
X. THE STATE OF THE INITIATIVE PROCESS AS SEEN THROUGH THE LENS OF CRIMINAL LAW

ANNUAL APPELLATE DEFENDERS DINNER

San Diego, April 9, 2010

Let me begin by extending my thanks to the Board of Appellate Defenders and Federal Defenders of San Diego for inviting me to speak tonight. I am honored to be in the company of so many talented and dedicated criminal defense attorneys. Representing those who are “presumed innocent” is, of course, no easy task. In a nation founded on establishing checks and balances against government oppression, many people often forget how important criminal rights are, especially the right to counsel.

A few months ago, an attorney for an accused 9/11 terrorist went on Fox News’s *The O’Reilly Factor*. Toward the end of the interview, Bill O’Reilly said to the attorney, “You know, people hate you.”¹⁴³ We also saw something to this effect recently when the Department of Justice recently hired a handful of Guantanamo defense lawyers. Well, of course, all this is totally absurd; because if you stop to consider the role of the advocate, whether it’s a prosecutor or defense attorney, each is asserting and defending the rights of all of us here tonight.

I want to talk tonight about the initiative process and how it has impacted the criminal justice system and the work of the courts.

Since the controversy surrounding Proposition 8, there has been a lot of discussion about flaws in California’s initiative process. Tonight, I will talk about a few of the major problems in the way initiatives are drafted, the way they are sold, and enacted, using as examples, criminal law ballot initiatives.

I think the origins of the initiative process is a good starting point. Direct democracy is not new. Forms of direct democracy date back to ancient

¹⁴³ Nicholas Graham, *O’Reilly Interviews Lawyer For 9/11 Defendant*, HUFFINGTON POST, (Nov. 24, 2009) http://www.huffingtonpost.com/2009/11/24/oreilly-interviews-lawyer_n_369338.html.

Athens and the Roman Republic, where citizens (I should qualify that by saying “men”) assembled in public meeting places to debate and to pass laws. And we see it today even in our country in the form of New England town halls.

The stirrings of the initiative process in California began in the late 1800s among farmers frustrated with the control wielded by railroad companies. With rail expansion, the railroads acquired whole industries necessary to farming, such as fertilizer and seed companies, as well as grain storage houses.¹⁴⁴ And, of course, the railroads controlled the means for transporting crops.¹⁴⁵ In California, Southern Pacific owned 85 percent of the railways.¹⁴⁶ At the same time, banks set mortgage rates that put farmers under water.¹⁴⁷ Farmers were selling crops at a loss, racked up massive debts, were denied credit, and lost their farms to banks.¹⁴⁸ Wait, this sounds too familiar!

These economic conditions gave birth to the Populist and Progressive movements, which advocated for the initiative and referendum as a check on corrupt state governments.¹⁴⁹ During the first decade of the 1900s, our state government was incredibly corrupt. Industry had a fixed scale for bribes based on a lawmaker’s position in the Legislature.¹⁵⁰ One legislator was a “\$2,500 man,” another was a “\$1,500 man,” and so on.¹⁵¹ Nowadays, of course, we call it “campaign finance.”

But the Progressive Era swept into California, and a little-known prosecutor by the name of Hiram Johnson rose to the Governor’s Office on a reform platform.¹⁵² During his first year in office, the Legislature approved legislative packages to be sent to the people, which included processes for the

¹⁴⁴ CENTER FOR GOVERNMENTAL STUDIES, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT* (2008) [hereafter “CGS”], 37.

¹⁴⁵ *Id.*

¹⁴⁶ CGS at 35–36.

¹⁴⁷ CGS at 37.

¹⁴⁸ THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* (1989), 43–44; DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000), 25–27.

¹⁴⁹ BRODER at 26–27.

¹⁵⁰ *Id.* at 39.

¹⁵¹ *Id.*

¹⁵² CGS at 40.

referendum, recall, and initiative.¹⁵³ They were approved by large margins.¹⁵⁴ The Progressives believed it was the beginning of a glorious new era.¹⁵⁵

Now, with that brief historical background, the first problem with the initiative process today actually involves the California Supreme Court and our lax enforcement of the so-called “single subject rule,” which originates — not surprisingly — from a 1948 ballot proposition.¹⁵⁶ That proposition said, “Every constitutional amendment or statute proposed by the initiative shall relate to but one subject.”¹⁵⁷ The language in the ballot pamphlet that year was clear: complex initiatives confused voters, and the single-subject rule would “entirely eliminate[] the possibility of such confusion.”¹⁵⁸ Despite this clear mandate for interpretation, our supreme court held that all legislation should be upheld that is “reasonably germane” to the title of a proposition.¹⁵⁹

So what does it take for a group of provisions to be “reasonably germane” to the proposition title? Not much, and this is especially well highlighted in criminal propositions. Take, for example, Prop 8 — not our most recent Prop 8. I am referring to the *other* Prop 8, passed in 1982, colloquially called the “Victim’s Bill of Rights.” Prop 8:

- Established restitution rights for crime victims.
- Amended the California Constitution to include the right to attend safe schools;
- Purported to abolish a program to treat mentally disordered sex offenders.
- Lowered criminal evidentiary standards, and increased prison terms.¹⁶⁰

If ever there were an initiative with disjointed and unrelated provisions, Prop 8 was it. As my predecessor, Justice Mosk, wrote in dissent,

¹⁵³ *Id.* at 40–41.

¹⁵⁴ *Id.* at 41.

¹⁵⁵ BRODER at 41.

¹⁵⁶ *Manduley v. Superior Court*, 27 Cal. 4th 537, 584 (2002) Moreno, J. concurring (*Moreno Concurrence*).

¹⁵⁷ BALLOT PAMP., APPEN., GEN. ELEC. (Nov. 2, 1948), 6.

¹⁵⁸ *Moreno Concurrence* at 584–85.

¹⁵⁹ *Perry v. Jordan*, 34 Cal. 2d 87, 92–93 (1949); *Moreno Concurrence* at 585.

¹⁶⁰ BALLOT PAMP., ANALYSIS BY THE LEGISLATIVE ANALYST, PRIMARY ELEC. (June 8, 1982), 32, 54.

“These provisions cannot be characterized as ‘so related and interdependent as to constitute a single scheme.’”¹⁶¹

But Prop 8 was hardly an exception. Justice Mosk later joked in 1990, “If you liked Prop 8, you will love Prop 115.”¹⁶² Prop. 115 expanded the number and reach of special circumstances for murder, added the crime of torture, created measures to ensure faster criminal trials, expedited preliminary hearings, altered discovery and evidentiary rules, and removed counsel’s right to examine potential jurors.¹⁶³ According to Justice Mosk, “the question whether Prop 115 satisfies the single-subject rule practically answers itself The measure is a veritable ‘grabbag of . . . enactments.’”¹⁶⁴

After an eminent career as the longest serving justice on the California Supreme Court, Justice Mosk passed away in 2001. Not long after I was confirmed to succeed him, a case called *Manduley v. Superior Court* came before the Court, challenging Prop 21, the “Gang Violence and Juvenile Crime Prevention Act.” In my concurring opinion, I picked up the single-subject torch from Justice Mosk and wrote: “the single-subject rule was . . . designed to prevent an unnatural combination of provisions dealing with more than one subject that have been joined together simply for improper tactical purposes (log rolling) Unfortunately, this court has generally not interpreted the single-subject requirement to accomplish these basic purposes.”¹⁶⁵

The second flaw in the initiative process is the “process” itself. Initiatives are often drafted quickly and in reaction to some interest group’s indignation about a hot potato social or economic issue. This haste leaves much to be desired from an enforcement perspective.

While legislatures across the country are routinely perceived as being sluggish and unresponsive to problems, it’s important to remember that may be exactly the point: the legislative process is supposed to be slow and deliberative so that our laws are written clearly enough to give notice to

¹⁶¹ *Brosnahan v. Eu*, 31 Cal. 3d 1, 11 (1982), dissent of Mosk, J.

¹⁶² JUSTICE MOSK, COMMENCEMENT ADDRESS AT UC DAVIS (May 19, 1990), 11 [on file with California Judicial Center Library, Special Collections].

¹⁶³ BALLOT PAMP. (June 5, 1990) at 32–33.

¹⁶⁴ *Raven v. Deukmejian*, *supra*, 52 Cal. 3d at 364, dissent of Mosk, J.

¹⁶⁵ *Moreno Concurrence* at 585, internal quotations and citations omitted.

the people of what they require or proscribe, and so they are easy for the courts to enforce.

In California's legislature, as a bill goes from one committee to another and from one legislative house to another, it has a *minimum* of seventeen procedural gates to pass before it becomes law, and along the way a lot of people analyze the proposed law.¹⁶⁶ Legislative counsel, staff members, legislators themselves, interested advocates, and ultimately the governor and his staff analyze bills passed through the legislative process.¹⁶⁷ However unpopular the process is, all the people along the way poke, prod, ask questions, and iron out problems.

Contrast this with the initiative process. For an initiative, a limited number of people or organizations propose what they alone believe is good public policy and give it to the voters on a take-it-or-leave-it basis.¹⁶⁸ The result is predictable: drafting errors and vagueness that leave the courts with the task of construing initiatives using only the limited information in the voter pamphlet as guidance.¹⁶⁹

Take, for example, Prop 36, which reduced criminal penalties for most nonviolent drug users.¹⁷⁰ The language of the proposition said its provisions would "become effective July 1, 2001 and . . . applied prospectively."¹⁷¹ Even language so seemingly straightforward can create problems without the watchful eyes behind the legislative process. In the case of *People v. Floyd*, the defendant was charged with a drug offense before Prop. 36 was enacted, but sentenced after.¹⁷² And unfortunately for the defendant, he already had two strikes under our Three Strikes law.¹⁷³ Two days before the defendant's sentence, voters passed Prop. 36, which would have made the defendant

¹⁶⁶ Sheila Kuehl, *Either Way You Get Sausages: One Legislator's View of the Initiative Process* (1998) 31 LOY. L.A. L. REV. 1327, 1327–29; California State Legislature, *Overview of the Legislative Process* <http://www.leginfo.ca.gov/bil2lawx.html>.

¹⁶⁷ *Id.*

¹⁶⁸ Kuehl at 1329.

¹⁶⁹ Kuehl at 1331, 1335; *Robert L. v. Superior Court*, 30 Cal. 4th 894, 901 (2003).

¹⁷⁰ BALLOT PAMP., ANALYSIS BY THE LEGISLATIVE ANALYST, GEN. ELEC. (Nov. 7, 2000), 23.

¹⁷¹ Prop. 36, § 8, as approved by voters, Gen. Elec. (Nov. 7, 2000).

¹⁷² *People v. Floyd*, 31 Cal. 4th 179, 182 (2003).

¹⁷³ *Id.*

eligible for rehabilitation and probation instead of a third strike sentence.¹⁷⁴ We therefore had to determine whether the “effective date” applied to defendants charged after that date only or to pending cases as well.¹⁷⁵ Based on the Court’s prior precedent, we determined that Prop 36 did not apply to the defendant. But had Prop 36 gone the legislative route, such an elementary problem may have been spotted and resolved early in the process.

The ambiguities of that particular proposition created additional problems. For example, in *People v. Canty*, we had to determine whether driving under the influence of drugs was “a misdemeanor not related to the use of drugs,” thereby disqualifying the defendant from parole and treatment.¹⁷⁶ In *People v. Guzman*, we had to determine whether Prop 36 required a probation sentence for a defendant already on probation for other crimes.¹⁷⁷ Prop 36 is not unique. Virtually every proposition passed generates more questions and problems than any law passed by the Legislature.

And propositions often compound these drafting problems with clauses that restrict the Legislature from amending the law without a two-thirds supermajority.¹⁷⁸ Thus, the Legislature can’t clarify poorly drafted initiatives and punts problems back to the voters.

The most recent example of this problem is the Compassionate Use Act, an initiative adopted by the voters in 1996. The Compassionate Use Act provides a defense to criminal charges for people who possess or cultivate marijuana for “personal medical purposes.”¹⁷⁹ The drafters of the initiative did not include any specific limit on the amount of marijuana a patient may possess or cultivate. While the Court of Appeal subsequently explained that the amount must be “reasonably related to the patient’s current medical needs,” plenty of uncertainty remained because no one knew how much marijuana a jury would ultimately determine was a reasonable amount.¹⁸⁰

Thus, people using marijuana for legitimate medical purposes weren’t sure how much marijuana they could safely possess without the possibility

¹⁷⁴ *Id.* at 183.

¹⁷⁵ *Id.* at 184.

¹⁷⁶ *People v. Canty*, 32 Cal. 4th 1266 (2004).

¹⁷⁷ *People v. Guzman*, 35 Cal. 4th 577 (2005).

¹⁷⁸ *See, e.g.*, BALLOT PAMP. PROP. 115 ANALYSIS BY THE LEGISLATIVE ANALYST, PRIMARY ELEC. (June 5, 1990), 69.

¹⁷⁹ § 11362.5, subd. (d).

¹⁸⁰ *People v. Trippet*, 56 Cal. App. 4th 1532, 1549 (1997).

of prosecution; and prosecutors prosecuting illegal possession weren't sure how to distinguish meritorious cases from those unlikely to succeed.

In response, the Legislature took a straightforward step to fix the problem: it passed a statute that created specific limits on the amount of marijuana patients could possess or cultivate. Under the statute, patients could avoid prosecution as long as the amount was below the ceiling and prosecutors could confidently move forward with charges if the amount was above the ceiling. To the benefit of patients, prosecutors, and the administration of justice generally, the outcome no longer depended upon the vagaries of a particular jury's conception of what was reasonable.

In *People v. Kelly*, decided earlier this year, we had to strike down this sensible scheme as an impermissible amendment of the Compassionate Use Act.¹⁸¹ Despite its helpful clarification of ambiguous language, the statute ran afoul of the constitutional prohibition against legislatively amending an initiative when the initiative itself does not authorize such amendment.

The third, and possibly most damning problem with the initiative process, is the sad irony that it has been co-opted and exploited by powerful special interests — the very problem Hiram Johnson and the Progressives sought to fix.

Special interests can qualify ballot initiatives with relatively small resources. To qualify a statutory initiative for the ballot, proponents need to collect signatures from registered voters totaling only 5 percent of the number of votes cast in the last gubernatorial election.¹⁸² Currently, that works out to about 434,000 signatures.¹⁸³ For constitutional amendments, the threshold is a mere 8 percent, which is about 694,000 signatures.¹⁸⁴ In recent years, special interest groups have begun utilizing services of the so-called “initiative industry,” which pays people to gather signatures.¹⁸⁵ For example, in 1994, Phillip Morris paid a then record \$2.00 per signature to qualify its smoking initiative for the ballot.¹⁸⁶ Signature gatherers sit in

¹⁸¹ *People v. Kelly*, 47 Cal. 4th 1008 (2010).

¹⁸² Cal. Sec. State, Initiative Guide, <http://www.sos.ca.gov/elections/ballot-measures/initiative-guide.htm>.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ CGS at 71.

¹⁸⁶ JIM SHULTZ, *THE INITIATIVE COOKBOOK: RECIPES AND STORIES FROM CALIFORNIA'S BALLOT WARS* (1996), 34.

front of retail stores asking patrons if they will support the “Victims Bill of Rights” initiative or the like¹⁸⁷ — and who could refuse?

When I’m approached, I have the perfect answer . . . “that issue may come before the court” (I don’t really say that).

The total amount required to collect the requisite signatures is a little over a million dollars.¹⁸⁸ Prop 36 cost only \$1.4 million to qualify for the ballot.¹⁸⁹ Similarly, Prop 69, which in 2004 required DNA collection for any adult arrested for or charged with any felony offense, cost only \$1.7 million to qualify.¹⁹⁰ Some special interest groups who cannot raise all the money they need for their issue literally sell provisions of their initiative to other groups in exchange for financial support.¹⁹¹ It’s no wonder we end up with ballot initiatives that look like “grab bags” of variously assorted policy proposals.

Another thing: All ballot initiatives today use some form of signature gathering services.¹⁹² Even the recent Prop. 8, the one repealing the right of same-sex couples to marry, as polarizing and emotive a subject it was, relied on hired signature gatherers.¹⁹³ This is hardly what the Progressives had in mind.

Add to this the question whether an initiative campaign has an interest in providing a fair and balanced picture of the proposed initiative.¹⁹⁴ Victory, *not* education, is the objective, so campaigns dispense slanted information that supports their respective cause, e.g., Save the Forests as a slogan for clear-cutting trees.¹⁹⁵ Not surprisingly, public discourse on initiative proposals is often rife with misinformation and appeals to voters’ emotions — especially fear (e.g., gay marriage will be taught to third graders).¹⁹⁶ The result is that we end up with laws that are poorly drafted, poorly understood, and richly serving special interests.

¹⁸⁷ See *Id.* at 33–34.

¹⁸⁸ CGS at 175.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 286.

¹⁹² *Id.* at 168–169.

¹⁹³ Cal. Sec. State, *Cal-Access*, <http://cal-access.ss.ca.gov>.

¹⁹⁴ CGS at 254.

¹⁹⁵ *Id.*

¹⁹⁶ SHULTZ at 44.

The money spent on initiative campaigns — expenditures on everything from signature gathering to political consultants to television advertisements — is also a perversion of the initiative process not contemplated by the Progressives. Between 2000 and 2006, proponents and opponents of ballot measures spent over \$1.3 billion on ballot initiative campaigns.¹⁹⁷ Today, this money mostly comes from corporations, wealthy individuals, labor unions, Indian tribes, and candidates for office.¹⁹⁸

In closing, I submit to you that this system of initiative governance is not what the Progressives intended. Initiatives contain mixes and matches of proposals that have little relation to each other. They are unclear to the people and to the courts who interpret them. And, in recent years, special interests have co-opted the process to enact legislation favorable to them by spending untold sums of money, spreading misinformation, and making manipulative emotional appeals to voters.

California is considered a great innovator: in government, industry, the arts, the law, technology, the environment, and so on.¹⁹⁹ We are a people ahead of the curve, ready to implement new, exciting ideas while other states proceed with caution. But even the most innovative people must step back from time to time and admit that an idea did not play out as intended, and it may be time to consider whether our liberal approach to ballot initiatives is one such failed experiment in need of retuning.

Thank you for being a most attentive audience.

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¹⁹⁷ CGS at 282.

¹⁹⁸ CGS at 291–95.

¹⁹⁹ Michael Grunwald, *Why California is Still America's Future*, TIME MAGAZINE (Oct. 23, 2009) <http://www.time.com/time/nation/article/0,8599,1931582,00.html>.