

Vote “No” on Criminal Justice Ballot Measures

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ABSTRACT

Public ballot measures have become a permanent fixture in America’s political system. Since their introduction into American politics during the Progressive Era, these vessels of direct democracy have covered a wide array of topics. While direct democracy may be an adequate substitute to stimulate a stalled legislature or advance a popular opinion, some areas, such as criminal justice, are not appropriate subject matters to be left to the public’s discretion. The ease of getting an initiative onto a ballot and the lack of oversight in some states has resulted in measures that have far-reaching legal consequences that may not be apparent to the average voter. Many of these ballot questions receive support and funding from public and private interest groups and political campaigns. This politicizes the subject matter of the measure and further marginalizes the minority view. Since criminal laws and legal matters are often in place to protect the constitutional rights of the minority and are exceptionally complex, these matters should not be presented to the public for a vote.

“It has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.”

Winston S. Churchill

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I. INTRODUCTION

Each election cycle approximately half the nation's voters head to their respective voting districts to elect candidates into office and to vote on qualified ballot measures.¹ Direct democracy, in the form of ballot measures, has been a part of the United States' electoral law history since the Progressive Era.² Progressives introduced the ballot measure system as a way to directly involve the public in the legislative process.³ Proponents of direct democracy offer several theories purporting that ballot measures positively affect the American democratic system.⁴ Two more common arguments contend that direct involvement of the citizens through ballot measures allow citizens to increase their knowledge and interests in the political process, and that plebiscites are a way to limit the influence and power of political parties and private interest groups.⁵

Ballot measures have been the catalyst of many significant public policy changes including women's suffrage,⁶ labor laws,⁷ and gay marriage.⁸ Regardless of the laudable causes enacted through prior ballot measures, criminal justice matters should not be placed on an election ballot. Given the complex nature of criminal justice principles and the variety of individual rights that could be affected if the public votes a measure into law, ballot measures are not a reliable way to enact change to criminal justice policies. In 2002, after conducting a study of ballot measures across the country, the National Conference of State Legislatures (NCSL) found that although direct democracy has evolved into a formidable democratic tool, it is subject

1. See *What are Ballot Propositions, Initiatives, and Referendums?*, INITIATIVE & REFERENDUM INST., <http://www.iandrinstitute.org/quick-facts.cfm> (last visited Feb. 15, 2016) ("Twenty-four states have the initiative process.").

2. See RICH BRAUNSTEIN, *INITIATIVE AND REFERENDUM VOTING: GOVERNING THROUGH DIRECT DEMOCRACY IN THE UNITED STATES* 15 (Eric Rise ed., 2004); see also STEVEN L. PIOTT, *GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA* 2 (2003); DANIEL A. SMITH & CAROLINE J. TOLBERT, *EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGS. IN THE AMERICAN STATES* 3 (2004); Caroline J. Tolbert, *Public Policy and Direct Democracy in the Twentieth Century: The More Things Change, the More They Stay the Same*, in *THE BATTLE OVER CITIZEN LAWMAKING* 44–45 (M. Dane Waters ed., 2001). The Progressive Era is a period of United States history, from 1890 to approximately 1917 commencing society's demand for transparency and fairness in the political and business world. BRAUNSTEIN, *supra*.

3. SMITH & TOLBERT, *supra* note 2, at 4.

4. See *id.* at 9–14.

5. See *id.* at 10, 14.

6. Tolbert, *supra* note 2, at 44.

7. *Id.*

8. *Same-Sex Marriage Laws*, NAT'L CONF. STATE LEGISLATURES, (June 26, 2015), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx#2>.

to exploitation, and states that do not have a ballot measure process should not introduce one into their political systems.⁹

This Note explores state legislation governing the ballot measure process, cases that deal with criminal justice ballot questions, and why the public should not be allowed to initiate criminal reform through the plebiscitary process. Part II of this Note defines the different types of ballot measures and explores state legislation governing the ballot measure process. Part III introduces and discusses current cases that have addressed ballot measures trying to change criminal justice policies in their respective states. Part IV discusses the reasons why the public should not decide criminal justice matters through ballot measures. Part V concludes this Note.

II. DEFINING A BALLOT MEASURE

A. General Terms

Many components make up a ballot measure.¹⁰ It is important to understand the nuances within the ballot measure process because not all ballot measures are entirely within the public's control and can be easily confused.¹¹ Generally, ballot measures "are proposals to enact new laws or constitutional amendments or repeal existing laws or constitutional amendments that are placed on the ballot for approval or rejection by the electorate."¹² A ballot measure can be further separated into two categories: referendums and initiatives.¹³

9. NAT'L CONF. STATE LEGISLATURES, INITIATIVE AND REFERENDUM IN THE 21ST CENTURY: FINAL REPORT AND RECOMMENDATIONS OF THE NCSL I&R TASK FORCE vii (2002), http://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/IandR_report.pdf ("The initiative lacks critical elements of the legislative process and can have both intended and unintended effects on the ability of the representative democratic process to comprehensively develop policies and priorities.").

10. See M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 11 (2003) (defining the different components that are considered ballot measures).

11. See SMITH & TOLBERT, *supra* note 2, at xii ("Unfortunately, the popular press often refers to initiative as referendums, muddling the two distinct mechanisms.").

12. INITIATIVE & REFERENDUM INSTITUTE, *supra* note 1.

13. DANIEL C. LEWIS, DIRECT DEMOCRACY AND MINORITY RIGHTS: A CRITICAL ASSESSMENT OF THE TYRANNY OF THE MAJORITY IN THE AMERICAN STATES 4 (2013); WATERS, *supra* note 10. Recall is another form of ballot measure, but it exclusively relates to candidates. *Initiative, Referendum, and Recall*, NAT'L CONF. STATE LEGISLATURES (Sept. 20, 2012), <http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx>.

1. Referendums

Referendums are reactionary and are forms of direct democracy where the citizens can accept or reject legislation passed by their legislatures.¹⁴ They can be broken down into two forms: popular and legislative.¹⁵ Popular referendums are ballot measures that allow the public to affirm or decline specific laws passed by their state governments; this type of referendum is available in twenty-three states.¹⁶ Conversely, all states have legislative referendums, which is where the state legislatures submit state constitutional amendments for approval or rejection by a vote.¹⁷

2. Initiatives

The ballot initiative is the form of direct democracy that receives the most public attention.¹⁸ Like a referendum, several types of ballot initiatives exist.¹⁹ Initiatives are primarily categorized as constitutional or statutory, and within those categories, they can be further classified as direct or indirect.²⁰ A constitutional initiative specifically deals with proposed amendments to the state's constitution, while statutory initiatives are legislative proposals introduced by a state's populace.²¹ A direct initiative amendment originates from the people and is placed directly on the ballot. In contrast, an indirect initiative amendment starts with the public, but the legislature must approve the amendment before it is placed on the ballot.²² The same is true for statutory initiatives.²³ Direct initiative statutes are laws proposed by the voters and then placed directly on the ballot, while indirect initiative statutes are laws that must be approved by the state legislature before being placed on the ballot.²⁴

14. WATERS, *supra* note 10.

15. *Id.*

16. *Initiative, Referendum, and Recall*, *supra* note 13 (including Alaska, Arizona, Arkansas, California, Colorado, Idaho, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming).

17. WATERS, *supra* note 10.

18. Frederick J. Boehmke, *Voters Can Be Swayed, Much Like Lawmakers*, N.Y. TIMES (Jun. 18, 2013), <http://www.nytimes.com/roomfordebate/2013/06/18/ballot-initiatives-at-the-local-level/voters-can-be-swayed-much-like-lawmakers>.

19. WATERS, *supra* note 10.

20. *Id.*

21. *Id.*

22. SMITH & TOLBERT, *supra* note 2, at xii; JOSEPH F. ZIMMERMAN, *THE INITIATIVE: CITIZEN LAW-MAKING* 7 (1999); *Initiative, Referendum, and Recall*, *supra* note 13.

23. *Initiative, Referendum, and Recall*, *supra* note 13.

24. *Id.*

Twenty-four states have an initiative process.²⁵ Among those twenty-four states, eighteen have a constitutional initiative process, with sixteen having a direct initiative amendment process and two having an indirect initiative amendment process.²⁶ Twenty-one states have a statutory initiative process: twelve have a direct statutory initiative process, seven have an indirect statutory initiative process, and two states have both a direct and an indirect statutory initiative process.²⁷ While both the referendum and the initiative are forms of direct democracy, the initiative process is the more popular and powerful of the two systems.²⁸

B. The Method for Placing an Initiative on the Ballot

Each state constructs its own election laws and the manner in which an initiative makes its way onto a ballot; however, there are five stages that are similar throughout all states.²⁹ The stages are: the preliminary filing, review of the initiative for statutory compliance, gathering of signatures, submission of the signatures to the appropriate state officials for verification, and vote on the ballot initiative.³⁰

1. Preliminary Filing and Review of Initiative

During the initial two phases, citizens propose the initiative's topic and then present it to a public officer for statutory compliance.³¹ Citizens propose a variety of topics, for example, last election cycle 4.4% of ballot measures dealt with criminal justice matters.³² Some states' constitutions limit the subject matter of ballot initiatives and can even further limit the

25. *Id.* Although the U.S. Virgin Islands have both a statutory and constitutional initiative process, U.S. territories were not included for this. *Id.*

26. *Initiative and Referendum States*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> (last reviewed Dec. 2015).

27. WATERS, *supra* note 10; *Initiative and Referendum States*, *supra* note 26.

28. WATERS, *supra* note 10.

29. *Id.*; *Initiative and Referendum States*, *supra* note 26.

30. WATERS, *supra* note 10; *Initiative and Referendum States*, *supra* note 26.

31. See ZIMMERMAN, *supra* note 22, at 27; *Drafting the Initiative Proposal*, NAT'L CONF. STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/drafting-initiatives.aspx> (last visited Mar. 15, 2015).

32. *Ballot Measures Database*, NAT'L CONF. STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/ballot-measures-database.aspx> (last visited Apr. 8, 2015) (From database select "All States" from the "Select States" option; then "Criminal Justice" from the "Select topic areas" option; then "2014" from the "Year" option; then "All" from the "Election" option; then "All" from the "Measure Type" option; then follow the "Submit Query" hyperlink).

subject matter to the powers exercised by the legislature.³³ Some states do not permit initiatives on spending or monetary policies,³⁴ while other states limit the subject matter of initiatives to a single-subject— meaning all parts of the initiative must relate to one issue.³⁵ Once the subject matter is decided, the proposed initiative is submitted to the appropriate authority to make sure that it conforms to the state’s constitutional and statutory provisions.³⁶

As with the subject matter requirements, the states vary greatly on who reviews the initiative’s content and what components are capable of being revised once the sponsor submits the initiative.³⁷ Of the twenty-four states permitting initiative petitions, only seventeen have a requirement for mandatory technical and or content review by the Attorney General, Secretary of State, Lieutenant Governor, or some legal agency within the state.³⁸ The remaining seven states either do not provide any drafting assistance to petitioners or allow for an optional review of the initiative’s technical components that can be turned down by the sponsor of the petition.³⁹

A review of a ballot measure’s content, what the measure is actually proposing, is only mandatory in seven states. The seven states that require a “mandatory” review of the measure’s content matter, limit the review to procedural matters and the petitioners are not required to adhere to or amend the initiative with any “recommendation[s] made as a result of the review process.”⁴⁰

Since members of the public, who often do not have experience drafting legislation, generate these preliminary ballot initiatives, the draft petition’s

33. LEWIS, *supra* note 13, at 6 fig. 1.1; WATERS, *supra* note 10, at 18 (“Nevada, for example, forbids any appropriation by initiative unless the measure also includes a tax sufficient to cover the appropriation.”); ZIMMERMAN, *supra* note 22, at 24–27 tbl. #2.1, 29–31; *see, e.g.*, MASS. CONST. art. XLVIII, pt. II, § 2 (listing the subjects that are excluded from being ballot measures).

34. WATERS, *supra* note 10, at 18.

35. *Id.* (explaining that the following states exercise a single-subject limitation on its ballot initiatives: Alaska, Arizona, California, Colorado, Florida, Missouri, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Oregon, Utah, Washington, and Wyoming).

36. ZIMMERMAN, *supra* note 22, at 29–30; *Initiative, Referendum, and Recall*, *supra* note 13.

37. *Drafting the Initiative Proposal*, *supra* note 31; *see* ZIMMERMAN, *supra* note 22, at 31.

38. *Drafting the Initiative Proposal*, *supra* note 31 (“In some states, the review is purely technical; the proposal is reviewed to ensure it meets the legal requirements for format and style and adheres to drafting conventions.”).

39. *Id.* Three states, Alaska, Illinois, and Ohio offer no review of the ballot initiative technical components, and California, Michigan, Oregon, and Washington have an optional review. *Id.*

40. *Id.*

content can be convoluted and confusing to understand.⁴¹ To rectify any confusion, ten states out of the twenty-four states, allowing initiative petitions, offer optional drafting assistance to citizens composing initiative petitions.⁴² These drafting assistance programs are in place to ensure that the language and content of the proposed ballot measure complies with the states' technical requirements and that the average voter can understand the initiative.⁴³ Although these ten states do offer drafting assistance, the remaining fourteen states do not provide any form of drafting assistance to their citizens.⁴⁴

2. Gathering and Approving Signatures

Once the sponsor drafts a ballot measure, the measure must be submitted to the public in order to collect signatures.⁴⁵ All states require that a certain number of signatures be collected before a sponsor submits a direct initiative to the legislature or is placed on the ballot.⁴⁶ The number of signatures required varies greatly depending on whether the initiative is constitutional or statutory.⁴⁷ Depending on the state, initiative petitioners could be required to obtain a percentage of signatures based on population, registered voters in a state, votes cast in the last election, or votes cast for a particular office.⁴⁸ In addition to overall signature requirements, most states have geographic dispersion requirements—a certain percentage of voters must be represented from various geographic areas of the state.⁴⁹ Half of the initiative states have these types of requirements.⁵⁰

41. ZIMMERMAN, *supra* note 22, at 33.

42. *Drafting the Initiative Proposal*, *supra* note 31. Of the ten states that offer assistance, California, Massachusetts, Montana, and Oregon permit their citizens to bring ideas and drafts of proposals to initiative drafters in their states. *Id.*

43. ZIMMERMAN, *supra* note 22, at 33; *Drafting the Initiative Proposal*, *supra* note 31.

44. *Drafting the Initiative Proposal*, *supra* note 31.

45. See WATERS, *supra* note 10, at 20.

46. *Initiative, Referendum, and Recall*, *supra* note 13; see ZIMMERMAN, *supra* note 22, at 38.

47. ZIMMERMAN, *supra* note 22, at 34–35 tbl. #2.4; *Initiative Petition Signature Requirements*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 20, 2012), <http://www.ncsl.org/research/elections-and-campaigns/signature-requirements.aspx>.

48. WATERS, *supra* note 10, at 20–24; ZIMMERMAN, *supra* note 22, at 34–35 tbl. #2.4.

49. *Initiative Petition Signature Requirements*, *supra* note 47.

50. *Id.* Federal courts declared the geographic distribution requirements in Idaho (2003) and Nevada (2006) unconstitutional. See *ACLU v. Lomax*, 471 F.3d 1010, 1021 (9th Cir. 2006) (declaring Nevada's geographic signature collection process unconstitutional); *Idaho Coal. United for Bears v. Cenarussa*, 342 F.3d 1073, 1079 (9th Cir. 2003) (declaring Idaho's geographic signature process unconstitutional). In response, Nevada refurbished its geographic requirement with a new system—requiring a certain percentage of signatures to come from its congressional districts. *Initiative Petition Signature Requirements*, *supra* note

Indirect initiatives vary slightly from this process.⁵¹ For an indirect initiative to be presented to the legislature, the petitioners must initially collect a small percentage of signatures.⁵² If the legislature does not consider the initiative during the legislative year, or if the legislature rejects the initiative, the petitioners are required to gather an additional number of signatures in order for the initiative to be placed on the ballot.⁵³

Once the petitioner collects the appropriate number of signatures, the sponsor submits the signatures for verification to the secretary of state, lieutenant governor, county clerk, or register of voters.⁵⁴ The executive then has a certain number of days to verify the signatures.⁵⁵ If the signatures are valid, the initiative proceeds to the next stage.⁵⁶ If the signatures are invalid, the petitioner can appeal the decision to the courts or attempt to acquire the necessary signatures within a specific number of days.⁵⁷ If the petitioner obtains the requisite number of signatures, and the executive verifies the authenticity of the signatures, then the initiative is placed onto the ballot for a vote.⁵⁸

3. Publishing the Ballot Measure

Publishing a ballot initiative consists of drafting the title and the substantive summary that is distributed to the voters.⁵⁹ The guidelines for this process also differ state to state.⁶⁰ In most states, the ballot title is drafted before the petitioner gathers signatures.⁶¹ Depending on the state, either the petitioner drafts the ballot title, which is subject to approval by a state official, or the title is simply drafted by a state official.⁶²

47. The Ninth Circuit upheld this formula in 2012. *Angle v. Miller*, 673 F.3d 1122, 1135–36 (9th Cir. 2012).

51. *Initiative Petition Signature Requirements*, *supra* note 47.

52. *Id.*

53. *Id.*

54. ZIMMERMAN, *supra* note 22, at 41–42 tbl. #2.6.

55. WATERS, *supra* note 10, at 22 (“Twelve states require full certification and ten states use the random sampling method.”); ZIMMERMAN, *supra* note 22, at 45.

56. ZIMMERMAN, *supra* note 22, at 41–42 tbl. #2.6.

57. *Id.*

58. WATERS, *supra* note 10, at 24.

59. *Preparation of a Ballot Title and Summary*, NAT’L CONF. STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/preparation-of-a-ballot-title-and-summary.aspx> (last visited Feb. 16, 2016).

60. WATERS, *supra* note 10, at 24.

61. *Preparation of a Ballot Title and Summary*, *supra* note 59.

62. *Id.*

The summaries of the initiative that the state publishes for its citizens are subject to a similar process.⁶³ Two types of summaries are relevant to the ballot initiative process—the summary that appears on the petition and the summary for the voter information pamphlet.⁶⁴ While sponsors are still collecting signatures, voters may learn about the content of a ballot proposal through the petition summary.⁶⁵ States place limitations on the length of these descriptions, and all states require the summaries to be impartial.⁶⁶ States educate their electorate on ballot proposals by distributing voter pamphlets, or by publishing an impartial description of the measures and arguments for and against the initiative in major newspapers.⁶⁷ Some states charge the initiative sponsors fees for the arguments to be printed in the voter pamphlets.⁶⁸ Eight of the twenty-four initiative states do not distribute a voter pamphlet to its citizens.⁶⁹ Hearings on the ballot initiative are available in a minority of states, therefore only a few states utilize public debate as an instrument to educate its electorate further on the proposed ballot initiatives.⁷⁰

4. The Vote

Once the subject matter is decided, the signatures are collected and verified, and the electorate is presented with the initiative on the ballot, the vote on the initiative takes place.⁷¹ Most initiatives require a simple majority to pass, but as with all the ballot initiative processes, states differ on how initiatives become ratified.⁷²

63. See WATERS, *supra* note 10, at 16; *Preparation of a Ballot Title and Summary*, *supra* note 59.

64. *Preparation of a Ballot Title and Summary*, *supra* note 59.

65. *Id.*

66. ZIMMERMAN, *supra* note 22, at 45–46; *Preparation of a Ballot Title and Summary*, *supra* note 59.

67. WATERS, *supra* note 10, at 24.

68. *Id.* at 24–25 (“Arizona charges \$100 per argument printed in its pamphlet. Oregon charges \$500 per argument. This fee may be waived if the submitter collects 2,500 valid signatures in support of the argument.”).

69. *Id.* at 25–26.

70. *Id.*

71. *Id.*

72. *Id.*

III. CRIMINAL JUSTICE BALLOT MEASURES ARE POPULAR WITH THE PUBLIC BUT UNPOPULAR WITH THE COURTS

Ballot measures are frequently the target of legal challenges.⁷³ In 2014, the Ninth Circuit Court of Appeals declared two complex criminal justice ballot initiatives unconstitutional.⁷⁴ The Ninth Circuit, in *Lopez-Valenzuela v. Arpaio*, declared unconstitutional an Arizona voter approved referendum, Proposition 100, denying bail to arrestees believed to have “entered or remained in the United States illegally.”⁷⁵ In *Doe v. Harris*, the same court declared unconstitutional Proposition 35, the Californians Against Sexual Exploitation (CASE) Act, which supplemented California’s sex offender registration requirements to include an offender’s Internet practices.⁷⁶

A. *Lopez-Valenzuela v. Arpaio*

In 2006, nearly 78% of Arizona voters voted “yes” to Proposition 100, which prevented courts from setting bail for individuals believed to have entered and remained in the United States illegally.⁷⁷ Following its passage, the American Civil Liberties Union (ACLU) brought a class action suit challenging the constitutional validity of the referendum.⁷⁸ The plain-

73. Kenneth P. Miller, *The Role of Courts in the Initiative Process: A Search for Standards 1* (Working Paper Prepared for Delivery at the 1999 Annual Meeting of the Am. Political Sci. Ass’n, 1999), <http://www.iandrinstitute.org/docs/Miller-Courts-and-IandR-IRI.pdf>; see, e.g., *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (holding that the CASE Act chills First Amendment free speech); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 792 (9th Cir. 2014) (holding that Proposition 100 is unconstitutional).

74. See generally *Harris*, 772 F.3d 563 (declaring Proposition 35 unconstitutional); *Arpaio*, 770 F.3d 772.

75. *Arpaio*, 770 F.3d at 775; James Queally, *Court Rejects Arizona’s No-Bail Law for Immigrants in U.S. Illegally*, L.A. TIMES (Oct. 15, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-federal-appeals-panel-tosses-prop-100-20141015-story.html>.

76. *Harris*, 772 F.3d at 568; Anna Almedraia, *Prop 35 Passes: California Voters Approve Harsher Sentencing for Human Traffickers*, HUFFINGTON POST (Nov. 7, 2012), http://www.huffingtonpost.com/2012/11/07/prop-35-passes-california_n_2089305.html; Samantha Masunaga & Titania Kumeh, *California Voted “Yes” on Prop 35; Experts, Police & Sex Workers Disagree on Impact*, OAKLANDNORTH (Nov. 19, 2012), <https://oaklandnorth.net/2012/11/19/california-voted-yes-on-prop-35-experts-police-and-sex-workers-disagree-on-impact/>.

77. *Arpaio*, 770 F.3d at 775 (“Proposition 100 mandates that Arizona state courts may not set bail [f]or serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge.”); ARIZ. SEC’Y OF STATE, STATE OF ARIZONA OFFICIAL CANVASS 14 (2006), <http://apps.azsos.gov/election/2006/General/Canvass2006GE.pdf>.

78. See *Arpaio*, 770 F.3d at 775–76; Press Release, Am. Civil Liberties Union, Law-

tiffs chosen for the class action were “charged with state crimes and held in Maricopa County jails as a result of orders finding that they had entered or remained in the United States illegally.”⁷⁹ They argued that Proposition 100 violated their substantive due process rights under the Fourteenth Amendment.⁸⁰ Specifically, they claimed that the referendum was “not narrowly tailored to serve a compelling government interest; and the law[] impermissibly impose[d] punishment before trial.”⁸¹ The Ninth Circuit agreed, holding that the broad scope of Proposition 100 did not permit the court to consider any of the sentencing factors that would be granted to any other arrestee.⁸²

The court concentrated on vague language in Proposition 100 and the irrebuttable presumption that an arrestee “poses an unmanageable flight risk.”⁸³ Additionally, the court identified that:

Once the court determines that there is probable cause to believe an arrestee has entered or remained in the United States unlawfully, the court has no discretion to release the arrestee under any circumstances, even if the court would find—and the state would concede—that the particular arrestee does not pose a flight risk or danger to the community.⁸⁴

The referendum did not provide a definition of “serious felony offense,” and did not permit the court to consider the traditional bail factors outlined

suit Challenging Denial of Bail Rights for Immigrants Can Continue, Says Federal Court (Dec. 10, 2008), <https://www.aclu.org/news/lawsuit-challenging-denial-bail-rights-immigrants-can-continue-says-federal-court?redirect=immigrants-rights/lawsuit-challenging-denial-bail-rights-immigrants-can-continue-says-federal-court>.

79. *Arpaio*, 770 F.3d at 776.

80. *Id.* at 777.

81. *Id.* at 776. The plaintiffs alleged additional constitutional violations under the procedural due process protections of the Fourteenth Amendment, the Fifth Amendment, the Sixth Amendment, the Excessive Bail Clause of the Eighth Amendment, and preemption of federal law under the Supremacy Clause. *Id.* Since the Ninth Circuit held “that [Proposition 100] laws facially violate substantive due process, [they did] not reach the plaintiffs’ procedural due process, Eighth Amendment, Sixth Amendment and preemption claims.” *Id.* at 792.

82. *Id.* at 791 (“Proposition 100 categorically denies bail or other pretrial release and thus requires pretrial detention for every undocumented immigrant charged with any of the broad range of felonies, regardless of the seriousness of the offense or the individual circumstances of the arrestee, including the arrestee’s strong ties to and deep roots in the community.”).

83. *Id.* at 775 (“At the initial appearance, the court must deny bail, irrespective of whether the arrestee poses a flight risk or a danger to the community, ‘if the court finds (1) that the proof is evident or the presumption great that the person committed a serious offense, and (2) probable cause that the person entered or remained in the United States illegally.’”).

84. *Id.*

in Arizona's criminal procedure statute.⁸⁵ By not defining "serious felony offense," the drafters of the measure created a broad group of individuals who could be held without bail.⁸⁶ This broad application of offenses was not narrowly tailored to meet the substantive due process requirements that the Fourteenth Amendment requires; thus, making the referendum unconstitutional.⁸⁷

B. Doe v. Harris

California sought to supplement its sex offender registry laws in 2012 through the CASE Act.⁸⁸ Voters overwhelmingly approved the ballot measure known as Proposition 35 with 81% of the vote.⁸⁹ The aim of the CASE Act was to require sex offenders to register with law enforcement regarding their Internet usage.⁹⁰ Specifically, the CASE Act:

[R]equire[s] sex offenders to provide "[a] list of any and all Internet identifiers established or used by the person" and "[a] list of any and all Internet service providers used by the person" . . . [and] send written notice to law enforcement within 24 hours of adding or changing an Internet identifier or an account with an Internet service provider (ISP).⁹¹

Additionally, the CASE Act changes the California Evidence Code and increases criminal penalties for human traffickers.⁹²

After its passage, the plaintiff and other members of "a class of registered sex offenders who regularly use the Internet to advocate anonymously on behalf of sex offenders and . . . comment on news articles, forums, and

85. *Id.*; see ARIZ. R. CRIM. P. 7.2(a) ("Any person charged with an offense bailable as a matter of right shall be released pending or during trial on the person's own recognizance, unless the court determines, in its discretion, that such a release will not reasonably assure the person's appearance as required."). After voters approved Proposition 100, the Arizona legislature enacted legislation defining "serious felony offense." ARIZ. REV. STAT. ANN. § 13-3961(A)(5)(b) (2015).

86. *Arpaio*, 770 F.3d at 784 ("Second the Proposition 100 laws are not limited to a 'specific category of extremely serious offense.' Instead they encompass an exceedingly broad range of offenses, including not only serious offenses but also relatively minor ones. . . .") (emphasis in original) (internal citations omitted).

87. *Id.* at 789.

88. Almedraia, *supra* note 76; Masunaga & Kumeh, *supra* note 76.

89. CAL. SEC'Y OF STATE, STATEMENT OF VOTE 69 (2012), <http://elections.cdn.sos.ca.gov/sov/2012-general/sov-complete.pdf> (providing official election results for the November 6, 2012 General Election).

90. *Doe v. Harris*, 772 F.3d 563, 567–68 (9th Cir. 2014).

91. *Id.*; CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE 103–04 (2012), <http://vig.cdn.sos.ca.gov/2012/general/pdf/complete-vig-v2.pdf>.

92. CAL. SEC'Y OF STATE, *supra* note 91, at 42.

blogs” filed a class action lawsuit.⁹³ The essence of the lawsuit was that “the CASE Act violates their First Amendment rights to freedom of speech and association and that the statutory provisions are void for vagueness and violation of the Fourteenth Amendment.”⁹⁴

In its analysis of the plaintiff’s First Amendment arguments, the Ninth Circuit held that the CASE Act was content neutral and thus, subject to an intermediate scrutiny test.⁹⁵ Although, the Ninth Circuit recognized that the state had a “significant interest in protecting its citizens from crime,”⁹⁶ the CASE Act failed the intermediate scrutiny test because “the Act’s ambiguities as to what registrants are required to report, combined with the criminal sanction for failure to report, unnecessarily chill protected speech.”⁹⁷ In addition, the Ninth Circuit held that the freedom the Act provides to law enforcement to release a sex offender’s Internet usage to the public also chills free speech.⁹⁸ Finally, the court held that the CASE Act’s twenty-four hour reporting requirement was overbroad and discouraged registered sex offenders from participating in lawful “expressive activity.”⁹⁹ With its holding, the Ninth Circuit declared that Proposition 35 “is likely unconstitutional.”¹⁰⁰

93. *Harris*, 772 F.3d at 569; Press Release, Am. Civil Liberties Union, Appeals Court Rules in Favor of Anonymous Speech in California Prop. 35 Case (Nov. 18, 2014), <https://www.aclunc.org/news/appeals-court-rules-favor-anonymous-speech-california-prop-35-case>.

94. *Harris*, 772 F.3d at 569; Press Release, Am. Civil Liberties Union, *supra* note 93. Initially, plaintiffs moved for a preliminary injunction to prohibit enforcement of the CASE Act. *Harris*, 772 F.3d at 569. The Ninth Circuit reviewed the district court’s grant of injunction for abuse of discretion. *Id.* at 570.

95. *Harris*, 772 F.3d at 575–76 (“Although we conclude that the Act burdens protected speech, nothing in the Act suggests that the Act’s purpose was to disfavor any particular viewpoint or subject matter. We therefore conclude that ‘the appropriate standard by which to evaluate the constitutionality of [the Act] is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech.’”) (quoting *Turner Broad. Sys., Inc., v. FCC*, 512 U.S. 622, 642 (1994)).

96. *Id.* at 583.

97. *Id.* at 579.

98. *Id.* at 579–80 (“[W]e conclude that the Act nevertheless chills anonymous speech because it too freely allows law enforcement to disclose sex offenders’ Internet identifying information to the public.”).

99. *Id.* at 582 (“Because the CASE Act’s requirements are not clear, the information may be too freely shared with the public, and the 24-hour reporting requirement is onerous and overbroad, we conclude that Appellees are likely to prevail on their claim that the CASE Act unnecessarily deters registered sex offenders from engaging in legitimate expressive activity.”).

100. Press Release, Am. Civil Liberties Union, *supra* note 93.

IV. THE PUBLIC'S ROLE IN DETERMINING CRIMINAL JUSTICE MATTERS

The aforementioned cases are just two examples of courts defeating ballot measures.¹⁰¹ According to a 1999 paper presented at the Annual Meeting of the American Political Science Association, “[c]ourts invalidate roughly half of all challenged initiatives in their entirety or in part, most often on the basis that they unconstitutionally violate individual rights. . . .”¹⁰² While it is difficult to say with certainty, criminal justice ballot measures appear to be more susceptible to judicial challenges because of the nature of their content.¹⁰³ These issues are complex and difficult for even the most educated citizens to understand.¹⁰⁴ When proponents of ballot measures attempt to reduce these complicated issues into an abridged campaign message supporting or opposing their issue, the details of a criminal law are bound to become confusing.¹⁰⁵

A. Inadequate Drafting Safeguards in States Leads to Confusing Ballot Measures

Although, all states that utilize ballot measures have a process that a ballot measure must go through before it is placed on the ballot, some states have more procedural guidelines than others.¹⁰⁶ Without the appropriate precautions, a state could potentially place a measure on the ballot and

101. See generally *Harris*, 772 F.3d 563 (using judicial review to defeat Proposition 35); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (using judicial review to defeat Proposition 100).

102. *Miller*, *supra* note 73.

103. See *id.*; see also Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239, 1244 (1998).

104. See J. Fred Silva, PUB. POLICY INST. OF CAL., THE CALIFORNIA INITIATIVE PROCESS: BACKGROUND AND PERSPECTIVE 31 (2000) (Unpublished Resource Material for the Speaker's Commission on the California Initiative Process) (on file with the Public Policy Institute of California), http://www.ppic.org/content/pubs/op/OP_1100FSOP.pdf (showing that 79% of voters polled in a survey agree that ballot question wording is “too complicated and confusing for voters to understand what happens if the initiative passes”).

105. See *id.*

106. See discussion *supra* Part II.B.

submit it for a vote even if it has potential to be constitutionally invalid.¹⁰⁷ Evidence of these limited procedures is evident in Arizona and California's guidelines.¹⁰⁸

At the preliminary review of referendum and initiative petitions, both Arizona and California do not require a state official to review the language of the ballot measure before the petition is submitted to the public.¹⁰⁹ Specifically, Arizona only has the Secretary of State review the petition for form, and California has optional review from Legislative Council.¹¹⁰ Neither Arizona nor California requires that the Attorney General or any member of the Judiciary review the ballot measures before they are submitted to the public.¹¹¹ This becomes problematic in cases like *Lopez-Valenzuela* and *Doe*, where the petitions have underlying interests in individual rights.¹¹² If Proposition 100 or the CASE Act were submitted to a judicial or legislative official prior to being released to the citizens for a vote, it is more likely that government officials could have identified the unconstitutional principles within these ballot measures.¹¹³

B. The Cost of Educating the Public

One of the biggest arguments for direct democracy is that it creates a more educated electorate; however, according to a study done by the National Conference on State Legislatures, a majority of direct democracy states had ineffective methods for educating their citizens.¹¹⁴ The electorate receives information in a variety of mediums: grassroots campaigns, media buys, and voter information pamphlets.¹¹⁵ Educating citizens about ballot measures should be a requirement for any subject matter submitted to the

107. See ZIMMERMAN, *supra* note 22, at 57 (“[T]he degree of difficulty encountered by voters in employing the initiative is associated with the requirements specified in the enabling constitution, statutory, or charter provisions.”); see, e.g., *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (invalidating Proposition 35 because it chills free speech); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 792, 792 (9th Cir. 2014) (invalidating Proposition 100 because it facially violated substantive due process).

108. See WATERS, *supra* note 10, at 71, 142–43.

109. *Id.* at 71, 142.

110. *Id.*

111. *Id.* at 71, 142–43 (purporting that the Attorney General only has to give the final approval for the ballot, but is not involved in the process).

112. See, e.g., *Harris*, 772 F.3d at 568 (contending that Proposition 35 infringes free speech rights); *Arpaio*, 770 F.3d at 777 (contending that Proposition 100 had underlying substantive due process issues).

113. See *supra* notes 109–14 and accompanying text.

114. SMITH & TOLBERT, *supra* note 2, at 10; NAT'L CONF. STATE LEGISLATURES, *supra* note 9, at vii, 44–45.

115. SMITH & TOLBERT, *supra* note 2, at 58; ZIMMERMAN, *supra* note 22, at 48, 149.

public for a vote—however, this information requires money, and the argument is often framed by those who donate the money.¹¹⁶

The California Proposition 35 case provides a strong example of issue shaping, where the side with the most monetary support gets to frame the initiative in a way that is most favorable to their outcome. The title of Proposition 35 was “Human Trafficking. Penalties. Initiative Statute.”¹¹⁷ In reading the summary of Proposition 35, its effects seem commendable: “[i]ncreasing penalties for human trafficking,” “[f]ines used for victim services and law enforcement,” increased registration requirements for convicted sex offenders, evidence of the victims sexual conduct, and additional training for police officials.¹¹⁸ Facially these measures seem like positive changes for society, but because of the general language used it is very difficult to see the true impact of Proposition 35.¹¹⁹ Further exploration into California’s voter information pamphlet shows that human trafficking is often a federal offense and that the state prosecutes very few of these crimes making the actual impact of Proposition 35 minimal in relation to the actual amount of citizens affected.¹²⁰

News outlets covering Proposition 35 addressed both sides of the argument, but with the amount of experts and funding in support of the initiative, finding well-known opponents against Proposition 35 was a difficult

116. K.K. DuVivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045, 1048–49 (2007) (“Although there is no guarantee that the party contributing the most money will prevail in an initiative campaign, additional resources play a significant role in exposure and how the public perceives an issue.”); see Sue Davis, *Discrimination Through Direct Democracy: The Role of the Judiciary in the Pursuit of Equality*, in THE JUDICIAL BRANCH 375, 379 (Kermit L. Hall & Kevin T. McGuire eds., 2005) (“[T]he judiciary’s role is even more crucial in the context of lawmaking by the electorate because that process is marred by organized campaigns that distort and manipulate public opinion to subvert rather than promote principles of democracy.”); SMITH & TOLBERT, *supra* note 2, at 57 (“The relationship between political knowledge and media use is mediated by interest. A number of studies show that individuals with low political interest are more vulnerable to media messages [A] host of scholars have found that by most standards, Americans possess little interest in or knowledge of politics.”). *Contra* WATERS, *supra* note 10, at 456 (referencing a poll that shows “the vast majority of participating voters are unlikely to be ‘manipulated’ by duplicitous, commercial campaign information”).

117. *California Proposition 35, Ban on Human Trafficking and Sex Slavery*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_35,_Ban_on_Human_Trafficking_and_Sex_Slavery_\(2012\)](https://ballotpedia.org/California_Proposition_35,_Ban_on_Human_Trafficking_and_Sex_Slavery_(2012)), (last visited Feb. 18, 2016).

118. *Id.*

119. *See generally id.*

120. *Proposition 35 Human Trafficking. Penalties. Sex Offender Registration. Initiative Statute.*, CAL. LEGISLATURE’S NONPARTISAN FISCAL AND POLICY ADVISOR (July 18, 2012) (“In recent years, there have been only a few people annually sent to a state prison for human trafficking crimes. As of March 2012, there were 18 such offenders in state prison.”).

undertaking.¹²¹ Supporters of Proposition 35 raised over \$3 million dollars, with Chris Kelly, a former Attorney General candidate, contributing over \$2.3 million.¹²² According to the California Secretary of State's website, no groups or funds registered an opposition to Proposition 35.¹²³

Since Proposition 35's proponents received so much monetary support, they were able to frame the discussion in a way that benefited their cause: by portraying Proposition 35 as a bill that could better society.¹²⁴ In direct democracy, "citizen voters generally receive no *direct* benefit by voting one way or another. Instead, they are more likely to vote their consciences on a topic and strive for an ethical government."¹²⁵ In the case of Proposition 35, voters received overwhelming messages to vote for an initiative that would prevent human trafficking.¹²⁶ Proponents streamlined the issue, and the electorate voted based on the generalized information they received.¹²⁷

This is precisely the problem with permitting criminal justice ballot measures to go through the initiative process: a few select individuals can

121. See, e.g., Jens Erik Gould, *California's Prop 35: Why Some Oppose an Anti-Sex Trafficking Initiative*, TIME (Nov. 8, 2012), <http://nation.time.com/2012/11/05/californias-prop-35-why-some-oppose-an-anti-sex-trafficking-initiative/> (portraying both sides of the Prop 35 argument and showing that "the yes campaign also backs up its argument by pointing out that many experts are on its side"); Melissa G. Grant, *California's Prop 35: A Misguided Ballot Initiative Targeting the Wrong People for the Wrong Reasons*, RH REALITY CHECK (Nov. 1, 2012, 9:39 PM), <http://rhrealitycheck.org/article/2012/11/01/prop-35/> ("The problems with Prop 35 extend beyond the language of bill.").

122. Drew Joseph & Jill Tucker, *Prop. 35: Trafficking Measure Passes*, SFGATE, <http://www.sfgate.com/politics/article/Prop-35-Trafficking-measure-passes-4014911.php> (last updated Nov. 7, 2012).

123. See *Campaign Finance: Proposition 035—Human Trafficking. Penalties. Sex Offender Registration. Initiative Statute.*, CAL. SEC'Y STATE, <http://cal-access.sos.ca.gov/Campaign/Measures/Detail.aspx?id=1343414&session=2011> (last visited Mar. 16, 2015).

124. See SMITH & TOLBERT, *supra* note 2, at 58 ("As one campaign consultant noted, 'most initiatives' campaigns really are processes of both one side and then the other side attempting to *educate* voters about different aspects of the measure. And as people get more information that tends to influence their attitudes about' the ballot measure."); see also Drew Joseph, *Prop. 35 Gets Tough on Human Traffickers*, SFGATE (Sept. 17, 2012), <http://www.sfgate.com/politics/article/Prop-35-gets-tough-on-human-traffickers-3872843.php>.

125. DuVivier, *supra* note 116, at 1050 (emphasis added).

126. See, e.g., CAL. AGAINST SLAVERY, <http://californiaagainstsavery.org> (last visited Mar. 29, 2015) (featuring videos with "survivor stories" documenting several sex-trafficking victims' experiences and their views on how Proposition 35 would impact the current laws in California).

127. See CAL. SEC'Y OF STATE, *supra* note 89 (publishing the voting results of the November 2012 election and showing that 81% of the electorate approved Proposition 35).

shape and obscure the true consequences of the initiative's impact.¹²⁸ Criminal justice matters are rarely straightforward and, as seen in the case of Proposition 35, can be overly simplified and packaged as broad matters pertaining to justice.¹²⁹ These generalizations can mislead the public as to who is potentially affected by the implementation of the initiative.¹³⁰

C. Protecting the Minority from the Majority

One of the main criticisms of the direct democratic process is that it "leads to tyranny of the majority."¹³¹ Since criminal justice aims to protect the rights of a smaller sect of individuals, this subject matter is highly susceptible to minority exclusion.¹³² The Ninth Circuit's ruling on Arizona's Proposition 100 in *Lopez-Valenzuela v. Arpaio* provides a relevant example.¹³³ According to a 2006 report by the Department of Homeland Security, the state of Arizona saw a 52% increase in its unauthorized resident population between 2000 and 2006.¹³⁴ Illegal immigration was a popular topic during Arizona's 2006 election season, with four ballot initiatives offered to the public for a vote.¹³⁵ Opponents of illegal immigration were very active during this election cycle, and all four measures passed.¹³⁶ Included in this group of measures was Arizona's Proposition 100, which denied bail to individuals believed to be in the United States illegally.¹³⁷

128. See BRAUNSTEIN, *supra* note 2, at 77 ("[A]n effective use of the media may be singly responsible for a successful or unsuccessful ballot campaign, which is contingent upon a group's ability to purchase media time.").

129. See generally 23 ABC News, KERO, *Proposition 35 Pros and Cons*, YouTube (Oct. 24, 2012), <https://www.youtube.com/watch?v=blvrtvts3dY> (debating the pros and cons of Proposition 35).

130. See BRAUNSTEIN, *supra* note 2, at 77 ("[T]he groups behind the committees serve a particularly important role insofar as they are the principal source of information for the electorate.").

131. FREDERICK J. BOEHMKE, *THE INDIRECT EFFECT OF DIRECT LEGISLATION: HOW INSTITUTIONS SHAPE INTEREST GROUP SYSTEMS* 9 (2005); LEWIS, *supra* note 13, at 3–4; see Davis, *supra* note 116, at 376.

132. See JOSHUA DRESSLER, *UNDERSTANDING: CRIMINAL LAW* 36–37 (LexisNexis ed., 5th ed. 2009).

133. See *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 792–98 (9th Cir. 2014) (Nguyen, J., concurring).

134. MICHAEL HOFER, NANCY RYTINA & CHRISTOPHER CAMPBELL, U.S. DEP'T OF HOMELAND SECURITY, *ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2006*, at 4 (2007), https://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf.

135. *Arizona, INITIATIVE & REFERENDUM INST.*, <http://www.iandrinstute.org/statutes/state.cmf?id=2> (last visited Apr. 4, 2015).

136. *Id.*

137. *Id.*

In her concurrence in *Lopez-Valenzuela v. Arpaio*, Judge Jacqueline Nguyen reviewed the legislative debate of the ballot referendum's sponsor, former State Representative Russell Pearce, a proponent for the referendum.¹³⁸ Throughout her concurrence, Judge Nguyen highlighted several statements made by the former representative that concentrated solely on an individual's status rather than Arizona's bail determination requirements of "posing a flight risk" or "danger to the community."¹³⁹ Instead of focusing the debate on these objective factors such as a criminal's flight risk and dangerousness, former Representative Pearce chose to attack an arrestee's immigration status, thus isolating these arrestees from the general arrestee population, and denying them certain elements of due process based solely off of this classification.¹⁴⁰

The animus for illegal immigrants was also evident in the voter pamphlet for Proposition 100 that the Arizona Secretary of State released to voters.¹⁴¹ Judge Nguyen also accentuated the disproportionate representation of the "pros" and "cons" in the voter pamphlet:

The ballot materials did not inform voters of the definition of "serious felony offense," or that it included many non-violent offenses. Instead, in a statement of support on the ballot, Representative Pearce warned voters of the "[l]arge, well-organized gangs of illegal aliens," and the need to keep such "dangerous thugs in jail rather than releasing them onto the streets."¹⁴²

138. *Arpaio*, 770 F.3d at 793–94 (Nguyen, J., concurring) ("Although he alluded generally to supposed dangers that 'violent aliens' pose to the public, he did not cite a single example or any other evidence of the problem, and instead elaborated: 'I mean you know bad enough you're illegal but you commit a serious crime you ought not to be bondable. . . . In fact, all illegal aliens in this country ought to be detained, debriefed, and deported'").

139. *Id.* at 792 (Nguyen, J., concurring) ("I write separately to address the extraordinary record of legislative intent, which I believe demonstrates that Proposition 100 was intentionally drafted to punish undocumented immigrants for their 'illegal' status, even if they pose no flight risk or danger to the community.").

140. *See id.* at 794 (Nguyen, J., concurring) ("I think that this just simply bridges the gap, a loophole in the law that would allow people who are not in this country []legally who have no business to be released if they commit any crime, *they have no business being released if they commit no crime, no additional crime [be]cause they're already in this country illegally.*") (alterations in original).

141. *See* JANICE K. BREWER, PUBLICITY PAMPHLET: BALLOT PROPOSITIONS & JUDICIAL PERFORMANCE REVIEW 13–15 (2006), <http://apps.azsos.gov/election/2006/info/PubPamphlet/english/Guide.pdf>.

142. *Arpaio*, 770 F.3d at 795 (Nguyen, J., concurring) (discussing the statements listed in support of Proposition 100); *see also* BREWER, *supra* note 141.

Proponents of Proposition 100 used legislative debates and the voter information pamphlets to target a minority of Arizona's citizens—illegal immigrants.¹⁴³ Proponents employed these tactics to discriminate against illegal immigrants and eliminate a right these individuals have when the state accuses them of a crime.¹⁴⁴

Non-citizens do not possess the legal right to vote, so this minority sect in Arizona could not even mobilize to defend themselves from the removal of their right to bail.¹⁴⁵ Individuals with felony convictions also have restrictions on their right to vote.¹⁴⁶ All but one state that has a direct democratic process disenfranchises individuals with felony convictions in some way.¹⁴⁷ In limiting their right to vote, disenfranchisement laws inherently create a minority faction of individuals involved with the criminal justice system.¹⁴⁸ Therefore, proposed ballot measure that alter the criminal justice process or amend criminal justice policies, are inherently prejudicial towards the individuals the plebiscite impacts because those individuals are unable to exercise their right to vote against such policies.

The anti-minority sentiment behind Proposition 100 demonstrates how a majority can impose discriminatory ballot measures on a select group.¹⁴⁹ Using the strong anti-immigrant sentiment felt in the 2006 Arizona election, the citizens permitted Proposition 100 to deny a right afforded to a minority of Arizona's population.¹⁵⁰ Denying the civil rights of minorities is not an anomaly limited to Arizona's Proposition 100; "states with direct democracy institutions are more likely than other states to adopt [] anti-minority policies."¹⁵¹ Other ballot initiatives, targeting anti-minority policies have been proposed and ultimately declared unconstitutional.¹⁵² These

143. See *Arpaio*, 770 F.3d at 792–98 (Nguyen, J., concurring); BREWER, *supra* note 141.

144. See *Arpaio*, 770 F.3d at 792 (Nguyen, J., concurring).

145. See U.S. CONST. amend. XV § 1 ("The right of *citizens* of the United States to vote . . .") (emphasis added).

146. *Felony Disenfranchisement, THE SENT'G PROJECT*, <http://www.sentencingproject.org/template/page.cfm?id=133> (last visited Mar. 9, 2015).

147. Compare *id.* (providing a map of states limiting individuals with felony convictions the right to vote), with LEWIS, *supra* note 13, at 6 fig. 1.1 (providing a map of states that allow for a direct democratic process).

148. See *Felony Disenfranchisement*, *supra* note 146.

149. LEWIS, *supra* note 13, at 2 ("When the majority preference is at odds with the rights of minority groups, these rights are at risk.").

150. See *id.* ("[I]n states where minority rights are targeted by the majority this induced policy congruence can be problematic.").

151. *Id.* at 44.

152. See, e.g., Davis, *supra* note 116, at 387 (providing a summary of another initiative, Proposition 187, that portrayed a minority sect of the population in an unfair way).

initiatives are afforded a pass on the traditional checks and balances that the United States Founding Fathers strongly believed would protect minority groups from majority pressures.¹⁵³ Since the direct democratic process does not permit the safeguards of checks and balances and criminal disenfranchisement laws restrict the voice of the targeted individuals, criminal justice subjects on ballot measures run a real risk of falling prey to majority influence.¹⁵⁴

V. CONCLUSION

Direct democracy has been a part of the United States political process since the early twentieth century.¹⁵⁵ States have adapted laws that govern the initiative process; however, these laws vary greatly in subject matter and review processes.¹⁵⁶ It is within this leniency of what states permit where an individual's rights can be lost in a campaign media message or can become victim to majority opinion.¹⁵⁷ For fear that the mob mentality will dictate laws impacting a number of minority subsets of society, criminal justice measures should be a prohibited subject matter for ballot measures in all states.

Although states attempt to offer thorough educational support to voters, sometimes the potential problems with the measures are too difficult to predict. Lack of oversight within the ballot process in some states means some ballot measures could be offered for a vote even if they have the potential to be unconstitutional.¹⁵⁸ The ballot measure process does not have appropriate safeguards in place to prevent confusion or misinterpretation of an issue.¹⁵⁹ Additionally, the ballot measure process does not contain the same checks and balances available in the legislative process.¹⁶⁰ The nature of the ballot measure process makes it difficult to have the public discourse necessary to identify and protect the minority.¹⁶¹

153. See THE FEDERALIST NO. 51 (James Madison) (arguing that checks and balances are necessary in order to prevent the majority from exercising its will against the minority).

154. See LEWIS, *supra* note 13, at 2; *Felony Disenfranchisement*, *supra* note 146.

155. See discussion *supra* Part I.

156. See discussion *supra* Part II.B.

157. See, e.g., *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 792 (9th Cir. 2014) (Ngyuen, J., concurring) (stating that Proposition 100 was motivated by a punitive purpose).

158. See WATERS, *supra* note 10, at 15 (providing the breakdown of how ballot petitions are reviewed by state governments); see also NAT'L CONF. STATE LEGISLATURES, *supra* note 9, at 22.

159. See, e.g., *Doe v. Harris*, 772 F.3d 563, 569 (9th Cir. 2014) (overlooking the underlying first amendment issue); *Arpaio*, 770 F.3d at 775 (misrepresenting Proposition 100 as an illegal immigration solution).

160. LEWIS, *supra* note 13, at 2.

161. *Id.*

Direct democracy has been and will continue to be a viable part of our democratic system, but it is a complicated process that is sometimes reduced into a far too simplistic “voice of the people” argument.¹⁶² Citing this and other reasons, the National Conference of State Legislatures released a report discouraging states that do not have a ballot initiative process from adopting one.¹⁶³ For the states that do have an initiative or referendum process, excluding criminal justice matters from the ballot measure is preferable and will not terribly dilute the role of the electorate. Criminal justice ballot measures consisted of less than 5% of all ballot measures offered in the 2014 election.¹⁶⁴ Removing criminal justice issues from the ballot measure process and requiring them to go through the legislative process is a more effective way to be sure that laws passed receive the appropriate legislative discourse, and will not harm the individuals the law was intended to protect.

162. See ZIMMERMAN, *supra* note 22, at 150.

163. NAT’L CONF. STATE LEGISLATURES, *supra* note 9, at vii.

164. See *Ballot Measures Database*, *supra* note 32.