i> .....	206
	<i>B. The Ohio Constitution</i> .....	209
	<i>C. The History of Initiatives in Ohio</i> .....	211
III.	AN OVERVIEW OF THE OHIO DRUG TREATMENT INITIATIVE.....	214
IV.	ANALYSIS .....	218
	<i>A. Comparison to Current Drug         Treatment Policies</i> .....	218
	<i>B. Reasons Why the Initiative Failed</i> .....	222
	1. A Sizeable Opposition.....	222
	2. The Ballot .....	224
	3. The Initiative was an Amendment to the Ohio Constitution .....	227
	<i>a. The Issue’s Length and Language</i> .....	228
	<i>b. Ohioans Did Not Agree with the                 Moral Implications of the Initiative</i> .....	229
	<i>c. Application Issues</i> .....	232
	<i>d. The Permanency of an Amendment                 to the Constitution</i> .....	234
V.	CONCLUSION.....	234

### I. INTRODUCTION

“Just as it is axiomatic that hard cases make bad law, so it is also true that difficult social issues often provoke ill considered and unsound legislative proposals.”<sup>1</sup>

She was wearing a billowy shirt with a flowery pattern on it underneath a fringed, suede vest. Her jeans had colorful patches on the knees. On her head sat an oversized, floppy tam hat. Her long, wispy hair flowed out from underneath it. I could barely see her eyes. She stopped me as I was walking out of the supermarket laden with kids and groceries.

“Are you a registered voter?” She inquired. After I nodded my head, she added, “Do you live in Cuyahoga County?”

“Yes,” I replied matter-of-factly. I knew what her third question would be.

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<sup>1</sup>David Westfall, *Beyond Abortion: The Potential Reach of a Human Life Amendment*, 8 AM. J. L. & MED. 97 (1982).

“Would you sign this petition?” Bingo!

“We are trying to reduce the state’s spending on prisons by getting drug treatment for people who need it. Right now the state spends \$23,000 a year per person in prison and many of those people need treatment rather than jail time. Treatment would cost only \$4,000 per year. This state is putting thousands of people in overcrowded jails for simply being in possession of marijuana. They don’t belong in jail; they need treatment. It would be better for these people and the state’s budget if they got treatment instead of jail time.”<sup>2</sup> I signed the petition because: (1) I actually agreed with her; (2) at one point in time, I worked in a drug treatment program and am an advocate for such programs; and (3) I thought it would be better to put the issue to a vote rather than let it get defeated before people actually heard about it.

In the summer of 2002, proponents of Issue 1 “The Ohio Drug Treatment Initiative,” (hereafter referred to as the Initiative) succeeded in getting the proposal on the November ballot.<sup>3</sup> The Initiative proposed an amendment to the Ohio Constitution that would have required courts to approve requests for treatment when made by eligible nonviolent drug offenders.<sup>4</sup> The Amendment sought to (1) allocate a fixed amount of the state’s General Revenue Fund to pay for the opening and operating of new treatment centers,<sup>5</sup> (2) limit prison sentences for users and possessors to ninety days,<sup>6</sup> and (3) provide for the sealing and expungement of records for those offenders who completed treatment.<sup>7</sup>

The Initiative sparked a “war on drugs” debate that was a major focus of the November 2002 gubernatorial race. Republican incumbent, Governor Bob Taft, was vocally against the issue, while Democratic candidate, Tim Hagan, argued the issue’s merits. The Initiative was defeated 66.92% “No” to 33.08% “Yes.”<sup>8</sup>

A similar debate occurred when the 1989 administration of President George Bush announced its “war on drugs.” “A strange bedfellow’s coalition of liberal and conservative critics argued that the plan relied too heavily on interdicting foreign supplies and incarcerating petty traffickers, tactics they viewed as failed, futile and a

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<sup>2</sup>This is not the petitioner’s exact wording. The quotation marks have been added for visual effect.

<sup>3</sup>See Secretary of State, *Proposed Constitutional Amendments, Initiated Legislation, and Law Challenged by Referendum, Submitted to the Electors*, at <http://serform.sos.state.oh.us/sos/results/many/isshist.pdf> (last revisited on Jan. 17, 2004) (on file with author).

<sup>4</sup>See ISSUE 1: THE OHIO DRUG TREATMENT INITIATIVE, at <http://serform.sos.state.oh.us/sos/results/index.html> (last revisited on Jan. 17, 2004) (on file with author).

<sup>5</sup>See INITIATIVE, *infra* note, 116.

<sup>6</sup>See INITIATIVE, *infra* note, 112.

<sup>7</sup>See INITIATIVE, *infra* note, 115.

<sup>8</sup> Secretary of State, *Official Election Results for November 5, 2002*, at <http://serform.sos.state.oh.us/sos/results/index.html> (last revisited Jan. 17, 2004) (on file with author).

threat to civil freedoms.”<sup>9</sup> Many members of Congress charged that the plan put too much emphasis on anti-drug law enforcement and not enough emphasis on drug abuse prevention and treatment.<sup>10</sup> They also insisted that the plan was terribly under funded.<sup>11</sup> Over a decade later, the same arguments are being made.<sup>12</sup> With so much emphasis being placed on the need for treatment and prevention why did Ohioans reject The Ohio Drug Treatment Initiative?

This note seeks to answer this complicated question. Section II summarizes the Initiative power, how it came to be, and how it has been used in Ohio. Section III describes the Initiative in detail and explains current statutes that provide for treatment in lieu of incarceration. The final section analyzes why the Initiative failed and suggests some likely consequences had the Initiative been ratified.

## II. A HISTORY OF THE INITIATIVE POWER

Direct democracy refers to the powers that allow citizens to create laws without the action of the elected legislators. These powers are embedded in many state

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<sup>9</sup>Henry J. Aaron & Charles L. Schultze, ed., *Setting Domestic Priorities: What can Government do?*, 112, (1992) (citing White House, National Drug Control Strategy (GPO, Sept. 1989)). See also, Noam Chomsky, Interviewed by David Barsamian, *The Common Good*, 35 (1998). “The utterly fraudulent war on drugs was undertaken at a time when everyone knew that the use of every drug – even coffee – was falling among educated whites, and was staying sort of level among blacks. The police find it much easier to make an arrest on the streets of a black ghetto than in a white suburb. By now, a very high percentage of incarceration is drug related, and it mostly targets little guys, somebody who’s caught peddling dope.” *Id.*

<sup>10</sup>See Aaron, *supra* note 9, at 112. Critics of the “war on drugs” have made several primary arguments: (1) many prisoners can be diverted into certain types of community-based supervision programs without a significant threat to public safety and with significant savings in public money; (2) a majority of the public when properly informed, supports a greater use of community based programs for offenders; and (3) imprisonment rates and crime rates do not vary inversely. *Id.* at 117.

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

<sup>12</sup>See generally David C. Leven, *Our Drug Laws Have Failed – So Where is the Desperately Needed Meaningful Reform?* 28 *FORDHAM URB. L.J.* 293, (2000); Margaret P. Spencer, *The Sentencing Controversy: Punishment and Policy in the War Against Drugs: Sentencing Drug Offenders: The Incarceration Addiction*, 40 *VILL. L. REV.* 335 (1995). See also *Winning the War on Drugs: A “Second Chance” for Nonviolent Drug Offenders*, 113 *HARV. L. REV.* 1485, 1492-93 (2000). Sandy Theis, *Issue 1’s Drug Treatment has Experts on Both Sides*, *THE COLUMBUS DISPATCH*, Oct. 20, 2002, at S4 (stating that most people agree that more treatment programs are needed).

constitutions, including the Ohio Constitution.<sup>13</sup> They are commonly known as the initiative and the referendum powers.<sup>14</sup>

Advocates of direct democracy argue that if people are intelligent enough to vote on a candidate, they are equally competent to vote on issues.<sup>15</sup> “It is far easier for people to make wise decisions on issues than on the shifting personalities and promises of individuals.”<sup>16</sup> Critics of direct democracy argue that voter apathy and confusion on issues result in incompetent voters deciding critical issues. “[P]eople are not informed or caring enough to vote on complicated public policy issues. Too many would not understand technical issues. Too many would simply be confused, and not enough would actually vote. The quality of our laws and constitutions would suffer.”<sup>17</sup>

Because the initiative is granted by state constitutions, only a constitutional amendment can remove it. All constitutional amendments must be submitted to the people for ratification. It is unlikely that citizens would surrender the initiative power and invest so much strength in the hands of the legislators.

#### A. *The History of Initiatives in the United States*

The late nineteenth century saw a great concern with the proper functioning of state governments.<sup>18</sup>

Public mistrust of state legislatures was considerable in the 1890s and at the turn of the century. . . . Thus a major premise underlying their campaign for the initiative and referendum was that representative government had failed to live up to expectation. . . . Citizens were increasingly convinced that powerful, organized, self-seeking interests shaped legislative outcomes at the expense of the public interest.<sup>19</sup>

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<sup>13</sup>See ALASKA CONST. art XI; ARIZ. CONST. art IV, pt. 1, § 1(2); ARK. CONST. VII; CAL. CONST. art. II, § 8; COLO. CONST. art. V, § 1; D.C. CODE ANN. § 1-282 (1992); FLA. CONST. art. XI, § 3; IDAHO CONST. art. III, § 1; ILL. CONST. art. XIV, § 3; ME. CONST. art. IV, pt. 3, § 18; MASS. CONST. amend. art. XLVIII; MICH. CONST. art. II, § 9, art. XII, § 2; MISS. CONST. art. 15, § 273; MO. CONST. art. III, § 49; MONT. CONST. art. III, § 4, XIV, § 9; NEB. CONST. art. III, §§ 1, 2; NEV. CONST. art. XIX, § 2; N.D. CONST. art. III, § 1; OHIO CONST. art. II, §§ 1a, b; OKLA. CONST. art. V, § 1; OR. CONST. art. IV, § 1; S.D. CONST. art. III, § 1, art. XXIII, § 1; UTAH CONST. art. VI, § 1; WASH. CONST. art. II, § 1; WYO. CONST. art. 3, § 52.

<sup>14</sup>See *id.* The initiative is a process where citizens gather enough signatures in support of a proposed law to place it on the ballot at the next election. If a majority of voters approve the measure, it becomes law. A referendum is the process where citizens can block a law approved by the General Assembly from taking effect. *Id.*

<sup>15</sup>THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM AND RECALL*, 61 (1989).

<sup>16</sup>*Id.* (quoting Chip Dent, testimony in New York State Legislature, *Public Hearings of the Subcommittee on Initiative and Referendum* (Albany: State of New York, 1979) at p. 102).

<sup>17</sup>CRONIN, *supra* note 15, at 61.

<sup>18</sup>See Richard A. Chesley, *The Current Use of the Initiative and Referendum in Ohio and other States*, 53 U. CIN. L. REV. 541, 544 (1984).

<sup>19</sup>See CRONIN, *supra* note 15.

As a result of this concern, a trend developed toward curbing the state legislative power.<sup>20</sup> The Progressive Party<sup>21</sup> viewed the initiative and referendum as a way to curb that power and assure the people of an opportunity to directly participate in the enactment of laws and amendments.<sup>22</sup> State constitutions were seen as the best tool to accomplish this opportunity.<sup>23</sup>

In the early twentieth century, the Progressive Party argued that direct legislation would be beneficial.<sup>24</sup> The initiative process would “result in increased government responsiveness to the will of the people, greater citizen participation and a better-informed electorate.”<sup>25</sup> It would force officials to face the true issues of the people and stop the tendency to not rock the boat.<sup>26</sup> The Party argued that because the people are sovereign, they merely delegated their power to the elected officials rather than relinquished it.<sup>27</sup>

Two primary assumptions led to the establishment of the initiative process in the United States.<sup>28</sup> First, because the common man was disassociated from all special interests and biases and was only motivated by the desire to improve society, it was assumed that he would rule well.<sup>29</sup> The second assumption was that special interest groups, political parties and even popularly elected officials could easily be bought, resulting in laws created not for the good of the people, but for the good of special interest groups.<sup>30</sup>

Supporters of the initiative process argued that public forums would provide in-depth discussions about the issues and thereby ensure honesty in government and cause voters to be less apathetic.<sup>31</sup> Initiative power would provide a check for the legislative power by allowing citizens to overrule their elected officials without removing them from office.<sup>32</sup> The initiative power now helps curb problems with the legislature including, but not limited to: campaign spending, unequal lobbying and

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<sup>20</sup>See CHESLEY, *supra* note 18, at 544.

<sup>21</sup>A short-lived, minor political party in the Progressive Era.

<sup>22</sup>See OHIO CONSTITUTIONAL REVISION COMMISSION, RECOMMENDATIONS FOR AMENDMENTS TO THE OHIO CONSTITUTION, 485 (1977).

<sup>23</sup>See CHESLEY, *supra* note 18, at 544.

<sup>24</sup>*Id.* at 4.

<sup>25</sup>DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION, 25 (1989).

<sup>26</sup>TEXAS GOVERNMENTAL COMMISSION ON INTERGOVERNMENTAL RELATIONS, INITIATIVE AND REFERENDUM: AN INFORMATIONAL REPORT, NO. VII-2, 1979, at 3.

<sup>27</sup>*Id.*

<sup>28</sup>See COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 26, at 3.

<sup>29</sup>*Id.*

<sup>30</sup>See *id.* This second assumption became a major focus of the *opposition* to the Initiative who stated that it was special interest groups that led the proponent force.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

off year contributions, gerrymandering, logrolling, unrepresentative representatives,<sup>33</sup> and legislators' arrogance.<sup>34</sup>

There were and are several drawbacks to and arguments against the initiative process. Some critics argue that the initiative process is alien to the spirit of the United States Constitution. They propose that millionaires and interest groups use this tool to achieve their own policy objectives.<sup>35</sup> Others complain that the system creates dual lawmaking bodies, encourages legislators to do nothing because the people will act when they want a change, and threatens to override the voice of the majority that is inherent in elected officials.<sup>36</sup> Opponents also assert that voters cannot be competent lawmakers because they are unable to understand all of the issues that they are voting on and will not have the benefit of the high-level debates that occur in legislative lawmaking.<sup>37</sup> While these arguments have some validity, the initiative process is here to stay.

Once in place, the initiative power was infrequently used by people of the states until the famous Proposition 13<sup>38</sup> secured a place on the 1973 California ballot and won the majority of votes.<sup>39</sup> After Proposition 13 won, citizens in many other states began proposing initiatives dealing with tax issues which legislative bodies had already voted down.<sup>40</sup> The initiative also gained popularity in Ohio.<sup>41</sup> In order to better understand the initiative process in Ohio, an in depth look at the Ohio Constitution should be made.

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<sup>33</sup>See SCHMIDT, *supra* note 25, at 32. Most elected officials are white, middle-aged male attorneys. Despite increases in the number of women and minority representatives, the legislatures do not reflect the makeup of the general population. *Id.*

<sup>34</sup>*Id.* at 30–33.

<sup>35</sup>DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY*, 1 (2000). “Government by initiative is not only a radical departure from the Constitution’s system of checks and balances, it is also a big business, in which lawyers and campaign consultants, signature-gathering firms and other players sell their services to affluent interest groups of millionaire do-gooders with private policy and political agendas. These players—often not even residents of the states whose laws and constitutions they are rewriting—have learned that the initiative is a far more efficient way of achieving their ends than the cumbersome process of supporting candidates for public office and then lobbying them to pass or sign the measures they seek.” *Id.* at 5.

<sup>36</sup>*Id.*

<sup>37</sup>*Id.*

<sup>38</sup>California’s Proposition 13 was a 1973 controversial tax cut initiative, which slashed taxes by at least half. More voters voted on this issue than the gubernatorial race held the same day. See CRONIN, *supra* note 15, at 3.

<sup>39</sup>See JOSEPH F. ZIMMERMAN, *THE INITIATIVE: CITIZEN LAW-MAKING*, 105 (1999).

<sup>40</sup>See *id.* at 106.

<sup>41</sup>After 1973, Ohioans proposed 31 laws and constitutional amendments through the initiative process. Secretary of State, Kenneth Blackwell, *Past Election Results*, at [http://www.state.oh.us/sos/election\\_results.htm](http://www.state.oh.us/sos/election_results.htm) (last revisited Jan. 17, 2004).

*B. The Ohio Constitution*

The Ohio Constitution was originally ratified in 1802 as Ohio was seeking to gain admission into the Union. The people of the territory pressed Congress to approve a constitutional convention to allow representatives to write a preliminary state constitution.<sup>42</sup> “The 1802 Constitution evinces a strong reaction to the executive autocracy that prevailed under the Ordinance of 1787, and touched off an era of legislative dominance.”<sup>43</sup> This undesirable era of legislative dominance led to the Constitutional Convention of 1851 and the adoption of Ohio’s second constitution.<sup>44</sup> Today, this new Constitution, with amendments, remains as the fundamental law of Ohio.<sup>45</sup>

The General Assembly could amend the 1851 Constitution through a joint resolution. The Constitution mandated that any proposed amendment required approval by three-fifths of each house prior to submission to the people for their approval.<sup>46</sup> Because the 1851 Constitution needed major revision, a Constitutional Convention was again held in 1912.<sup>47</sup> The initiative and referendum, significant alterations adopted at the 1912 convention, gave people more direct legislative power.<sup>48</sup> The initiative enabled amendment to the Constitution through citizen-initiated proposals.<sup>49</sup> The initiative “is a method whereby the people propose an

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<sup>42</sup>See *The State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 462 (1999).

<sup>43</sup>*Id.* at 463.

<sup>44</sup>*Id.* at 465.

<sup>45</sup>See 124 LSC MEMBERS’ BRIEF: HOW TO APPROACH THE OHIO CONSTITUTION, 1 (Issue 12, November 8, 2002). “The Ohio Constitution is a document of independent force.” *Arnold v. Cleveland*, 67 Ohio St.3d 35 (1993).

<sup>46</sup>“Either branch of the General Assembly may propose amendments to this constitution; and, if the same shall be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be filed with the secretary of state at least ninety days before the date of the election at which they are to be submitted to the electors, for their approval or rejection. . . . Such proposed amendments, the ballot language, the explanations, and the arguments, if any, shall be published once a week for three consecutive weeks preceding such election, in at least one newspaper of general circulation in each county of the state, where a newspaper is published. . . . If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution.” OHIO CONST. art. XVI, § 1.

<sup>47</sup>This convention has been known as the single greatest event in the political evolution of Ohio. See CONSTITUTIONAL REVISION COMMISSION, *supra* note 22, at 485. The delegates to the 1912 convention agreed that the framers of the 1851 Constitution made the document too difficult to amend. *Id.* at 91. They submitted forty-one separate amendments to the voters and thirty-three were approved. *Id.*

<sup>48</sup>“The initiative and referendum have been treated as separable institutions, with the former considered a ‘condition precedent’ to the later.” See CHESLEY, *supra* note 18, at 544. This article will not discuss details of the referendum power.

<sup>49</sup>*Id.* See OHIO CONST. art II, § 1a. “The first aforesated power reserved by the people is designated the initiative, and the signatures of ten per centum of the electors shall be required upon a petition to propose an amendment to the constitution. When a petition signed by the

amendment by petition; their proposal appears on the ballot, and if a majority votes favorably, the proposal becomes an amendment to the constitution.<sup>50</sup> No action by the General Assembly is involved.”<sup>51</sup> The people may also use the initiative to effectuate a statute by proposing a law to the General Assembly.<sup>52</sup>

The initiative resulted in an increase in both the number of constitutional amendments submitted to the people for ratification and the number adopted since 1912.<sup>53</sup> By 1920, fourteen citizen-initiated amendments were submitted to the people.<sup>54</sup> Four of these were adopted.<sup>55</sup> While the number of initiative petitions decreased thereafter, the submission of constitutional amendments proposed by the General Assembly increased substantially.<sup>56</sup>

Although challenged several times since its enactment in 1912, the initiative process has not changed. The language of the amendment, its placement in the constitution and the procedures outlining the initiative process have been questioned several times. In 1939, voters rejected a proposed constitutional amendment that would have changed the requirements necessary to qualify an initiative petition.<sup>57</sup> In 1976, another proposal was placed before the people seeking to simplify the procedures for initiative and referendum. The measure failed by a vote of more than two-to-one.<sup>58</sup> In 1977, The Ohio Constitutional Revision Commission suggested that the initiative and referendum be repealed from Article II.<sup>59</sup> It proposed that the two processes should be more clearly spelled out in a separate location, Article XIV.<sup>60</sup>

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aforesaid required number of electors, shall have been filed with the secretary of state, and verified as herein provided, proposing an amendment to the constitution, the full text of which shall have been set forth in such petition, the secretary of state shall submit for the approval or rejection of the electors, the proposed amendment, in the manner hereinafter provided, at the next succeeding regular or general election in any year occurring subsequent to ninety days after the filing of such petition.” *Id.*

<sup>50</sup>Now the Constitution may be amended in three ways: by Constitutional Convention, initiative or joint resolution. All methods require that the amendment be submitted to the citizens for vote. *See id.* The requirements and prohibitions of the constitution were enacted to “save the people from the consequences of their impulses, while the provisions for its orderly amendment would enable them to give effect to their deliberately formed opinions.” *State ex rel. Karlinger v. Bd. of Deputy State Sup'rs of Elections*, 80 Ohio St. 471, 491-92 (1909) (overruled in part on other grounds).

<sup>51</sup>*See* SECRETARY OF STATE, *supra* note 3.

<sup>52</sup>*See* OHIO CONST. art. II, § 1b.

<sup>53</sup>*See* CONSTITUTIONAL REVISION COMMISSION, *supra* note 22, at 485.

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

<sup>57</sup>*See* SECRETARY OF STATE, *supra* note 3.

<sup>58</sup>*Id.*

<sup>59</sup>*See* CONSTITUTIONAL REVISION COMMISSION, *supra* note 22, at 349. The Commission also suggested other changes to the initiative process including requiring a fixed number of signatures to gain access on the ballot. None of the changes were adopted. *Id.*

<sup>60</sup>*Id.* at 349.

The Commission argued that a revision in the language and placement would make the initiative and referendum processes clearer and more understandable.<sup>61</sup> However, this structural change to the Constitution has not yet been approved.<sup>62</sup> The initiative process remains the most direct form of democracy available to the people, as it provides the ability to change the state's laws through direct vote.

### C. *The History of Initiatives in Ohio*

There are two basic forms to the initiative process: the direct initiative and the indirect initiative.<sup>63</sup> The Ohio Constitution establishes direct initiatives for Constitutional amendments and indirect initiatives for statutes.<sup>64</sup> The methods are not interchangeable.<sup>65</sup>

A direct initiative is a proposed constitutional amendment that qualifies for the ballot by citizen petition and is submitted directly to the people for a vote.<sup>66</sup> For an indirect initiative, the proposed statute must be submitted to the legislature first.<sup>67</sup> If the legislature decides to adopt the law, there is no need to submit it to the people.<sup>68</sup> If the legislature modifies the statute, declines to accept it, or does not act on it within four months, the citizens must gather more signatures to place the proposal on the next ballot for a vote by the people.<sup>69</sup>

Proponents of a proposed initiative generally dislike the indirect initiative, and when given a choice, most opt for the direct initiative.<sup>70</sup> "Eighty-five percent of the

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<sup>61</sup>*Id.*

<sup>62</sup>*See generally* OHIO CONST. art. II § 1, art. XIV.

<sup>63</sup>PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS*, 27 (1998).

<sup>64</sup>*See* OHIO CONST. art. II, §§ 1a (constitutional amendments), 1b (statutes).

<sup>65</sup>*Id.* Ohio is one of five states that require proponents of statutory initiatives to submit all proposals to the legislature for consideration. *See* DUBOIS at 85. Maine, Massachusetts, Michigan, Nevada, and Ohio comprise this group. Ohio, Michigan and Nevada are the only three states that have direct initiative for constitutional amendments and indirect initiative for statutes. *See id.* at 87.

<sup>66</sup>*See* DUBOIS, *supra* note 63, at 27.

<sup>67</sup>*Id.* To send an initiative to the General Assembly the proponents must gather signatures totaling 3% of votes cast in the last gubernatorial election. Gatherers must have signatures from each county. *See* OHIO CONST. art. II, § 1b.

<sup>68</sup>*See* DUBOIS, *supra* note 63, at 27.

<sup>69</sup>*See* OHIO CONST. art. II, § 1b. "If it shall not be passed, or if it shall be passed in an amended form, or if no action shall be taken thereon within four months from the time it is received by the general assembly, it shall be submitted by the secretary of state to the electors for their approval or rejection at the next regular or general election, if such submission shall be demanded by supplementary petition verified as herein provided and signed by not less than three per centum of the electors in addition to those signing the original petition . . ." *Id.* Unhappy proponents can collect signatures equal to an additional 3% to get the proposal to appear on the next ballot. Together the number of signatures must be at least 6%; 3% to put it before the legislature and then 3% more to put it before the people. *See id.*

<sup>70</sup>*See* DUBOIS, *supra* note 63, at 87.

proponents who have been successful in getting an initiative on the ballot have chosen to use the direct initiative.”<sup>71</sup> This has led to a large number of constitutional amendment proposals. Many, perhaps most, of these proposals should have been statutes.

Proponents prefer direct initiatives for several reasons. One reason may be that they have failed to initially persuade the legislature to pass measures reflecting their proposals. They see little benefit in going back to the legislature for another go-around as an indirect initiative. Another reason is that grass-roots organizations rely heavily on initiatives to get their message heard.<sup>72</sup> The delays associated with the legislative process are especially burdensome on the resources of these groups making indirect initiatives unattractive. However, the most important reason for choosing the direct initiative may be that it “does not require compromise [with the General Assembly] and allows a proponent to put exactly what they [sic] want before the voters.”<sup>73</sup> “Undoubtedly one reason for selecting the direct initiative in these states is the greater immunity to legislative change that constitutional amendments provide for the proponents’ proposals.”<sup>74</sup>

Direct initiatives do have downsides. If a measure is submitted as a direct initiative, the proposal cannot be changed once it has been accepted for circulation to gather signatures.<sup>75</sup> The initiative and its summary, which will be placed on the ballot, must be in the exact form as the proposal used for signature gathering. There is no opportunity to alter the proposal to include public response, improve drafting, or adjust policy concerns. A seemingly minor flaw in wording can become a significant focus for opponents. More importantly any flaw could also lessen the effectiveness of the proposal if it passes.<sup>76</sup>

According to the Secretary of State, from 1912 – 1997 there were fifty constitutional amendment initiatives and nine statutory initiatives proposed in Ohio.<sup>77</sup> The electors approved only fourteen amendments and two laws.<sup>78</sup> Of the amendments that passed, only one involved a greatly debated social policy, the national prohibition on alcohol.<sup>79</sup> It was repealed thirteen years later.<sup>80</sup> Those that failed pertained to gambling, environmental issues, controversial taxes, voting, employment and schools.<sup>81</sup> Ohioans favored changes to the Ohio Constitution that

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

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

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

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

<sup>75</sup>One argument against allowing revision of an initiative after it has begun to circulate is that those who have already signed the proposal might not have signed it if it had circulated in its amended form. *Id.* at 117. See DUBOIS, *supra* note 63, at 27.

<sup>76</sup>See SCHMIDT, *supra* note 25.

<sup>77</sup>See SECRETARY OF STATE, *supra* note 3.

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

<sup>79</sup>See *id.*

<sup>80</sup>*Id.*

<sup>81</sup>*Id.*

were general in nature, affected a majority of citizens favorably, and were fundamental to their way of life.

The Ohio Legislative Service Commission maintains that the changes to the Ohio Constitution in the past 200 years have yielded a succinct, general document that lays the foundations for all laws which govern our behavior.<sup>82</sup> However, Ohioans have expressed concern over the constitution becoming too cluttered.<sup>83</sup> Because the constitution is a conglomeration of past General Assembly and initiative reform measures, it seems far from succinct.

Ohioans have indicated that constitutional amendments that raise moral dilemmas will not be considered lightly.<sup>84</sup> The Drug Treatment Initiative has itself sparked moral debates. Opponents to the Initiative claimed that it was a step toward legalizing drugs.<sup>85</sup> Proponents of the measure indicated that differences in drug sentencing for possession of crack and cocaine have led to a huge discrepancy in the amount of blacks and whites in prison.<sup>86</sup>

The Ohio Constitution is an educational document that says a lot about the history, politics, and values of the state.<sup>87</sup> State constitutions “summarize the collected experiences of the American people and apply them to a single commonwealth’s circumstances. Most of all, they are a people’s basic notions about who they are, how they choose to rule themselves, and what values they wish to hand

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<sup>82</sup>See LSC MEMBERS’ BRIEF, *supra* note 45, at 3. “Some provisions of the Constitution are broadly philosophical, while others are narrowly drawn. Some are short, manageable sections with the characteristics of fundamental law, while others are long and detailed with the characteristics of statutory law. Older sections may have long, unlettered paragraphs and language that reflects a long-past historical context; more recently adopted sections generally conform to LSC drafting standards and use modern terminology. Some provisions are limited to one principle or rule of law; others contain several principles or rules of law.” *Id.*

<sup>83</sup>Ohio State Medical Association, *State Issue 1: The Ohio Drug Treatment Initiative*, at <http://www.osma.org/legislation/state-issue-1.cfm> (last visited Jan. 17, 2004) (on file with author).

<sup>84</sup>The Catholic Church provided a list of guiding questions for issues of great moral question when the constitutional amendment initiative for casino gambling was put before the voters. See Catholic Conference of Ohio, *Statement on the Establishment of Riverboat Casino Gambling in Ohio*, at <http://www.cdeducation.org/cco/bs/riverboatgambling.pdf> (last visited Jan. 17, 2004) (on file with author).

<sup>85</sup>See Glenn Scheller, *Issue 1 aims to Nudge Ohio Toward Drug Legalization*, COLUMBUS DISPATCH, October 20, 2002, at B5 (claiming that proponents know a drug legalization measure would fail and have used this initiative as a disguised effort to further their goal); Alan Johnson, *Taft Upsets Issue 1 Backers*, COLUMBUS DISPATCH, Oct. 15, 2002, at B1 (voicing suspicions that the Initiative is a first step in legalization because the proponent supports medical use of marijuana).

<sup>86</sup>See Alan Johnson, *Some Looking Beyond Issue 1 Campaign: Activists seek equality in sentencing*, COLUMBUS DISPATCH, Nov. 1, 2002, at C8 (quoting national studies that indicate while drug use among blacks and whites is about the same, blacks account for 35% of drug arrests, and 74% of convictions); Olivia Perkins, *Drug War Fuels Black Support for Issue 1*, PLAIN DEALER, Oct. 31, 2002, at B1 (stating that issue 1 is a civil rights issue because of the disproportionate number of blacks who have been affected by mandatory sentencing laws).

<sup>87</sup>See LSC MEMBERS’ BRIEF, *supra* note 45, at 6.

down to the next generation.”<sup>88</sup> The Initiative was too far removed from the values and beliefs of Ohioans today.

### III. AN OVERVIEW OF THE OHIO DRUG TREATMENT INITIATIVE

The Initiative failed to gain the majority of votes at the November 5, 2002 election.<sup>89</sup> Its title was “To amend Art. IV of the Ohio Constitution by adding a Section 24 to provide for treatment in lieu of incarceration for persons charged with or convicted of illegal possession or use of a controlled substance in certain limited circumstances.”<sup>90</sup>

The coalition “Ohioans for New Drug Policies” was the main proponent for the Initiative. Dissatisfied with the failing “war on drugs,” three wealthy men backed the coalition and set out to change the policy of drug treatment in Ohio. The men, George Soros, Peter Lewis, and John Sperling, had earlier founded a similar national coalition named “The Campaign for New Drug Policies.”

In their past efforts, these primary supporters of the Initiative formed an organization called Californians for Medical Rights in 1996.<sup>91</sup> In California, they financed a successful initiative that legalized prescription medical marijuana.<sup>92</sup> The trio then expanded their target states, changed the name of their organization to “Americans for Medical Rights,” and placed parallel initiatives on the ballots of five other states.<sup>93</sup> A spokesman for “Americans for Medical Rights” stated that its “goal is to change national policy, but we know we will have to win more battles in the states in 1998, 1999, and 2000 before that happens.”<sup>94</sup>

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

<sup>89</sup>See SECRETARY OF STATE, *supra* note 3. In order for the amendment to appear on the ballot, the proponents had to meet the procedures laid out in the constitution. They submitted the Initiative proposal to the Attorney General together with a summary of the proposal. Once the Attorney general approved the summary as a fair and accurate description of the proposal, the proponents circulated the summary and solicited the signatures of registered voters. The proponents needed to gather 10% of the votes cast in the last gubernatorial election, which according to the Secretary of State, Kenneth Blackwell, was ~335,000. See Secretary of State, Kenneth Blackwell, *Official election results*, (1998). The coalition secured over twice that amount. See Sandy Theis, *New Tactic Pushed in War on Drugs*, THE PLAIN DEALER, August 8, 2002, at A1. The amount of signatures needed for a constitutional amendment initiative (10%) is much greater than the amount needed for a statutory initiative (3%).

<sup>90</sup>ISSUE 1: THE OHIO DRUG TREATMENT INITIATIVE, *at* [http://www.state.oh.us/sos/ISSUE1\\_TEXT\\_2002.htm](http://www.state.oh.us/sos/ISSUE1_TEXT_2002.htm) (last revisited on Jan. 17, 2004) (on file with author). The Constitution provides that the Secretary of State shall be one of a five-member Ohio Ballot Board committee to write the language of the title and summary for the ballot. See OHIO CONST. art. XVI, § 1.

<sup>91</sup>See BRODER, *supra* note 35, at 191.

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

<sup>93</sup>*Id.* Those states are Alaska, Colorado, Nevada, Oregon, and Washington. *Id.* *But cf.* Alan Johnson, *Issue 1 Debate Highlights Gulf between Viewpoints*, THE COLUMBUS DISPATCH, Oct. 31, 2002 at C3 (indicating the trio has had success in backing 17 of 19 drug reform initiatives in other states).

<sup>94</sup>See BRODER, *supra* note 35, at 192.

In Arizona for the 1996 election, the organization staged a much broader attack on the drug laws. There the initiative, a statute entitled “Drug Medicalization, Prevention, and Control Initiative,” was approved almost two-to-one.<sup>95</sup> That measure, in part, provided that the first two convictions for drug possession would result in probation and require the offender to participate in a drug treatment or education program.<sup>96</sup> In 2000, a similar statute was passed in California, Proposition 36.<sup>97</sup> The organization then turned its attention to Ohio. The Initiative and its goals mimic the Arizona and California statutes.

The Ohio Initiative contained over 6,400 words.<sup>98</sup> The Ohio Constitution itself has a little over 35,000 words.<sup>99</sup> Thus, it would have expanded the Constitution by over 18%. The Proposal sought to amend the constitution by adding section 24 to Article IV. It included twelve sections<sup>100</sup> and numerous subsections.

The first section entitled, “Intents and Purposes,” read like propaganda supporting treatment as a cure for the drug problem in Ohio. The intent of the Initiative was to break the cycle of drug use, halt the wasteful expenditure of millions of dollars each year, provide substance abuse treatment and rehabilitation programs, make qualified professionals responsible for treatment and supervision of alleged offenders, and maintain existing prevention efforts in Ohio.<sup>101</sup>

The Initiative laid out strict guidelines for courts to follow when trying defendants charged with possession or use of a controlled substance. An offender charged with, or convicted of, illegal possession or use would be entitled to request treatment in lieu of jail time.<sup>102</sup> At that time the court would be mandated to stay all criminal proceedings and determine if the offender met the eligibility guidelines set out in sections (C)(1)(a)-(d) or (C)(2).<sup>103</sup> Section (C)(3) is a catch-all clause that

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

<sup>96</sup>*Id.* at 193. *See* ARIZ. REV. STAT. § 13-901.01 (2002). Interestingly, the Arizona statute is 497 words long, and the California statute has 2,085 words.

<sup>97</sup>*See* CAL. PENAL CODE § 1210.1 (Deering 2003).

<sup>98</sup>*See* INITIATIVE, *supra* note 90.

<sup>99</sup>*See generally* OHIO CONST. The Ohio Constitution is longer and more detailed than the United States Constitution and has its own structure. *See* LSC MEMBERS' BRIEF, *supra* note 45, at 2.

<sup>100</sup>The sections are: Intents and Purposes; Treatment Motion, Hearing and Assessment; Eligibility for Treatment; Treatment Plan; Modification of Treatment Plan at Treatment Provider's Initiation; Modification of Treatment Plan at Independent Monitor's Initiation; Program Violations, Consequences, Increased Level of Care, Removal from Treatment Plan; Drug Related Violations; Completion of Program, Benefits, Limitations; Funding for Treatment; Limited Scope of Treatment Right; Definitions; Effective Date. *See generally* INITIATIVE, *supra* note 90.

<sup>101</sup>*See* INITIATIVE, *supra* note 90, at (A).

<sup>102</sup>*Id.* at (B)(1).

<sup>103</sup>*Id.* at (B)(2). The requirements for eligibility are as follows:

A first or second-time offender shall be eligible for treatment if the court finds all of the following:

(a) The offender is charged with illegal possession or use of a controlled substance:

would have given the court discretion to order treatment if the offender had been convicted of certain non-violent felonies in addition to possession or use.<sup>104</sup> The court would have had the option of making an eligibility determination with or without a hearing within three days of the request.<sup>105</sup> If the court determined the offender was not eligible without conducting a separate hearing, the offender could request a hearing. The court would have had additional time in which to hold the hearing. The proposal allowed a total of sixteen days from the time of initial request for treatment to a final determination of eligibility if the offender requests a hearing.<sup>106</sup> If the offender met the eligibility requirements, the court then would have been required to send the offender to treatment and secure a treatment contract and confidentiality waiver from the offender.<sup>107</sup> If at any time the offender withdrew a

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- (b) The offender has not been convicted of or imprisoned for a violent felony within five years of committing the current offense;
  - (c) The offender has not been sentenced to a term of incarceration that would interfere with the offender's participation in the treatment plan; and,
  - (d) In the same proceeding, the offender has not been convicted of and does not have pending charges for:
    - (i) Any felony other than illegal possession or use offense, or any misdemeanor involving theft, violence or the threat of violence;
    - (ii) An offense of trafficking, sale or manufacture of controlled substances;
    - (iii) An offense of possession of controlled substances with the intent or for the purpose of trafficking, sale or manufacture of controlled substances; or,
    - (iv) An offense of illegally operating a motor vehicle under the influence of alcohol or a controlled substance.

A repeat offender shall be eligible for treatment if the court finds both of the following:

- (a) The offender satisfies all of the eligibility requirements of division (C)(1)(a)-(d) of this section; and,
- (b) The requested treatment is in the best interests of the offender and the public.

*Id.* at (C)(1), (2).

<sup>104</sup>*See* INITIATIVE, *supra* note 90, at (C)(3).

(C)(3) If an offender does not qualify under division (C)(1) of this section solely due to the offender's failure to satisfy the eligibility requirement of division (C)(1)(d)(i) of this section, the offender may nonetheless be found eligible for treatment if the court finds all of the following:

- (a) The Offense or offenses do not include a violent felony or any misdemeanor involving violence or the threat of violence;
- (b) The offense or offenses resulted from the offender's drug abuse or addiction;
- (c) Treatment of the individual is in the best interests of the offender and the public; and
- (d) The individual has not been proved to pose a danger to the safety of other persons.

*Id.*

<sup>105</sup>*See* INITIATIVE, *supra* note 90, at (B)(3).

<sup>106</sup>*Id.* at (B)(2)-(3).

<sup>107</sup>*See* INITIATIVE, *supra* note 90, at (B)(4).

request for treatment, the court would have been limited to sentencing the offender to a maximum of ninety days in jail.<sup>108</sup>

The Initiative then laid out the plan for treatment. A “qualified treatment professional” would have assessed the offender, devised an individualized treatment plan and monitored the treatment.<sup>109</sup> To be eligible for probationary treatment, the offender needed to consent to the plan. Treatment would normally last no longer than twelve or eighteen months depending on how much time the treatment professional or court felt was necessary.<sup>110</sup> Additionally, at the treatment provider or independent monitor’s discretion, the treatment plan could be modified to suit the offender’s ongoing treatment needs.<sup>111</sup>

The Initiative also addressed the consequences for voluntary discharge or violations of the treatment plan. The offender, if removed from treatment for any reason, would have been sentenced to a maximum of ninety days in prison or required to perform community service.<sup>112</sup>

The remainder of the section detailed the court’s authority to alter the plan or sanction the offender.<sup>113</sup> If the time line for treatment had expired and the offender did not satisfactorily complete the treatment program, the Initiative permitted the court to modify the plan or dismiss the proceedings and release the offender, but was not permitted to incarcerate him/her.<sup>114</sup> After the completion of treatment, whether successful or not, the offender had the option of filing a motion to seal the records and expunge the conviction.<sup>115</sup>

The Initiative imposed huge costs by requiring strict adherence to treatment in lieu of incarceration. In conjunction with requiring additional costs in both court proceedings and treatment programs, the Initiative also provided a mechanism for funding the program.

The Initiative allocated \$19 million in 2003 and \$38 million for each year through 2009. This money, taken from the General Revenue Fund, would be used to create a Substance Abuse Treatment Fund (“SATF”).<sup>116</sup> The proposal specified that the funds allocated to the SATF could not be used to supplant current funding for prevention and education.<sup>117</sup> It proposed to set up an agency to dispense funds and set specific guidelines for communities wishing to utilize the funds.<sup>118</sup> It designated

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<sup>108</sup>*Id.* at (B)(4)(b).

<sup>109</sup>*Id.* at (D)(1)-(4). This “qualified treatment personnel” would have remained the offender’s monitor even if she or he was not the actual treatment provider. *Id.*

<sup>110</sup>*Id.* at (D)(9).

<sup>111</sup>*Id.* at (E), (F).

<sup>112</sup>*See* INITIATIVE, *supra* note 90, at (G)(1).

<sup>113</sup>*Id.* at (G)(2)-(3).

<sup>114</sup>*Id.* at (H)(1)-(3).

<sup>115</sup>*Id.* at (H)(4)-(6).

<sup>116</sup>*See* INITIATIVE, *supra* note 90, at (I)(4). The proposal does not mention funding for any years after 2009. *See id.*

<sup>117</sup>*Id.* at (I)(5).

<sup>118</sup>*Id.* at (I)(1), (2).

85% of the SATF to fund programs and treatment plans for eligible offenders.<sup>119</sup> The remaining 15% of the fund would be used to pay for the costs of administering the funds and monitoring its success.<sup>120</sup>

In addition to addressing the court procedures and funding, the Initiative was complete in that it (1) set out applicable constitutional principles; (2) set out the standard of proof for court proceedings;<sup>121</sup> (3) specified the intent of the people in enacting the amendment;<sup>122</sup> (4) included a limited section of definitions for terms;<sup>123</sup> and (5) specified an effective date.<sup>124</sup>

#### IV. ANALYSIS

##### A. Comparison to Current Drug Treatment Policies

The majority of critics of the proposed Initiative maintained that the drug treatment issue would be better dealt with as a statute rather than an amendment to the constitution.<sup>125</sup> Ohio Revised Code section 2951.041 currently addresses drug treatment in lieu of incarceration.<sup>126</sup> Section 2951.041 was predicated by section 2951.04 which was repealed in 1996.<sup>127</sup> Section 2951.041 has been amended several times since its counterpart's repeal.<sup>128</sup> While Initiative was modeled after the statute, the two were similar and different in several fundamental ways.<sup>129</sup>

Both documents provide for evaluation by qualified personnel to determine if an offender is eligible for treatment instead of incarceration.<sup>130</sup> The statute, similar to the Initiative, has a provision which gives the court recourse in the event that the

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<sup>119</sup>*Id.* at (I)(8).

<sup>120</sup>That equates to \$2,850,000 in 2003 and \$5,700,000 in subsequent years.

<sup>121</sup>*See, e.g.*, INITIATIVE, *supra* note 90, at (G)(2)(a) “preponderance of the evidence” and (b) “clear and convincing evidence.” *Id.*

<sup>122</sup>*See id.* at (A).

<sup>123</sup>*See id.* at (K).

<sup>124</sup>*See id.* at (L).

<sup>125</sup>*See* Justice Tomas J. Moyer & Justice Alice Robie Resnick, *Letter to Peter Lewis, George Soros, & John Sperling*, at <http://www.nationalfamilies.org/guide/ohiossc.htm> (last revisited on Feb. 28, 2003) (on file with author); Ted Wendling, *Hope Taft was Key to Defeat of Issue 1*, THE PLAIN DEALER, Nov. 11, 2002, at B1 (reporting the opposition's focus on the theme of the inappropriateness of the measure being a constitutional amendment).

<sup>126</sup>OHIO REV. CODE ANN. § 2951.041 (Anderson 2002).

<sup>127</sup>*See id.* Section 2951.041 was enacted at the same time as the repeal of section 2951.04 in 1996. It was itself repealed in its entirety in 2000 and replaced by the current version of section 2951.041. *See* § 2951.041 history.

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

<sup>129</sup>The Initiative was 6,400 words in length and the statute is 1,550 words. This difference flows against the norm that constitutional provisions are shorter and more general than statutes. The statute is entitled “Intervention in lieu of Conviction.” It defines this as “any court supervised activity that complies with this section.” § 2951.041(G)(2).

<sup>130</sup>*See* INITIATIVE, *supra* note 90, at (B)(5); § 2951.041(B)(5).

treatment is later determined to be unnecessary or ineffective. It also provides measures in the event the offender becomes a disciplinary problem.

Both the statute and the Initiative address offenders who successfully complete the treatment program. Both allow a defendant's records to be sealed. The statute provides, "[s]uccessful completion of the intervention plan and period of abstinence under this section shall be without adjudication of guilt and is not a criminal conviction for purposes of any disqualification or disability imposed by law and upon conviction of a crime, and the court may order the sealing of records related to the offense in question."<sup>131</sup> The Initiative sets out that "[i]f the court so finds [that the offender successfully completed treatment] . . . the court shall, . . . order the sealing of records related to the offender's charge or conviction for illegal possession or use of a controlled substance, and expunge any conviction."<sup>132</sup>

Just as there are several similarities, there are also many differences between Section 2951.041 and the Initiative. The statute provides that a court *may* accept an offender's request for intervention in lieu of conviction.<sup>133</sup> Such a request must be made prior to entering a plea.<sup>134</sup> The court may consider or reject the request with or without a hearing.<sup>135</sup> If the court accepts the request, it must stay all criminal proceedings and conduct a separate hearing to determine whether the offender is eligible for treatment in lieu of incarceration.<sup>136</sup>

The statute has nine requirements for eligibility on its face<sup>137</sup> and multiple additional restrictions on eligibility by reference to other code sections.<sup>138</sup> To be

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<sup>131</sup> § 2951.041(E).

<sup>132</sup> See INITIATIVE, at (H)(4).

<sup>133</sup> See § 2951.04 at (A)(1) (emphasis added).

<sup>134</sup> *Id.*

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

<sup>137</sup> See OHIO REV. CODE ANN. § 2951.041 (B)(1)-(9) (Anderson 2002). The nine requirements are:

- (B) An offender is eligible for intervention in lieu of conviction if the court finds all of the following:
- (1) The offender previously has not been convicted of or pleaded guilty to a felony, previously has not been through intervention in lieu of conviction under this section or any similar regimen, and is charged with a felony for which the court, upon conviction, would impose sentence under division (B)(2)(b) of section 2929.13 of the Revised Code or with a misdemeanor.
  - (2) The offense is not a felony of the first, second, or third degree, is not an offense of violence, is not a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code, is not a violation of division (A)(1) of section 2903.08 of the Revised Code, is not a violation of division (A) of section 4511.19 of the Revised Code or a municipal ordinance that is substantially similar to that division, and is not an offense for which a sentencing court is required to impose a mandatory prison term, a mandatory term of local incarceration, or a mandatory term of imprisonment in a jail.
  - (3) The offender is not charged with a violation of section 2925.02, 2925.03, 2925.04, or 2925.06 of the Revised Code and is not charged with a violation

eligible, the prosecutor in the case must recommend that the offender be classified as eligible for intervention in lieu of conviction.<sup>139</sup> Presently, under the code, an offender is not eligible if she or he has a prior prison sentence<sup>140</sup> or prior treatment in lieu of incarceration.<sup>141</sup>

Under current law, if the offender is eligible for treatment, a court has the option of suspending the sentence and placing the person on probation under the control of the county probation department. The Initiative differed in this respect. It did not give the court discretion in sentencing. The Initiative provided that “[n]o offender found to be eligible for treatment and entitled to such release shall be sentenced to a term of incarceration unless and until the offender is removed from treatment

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of section 2925.11 of the Revised Code that is a felony of the first, second, or third degree.

- (4) The offender is not charged with a violation of section 2925.11 of the Revised Code that is a felony of the fourth degree, or the offender is charged with a violation of that section that is a felony of the fourth degree and the prosecutor in the case has recommended that the offender be classified as being eligible for intervention in lieu of conviction under this section.
- (5) The offender has been assessed by an appropriately licensed provider, certified facility, or licensed and credentialed professional, including, but not limited to, a program licensed by the department of alcohol and drug addiction services pursuant to section 3793.11 of the Revised Code, a program certified by that department pursuant to section 3793.06 of the Revised Code, a public or private hospital, the United States department of veterans affairs, another appropriate agency of the government of the United States, or a licensed physician, psychiatrist, psychologist, independent social worker, professional counselor, or chemical dependency counselor for the purpose of determining the offender's eligibility for intervention in lieu of conviction and recommending an appropriate intervention plan.
- (6) The offender's drug or alcohol usage was a factor leading to the criminal offense with which the offender is charged, intervention in lieu of conviction would not demean the seriousness of the offense, and intervention would substantially reduce the likelihood of any future criminal activity.
- (7) The alleged victim of the offense was not sixty-five years of age or older, permanently and totally disabled, under thirteen years of age, or a peace officer engaged in the officer's official duties at the time of the alleged offense.
- (8) If the offender is charged with a violation of section 2925.24 of the Revised Code, the alleged violation did not result in physical harm to any person, and the offender previously has not been treated for drug abuse.
- (9) The offender is willing to comply with all terms and conditions imposed by the court pursuant to division (D) of this section.

*Id.*

<sup>138</sup>*See id.* Some restrictions in section 2929.13(B)(1) exclude offenders who caused or attempted to cause harm to others with or without a firearm, certain sex offenses, offenders who hold public office, and those who were previously sentenced to prison or are on probation. *See* § 2929.13.

<sup>139</sup>§ 2951.041(B)(4).

<sup>140</sup>*See* § 2929.13(B)(1).

<sup>141</sup>*See* OHIO REV. CODE ANN. § 2951.041(B)(8) (Anderson 2002).

...”<sup>142</sup> Courts would have had to send eligible offenders to treatment instead of prison.

The Initiative, in contrast, did not give the court the option of accepting or rejecting a request for treatment. The Initiative provided that upon receiving a request for treatment the court *shall* stay the proceedings and determine whether the offender meets eligibility requirements.<sup>143</sup> Unlike the statute, the Initiative allowed a defendant to make a request for treatment at any point during the criminal proceedings, including post-sentencing.<sup>144</sup>

The Initiative had more lenient requirements for eligibility.<sup>145</sup> The Initiative did not reject offenders who had prior records or who had received prior drug treatment.<sup>146</sup> In fact the Initiative specifically included first and second-time offenders as well as repeat offenders.<sup>147</sup>

Other differences between the present statute and the Initiative include drug testing and funding for the program. The statute mandates drug testing for at least one year after the successful completion of treatment.<sup>148</sup> The Initiative on the other hand, does not mention drug testing except in its intents and purposes section.<sup>149</sup> The statute does not provide a source of funds or an agency to distribute and oversee the treatment programs while the Initiative establishes a comprehensive funding program.<sup>150</sup> The statute does not lay out its intents and purposes. In fact, it would be extremely difficult for a fact finder to determine the General Assembly's intent in enacting section 2951.041.<sup>151</sup>

The Initiative was under inclusive in addressing how drug use relates to other crimes. It did not address those criminals whose behavior was actually linked to drug use. The Initiative only spoke to drug users and possessors. It was at the same time over inclusive by maintaining that all drug users and possessors need treatment. The reality is that there are many unfortunate people who dabble with drugs who

<sup>142</sup>*Id.* at (B)(4)(b).

<sup>143</sup>*See* INITIATIVE *supra* note 90, at (B)(2) (emphasis added).

<sup>144</sup>This can be implied from language elsewhere in the Initiative. There are different consequences if prior to treatment an offender had been or had not been convicted of the possession or use charge. *See id.* at (G)(1)(a), (b).

<sup>145</sup>*See* INITIATIVE, *supra* note 90.

<sup>146</sup>*See id.* at (C)(1), (2).

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

<sup>148</sup>*See* § 2951.041(E). “The terms and conditions of the intervention plan shall require the offender, for at least one year from the date on which the court grants the order of intervention in lieu of conviction, to abstain from the use of illegal drugs and alcohol and to submit to regular random testing for drug and alcohol use.” *Id.*

<sup>149</sup>*See* INITIATIVE, *supra* note 90, at (A)(5). It states, “to ensure that drug testing is used as a treatment tool . . .” *Id.*

<sup>150</sup>*Id.* at (I).

<sup>151</sup>There is no record of the debates on any of the changes made to the statute. The reason for changing the statute was to make it clearer. *See* OHIO REV. CODE ANN. § 2951.041 (Anderson 2002).

would never undertake further criminal behavior. If the Initiative was truly concerned with the effects that drug use had on crime, it would have fully addressed the circumstances in which a crime and drug use were linked.

The statute, by contrast, provides a more comprehensive cure for the link between drugs and crime by allowing a treatment option for all “probationary” crimes. However, this cure was reactionary in nature because it only addressed drug dependency when it resulted in crime. The Initiative was more proactive by allowing intervention in the form of treatment at the early stages of drug use before it leads to increased criminal behavior.<sup>152</sup>

Proponents of the Initiative utilized current law when fashioning the language of the measure making them seem similar.<sup>153</sup> However, the two documents very quickly diverged substantively and procedurally. The Initiative mandated court acceptance of a request for treatment. It shortened the timeline and decreased the requirements for determining eligibility. It limited the length of prison sentence for use or possession to ninety days. The Initiative provided funding for the program, while the statute left funding up to yearly budget fluctuations. The two documents are fundamentally different in another way as well: the statute is easily modified, the Constitution is not.

### *B. Reasons Why the Initiative Failed*

The Initiative failed for several reasons. Opposition to the measure was substantial, but ultimately, the Initiative itself was its greatest adversary. Many citizens rejected it because of its language, length and effect. “From a voter’s perspective, most initiatives cannot be relegated neatly into a ‘should be passed’ or ‘should not be passed’ category.”<sup>154</sup>

#### 1. A Sizeable Opposition

One significant reason the Initiative failed was the size and make-up of its opponents.<sup>155</sup> Governor Bob Taft and his wife Hope Taft were decidedly against the proposed amendment. Governor Taft, along with many law enforcement groups<sup>156</sup> and judges<sup>157</sup> supported the opposition group, Ohioans Against Unsafe Drug Laws. This organization was very vocal in its disdain of the Initiative and had many

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<sup>152</sup>See INITIATIVE, *supra* note 90, at (A).

<sup>153</sup>One of the purposes for the initiative process is inaction by the legislature or action against the desires of the people. “It provides the people with the ability to compel legislative enactment when the state legislature has failed to pursue such a cause.” See CHESLEY, *supra* note 18, at 542.

<sup>154</sup>See BRODER, *supra* note 35, at 73.

<sup>155</sup>Outcomes of initiatives are influenced by the positions taken by prominent political and community leaders. See DUBOIS *supra* note 63, at 188. *But cf.* DEMOCRACY DERAILED at 181. Governor Locke openly opposed an initiative that would end affirmative action in Washington. It passed 58% to 42%. *Id.*

<sup>156</sup>Ted Wendling, *Voters Hand Huge Defeat to Issue 1 Drug Reform*, PLAIN DEALER, Nov. 6, 2002, at S1. See also, Joel Moroney, *Law Officials in Favor of Accountability*, MANSFIELD NEWS JOURNAL, Oct. 25, 2002, at 7A.

<sup>157</sup>See *Juvenile Judge Sees Issue 1 as Effort*, NEWS-MESSENGER, Oct. 24, 2002, at A10.

arguments against the Initiative.<sup>158</sup> They were also critical of the Initiative's backers since they were not all Ohioians.<sup>159</sup>

Jack Ford, the Democratic mayor of Toledo was co-chairman of Ohioans Against Unsafe Drug Laws. He relied on his experience as a former head of a drug treatment center to make the argument that the Initiative would allow drug offenders to receive treatment before those who may be in greater need of treatment.<sup>160</sup> He also argued that there was a substantial lack of treatment centers in Ohio.<sup>161</sup>

First Lady Hope Taft, a nationally recognized expert in substance abuse treatment, argued that the Initiative was a step toward decriminalizing drug laws.<sup>162</sup> She and the Governor stated that the Initiative would severely undermine the state's well-regarded drug courts.<sup>163</sup> In drug courts, which exist in only twenty-five counties, treatment is mandatory and successful defendants can have their records expunged. The Tafts maintained that these courts already successfully address the Initiative's goals.<sup>164</sup>

Key to the Taft and Toledo mayor's opposition was the fact that arguments against the Initiative as an amendment to the constitution resonated with the "informed opposition – primarily elected officials and newspaper editorial writers."<sup>165</sup> It was these editorial writers that made up a large part of the media's scope of coverage.

The stance by treatment providers was conflict-ridden. Many drug treatment providers came out against the Initiative by stating that treatment is unsuccessful without the underlying threat of incarceration.<sup>166</sup> On the other hand, some treatment providers publicly supported the Initiative claiming that those who were against it

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<sup>158</sup>See Historical Election Data for the General Election Nov. 5, 2002: Arguments Against State Issue 1, at <http://serform.sos.state.oh.us/sos/results/index.html> (last revisited Jan. 17, 2004) (on file with author).

<sup>159</sup>Kristy Eckert, *Issue One Backers Detail Costs in Bid for Ballot*, DAYTON DAILY NEWS, Sept. 4, 2002. While the initial list of three millionaires contained only one Ohioan, they were joined by a second, Richard Wolfe a Columbus native who now resides in California. Wolf previously served as chairman of the Franklin County Alcohol, Drug and Mental Health Services Board. He contributed \$200,000 to the campaign. See *id.*

<sup>160</sup>Jack Ford, *Drug Initiative is a Dangerous, Unfair Policy*, COLUMBUS DISPATCH, Oct. 20, 2002, at B4.

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

<sup>162</sup>Sandy Theis, *New Tactic Pushed in War on Drugs*, PLAIN DEALER, Aug. 8, 2002, at A1. See also, Ted Wendling, *Hope Taft was Key to Defeat of Issue 1*, PLAIN DEALER, Nov. 11, 2002, at B1.

<sup>163</sup>See NEW TACTIC, *supra* note 162.

<sup>164</sup>See TAFT WAS KEY, *supra* note 162. Hope Taft felt that "[i]t was more effective to point out . . . how a constitutional amendment wasn't going to work in Ohio and how we were already doing what they said they wanted to do." *Id.*

<sup>165</sup>*Id.* See also, HUGE DEFEAT, *supra* note 156 (reporting that it was a mistake to propose the drug initiative as an amendment to the constitution).

<sup>166</sup>See Alan Johnson, *Issue 1 Isn't the Answer, Say Some Drug Counselors*, COLUMBUS DISPATCH, Oct. 10, 2002 at C3.

were pressured to say so.<sup>167</sup> Their claim was that current funding for their treatment programs would be cut if they did not come out against the Initiative.<sup>168</sup> Treatment provider Sandra Stephenson said, it's "clear that some of Ohio's treatment providers are not free to speak their minds about Issue 1. We know that a significant number of treatment providers support Issue 1."<sup>169</sup> The majority of treatment providers, however, were vocally against the Initiative.

The opposition to the Initiative had a snowball effect. Early polls showed that the Initiative had the support of sixty-percent of voters.<sup>170</sup> In late October, however, the opposition began to gain members, and by Election Day, the opposition had placed numerous television ads, newspaper articles and editorials in front of the public. Mervin Field, a public opinion expert explains the impact of such an opposition:

Typically, the public only becomes fully aware of the opposition to the measure relatively late in the campaign, sometimes only a few weeks before Election Day. Then, if the force and extent of opposition to the proposal are considerable, public awareness of the measure increases dramatically. And more times than not the original instinctive support of the idea is replaced by a negative view.<sup>171</sup>

The Proponents agreed that the opposition was a crucial cause of the Initiative's defeat. "We didn't expect to run into a million dollars in opposition expenditures . . . This governor and this first lady took this much more personally than anyone in leadership in any of the other states that we've worked in."<sup>172</sup> Because the opposition was so strong the few weeks before the election, much of the public's exposure to the Initiative's merits was from a negative perspective.

## 2. The Ballot

One possible reason for the Initiative's failure was the ballot itself. Many times, a difference in the location and language on the ballot may have returned a different result. Proponents do not have control over either the placement or language of the measure. The Ohio ballot board writes the ballot caption and summary,<sup>173</sup> and the Secretary of State determines the placement of issues on the ballot.<sup>174</sup> In Ohio, many

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

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

<sup>169</sup>*Id.*

<sup>170</sup>SurveyUSA. "If the election were today, and you were standing in the voting booth right now, would you vote yes or would you vote no on Issue 1? 60 % "Yes" 38 % "No." Taft, Issue 1 Win according to New Poll (WKYC-TV Oct. 21, 2002); SurveyUSA: *Taft atop Hagan by 7; Surprising Strength for Issue #1*(WKYC-TV Oct. 21, 2002).

<sup>171</sup>See BRODER, *supra* note 35, at 84.

<sup>172</sup>See HUGE DEFEAT, *supra* note 156.

<sup>173</sup>See OHIO REV. CODE ANN. § 3505.062 (Anderson 2002).

<sup>174</sup>OHIO REV. CODE ANN. § 3519.12 (Anderson 2002). See also, State *ex rel.* Williams v. Brown, 368 N.E.2d 838 (Ohio 1977).

measures have unintended results because the effect of a vote is unclear.<sup>175</sup> Not surprisingly, the ballot can make or break a measure.

Although Ohio does not require the ballot to state the effect of a yes or no vote, which generates voter confusion,<sup>176</sup> this was not the case with the Initiative. The ballot title for the Initiative stated, "To adopt Section 24 of Article IV of the Constitution of the State of Ohio [text of ballot summary] Shall the proposed amendment be adopted?"<sup>177</sup> This language clearly indicated the effect of an affirmative vote. A "yes" vote would amend the constitution and a "no" vote would reject the proposal.

The Initiative was located on the last page of the ballot following all other candidates and local issues. Studies have shown that a five to fifteen-percent drop-off in voter participation is common in state elections.<sup>178</sup> A drop-off is the percentage of voters who come to the polls but fail to vote on candidates or proposals found lower on the ballot.<sup>179</sup> If the issue had been located higher up on the ballot more voters would have considered the proposal.

Both the measure's proponents and opponents agree "that putting the cost in the ballot's first paragraph doomed the measure."<sup>180</sup> The Ohio ballot board has the responsibility of writing the ballot language for measures.<sup>181</sup> Proponents of an initiative may reject the ballot language if it misleads the voters.<sup>182</sup> When the Ohio

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<sup>175</sup>See DUBOIS, *supra* note 63, at 118. "Voter surveys of [Ohio] elections involving three different initiatives—a 1972 initiative to repeal a recently adopted income tax, a 1977 initiative to repeal Election Day registration and an initiative to repeal tax increases adopted in 1983—showed that in each election 25 to 30 percent of the voters voted opposite to their own policy preference." *Id.* (quoting Herb Asher, "Voter Confusion in Initiative Elections," paper presented at the 1989 Annual Meeting of the American Political Science Association, Atlanta, Georgia.). Wouldn't it be an interesting initiative to propose a law that would make sure there is no voter confusion of the effect of a yes vote?

<sup>176</sup>*Id.* at 120.

<sup>177</sup>Secretary of State, Kenneth Blackwell, *Issue 1 Ballot Language for the November 5, 2002 General Election*, at <http://serform.sos.state.oh.us/sos/results/index.html> (last revisited Jan. 17, 2004) (on file with author).

<sup>178</sup>See also JOSEPH F. ZIMMERMAN, *THE INITIATIVE: CITIZEN LAW-MAKING*, 172 (1999). "The falloff in the number of votes cast on propositions if they appear at the end of the ballot or bottom of the voting machine in comparison with votes for candidates at the top of the ballot strongly suggests that initiated propositions be placed at the top of the ballot before the listing of the names of candidates for elective office." *Id.*

<sup>179</sup>See CRONIN, *supra* note 15.

<sup>180</sup>See TAFT WAS KEY, *supra* note 162. See *BALLOT LANGUAGE* *infra* note 183, at first paragraph.

<sup>181</sup>See OHIO REV. CODE ANN. § 3505.062 (Anderson 2002). The ballot language for such proposed amendments shall be prescribed by a majority of the Ohio Ballot Board, consisting of "the Secretary of State and four appointed members. No more than two of the appointed members shall be of the same political party." OHIO REV. CODE ANN. § 3505.061 (Anderson 2002).

<sup>182</sup>OHIO REV. CODE ANN. § 3519.12 (Anderson 2002).

ballot board wrote the ballot language for the Initiative,<sup>183</sup> the proponents did not initially object to it.<sup>184</sup> Objections came later when proponents began to feel that the

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<sup>183</sup>The ballot read:

In order to provide for persons charged with or convicted of illegal possession or use of a drug, in certain circumstances, to choose treatment instead of incarceration, to require the state to spend two hundred forty-seven million dollars (\$247,000,000) over seven (7) fiscal years to pay for the drug treatment programs, to allow the applicable records of offenders who complete treatment instead of incarceration for illegal drug use and possession to be sealed and kept confidential for most purposes, and to limit the maximum sentence to ninety (90) days incarceration that eligible first-time, second-time, and certain repeat illegal drug possession or use offenders could serve, this amendment would:

1. Require a court to order treatment instead of incarceration for first-time or second-time offenders charged with or convicted of illegal possession or use of a drug who request treatment, have not been convicted of or imprisoned for a violent felony within five years of committing the current offense, have not been sentenced to a term of incarceration that would interfere with participation in treatment, and in the same proceeding have not been convicted of or charged with other drug-related offenses or misdemeanors involving theft, violence or the threat of violence.

2. Allow a court to order treatment instead of incarceration for eligible repeat offenders charged with or convicted of illegal possession or use of a drug who request treatment, and for offenders charged with or convicted of illegal possession or use of a drug who are also charged with or convicted of other nonviolent offenses resulting from drug abuse or addiction and who request treatment.

3. Create a Substance Abuse Treatment Fund and require the state to spend a total of two hundred and forty-seven million dollars (\$247,000,000) to pay for the treatment, breaking down to nineteen million dollars (\$19,000,000) for the remainder of the 2003 fiscal year and thirty-eight million dollars (\$38,000,000) annually through fiscal year 2009, in addition to requiring the state to maintain its current spending to fund existing substance abuse treatment programs through fiscal year 2009, and to require the state to continue to provide adequate resources for these purposes after fiscal year 2009.

4. Limit the period of treatment a court may impose to not more than twelve (12) months, allow an extension of the treatment period for not more than six (6) more months, and allow court supervision of an offender for up to ninety (90) days after treatment.

5. Limit the sentencing of first-time, second-time, and certain repeat offenders who are eligible for treatment but who either do not request treatment or do not meet the terms of the treatment to a maximum of ninety (90) days incarceration for illegal possession or use of a drug.

6. Limit the authority of judges who place eligible offenders into treatment to remove those offenders from the programs.

7. Require a court to dismiss legal proceedings against an offender without a finding of guilt if the offender completes the treatment.

8. Allow an offender who successfully completes the treatment to have applicable records sealed and to have the conviction that prompted the request for treatment expunged, and require that the sealed or expunged records be kept confidential except for specified law enforcement and court related purposes.

opposition was corrupt.<sup>185</sup> Seeing a dollar amount in the first line of the summary, many voters who were unfamiliar with the Initiative may have felt that it proposed a tax increase.<sup>186</sup> This language, alone, may have defeated the Initiative, as voters are very reluctant to raise taxes.<sup>187</sup>

### 3. The Initiative was an Amendment to the Ohio Constitution

Some critics of the Initiative argued that the issue belongs in the General Assembly, not the state constitution.<sup>188</sup> Sources from the “Americans for Medical Rights” indicated that because of the post enactment legislative tinkering of the similar statute in Arizona,<sup>189</sup> it decided to effectuate changes in Ohio laws through amendment to the constitution rather than statute.<sup>190</sup> One alternative to this scenario could have been to propose the Initiative as a statute and include a provision restricting legislative tinkering until two or more years after enactment as the initiative in Arizona did<sup>191</sup> or requiring a higher percentage of the votes in the

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If adopted, provisions of this amendment related to funding for the remainder of fiscal year 2003 will be effective immediately; otherwise this amendment will be effective July 1, 2003, and will apply to all qualifying charges, convictions and criminal sentences pending before the court from that day forward.

See BALLOT LANGUAGE, *supra* note 177.

<sup>184</sup>Alan Johnson, *Taft Upsets Issue 1 Backers*, COLUMBUS DISPATCH, Oct. 15, 2002, at B1.

<sup>185</sup>*Id.*

<sup>186</sup>See HUGE DEFEAT, *supra* note 156.

<sup>187</sup>See TAFT WAS KEY, *supra* note 162.

<sup>188</sup>Kristy Eckert & William Hershey, *Drug Policy Backers May Make Ballot*, DAYTON DAILY NEWS, Aug. 7, 2002.

<sup>189</sup>See BRODER, *supra* note 35, at 194-96. Shortly after the 1996 enactment, the Arizona legislature passed two bills that seriously undermines the new law. One called for the full prison sentence for those defendants that refused treatment, and the other suspended medical use of an of the 117 drugs until they were approved by the Food and drug Administration (an unlikely occurrence). In response to this legislation, the coalition changed its name to “The People Have Spoken Coalition,” and they succeeded in passing a referendum vote effectively blocking the two laws. In addition to the referendum, they succeeded in getting an initiative passed that limited legislative action on voter-approved measures to allow only minor technical changes by a three-fourths majority. *See id.* *See also* ZIMMERMAN, *supra* note 179, at 114-15.

<sup>190</sup>See TAFT WAS KEY, *supra* note 162. This has been cited as one of the reasons that, in Ohio, proponents seek constitutional amendments rather than statutes. *See* DUBOIS, *supra* note 63. *See also*, Philip Bentley, *Armatta v. Kitzhaber: A New Test Safeguarding the Oregon Constitution from Amendment by Initiative*, 78 Or. L. Rev. 1139 (claiming this phenomenon also affects Oregon initiative proponents). *Cf.* DUBOIS, *supra* note 63, at 224 (maintaining that general experience is that legislatures are reluctant to change laws that were adopted by initiative).

<sup>191</sup>As it is written, The Drug Treatment Initiative could not have been a statute. It would have encountered issues of unconstitutionality. The problem would have centered on the separation of powers doctrine. A statute that violates the doctrine of separation of powers is unconstitutional. The people of Ohio delegate their judicial power to the courts and expressly

General Assembly to change it. The Initiative's failure was predominantly due to the fact that it was a proposal to change the Ohio Constitution.

*A. The Issue's Length and Language*

"No American jurisdiction has gone as far in creating detailed and social entitlements in their constitutions as such countries as Brazil, Mexico, the former Soviet Union, or Haiti. But some state constitutions are nearly as lengthy."<sup>192</sup> Many critics of the Initiative complained of its length.<sup>193</sup> They maintained that the proposal was too lengthy for an amendment to the constitution. "Like James Madison and Alexander Hamilton, the principal authors of the *Federalist Papers*, most modern commentators tend to favor a shorter, more basic constitution."<sup>194</sup> When a measure is lengthy, there is an immense possibility of voter confusion. The proposed Initiative, at a length of 6,400 words, was far from short. Claims were made that very few voters grasped the full understanding of the Initiative and its implications.<sup>195</sup>

The proposed amendment was very wordy and had numerous redundant provisions. For example, the phrase "[a]n offender declared eligible for treatment but who thus withdraws a request for treatment shall be sentenced, upon conviction, to up to ninety days of incarceration, or up to ninety days of confinement on a community-based corrections facility, for the illegal possession or use offense" is found twice exactly as quoted above and two more times in a minutely altered form.<sup>196</sup> This redundancy added approximately 113 words to the Initiative. Many other redundancies extended the language of the amendment by at least 520 words.<sup>197</sup>

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prohibit the Ohio General Assembly from exercising it. *See* OHIO CONST. art. IV, § I. The Constitution limits legislative authority over the judicial power to set the rules and procedure of the courts of the state. The general assembly shall not exercise any judicial power, not herein expressly conferred. OHIO CONST. art. II, § 32. Article II, §1 extends this legislative restriction to the citizens and the initiative. "In whom power vested - The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws." OHIO CONST. art. II, § 1 The Ohio Rules of Civil Procedure, which are promulgated by the Ohio Supreme Court pursuant to Ohio Const. art. IV, § 5(B), must control over subsequently enacted inconsistent statutes purporting to govern procedural matters. *The State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 478 (1999).

The drug treatment Initiative as a statute would have mandated procedure in courts. It most likely would have been void by the *Sheward* court. It would be interesting to see if the outcome would differ now that the composition of the court is different.

<sup>192</sup>*See* DUBOIS, *supra* note 63, at 71-72.

<sup>193</sup>Michael Meckler, *Issue 1 showed danger looms in wordiness*, COLUMBUS DISPATCH, Nov. 6, 2002, at A19.

<sup>194</sup>*See* DUBOIS, *supra* note 63, at 72. The authors recommend that "most issues of everyday policy should be enacted as statutes, and that only matters of great principle should be embodied in constitutional form." *Id.* at 223.

<sup>195</sup>*See Ohio Drug Laws*, CINCINNATI ENQUIRER, Oct. 6, 2002, at F2.

<sup>196</sup>*See* INITIATIVE, *supra* note 90, at (B)(4)(b), (D)(8), (G)(1)(a), and (b).

<sup>197</sup>*See id.* §§ (G)(3)(b)(ii) and (iii); §§(G)(2)(a) and (b); §§ (H)(1) and (2) and (4).

Another problem with the Initiative was that it was poorly written. "A persistent complaint about initiative proposals is that many are poorly drafted . . . because they are poorly or ambiguously worded, or create strange effects because they ignore related legislation or conflict with another constitutional provision."<sup>198</sup> "Because legislative proposals are subject to public hearings and can be amended during the legislative process, constitutional amendments proposed by the legislature tend to be better drafted and more thoroughly debated and understood than those proposed by initiative."<sup>199</sup> Many proposals are poorly written and either do not get passed for that reason or do get passed and reek more havoc than good.<sup>200</sup> "When these technical failures occur in a very long, highly complex initiative, there is a double effect. Both the technical flaws and the potential for voter confusion increase geometrically."<sup>201</sup> When a voter is uncertain or confused about a measure, the likelihood of a "No" vote is very high.

The Initiative's language was extremely specific, which is a trait of a statute rather than an amendment. It also had numerous clauses whose effects were unclear to readers. While the Ohio constitutional amendment process does not require proponents to take their initiatives to the legislature for approval, this proposed amendment would have benefited from the machinery available for honing and structuring legislative action. The Amendment would also have benefited from further public debates prior to its submission for signatures.<sup>202</sup>

#### *B. Ohioans Did Not Agree with the Moral Implications of the Initiative*

Ohioans do not take issues involving morality lightly. Many of the reservations about the Initiative involved its moral implications. With the Initiative posing a threat to the morals of society, even if that threat was misperceived, Ohioans rejected it rather than take the chance that it might succeed in rehabilitating drug users. Some felt that treatment would have let offenders off the hook.<sup>203</sup>

Opponents disagreed with the Initiative's limited scope.<sup>204</sup> The Ohio Medical Association (OMA) disapproved of the Initiative because it did not contain provisions for alcoholics and juveniles.<sup>205</sup> They contended that many criminal acts are committed by people under the influence of alcohol.<sup>206</sup> The OMA also believes

<sup>198</sup> See DUBOIS, *supra* note 63, at 113-14.

<sup>199</sup> *Id.* at 76.

<sup>200</sup> California's Proposition 13, which was the spark for modern-day initiatives, was drafted, unintentionally, to prevent the use of general obligation bonds by local governments. The poor drafting of the measure caused a loss in savings of over \$250 million in seven years. DUBOIS *supra* note 63, at 157.

<sup>201</sup> *Id.* at 112.

<sup>202</sup> After which it cannot be amended.

<sup>203</sup> See Joel Moroney, *Law Officials in Favor of Accountability*, MANSFIELD NEWS JOURNAL, Oct. 25, 2002, at A7.

<sup>204</sup> See FORD, *supra* note 160.

<sup>205</sup> Ohio State Medical Association, at <http://www.osma.org/legislation/state-issue-1.cfm> (last revisited Aug. 26, 2003).

<sup>206</sup> *Id.*

that prevention of habitual drug use needs to start with our youth.<sup>207</sup> As the association recognizes the need for action addressing substance abuse, it may have approved the proposal had it contained provisions addressing these needs. Mayor Jack Ford argued that in addition to neglecting alcohol addiction, the Initiative did not speak “of juveniles, even though most addictions begin in youth.”<sup>208</sup>

Opponents questioned the voluntariness of the program.<sup>209</sup> Critics complained that if the Initiative were in place, offenders would fail in treatment because there was no threat of prison making them stay in treatment; the Initiative made treatment voluntary.<sup>210</sup> “In voluntary drug treatment programs dropout rates are notoriously high.”<sup>211</sup> The Initiative mandated that courts accept treatment as an alternative to sentencing for those who requested it. While this appeared to make treatment voluntary for offenders, the proponents must have taken this into account when writing the substance of section G(1).<sup>212</sup> If at any time the offender leaves treatment or if the court or other involved professionals determine treatment is not successful, the court must order an immediate prison sentence for the offender. It is the threat of a prison term that keeps drug offenders in treatment.<sup>213</sup> Contrary to critics beliefs, this threat was not absent from the Initiative.

Controversy arose over the strict allocation of funding for the program.<sup>214</sup> The Initiative provided a source of funding for the increase in treatment needs. This funding however, became a hotly debated issue. Some argued that Ohio is ranked “thirty-fifth . . . in per-capita drug treatment funding,”<sup>215</sup> and the funding was necessary. They argued that the funding would be able to accommodate all persons currently in need of treatment yet forced to be on waiting lists.<sup>216</sup>

Opponents disliked a constitutional decree that allocated a minimum amount of the General Revenue Fund to treatment. They claimed it gave a constitutional right to the Initiative over the budget needs of public health and safety, roads, economic development, education, and environmental protection.<sup>217</sup> It created a public

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<sup>207</sup>*Id.*

<sup>208</sup>*See* FORD, *supra* note 160.

<sup>209</sup>*See* SCHELLER, *supra* note 85; Beverly Young, *Issue 1 is a Faulty, Dangerous Plan*, MARION STAR, Oct. 22, 2002, at A6.

<sup>210</sup>*See* FORD *supra* note 160; *See also* JOHNSON, *supra* note 166.

<sup>211</sup>HENRY J. AARON AND CHARLES L. SCHULTZE, *SETTING DOMESTIC PRIORITIES: WHAT CAN GOVERNMENT DO?* 130 (1992).

<sup>212</sup>*See* INITIATIVE, *supra* note 90, at G(1) (laying out the consequences for removal from treatment is prison sentence).

<sup>213</sup>*See* JOHNSON, *supra* note 166.

<sup>214</sup>*See* Ted Wendling, *State Puts \$112.6 Million Cost on Drug Treatment Ballot Issue*, PLAIN DEALER, Oct. 29, 2002, at B5; Alan Johnson, *Ad War on Issue 1 Under Way; Supporters of Proposal Say They Won't Attack Taft Now*, COLUMBUS DISPATCH, Oct. 19, 2002, at B1.

<sup>215</sup>*See* WENDLING, *supra* note 214.

<sup>216</sup>*See id.*

<sup>217</sup>*See* SCHELLER, *supra* note 85.

sentiment that drug treatment would become a priority over all other forms of public assistance.<sup>218</sup> This troubled citizens at a time when threats of tax increases were being made to offset projected budget deficits. Because the allocation from the General Revenue Fund was such a large sum of money, people voted against the Initiative fearing additional tax increases.<sup>219</sup>

Both sides disagreed with the policy of treatment instead of incarceration. There were also debates over the number of offenders who would actually request treatment instead of jail time. The opposition estimated 25% of offenders would actually choose treatment over incarceration, indicating that a large amount of offenders would chance receiving a maximum sentence of ninety days in prison rather than up to a year in treatment.<sup>220</sup> Reasons for wanting a sentence shorter than the length of treatment may include family responsibilities and potential loss of employment. Proponent Ed Orlett claimed that 90-95% of offenders would choose treatment.<sup>221</sup> The reasons for selecting treatment could include: the need for help, concealment of a drug record, and avoiding prison. Either way, the huge difference in estimates raises the question of how necessary the Initiative really was and how much money it would save.

Many editorials published in major newspapers indicated that opponents felt the Initiative provided criminals with relief rather than punishment.<sup>222</sup> This was the reason that many law enforcement groups opposed the Initiative. Law enforcement officials were concerned that the Initiative would no longer hold drug offenders accountable for their behavior.<sup>223</sup> They also expressed concern over the ability of criminal defense attorneys to find loopholes in the amendment that would generate endless, costly litigation.<sup>224</sup> Sentiment against the Initiative also included a popular belief that treatment does not work and therefore, criminals would not feel the consequences of their behavior. The fear that criminals would be released from treatment and be free to commit other crimes in support of their addictions compounded the sentiment.<sup>225</sup>

The Initiative gave the option of treatment to users and possessors of "harder drugs."<sup>226</sup> While many people believe that marijuana possession is a low-level offense, this is not true of heroin and crack cocaine.<sup>227</sup> The General Assembly has

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<sup>218</sup>*Id.*

<sup>219</sup>*See generally* HUGE DEFEAT, *supra* note 156.

<sup>220</sup>Gloria Gardner, author of Ohio's Tax Department study on the Initiative, concluded that "25% of the defendants will choose incarceration over treatment because Issue 1 allows judges to impose no more than 90 days in jail." *See* COST, *supra* note 216.

<sup>221</sup>*See* WENDLING, *supra* note 214.

<sup>222</sup>*See* MORONEY, *supra* note 203.

<sup>223</sup>*Id.*

<sup>224</sup>*Id.*

<sup>225</sup>*See* FORD, *supra* note 160.

<sup>226</sup>*See* INITIATIVE *supra* note 90, at (K)(1).

<sup>227</sup> *See* ANDREW WEIL AND WINIFRED ROSEN, FROM CHOCOLATE TO MORPHINE: EVERYTHING YOU NEED TO KNOW ABOUT MIND-ALTERING DRUGS, 130 (1993).

codified this belief through harsher sentences for possessors of crack versus marijuana.<sup>228</sup> The option of treatment for harder drug users did not bode well with some Ohioans causing them to reject the Initiative. Other opponents claimed that this Initiative was the first step in legalizing marijuana.<sup>229</sup>

The Initiative proposed a change in social policy. It generated a perception that it was lenient toward the crimes of drug use and possession. Perhaps there is truth to Curt Steiner's proposition, "I don't think there's a great nod in Ohio for making our drug laws more lenient. . . . The idea of treatment instead of jail for truly low-level offenders has some appeal, but this issue was defeated because it was so much more than that."<sup>230</sup>

### C. Application issues

If The Ohio Drug Treatment Initiative had received a majority of votes in November, it would have created changes too numerous to count. It would have had intended consequences that were the focus of much pre-election debate. And it would have had many unintended consequences that were never addressed. While the intended consequences were hotly controversial, the unintended ones could have been more so. "Unintended consequences outnumber intended consequences."<sup>231</sup>

The Initiative would have changed the way courts sentence non-violent offenders and most likely would have made the drug courts designed to handle such violators obsolete. It would have given eligible offenders a constitutional right to treatment. The strict allocation of money from the budget would have been difficult to handle at first. Once the system had been in place for a while the cost savings from reduced prison sentences might have neutralized this difficulty. Non-violent drug offenders would have their cases stepped-up in order to comply with the time limit. Offenders would have a constitutional right to seal or expunge their records making it possible to get a job.

It is impossible to know for certain what else the Initiative would have affected. Many political theorists caution legislators and the public on the unintended consequences of statutory and constitutional enactments.<sup>232</sup>

[N]o policy choices are fraught with more peril in terms of unanticipated consequences than decisions to define or alter constitutions. When constitutional change is formalized in the process and language of amendment, rather than the more malleable claims of judicial, executive,

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<sup>228</sup>See OHIO REV. CODE ANN. § 2929.13 (Anderson 2002).

<sup>229</sup>See SCHELLER, *supra* note 85; Alan Johnson, *Issue 1 Debate Highlights Gulf between Viewpoints*, COLUMBUS DISPATCH, Oct. 31, 2002, at C3 (claiming that the Initiative's backers hijacked the rehabilitation and treatment issues to further their campaign of decriminalization).

<sup>230</sup>See WENDLING, *supra* note 156.

<sup>231</sup>STEVEN M. GILLON, "THAT'S NOT WHAT WE MEANT TO DO:" REFORM AND ITS UNINTENDED CONSEQUENCES IN TWENTIETH-CENTURY AMERICA, 21 (2000).

<sup>232</sup>See *id.*; DAVID E. KYVIG, UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT (2000). The unintended consequences of liberal social legislation in the 1960s have contributed to a souring of the public mood and to a growing public cynicism about the possibility of change through politics. GILLON, *supra* note 231, at 25. This general cynicism may have also contributed to Initiative's failure.

or legislative interpretation, the significance and risk of unintended outcomes escalate. Once in place, a constitutional amendment becomes devilishly difficult to dislodge.<sup>233</sup>

While unintended consequences are not always forecasted, a few possibilities are put forth below.

The language provides very detailed time limits for hearings.<sup>234</sup> It clearly states that courts must act within three days to establish eligibility for a defendant. With such specific protocol for procedure, courts would violate procedural due process whenever they were unable to determine eligibility of a defendant within that time. This time limit might lead courts to find some defendants eligible for treatment who should not be. Alternatively, Courts may deem offenders ineligible within that first three-day period invoking the clause that affords defendants the right to a hearing on their eligibility. This practice by the courts would lead to extra expenses in the form of attorney fees, court costs and court time.

Early studies of California's Proposition 36<sup>235</sup> show that initial offenders had more serious addictions than anticipated and the state scrambled to open more centers.<sup>236</sup> Ohio would similarly rush to open more centers who are qualified to treat serious offenders. Without an increase in capable and qualified treatment staff personnel, treatment centers would have been short staffed. Quite possibly, treatment providers would have become monitored by a new state organization and state standards would have been created to mandate equality across the state.

The public perception that clients of treatment centers are a threat to a neighborhood might have caused exoduses from areas that contain programs. "It's a great idea, just not in my backyard" syndrome may have become prevalent across the state. Zoning changes might have been implemented to allow communities to restrict program development when faced with the possibility of a treatment center being built in their neighborhoods.

Like many other legislative acts, the Initiative would have produced many consequences, desirable and undesirable. Because the statutes in Arizona and California have only been recently been passed, it is too early to determine what some of the consequences might have been.<sup>237</sup>

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<sup>233</sup>See KYVIG, *supra* note 232, at 4. Only once in the entire course of the U.S. Constitution has an amendment been overturned once adopted. *Id.* That amendment, U.S. Constitutional Amendment XVIII, Prohibition, adopted in 1919, was repealed by Amendment XXI in 1933, had numerous consequences. Among the many unintended consequence of Prohibition were the growth of "bootleggers" and the creation of a police force to enforce the new laws. *See id.* at 175-78.

<sup>234</sup>See INITIATIVE, *supra* note 90.

<sup>235</sup>This is California's statute that parallels the Initiative. *See supra* note 97.

<sup>236</sup>See NEW TACTIC *supra* note 162.

<sup>237</sup>For a detailed analysis of Arizona's Proposition 200 see Abbe M. Goncharsky, *Drug Paraphernalia Charges and Proposition 200: State v. Estrada*, 44 ARIZ. L. REV. 283 (2002). Early studies show a cost savings in California. *See NEW TACTIC, supra* note 162.

*D. The Permanency of an Amendment to the Constitution*

The Initiative was defeated in part because it “cements a huge, untested policy right into the Ohio Constitution.”<sup>238</sup> If any of the Initiative’s consequences were undesirable, the General Assembly would have had difficulty in reconciling the problems. As an amendment to the Ohio Constitution, the measure would have been permanent. “Once a constitutional change is put into place, its removal presents an exceptional challenge.”<sup>239</sup> The only way the Amendment could have been changed or abolished is by ratifying another constitutional amendment. This would involve immense time and work on the part of legislators or citizen groups and would have to be put to the vote of the people for ratification. The amount of time needed for making another amendment could have allowed for further damage to be inflicted.

“A government [and the people] must be able to forecast rationally the situation that lies ahead in order to have any reasonable chance of dealing with it successfully.”<sup>240</sup> Studies of California’s Proposition 36 show that it need tweaking. Proposition 36 is a law as opposed to Ohio’s Initiative. The legislators in California can tweak and change the underlying code of Proposition 36. Ohio could not have tweaked the Initiative if it had passed.

V. CONCLUSION

The Ohio Drug Treatment Initiative failed for several reasons. The incumbent governor backed the opposition. The ballot language resulted in uncertainty as to the Initiative’s effect. Finally, the Initiative’s length, language and substance are better suited as a statute rather than as an amendment to the constitution.

The concept behind the proposal has been accepted by popular vote in Arizona and California. There is even support for substantive reform of Ohio’s drug laws. Ohio would be well served to sit back and watch the laws of Arizona and California in place. Ohio legislators and judges would benefit from seeing these laws in action, observing the flaws and strengths of drug treatment probation for first and second-time offenders. The General Assembly can then make decisions based on educated facts and data rather than ill-defined public opinion and fear. If at that time, Ohio does not act, the public can again propose to mandate drug treatment for eligible offenders. Next time, it should be done as a law rather than a constitutional amendment.

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<sup>238</sup>SCHILLER, *supra* note 85.

<sup>239</sup>See KYVIG *supra* note 232, at 1.

<sup>240</sup>*Id.*