

The Supreme Court of Ohio

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The Hidden Disaster of State Issue 1

Too many people in our criminal justice system are there because of substance abuse disorders. This is undeniable. We know that substance abuse disorders are a major driver in criminal justice spending. We also know that through long-term treatment and therapy, those addicted can lead law-abiding, productive lives.

Issue 1 on Ohio's November 6 ballot purports to address this problem by reducing drug possession penalties and directing the savings from reduced incarcerations to expanded drug treatment and resources for crime victims. A superficial reading of Issue 1 could lead voters to see it as a thoughtful, compassionate, and reasonable response to a difficult and intractable problem. It seems so, until you peel back its layers and see that it will have catastrophic consequences for our state. If Issue 1 passes, Ohio may have some of the most lenient drug crime laws in the nation. We could easily become a magnet for substance abuse activity because there will be, in effect, very little consequence to engaging in such behavior.

Let me put the issue in context by explaining just one of Issue 1's consequences as it relates to possession of fentanyl, a lethal opioid. According to the Ohio Department of Health (ODH), drug overdose (poisoning) deaths in Ohio increased from 3,050 in 2015 to 4,050 in 2016. This is roughly four times the number of people who die in traffic accidents in Ohio annually. The ODH reported that 58.2 percent of the overdose deaths in Ohio in 2016 involved fentanyl compared with only 4 percent in 2013. This dramatic rise is due to the fact that fentanyl is 50 times more potent than heroin. According to the U.S. Drug Enforcement Administration, it takes just 2 *milligrams* of fentanyl – an amount barely able to cover Abraham Lincoln's beard on a penny – to kill the average person. Fentanyl is addictive, lethal, and simple to manufacture. It is easy to smuggle into our country from foreign sources, even using express mail envelopes. Its potency is not just a problem for abusers. It can be absorbed through the skin, putting freight handlers and first responders at serious risk.

Issue 1 would make the possession of powdered fentanyl in amounts less than 20 grams a misdemeanor with only probation as the consequence. This means that a drug offender caught with less than 20 grams walks away with no possibility of jail time. Since the lethal dose of fentanyl is just 2 *milligrams* (one-thousandth of a gram), 19 *grams* of fentanyl is enough to kill approximately 10,000 people. So if Issue 1 passes, an offender charged with possession of 19 grams of fentanyl would automatically get probation and could only be charged with a misdemeanor. Issue 1 does this by *constitutionally* dictating that any drug possession conviction that is now a Felony 4 or Felony 5 would be reduced to a misdemeanor. The requirement of probation ties the hands of the judge when it comes to sentencing. The judge **MUST** sentence an individual to probation for these offenses under Issue 1. This is unconscionable. Drug dealers would be incentivized to distribute fentanyl in amounts less than 20 grams so those caught possessing it would avoid incarceration.

The lack of consequences for fentanyl possession is shared with possession of other lethal drugs -- cocaine, K2, meth and heroin among them. Across the range of illegal substances, many current felonies would become misdemeanors. Who wouldn't want to set up their drug distribution business in Ohio knowing that possessing 19 grams of fentanyl or lethal amounts of other drugs would result only in a first class misdemeanor with mandatory probation?


The adoption of Issue 1 would, I predict, have another devastating consequence: Severely hampering the use of our very effective drug court programs across this state. Drug courts would be impeded by taking jail time off the table. We know, through multiple studies, that drug courts are effective only when they combine the "carrot" of treatment and support with the "stick" of judicial accountability, including incarceration when needed. It is this carrot-and-stick approach that enables judges and drug court teams to use a variety of tools to help people overcome addiction. But Issue 1, while providing a lot of carrots by expanding treatment, takes away the stick.

We are not talking about possession of marijuana. We are talking about Ohio becoming, in effect, unable by its constitution to offer drug court participation and to incentivize that involvement by the "carrot" of not having a felony conviction record. Who would want to participate in a drug court program knowing that they only face probation for possession of fentanyl, cocaine, methamphetamine, K2, heroin, and so forth? I predict that we will see a severe drop-off in drug court participation at the very moment when it is needed most should voters approve Issue 1.

To make matters worse, Issue 1 would freeze our criminal drug offense laws in time. It expressly mandates that its provisions be implemented based on the laws in effect on January 1, 2018. Our General Assembly couldn't, by passing a statute, fix all that is wrong with Issue 1. Our elected leaders could not pass laws to contradict Issue 1 -- laws meant to keep us safe. Another constitutional amendment would be necessary to repeal or modify the Issue 1 constitutional amendment. This would take another statewide election.

Keep in mind that special interest groups spent more than \$4 million to put Issue 1 on the ballot. Those same special interest groups will fully fund a campaign before this November's election that will try to mislead and confuse you regarding Issue 1. Please don't be fooled. Do your homework on Issue 1.

The proponents of Issue 1 seek to address a very real problem in our criminal justice system: the impact of substance abuse on our society and our criminal justice system. But by taking a hammer to that problem, the proponents have set Ohio on a dangerous course to adopting some of the most lenient drug laws in the country. It would limit the ability of the state to confront very real dangers, now and in the future, in battling substance abuse. Issue 1 may be well-intentioned in design, but its passage would gravely endanger Ohioans. It would be devastating in effect.



Maureen O'Connor
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Statement from OSBA President Robin Weaver: Ohio State Bar Association Opposes State Issue 1

FOR IMMEDIATE RELEASE

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COLUMBUS (September 13, 2018) — At the Ohio Judicial Conference's annual meeting today, OSBA President Robin Weaver announced that the OSBA stands together with Ohio judges and the growing list of organizations, which are opposing State Issue 1. Regarding the OSBA's position, all of the following may be attributed to President Weaver:

"We firmly believe that treatment and rehabilitation are the right strategies for curbing Ohio's opiate crisis and have seen them working in drug courts around the state. However, when you categorically strip our judges of their discretion and take away an important tool — the threat of prison time — you significantly lower the chances that they will get sober, enroll in and complete a drug treatment program.

"Make no mistake, by removing accountability for defendants and shifting the cost burden to local governments, this proposal will set Ohio back, and because it would be written into the Ohio Constitution, it will take years and significant resources to fix.

"We understand and share the sense of urgency of Issue 1 proponents, but our time would be better spent working together through the legislative process to expand and promote the use of drug courts and treatment in lieu of conviction. We urge all Ohioans to vote NO on State Issue 1."

About the Ohio State Bar Association

The Ohio State Bar Association, founded in 1880, is a voluntary association representing approximately 26,000 members of the bench and bar of Ohio. Through its activities and the activities of its related organizations, the OSBA serves both its members and the public by promoting the highest standards in the practice of law and the administration of justice.

