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CRIME INITIATIVES AND THE "ASTEROID THEORY" OF DIRECT DEMOCRACY IN OREGON

The "initiative" is a populist institution common to the American West whereby citizens may legislate directly through petition and special elections. This technique allows the electorate to pass legislation and ŠstateĆ constitutional amendments without any participation by the elective branches of government.

A debate has raged over the effect of the initiative on public policy. Viewed as a continuum, one end is anchored by a view that the initiative is an institution with little, if any, redeeming virtue, essentially a negation of democratic values. We term this the "asteroid theory" because the effect is deemed to be so destructive. On the other end of the continuum, supporters of the initiative argue that every situation has its excesses, including democracy, for which a "leveling" mechanism is needed which will protect the legitimacy of government as well as yield better public policy. We term this the "pendulum." We evaluate the arguments through a case study of one ballot measure in Oregon, a sweeping omnibus criminal justice measure titled the "Victims' Rights Initiative" (Measure 40). Our methods include statutory analysis, constitutional analysis and interviews with a wide range of stakeholders on the Measure 40 debate. We conclude that Measure 40 was not an "asteroid" that destroyed, or even dramatically altered, criminal justice policy in Oregon, but was an important illustration of access to agendas. This outcome was produced by a go- vernment committed to the sometimes competing values of respecting the will of the electorate on the one hand, while on the other hand maintaining the integrity and efficacy of the government and its constituent departments and programs.

INTRODUCTION

The past forty-five years have been a period of enormous policy change in the American criminal justice system. Actually, it would be far more accurate to say *systems,* since there at least fifty-one separate criminal justice systems in the U.S., one for each of the fifty states and another for the federal government.[1] What binds them together is the Constitution of the U.S., especially its "Bill of Rights" (the first ten amendments), and the Anglo-American tradition of an adversary system. But these still leave enormous room for differences and experimentation among the states. Indeed, the American states have often been referred to as the "laboratories of democracy" because of their ability to experiment with different institutions and processes.[2]

The U.S. is also a federal system where the states have the primary responsibility for what is generally known as "law and order,"[3] and the federal criminal law is limited to the powers of Congress under Article I. However, this does not mean that the federal government does not influence state criminal justice policy. It does so through the power of the purse by redistributing tax dollars to the states for very specific criminal justice purposes, which conform to what the federal government thinks the states ought to be doing. Of course, states are free to refuse the money, but this is a very hard thing to do in the prevailing fiscal climate of limited state tax revenues and rising criminal

justice needs. On the contrary, states tend to aggressively pursue federal crime funding.

THE INITIATIVE AND CITIZEN PARTICIPATION IN CRIMINAL JUSTICE POLICY MAKING

The policy making process in the U.S. is therefore very complex, made up of multiple levels of government, funding sources and (most importantly) an open or "transparent" legislative process which involves a myriad of "stakeholders" or interested parties in virtually any policy arena. Political scientists traditionally use the term "pluralism" to describe a decision-making system characterized by a virtually unlimited number of interests or stakeholders competing openly (for the most part) for preferred policy outcomes. Skeptics, in contrast, see the system as opaque, elitist, resistant to change and structured so as to carefully control the public agenda and keep threatening ideas out.[4] These conflicting scenarios or theories are evident in criminal justice policy because of the increase in crime beginning in the late 1950's and the real or imagined intransigence of the criminal justice system to change.[5] The latter spurred the rise of the "victim's rights" movement in the U.S.,[6] which usually is led by close relatives of victims of especially heinous crimes (not victims themselves). The personal losses and the exasperating experience within the criminal justice system provide the incentive to get involved and to force institutions to address perceived needs for change.[7] At the same time, the federal "Omnibus Crime Control and Safe Streets Act of 1968" and its successors pumped billions of federal dollars into state criminal justices systems. This federal largesse had the unintended consequence of providing an incentive for criminal justice system personnel to become politically active in competing for federal funds. In other words, formerly politically inactive state bureaucrats became change agents, usually through their professional associations, such as prosecutors. The combination of victims' rights advocates and system bureaucrats (primarily prosecutors) have become a potent political coalition for fundamental criminal justice system change.

This political mixture was especially important in the American west, where it has been coupled with the initiative and the referendum as means of "direct democracy," which was a product of the Progressive Movement of the early twentieth century. The referendum is not unknown in other parts of the world, or at least some form of it is not unknown, usually as a plebiscite. In the referendum, a law passed by a state legislature is "referred" to the people and does not become law unless it receives a majority vote. The initiative, however, by passes the legislature entirely—that's what is meant by "taking the initiative": The people can write, propose and pass binding legislation, even state constitutional amendments, by circulating petitions, getting the requisite number of signatures to get on the ballot and then a majority of voters.[8]

Prior research co-authored by Professor Kapsch (Kapsch and Steinberger, 1998) argued a "legislative displacement hypothesis" in regard to the initiative process of "direct democracy"[9] in Oregon. The idea was that the initiative bypasses the normal legislative process, which is characterized by an open, accessible rational choice-based system of deliberative decision-making. Because of this, they argued that the initiative is inconsistent with democratic theory and has had a great impact on public policy in many areas. Moreover, it can be argued that it is undemocratic since initiatives are often passed by slim majorities in very low-turnout elections. This notion has been echoed in the popular press and political discussions, i.e, that the initiative has an unpredictable and negative impact on process and policy.

A debate has raged over whether and how negative this effect has been.[10] Viewing the public debate as a continuum, one end is anchored by a view that the initiative is an institution with little, if any, redeeming virtue or at best as a good idea that simply doesn't

work and often disrupts rational decision- making processes. Not only does the initiative negate democratic values, but this view believes it further reaps devastation on the governmental institutions in its path. We term this the "asteroid theory" because the effect is deemed to be so total, if not downright destructive. After all, asteroids destroy everything they come in contact with. On the other end of the continuum, supporters of the initiative argue that every process has its excesses, including democracy, for which a "leveling" mechanism is needed to protect the legitimacy of government, address unresponsiveness if not outright corruption, as well as yield better public policy.[11] A fitting metaphor here might be the "pendulum" theory because a pendulum keeps the mechanism working smoothly.[12] In the end, the debate over the initiative is a debate about how, when and why the citizenry can participate in policy making. The U.S. Constitution requires Congress to assure that every state has a "Republican form of government," meaning a representative government.[13] The introduction of the initiative has been challenged in the courts on the grounds that "direct democracy" is inconsistent with the constitutional requirement that states are to be governed through representation. In refusing to take a case challenging the initiative, the U.S. Supreme Court let the initiative stand in the face of a challenge under the republican form provision.[14] While the citizens in any state can participate by directly addressing the legislature or executive, the initiative allows them to bypass this entirely and legislate directly, hence "direct democracy."

Why would they not directly address the legislature or the executive? Why has the citizenry in many western states turned to the initiative as a means of first resort, bypassing the legislative process? These questions have not been systematically researched, but our own research interviews suggest that answers are related to the notion that the "pluralist" system has two important faults: (1) It is biased in favor of the status quo and (2) it is "incremental" in nature – hat is, change comes only at the margins.[15] Once policy is institutionalized, stakeholders who benefit or favor it tend to protect it from major change, thus perpetuating the status quo. Critics of the American criminal justice system would certainly see it in these terms, and these critics come from both the left and the right.

Advocates of the initiative tend to be change agents, often alienated change agents. That is, they tried the normal process and were frustrated by it. Or, they have becomes so cynical about government that they bypassed representative government entirely.[16] The petitioners (the legal term for those who sponsor initiatives) are people who are seeking large scale, even massive change. This is especially true in the criminal justice system where petitioners are the representatives of victims' groups who are convinced the criminal justice system is seriously dysfunctional, in concert with bureaucrats, especially prosecutors and law enforcement personnel, who believe the restrictions of the adversary system make it impossible for them to do their jobs well.[17]

HYPOTHESES AND METHODS

In this paper, we report on our examination of one Oregon ballot measure, Measure 40, called the "Victim's Rights Initiative" in 1996. We examine two general questions:

(1) Was Ballot Measure 40 intended by its proponents as an "asteroid," or is that an unfair characterization by political opponents? That is, was it a radical proposal?
(2) What was the effect of Measure 40 on government once passed and how did government respond to it?

This is a preliminary analysis in the sense that we see it as heuristic and exploratory, designed to determine whether impact analysis on a broader and deeper scale covering

the criminal justice system as well as other policy arenas, is justified. Is this dichotomy between the asteroid and the pendulum worth pursuing systematically and deeply over time, as a means of assessing the phenomenon of direct citizen participation in policy making? It is also a study of a single case – Measure 40 – rather than an aggregate study of numerous ballot measures.[18]

Our methods include statutory analysis, constitutional analysis and interviews with a wide range of stakeholders on the Measure 40 debate.[19] We began with a "stakeholder" analysis – that is, by listing all organizations, government agencies and individuals involved in Measure 40 from inception to eventual implementation. From that, we developed a survey instrument (questionnaire) to guide our open-ended interviews. The instrument is divided into three main sections: (1) Problems leading to Measure 40; (2) Implementation and Institutional Adaptation to Measure 40 by the criminal justice system and (3) System response to Measure 40 (Legislative and judicial actions). There were eight subsections and forty-nine topics (broad questions). We conducted 20 open- ended interviews including the proponents and authors of Measure 40 (victims rights representatives, prosecutors and some legislators), state officials responsible for implementation (especially the courts); and opponents and critics of Measure 40. Interviews typically lasted from 1.5 to 2 hours each. No one we asked declined to be interviewed, and cooperation was excellent during the sessions. Both authors participated in all interviews except one, which Isaak conducted.

THE HISTORY OF BALLOT MEASURE 40

Ballot Measure 40 was placed on the Oregon ballot in November, 1996 by a coalition of citizen victim's rights advocates and prosecutors who were emboldened by the success of Ballot Measure 11 in 1994.[20] The advocates, who believed the justice system was unresponsive to serious consideration of dissenting views, were also motivated by a growing perception that Oregon's criminal justice system was unfairly slanted to benefit criminal defendants at the expense of crime victims and public safety. The "Chief Petitioners" (leaders and legal sponsors of the initiative) were a prosecutor from Multnomah County (Portland) and a conservative State Representative who later ran for Governor in 2002. In a sense, there was a conviction that the system was biased toward the status quo and that there was no way to adequately reform it from within, or through the Legislature.

However, Measure 40 set out to accomplish far more than merely protecting the rights of crime victims, which was its stated purpose. In addition to codifying the rights of victims to be informed of, to attend, and to be heard at court proceedings, the measure limited juries to registered voters,[21] permitted non-unanimous jury verdicts, raised the standard for pre-trial release for defendants charged with violent crimes,[22] eliminated the possibility of early release from prison, made admissible all evidence that was relevant to a case (including evidence that had been unconstitutionally obtained), permitted limited immunity for witnesses, and prohibited Oregon's judiciary from interpreting the search and seizure provisions of the Oregon Constitution more broadly than analogous provisions of the federal Constitution. On the ballot with 23 other statewide measures (as well as a presidential and hotly contested senatorial race), Measure 40 passed with 58.9 percent of the vote.[23]

An important point at this juncture is that whatever the impact of Measure 40, i.e., it's actual effect on the criminal justice system, our interviews clearly indicate that it was intended as an "asteroid," at least in the sense that it was intended and designed to force major change in the criminal justice system.[24] While comprehensive (i.e., it covered a

wide substantive field), unlike an "asteroid," it was not totally random or indiscriminate. It focused on those of criminal justice policy its sponsors thought most in need of reform. The proponents felt alienated and excluded from the usual process of government, and felt that their efforts to reform the system to the extent they thought it needed reform, had been to no avail.[25]
Shortly before the 1996 general election, Measure 40's opponents, led by the Oregon American Civil Liberties Union, commissioned a public opinion poll which revealed overwhelming electoral support for the measure. Consequently, the ACLU convened a strategy session to discuss how Measure 40 could be challenged in court given the apparent inevitability of its passage on Election Day.[26] Over time, ACLU lawyers developed a number of constitutional challenges, first attempting to enjoin the Governor from certifying the measure, and when that failed challenging the measure on technical, rather than substantive, grounds.[27]

Their initial efforts failed, and thirty days after the November 5th election, the Oregon Constitution was amended to include Measure 40. This precipitated a legal challenge in the case, *Armatta v. Kitzhabe*r. This case would be a key governmental response to the "asteroid" of Measure 40, one that precipitated all future responses.

MEASURE 40 IN THE COURTS

The legal issues raised in *Armatta* are complicated, but what is important is that in 1998 (two years later, after Measure 40 automatically became part of the Oregon Constitution), the Oregon Supreme Court struck down Measure 40 on grounds that hitherto had not been the main thrust of any challenge to any ballot measure, i.e., that Measure 40 involved multiple, separate constitutional amendments that must be voted on separately.

Nevertheless, prior to the action of the Oregon Supreme Court in *Armatta*, the Legislature had the responsibility of implementing the measure through statute while the bureaucracy and the courts had to make sense of what had become a part of the Oregon Constitution by early December, 1996. Meanwhile, Oregon trial judges had to decide to what extent Measure 40's provisions applied to the cases pending before them. Trial judges throughout Oregon were hearing and ruling on challenges to the technical and substantive merits of Measure 40 as prosecutors began to use their new powers, pursuant to the measure. In the 1997 legislative session (which runs from January to early summer), the Legislature negotiated, debated, and enacted Senate Bill 936, which was passed as implementing legislation for Measure 40.

Senate Bill 936 was a good faith effort to implement Measure 40 as passed, including cleaning up ambiguous language and giving legal substance to the broad principles codified in Measure 40. This was an enormous task, partly because Measure 40 was authored without the assistance of the Office of Legislative Counsel (about one in five citizen-initiated ballot measures is written with the help of the Legislative Counsel[28]). Many of Measure 40's provisions were unclear.[29]

Additional considerations contributed to the 1997 Legislature's deliberations over enabling legislation for Measure 40. On February 5, 1997, a low-level appellate court struck down one part of Measure 40 but upheld the rest of it. Most importantly, the lower court action created the feeling among many observers that the Oregon Supreme Court might declare the entire measure unconstitutional. Accordingly, opponents in the legislature insisted that many of the legislation's provisions be contingent whatever

the Supreme Court would eventually rule, fearing that the Legislature might needlessly implement an invalid constitutional amendment.

One of the challenges to Measure 40 at the Oregon Supreme Court was the claim that the Measure violated the so-called "One-Amendment- Per-Measure-Rule." Article XVII of the Oregon Constitution provides, "When two or more amendments shall be submitted in the manner aforesaid to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately."[30] The Supreme Court had never interpreted this clause, so no controlling case law guided the plaintiffs' argument.[31]

Without ruling on the plaintiffs' other two challenges, the Court struck down Measure 40 on June 25, 1998 in its entirety on the grounds that "the measure contains two or more amendments, in violation of Article XVII, section 1, of the Oregon Constitution." In the past, the Court had almost universally rejected challenges to initiatives on "single subject" grounds. The legal and political communities (including Measure 40's opponents), were shocked by the Court's unprecedented ruling.

Generally, two divergent narratives have accounted for the Court's decision in *Armatta v. Kitzhaber.* Many of Measure 40's advocates point to *Armatta* as a classic case of judicial activism, i.e., as an instance of judges reading their own values into what ought to be a purely legal decision. The Crime Victims United Director and chief architect of Measure 40, put his position bluntly: "I think this was nothing less than a political power play by the Court." In his view, shared by many, the Court manufactured a technicality on which it could invalidate a measure it opposed on substantive policy grounds.

Those who agree with the *Armatta* ruling, argue that "the Supreme Court did not make up the single vote rule";[32] it is, after all, in the Constitution. *Armatta's* advocates account for the sudden shift of case-law surrounding the initiative by pointing to what they considered to be the increasingly "reckless" use of the initiative: "It was not until Measure 40 came along that the abuses became so obvious,"[33] one *Armatta* supporter said. These escalating "abuses" include logrolling – packing ballot measures with unrelated provisions to gain support from broad coalitions – and amending the Constitution rather than enacting a statute in order to preclude the possibility of legislative revision without another vote of the people.

Under the logic of either narrative– that of the supporters or the opponents – the Court asserted itself where it had not before. Oregon Attorney General Hardy Myers aptly stated the point of consensus between *Armatta's* defenders and its detractors: "For some reason, at that juncture, the Court decided that enough is enough."[34] The consensus of nearly all of the interested parties, therefore, is that the Court used its authority to halt an initiative when it felt that the initiative process had escalated to an intolerable point by including too much in one ballot measure. For the Oregon Supreme Court, Measure 40 marked that point. After the measure's petitioners recovered from the shock of this unexpected defeat in the Supreme Court, they began planning for vindication in the Legislature.

HOW THE LEGISLATURE RESPONDED TO MEASURE 40.

Generally, Oregon's Legislature and the initiative dance very cautiously and deliberately around one another. Many Oregon initiatives, particularly before the *Armatta* ruling, were drafted as constitutional amendments in response to the perception that

the Legislature would insidiously manipulate a statutory initiative after its passage so as to circumvent its intended effect. This fear, however, appears to be unfounded. Willamette University law professor Richard Ellis, an expert on the initiative process, commented, "In Oregon, the Legislature seems very reluctant to touch voter-passed initiatives... The problem is not that the Legislature is not responsive enough... The problem is that the Legislature is too responsive." This sentiment was echoed throughout our interviews, which exposed the widespread perception that the Legislature fears its constituency and will go to great lengths to avoid the appearance of subverting the public will.[35]

Two years after the passage of Senate Bill 936, the 1999 session of the Oregon Legislature had to take up the implementation of Measure 40 again because of *Armatta*. The Chair of the House Judiciary Committee (and one of the Chief Petitioners of Measure 40), introduced legislation in 1999 which would have "bundled" eight different amendments to the Oregon Constitution, all to be considered by the Legislature and referred back to the voters in a single resolution. Clearly, the goal was to preserve Measure 40 in its original form as much as possible, and to prevent the kind of legislative meddling so many initiative advocates decry. To put it simply: he wanted Measure 40 to pass again as unchanged as possible, while still being sufficiently consistent with *Armatta* to survive another challenge, should one come. This was a risky strategy because of the likelihood that the Oregon Supreme Court would strike it down again on the same grounds as *Armatta*. Under pressure from several sources legal and political, agreement was reached to "unbundle" it into eight separate resolutions, all to be considered independently by the Legislature and referred to the voters as separate ballot measures.

Indeed, this move did bring considerable scrutiny to each individual measure and resulted in intense political activity to work out acceptable compromises, which are too complex to discuss here. The sum of it is that much of the political language of the original Measure 40 was deleted (for example, characterizing certain parts in terms of victims' rights when they had more to do with the power of prosecutors than victims' rights), all parts were thoroughly worked over in the normal legislative process and one drew so much opposition that it was deleted.[36] Measure 40 was referred to the voters as a series of seven proposals with separate votes on each (three of which were defeated by the voters). One side could easily cite this as evidence that the normal policy-making process does work, when given a chance, but the other side could credibly claim that the ideas in Measure 40 would never have gained formal agenda status had it not first been passed overwhelmingly by the voters in 1996 as an initiative.[37]

There can be no doubt that the Legislative process significantly influenced Measure 40's form and effect. Saddled with the burden of enforcing the measure in 1997, the Legislature debated, bargained, and successfully negotiated an implementation formula that passed both chambers and was signed by the Governor. The Legislature's greatest influence, however, came after the *Armatta* decision. Compelled to refer Measure 40's provisions back to the voters by a sense of loyalty to the electorate's will, the Legislature teased-out measures and ballot titles that reflected its collective best judgment.

HOW THE BUREAUCRACY RESPONDED TO MEASURE 40

The passage of Measure 40 affected people working throughout Oregon's state government. From the Department of Corrections to local court administrators, unelected professionals in state, county, and city governments had to pause, consider the impact of Measure 40 on their jobs, and adjust accordingly. Our research could not have

covered the affect of Measure 40 on every government agency. Thus, this section reflects our findings from interviews with professionals in a selection of government most affected offices around the state, especially court administrators who absorbed perhaps the greatest shock from the passage of Measure 40 even though passage had been anticipated.

In general, court administrators did not prepare for Measure 40's passage in advance of the 1996 general election, made even more difficult because Measure 40 became effective a mere thirty days after passage. The primary interest of court administrators is to facilitate uniformity among courts across the state. Measure 40 confronted trial judges with an unusually difficult task for a number of reasons. First, courts and court administrators at the county level were exasperated by the measure's unclear language because the measure was written primarily to appeal to voters, leaving a lot of ambiguity for the courts to resolve.[38] Courts had to reconcile Measure 40 with apparently contradictory clauses in the Oregon Constitution, make sense of seemingly illogical provisions in the measure, and trouble-shoot the measure's unforeseen consequences. A second factor frustrating the court administrators' goal of uniformity was the lack of evidence from which to draw interpretive conclusions about the measure. A statute that passes through the Legislature, even if it is ultimately referred to the voters, can be situated within a context of committee hearings, floor debates, proposed amendments, and documented recommendations from the bureaucracy to understand its intended meaning. In the case of an initiative, "the system is suddenly expected to adjust to new language without any legislative history to guide interpretation."[39]

From the perspective of the State Court Administrator's office, chaos ensued. Different counties issued divergent rulings on Measure 40's meaning and local judges were ruling sections of the measure unconstitutional in the context of small criminal trials. The State Court Administrator's office did everything in its power to facilitate uniformity across the state.

As trial courts began interpreting Measure 40's provisions, the State Court Administrator's office widely distributed trial court rulings to keep judges apprised of various interpretive approaches. While this did not prevent judges from ruling divergently on similar legal questions, it was an attempt to keep judges informed about how the new law was being applied throughout the state. Overall, having failed to prepare for Measure 40, the court administration sprang into action and implemented Measure 40 as it applied to them on a good faith basis. We saw no evidence to justify the kind of noncompliance or even "sabotage" sometimes alleged by initiative proponents when the bureaucracy dislikes an initiative's provisions (which this bureaucracy clearly did).

HOW THE PROSECUTORS RESPONDED TO MEASURE 40

While crime victims were the public face of Measure 40, prosecutors were in many ways the engine behind the movement. Norm Frink, Mulnomah County deputy district attorney, was one of the measure's chief petitioners and was deeply engaged in the process of drafting the measure, soliciting the active public support of prosecutors statewide, campaigning for the measure, and then negotiating with legislators when Measure 40's daughter referrals were being considered.

Some of Measure 40's proponents partially blame the heavy involvement of prosecutors for the measure's politically loaded content and some of its less popular provisions. Prosecutors and victims' advocates clashed on whether to permit victims to petition the courts directly to enforce their Measure 40 rights. In the measure's final

draft, only prosecutors had the power to exercise the rights of victims in court, as opposed to empowering the victims themselves.[40] It is hard to gauge precisely how the passage of Measure 40, and the subsequent passage of four of the measure's daughter referrals affected the job of prosecutors. In our interviews, prosecutors said that Measure 40 shifted their general focus to the concerns of victims, resulting in an attitude change rather than a measurable policy effect. But there seem to have been few more tangible policy results up to this point.

However, some of Measure 40's critics say that the measure has changed the job of prosecutors more substantially. These critics argue that Measure 40 was part of a long-term, systematic campaign to shift the balance of power in Oregon's court system to favor prosecutors at the expense of the rights of criminal defendants.[41] Measure 40 required such a high burden of proof for courts to grant pre-trial release to criminal defendants (some might argue, impossibly high), that activist Arwen Byrd argued prosecutors could use this as leverage in the plea bargaining process. Defendants are much more likely to plead guilty, she argued, if they are facing a mandatory minimum sentence imposed by Measure 11, and if they are facing an indeterminable amount of jail time while their trial is pending as a result of Measure 40.

DISCUSSION AND CONCLUSIONS

Gerber et. al. (2001) studied "how government responds to direct democracy" utilizing eleven case studies covering many substantive policy arenas in California, whereas our study focuses on just one initiative, making their study much more complex than ours. Methodologically, they also analyze empirical data on impact of the initiatives, something that we have chosen to postpone in favor of an initial analysis based upon interviews with significant stakeholders, and constitutional and archival analysis. Gerber et. al. conclude that the post election "fates" of ballot measures are "widely varying" depending on a large number of factors, particularly the nature (language) of the initiative itself and the sanctions built in to assure compliance by government. (Gerber et. al, 2001, p.109-110) They emphasize the difficulty of writing initiatives that are clear and do provide provisions to assure implementation, and the conflict in the notion that the more specific and clear an initiative is, the easier it is to attack politically and the less likely it will pass. Thus, governmental actors retain a great deal of discretion with regard to implementation of successful initiatives. (Gerber, et. al. p. 110).

Many of the same dynamics are observable in the case of Measure 40. The Measure was unclear in many provisions and was written with appealing to the voters in mind, hence its ties to "victims' rights," a popular concept in an atmosphere of fear of crime. Measure 40 was also written by people who were well aware of the single amendment rule for initiatives amending the Oregon Constitution, but also were aware that the courts had shied away from interpreting this clause restrictively. Thus, it was a calculated risk to "bundle" so many provisions into one initiative, but a risk the proponents assumed to be reasonably safe – safe enough to justify the effort of circulating petitions, running a campaign and investing in the very considerable work it takes to get an initiative on the ballot and passed in Oregon. This was a risk that proved to be dead wrong when the Oregon Supreme Court struck down all of Measure 40 in the *Armatta* case.

There is no doubt that Measure 40 was *intended* as something akin to an "asteroid" in the sense that it did mandate massive change in the criminal justice system. Whether that change was destructive, as an asteroid would be, or more like the leveling of a

pendulum is debatable, and perhaps not clearly discernible until enough time has passed to actually analyze fiscal impact data and other impact data of Measure 40 provisions. For example, the provisions tightening judicial discretion of pretrial release of violent criminals could have a major impact on the system except for the fact that most jurisdictions in Oregon are short on jail space, conceivably short enough that this provision would require building jails which in turn will take a long time. Also, it could be that this pretrial detention is already *de facto* policy, and Measure 40's effect was to formalize that and remove or limit judicial discretion on pretrial release. If so, the empirical impact would be significantly less and maybe absent. This is also consistent with the deep suspicion of the courts and judiciary among Measure 40 proponents.

Similarly, the hands of Oregon prosecutors have been strengthened considerably, but the empirical impact will depend on how the prosecutors use that power especially in plea bargaining. After all, prosecutors are public officials and part of the system, and it is not at all obvious that they would act in such a way as to make the "asteroid' a self-fulfilling prophecy. Our interviews suggest otherwise, in fact.[42]

While government agencies (especially the state courts) were caught unprepared for Measure 40, we can say that the process of implementation proceeded on a good-faith basis and that overall Measure 40 was not an asteroid, but was a major problem that took a great many people and a great deal of time and effort to work out. The court system in particular was faced with what amounted to something near chaos in regard to Measure 40, with trial court judges forced to make rulings about Measure 40 without central guidance. Communication and coordination throughout the court system – facilitated primarily by court administrators – was a key to managing what could have been a damaging situation, potentially causing unprecedented backlog and undermining the credibility of Oregon's court system.

What is important is that the notion of the "will of the electorate" as sacrosanct is so firmly established in Oregon, that parties who opposed Measure 40 (bureaucrats, legislators, and interest groups) worked together, even if not always amiably, to find ways to implement the measure faithfully while averting the potentially devastating effects to the system. This is not to say that it was uncontroversial or without its political battles, but only that the notion of the citizen initiative is so well established in Oregon, and the governmental stakeholders so respectful of the will of the electorate, that Measure 40 was implemented both in Senate Bill 936 in 1997, and then again in the referral of the seven "daughter" provisions by the 1999 Legislature, four of which were passed by the voters.

The four that passed were (1) victims' rights to participate in court proceedings; (2) limitations on pretrial release of persons accused of violent crimes; (3) a requirement that sentences announced in court be fully served; and (4) disqualifying certain felons and other persons from jury duty. The three defeated referrals were (1) the power of the prosecutor to demand a jury trial; (2) non-unanimous jury verdicts; and (3) limiting immunity for witnesses. The passage of four of the provisions and the defeat of three (plus one from the original Measure 40 that the Legislature did not referred to the voters) allowed both sides to claim victory. Proponents of Measure 40 could and did claim that the parts that passed were the important ones, and opponents of Measure 40 (as well as supporters of the Oregon Supreme Court and the *Armatta* decision) could claim victory by pointing out that the voters rejected three of seven, thus vindicating their judgment that Measure 40 contained provisions that would never pass the voters, let alone the Legislature, unless bundled with provisions that were more popular.

In thinking about the "asteroid" metaphor after conducting our research, a couple of key points can be made:

(1) To be a true "asteroid," that is, indiscriminately destructive, the measure would have to be designed as such, and written in careful, precise unambiguous language.
(2) Failing that, any initiative once passed will necessarily have to be "fine- tuned" either by the judiciary (*Armatta* as well as lower court rulings), the bureaucracy and/or the Legislature. All of these act as a kind of "filter," similar to the effects of the earth's atmosphere on a [real] asteroid before it impacts the earth itself.

In the case of Measure 40, the filter effect was crucial, and was the primary factor in modulating the language of Measure 40 (which, as we have pointed out, was written primarily to appeal to voters, not to guide implementation). The filter effect was further crucial in sifting through Measure 40's various provisions to arrive at compromise (if not consensus), with the voters having the final say in a referendum of the seven "daughter" referrals of Measure 40.

Thus, we believe that Measure 40 – and the initiative process more broadly – really is about access to the agenda of government as much as it is about substantive criminal justice policy. In that sense, Measure 40 proponents succeeded in force their policy views to be taken seriously – imposing them on the "systemic agenda" (Cobb and Elder, 1983) – when they otherwise would not have achieved formal agenda status. The professionalism of the bureaucracy and other government actors, the dominance of the Legislature by legislators friendly to Measure 40[43] and respect for the notion of the "will of the voters" meant that Measure 40 was implemented despite severe reservations by many stakeholders on most if not all of its provisions. In other words, "good government" in Oregon means respecting the electorate while maintaining the integrity and efficacy of the government and its constituent departments and programs.

We cannot resist one more metaphor: the "snake and the mouse." The fear of initiative supporters is not only that they lack *effective* access to the agenda, but also that entrenched governmental elites with a stake in the status quo will find a way to negate any initiative with which they disagree. When a snake eats a mouse, the shape of the mouse alters the snake's shape only at first; over time, as the snake digests its food, the mouse disappears. So, too, initiative petitioners fear that entrenched government elites, in their mediation and implementation role, "digest" initiatives approved by the voters, whittling away at them until it would appear that nothing changed. This is why those who favor significant change have turned to the initiative, rather than the normal legislative process. This is also why they have favored constitutional amendments, which cannot be changed without a vote of the people, over statutory initiatives, which can be changed by the Legislature without a popular vote.[44] Instead – and this is a crucial point – we believe that Measure 40 survived the process well, came out as improved public policy (compared to the original provisions of Measure 40) and alleviated mistrust on all sides at least to some degree. No doubt there are still many knowledgeable people who believe Measure 40 even in its "daughter" forms will prove to be untenable and destructive in a number of respects (in principle, fiscally, constitutionally, etc.), but those are important impact questions which will require experience over time and further analysis to address. Direct democracy may not be orderly or pretty, but in this instance, it worked – at least it has so far.

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ENDNOTES

1 This does not consider other special purpose criminal systems such as the military, or (perhaps) what appears to be an evolving system for terrorism.

2 Louis Brandeis , dissenting in New State Ice Co. v. Leibmann. 285 U.S. 262, 311 (1932).

3 Constitutionalists generally refer to the power of the states as the "police power," meaning the power over public safety, welfare and morals. The public has a shallower view. For example, most Americans were surprised in 1963 when accused assassin Lee Harvey Oswald had violated no federal law, and therefore was in the custody of the Dallas, Texas police when he was murdered by Jack Ruby.

4 For example, Robert Dahl (1961) and Bachrach and Boratz (1962). For a classic work on agenda stetting, see Cobb and Elder (1983).

5 The 1967 President's Commission on Law Enforcement and the Administration of Justice report "The Challenge of Crime in A Free Society" and the accompanying Task Force Reports were essentially status quo oriented. While widely regarded as the best overall evaluation of American criminal justice, it is nonetheless true that it did not call for the kind of revolutionary change that system critics later demanded.

6 See, McGuire, Mike, (1991).

7 For example, see http://www.crimevictimsunited.org/, the website of Crime Victims United of Oregon which has been very effective in participating in criminal justice policy making in Oregon.

8 This process is structured and regulated by law and has time limitations so that success is by no means assured. Most initiatives do not "get on the ballot," i.e. they fail to gather enough signatures in the time allowed or are declared invalid by the courts for other reasons. Still, they have become a potent force in policy making in western states like Oregon, California and Washington. For more information of the initiative as it is in Oregon, see the webpage of the Oregon Secretary of State: http://www.oregonvotes.org/ballot.htm

9 See, Cronin (1989).

10 City Club of Portland, (February 16, 1996).

11 This view is consistent with the long-term increase in cynicism toward government by the American electorate.

12 Some of the recent Oregon criminal justice ballot measures have reinstated the death penalty (Measure 6 in 1984); imposed mandatory minimum sentencing and required prisoners to work (Measures 11 and 17 in 1994). Others have failed. Overall, while some criminal justice measures have made far-reaching changes (Measure 11 in 1994, which was widely regarded as an "asteroid' that destroyed years of careful criminal justice reform), others have failed. Overall, Oregon voters seem to have been quite deliberate in casting their votes.

13 U.S. Constitution, Article IV, section 4.

14 Pacific States Tel & Tel v. Oregon 223 U.S. 118 (1912).

15 Lindblom, Charles (1965).

16 In our interviews, the mistrust of the courts (especially the Oregon Supreme Court) in many interviews was striking among the pro Measure 40 proponents.

17 In his seminal 1968 work, THE LIMITS OF THE CRIMINAL SANCTION, Herbert Packer posed the dichotomy of the "crime control model" versus the "due process model." The latter is essentially the adversary system with its primary value on the limitation of official power, which is the traditional model for American criminal justice. The movement in recent decades has been toward the crime control model.

18 As a case study, caution must be exercised in generalizing our findings.

19 The "List of Interviews" below includes those who are quoted or paraphrased in this paper.

20 Measure 11 created mandatory minimum sentences for all violent offenders over the age of 15. It was the most far-reaching criminal justice initiative in Oregon prior to Measure 40. It was a major change in the "sentencing guidelines" system, which had been developed over almost twenty years in the Oregon Legislature. Consistent with previous discussion, the guidelines system was developed by traditional criminal justice stakeholders through regular legislative processes. Measure 11 was the product of external change agents.

21 Critics argue that doing so might have assured a jury pool of more interested and active citizens, but it also would have decreased minority representation on juries who tend to be low voting populations and thus not registered. Others dispute this view, but any plausible suggestion of racial bias, intended or not, will be controversial.

22 This is known as "preventive detention" and is a growing movement in the U.S. today. It is not a new idea, but it is one of the most important unaddressed issues in American criminal justice.

23 http://www.sos.state.or.us/elections/nov596/results/results.htm

24 We do not attempt to assess the actual impact of Measure 40 here—that is a subject for future research. For an example of research that does attempt to measure impact of the initiative, see Gerber, et. al.(2001)

25 Even without analysis, it can be said, as an example, that the provision in Measure 40 on pretrial release, had it been implemented probably would have precipitated an unparalleled crisis in jail overcrowding, unless other remedial actions were taken by the counties which are responsible for jails.

26 Fidanque interview; Christ, interview.

27 The language "technical" versus "substantive" should not be construed to imply anything about the importance of the challenge. It is only to say that the measure was not challenged based on the constitutionality of its substantive provisions; the three challenges argued by the measure's opponents each attacked the technical validity of the measure.

28 Chaimov interview. The Office of Legislative Counsel can be fairly described as a law firm that specializes in drafting legislation and has but one client—the Legislature. By law, the services of Legislative Counsel are also available to initiative petitioners. However, whenever petitioners are cynical about government, or feel excluded in the past, it is not surprising that they would not seek the assistance of Legislative Counsel.

29 For example, section 1(h) of the measure guarantees crime victims "The right to have eleven members of the jury render a verdict of guilty…." A literal reading of this provision seems to give crime victims the right to a guilty verdict, even before the trial is held. The intent of this provision is to permit non-unanimous jury verdicts, but its language does not appear to make sense.

30 The state argued that the plain wording of the "One-Amendment-Per-Measure-Rule" only applied to referrals from the Legislature, not initiatives.

31 The plaintiffs' brief conceded that "The Supreme Court has not yet devised a means for determining whether a measure presents one amendment or several" (page 35). However, the plaintiffs' argument relied on a dissenting opinion written by Justice Ed Fadeley in the 1996 case *Atiyeh v. State of Oregon* (323 Or 413) in which Fadeley distinguished one amendment from several based on whether there was a "necessary and interdependent relationship" between an initiative's parts.

32 Christ interview.

33 Christ interview.

34 Myers interview.

35 Ellis, Fidanque interviews.

36 This was a provision that would have required Oregon courts to interpret provisions of the Oregon constitution on search and seizure more broadly than analogous provisions of the U.S. Constitution. Many states are more restrictive of official power on search and seizure than the federal Supreme Court rulings on the Fourth Amendment of the U.S. Constitution.

37 See generally, Cobb and Elder (1971) and Baumgartner and Jones (1993) on agenda setting.

38 Although Oregon has a unified state court system, much administrative responsibility is at the county (local) level, especially in the absence of state directive.

39 Bray interview.

40 Historically, victims in the Anglo-American criminal justice system were treated more or less as any other witness. The parties to the trial were the defense counsel and counsel for the state (the prosecution). Victims had no decision-making role.

41 Bird, Simon, Swenson interviews.

42 Defense attorneys would see this quite differently, of course, as would civil libertarians who would see this as a matter of principle (too much power in the hands of prosecutors) as well as the practical impact it might have on convictions, pretrial incarceration, etc. Provisions such as

non-unanimous juries might affect a few cases, but even now so few cases go to trial that it may not be large. Again, more cases may go to trail because the stakes to the defendants are so much higher (although this is more an outcome of Measure 11, the mandatory sentencing initiative of 1994).

43 Especially Representative Kevin Mannix, the Chair of the House Judiciary Committee.

44 This is also consistent with Gerber, et. al., on the importance of "sanctions."

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