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OHIO'S NEW SENTENCING GUIDELINES: A "MIDDLEGROUND" APPROACH TO CRACK SENTENCING

INTRODUCTION

For the first time in our nation's history, the majority of crimes regulated by the states are also regulated by the federal government.¹ Federal regulation over criminal offenses does not preempt any state involvement,² but rather there is dual and concurrent jurisdiction to prosecute these crimes.³ Under this "dual sovereignty" doctrine, both the state and the federal government can prosecute the same offense without violating the constitutional

1. There are now more than 3,000 federal crimes. Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681, 681 (1992). Prior to the Civil War, there were only a few federal offences and virtually no overlap between offences subject to both federal and state prosecution. Federal laws were limited to (1) treason; (2) bribery; (3) perjury; (4) theft of government property; and (5) revenue fraud. See Sara Sun Beale, *Federal Criminal Jurisdiction*, in ENCYCLOPEDIA OF CRIME AND JUSTICE 775-79 (1983). For a discussion of the shift in the function of federal criminal law, see Stephen Chippendale, *More Harm Than Good: Assessing Federalization or Criminal Law*, 79 MINN. L. REV. 445 (1994); William Van Alstyne, *Dual Sovereignty, Federalism, and National Criminal Law: Modernist Constitutional Doctrine and the Non-role of the Supreme Court*, 26 AM. CRIM. L. REV. 1740 (1989).

2. Preemption is based upon the Supremacy Clause of the Constitution. U.S. CONST. Art. VI, § 2 (stating that "[t]he Constitution and the laws of the United States . . . shall be the Supreme Law of the land"). It essentially forecloses any state regulatory action over a certain area currently regulated by Congress. Preemption can be "express" if Congress makes its intention that only federal law govern a certain area within the body of the relevant statute. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Preemption can also be implied if "it is impossible for a private party to comply with both the state and the federal law" (implied conflict), or if "there is a congressional scheme of regulation so pervasive so as to make reasonable the inference that Congress left no room for the states to supplement it." *Pacific Gas & Elec. V. Energy Resources Comm'n*, 461 U.S. 190, 231 (1983). Congress could, but has not, preempted the subsequent state prosecution of drug offenses. However, some states have preempted themselves from prosecuting any offense if there has been preceding federal prosecution. For example, in Ohio if there has been "a conviction or acquittal under federal narcotics laws for the same act it is a bar to prosecution in this state." OHIO REV. CODE ANN. § 2925.50 (Anderson 1993). Virginia has a similar provision. VA. CODE ANN. § 19.2-294 (Mitchie 1993). Other states have no such statutory provisions. For general discussion of preemption, see Joseph T. McLaughlin & Kimberly O'Toole, *Federal Preemption*, C842 ALI-ABA 639 (1993).

3. The 1872 mail fraud statute was the first federal intrusion into the states' traditional criminal jurisdiction. Special Laws Prohibition Act (Harrison Acts), ch.1, 38 Stat. 785 (1914). Congress' first two significant forays into concurrent jurisdiction, based upon the Commerce Clause, were developed about 25 years later: the Mann Act, prohibiting the interstate transportation of prostitutes, 18 U.S.C. § 2421 (1994); and the Harrison Narcotics Act of 1914, which was later tied to the Commerce Clause, Drug Abuse Control Amendments of 1965, Pub. L. No. 89-74 (1965); and the Controlled Substances Act of 1970, Pub. L. No. 91-513 (1970). However, "[n]obody suggests that the Framers' limited contemplation of federal jurisdiction is viable today. Federal jurisdiction that overlaps that of the states—that is concurrent jurisdiction—has become a vital tool of prosecution of sophisticated criminal enterprises operating across state or national boundaries, using modes of travel, communication, and commerce undreamed of two hundred years ago." H. Scott Wallace, *The Drive to Federalize is the Road to Ruin: When More is Less*, 8 CRIM. JUST. 8 (Fall 1993).

protection against double jeopardy.⁴ An example of crimes that are concurrently regulated are narcotics offenses.⁵ The differential between the state and federal drug sentences has been subject to great scrutiny, particularly in the area of crack cocaine.⁶ While proposed amendments to the Federal Sentencing Guidelines Manual⁷ have failed,⁸ Ohio has recently amended its crack sen-

4. The notion that one trial and one punishment are enough is one of the oldest precepts of Western civilization, and a cornerstone of the Anglo-American system of jurisprudence. See *Bartkus v. Illinois*, 359 U.S. 121, 151-55 (1959) (Black, J., dissenting). The Fifth Amendment guarantees that "no person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST., amend. VI (1791). A person is "in jeopardy" when, in a jury trial, the jury is empaneled and sworn, and it attaches in a bench trial when the first witness is sworn. See *Illinois v. Sommerville*, 410 U.S. 458 (1973). The Fifth Amendment guarantee against double jeopardy protects a defendant against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by*, *Alabama v. Smith*, 490 U.S. 794 (1989). The Supreme Court has held that duplicative state and federal prosecutions for concurrently regulated offences do not violate the Double Jeopardy Clause under the dual sovereignty doctrine. *Abbate v. United States*, 359 U.S. 187, 195-96 (1959). The Supreme Court reaffirmed the dual sovereignty doctrine in 1985. *Heath v. Alabama*, 474 U.S. 82 (1985). Apparently, such duplicative prosecution was, at one time, prohibited under Department of Justice policy. See Wallace, *supra* note 3, at 51 (stating that under Attorney General William Rodgers in the late 1950s it was prohibited as a matter of Justice Department policy). There is also a well-understood, but not binding U.S. Attorney's Office policy, commonly referred to as the "Petite Policy," that informally prevents a subsequent federal prosecution unless the prosecutors obtain the permission of an Assistant U.S. Attorney General. This policy was based upon, but not reflected in the case of *Petite v. United States*, 361 U.S. 529 (1960). See also Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995); Elizabeth T. Lear, *Double Jeopardy, the Federal Sentencing Guidelines, and the Subsequent Prosecution Dilemma*, 60 BROOK L. REV. 725 (1994); Michael P. Reagan, *Topical Survey, Constitutional Law: Does the Double Jeopardy Clause Bar Reprosecution After Prosecutorial Error Leads to Mistrial*, 27 SUFFOLK U. L. REV. 484 (1993); George C. Thomas III, *The Probation of Successive Prosecutions for the Same Offense: In Search of a Definition*, IOWA L. REV. 323 (1986); Michael A. Damson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L. J. 281 (1992).

5. The possession or improper use of controlled substances was declared by Congress to have a "substantial and detrimental effect upon the health and general welfare of the American people." 21 U.S.C. § 801(2) (1994). While generally Congress would only regulate interstate violations, in the case of drugs, Congress based its concurrent regulation on the fact that "all drugs look alike and it is not feasible to try to distinguish between ones that have crossed state lines and ones that have not, and besides, even purely intrastate drug use probably contributes to swelling the interstate traffic." *Id.* § 801(4), (5). Thus, every drug offense under state law can also be prosecuted federally. The federal narcotics prosecutions typically arise under 21 U.S.C. § 841 (1994) (manufacture, distribution, and possession with intent to distribute a controlled substance), § 841 (drug conspiracy), § 848 (drug kingpin).

6. See *infra* parts III(A)-(E) (discussing the problems associated with disparate state and federal crack sentences).

7. United States Sentencing Comm'n, *Guidelines Manual*, § 2D1.1(c)(1) (Nov. 1995).

8. See *infra* part IV(A) (discussing the United States Sentencing Commission's recent proposed amendments to the Federal Sentencing Guidelines Manual, and Congress' rejection of the amendments).

tences in S.B. 2, its new sentencing guidelines.⁹ Now, in Ohio, the amount of crack, compared to powder cocaine, necessary to receive certain sentences fluctuates between the ratios of 5:1 to 10:1, depending on the quantity of crack involved.¹⁰ This Comment discusses the strengths and weaknesses of Ohio's new crack to powder cocaine ratio, the legislative rationale behind the new ratio, and the implications of this "middleground"¹¹ approach to crack sentencing.

I. THE CRACK PROBLEM

Crack is an impure derivative¹² of cocaine that is easily manufactured by heating powder cocaine in water and mixing it with baking soda.¹³ Both powder and crack cocaine are a form of the same psychoactive alkaloid, a derivative from the leaves of the coca plant.¹⁴ Despite this common origin, however, there are numerous differences between the two drugs that make crack a more dangerous form of cocaine.¹⁵

9. Ohio Senate Bill No. 2, Ohio 121st Gen. Assembly, 1995-96 Reg. Sess. [hereinafter S.B. 2].

10. See part IV(B)(3) (explaining Ohio's new sentencing scheme for crack and powder cocaine).

11. "Middleground approach" refers to the approach of sentencing crack more severely than powder cocaine (not 1:1), but yet not as severely as a few states and the federal guidelines (100:1). For the various state and federal sentencing ratios, see *infra* part II(A) (discussing the federal 100:1 ratio) and *infra* part II(B) (discussing the majority of states sentence the two drugs according to an equal, or 1:1 ratio).

12. Crack is simpler and generally unpurified—"the residual salt, other impurities, and dilutents remain present in the consumed substance." M. Elena Khalsa et al., *Smoked Cocaine: Patterns of Use and Pulmonary Consequences*, 24 J. PSYCHOACTIVE DRUGS 265, 267 (1992).

13. Ronald K. Siegel, *Cocaine Smoking*, 14 PSYCHOACTIVE DRUGS 271, 287 (1982). Specifically, powder cocaine is dissolved in a solution of sodium bicarbonate and water. The solution is boiled and a solid substance, crack, separates from the boiling water and is removed and allowed to dry. U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, COCAINE: CULTIVATION AND COCAINE PROCESSING: AN OVERVIEW (1991). Crack cocaine is typically cut into "rocks," usually weighing between one-tenth and one-half a gram. UNITED STATES SENTENCING COMM'N, COCAINE AND FEDERAL SENTENCING POLICY 14 (1995) [hereinafter COCAINE AND POLICY]. The Drug Enforcement Administration estimates that 1 gram of cocaine will produce approximately .89 grams of crack. U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, ILLEGAL DRUG PRICE AND PURITY REPORT 23 (1992). The resulting crack rocks are between 75 % and 90% pure cocaine. *Id.* The reason for the less than 100% purity is because the crack processors tend to be less careful when making crack, and because they add adulterants such as baking soda to increase the weight of the "rocks." *Id.*

14. COCAINE AND POLICY, *supra* note 13, at 13. Cocaine in the form of crack has been processed so that the cocaine alkaloid has been "freed" from the salt substrate and is once again in a base form similar to that of "coca paste." *Id.* Cocaine paste is an intermediate product in the processing of coca leaves into powder cocaine. *Id.* Coca paste is extracted from coca leaves by mixing the leaves with an alkaline material (e.g., sodium bicarbonate), an organic solvent (e.g., kerosene), and water. *Id.*

15. See notes 16-26 and accompanying text (explaining the differences between crack and

Crack is a hard and waxy substance making the sale of small, personal amounts much easier than with the fine granular form of powder cocaine.¹⁶ While powder cocaine must be snorted or sniffed, crack is smoked.¹⁷ This allows the substance to enter the bloodstream immediately, providing a quicker and more intense high.¹⁸ Among the numerous other indications that crack is more dangerous than cocaine are: crack accounts for more emergency room visits; involves more juveniles in the distribution chain; has a greater likelihood of being accompanied by violence; is used more often by juveniles; and has much greater potential to spread¹⁹ than powder cocaine.²⁰ Perhaps the most disturbing quality of crack is its increased likelihood of addiction.²¹

Crack is a relatively recent drug that came to the public's attention

powder cocaine). See also *infra* part IV(B)(4) (discussing Ohio's concerns over crack), and *infra* notes 120-23 (discussing the United States Sentencing Commission's concerns over crack and Congress' concerns over rejecting the amendments).

16. MARK KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 296 (1992); James A. Inciardi, *Beyond Cocaine: Basuco, Crack and Other Coca Products*, 14 CONTEMP. DRUG PROBS. 461, 485 (1987). Apparently it is not feasible to distribute very small amounts of powder cocaine, while it is easy to do the same with crack.

17. KLEIMAN, *supra* note 16, at 296.

18. *Id.* See also COCAINE AND POLICY, *supra* note 13, at 28. When crack is smoked, the body responds by reaching its maximum physiological effects in approximately two minutes and maximum psychotropic effects in just one minute. *Id.* at 29. The same effects when cocaine is snorted are achieved in 20 and 40 minutes respectively. *Id.* The duration of effect, however, is 30 minutes compared to powder cocaine's 60 minutes. *Id.* The duration of the effects of crack and powder cocaine are significant because they relate to how quickly one becomes dependent. Because of the short, but intense high produced by crack, the user is more likely to use the drug more frequently and in binges. *Id.* at 28.

19. "Spread" refers to the easily packaged nature of crack and the cheap price of these small packages. This makes crack a more affordable and more distributable drug. There is evidence that these characteristics have caused the drug to begin to move from just the inner-city to the surrounding suburbs, which generally are not prone to the same type of drug problems. See *infra* note 196 (discussing this as part of the reason the Ohio Criminal Sentencing Commission treated the drugs differently for sentencing purposes).

20. These other characteristics of crack were summarized by the Judiciary Committee's Crime Subcommittee based upon the hearings conducted on the differences between the two drugs. H.R. REP. NO. 272, 104th Cong., 1st Sess. 3 (1995). It is fairly unanimously accepted, and research has proven that crack does possess these characteristics. However, these characteristics are often disputed and there is some sparse contrary research evidence available. In addition to being reflected in congressional debates and professional literature, these characteristics were determined to exist and are reflected in Ohio's S.B. 2. See *infra* note 196 and accompanying text (discussing the research findings that were the impetus behind S.B. 2).

21. KLEIMAN, *supra* note 16, at 296. However, not everyone who uses crack becomes addicted to it. See Inciardi, *supra* note 16, at 484 (stating that "compulsive users" are the minority of crack users). But see Nkechi Tafia, *Crack vs. Cocaine: Disparity in Punishment*, 9-Aug NBA NAT'L B.A. MAG. 30, 31 (1995) (asserting, as a lawyer by profession and with no scientific backing behind the opinion, that powder cocaine is just as addictive as crack and that injecting cocaine is even more dangerous than crack).

around 1984.²² The public's reaction to crack modeled closely its reaction to past drugs.²³ Smokeable opium received widespread public attention in the late-nineteenth century, followed by powder cocaine in the early-twentieth century, marijuana in the 1920s and 1930s, and heroin in the 1950s.²⁴ By 1986, crack was labeled by the press as "the most dangerous drug, in terms of addictiveness and association with crime," and was declared a "national epidemic."²⁵

II. CRACK LEGISLATION

Powder cocaine has long been a focus of the legislature, both state and federal.²⁶ Despite this past legislation outlawing cocaine, concern over the enforcement of these laws has not been a top priority of the criminal justice system.²⁷ However, the recent increase in regulation and prosecution of drug

22. Crack was first mentioned in the media by the *Los Angeles Times* on November 25, 1984, referring to a "cocaine rock" that was appearing in the barrios. COCAINE AND POLICY, *supra* note 13, at 122. The *New York Times* first mentioned crack on November 17, 1985. *Id.* In the months leading up to the 1986 elections, more than 1,000 stories on crack had appeared in the national press, including five cover stories in both *Time* and *Newsweek*. *Id.*

23. See *infra* note 24 and accompanying text (discussing the different drugs that have been the focus of a great deal of public attention in the past).

24. H. WAYNE MORGAN, DRUGS IN AMERICA: A SOCIAL HISTORY, 1800-1980 29-43, 145-48 (1981); DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTICS CONTROL 45-46 (1987).

25. Craig Reinerman & Harry G. Levine, *Crack in Context: Politics and Media in the Making of a Drug Scare*, 16 CONTEMP. DRUG PROBS. 535, 541-43 (1989) [hereinafter "*Crack in Context*"]. It had also been the subject of 400 separate N.B.C. reports consisting of 15 hours of air time. Craig Reinerman & Harry G. Levine, *The Crack Attack: Politics and Media in America's Latest Drug Scare*, in IMAGES OF ISSUES: TYPIFYING CONTEMPORARY SOCIAL PROBLEMS 117 (J. Best ed., 1989).

26. The Harrison Act of 1914 was the first federal legislative attempt to regulate cocaine. It was later incorporated in to the Controlled Substances Act of 1970. See *supra* note 5. By this time, 46 states had laws regulating the use and distribution of cocaine. See D. Musto, *Opium, Cocaine, and Marijuana in American History*, SCIENTIFIC AMERICAN 44 (1991). The federal law prohibited cocaine and heroin transactions. States, however, had been regulating cocaine since approximately 1887. *Id.* Cocaine subsequently was viewed as the rich man's drug and typically associated with the Hollywood glamorous lifestyle. See *Crack in Context*, *supra* note 25, at 558. In the eighties, cocaine was a mainstream drug of choice. *United States v. Clary*, 846 F. Supp. 768, 775 (E.D. Mo.), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

27. See DONALD J. BLACK, THE MANNERS AND CUSTOMS OF THE POLICE 23 (1980):

Law enforcement agencies often show little or no interest in cocaine use by individuals who are in all other respects part of the mainstream of America. Thus, although physicians as a group have an exceptionally high rate of addiction, the police do not develop informers within the medical profession. Furthermore, upon learning of a doctor who is an addict, the police rarely make an arrest or subject the individual to other indignities that street addicts so often experience.

Id.

offenses²⁸ has been accompanied by more severe drug sentences.²⁹ One particularly troublesome area of recent drug legislation has been crack sentencing.³⁰

A. Federal Sentencing Guidelines

The Federal Anti-Drug Abuse Act of 1986 was the first federal legislative attempt to deal with the rapidly increasing crack problem in the nation's inner cities.³¹ The Act took an extremely harsh stance on crack by establishing substantially lower "threshold amounts"³² than for powder cocaine to trigger mandatory minimum federal sentences.³³ The United States Sentencing Commission³⁴ followed suit in its passage of the Federal Sentencing Guidelines Manual.³⁵ The guidelines set forth the current 100:1 crack to powder

28. See Wallace, *supra* note 3, at 12 (stating that "[t]oday, drug crimes constitute the largest and fastest growing federally regulated area."). Among only the federal agencies with operational and law enforcement responsibilities for drug control are: the D.E.A., the F.B.I., the United States Attorney's Office, the Immigration and Naturalization Service, the U.S. Marshals Service, the U.S. Customs Service, the Bureau of Alcohol, Tobacco, and Firearms, the U.S. Coast Guard, and the F.A.A. COCAINE AND POLICY, *supra* note 13, at 126. The states make 1.1 million drug arrests each year and the federal government adds an additional 21,799. *Id.* at 139.

29. See *infra* notes 31-37 and accompanying text (discussing in particular the severity of federal drug laws regulating powder cocaine and crack).

30. See *infra* parts II, III, IV, V (discussing the problems presented by modern crack legislation).

31. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections at 21 U.S.C. §§ 801-978 (1994)).

32. "Threshold amounts" means the amount of a certain drug necessary to be classified as a particular offense and to receive its accompanying sentence.

33. Persons convicted of possessing 50 grams of crack (lower crack threshold) would receive a mandatory minimum sentence of ten to twenty years, while a person possessing powder cocaine would have to possess 5,000 grams (threshold amount for powder cocaine) before the ten to twenty year mandatory minimum sentence would be triggered. 21 U.S.C. § 841(b)(1)(B)(iii) (1994). Possession of between 5 and 50 grams of crack would trigger a mandatory minimum federal sentence of five years, ten for second-time offenders, while one must possess between 500 to 4,999 grams of powder cocaine before triggering the same mandatory minimum sentence. *Id.* at § 841(b)(1)(A)(iii). These differences in the amounts necessary to receive certain mandatory minimum sentences is commonly referred to as a 100:1 ratio.

34. The Sentencing Reform Act, Pub. L. No. 98-473, tit. II, §§ 211-38, 98 Stat. 1987-2040 (1984) (codified as amended in scattered sections of 18 U.S.C. §§ 3551-3559 and at 28 U.S.C. §§ 991-98) (1994)), created the United States Sentencing Commission and charged it with developing and promulgating a comprehensive system of guidelines [hereinafter U.S. Commission]. The U.S. Commission set forth its initial Guidelines Manual in 1987 and has since repeatedly amended it. For a discussion of the Sentencing Reform Act, see William W. Wilkins et al., *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Disparity Problem*, 2 Crim. L.F. 355 (1991).

35. See United States Sentencing Commission, *Guidelines Manual* (Nov. 1995) [hereinafter USSG]. The guidelines are binding on federal judges and drastically restrict the discretion of the federal judge doing the sentencing. For general discussion of the federal sentencing

cocaine ratio.³⁶ Congress further distinguished between crack and powder cocaine in the Anti-Drug Abuse Act of 1988 by creating a mandatory minimum penalty for simple possession of crack.³⁷

Not surprisingly, the extreme 100:1 ratio imposed by the guidelines has resulted in numerous constitutional challenges.³⁸ The most popular is an equal protection challenge based on the disproportionate percentage of blacks sentenced for crack offenses.³⁹ These challenges have universally failed to

guidelines, see Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. Rev. 1681 (1992); Stacy M. Studnicki, *Federal Sentencing Guideline*, 1995 Det. C.L. Rev. 667 (1995); Terrence Dunworth & Charles D. Weisselberg, *Felony Cases the Federal Courts: The Guidelines Experience*, 66 Cal. L. Rev. 99 (1992). The constitutionality of the guidelines has been upheld against a separation-of-powers charge in *Mistretta v. United States*, 488 U.S. 361 (1989).

36. United States Sentencing Comm'n, *Guidelines Manual*, § 2D1.1(c)(1) (Nov. 1995). The 100:1 ratio is the same described *supra* note 33. The ratio is significant because certain amounts of crack receive the same mandatory minimums as 100 times more powder cocaine. Thus, relatively small amounts of crack receive very harsh sentences. To stiffen this seemingly draconian system, the federal guidelines provide that any person sentenced under the guidelines must serve the full sentence imposed with no possibility for parole. 21 U.S.C. § 841 (b)(1)(A), (B) (1994).

37. See Anti-Drug Abuse Act of 1988. Pub. L. No. 100-690, 102 Stat. 4181 (1988). The Act amended 21 U.S.C. § 844 to make crack the only drug with a mandatory minimum penalty for a first offense of simple possession. The mandatory minimum was 5 years in prison for possession of 5 or more grams of crack. The same mandatory minimum also applies to 3 or more grams if the defendant has a prior conviction for possession of crack, and to possession of more than 1 gram of crack if the defendant has a two or more prior convictions of possession of crack.

38. See *infra* notes 39-50 and accompanying text (discussing the various constitutional challenges to the federal sentencing guidelines). See generally Maureen Juran, *Tenth Circuit's Approach to the Constitutionality of the Federal Guidelines*, 67 DENV. U. L. REV. 545 (1990) (discussing the Sixteenth Annual Tenth Circuit Survey regarding the federal sentencing guidelines).

39. The Fourteenth Amendment states that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV (1868). In 1992, approximately 90% of all those convicted of federal crack violations and sentenced according to the guidelines were black, while only 4% were white. See COCAINE AND POLICY, *supra* note 13, at 161, tbl. 13. These cases have all failed to show the necessary discriminatory intent by Congress and the U.S. Commission. Perhaps the best synopsis of the courts' position on this issue is provided by *United States v. Galloway*, 951 F.2d 64, 65 (5th Cir. 1992) (holding that, with respect to enhanced crack penalties, even if the crack statutes have a disproportionately adverse effect upon a racial minority, they violate equal protection guarantees only if that impact is the result of a discriminatory purpose). There was one case that did find an equal protection violation, however it was later reversed. See *United States v. Clary*, 846 F. Supp. 768, 786 (E.D. Mo.), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995). There is a great deal of literature that comes to a different conclusion, that the guidelines do violate equal protection. See generally Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System that Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines' Classification Between Crack and Powder Cocaine*, 25 U. TOL. L. REV. 215 (1994); Knoll D.

show any legislative intent to discriminate against any certain group.⁴⁰ The United States Supreme Court has stated that "absent a racially discriminatory purpose, explicit or inferable, on the part of the lawmaker, the statutory distinction is subject only to the rational basis review."⁴¹ Congressional investigation of this allegation has found the lack of discriminatory intent behind the guidelines.⁴² However, one state court decision in Minnesota, *State v. Russell*,⁴³ found unconstitutional a state penalty that treated three grams of crack equal to 10 grams of powder cocaine.⁴⁴

Another popular challenge is that the guideline's crack sentences are so disproportionate to severity of crack offenses as to violate the Eighth

Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121 (1994); David A. Slansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995); Nkechi Taifa, *Crack vs. Cocaine: Disparity in Punishment*, 9-AUG. NBA NAT'L B.A. MAG. 30 (1995); Laura A. Wytsma, Comment, *Punishment for "Just Us"—A Constitutional Analysis of Crack Cocaine Sentencing Statutes*, 3 GEO. MASON INDEP. L. REV. 473 (1995) (All arguing that the guidelines' crack ratio violates equal protection due to the disparate impact on blacks).

40. *United States v. Then*, 56 F.3d 464 (2d Cir. 1995); *United States v. Moore*, 54 F.3d 92 (2d Cir. 1995); *United States v. Williamson*, 53 F.3d 1500 (10th Cir. 1995); *United States v. Maxwell*, 25 F.3d 1389 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 610 (1994); *United States v. Coleman*, 24 F.3d 37 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 261 (1994); *United States v. Stevens*, 19 F.3d 93 (2d Cir. 1994); *United States v. D'Anjou*, 16 F.3d 604 (4th Cir. 1994), *cert. denied*, 114 S. Ct. 2754 (1994); *United States v. Cody*, 7 F.3d 1523 (10th Cir. 1993); *United States v. Angul-Lopez*, 7 F.3d 1506 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1563 (1993); *United States v. Thurmond*, 7 F.3d 947 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1311 (1993); *United States v. Reese*, 994 F.2d 277 (6th Cir. 1993); *United States v. Wesley*, 990 F.2d 360 (8th Cir. 1993); *United States v. Williams*, 982 F.2d 1209 (8th Cir. 1992); *United States v. Frasier*, 981 F.2d 92 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1661 (1992); *United States v. Lattimore*, 974 F.2d 971 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1819 (1992).

41. *Frasier*, 981 F.2d at 95 (citing *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979) and *Washington v. Davis*, 426 U.S. 229 (1976)). Even if the legislature was aware of a racially disparate impact, the statute is not invalid if that awareness was not a causal factor in its enactment. *Frasier*, 981 F.2d at 95; *Feeney*, 442 U.S. at 279. For a discussion of the appropriate standard of review, see generally Leitman, *supra* note 39.

42. The U.S. Commission has stated, with regard to the racially disparate impact of the guidelines that "clearly, the penalties apply equally to similar defendants, regardless of race." H.R. REP. NO. 272, 104th Cong., 1st Sess. 3 (1995). The Judiciary Committee's Crime Subcommittee's review of the guidelines came to the conclusion that "there is no evidence that Congress or the U.S. Commission acted with any discriminatory intent in setting different statutory penalties for different forms of cocaine." *Id.*

43. 477 N.W.2d 886 (Minn. 1991).

44. *Id.* The *Russell* decision was based upon the state's definition of equal protection, not the Constitution's. *Id.* at 889. Therefore, *Russell* stands on its own and does not provide any precedent for similar challenges to the guidelines. For discussions of *Russell*, see Ann L. Iijima, *Minnesota Equal Protection in the Third Millennium: Old Formulations or New Articulations?*, 20 WM. MITCHELL L. REV. 337 (1994). See also Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994); Judith A. Zolar, *Discriminatory Impact Analysis: A State Constitutional Approach: State v. Russell*, 15 HAMLINE L. REV. 497 (1992).

Amendment's prohibition against cruel and unusual punishment.⁴⁵ The most widely used test for Eighth Amendment challenges is set forth in *Solem v. Helm*.⁴⁶ All but one court that has applied the *Solem* test found that guideline sentences are rational and proportionate.⁴⁷

Perhaps the most well-founded challenge is a due process attack based on the lack of legislative rationale for the differential treatment given to crack from any other drug, most notably powder cocaine.⁴⁸ There is some evidence the Anti-Drug Abuse Act and the accompanying Federal Sentencing Guidelines Manual were an arbitrary attempt by politicians to appear to be "tough" on crime immediately preceding an election.⁴⁹ However, these too have

45. The Eighth Amendment provides that "cruel or unusual punishments [shall not be] inflicted." U.S. CONST. Amend. VIII (1791). The Supreme Court has indicated that these challenges will not likely succeed. See, e.g., *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C. Cir. 1989) ("This (Eighth Amendment) argument is baseless. There have been only three recognized instances of disproportionality rising to a level of an Eighth Amendment violation A ten year drug possession sentence simply does not approach the same level of gross inequity."). The Supreme Court has also indicated that successful challenges to the proportionality of particular sentences will be exceedingly rare. *Solem v. Helm*, 463 U.S. 277, 289-90 (1983). See also *United States v. Nicholson*, 17 F.3d 1294 (10th Cir. 1994); *United States v. Aguilera-Zapata*, 901 F.2d 1209 (5th Cir. 1990). For a discussion of the Eighth Amendment, see Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107 (1996); Travis A. Pearson, *Constitutional Law: Eighth Amendment Principle of Proportionality*, 31 WASHBURN L.J. 394 (1992).

46. *Solem*, 463 U.S. at 292. The Court looked to (1) the gravity of the offense and the harshness of the penalty; (2) the sentence imposed on other criminals in the same jurisdiction; (3) the sentence imposed for the same crime in other jurisdictions. *Id.* The *Solem* test has been criticized on the basis that the Eighth Amendment provides no guarantee of proportionality. See *Harmelin v. Michigan*, 507 U.S. 957, 989-99 (1991) (Kennedy, J., concurring).

47. *Frasier*, 981 F.2d at 94; *United States v. Simmons*, 964 F.2d 763, 767 (8th Cir. 1992), *cert. denied*, 506 U.S. 1011 (1992); *United States v. Pickett*, 941 F.2d 411 (6th Cir. 1991); *United States v. Avant*, 907 F.2d 623 (6th Cir. 1990); *United States v. Colbert*, 894 F.2d 373 (10th Cir. 1990), *cert. denied*, 496 U.S. 911 (1990); *United States v. Buckner*, 894 F.2d 975 (8th Cir. 1990). *United States v. Walls*, 841 F. Supp. 24, 31 (D.D.C. 1994), found that the application of the 100:1 ratio was cruel and unusual punishment. The appeal on the *Walls* case is still pending. That same circuit has recently rejected an Eighth Amendment, as well as a Fifth Amendment, challenge to the guidelines' crack sentences. *United States v. Thompson*, 27 F.3d 671, 678 (D.C. Cir. 1994).

48. The Fifth Amendment provides "no person shall be . . . deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V (1791). The Due Process Clause of the Constitution forbids Congress from enacting laws with no rational foundation and from enacting arbitrary laws. *Nebbia v. New York*, 291 U.S. 502, 537 (1934). For a discussion of the relevant considerations of such an attack on the guidelines, see Jack H. McCall, *The Emperor's New Clothes: Due Process Considerations Under the Federal Sentencing Guidelines*, 60 TENN. L. REV. 467 (1993); Jonathan E. Scharff, Comment, *Federal Sentencing Guidelines: Due Process Denied*, 33 ST. LOUIS U. L.J. 1049 (1989).

49. The Republicans and Democrats seemed to be in sort of a "tough on crime" battle in 1986, that each party "tried to out-do each other with proposals designed to combat crime,

failed.⁵⁰

Despite withstanding various constitutional challenges, the guidelines have received a great deal of criticism from different areas of the legal profession.⁵¹ Federal judges, while adhering to the guidelines, have been and continue to be very critical of them.⁵² At the 1991 Ninth Circuit Judicial Conference, the judges asked Congress to reconsider their treatment of crack in the guidelines.⁵³ One well-respected federal judge, upon retiring from the

certain that, effective or not, votes would be gained in the upcoming elections." See Wytmsa, *supra* note 39, at 477. See also Douglas O. Linder, *Journeying Through The Valley of Evil*, 71 N.C. L. REV. 1111, 1113 (1993) (discussing how political selfishness has caused "gross miscarriages of justice."). The sentencing ratio has been labeled "clearly arbitrary." Wytmsa, *supra* note 39, at 489. Apparently the 100:1 ratio had originally been a 50:1 ratio in the Crime Subcommittee's bill, H.R. 5394, and was arbitrarily doubled simply to symbolize congressional seriousness. See *Hearings before the United States Sentencing Commission on Proposed Guideline Amendments for Public Comment* 4 (1993) (testimony of Eric E. Sterling, President of the Criminal Justice Policy Foundation). According to others, the atmosphere resembled an "auction house" and was "frenzied and panic ridden." Michael Isikoff & Tracy Thompson, *Getting Too Tough on Drugs: Draconian Sentences Hurt Small Offenders More Than Kingpins*, WASH. POST, Nov. 4, 1990, at C2. The political climate at that time was clearly ripe for such an electoral strategy by either party. See Reinerman & Levine, *supra* note 25, at 562-63. For Republicans, America's drug problems provided the opportunity to impose their moral agenda, and for the Democrats, the drug issue presented the opportunity to recapture democratic defectors of the early 1980s. *Id.* The anti-drug speeches became so popular by the mid-eighties that conservative columnist William Safire complained of the "anti-drug hysteria." *Id.* For a discussion of the exact legislative progression of the Anti Drug Abuse Act of 1986, see *infra* note 235.

50. See, e.g., *United States v. Thomas*, 932 F.2d 1085, 1090 (5th Cir. 1991), *cert. denied*, 502 U.S. 1038 (1991) (Congress need not treat dissimilar drugs in a similar manner); *United States v. Buckner*, 894 F.2d 975, 980 (8th Cir. 1989) (The court, "cognizant of the message Congress intended to send to society by creating comparably stiff penalties for offenses involving cocaine base (crack)," found that the statute was rationally related to the congressional objective of protecting the public welfare from the dangerous propensities of crack and therefore, did not violate substantive due process.); *United States v. Solomon*, 848 F.2d 156, 157 (11th Cir. 1988) (holding that Congress could have rationally concluded that cocaine base (crack) "posed a particularly great risk to the welfare of society warranting heavy sentences."); *United States v. Collado-Gomez*, 834 F.2d 280, 281 (2d Cir. 1987) (holding that Congress' purpose of deterring "a particular insidious form of criminal activity" with enhanced penalties is "clear, unequivocal, and rational.").

51. See *infra* notes 52-57 and accompanying text (criticizing the guidelines).

52. See, e.g., *United States v. Moore*, 54 F.3d 92, 92 (2d Cir. 1995) (refusing to find that the guidelines violate equal protection but characterizing the arguments against the guidelines' treatment of crack as "raising troublesome questions about the fairness of the crack-cocaine sentencing policy."); *United States v. Singleterry*, 29 F.3d 733, 741 (1st Cir. 1994) (concluding that the guidelines were constitutional but that the defendant had "raised important questions about the efficiency and fairness of our sentencing policies for offenses involving cocaine."); *United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring opinion) (affirming a 15-year crack sentence but suggesting that Congress had "no rational basis to make the harsh distinction between powder and crack cocaine," and quoted the district judge's description of the sentence as a "tragedy.").

53. At the 1991 Ninth Circuit Judicial Conference, the judges in attendance adopted a resolution recommending that Congress make the sentencing guidelines permissive and non-

bench, had this to say about the guidelines: "If I remain on the bench, I have no choice but to follow the law. I cannot, in good conscience, continue to do this [impose guideline sentences]." ⁵⁴ In addition to judicial criticism, there has been a considerable amount of academic criticism of the guidelines. ⁵⁵ Summarized by one commentator, the guidelines are generally viewed as a "cure that is worse than the disease." ⁵⁶ He stated that "those who created the Guidelines are so wedded to their tenacious defense [state laws are not severe enough] that they remain oblivious to the systemic dissonance that they have created." ⁵⁷

B. State Views on Crack Sentencing

The states have divergent views on whether crack should be punished proportionally to powder cocaine. ⁵⁸ The majority of the states sentence crack and powder cocaine violations equally, meaning that they have a 1:1 ratio between crack and powder cocaine. ⁵⁹ However, a growing minority of states

binding. Eighty-five percent of those judges in attendance voted for this resolution. 9th CIRCUIT NEWS, CONFERENCE EDITION, Fall 1991, at 4.

54. Alexander Wohl, *The Calculus of Rationality*, A.B.A. J., Jan 1992, at 37, 39.

55. See Kathi A. Drew & R.K. Weaver, *Disproportionate or Excessive Punishments: Is there a Method for Successful Constitutional Challenges?*, 2 TEX. WESLEYAN L. REV. 1 (1995); Leitman, *supra* note 39 (discussing the guideline's treatment of crack and the potential inequities that may result from it); William W. Schwarzer, *Federal Sentencing Guidelines and Mandatory Minimum's: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405 (1992); Tafia, *supra* note 39 (discussing the disparate impact that the guidelines have on minorities); Eric P. Berlin, Comment, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187 (1993); Gerald F. Uelman, *Federal Sentencing Guidelines: A Cure Worse Than The Disease*, 29 AM. CRIM. L. REV. 899 (1992) (reviewing the negative consensus about the federal sentencing guidelines at a recent judicial conference); But see William W. Wilkins, *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. DAVIS L. REV. 571 (1992) (supporting the guidelines).

56. Uelman, *supra* note 55, at 899. A 100:1 ratio of crack to powder cocaine imposes sentences for possessing or trafficking 100 grams of crack that are, on average, three times the average prison sentence served by a murderer, four times the prison sentence for most kidnappers, five times the prison sentence for rapists, and ten times the prison sentence imposed for those who illegally possess guns. Richard Leiby, *A Crack in the System*, WASH. POST, Feb. 20, 1994, at F4.

57. *Id.* The "systemic dissonance" that he is referring to is discussed *infra* part III(A) and parts V(C)(1)-(5).

58. See *infra* notes 59-78 and accompanying text (discussing the various approaches that the states have taken in their sentencing of crack violations in comparison to the cocaine violations).

59. Alabama, ALA. CODE § 13A-12-231(2) (1993); Alaska, ALASKA STAT. §§ 11.71.010-11.71.070 (1993); Arizona, ARIZ. REV. STAT. ANN. § 13-3408(1993); Colorado, COLO. REV. STAT. § 18-18-405(3a) (West 1993); Delaware, DEL. CODE ANN. title 16, § 4753A(a)(2) (Supp. 1992) (trafficking), § 4751(a) (possession); District of Columbia, D.C. CODE ANN. § 33-541(c)(1)(A) (1993); Florida, FLA. STAT. ANN. § 893.135(1)(b) (West Supp. 1993); Georgia, GA. CODE ANN. § 16-13-31(a)(1) (1992); Hawaii, HAW. REV. STAT. §§ 712-1240 to 712-1246 (Supp. 1992); Idaho, Idaho Code § 37-2732(B)(2) (Supp. 1993); Illinois, ILL. REV. STAT. ch. 720, para. 570/401a (Smith-Hurd 1993) (manufacture or delivery), para. 570/402(a)

do distinguish between the two drugs.⁶⁰ Of the states which have established different quantity ratios, there are two distinct views.⁶¹ Some states follow the guidelines ratio or have enacted comparable ratios. These states include Connecticut (56:1),⁶² Missouri (75:1),⁶³ Maryland (90:1),⁶⁴ North Dakota,⁶⁵

(possession); Indiana, IND. CODE ANN. § 35-48-4-1 (Burns Supp. 1993); Kansas, KAN. STAT. ANN. § 65-4127a (1992); Kentucky, KY. REV. STAT. ANN. §§ 218A.1411-218A.1412 (Michie/Bobbs-Merrill Supp. 1992) (trafficking), §§ 218A.1415-218A.1416 (possession); Louisiana, LA. REV. STAT. ANN. § 40:967(A) (West 1992) (manufacture & distribution), § 40:967(F) (possession); Maine, ME. REV. STAT. ANN. tit.17-A, § 1103(3)(B) (West 1991 & Supp. 1993) (trafficking), § 1105 (aggravated trafficking), § 1106 (furnishing), § 1107 (possession); Massachusetts, MASS. ANN. LAWS ch. 94C, § 32E(b) (Law. Co-op. Supp. 1993); Michigan, MICH. COMP. LAWS ANN. §§ 333.7401-333.7403 (West 1992); Minnesota, MIN. STAT. ANN. §§ 152.021-152.025 (West 1993); Mississippi, MISS. CODE ANN. § 41-29-139 (1993); Montana, MONT. CODE ANN. § 45-9-101 (1993) (sale and possession); Nevada, NEV. REV. STAT. § 453.321 (1991) (manufacture and sale), § 453.336 (possession); New Hampshire, N.H. REV. STAT. ANN. § 318-B:26(I)(a)(1) (Supp. 1991); New Jersey, N.J. STAT. ANN. § 2C:35-10 (West 1993); New Mexico, N.M. STAT. ANN. § 30-31-20 (Michie 1989), § 30-31-22 (distribution), § 30-31-23 (possession); New York, N.Y. PENAL LAW § 220.06(5) (McKinney 1989), §§ 220.03-.21 (possession), § 220.31-.44 (sale); North Carolina, N.C. GEN. STAT. § 90-95(d)(2) (1993); Ohio, OHIO REV. CODE ANN. § 3179.99 (Anderson 1992); Oregon, OR. REV. STAT. § 475.992 (Supp. 1992); Pennsylvania, PA. STAT. ANN. tit.35, § 780-113(f)(1.1), §§ 821-825 (1993); Rhode Island, R.I. GEN. LAWS §§ 21-28-4.01 to 21-28-4.01.2 (Supp. 1993); South Carolina, S.C. CODE ANN. § 44.53-370(e)(2) (Law. Co-op. Supp. 1992) (trafficking in cocaine), § 44.53-375 (possession, distribution, and manufacture of crack); South Dakota, S.D. CODIFIED LAWS ANN. § 22-42-2 (1993); Tennessee, TENN. CODE ANN. § 39-17-417 (Supp. 1993); Texas, TEX. HEALTH & SAFETY CODE ANN. §§ 481.115-481.118 (West 1992); Utah, UTAH CODE ANN. § 58-37-8 (Supp. 1993); Vermont, VT. STAT. ANN. tit. 18, § 4231 (Supp. 1993); Virginia, VA. CODE ANN. § 18.2-250 (Michie 1993); Washington, WASH. REV. CODE ANN. § 69.50.401 (West Supp. 1993); West Virginia, W.VA. CODE § 60A-4-401 (1992); Wisconsin, WIS. STAT. ANN. § 161.41 (West 1993); Wyoming, WYO. STAT. § 35-7-1031 (1988).

60. See *infra* notes 62-78 (discussing the states that treat crack and powder cocaine differently and how they achieve their sentencing differential).

61. Compare *infra* notes 62-66 and *infra* notes 68-72 (discussing the two "schools" of state sentencing ratios of crack to powder cocaine).

62. CONN. GEN. STAT. ANN. § 21a-278(a) (West 1993) (providing that any person who manufactures, distributes, transports, or possesses with intent to distribute, gives or administers 1 or more grams of powder cocaine or .5 ounces of crack is sentenced to a mandatory minimum sentence of 5 years and not more than 20 years).

63. MO. ANN. STAT. § 195.222(2) & (3) (Vernon Supp. 1993) (trafficking), § 195.223(2) & (3) (possession). The Missouri statutes provide that offenses involving more than 150 grams but less than 450 grams of powder cocaine are Class A felonies. *Id.* An offense involving 450 grams or more is also a Class A felony, but the offender may not receive probation or parole. *Id.* The quantities that trigger the same sentences for offenses involving crack are more than 2 but less than 6 grams, and 6 or more grams, respectively. *Id.*

64. MD. ANN. CODE art. 27, § 286(f) (1992 & Supp. 1993). The Maryland Criminal Code provides for a mandatory minimum penalty for trafficking 448 gram of powder cocaine and for trafficking 50 grams of crack. *Id.* The Maryland sentencing scheme also provides for "drug kingpin" enhanced penalties for offenders that meet the statutory definition of a certain quantity of controlled substance, but does not provide for different penalties for crack and powder cocaine. See COCAINE AND POLICY, *supra* note 13, at 132.

65. N.D. CENT. CODE § 19-03.1-23.1.1(c) (1991). The criminal code provides for increased

and Iowa (100:1).⁶⁶ Other states have enacted intermediate minimum threshold ratios that punish crack more severely than powder cocaine, but not nearly as harshly as the guidelines.⁶⁷ These states include Oklahoma (6:1),⁶⁸ Nebraska (7:1),⁶⁹ Alabama (10:1),⁷⁰ the District of Columbia (10:1),⁷¹ and now Ohio.⁷² Some other states have distinguished between crack and powder cocaine by establishing sentencing schemes that result in crack defendants being subject to harsher penalties than powder cocaine defendants.⁷³ Such alternative schemes have been enacted in California,⁷⁴ Louisiana,⁷⁵ South

penalties in offenses involving 500 grams of powder cocaine or 5 grams of crack. *Id.* However, below these thresholds, all controlled substances are sentenced alike. *Id.*

66. IOWA CODE § 124.401(1)(a)(2), (3) (West Supp. 1993). This ratio is not a 100:1 quantity minimum threshold ratio like the guidelines, but rather the 100:1 ratio is reflected in the threshold amounts that determine maximum statutory penalty. *Id.* In other words, a defendant must actually possess 100 more grams of powder cocaine in weight than crack to trigger the same statutory maximum penalty.

67. See *supra* notes 113-23 (discussing the guidelines 100:1 ratio).

68. OKLA. STAT. ANN. tit. 63, § 2-415(C)(2), (7) (West Supp. 1993). Oklahoma provides ten-year mandatory minimum penalties for offenses involving 28 grams of powder cocaine or 5 grams of crack. *Id.* It also provides a 20-year mandatory minimum for offenses involving 300 or more grams of powder cocaine or 50 grams of crack. *Id.*

69. NEB. REV. STAT. § 28-416(7) & (8) (Supp. 1992). An offender is subject to punishment for a Class IC felony for 7 or more ounces of powder cocaine or 28 grams of crack are involved in the offense. *Id.*

70. ALA. CODE § 13A-12-231(2) (1993). Alabama does not differentiate penalties for crack and powder cocaine, but uses a 10:1 ratio for determining eligibility for its diversion program. The penalties for powder cocaine and crack are determined by the quantity involved. However, an offender may not be included in the diversion program if they possess or traffick more than 5 grams of powder cocaine or .5 grams of crack.

71. D.C. CODE ANN. § 33-541(c)(1)(A) (1993). The District of Columbia provides a 5-year term for a first offense and a 10-year term for a second offense. The threshold amount for powder cocaine is 500 grams and 50 grams for crack. *Id.* The Code further distinguishes between crack and powder cocaine by providing that if the threshold amounts are not met, certain mandatory minimum penalties are imposed. These minimums differ for crack and powder cocaine in that a first offense for powder cocaine requires 4, 7, and 10 years, depending on whether it is the offender's first, second, or third offense, and 5, 8, and 10 years for crack, respectively. See COCAINE AND POLICY, *supra* note 13, at 131.

72. See *infra* parts IV(B)(1)-(5) (discussing Ohio's adoption of S.B. 2 and its sentencing scheme).

73. See *infra* notes 74-78 and accompanying text (setting forth those states with "alternative" schemes to differentiate crack from powder cocaine).

74. CAL. HEALTH & SAFETY CODE, § 11350 (West 1991). Individuals convicted of possession or possession with intent to distribute crack and powder cocaine are sentenced to different terms. Crack defendants are sentenced to a 3-5 year term, while powder cocaine defendants receive a lesser 2-4 year term. *Id.* California also has enhancements for large quantities of drugs, but when calculating the quantity levels necessary to trigger these enhancements no distinction is made between crack and powder cocaine. *Id.*

75. LA. REV. STAT. ANN., § 40:967(A) (West 1992). Louisiana provides a sentencing range of 5-30 years for trafficking in any amount of powder cocaine and a sentencing range of 20-50 years for trafficking in any amount of crack. *Id.*

Carolina,⁷⁶ Virginia,⁷⁷ and Wisconsin.⁷⁸

C. *Extreme Disparity Between State Sentences and Federal Guidelines*

As a result of the dual state and federal jurisdiction to prosecute defendants guilty of the same crime, the offenders now run the risk of receiving vastly different sentences depending on whether they are prosecuted in federal or state court.⁷⁹ While only effecting approximately 5% of crack offenders,⁸⁰ federal sentences are often considerably harsher than the equivalent state sentence.⁸¹ A study done by the United States Sentencing Commission found

76. S.C. CODE ANN., § 44.53-370(e)(2) (trafficking in powder cocaine), § 44.53-375 (possession, distribution, and manufacturing of crack) (Law Co-op. Supp. 1992). This scheme is very complex in that it involves separate offenses for possession, distribution, and manufacturing of crack and powder cocaine with different minimum and maximum penalties. The penalties for distributing powder cocaine are more stringent than those for crack: 5-30 years for a first offense involving the distribution of powder cocaine and 15-30 for a second offense, as compared to 0-25 for a first offense involving the distribution of crack and 0-30 years for a second offense. *Id.* However, there is a separate statute that directs sentences for particular quantities of powder cocaine involved within the larger minimum and maximums. See COCAINE AND POLICY, *supra* note 13, at 133-34. These sentencing ranges are based upon the same quantities of the two drugs. *Id.* There are also different maximum penalties for offenses involving possession, with crack being sentenced more severely than powder cocaine: for example, crack first offenses receive a maximum of 5 years, while a powder cocaine first offense receives a 2 year maximum. *Id.*

77. There is no distinction between crack and powder cocaine and the penalties for both drugs are determined according to schedule II of controlled substances. VA. CODE ANN. 18.2-248 (1993 Supp.). However, Virginia recently enacted a "kingpin" statute that provides a 20-year mandatory minimum for those who traffick above certain amount of controlled substances. See COCAINE AND POLICY, *supra* note 13, at 134. The "kingpin" level is 500 kilograms for powder cocaine and 1.5 kilograms for crack. *Id.* This results in a 333:1 ratio.

78. In Wisconsin, drug weight ratios vary depending upon the quantity of drugs. WIS. STAT. ANN., § 161.41 (West 1993). For example, 3 grams or less of crack gets a 1-year mandatory sentence, while 25-100 grams of powder cocaine gets the same penalty. *Id.* This varies between the ratios of 8:1-33:1. A 3-year mandatory minimum is imposed for offenses involving 3-10 grams of crack and 100-400 grams of cocaine. *Id.* This ratio varies between the ratios of 33:1-40:1. *Id.* A 5-year mandatory sentence is imposed for offenses involving between 10-40 grams of crack and 400-800 grams of powder cocaine. *Id.* This ratio varies between 40:1 and 20:1. For offenses that involve more than 40 grams of crack and more than 800 grams of powder cocaine a 10-year mandatory minimum is imposed. *Id.* The end ratio is 20:1. *Id.*

79. See *infra* notes 80-82 and accompanying text. See also Edward A. Tafe, *Sentencing Drug Offenders in Federal Courts: Disparity and Disharmony*, 28 U. S.F. L. REV. 1412 (1994).

80. OFFICE OF THE ATTORNEY GENERAL, U.S. DEP'T OF JUSTICE, COMBATING VIOLENT CRIME 4 (July 1992) ("Nineteen out of twenty crimes are still prosecuted by the states.").

81. Compare *supra* notes 36-37 (setting forth the applicable federal sentences) and notes 59-78 (setting forth the various state sentences). This situation has been labeled, quite accurately, a "cruel lottery" in which a small minority of defendants are selected for federal prosecution and receive extremely disparate punishment compared to those who are sentenced in state court. Sara Sun Beale Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 997 (1995). The present scheme has also been referred to as "a system with the predictability of a walk in

that drug offenders prosecuted in federal court served approximately 84 months in prison, while those prosecuted in state courts usually serve an average of 20 months.⁸² This fact blatantly derogates the very purpose behind the Federal Sentencing Reform Act,⁸³ which sought to eliminate such sentencing disparity among similarly situated defendants.⁸⁴ Congress is now very aware of the problems that such a disparity creates and has yet to take affirmative action to remedy them.⁸⁵ This disparity among similarly situated defendants will continue unless the gap between the federal and state sentences are bridged. Sadly, it is often this disparity that compels federal prosecutors to use the federal, rather than the state forum.⁸⁶

under tall trees in a thunderstorm." Wallace, *supra* note 3, at 52. In *United States v. Williams*, a defendant was recommended for eighteen months incarceration according to the state sentencing guidelines, but was to receive a mandatory minimum federal sentence of ten years. 746 F. Supp. 1076, 1078-79 (D. Utah 1990), *rev'd on other grounds*, 63 F.2d 1337 (10th Cir. 1992). In *United States v. Woodard*, a defendant who was prosecuted by both state and federal prosecutors received probation in the state court, but received 5 years in prison in the federal court. 927 F.2d 433 (8th Cir. 1991), *cert. denied*, 502 U.S. 887 (1991). Some very startling results occur when one co-defendant is prosecuted in state court and the other co-defendant is prosecuted in a federal court. In *United States v. Palmer*, one co-defendant received no jail time while the other co-defendant, prosecuted in federal court, received a ten year federal sentence. 3 F.3d 300, 305 n.3 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1120 (1994). For a discussion of the unwanted disparity created by the guidelines, see Wilkins, *supra* note 34 (discussing the Sentencing Reform Act and the resulting disparity).

82. BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, "Drugs, Crime, and the Justice System," 78-80 (Dec. 1992).

83. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1990 (codified as amended at 18 U.S.C. § 3553(a)(6) (1994)).

84. One of the goals of the legislation was to:

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices. . . .

Id. at § 217, 98 Stat. 2018 (codified at 28 U.S.C. § 991(b)(1)(B) (1994)).

For further discussion of the impact of disparate sentences of defendants guilty of similar crimes, see Beale, *supra* note 81, at 1002-1004.

85. In light of the congressional disapproval of the U.S. Commission's proposed amendments to the guidelines, and the extensive debates that accompanied their decision, it is clear that Congress, by now, is fully aware of exactly how the guidelines relate to state sentences. See *infra* part IV(A) (discussing Congress' rejection of the proposed amendments to the guidelines). Prior to the proposed amendments to the federal guidelines, there were arguments made that Congress may treat crack differently if they knew the problems associated with the disparity between the federal guidelines and the sentences available in the states. See Beale, *supra* note 81, at 1003.

86. See parts III(B) & (D) and parts V(C)(2) & (3) (discussing the problems associated with using the more severe federal sentences as a reason to use federal courts to prosecute crack violations).

III. PROBLEMS CREATED BY DIFFERING STATE AND FEDERAL SENTENCES

A. Federal Forum Shopping for Harsh Federal Sentences

The decision whether to prosecute a drug offender in federal court or to leave it to the state is purely discretionary.⁸⁷ The United States Attorney's Manual⁸⁸ sets objective criteria for deciding whether to proceed with a federal prosecution, including "probable sentence."⁸⁹ For prosecuting a drug offense specifically, the Manual sets forth the following factors to consider: (1) degree of federal involvement; (2) effectiveness of state or local prosecutors (including the penalties available);⁹⁰ (3) amount of drug involved; (4) the violator's background; and (5) the backlog of cases in federal court.⁹¹ Unfortunately, the objectivity offered by the U.S. Attorney's Manual standards is often diffused or disregarded by federal prosecutors.⁹² It is likely that the single most important factor that federal prosecutors have in mind when bringing federal drug charges is the severity of the federal sentence in relation

87. A prosecutors decision to bring a "state" case in federal court is unreviewable. *See. e.g.,* United States v. Armstrong, 48 F.3d 1508, 1514 (9th Cir. 1995); United States v. Smith, 30 F.3d 568, 572 (4th Cir. 1994); United States v. Jacobs, 4 F.3d 603, 604-05 (8th Cir. 1993); *Palmer*, 3 F.3d at 300, 305-06 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1120 (1994). Prosecutors often have the choice to initiate criminal cases in either federal or state court. Ellen A. Peters, *State-Federal Judicial Relationships: A Report From the Trenches*, 78 Va. L. Rev. 1887, 1891 (1992); *see generally* Tobin J. Romero, *Prosecutorial Discretion*, 83 Geo. L.J. (1995).

88. U.S. DEP'T. OF JUSTICE, U.S. ATTORNEYS' MANUAL §§ 9-27.000 to 9-27.750B (hereinafter U.S. ATTORNEYS' MANUAL).

89. The federal prosecutors are to consider "all relevant considerations, including federal law enforcement policies, the nature and seriousness of the offense, the deterrent effect of the prosecution, the person's culpability in connection with the offense, and the probable sentence or other consequences." *Id.* § 9-27.230. The comments conclude that each case will dictate whether there should be a federal prosecution and the list provided is not all inclusive. *Id.* § 9-27.230 cmt. The ambiguity and general lack of guidance set forth by these standards is made even worse by the standards themselves, stating that "[a] United States attorney may modify or depart from the principles set forth herein as necessary in the interests of fair and effective law enforcement within the district." *Id.* § 9-27.140. Therefore, these factors provide guidance unless the prosecutor does not want guidance, in which case they are free to do as they please.

90. In addition to generally lower state sentences that tend to impact on federal prosecutors choice of forum, *see infra* note 261, state effectiveness is likely lower than federal courts. State courts are chronically under-funded, which is especially exacerbated by the demands of drug prosecutions. Peters, *supra* note 87, at 1887. Forty percent of state convictions are overturned as a result of the inadequacy of state procedures. *Id.* at 1888. This inadequacy may be further heightened by the lack of well funded appointment programs and well prepared legal counsel. *Id.* For a general discussion of the quality of state courts compared to federal courts, *see* J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967).

91. U.S. ATTORNEYS' MANUAL, *supra* note 88, at § 9-101.200.

92. There are varying interpretations between federal districts as to exactly what these

to the state sentence.⁹³

B. Unsatisfied State Interest in Prosecuting Crack Violations

While one may argue the state interest has been satisfied by a federal prosecution, there are some inescapable ramifications resulting from federal prosecution;⁹⁴ notably, the fundamental tension it creates with the values of decentralization promoted by federalism.⁹⁵ Subsequent state prosecution is

standards mean and how they should be applied in deciding whether to use federal court to prosecute crimes. Beale, *supra* note 81, at 1000. There are also numerous cases of federal prosecutors, or those influencing federal prosecutors, totally disregarding any objectivity and using their own arbitrary standards in deciding whether to use federal court. For example, U.S. Attorney for the Southern District of New York Giuliani initiated "federal day" in the Southern District of New York, where the determinative factor on whether a defendant was prosecuted in state or federal court was the day on which they were apprehended. Alexander Stille, *A Dynamic Prosecutor Captures the Headlines*, NAT'L L.J., June 17, 1985, at 48. This was in order to create a "Russian Roulette" effect for deterring crime. *Id.* Another odd federal prosecution strategy was when the prosecutors in the Eastern District of Pennsylvania issued a press release stating that they intended to make an example out of a particular defendant who was going to be prosecuted in federal rather than state court. See Wallace, *supra* note 3, at 52. This same district also utilized a program called FAST — Federal Alternative to State Trials — that allowed federal courts to adopt certain state cases to relieve overcrowding in local prison. *Id.* at 53.

93. See e.g., Beale, *supra* note 81, at 1003 ("Sentencing is probably the most important factor that motivates federal prosecutors to bring federal charges when there is dual jurisdiction"); Peters, *supra* note 87, at 1891 (1992) ("Although many state legislatures have recently enacted mandatory minimums, the availability of the Federal Sentencing Guidelines appears to be a strong incentive for prosecutors to pursue criminal litigation in a federal forum."). In addition to harsher federal sentences, there are often procedural advantages that offer an additional incentive for federal prosecutors to use federal court rather than state court to prosecute crack violations. See Beale, *supra* note 81, at 1003. For example the Federal Rules of Criminal Procedure allow more permissive joinder than do many states. *Id.* Also, the discovery available in state courts is often more restrictive than under the Federal Rules. *Id.* These factors allow the federal prosecutors to forum shop for a procedural advantage in federal court. *Id.* Such forum shopping for a federal procedural advantage has been upheld by the courts. *United States v. Ucciferri*, 960 F.2d 953 (11th Cir. 1992) (stating that the court had no discretion to review a federal prosecutors decision to bring a "state" case to federal court to take advantage of less stringent procedural standards). This incentive may be reinforced by state court decisions interpreting state constitutions to provide for greater procedural protection than the federal constitutional law currently affords. See, e.g., *State Constitutions and Criminal Procedure: A Primer for the 21st Century*, 67 OR. L. REV. 689 (Ken Gormley ed., 1988); John Kincaid & Robert F. Williams, *The New Judicial Federalism: The States' Lead in Rights Protection*, 65 J. ST. GOV'T, Apr.-June 1992, at 50; Ellen A. Peters, *State Supreme Courts in Our Evolving Federal System*, 17 INTERGOVERNMENTAL PERSP., Fall 1991, at 21.

94. See notes 95-98 and accompanying text (discussing the impact upon the states of a federal prosecution).

95. See *infra* notes 280 & 282 and accompanying text (discussing the federalist notion that states are the traditional regulator of crime and the concept of "states' rights" stemming from the Ninth and Tenth Amendments). States also presently serve as the "natural and convenient means to achieve the managerial benefits that flow from decentralization of certain governmental functions." Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 951 (1994).

also seriously hampered by a preceding federal prosecution.⁹⁶ Notwithstanding the obvious state interest in prosecuting the crime, there are many other implications of a federal prosecution of state crimes.⁹⁷ The negative implications cast upon the rest of the criminal justice system by excessive federal prosecution begs the question whether prosecutors' choice of the federal forum is creating solutions or more problems.⁹⁸

C. Burden on the Federal Court System

The federal judiciary is small by design and has become overburdened by the increased responsibility of hearing additional criminal cases.⁹⁹ The number of drug cases that were prosecuted in federal court quadrupled between 1980 and 1992.¹⁰⁰ In addition to the all-time high number of drug cases heard in federal court, a disproportionate share of judicial resources is being devoted to those drug cases.¹⁰¹ The guidelines require that more extensive

96. Federal writs of habeas corpus require the exhaustion of state-court procedures for appellate and collateral review. 28 U.S.C. § 2254(b) (1994). Therefore, federal courts often invalidate state court convictions long after the original prosecution has been completed, impairing the chances that the state can successfully re-prosecute a defendant who has prevailed in federal habeas corpus litigation. See John B. Oakley, *Essay on Jurisdictional Reform, the Transformation of Property, and the New Age of Information*, 66 S. CAL L. REV. 2233, 2236 (1993). As many as 40% of state convictions are overturned as a result of federal habeas corpus proceedings. See Ronald J. Tabak & Mark Lane, *Judicial Activism and Legislative Reform of Habeas Corpus: A Critical Analysis of Recent Development and Current Proposals*, 55 ALB. L. REV. 1, 11 (1991). Most importantly, many states are unable to pursue a subsequent prosecution based upon their own substantive law. See *supra* note 2 (discussing the state laws that basically preempt themselves from prosecuting a crime of the federal government has already prosecuted it).

97. For example, many of the most promising current trends in criminal enforcement begin at the state and local levels, including specialized drug courts, community policing, and sentencing guidelines. Beale, *supra* note 81, at 994. There are also many efficiency factors such as the greater size of the state judiciary, their geographical proximity to the parties, witnesses, and jurors. *Id.* The family of the prisoners are nearby when serving in a state prison, which is an important factor for their social support while in prison. *Id.* Federal prosecutors also have a much greater area to cover and cannot keep in as close of touch with the community. *Id.*

98. See *infra* parts V(C)(1), (2), & (3) (discussing federal forum shopping for more severe federal sentences and the impact that this has on the federal judiciary).

99. See *infra* notes 100-103 and accompanying text (discussing the increase of federal drug prosecutions and their impact upon the available federal judicial resources).

100. The number of drug cases filed in the federal courts rose from 3,130 cases (6,678 defendants) in 1980 to 12,833 cases (25,033 defendants) in 1992. See ADMIN. OFFICE OF THE U.S. COURTS, 1992 ANNUAL REPORT OF THE DIRECTOR, 248 tbl. D-2 (1992); ADMIN. OFFICE OF THE U.S. COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR A-56, tbl. D-2 (1980). See also REPORT OF THE FEDERAL COURTS STUDY COMM. 4-10, 35-38 (1990) (federal courts are nearing a caseload crisis from the increasing number of federal narcotics prosecutions).

101. For example, in the Southern District of Florida, 84% of judicial resources are spent on criminal cases leaving only 16% left for civil cases. See Judge Stanley Marcus, Speech at the Western Regional Conference on State-Federal Judicial Relationships 4 (June 5, 1993)

factual findings and legal conclusions be made by federal judges in each case.¹⁰² In fact, federal crack prosecutions contribute more to this problem than any other federal charge.¹⁰³

At the present rate of growth, many feel the very nature of the federal judiciary will soon change.¹⁰⁴ It is estimated that more than 4,000 federal judges will be necessary by the year 2020 to meet the ever increasing caseload.¹⁰⁵ Such expansion may violate the basic notions of federalism on

(transcript on file with Hastings Law Journal). By 1992, thirty-eight of the ninety-two federal districts devoted more than 50% of their time to criminal cases. See ADMIN. OFFICE OF THE U.S. COURTS, *THE CRIMINAL CASELOAD: THE NATURE OF CHANGE I* (1994) [hereinafter *THE CRIMINAL CASELOAD*]. Some district courts have not been able to hear a civil case for more than a year. See Miner, *supra* note 1, at 686 (quoting a judge from the Eastern District of New York). See also Stephen Labaton, *New Tactics in the War on Drugs Tilt Scales of Justice Off Balance*, N.Y. TIMES, Dec. 29, 1989, at A1, A18 (district judge only able to try one civil case in two years and has 20 civil cases ready for trial but neither has the time or resources to begin trial). A Federal Judicial Center time study found that cocaine distribution cases take four times as much judicial resources as cases for possession of the same drug. *THE CRIMINAL CASELOAD, supra*.

102. Ninety percent of federal district judges surveyed by the Federal Courts Study Committee stated that sentencing had become more time consuming, with more than half reporting an increase of at least 25% and a third reporting an increase of more than 50% in the time required for sentencing. See *THE CRIMINAL CASELOAD, supra* note 101, at 137. Since 1975, the conviction rate of federal drug violations has increased from seventy-five percent to eighty-five percent. See *THE CRIMINAL CASELOAD, supra* note 101, at 10. The Speedy Trial Act, 18 U.S.C. § 3162(a) (1994), exacerbates this problem by requiring that criminal cases receive preferential treatment by the federal courts and be promptly resolved. The result of this is to postpone very important civil cases for periods as long as a year beyond their scheduled hearing date. In response to the significant burdens and time constraints placed upon federal courts by the Act, the courts have responded by reducing the trial resources available for the civil cases. See Beale, *supra* note 81, at 987-88.

103. In 1993, the number of drug defendants in federal court increased by 10%. U.S. SENTENCING COMM'N, ANNUAL REPORT (1993). Of those defendants prosecuted for crack offenses, 97.6% receive prison time. *Id.* The next most likely offense to receive prison time are offenses involving methamphetamine, of which 78% received prison terms. *Id.* Powder cocaine offenses were sentenced to prison terms 63% of the time. In addition to being the most likely to receive jail time, crack offenses also received the longest prison terms of any drug offense, at an average of 97 months. *Id.*

104. See William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WISC. L. REV. 1, 7 (1993) ("Continuation of the current trend toward large scale federalization of criminal law has the enormous potential of changing the character of the federal judiciary.") [hereinafter Rehnquist, *Seen Darkly*]. See also generally William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1657 (1992) [hereinafter Rehnquist, *Welcoming Remarks*]; Jonathon D. Varat, *Determining the Mission and Size of the Federal Judiciary Via a Three Branch Process: The Judges' Debate and a Reform Menu*, 27 CONN. L. REV. 885 (1995); J. Clifford Wallace, *Developing the Mission of the Federal Courts—A Method to Determine the Size of the Federal Judiciary*, 27 CONN. L. REV. 851 (1995); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147 (1994).

105. See COMM. ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., PROPOSED LONG RANGE PLANS FOR THE FEDERAL COURTS 13, tbl. 6, 16 (Draft for Public Comment, Nov. 1994). The Judicial Conference has created a formula to calculate the

which this country was founded.¹⁰⁶ The availability of the state forum for prosecuting drug cases, while still satisfying the federal interest, would provide needed relief to the federal courts.¹⁰⁷

D. Cost to the Other Branches of the Criminal Justice System

The cost to the federal and state prison systems of extremely harsh crack sentences is also overwhelming.¹⁰⁸ For example, the Congressional Budget Office (CBO) estimated that the cost differential between a 100:1 ratio and a 1:1 ratio to the federal prison system would be approximately \$15,000,000 in fiscal year 1996 and would increase to about \$90,000,000 by fiscal year 2000.¹⁰⁹ Additionally, the (CBO) states that the longer prison terms imposed by a 100:1 crack to powder cocaine ratio further increases the cost to federal prisons because they remain at the current spending levels per prisoner.¹¹⁰ Presumably, comparable costs would accompany comparable state sentences.¹¹¹

IV. LEGISLATIVE REVISIT OF THE CRACK TO POWDER DISPARITY

Congress and many state legislatures have taken a second look at the

expansion of the federal judiciary and, according to this formula, the Ninth Circuit alone will need 382 circuit judges, more than twice the size of the entire current federal appellate bench. See Rehnquist, *Seen Darkly*, *supra* note 104, at 3.

106. Historically, the responsibility for the "day to day maintenance of order in the society" has rested with local law enforcement. Norman Abrams, *Report on Jurisdiction*, in NAT'L COMM'N ON REFORM OF FED. CRIM. LAWS, WORKING PAPERS 33 (1970). This flows from the Constitution's own preference for decentralized government, which is the essence of federalism, as embodied in the Ninth and Tenth Amendments, which protect individual liberties and state prerogatives, respectively, from state encroachment. CLINT BOLICK, GRASSROOTS OF TYRANNY: THE LIMITS OF FEDERALISM 14 (Cato Inst., 1993). See also Beale, *supra* note 81, at 992-96 (discussing the impact of increased federal regulation on states and concept of federalism).

107. Beale, *supra* note 81, at 1013 (proposing federal legislative judgement be used over and become part of the state's prosecutorial jurisdiction). Such exercises of power have been upheld in the past. See *Palmore v. United States*, 411 U.S. 389, 397-410 (1973). For a discussion of the increased feasibility of greater state crack prosecutions, see *infra* parts V(C)(4) & (5) (discussing the financial ability of Ohio, under the S.B. 2 sentencing scheme, to accommodate a greater caseload).

108. See notes 109-11 and accompanying text (discussing the cost increases of very high sentences for crack violations). For a discussion of the effect of the increase in federal drug prosecutions, see Wallace, *supra* note 28, at 12.

109. *Id.* (testimony of Henry Clyde, Chairman of the Committee on the Judiciary).

110. H.R. REP. NO. 272, 104th Cong., 1st Sess. (1995), reprinted in 1995 U.S.S.C.A.N. 335. The average increased sentence imposed by the guidelines is approximately two years. *Id.* The guidelines effect approximately 5,000 prisoners per year at a cost of around \$20,000 per year to maintain them. *Id.*

111. This is not the case under S.B. 2. See *infra* part V(C)(5) (discussing the ability of S.B. 2 to both save prison costs and to impose longer sentences for crack).

current federal and state sentencing of crack relative to powder cocaine.¹¹² The trend seems to be toward a "middleground approach" to crack sentencing that continues to treat crack more severely than powder, while keeping the sentences low enough to remain proportional to crack's impact on society.¹¹³

A. *Proposed Congressional Amendments to the Federal Guidelines*

In the 1994 Violent Crime Control and Law Enforcement Act,¹¹⁴ Congress directed the United States Sentencing Commission to reexamine the 100:1 ratio imposed by the guidelines.¹¹⁵ On May 1, 1995, the Commission submitted its recommendations to Congress regarding sentencing policy for crack cocaine.¹¹⁶ By a 4-3 vote, the U.S. Commission proposed amendments to the guidelines that would equalize the sentences for crack and powder cocaine, a 1:1 ratio.¹¹⁷ The rationale behind the amendments was the

112. See *infra* parts IV(B)(1)-(5) (discussing Ohio's legislative revisit in S.B. 2) and part IV(A) (discussing Congress' consideration of the U.S. Sentencing Commission's proposed amendments to the federal guidelines).

113. See *infra* notes 120-23 (discussing the proposed amendments to the guidelines, finding a heightened risk presented by crack but being unprepared to suggest a better alternative), part IV(B)(4) (discussing the legislative rationale behind S.B. 2), and *supra* notes 68-78 (discussing the growing minority of states that have reflected similar concerns in higher crack sentences).

114. Pub. L. 103-322, § 280006 (1994) (Crime Bill).

115. The U.S. Commission has continuing statutory authority to propose amendments to the Guidelines Manual through the Sentencing Reform Act. 28 U.S.C. § 994-95 (1994). The Commission must submit their amendments to Congress for a 180 day review period which will take effect on November 1 of the year proposed "unless . . . the amendment is otherwise modified or disapproved by Act of Congress." *Id.*

116. The Commission's amendments were contained within their report to Congress, COCAINE AND POLICY, *supra* note 13, at 198. The entire report discussed the properties and effects of crack and powder cocaine and compared them on numerous characteristics. While the report contains extensive research, the only proposal to Congress was:

The Commission strongly recommends against a 100:1 quantity ratio. Having said that, the Commission is not prepared in this report to recommend a specific different ratio or specific different structural approach to deal with the enhanced dangers believed to be presented by crack. Rather, as a priority matter, the Commission intends to develop a model or models for Congress to consider in determining whether to revise the current approach that it takes in the sentencing of crack offenses.

Id.

117. COCAINE AND POLICY, *supra* note 13. Proposed amendment 5 of the Commission's revised guidelines seeks to change §§2D1.1(c) and 2D2.1 of the Guidelines Manual. Section 2D1.1(c) governs the sentencing for the trafficking of crack cocaine and §2D2.1 governs the sentencing of possession of crack. *Id.* The amendments seek to bring about equal treatment of crack and powder cocaine by manipulating the "quantity thresholds." The minimum threshold is the minimum amount of a certain drug that will trigger a mandatory sentence. *Id.* The amount of crack necessary to trigger a certain sentence is 100 times less than the amount of powder cocaine necessary to trigger the same mandatory sentence in the guidelines. *Id.* The proposed amendments seek to make the amount of crack required to trigger a certain mandatory sentence equal to the amount of powder cocaine necessary to trigger the same sentence. *Id.*

Commission's finding that the guidelines' crack sentences were too harsh.¹¹⁸ They felt that such extremely disparate treatment of variations of the same drug requires a strong underlying policy, which was lacking in the enactment of the original 100:1 ratio by Congress.¹¹⁹

The Judiciary Committee's Crime Subcommittee rejected to the Commission's proposed amendments.¹²⁰ The Committee's rejection of the amendments was based on several concerns.¹²¹ First, the equal treatment of the two drugs would not satisfy their concern over the significant distinctions between the drugs.¹²² Second, the proposed guideline amendments relating to crack were inconsistent with current mandatory minimum penalties.¹²³

Despite three Commission members dissenting on the issue of whether the sentences of crack and powder cocaine should be equal, all agreed the current 100:1 ratio was too high. *See generally* COCAINE AND POLICY, *supra* note 13. For a discussion of many of the issues that faced the Commission, see Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291 (1993).

118. *See generally* COCAINE AND POLICY, *supra* note 13, at 195-98.

119. COCAINE AND POLICY, *supra* note 13. Specifically, the Commission stated:

Although the Guidelines provide punishment for some of the factors that led Congress to establish the 100:1 ratio, the Guidelines do not address all of the factors that concerned Congress Such a vast difference in the quantity of drug necessary to trigger the same sentence would be acceptable if the threat of increased dangers and harms created by crack versus powder cocaine appeared commensurate. Yet, even though crack is arguably more addictive than powder . . . the Commission cannot say that the increased likelihood of dependency or binge is commensurate with a ratio differential as great as 100:1.

Id. at 196-97.

Rather enigmatic is that the Commission clearly recognized important differences between the two drugs: crack is more addictive; it accounts for more emergency room visits; it has a greater likelihood of being associated with violence; it is most popular among juveniles; and crack dealers tend to have more extensive criminal records; and tends to be distributed most often by juveniles. H.R. REP. NO. 272, 104th Cong., 1st Sess. (1995), *reprinted in* 1995 U.S.S.C.A.N. 335. *See also supra* note 49 and *infra* note 235 (discussing the circumstances surrounding the guidelines' enactment and the seemingly arbitrary figure of 100:1 used by Congress). However, it proposed equal treatment of the drugs.

120. H.R. REP. NO. 272, 104th Cong., 1st Sess. (1995), *reprinted in* 1995 U.S.S.C.A.N. 335 (1995) (ratifying H.R. 2259, which approved most of the Commission's recommendations except for the provisions regarding the equal sentencing treatment of crack and powder cocaine). The Committee, however, seemed not to affirm the current ratio, only disapprove of a 1:1 ratio. *See infra* notes 244-245.

121. *See infra*, notes 122-23 and accompanying text (discussing the reasons why the Judiciary Committee was dissatisfied with the amendments to the Guidelines Manual).

122. H.R. REP. NO. 272, 104th Cong., 1st Sess. 4 (1995). The Commission found that crack is "a more dangerous and harmful substance than cocaine powder for a number of reasons. It is the more psychologically addictive of the two substances through the most common routes of administration. Additionally, the open-air street markets and crack houses used for the distribution of crack . . . which can be broken down and packaged into very small and inexpensive quantities for distribution to the most vulnerable members of society and . . . contributes heavily to the deterioration of neighborhoods and communities." *Id.* at 12.

123. *Id.* This concern is founded on the fact that equal treatment of the drugs would result

B. Ohio's New Sentencing Guidelines-A "Middleground" Approach

1. Introduction to Senate Bill 2

While some states feel that it is necessary to punish crack as severely as the guidelines,¹²⁴ others feel that it is unconstitutional to treat the drugs any differently.¹²⁵ With no clear state consensus on the issue, a compromise position is needed that will meet the legislative concern over crack¹²⁶ and, at the same time, rectify the problems associated with extremely disparate state and federal crack sentences.¹²⁷ Ohio has recently taken such a "middleground approach" to sentencing crack in relation to powder cocaine.¹²⁸

With S.B. 2, its new sentencing guidelines, Ohio has joined the minority state trend of sentencing crack at a higher ratio than powder cocaine, but

in low sentences that would be below the statutory minimum sentences for the same offense already adopted by Congress. *Id.* at 13. For example, the offense of distributing 50 grams of powder cocaine has a mandatory minimum sentence of 10 years imprisonment, but if the amendments were adopted the applicable revised guideline sentence would be approximately 2 years. Violations involving 5 grams of crack carry a mandatory minimum sentence of 5 years, but if the amendments to the guidelines were adopted the sentence would likely involve no jail time. Even if the amendments were adopted, an irreconcilable conflict would arise between the mandatory minimum sentences and the revised guidelines, resulting in "sharp sentencing cliffs." *Id.* Amendments to the guidelines would not effect the statutory mandatory minimums for crack violations (5 grams), however, the amendments would significantly alter the sentences below the statutory minimum (4.9 grams and less). The reason the amendments would not effect the statutory mandatory minimums is that they were created a part of the Anti Drug Abuse Act, not the sentencing guidelines. Therefore, both would need to be amended, to avoid these "sentencing cliffs." Unless both were amended, the sentences for amounts above the statutory minimum would remain very high and the amounts below the minimum would drop dramatically. For example, 5 grams of crack would receive a sentence of 5 years in prison while 4.9 grams of crack would receive 0-6 months of prison time. *Id.* at 10. An equally plausible solution would be to do away with the mandatory minimum sentences. Eight of the ten witnesses that testified before the Committee agreed that the mandatory minimum sentences for simple possession should be eliminated. See generally *id.* This approach is flawed because it seeks to avoid one injustice (sentencing cliffs) by perpetuating another (high mandatory minimums).

124. See *supra* notes 62-66 and accompanying text (discussing states who punish crack nearly as severely as the guidelines).

125. See *supra* notes 62-78 and accompanying text (setting forth the various sentences imposed by the states for crack offenses) and notes 43-44 and accompanying text (discussing *State v. Russell* and Minnesota's finding that treating the two drugs differently violates the state constitution's definition of equal protection).

126. See *supra* part I (A) (discussing the differences between the drugs), *infra* note 187 (discussing Ohio's concern over crack), *infra* notes 120-23 (discussing the Congressional Judiciary Committee's rejection of the U.S. Sentencing Commission's proposed amendments based upon their concern over the more dangerous nature of crack), and *infra* notes 217-218 (discussing the congressional concern over crack in their debate prior to the enactment of the guidelines).

127. See *supra* parts III(A)-(E) (discussing the various problems associated with a large federal-state crack sentencing gap).

128. See *supra* parts IV(B)(3) & (4) (discussing the "middleground approach" taken by Ohio).

stopping short of the 100:1 guideline ratio.¹²⁹ S.B. 2 does not apply a single ratio in discriminating between crack and powder cocaine, but rather applies ratios varying between 5:1 and 10:1.¹³⁰ Persons who commit offenses on or after July, 1 1996, will be subject to S.B. 2's sentencing guidelines.¹³¹

2. Summary of Ohio's Former Sentencing Scheme

Prior to the enactment of S.B. 2, Ohio's sentencing scheme made no distinction between powder cocaine and crack.¹³² Currently all drug offenses are classified and sentenced according to the amounts involved.¹³³ The amount is calculated based upon a "bulk amount,"¹³⁴ or a multiple thereof.¹³⁵ The bulk amount for powder and crack is "an amount equal to or exceeding ten grams or twenty-five "unit doses."¹³⁶

129. See *supra* notes 65-78 and accompanying text (discussing those state sentences for crack that are intermediate, or between the majority 1:1 and the guidelines' 100:1 ratios) and *infra* part IV(B)(3) (discussing Ohio's sentencing of crack).

130. See *infra* part IV(B) (discussing the minimum threshold amount for both crack and powder cocaine and calculating the upper and lower threshold ratios for each felony level). These ratios depend upon which felony level the offense is, and where within the applicable quantity range the amount falls. *Id.*

131. The S.B. 2 sections are virtually identical to the current Ohio Revised Code sections for the same offenses, and replace those sections on July 1, 1996.

132. See *infra* notes 136-46 and accompanying text (discussing Ohio's sentencing scheme prior to July 1, 1996). Crack is referred to throughout the Ohio Revised Code as "unit doses." O.R.C. § 2925.01(F) (definitions). Unit doses are defined as "an amount or unit of compound, mixture, or preparation containing a controlled substance, such amount or unit being separately identifiable and in such form as to indicate that it is the amount or unit by which the controlled substance is separately administered to or taken by an individual." *Id.* Many controlled substances can be converted into "unit dose" form. *Id.* at (E)(1)-(11). However, the specific compounds that make up these "unit doses" are specified within each provision referring to them. See *id.*

O.R.C. § 3719.41(A) classifies "all opium and opium derivatives" as narcotics. Narcotics are "schedule II" drugs. *Id.* The applicable definition that fails to distinguish between crack and powder cocaine reads "coca leaves and any salt, compound, derivative, or preparation of coca leaves (including . . . salts, isomers, and derivatives, and the salts of those isomers and derivatives), and any salt, compound, derivative or preparation thereof that is chemically equivalent to or identical with any of these substances." *Id.* at § 3719.41(A)(4).

133. See *infra* notes 134-36 (setting forth the former Ohio crack and powder cocaine sentencing scheme, which classifies its offenses according to the amount of drugs, or "bulk," involved).

134. [hereinafter bulk].

135. O.R.C. § 2925.01(E).

136. O.R.C. § 2925.01(E)(1). While this system makes no formal distinction between the drugs, the concept of "bulk amount" introduced significant variability and uncertainty into crack offenses. Typically, crack "rocks" weigh anywhere between one-tenth and one-half of a gram. See COCAINE AND POLICY, *supra* note 13, at 14. Therefore the "bulk amount" of crack utilized by Ohio can encompass between 2.5 grams and 12.5 grams. Obviously this leaves the determination of the crime and the accompanying sentence up to the size of the "rocks" carried by the traffickers. A crack dealer may be better off by distributing larger and fewer "rocks." This incentive and the arbitrary nature of the "bulk amount" may have

Possessing less than bulk of crack or powder cocaine is classified as "drug abuse."¹³⁷ Selling or attempting to sell less than bulk of crack or powder cocaine is "trafficking."¹³⁸ Possessing and trafficking more than bulk, but not more than three times bulk are both "aggravated trafficking."¹³⁹ Possess-

been several of the factors that led Ohio to dispose of this classification in S.B. 2. See O.R.C. § 2925.03(C) (effective July 1, 1996) and § 2925.11(C) (effective July 1, 1996). S.B. 2 retains this concept for marijuana offenses. See O.R.C. § 2925.03(D) (effective July 1, 1996) and § 2925.11(D) (effective July 1, 1996).

137. O.R.C. § 2925.11(A). This offense does not include the sale or attempted sale of less than the "bulk amount," which is classified as a more serious offense under § 2925.03(A), and is a felony of the fourth degree. *Id.* § 2925.11(C)(1). Felonies of the fourth degree are accompanied by a mandatory minimum fine of \$1,500. *Id.* § 2925.11(E)(1). If the offender has violated O.R.C. § 2925.11(A) (drug abuse), and has a previous conviction of a "drug abuse" offense, the offense is sentenced as a felony of the third degree. *Id.* § 2925.11(C)(1). A felony of the third degree is accompanied by a mandatory minimum fine of \$2,500. *Id.* § 2925.11(E)(1). Drug abuse violations involving schedule III, IV, or V controlled substances are classified as misdemeanors of the third degree. *Id.* § 2925.11(C)(2). In this respect, the Revised Code makes a distinction between crack, powder cocaine, and other schedule I & II drugs and the remaining schedule III, IV, & V drugs. These are increased to misdemeanors of the second degree if the offender has a prior drug abuse conviction. *Id.* Second degree misdemeanors are accompanied by a mandatory minimum fine of \$750 and third degree misdemeanors are accompanied by a mandatory minimum fine of \$500. *Id.* § 2925.11(E)(1).

138. O.R.C. § 2925.03(A)(1). Trafficking is a felony of the third degree. *Id.* § 2925.03(C)(1). This offense is upgraded to a second degree felony, "aggravated trafficking," if the felon commits an offense on school premises, within one hundred feet of a juvenile, or has previously been convicted of a felony drug abuse offense. *Id.* § 2925.03(C)(a), (b), & (c). These offenses are also subject to the mandatory minimum fines discussed *supra* at note 137. S.B. 2 has a similar upgrade for offenses committed near a school.

139. O.R.C. § 2925.03(A)(4)-(5). Possession of this amount is sentenced as a third degree felony. *Id.* § 2925.03(C)(4). This offense is subject to a mandatory period of "actual incarceration" of 18 months. *Id.* § 2925.03(C)(4). The felony level is upgraded to a felony of the second degree if the offender has a prior conviction of felony drug abuse and must be sentenced to a minimum of 3 years of "actual incarceration." *Id.* § 2925.03(C)(4). "Actual incarceration" means that an offender is required to be imprisoned for the stated period of time to which he is sentenced as a term of actual incarceration. If a person is sentenced to a term of actual incarceration, the court cannot suspend his term of actual incarceration, and cannot grant him probation or shock probation, or any furlough until after the expiration of his term of actual incarceration, diminished as provided in sections 2967.19 (deduction from sentence for faithful observance of the rules), 2967.193 (deduction from sentence for participation in a rehabilitation program), and 5145.11 (deduction from sentence for advancement in grades (*i.e.* education)) of the Revised Code. *Id.* § 2929.01(C). Any of the three previously mentioned factors can result in reductions up to thirty percent from a minimum or definite sentence. *Id.* § 2967.19(A). The cumulative total of any and all diminutions in sentences cannot exceed one-third of the minimum or definite sentence. *Id.* § 2967.19(F). The use of "actual incarceration" was recommended by the Ohio Criminal Sentencing Commission to be eliminated, and was described as "confusing" and resulted in "dishonesty in sentencing." See *infra* notes 149-150 (discussing S.B. 2's elimination of "good time" because it was virtually automatic and derogated their "truth in sentencing" approach). See also OHIO CRIMINAL SENTENCING REPORT, A PLAN FOR FELONY SENTENCING 28 (1995) [hereinafter COMM'N REPORT]. The Ohio Commission opted for the judicial discretion allowed by basic ranges of prison terms. *Id.* The General Assembly followed these recommendations in enacting S.B. 2.

ing more than three times bulk, but not more than one hundred times bulk¹⁴⁰ is a second degree felony.¹⁴¹ Selling or attempting to sell the same amount¹⁴² is a first degree felony.¹⁴³ Possession or trafficking of more than one hundred times bulk¹⁴⁴ is a first degree felony and subject to a mandatory indefinite term of imprisonment¹⁴⁵ of fifteen years to life, with at least 15 years of actual incarceration.¹⁴⁶

3. The S.B. 2 Sentencing Scheme and Corresponding Crack and Powder Cocaine Sentences

To meaningfully discuss Ohio's distinction between crack¹⁴⁷ and powder cocaine, it is important to understand the sentencing scheme used in S.B. 2. The theory behind S.B. 2 is "truth in sentencing."¹⁴⁸ This approach seeks to accurately and honestly inform the offender of the sentence that he

Trafficking of this amount is sentenced as a felony of the second degree. *Id.* § 2925.03(C)(5). The sentence is upgraded to felony of the first degree if the offender satisfies one of the three aggravating factors (school premises, juvenile, or prior felony drug abuse). *Id.* § 2925.03(C)(5)(a), (b), & (c). This offense requires a mandatory minimum period of actual incarceration of 3 years. *Id.* § 2925.03(C)(5). However, if the aggravating factors are satisfied, the period of actual incarceration is increased to a mandatory minimum of 5 years. *Id.* § 2925.03(C)(5)(a), (b), & (c).

140. O.R.C. § 2925.03(A)(6).

141. O.R.C. § 2925.03(C)(6). The sentence is upgraded to a first degree felony if the offender has a prior felony drug abuse conviction. *Id.* The mandatory minimum period of actual incarceration for this offense is 3 years. *Id.* However, the period is increased to 5 years if the offender has a prior felony drug abuse conviction. *Id.*

142. O.R.C. § 2925.03(A)(7).

143. O.R.C. § 2925.03(C)(7). The mandatory minimum period of actual incarceration for this offense is 5 years. *Id.* If the offender satisfies the three aggravating factors (school, juvenile, prior felony drug abuse), the mandatory period of actual incarceration is increased to 7 years. *Id.* § 2925.03(C)(7)(a), (b), & (c).

144. O.R.C. § 2925.03(A)(9) (possession), (10) (trafficking).

145. An indefinite prison term is essentially a sentencing range. The lower end of the range is the mandatory minimum sentence and the upper range is the maximum sentence that can be imposed for the particular offense. Offenders that are sentenced above the minimum are eligible for parole, probation, and various furloughs only after they have served a prison term above that minimum. *Id.* § 2929.01(C). The lower end of the indefinite sentences are synonymous with a period of actual incarceration.

146. O.R.C. § 2925.03(C)(9), (10). However, the sentence can be increased to a mandatory indefinite term of imprisonment of 20 years to life with the minimum period of actual incarceration being 20 years if the aggravating factors are satisfied. *Id.* § 2925.03(C)(9) (prior felony drug abuse) and (10)(a), (b), & (c) (school premises, juvenile, or prior felony drug abuse).

147. Crack is not referred to as "crack" but as cocaine in "unit dose" form. See O.R.C. §§ 2925.03(C)(4) (effective July 1, 1996) (trafficking), 2925.11(C)(4) (effective July 1, 1996) (possession), and various other sections of S.B. 2.

148. "Truth in sentencing" will impose more definite sentences; supervision after prison for those who most need to be watched or helped; a broader continuum of non-prison sanctions for less threatening felons; and "bad time" to help maintain order in the prisons. OHIO C.L.E. INST., CRIMINAL SENTENCING: S.B. 2, vol. 95-73 (1995), at 2 [hereinafter C.L.E. INST.]. S.B.

will serve.¹⁴⁹ S.B. 2 accomplishes this purpose with a hybrid felony sentencing scheme, designed to eliminate the uncertainties of purely indeterminate sentencing and to avoid the rigidity of purely determinate sentencing, while retaining the strengths of both.¹⁵⁰ With this goal in mind, S.B. 2 simplified Ohio's prior felony classifications¹⁵¹ into five felony levels.¹⁵² This transition

2 eliminates the virtually automatic "good time" that reduces terms of "actual incarceration" by 30% and narrows the earned credit reductions. *See* O.R.C. § 2929.14 (effective July 1, 1996). S.B. 2 narrowed the sentencing ranges to reflect the elimination of good time and parole to foster honesty. C.L.E. INST., *supra* at 14. In effect, the offender serves a similar amount of time, but the time is honestly stated. *Id.* This approach is similar to the approach taken by the U.S. Commission. The Commission stated that Congress sought to eliminate the "deception" that was implicit in the former sentencing scheme that arose when a judge imposed an indeterminate sentence. U.S. ATTORNEYS' MANUAL, *supra* note 35, at 1.2. A defendant did not serve the time because it was automatically reduced for "good time" and/or parole. The solution to this deception was the same as Ohio adopted, eliminating the "good time credits" and imposing sentences the offender will actually serve. 18 U.S.C. 3624(b) (1994); *see also* U.S. ATTORNEYS' MANUAL, *supra* note 35, at 1.1

149. U.S. ATTORNEYS' MANUAL, *supra* note 35, at 1.1.

150. The approach taken by the Ohio Commission was "designed to obtain some of the benefits of each, without their disadvantages." *Id.* Ohio's prior sentencing scheme was a complicated mixture of indeterminate, determinate, and mandatory sentences. Often the same offense, under Ohio's prior scheme, was accompanied by both mandatory and indeterminate sentences. For example, an offender violating O.R.C. § 2925.03(10) (the most severe drug trafficking offense) receives an indeterminate sentence of 15 years to life. *Id.* This indeterminate sentencing range was accompanied by a mandatory minimum of 15 years actual incarceration. *Id.* § 2925.03(C)(10). Therefore, while providing some minimum certainty with the period of actual incarceration, the indeterminate sentence leaves the actual sentence purely up to the judges discretion within this large range of available sentences. This can result in fluctuation between offenders. Also, despite the minimum term of 15 years, this defendant could serve anywhere between 10 years, *see supra* note 139 (3 reasons for a 1/3 sentence reduction), to 60 years or so (life). Sentencing reductions and uncertainty prompted the Ohio Commission to take a more definite and honest approach to telling the offender what their prison term will be. The Commission rejected:

(a) purely indeterminate sentences, which can foster rehabilitation and encourage good behavior, but provide no certainty for the victim or offender; (b) purely determinate sentences, which can provide for certainty, but no opportunity to control behavior after release from prison and provides little motivation for good prison behavior; (c) a federal-style matrix grid, which can provide certainty, but may shift sentencing discretion from the judges to prosecutors and parole officers; and (d) Ohio's former mixture of indeterminate, determinate, and mandatory approach, which is confusing and complicated.

C.L.E. INST., *supra* note 148, at 2.

For a general discussion of the strengths and weaknesses of various types of sentencing schemes, *see* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61 (1993).

151. Prior to S.B. 2, the felony scheme was complicated and consisted of 12 levels of felony: indeterminate 1st, 2nd, 3rd, & 4th degree felonies; determinate 3rd & 4th degree felonies; aggravated 1st, 2nd, & 3rd degree felonies; and repeat aggravated 1st, 2nd, & 3rd degree felonies.

152. These levels range from F-5, the lowest felony level, to F-1, the highest felony level or first degree felony.

was accomplished through a "neutral conversion."¹⁵³ The new five-felony scheme retains the prior scheme's prison terms, while eliminating its confusion.¹⁵⁴

The accompanying sentencing scheme is tailored to this new five-felony system.¹⁵⁵ To achieve the desired consistency, the judge must select a prison sentence from a narrow range of prison terms available for that particular felony level.¹⁵⁶ The flexibility in this scheme is accomplished by giving the judge discretion to decide: (1) which prison sentence within the available range is most appropriate;¹⁵⁷ and (2) in many instances, whether to impose a sentence that involves a prison term.¹⁵⁸ To ensure consistency in both prison and non-prison sentences, S.B. 2 also provides presumptive "sentencing guidances" that judges must consider when sentencing.¹⁵⁹ If the judge deviates

153. The current seriousness ranking of crimes would be preserved in converting the previous 12 categories, *see infra* note 151, into five categories, *see supra* note 152. This new classification places crimes into new classifications, with roughly the same prison terms as before. For example, non-violent 3rd degree felonies became the new 4th degree felonies, with the range of actual prison sentences remaining very similar. The new 5th degree felonies would reflect the same prison terms actually served by non-violent fourth degree felons under the prior scheme. Thus a "neutral" conversion was made between previously non-violent 4th degree felons and the current 5th degree felons. *See COMM'N REPORT, supra* note 139, at 32.

154. *COMM'N REPORT, supra* note 139, at 32.

155. *See infra* notes 156-62 and accompanying text (discussing the interaction between felony level and sentencing).

156. If a prison term is appropriate, the mandatory ranges are as follows: F-1 (3-10 years), F-2 (2-8 years), F-3 (1-5 years), F-4 (6-18 months), and F-5 (6-12 months). O.R.C. § 2929.14(A) (effective July 1, 1996). An exception to these felony categories is the "mandatory 10 + 1-10." *See infra* note 161 and notes 177-79 for that exception.

157. In instances where the judge has no discretion whether to impose a prison sentence, *see infra* note 161 (defining the sentencing guidances "mandatory" and "mandatory 10 + 1-10"), the judge may elect which sentence within the range is appropriate. *Id.* The judge is afforded considerable discretion in passing sentence, both prison and non-prison. O.R.C. §§ 2929.11(c) (effective July 1, 1996). The new guidelines also provide a list of "Sentencing Factors" to be considered by the judge in sentencing, reflecting the severity of the offense. O.R.C. § 2929.12(B) & (C) (effective July 1, 1996).

158. If a mandatory prison term is not required, *see infra* note 161 (defining the sentencing guidances of "Division B," "Division C," and "In Favor"), the judge has discretion to determine the best ways to comply with the principles and purposes of S.B. 2. O.R.C. § 2929.12(A) (effective July 1, 1996). In such situations where prison is not mandatory, a judge may impose any permissible residential, non-residential, or financial sanction, or combination of sanctions, as well as prison. O.R.C. § 2929.15(A) (effective July 1, 1996); O.R.C. § 2929.16(A) (effective July 1, 1996); O.R.C. § 2929.17(A) (effective July 1, 1996); and O.R.C. § 2929.18(A) (effective July 1, 1996). The judge still has discretion to sentence the defendant to any prison term within the applicable range of prison terms.

159. *See infra* note 161 (defining the presumptive sentencing guidances of "Division B," "Division C," "In Favor," "Mandatory," and "Mandatory 10 + 1-10"). Each different guidance must be viewed in the context of, and in the furtherance of, the purposes and principles of sentencing set forth in O.R.C. § 2929.11 (effective July 1, 1996). The "Overriding Purposes" of the S.B. 2 are punishing offenders and protecting the public from future crimes by the offender and others. O.R.C. § 2929.11(A) (effective July 1, 1996). To achieve these purposes,

from the applicable sentencing guidance, which is permissible in certain circumstances, he must provide specific reasons for his sentence.¹⁶⁰ The overall S.B. 2 scheme pairs certain presumptive sentencing guidances with different felony levels resulting in a sentencing scheme that accurately reflects the severity of the offense.¹⁶¹ Generally, the higher felony levels are accompanied by more severe presumptive sentencing guidances.¹⁶²

Both crack and powder cocaine are subject to the same presumptive sentencing guidance at each felony level.¹⁶³ Crack is differentiated from powder cocaine by the amount of the drug, or "minimum threshold," necessary to place it into a certain felony level.¹⁶⁴ The lowest felony level, F-5, is

the sentencing court considers the need for incapacitating the offender, deterring the offender and others, rehabilitating the offender, and making restitution to the victims. *Id.* "General Guidance" for sentencing is provided by O.R.C. § 2929.11(B) (effective July 1, 1996). This section states that each sentence shall be: (a) reasonably calculated to reflect the overriding purposes in § 2929.11(A); (b) commensurate with, and not demean, the seriousness of the offender's conduct and its impact on the victim; (c) consistent with sentences for similar crimes by similar offenders; (d) not be based on the race, ethnicity, gender, or religion of the offender. *Id.*

160. *See infra* note 161 for the prison presumptions in certain drug offenses. There are limited situations where the judges sentence may be appealed. O.R.C. § 2929.11 (effective July 1, 1996). In these cases, usually involving sentences not in accordance with the provided sentencing guidance, judicial findings must be made and based upon the purposes, principles, and factors governing sentencing in § 2929.11 and § 2929.12. Reasons for a judges sentence must be given when (a) the judge selects a non-prison term for an F-1 or F-2 (or any drug offense with a guidance presuming for prison); (b) imposes a prison term for an F-4 or an F-5 offense (or any drug offense with a guidance presumption against prison) and certain factors are not present and stated (*see infra* note 165 for those factors); or (c) imposes the maximum prison term from a particular range. O.R.C. § 2929.19(B)(2) (effective July 1, 1996).

161. For many drug offenses, the "level" of felony and the applicable statutory "guidance" on penalties vary with the substance involved and nearness of the violation to a school or a juvenile. "Mandatory" means that the judge must sentence the offender to a prison term, but can select the duration from the range available for that level of offense. A few drug offenses require the judge to impose the maximum sentence in the range. "Mandatory 10 + 1-10" means that the offender is a "major drug offender." The judge must impose a 10-year term, and may elect to add from 1 to 10 additional years to the term. "In Favor" means there is a rebuttable presumption in favor of a prison term under O.R.C. § 2929.13(D). "Division C" means sentencing is guided by O.R.C. § 2929.13(C). The judge must comply with the purposes and principles in sentencing set forth in O.R.C. § 2929.11 and O.R.C. § 2929.12. Otherwise, there is no presumption in favor of prison of guidance regarding community sanctions. "Division B" means that sentencing is guided by O.R.C. § 2929.13(B). *See infra* note 165 (stating both the factors in favor of a prison term for F-4 and F-5s, O.R.C. § 2929.13(B)(1)(a)-(h), and when prison is inappropriate for F-4 and F-5s. O.R.C. § 2929.13(B)(2)(a)).

162. *See infra* notes 163-78 (discussing the various classifications of drug offenses in levels of felony and their accompanying sentencing guidance).

163. *See infra* notes 164-78 (explaining the amounts of crack and powder cocaine necessary to trigger certain felony classifications and their accompanying sentencing guidances under O.R.C. § 2925.03(C)(4)(c)-(g) (trafficking crack and powder cocaine) and O.R.C. § 2925.11(C)(4)(a)-(f) (possession of crack and powder cocaine)).

164. *See infra* notes 165-78 and accompanying text (discussing the sentences that accompany certain levels of felonies and the amounts of both drugs necessary to be classified

accompanied by a presumptive sentencing guidance of "Division B" or "Division C," depending whether the offense is for trafficking or possession.¹⁶⁵ The threshold amounts necessary to be classified as an F-5 are one gram or less of crack¹⁶⁶ and one to five grams of powder cocaine, a 5:1 ratio.¹⁶⁷

at a certain felony level). Crack and powder cocaine offenses are increased one felony level if the offense "is committed in the vicinity of a school." See O.R.C. § 2925.03(C)(4)(c)-(e) (effective July 1, 1996) (trafficking offenses). School is defined as "on school premises, in a school building, or within 1,000 feet of the boundaries of any school premises." O.R.C. § 22925.01(P) (effective July 1, 1996).

165. If the offense is possession, O.R.C. § 2925.11(C)(4) (effective July 1, 1996), it is accompanied by a presumptive sentencing guidance of "Division B." This means that the sentencing is guided by O.R.C. § 2929.13(B)(1) (effective July 1, 1996). This section requires the judge to consider whether any of the following apply:

- (a) The offender caused physical harm to a person; (b) The offender attempted to cause, or made an actual threat of, physical harm with a weapon; (c) The offender attempted to cause, or made an actual threat of, physical harm to a person, and the offender previously was convicted of an offense that caused such harm; (d) The offender held a public office or position of trust and the offense related to the office or position; the offenders position obligated the offender to prevent the offense or bring those committing the offense to justice; or the offender's reputation or position facilitated the offense or was likely to influence the future conduct of others; (e) The offense was committed for hire or as part of an organized criminal activity; (f) The crime was a sex offense; (g) The offender previously served a prison term; (h) The offense was committed while the offender was under a community control (non-prison) sanction.

Id.

O.R.C. § 2929.13(B)(2) determines when an F-5 drug offenses and F-4 non-drug offenses should receive imprisonment as part of their sentence. Imprisonment is "appropriate:"

- (a) If the court makes any of the eight findings in § 2929.13(B)(1); and (b) If, after weighing the seriousness and recidivism factors section § 2929.12, the court finds that a prison term is consistent with the purposes in § 2929.11; and (c) If it finds the offender is not amenable to an available community control sanction, then (d) The court shall sentence the F-4 or F-5 to prison, (e) This prison term is not appealable.

Id.

A prison term is not appropriate for F-4 non-drug offenses or F-5 drug offenses if the court fails to make any of the eight factors in O.R.C. § 2929.13(B)(1), and the court shall impose a community control sanction if it is consistent with the purposes and principles in O.R.C. § 2929.11. O.R.C. § 2929.13(B)(3) (effective July 1, 1996). If such a sanction is not consistent with the purposes and principles, a prison term may be imposed. *Id.* This prison term is appealable in this situation. *Id.*

If the offense is trafficking, O.R.C. § 2925.03(C)(4)(a), then sentencing is governed by O.R.C. § 2929.13(C) (effective July 1, 1996). That section states that the judge must look to the purposes and principles of sentencing in O.R.C. § 2929.11, and the seriousness and recidivism factors in O.R.C. § 2929.12, and decide whether to impose a prison term or a community control sanction. *Id.* This decision is not appealable. *Id.* Division C is more severe than Division B, because the court is not restricted to making a finding of certain factors, *see supra* this note, before it may impose a prison term.

166. For the purposes of the quantity ratio, the threshold amount of crack precedes the threshold amount for powder cocaine.

167. O.R.C. § 2925.11(C)(4)(a) (effective July 1, 1996) classifies the possession of up to one gram of crack and up to five grams of powder as an F-5 felony, with an accompanying

F-4 felonies are accompanied by a presumptive sentencing guidance of "In Favor."¹⁶⁸ This means there is a presumption "in favor" of prison at the F-4 level.¹⁶⁹ The applicable F-4 threshold amounts are one to five grams and five to ten grams, a ratio that ranges between 5:1 and 2:1.¹⁷⁰ An F-3 felony is accompanied by a presumptive sentencing guidance of "Mandatory."¹⁷¹ The

guidance of "Division B," and has a presumption against prison. *Id.* O.R.C. § 2925.03(a), (b) (effective July 1, 1996) classifies the sale/trafficking of up to one gram of crack and up to five grams of powder cocaine as an F-5, felony with an accompanying guidance of "Division C," and has no accompanying presumption whether the offender should be sentenced to prison. Sentences imposed for F-5 felonies is guided by O.R.C. § 2929.13(B). *See supra* note 165 (setting forth O.R.C. § 2929.13(B) (effective July 1, 1996)). The 5:1 ratio refers to the fact that as much as 5 grams of powder cocaine can receive an F-5 classification, while only up to 1 gram of crack can receive such classification and its accompanying punishment.

168. The sentence for an F-4 is also governed by O.R.C. § 2929.13(B) (effective July 1, 1996). *See supra* note 165 (setting forth O.R.C. § 2929.13(B)(1)(a)-(h) (effective July 1, 1996) (factors in favor of a prison term) and § 2929.13(B)(2)(a)-(e) (whether prison is appropriate). This is the same section as sentencing F-5 offenses. However, while the judicial considerations must be the same, the sentencing guidance is different. *See supra* note 161 (defining "In Favor"). The "In Favor" guidance attached to these F-4 felonies is imposed by O.R.C. § 2925.11(C)(4)(b) (effective July 1, 1996) (possession) and O.R.C. § 2925.03 (C)(4)(c) (effective July 1, 1996) (trafficking).

169. O.R.C. § 2929.13(D) (effective July 1, 1996). This section is generally the applicable section for non-drug F-3s. However it guides F-4s in drug cases. O.R.C. § 2929.11(C)(4)(b) (effective July 1, 1996) (possession) and § 2925.03(C)(4)(c) (effective July 1, 1996) (trafficking) (applying the higher sentencing guidance pursuant to O.R.C. § 2929.12(E) (effective July 1, 1996)). At this level it is presumed that a prison term is necessary to comply with the purposes and principles of sentencing in O.R.C. § 2929.11. *Id.* A non-prison sanction may be imposed on a non-drug F-3 (F-4 drug) if the court finds BOTH of the following:

(a) A non-prison sanction would adequately punish the offender and protect the public because one or more of the § 2929.12 factors indicating that the offender is unlikely to recidivate outweighs one or more of the factors indicating that recidivism is likely; and

(b) A non-prison sanction would not demean the seriousness of the offense because one or more of the § 2929.12 factors decreasing the seriousness outweighs the factors increasing seriousness.

Id. A sanction other than prison imposed on an F-1 or F-2 may be appealed by the prosecutor. *Id.* A judge finding that no prison sentence is necessary would be required to substantiate this finding. O.R.C. § 2929.19(B)(2)(I) (effective July 1, 1996).

170. O.R.C. § 2925.11(C)(4)(b) (effective July 1, 1996) (possession) and § 2925.03(C)(4)(c) (effective July 1, 1996) (trafficking). This ratio refers to the fact that, at the minimum threshold for F-4 classification, 5 grams of powder cocaine is necessary, while only 1 gram of crack is necessary. At the top of this range, up to 10 grams of powder cocaine can still be classified as an F-4 offense, while only up to 5 grams of crack can be classified as an F-4 offense. Therefore, the ratio varies from the lower and upper thresholds for an F-4 offense between 5:1 to 2:1.

171. Generally F-3 offenses are governed by O.R.C. § 2929.13(C) (effective July 1, 1996), which requires the judge to "look to the purposes of sentencing in § 2992.11, and the seriousness and recidivism factors in § 2929.12, and decide whether to impose a prison term or a community control sanction." However, for these two F-3 drug offenses, the guidelines

F-3 threshold amounts are five to ten grams and ten to one hundred grams, a ratio varying between 10:1 and 2:1.¹⁷² An F-2 felony is accompanied by the same presumptive sentencing guideline of "Mandatory."¹⁷³ The applicable F-2 threshold amounts are ten to twenty five grams and one hundred to five hundred grams, a ratio that fluctuates between 10:1 and 20:1.¹⁷⁴

An F-1 felony level is accompanied by the same "Mandatory" presumptive sentencing guidance.¹⁷⁵ The F-1 thresholds are between twenty five and one hundred grams and five hundred and one thousand grams, a ratio varying between 20:1 and 10:1.¹⁷⁶ There is another F-1 level offense that is accompanied by a more severe presumptive sentencing guidance of "Mandatory 10 years + 1 to 10 years."¹⁷⁷ This heightened sentencing is comparable to what many statutory schemes call "kingpin" provision, and is imposed for possession of greater than one thousand grams of powder cocaine and one hundred grams of crack.¹⁷⁸

The differences in prison terms imposed under S.B. 2 when compared to the prior Ohio sentencing scheme are as follows:

have attached the sentencing guidance of "Mandatory." O.R.C. § 2925.11 (effective July 1, 1996) (possession) and § 2925.03 (effective July 1, 1996) (trafficking). This means that "the judge must sentence the offender to a prison term, but the judge can select the duration from the range available for that level of offense." This is the sentencing guidance for F-1 and F-2 non-drug offenses as set forth in § 2929.13(D). *See supra* note 169 (setting forth O.R.C. § 2929.13(D) (effective July 1, 1996)). The applicable mandatory sentencing range is between 1 to 5 years. *See supra* note 156 (discussing the F-3 sentencing range).

172. O.R.C. § 2925.11(C)(4)(c) (effective July 1, 1996) (possession) and § 2925.03(C)(4)(d) (effective July 1, 1996) (trafficking). The minimum threshold for an F-3 classification is 10 grams for powder cocaine and 5 grams for crack (2:1). *Id.* The upper threshold for such classification is 100 grams for powder cocaine and 10 grams for crack (10:1). *Id.* Therefore, depending on the exact amount involved, the ratio can vary anywhere from 2:1 up to 10:1.

173. *See supra* note 161 (defining "Mandatory").

174. The lower threshold for classification as an F-2 offense is 100.1 grams for powder cocaine and 10.1 for crack (10:1). O.R.C. § 2925.11(C)(4)(d) (effective July 1, 1996) (possession) and § 2925.03(C)(4)(3) (effective July 1, 1996) (trafficking). The upper threshold for such classification is 500 grams for cocaine and 25 grams for crack (20:1). *Id.* While having the same presumptive sentencing guidance, F-2s have an increase in the available range of prison sentences to 2 to 8 years. *See supra* note 156 (setting forth the F-2 sentencing range).

175. *See supra* note 161 (defining "Mandatory").

176. The lower threshold for classification as an F-1 offense is 500.1 grams for powder cocaine and 25.1 grams for crack (20:1). O.R.C. § 2925.11(C)(4)(e) (effective July 1, 1996) (possession) and § 2925.03(C)(4)(f) (effective July 1, 1996) (trafficking). The upper threshold for such classification is 1000 grams for powder cocaine and 100 grams for crack (10:1). *Id.* The applicable sentencing range is increased to 3 to 10 years. *See supra* note 156 (discussing the sentencing range for F-1s).

177. *See supra* note 161 (defining "Mandatory 10 + 1-10").

178. O.R.C. § 2925.11(C)(4)(f) (effective July 1, 1996) (possession) and § 2925.03(C)(4)(g) (effective July 1, 1996) (trafficking).

S.B.2	<1g 0-12 months	1-5g 0-18 months	5-7.5g 1-5 years	7.5-10g 1-5 years	10-12.5g 2-8 years	22.5-25g 2-8 years	25-100g 3-10 years	100-750g 10-20 years	>750g 10-20 years
Prior	0 months	0 months	0 years	1 or 2 years	1 and 2 years	2 or 3.75 years	2 or 3.75 years	2 or 3.75 years	10-life
Max S.B.	12 months ¹⁷⁹	18 months ¹⁸⁰	5 years ¹⁸¹	4 years ¹⁸²	7 years ¹⁸³	6 years ¹⁸⁴	8 years ¹⁸⁵	18 years ¹⁸⁶	10 ¹⁸⁷ years

179. This would be a violation of O.R.C. § 2925.11(A) (effective July 1, 1996) (drug abuse), which carries no prison term under O.R.C. § 2925.11(C)(1) (effective July 1, 1996). However, under S.B. 2 this same violation would be classified depending on whether it was a trafficking or possession. If it was possession under O.R.C. § 2925.11(C)(4)(a) (effective July 1, 1996), there would only be a prison term if 1 of the 8 aggravating factors in § 2929.12(B), *see supra* note 165, is present. If one is present, the sentencing range is 6-12 months. If the offense is trafficking under O.R.C. § 2925.03(C)(4)(a) (effective July 1, 1996), the judge has discretion under § 2929.13(B) whether to impose a prison term. If the judge feels that imprisonment is necessary to comply with the principles and purposes under § 2929.11, and there is a likelihood of recidivism under § 2929.12, the sentencing range is from 6-12 months. Therefore, S.B. 2 has a potential increase from 0 to 12 months of prison time for offenses involving less than 1 gram of crack. However, it could just as likely have no impact based upon its focus on non-prison alternatives.

180. O.R.C. § 2925.03(C)(4)(b) (effective July 1, 1996) (trafficking of between 1-5 grams of crack) and § 2925.11(C)(4)(b) (effective July 1, 1996) (possession of between 1-5 grams of crack) would involve a presumption for prison under § 2929.13(D) (effective July 1, 1996), for a sentencing range of 6-18 months. Under the prior scheme, this would have been an offense of O.R.C. § 2925.11(A), which is subject to no jail time under § 2925.(C)(1).

181. The figure of 7.5 grams is my approximation of what the "bulk amount" would have been under the prior scheme. Crack is dealt in units that typically vary between 1/10-1/2 gram. *See supra* note 127. The bulk amount under O.R.C. § 2925.01(E) was up to 25 "unit doses." 1/10 gram multiplied by 25 is 2.5 grams, and 1/2 gram multiplied by 25 is 12.5 grams. Therefore, the bulk amount could consist of anywhere between 2.5-12.5 gram, and the average of this range is 7.5 grams. Possession (O.R.C. § 2925.11(C)(4)(c) (effective July 1, 1996)) or trafficking (O.R.C. § 2925.03(C)(4)(c) (effective July 1, 1996)) receives a mandatory period of imprisonment of 1-5 years. However, under the old scheme this amount would have still fallen at or below the bulk amount, making it a violation of O.R.C. § 2925.11(A)(1) (effective July 1, 1996) (possession) or § 2925.03(A)(1) (effective July 1, 1996) (trafficking), and would not be subject to any jail time. Therefore, S.B. 2 could result in as much as a 5 year increase in prison sentencing. Here, S.B. 2 makes a definite increase in prison time, while not necessarily by an average of 5 years, but easily averaging several years.

182. Under S.B. 2, offenses involving this amount are the same as violations involving between 5 and 7.5 grams, and are subject to the same mandatory 1-5 year prison terms discussed *supra* note 181. However, under the old scheme this amount would fall above the bulk amount. Therefore, if the offense was possession under O.R.C. § 2925.03(A)(4), the offense would be subject to a mandatory period of actual incarceration of 18 months under § 2925.03(C)(4). This figure is reduced to 1 year to account for the almost "automatic" reduction for "good time." Therefore, if the offense is for possession, S.B. 2 would result in an increase of as much as 4 years. If the offense was trafficking under O.R.C. § 2925.03(A)(5), the offense would be subject to a mandatory period of actual incarceration of 3 years under O.R.C. § 2925.03(C)(5). Subject to the same 1/3 reduction to 2 years, S.B. 2 could result in as much as a 3 year increase for trafficking between 7.5 and 10 grams of crack.

183. The figure of 22.5 grams was calculated to be approximately what 3 times the bulk amount would be under the prior scheme, according to the same formula mentioned *supra* note 181. Under the old scheme, offenses within this range would still be between one and three times bulk and therefore subject to the same terms of 1 year (possession) and 2 years (trafficking) incarceration as mentioned *supra* note 187. However, under S.B. 2, offenses involving over 10 grams are now subject to a 2-8 year sentencing range. O.R.C. § 2925.11(C)(4)(d) (effective July 1, 1996) (possession) and § 2925.03(C)(4)(e) (effective July 1, 1996) (trafficking). Therefore, S.B. 2 could result in an increase of as much as 7 years for possession and 6 years for trafficking between 10-22.5 grams of crack. This is another range that S.B. 2 will definitely impact. As it is starting to get into the higher amounts of crack, this result would be consistent with its intent to hit the larger dealers harder. *See supra* notes 188-189 (discussing the legislative rationale and intent behind the new scheme).

184. Offenses under S.B. 2 are within the same mandatory 2-8 year ranges as mentioned *supra* note 183. However, under the old scheme this offense would now be above three times bulk, according to the formula being used here. Therefore, these offenses would now be violations of O.R.C. § 2925.03(A)(6), (possession) and § 2925.03(A)(7) (trafficking). Possession is subject to a mandatory period of actual incarceration of 3 years under § 2925.03(C)(6), and trafficking is subject to a mandatory period of actual incarceration of 5 years under § 2925.03(C)(7). Subject to a 1/3 reduction for good time, these sentences are 2 and 3.75 years respectively. Therefore, for possession of between 22.5 and 25 grams, S.B. 2 could increase prison terms by as much as 6 years, and for trafficking of the same amount increase as much as 4.25 years. This result is also consistent with S.B. 2's intent to hit the larger dealers harder. *See supra* notes 188-189.

185. The old scheme offenses still fall within the same category (between 3 to 100 times bulk) and have the same sentences. Under O.R.C. § 2925.03(C)(4)(f) (effective July 1, 1996) (trafficking) and § 2925.11(C)(4)(e) (effective July 1, 1996) (possession), offenses involving this amount of crack are subject to a mandatory sentencing range of between 3-10 years. Therefore, for possession offenses, S.B. 2 could result in an increase from 2 to 10 years and, for trafficking offenses, S.B. 2 could result in increase of 6.25 years. This is the beginning of the range the Commission felt was occupied by the middle to higher level crack dealers, *see infra* note 197-198, hence the marked increase compared to the old scheme.

186. Under the old scheme, this amount still falls within the 3 to 100 times bulk category as discussed in the previous two notes. Thus, they are subject to the same 2 years (possession) or 3.75 (trafficking). However, under S.B. 2 this amount is now a violation of § 2925.11(C)(4)(f) (possession) or 2925.03(C)(4)(e) (trafficking), which are accompanied by a mandatory 10 years plus anywhere between 1 to 10 more. Therefore these offenses, under S.B. 2, could result in a 20 year sentence. Compared to the 2 to 3.75 year sentences under the old scheme, S.B. 2 could result in an increase of as much as 18 years. This is the range that S.B. 2 probably desired to hit the hardest. *See infra* notes 197-98.

187. Under S.B. 2, an offense of this amount is the same as mentioned *supra* note 186, and would receive the same potential 20 year sentence. However, under the old scheme this would be a violation of either O.R.C. § 2925.03(A)(9) (possession) or § 2925.03(A)(10) (trafficking), and therefore would receive a mandatory indefinite term of 15 years to life and a mandatory period of actual incarceration of 15 years. *Id.* This would likely be reduced by 1/3 to 10 years. This is the same minimum as S.B. 2. However, the maximum under S.B. 2 is 20 years, while the maximum under the old scheme is life in prison. Therefore, while S.B. 2 could result in an increase of 10 years, the more probable result would be that the S.B. 2 sentence would be lower than under the old scheme.

188. The Ohio Commission is a 24-member body created by statute. O.R.C. § 181.21. The prior State Coordinating Council was repealed. *Id.* § 181.01-.04. This Commission is to study the existing criminal law statutes and law of Ohio, sentencing patterns throughout the state, and available correctional resources. *Id.* § 181.23(A). The Commission is directed to develop sentencing policy for the state that is based upon the findings and conclusions of its study under § 181.23(A). *Id.* § 181.23(B). Not later than July 1, 1993, the Commission was

5. Legislative Procedure and Rationale Behind S.B. 2

S.B. 2 was based almost exclusively upon the recommendations of the Ohio Criminal Sentencing Commission.¹⁸⁸ The Commission was created to develop sentencing policy and recommend a sentencing plan to Ohio's General Assembly.¹⁸⁹ While states generally vary slightly in their sentencing priorities,¹⁹⁰ all share the goal of eliminating unwanted disparities by making their guidelines more uniform.¹⁹¹

Ohio enacted their guidelines with the additional goal that sentences reflect the severity of the underlying offense.¹⁹² The Commission's recommendation to sentence crack more severely than powder cocaine was based upon many very complex legislative concerns.¹⁹³ Most prominent was the Commission's concern that past crack sentences did not reflect its more dangerous nature.¹⁹⁴ In its Report, the Commission stated "[f]or criminal sentencing purposes, powder cocaine and crack cocaine are different drugs because: (1) Crack is cheaper and faster acting than powder—experts also say it is more addictive; (2) Crack is linked with more violence; (3) Crack is more often the subject of complaints to law enforcement; and (4) Crack is doing grave harms to the inner-city communities and expert testimony before the Commission indicates that it is spreading."¹⁹⁵ This was not a blind, uniform differential,

to recommend to the General Assembly a comprehensive criminal sentencing structure for the state that is consistent with the sentencing policy developed pursuant to § 181.23(B). *Id.* § 181.24. The Commission reported its sentencing recommendations in 1993. *See* COMM'N REPORT, *supra* note 139.

189. *See* O.R.C. § 181.23(A) & (B) and § 181.24(A). The Commission was charged with the responsibility of developing sentencing policy that accomplished deterrence, O.R.C. § 181.23(A) & (B), proportionality, uniformity, and fairness, *id.* § 181.24(A) & (B)(1) & (2), rehabilitation and treatment, *id.* § 181.23(A)(6), and simplification of the sentencing scheme, *id.* § 181.24(A).

190. Based upon his review of state sentencing guidelines, Professor Richard Frase concluded that "beyond eliminating a desire of uniformity and eliminating unwarranted disparities, the declared or apparent goals and priorities of these state reforms are diverse." *See* Richard S. Frase, *Sentencing Guidelines in the States: Lessons for State and Federal Reformers*, 6 FED. SENT. REP. 123, 124 (1990) [hereinafter Frase, *Lessons for States*].

191. *Id.*

192. O.R.C. § 181.24(B)(1) ("The comprehensive criminal sentencing structure recommended by the commission shall provide for proportionate sentences, with increased penalties for offenses based upon the seriousness of the offense . . ."). *See also* Frase, *Lessons for States*, *supra* note 190, at 124 (stating the intent behind states turning to sentencing guidelines). This principle has been reflected in the ABA standard concept of "parsimony:" sanctions should be the least severe necessary to achieve the purposes of the sentence. *See* N. MORRIS, *THE FUTURE OF IMPRISONMENT* 59-64 (1974).

193. *See infra* notes 196-206 and accompanying text (discussing the rationale behind the Commission's differential treatment of crack and powder cocaine).

194. *See infra* notes 196-198 and accompanying text (discussing the more dangerous nature of crack in relation to powder cocaine and the effect this fact had upon the Commission and its recommendations).

195. *See* COMM'N REPORT, *supra* note 139, at 40. These findings are almost universally

but rather a differential that was aimed at purposefully hitting the “kingpin” crack dealers with a greater sentencing ratio than the street-level dealers.¹⁹⁶ Ohio Criminal Sentencing Commission’s Executive Director, David Diroll, stated that “the lower 5:1 ratio for smaller amounts and the eventual 10:1 ratio for large amounts of crack was the means for carrying out the Commission’s desire to remain tough on large-scale dealers.”¹⁹⁷

Another concern of the Commission was the potential for a racially disparate impact of a heightened crack ratio.¹⁹⁸ The Commission and the

cited as the main differences between crack and powder cocaine. *See supra* part I(A) (discussing the more dangerous nature of crack when compared to powder cocaine). These concerns were continuously raised and agreed upon by the Advisory Committee in its discussions of how to sentence crack in relation to powder cocaine. *See generally* OHIO COMMISSION REPORT, ADVISORY COMM. MINUTES (March 18 & 19 (1993)) [hereinafter ADVISORY COMM. REPORTS]. *See also* Memorandum from David Diroll (Jan. 23, 1996) (stating that the reasons for the Ohio Commission’s disparate treatment of crack were: addictive nature, violence associated with crack, more police calls from the inner-cities, and large crack dealers deal in lower quantities than powder cocaine).

196. “The Commission’s plan would ease penalties somewhat for low-level drug offenders, while staying tough with high-level dealers.” COMM’N REPORT, *supra* note 139, at 56. *See also infra* notes 212-224 (discussing the different nature of the crack trade and that high-level crack dealers deal in small amounts of crack). The Commission estimated that S.B. 2’s sentencing scheme would reduce the intake of low level F-5s into prison by approximately 10%. *Id.*

197. Telephone interview with David Diroll, Executive Director, Ohio Criminal Sentencing Commission (Jan. 21, 1995). Note also that there is an additional level above F-1 for those who deal in quantities of greater than 100 grams of crack and 1,000 grams of powder cocaine, and receive up to 10 additional years imprisonment beyond the mandatory 10 years. *See supra* note 161 (discussing the “Mandatory 10 + 1-10” sentencing guideline for trafficking or possessing greater than 100 grams of crack and 1,000 grams of powder cocaine). ADVISORY COMM. REPORT, ADVISORY COMM., OHIO CRIMINAL SENTENCING COMM’N 3 (relating the testimony of Lt. Kent Shafer, a Narcotics officer who proposed a sentence structure that would place users in the F-5 category, users who sell to feed the habit in F-4, lowest level street dealer in F-3, middle level street dealers in F-2 and major violators in F-1) [hereinafter ADVISORY COMM. REPORT].

198. The Ohio Commission was specifically directed to consider sentencing fairness, O.R.C. § 181.23(A), and to propose a sentencing policy that assured proportionality, uniformity, and fairness. *Id.* § 181.24(A) & (B)(1), (2). The Commission responded by recommending that any sentence that was based upon the offenders race, ethnicity, gender, or religion be prohibited, and directing that each sentence be fair and consistent with sentences for similar offenders in similar circumstances who have committed similar crimes. *See* ADVISORY COMM. MINUTES, *supra* note 197, at 14. The Advisory Committee took into account numerous efforts by sentencing commissions around the country, and cited one article they considered while recommendations. *Id.* at 72 (the article consulted was not named but, in 64 UNIV. COLO. L. REV., issue 3 (1993)). In addition to expressly prohibiting sentences based upon race, judges are be instructed to choose sentences that treat similar offenses similarly. *Id.* This notion was incorporated into S.B. 2 by requiring judges to substantiate the sentences they have imposed in certain circumstances. O.R.C. § 2929.19(B)(1) (effective July 1, 1996). This section requires the court to give reasons for the sentence in the limited cases where the sentence is appealable under the act. *Id.* The finding may be made orally, but must be based upon the purposes, principles, and factors governing sentences in § 2929.11 and § 2929.12. *Id.* The situations where such substantiation is required are those situations where the judge imposes

Advisory Committee¹⁹⁹ discussed this issue extensively and conducted a statistical evaluation of the disparate impact of S.B. 2's crack and powder cocaine sentences on those of different races.²⁰⁰ After closely scrutinizing S.B. 2's racial impact, the Commission concluded that its recommendations would not discriminate on the basis of race.²⁰¹

The last major concern of the Commission was the impact that S.B. 2 would have on the criminal justice system, most significantly the Ohio prison system.²⁰² The Commission devoted an entire section of its recommendations to the projected cost and savings as a result of S.B. 2.²⁰³ The impact that S.B. 2's enhanced crack sentences would have on the prison population was also addressed by the Advisory Committee.²⁰⁴ The consensus of both the Advisory Committee and the Commission was that any prison overcrowding resulting

a sentence that does not closely follow the sentencing instructions they are provided. For example, judicial substantiation is required when (i) no prison term is imposed for an F-1 or an F-2 offense; (ii) a prison term is imposed for certain F-4 or F-5 offenses; (iii) when the judge imposes the maximum sentence; and (iv) when the court imposes consecutive prison terms. O.R.C. § 2929.19(B)(2) (effective July 1, 1996).

See also *infra* notes 200-01 (discussing the racially disparate impact of a crack/powder cocaine sentencing disparity); *supra* notes 39-44 (discussing the equal protection challenges to the guidelines' 100:1 ratio).

199. This is an advisory body to the sentencing commission created pursuant to O.R.C. § 181.22.

200. The Commission did a statistical analysis, based upon its own tracking study and the FBI's Uniform Crime Reports. See COMM'N REPORT, *supra* note 139, at 73. The Commission found no statistical patterns of racial bias for any high-level felonies. *Id.* at 74. There was also considerable discussion in the Advisory Committee's meetings, which determined that "[a]ny disparate impact on minorities would be offset by the fact that crack is seldom possessed in large quantities . . . and persons caught with such quantities are usually white and receive very long sentences." See ADVISORY COMM. MINUTES, *supra* note 197, at 5. Apparently, 90% of complaints registered daily are from inner-city blacks. *Id.* at 6. Black members of the Sentencing Commission supported tougher crack penalties because of the damage that the drug does to the inner-city neighborhoods. (Memorandum from David Diroll, Executive Director of the Ohio Criminal Sentencing Comm'n to the author) (Jan. 23, 1996) (on file with the University of Akron Law Review). Mr. Diroll states that "it can also be argued that the enforcement of the crack offenses has a beneficial impact on the vast majority of inner-city residents who are law-abiding. *Id.* It should be noted that, in addition to comprising multiple black members, the Commission also included a representative of the NAACP, Charles See.

201. See COMM'N REPORT, *supra* note 139, at 73.

202. The General Assembly instructed the Commission to learn more about correctional resources—from prison to probation. See COMM'N REPORT, *supra* note 139, at 10. The Commission was also told to help manage current resources and to identify new ones that may be needed. O.R.C. § 181.23(A)(4)-(7). The Commission's sentencing policy must achieve a reasonable use of correctional resources. *Id.* § 181.23(B). It must also assist in the management of prison crowding, *id.* § 181.24(A), by matching criminal penalties with available resources and by promoting a full range of sentencing options. *Id.* § 181.24(B)(4) & (5).

203. See COMM'N REPORT, *supra* note 139, at 60-64.

204. State Public defender, James Jura, argued that if the Committee sentences crack and powder cocaine differently, it would "greatly increase prison crowding." See ADVISORY COMM. MINUTES, *supra* note 197, at 10.

from lengthier crack sentences would be necessary to meet their concern over crack and its impact on society.²⁰⁵ In terms of the overall sentencing scheme of S.B. 2, however, there are many other non-prison alternatives available that are projected to counter situations such as the potential increase in prison sentences for crack offenders.²⁰⁶

V. IMPLICATIONS OF OHIO'S NEW GUIDELINES

A. *Ohio Criminal Sentencing Commission's Crack Research*

James Madison wrote that "a republic must refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may discern their true interest."²⁰⁷ The research and legislative effort behind S.B. 2 and its decision to sentence crack differently than powder cocaine is the yardstick against which other legislatures considering this problem, or any other problems, should be measured.²⁰⁸ The complexity

205. Although not explicitly expressed, it is clear the Advisory Committee and the Sentencing Committee had too great a concern over the dangerous nature of crack and if, in the instance of crack, the prison population would increase, it would be the price that the system has to pay for addressing a very serious concern. *See generally* ADVISORY COMM. MINUTES, *supra* note 197; COMM'N REPORT, *supra* note 139; and the sentencing scheme of S.B. 2, *infra* part IV(B)(3) (making it clear that in order to address the nature and marketing patterns of crack that the lower thresholds for crack were necessary).

206. *See* part V(C)(5) (discussing the overall savings from S.B. 2 and the scheme's ability to absorb small increases, such as lengthier crack sentences).

207. THE FEDERALIST No. 10, 46 (James Madison).

208. The Commission is required to study the state's criminal laws, patterns, and resources. O.R.C. § 181.23(A). It must evaluate existing sentencing laws, review criminal statutes for proportionality, review state and local correctional resources, profile offenders, and identify needed resources. *Id.* § 181.23(B). The Commission, in fact, catalogued 360 classified felonies and degrees of felonies throughout the Revised Code and reviewed each for proportionality; identified 76 duplicate offenses for repeal and recommended changes to several other offenses to eliminate inconsistencies; cataloged over 1,000 classified misdemeanors and degrees of misdemeanors; cataloged over 500 unclassified offenses throughout the O.R.C.; developed a computer model capable of predicting prison population trends and the impact of changes in the law; described and inventoried 34 pre-sentencing, sentencing, and release options, surveyed the use of these options, and profiled offenders in the options; tracked hundreds of cases from the initial filing of charges through disposition; profiled offenders by race, gender, offense, county, employment, education, criminal history, and many other factors; studied plea bargaining and victimization; provided the first in-depth review of sentencing state-wide to help the Commission monitor any recommendations adopted by the General Assembly; worked with the Department of Rehabilitation and Correction (DRC) on data collection and analysis; undertook the first state-wide analysis of the costs of sentencing options; surveyed common pleas judges on the severity of offenses, equivalencies of sanctions, aggravating and mitigating circumstances, and sentencing generally; reviewed the work of sentencing commissions in other states and studied laws covering drugs, victim rights, "good time," and appellate review of sentencing in several states; heard vast amounts of testimony on various aspects of Ohio's sentencing scheme; and other efforts to thoroughly research its recommendations to the Assembly. *See* COMM'N REPORT, *supra* note 139, at 16-17.

and multitude of issues behind sentencing have prompted other states to create commissions similar to Ohio's Criminal Sentencing Commission to research different sentencing schemes and their implications.²⁰⁹ Consistent with the Ohio Criminal Sentencing Commission's findings that crack is a more dangerous drug, the Ohio General Assembly took the controversial step of sentencing crack violations proportionately to the impact that they have on today's society.²¹⁰

B. Effect of S.B. 2's Higher Crack Sentences

One of the most popular arguments against lower crack thresholds, like those enacted in S.B. 2, is that the "kingpins" or large-scale dealers are not punished, while the "street-level" or small-time dealers are.²¹¹ This is necessarily so because crack is marketed differently than the powder cocaine.²¹² In order to effectuate its intent to hit the "major players" harder²¹³ than the street-level dealers,²¹⁴ the Ohio Criminal Sentencing Commission tailored its sentencing scheme to the unique nature of the crack trade.²¹⁵ Those who traffic

209. See *infra* note 304 and accompanying text (discussing the seventeen states that have taken the "sentencing commission" approach to enacting their sentencing guidelines).

210. See *supra* part IV(B)(3) (setting forth the Ohio crack sentencing scheme). "Crack is obviously a dangerous drug, and its abuse is clearly inflicting serious social and economic costs on the country. There is every reason to see the enhanced crack sentences as a reasonable legislative response to a very real social threat." Leitman, *supra* note 39, at 215.

211. Slansky, *supra* note 39, at 1287 ("Nobody has suggested that a defendant caught with 50 grams is a 'kingpin' or a 'major trafficker.' Defendants caught dealing crack are almost always street-level retailers, not wholesalers."). See also Jim Newton, *Harsher Crack Sentences Criticized as Racial Inequality*, L.A. TIMES, Nov. 23, 1992, at A1, A20.

212. See *infra* notes 216-219 (discussing the different nature of marketing and distributing crack).

213. See *supra* note 197 and accompanying text (quoting David Diroll on the intended effect of the escalating 5:1 to 10:1 ratio).

214. The Commission Report provides a "Drug Sentencing Summary" that provides "Weights and divisions between felony levels are based on expert testimony." The divisions distinguish between users (F-5), users who sell to support habits (F-4), basic traffickers (F-3), middle-level traffickers (F-2), and major dealers (F-1). See COMM'N REPORT, *supra* note 139, at 38.

215. See *infra* notes 217-219 and accompanying text (discussing the difference between crack and powder cocaine distribution). The Commission clearly took this fact into account in their enactment of S.B. 2. See ADVISORY COMM. MINUTES, *supra* note 197, at 6 (testimony of Lorain County Prosecuting Attorney, Gregory A. White) ("[D]ealers of cocaine deal in pounds of the substance, while crack dealers do not. A seller of 50 grams of crack is a bigger dealer than someone with 10 grams of cocaine."); *Id.* (testimony of Chief Eldredge, Lyndhurst Police Chief) ("1,000 grams of cocaine equals 5,000 rocks of crack, but no one carries that many rocks. If the level for an F-1 is set at 5,000 rocks, realistically, no high level dealers would be found."); *Id.* at 7 (testimony of Judge Griffen, Cuyahoga County Common Pleas Judge) ("These suppliers (major suppliers) must be the target rather than the small-time buyer on the street who is easier to catch."); *Id.* (testimony of undercover agent) ("500 grams of 80% pure powder cocaine could yield 2,500 to 5,000 'unit doses,' depending on how it was cooked. Therefore, 500 grams of powder cocaine is comparable to 25 grams of crack.").

crack operate at a lower level within trafficking operations than do traffickers of powder cocaine.²¹⁶ They also operate on a smaller geographic scale than do powder cocaine dealers.²¹⁷ Therefore, the lower thresholds imposed by S.B. 2 for crack violations will proportionally punish the major crack dealers who deal in correspondingly low amounts of crack.²¹⁸

In addition to accounting for differences in the crack market, S.B. 2's

216. The U.S. Commission conducted a special study in 1993 to assess crack and powder cocaine defendants' roles within drug organizations. See COCAINE AND POLICY, *supra* note 13, at 169. Within-organization function of crack offenders is mostly at the "street-level" (59.6% compared to 31.2% of powder cocaine offenders), *id.* at 172, tbl. 18, while more powder cocaine offenders operate at "mid-level" (38.2% vs 30.8% for crack offenders) or "high-level" (9.2% vs. 5.5% for crack offenders). *Id.* See also *United States v. Shepard*, 857 F. Supp. 105, 110 (D.D.C. 1994) (Judge Green took judicial notice "that many, if not most, crack dealers cook their own product."); 132 CONG. REC. E259 (daily ed. July 22, 1986) (remarks of Rep. Garcia) (noting that crack "is produced almost anywhere and in small quantities."); 132 CONG. REC. 14, 822 (1986) (remarks of Sen. D'Amato) (observing that under the then-existing law "crack dealers cannot be subject to the maximum unless he is caught with a kilogram, or more than 15,000 doses, of crack. That simply never happens.").

217. See COCAINE AND POLICY, *supra* note 13, at 169. 76.8% of crack dealers operate at the "local" level, while 39.0% of powder cocaine dealers operate locally. *Id.* at 170, tbl. 17. However, 31.3% of powder cocaine dealers operate at the "inter-state" level, while only 14.6% of crack dealers operate at this level. *Id.* Most notably, 18.1% of powder cocaine dealers operate at an "international" level, while only 1.3% of crack dealers operate at this level. *Id.*

In tying mandatory minimum penalties to the quantity of the drug involved in trafficking offenses, Congress apparently intended these penalties to apply to discrete categories of offenders—specifically "major" traffickers (10 year minimum) and "serious" traffickers (5 year minimum). See *id.* at 118. Senator Byrd, the Senate Minority Leader, summarized the intent behind the 100:1 ratio:

For the kingpins, the masterminds who are really running these operations—and they can be identified by the amount of drugs with which they are involved—we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years Our proposal would also provide mandatory penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The jail term would be slightly less than those for the kingpins, they nevertheless would have to go to jail—a minimum of 5 years for the first offense.

132 CONG. REC. S.14, 300 (daily ed. Sept. 30, 1986).

See also 132 CONG. REC. 22, 993 (Oct. 11, 1986) (statement of Rep. LaFalce) (statement of Sen. Byrd stating that "the bill . . . acknowledges that there are differing degrees of culpability in the drug world. Thus, separate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers."); H.R. REP. NO. 9-845, 99th Cong., 2d Sess., pt. 1 at 11-17 (1986) (construing penalty provisions of a comparable bill (H.R. 5394) similarly).

218. See *supra* note 218 (discussing the differences in the amounts that dealers of crack and powder cocaine traffic on the streets and that lower thresholds for crack were necessary to reflect the Commission's aim of sentencing the "major players" more harshly than street users). See also *supra* part IV(B)(5) (showing that the increases in prison term imposed by S.B. 2 do in fact impact those higher ranges much more severely than the lower level dealers, especially those between 100-750 grams).

moderately enhanced crack sentences will also account for differences among the drug traffickers themselves.²¹⁹ There is considerable evidence that longer sentences may be necessary to adequately deter crack offenders.²²⁰ Crack offenders have the worst criminal history,²²¹ and also have the highest recidivism rates of any drug offenders.²²² Lastly, crack offenders are the more likely to use violence and weapons while trafficking or dealing.²²³ Therefore, in addition to accounting for differences between crack and powder cocaine, S.B. 2 also sentences crack offenders proportionately to their role in the distribution scheme and their greater likelihood of presenting a danger to society.

S.B. 2's crack sentences also account for another important variable—race.²²⁴ The increase in the average sentences served by black crack offenders between 1986-1990 was determined by the Department of Justice to be attributable to the federal guidelines' 100:1 ratio.²²⁵ With a moderate 5:1-10:1 ratio, this disparity may be reduced.²²⁶ While some argue that any ratio other

219. See *infra* notes 221-24 (discussing the different and more dangerous characteristics of crack offenders).

220. See *infra* notes 222-24 (discussing the criminal histories and recidivism rates of crack offenders as compared to powder cocaine offenders).

221. See U. S. DEP'T OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES (Feb. 1994), Table 26, Part I. Crack defendants are the least likely of drug offenders to have a minimal criminal history. See COCAINE AND POLICY, *supra* note 13, at 163 (relying on the data from the previously mentioned study). They are also the most likely of all drug offenders to be "career offenders." *Id.* This data is summarized at *id.* at 164, tbl. 14 (graphing the criminal histories of drug trafficking defendants from Oct. 1, 1992 through Sept. 30, 1993).

222. Crack defendants are more likely than all other drug offenders, as a class, to commit a crack offense while under a pre-existing criminal justice sentence (19.2% vs. 12.3% for powder cocaine offenders). *Id.* at 163. Additionally, crack offenders are the most likely to commit the instant crack offense within 2 years of release from imprisonment for a prior offense (4.2% vs. 1.7% for powder cocaine offenders). *Id.* Lastly, crack offenders are the most likely to commit a crack offense while both under a criminal justice sentence at the time of the current offense and to commit another crack offense within 2 years of their being released from imprisonment for a prior offense 14.4% vs. 6.6% for powder cocaine offenders). *Id.* This data is summarized at *id.* at 165, tbl. 15.

223. *Id.* at 166. Federal "weapon enhancements" are given to 13.9% of crack offenders, while the same enhancements were only given to powder cocaine offenders 8.8% of the time. *Id.* This statistic for crack offenders is also higher than for any other drug. This information is summarized at *id.* at 167, tbl. 16.

224. See *infra* notes 226-230 and accompanying text (discussing the racial considerations behind S.B. 2).

225. See BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? 1 (1993). The main reason cited for this increase was that 83% of all federal offenders convicted of trafficking crack were black. *Id.* McDonald and Carlson, who conducted the study, concluded that if the ratio were reduced to 1:1, blacks would actually have an average lower sentence than whites for crack violations. *Id.* at 2.

226. BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF

than 1:1 will adversely effect minorities,²²⁷ David Diroll, Executive Director of the Ohio Criminal Sentencing Commission, stated that "Ohio's crack to cocaine disparity would help blacks as much as it would hurt them."²²⁸ He supported this contention by explaining:

crack-related reports to police are usually made by black, law-abiding citizens. With the damage that crack does to inner-city neighborhoods, these more severe sentences for crack would help the vast majority of these concerned citizens, while adversely effecting those few crack dealers who menace their neighborhoods.²²⁹

This racial inequity may be further reduced if the federal sentencing system does in fact lower its ratio.²³⁰

C. *Sentences that Reflect the Crime: The Cure to Many Evils*

The consistency between problem and solution reflected in S.B.2's "middleground approach" is perhaps its most important accomplishment.²³¹ The enhanced crack sentences stemming from this approach meet the legislative concern over the dangers associated with crack,²³² while also keeping the sentences proportional to its danger.²³³ While Congress may have had the same intent in its passage of the federal guidelines,²³⁴ S.B. 2 has achieved this

JUSTICE, *supra* note 221, at 1. The Bureau concluded that, "if legislation and guidelines were changed so that crack and powder cocaine traffickers were sentenced identically . . . this study's analysis suggests that the black-white differences in sentences for cocaine trafficking would not only evaporate, but would slightly reverse." *Id.* While S.B. 2 will not reach this reversal, it may make a marked improvement on this situation.

227. *See generally* Taifa, *supra* note 39.

228. Telephone interview with Mr. Diroll, *supra* note 200.

229. *Id.*

230. *See infra* notes 240-45 (proposing that the federal guidelines will soon lower their 100:1 ratio, as well as the mandatory minimum sentences for crack).

231. H. Scott Wallace, former counsel to the U.S. Senate Judiciary Committee, former general counsel to the U.S. Senate Committee on Veterans' Affairs, and current senior "fellow" at the Criminal Justice Policy Foundation, states that the federal/state punishment gap "fosters arbitrariness of punishment, which frustrates deterrence and devastates the balance of justice and fairness that citizens have a right to expect in the administration of law." *See* Wallace, *supra* note 3, at 52.

232. *See supra* part I(A) (discussing the dangerous nature of crack), notes 196-98 (discussing the Ohio Sentencing Commission, their Advisory Committee, and eventually Senate Bill 2's legislative concern over crack when compared to cocaine), notes 217-19 (discussing the difference between crack and cocaine distribution), and notes 221-24 (discussing the more dangerous offenders typically apprehended for crack offenses).

233. This refers to the federal guidelines' 100:1 disparity between crack and powder cocaine with no supporting rationale. *See supra* note 50 and *infra* note 235 (discussing the circumstances surrounding the enactment of the federal guidelines). There is also evidence that a large state-federal punishment gap "fosters arbitrariness of punishment, which frustrates deterrence and devastates the balance of justice and fairness that citizens have a right to expect in the administration of law." Wallace, *supra* note 3, at 52.

234. Congress was clearly concerned over the more dangerous nature of crack in its

mutually desired result through appropriately extensive research, rather than through the uninformed, "knee-jerk" approach taken by Congress.²³⁵

S.B. 2 clearly typifies the process through which any state reform should go, however this may not be its most important contribution. S.B. 2's potential impact on many of the problems plaguing today's court system, not only Ohio's, but other state and federal courts, makes S.B. 2 a valuable state sentencing reform.²³⁶

enactment of the 1986 Drug Abuse Act. 132 CONG. REC. 26, 447 (Sept. 6, 1986) (testimony of Sen. Lawton Chiles) ("This legislation will . . . decrease the amount for the stiffest penalties to apply Suc[h] treatment is absolutely essential because of the *especially lethal characteristics* of this form of cocaine (crack)." emphasis added)).

235. However, the legislative history of the 1986 Drug Abuse Act does not include any discussion of the rationale behind the 100:1 ratio. Congress considered numerous other potential ratios much lower than 100:1. For example, there was much debate over a 20:1 ratio. *See, e.g.*, S. 2787 (Mandatory Crack and Other Drug Penalties Act); S. 2849 (Drug Free Workplace Act of 1986) (introduced by Senate Majority Leader Dole on behalf of the Reagan Administration); S. 2850 (Drug Enforcement Act of 1986). The original version of House Bill 5484 that was enacted into law (Anti Drug Abuse Act) was H.R. 5394 (Narcotics Penalties and Enforcement Act of 1986) and contained a ratio of 50:1. The Senate, however, hurried the bill through and added the 100:1 ratio with no explanation. *See COCAINE AND POLICY, supra* note 13, at 120. The Senate conducted only a single hearing on the 100:1 ratio, which lasted less than four hours. *See Crack Cocaine: Hearing before the Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs, United States Senate, 99th Cong., 2d Sess. 20 (1986)*. *See also* 132 CONG. REC. 31, 329 (daily ed., Oct. 15, 1986) (statement of Sen. Chiles) ("it is historical for Congress to be able to move this quickly."); 132 CONG. REC. 26, 449 (daily ed. Sept. 26, 1986) (statement of Sen. Rockefeller) ("I know it seems to some that we are moving too fast and frenetically to pass drug legislation."). Some members of Congress were wary of the speed behind the Act. *See, e.g.*, 132 CONG. REC. 26, 462 (daily ed. Sept. 26, 1986) (statement of Sen. Mathias) ("Very candidly, none of us has had the opportunity to study this enormous package. It did not emerge from the crucible of the committee process."); 132 CONG. REC. 22, 658 (daily ed. Sept. 10, 1986) (statement of Rep. Lott) ("In our haste to patch together a drug bill-any drug bill-before we adjourn, we have run the risk of ending up with a patch-work quilt . . . that may not fit together with a comprehensive whole."). *See also COCAINE AND POLICY, supra* note 13, at 121 ("The 1986 Act was notable for the speed of its development and enactment."). The social context behind which this legislation was making its way through Congress was one of panic, especially heightened with the recent cocaine-related death of Len Bias in 1986. He had been drafted in the first round by the Boston Celtics but died of a cocaine-related overdose. One member of Congress went as far as to referring to this legislation as "being addressed on an emergency basis." *See* CONG. REC. 26, 436 (daily ed. Sept. 26, 1986) (statement of Sen. Hawkins).

See also United States v. Willis, 967 F.2d 1220, 1226 (Heany, J., concurring). In his concurrence, Judge Heany stated that "although the 1986 congressional hearing with respect to crack . . . was filled with general statements about the dangers of crack and the economics of crack distribution, Congress had no hard evidence before it to support the contention that crack is 100 times more potent or dangerous than powder cocaine. *Id.*

For a discussion of the differences between the federal and state sentencing guidelines, see Kay A. Knapp & Dennis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679 (1992).

236. *See infra* parts V(C)(1)-(5). Today's criminal justice system is made up of many constituent parts, such as the state and federal courts. Each of these parts have sub-parts such as state sentencing laws, which in turn have even smaller parts such as state crack sentences.

1. Reduction of the Federal-State Sentencing Disparity

The respective state and federal crack sentences are intimately related because they influence which forum is used to prosecute the offense.²³⁷ While states should not punish crack more severely simply to bring their sentences closer to the federal sentences, the practical effect of low state sentences has clearly been to leave federal prosecutors dissatisfied.²³⁸ Ohio's "middle-ground approach" will likely reduce the federal/state disparity and the consensus seems to be that Congress will soon reciprocate.²³⁹ It is likely that the mandatory minimum sentences imposed by the Anti Drug Abuse Act of 1988²⁴⁰ will be reconsidered.²⁴¹ Also, despite rejecting the U.S. Sentencing

While only being a very small part of a unified whole, elements such as crack sentences can have a significant effect upon the criminal justice system as a whole. For example, if the large state-federal punishment gap is reduced, federal prosecutors will reduce their federal forum shopping based upon the states' lenient sentences. If this occurs the federal judiciary, currently overburdened by drug cases, will get some relief. This will also bring about a situation more consistent with the notions of federalism in which the states handle the majority of these cases. The states, Ohio in this case, will now have more drug offenses prosecuted in its court system. The availability and population of the state's prison system will necessarily be effected. In the case of S.B. 2, the cost savings make this increase in state cases more feasible.

237. Gerald W. Heany, *The Reality of Guideline Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 197 (1991) ("Because some state laws provide drug penalties less severe than those mandated by federal statutes and the guidelines for the same underlying conduct, the choice between federal and state prosecution is a significant factor in the sentence a defendant will ultimately receive if convicted."); *United States v. Williams*, 746 F. Supp. 1076, 1080 (D. Utah 1990), *aff'd and rem'd*, 963 F.2d 1337 (10th Cir. 1992). The *Williams* court stated:

it is not an exaggeration that the decision . . . to refer a defendant for federal or state prosecution is a substantial and indeed crucial factor in the ultimate sentence that the defendant will receive if convicted. The significance of this decision is magnified by the wide disparity between mandatory drug crime sentences under federal law as opposed to less severe indeterminate sentences under state law for the same underlying conduct.

Id.

238. See *supra* notes 79-86 and accompanying text (discussing the disparity that exists between federal and state systems with regard to crack sentencing and that the federal prosecutors view the leniency of the state sentences as a reason to seek the federal forum for more severe federal sentences).

239. See *infra* notes 241-246 and accompanying text (discussing the future of the current 100:1 crack to powder ratio in the federal guidelines).

240. See *supra* note 37 (discussing the Act and its mandatory minimums for crack offenses). For a general discussion of the function of the mandatory minimums, see Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851 (1995).

241. See Dan J. DeBenedictis, *How Long is Too Long?*, A.B.A. J., Oct. 1993, at 74 (suggesting that Congress may soon eliminate mandatory minimum sentences). It is often said that federal mandatory minimum sentences result in prison sentences for distribution of crack that are "incomprehensibly severe." See Richard Leiby, *A Crack in the System*, WASH. POST, Feb. 20, 1994, at F1. See also Michael Isikoff, *Getting Tough on Drugs: Draconian*

Commission's proposed 1:1 ratio,²⁴² Congress has strongly implied that: (1) the current guideline 100:1 ratio is over-punishment for crack violations;²⁴³ and (2) it is receptive to considering intermediate crack to powder cocaine ratios falling between 100:1 and 1:1.²⁴⁴ If mutual "middleground" approaches

Sentences Hurt Small Offenders More Than Kingpins, WASH. POST, Nov. 4, 1990, at C1. Compare this note with note 123 (discussing Congress' rejection of the proposed amendments to the federal sentencing guidelines and one their two concerns was the sentencing "cliffs" created by any amendments to the federal guidelines because of the mandatory minimums which would not be affected by guideline amendments). If the mandatory minimums were gone, one of two impediments to a lower crack ratio in the federal guidelines would be gone. Mandatory minimum sentences have been criticized by Attorney General Janet Reno. See DeBenedictis, *supra* at 77 (noting Janet Reno's concern with the prison overcrowding caused by federal mandatory sentences). See also *supra* note 123 (discussing the 8 of 10 witnesses before the Judiciary Committee were in favor of eliminating the mandatory minimum sentencing scheme enacted in the Anti Drug Abuse Act).

242. See *supra* notes 120-23 (discussing the U.S. Commission proposing amendments to the guidelines and Congress rejecting).

243. Despite rejecting the Commission's amendments, the Judiciary Committee noted that while there are important distinctions between crack and powder cocaine that mandate longer sentences for crack, "the current 100 to 1 quantity ratio may not be the appropriate ratio." H.R. REP. NO. 272, 104th Cong., 1st Sess. (1995). The Department of Justice also has recognized that some adjustment of the current penalty structure may be appropriate. *Id.* The reason for the Judiciary Committee's failure to adopt the amendments is based upon the fact that equal treatment of the drugs does not satisfy the overriding concern over crack, that "any such adjustment (in sentencing policy) must reflect the greater dangers associated with crack than powder cocaine." *Id.* Thus, until there is a contrary legislative finding that crack is not more dangerous than powder cocaine, it seems impractical to even propose equal sentencing of the drugs. This seems to be acknowledging that the 100:1 ratio is not the best result, but that neither is the equal treatment of the drugs. This could be interpreted as a call for the "middleground approach" taken by Ohio and supported in this Comment. "While the Department of Justice recognizes that some adjustment of the current penalty structure may be appropriate, any such adjustment must reflect the greater dangers associated with crack than cocaine." H.R. REP. NO. 272, 104th Cong., 1st Sess. 14 (1995).

244. "While the U.S. Commission researched only the propriety of the current federal 100:1 ratio, the Department of Justice had urged them to explore numerous ratios and their impact to submit them to Congress. However, the Commission only proposed the 1:1 ratio in the face of inconsistent mandatory minimums and provided Congress no data on other ratios." *House Hearings, Subcomm. on Crime Comm. on the Judiciary, U.S. House of Representatives* [hereinafter *House Hearings*], 1995 WL 421247 (F.D.C.H.) (testimony of Jo Ann Harris, Assistant Attorney General). "As for a 10:1 ratio, some precedent exists under the guidelines for applying this ratio to the smokeable form of a drug Like crack . . . [a]pplying a 10:1 ratio would adequately punish crack distributors," *House Hearings*, 1995 WL 471733 (F.D.C.H.) (testimony of Michael Goldsmith); "I offer the following brief discussion of the most frequently cited alternatives: 5:1, 10:1, and 20:1 . . . are certainly not the only options. I . . . think they represent the most appropriate range of alternatives." *House Hearings*, 1995 WL 410899 (F.D.C.H.) (testimony of Deanell Reece Tarca). The United States Sentencing Commission, in its Special Report to Congress, "Cocaine and Federal Sentencing Policy (COCAINE AND POLICY)," strongly implied that their 1:1 recommended ratio was the result of a lack of a more appropriate recommendation for crack sentences. The Commission clearly indicates that crack is a more dangerous drug. See generally COCAINE AND POLICY, *supra* note 13. The Commission stated "even while agreeing that crack may be a more harmful drug, the Commission is not prepared at this time to say definitely how that additional harm

are taken, there will finally be some needed consistency between state and federal courts exercising concurrent jurisdiction.²⁴⁵

United States Supreme Court Chief Justice William Rehnquist²⁴⁶ has strongly advocated the need for such consistency between federal and state courts and feels that the lack of such consistency has resulted in the current haphazard exercise of concurrent jurisdiction.²⁴⁷ He stated that "a significant portion of federal and state jurisdiction is concurrent . . . these arrangements contemplate a large measure of inter-system cross-fertilization and collaboration."²⁴⁸ The present lack of consistency in the exercise of concurrent jurisdiction has created chaos in many states.²⁴⁹ For example, both state and federal courts in California have suffered considerably as a result of haphazard concurrent jurisdiction.²⁵⁰ The effect of S.B. 2's crack sentencing scheme provides a needed first step for Ohio, and other states, toward resolving their problematic relationship with the federal courts.²⁵¹

should be accounted for in the current penalty scheme." COCAINE AND POLICY, *supra* note 13, at 196. In its final recommendation, the Commission stated "the Commission is not prepared to in this report to recommend a specific different ratio or a specific different structural approach to deal with the enhanced dangers believed to be presented by crack . . . the Commission intends to develop a model or models for Congress to consider in determining whether to revise the current approach." Taken together, these statements fairly clearly suggest that the Commission feels that, while the 100:1 is not the correct ratio, neither is the 1:1 ratio.

245. See *infra* notes 247-52 (discussing the problems with concurrent jurisdiction occurring today). See also Erwin Chemerinsky, *Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish*, 36 UCLA L. REV. 369 (1988); William W. Schwarzer et. al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992).

246. William Rehnquist, current Supreme Court Chief Justice, was first appointed to the Supreme Court by President Richard Nixon in 1972. He was an Associate Justice from 1972-1986. In 1986, he was promoted to Chief Justice upon the resignation of former Chief Justice Warren E. Burger.

247. See generally Rehnquist, *Seen Darkly*, *supra* note 104; Rehnquist, *Welcoming Remarks*, *supra* note 104. "The runaway growth of federal criminal jurisdiction has been unremittingly haphazard and without regard for its actual impact on the battle against crime nationwide." Wallace, *supra* note 24, at 8.

248. Rehnquist, *Seen Darkly*, *supra* note 104, at 7.

249. See *infra* note 251 and accompanying text (discussing California's problems with the current state of concurrent jurisdiction).

250. See generally Oakley, *supra* note 96 (discussing the fact that haphazard federal/state exercises of jurisdiction has created chaos in both the federal and state courts).

251. See *supra* notes 248-251 and accompanying text (discussing the haphazard relationship between state and federal concurrent jurisdiction and the problems that have resulted from this relationship). For a general overview of some of the reasons for this relationship and implications for the future of the federal-state court relationship, see generally Rehnquist, *Seen Darkly*, *supra* note 104 and Rehnquist, *Welcoming Remarks*, *supra* note 104 (discussing the future of the federal courts and the role that the state courts have in their future). State and federal judges meeting with one another has helped start a more cooperative environment, rather than competitive, between the two court systems. See Peters, *supra* note 87, at 1887.

2. Less Federal Forum Shopping

Federal prosecutors are flocking to the federal courts to prosecute drug offenses at an unprecedented rate.²⁵² Chief Justice Rehnquist cites the state-federal sentencing disparity as the root of this federal forum shopping that continually plagues our federal court system.²⁵³ The very practice of forum shopping between federal and state courts has continually been denounced in what is commonly referred to as the “policy against forum shopping,”²⁵⁴ and the Court has used the rationale to support numerous decisions.²⁵⁵ The Su-

252. See *supra* part III(B) (discussing forum shopping for harsher federal sentences), *infra* note 270 and accompanying text (discussing the problems the federal courts are having as a result of the marked increase of federal drug cases), and *infra* note 261 (discussing that reason that federal prosecutors are unhappy with state courts is because the available sentences are too lenient). See also Beale, *supra* note 81, at 1005-06 (discussing the strain placed upon the federal court system by the increase in drug cases prosecuted in federal court); Rehnquist, *Seen Darkly*, *supra* note 104, at 2 (“The point is that as a result of people looking to the federal courts those courts have become overburdened and the system has become clogged.”); *Judges Rap Stephens on Drug Cases*, LEGAL TIMES, Feb. 11, 1991, at 7 (stating that federal courts are being suffocated by small, run-of-the-mill drug cases). The main source of this problem has been congressional over-regulation. See Rehnquist, *Seen Darkly*, *supra* note 104, at 6 (“Politics also drive proposed increases in federal jurisdiction. During every congressional session, individuals and groups present new proposals to impose additional duties on the federal court We must avoid creating new federal causes of action unless they are crucial to meeting important national interests which cannot be satisfied by . . . the states.”). For a discussion of the impact of federalization on federal courts, see Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary From the Federalization of State Crime*, 43 KAN. L. REV. 503 (1995). See generally Melissa M. McGrath, Comment, *Federal Sentencing Law: Prosecutorial Discretion in Determining Departures Based on Defendant's Cooperation Violates Due Process*, 15 S. ILL. U. L.J. 321 (1990); Elizabeth A. Parsons, Note, *Shifting the Balance of Power: Prosecutorial Discretion Under the Federal Sentencing Guidelines*, 29 VAL. U. L. REV. 417 (1004).

253. See generally Rehnquist, *Seen Darkly*, *supra* note 104, at 6-7; Rehnquist, *Welcoming Remarks*, *supra* note 104, at 1891).

254. See, e.g., Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 641 (1974). See also *infra* notes 256-57 (denouncing forum shopping). Roscoe Pound called forum shopping the “sporting theory of justice” according to which the law is a sort of game in which the contestants must surmount the obstacles that chance or the system impose. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 417 (1906). See also Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 7 HARV. L. REV. 1521 (1981); Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990) [hereinafter *Forum Shopping Reconsidered*].

255. See, e.g., *Agency Holding Corp. v. Malley-Dupp & Assocs.*, 483 U.S. 143, 154 (1987); *Van Dusen v. Barrack*, 376 U.S. 612, 630-31 (1964) (arguing the federal venue transfer should not effect the applicable law should not be construed to promote forum shopping). See also *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 11 U.S.P.Q.2d (BNA) 1544, 1547 (S.D.N.Y. 1989) (labeling forum shopping to federal courts as “an improper purpose.”); *Coastal Corp. v. Texas E. Corp.*, 869 F.2d 817, 821 (5th Cir. 1989) (labeling forum shopping as a “heads I win, tails you lose . . . strategy.”); *Posadas de Puerto Rico Assocs., Inc. v. Association de Empleados de Casino de Puerto Rico*, 873 F.2d 479, 485 (1st Cir. 1989) (calling it “wise” to “discourage forum shopping.”); *Ojeda Rios v. Wigen*, 863 F.2d 196, 199 (2d Cir. 1988)

preme Court's aversion to forum shopping seems to be particularly focused on state-federal forum shopping.²⁵⁶ Attorney General Janet Reno, in an attempt to curtail federal prosecutorial discretion, actually exacerbated the effect of state-federal sentencing disparities by authorizing federal prosecutors to consider whether the penalty for a given offense "is proportional to the seriousness of the defendant's conduct."²⁵⁷

The guidelines' 100:1 ratio was clearly intended to discourage federal prosecution of minor drug offenses.²⁵⁸ However, the ratio has actually worsens the problem, suggesting the need for a new approach.²⁵⁹ Senate Bill 2 has responded to this unfortunate situation by satisfying the perpetual complaint of both federal legislators and prosecutors that state laws are too lenient.²⁶⁰ By

(stating that "[f]orum shopping is to be discouraged."). For further discussion of forum shopping, see *Forum Shopping Reconsidered*, *supra* note 254 (discussing the nature and practice of forum shopping). Members of the Supreme Court have stated that a "significant encouragement of forum shopping is alone sufficient to warrant application of state law." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 40 (1988) (Scalia, J., dissenting).

256. See Brilmayer & Lee, *State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflict of Laws*, 60 NOTRE DAME L. REV. 833, 833-35 (1985); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977).

257. See Beale *supra* note 81, at 310 (discussing the statements made by Janet Reno in her "Bluesheet" memorandum). Previous memorandums from past Attorney Generals have raised similar concerns over federal prosecutorial discretion. See, e.g., U.S. DEP'T OF JUSTICE, PROSECUTORS HANDBOOK ON SENTENCING GUIDELINES AND OTHER PROVISIONS OF THE SENTENCING REFORM ACT OF 1984 (Nov. 1, 1987) (memorandum referred to as the "Redbook" by Attorney General Richard Thornburgh); MEMORANDUM FROM ACTING DEPUTY ATTORNEY GENERAL GEORGE J. TWILLINGER, III, TO FEDERAL PROSECUTORS (Feb. 7, 1992); MEMORANDUM FROM ATTORNEY GENERAL RICHARD THORNBURGH TO FEDERAL PROSECUTORS (Mar. 13, 1989). The "Redbook" was clearly intended to strip away federal prosecutorial discretion. See Beale, *supra* note 81, at 310.

258. The Judiciary Subcommittee determined that the 5 and 10-year mandatory sentencing scheme would create the proper incentives for the Department of Justice to direct its "most intense focus" on "major traffickers" and "serious traffickers." See COCAINE AND POLICY, *supra* note 13, at 119. One of the major goals of a similar bill to the sentencing guidelines, H.R. 5394, is to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources. *Id.* The crack threshold amounts were 20 grams for a 5-year mandatory minimum and 100 grams for a 10-year mandatory minimum, which are greater amounts than those finally included in the guidelines, and reflect a 50:1 crack to powder cocaine ratio. *Id.*

259. However, the effect of the guidelines was to exacerbate sentencing disparities by shifting more discretion to federal prosecutors. See Heany, *supra* note 238, at 189. *Id.* at 190 ("The prosecutor's role in the sentencing process has been enhanced by Guideline sentencing . . . [n]o longer does the court retain its traditional ability to moderate the effect of the prosecutor's decisions . . ."). See also *supra* parts III(A) & (B) (discussing the incentive that the guidelines have created for federal prosecutors to use federal, instead of state courts to prosecute crack offenses).

260. See Wallace, *supra* note 3, at 52 ("Each new federal criminal law builds on the same premise, echoed time after time in congressional debate: The states are not tough enough . . . people are hurting . . . the states won't stamp out the problem . . . the states don't know

increasing state crack sentences, S.B.2 provides what amounts to a prosecutorial "stop-gap."²⁶¹ There will now be less incentive for the federal prosecutors to seek the federal forum to prosecute routine drug violations, and they will be able to keep their focus on the cases that are worthy of federal resources.²⁶²

Ironically, Attorney General Janet Reno foreshadowed Ohio's "middleground" solution by repeatedly warning against over-reliance on federal criminal laws and speaking of the need to develop a rational division of state-federal responsibilities.²⁶³ In order to bring about such a situation, the National Drug Control Strategy Commission has defined the role of the federal court, in overall drug enforcement, as "cooperative" with the state courts.²⁶⁴ Because some federal districts do not prosecute routine drug vio-

what's best for them . . . We do."); see also Frase, *Lessons for States*, *supra* note 190, at 128 ("The federal approach was designed to prevent . . . undue or inconsistent leniency.").

261. H. Scott Wallace feels that "the increasing state-federal punishment gap has two effects . . . it operates as a magnet, drawing cases into the federal system and bloating it." Wallace, *supra* note 3, at 52. Judge William W. Schwarzer opines that "[s]tate-federal coordination . . . can pay off in furthering economy, efficiency, and fairness." See William H. Schwarzer et. al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1750 (1992).

262. See *supra* notes 285-87 (discussing theories as to when federal jurisdiction is appropriate, especially when there is a "substantial national interest"). According to the Office of National Drug Control Policy ("ONDCP"), *infra* note 264, "targeting major trafficking organizations will continue to be a top priority of federal drug law enforcement authorities." NATIONAL DRUG CONTROL STRATEGY, OFFICE OF NATIONAL DRUG CONTROL POLICY, THE WHITE HOUSE 36-46 (1994) [hereinafter White House]. Part of the investigative policy outlines by the ONDCP includes "kingpins and enterprise strategies" that are designed to ensure that federal enforcement efforts are aimed on major drug trafficking organizations. *Id.*

263. Wallace, *supra* note 3, at 55. Attorney General Janet Reno has also expressed her concern over the seemingly arbitrary exercise of jurisdiction by federal prosecutors in her memorandum, the "Bluesheet." See generally Sara Sun Beale, *The New Reno Bluesheet: A Little More Candor Regarding Prosecutorial Discretion*, 6 FED. SENT. R. 310 (1993) (discussing this memorandum and previous similar memorandums from past Attorney's General). For a re-print of the "Bluesheet" memorandum, see *id.* at 352.

264. The 1986 Drug Abuse Act, see *supra* note 31, created the ONDCP in the Executive Office of the President. The Act requires ONDCP to publish national strategies for drug control. In February 1994, ONDCP released its strategy on the federal enforcement role. *Id.* The federal role is outlined as:

- (1) aggressively pursuing those enforcement efforts that target the major international and inter-state drug enterprises; (2) providing leadership, training, technical assistance, and research; (3) fostering cooperation among Federal, State, and local agencies; and (4) facilitating State and local enforcement and criminal justice efforts and/or innovative drug control approaches.

WHITE HOUSE, *supra* note 264, at 36-46.

For a general discussion of the proper state-federal roles, see Malcolm M. Lucas, *Keynote Address: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1663 (1992); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and the "Martian Chronicles"*, 78 VA. L. REV. 1769 (1992).

lations,²⁶⁵ the impact of crack sentencing schemes, such as S.B. 2's, will be greatest in those federal districts that do pursue minor crack violations.²⁶⁶

3. Relief for the Federal Judiciary

The effect of forum shopping has been to overburden the federal courts.²⁶⁷ It is clear that the federal judiciary does not have the capacity to accommodate all criminal cases in which there is a some element of national interest.²⁶⁸ Proportional state sentences will clearly play a role in easing the current flooding of the federal courts with routine drug prosecutions.²⁶⁹ Addressing the role of more consistent state and federal sentences in the current trend toward federal prosecution, then Chairman of the House Judiciary Subcommittee on the Administration of Justice, Representative William J. Hughes,²⁷⁰ stated that "in a federal system with concurrent jurisdiction, cases tend to flow toward the jurisdiction with tougher penalties."²⁷¹ Former United

265. In the Central District of California, the United States Attorney's Office has stated that it does not usually prosecute crack cases involving less than 50 grams of crack. See *United States v. Washington*, CR 91-632-TJH (C.D. Ca. 1993) (declaration of Assistant U.S. Attorney David C. Scheper attached to Government's Opposition to Defendant's Motion to Dismiss Re: Selective Prosecution). This statement is corroborated by only 4 prosecutions for crack trafficking of amounts below 50 grams. See *COCAINE AND POLICY*, *supra* note 13, at 139. A federal judge told a U.S. Sentencing Commission Symposium on Drugs and Violence, June 1993, that his district will not even consider bringing a federal case involving less than marijuana. Wallace, *supra* note 24, at 12.

266. The District of Columbia, in 1993, successfully prosecuted 111 defendants for trafficking less than 50 grams of crack. *COCAINE AND POLICY*, *supra* note 13, at 143. The United States Attorney's Office in the District of Columbia has recently changed its policy so that crack cases involving less than 50 grams generally are not prosecuted in federal court. *Id.*, n.94. Also, in the Southern District of West Virginia, 97 defendants were sentenced for trafficking less than 50 grams. *Id.* In the Southern District of California in 1992, there were 200 simple possession conviction for crack, which constituted 14% of that district's total caseload. Wallace, *supra* note 24, at 12.

267. See *supra* note 253 (discussing the overburdened federal docket stemming from increased drug prosecutions).

268. See Beale, *supra* note 81, at 981 (citing the REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 4-10, 35-38 (1990) (federal courts nearing caseload crisis, the most pressing problems stem from unprecedented number of narcotics prosecutions)). The federal interest is punishing crime at a level that is proportional to its impact on society. See *supra* note 258 (discussing Attorney General Janet Reno's statement about federal prosecution) and notes 87-91 (discussing the United States Attorney's Manual setting forth the federal interest in prosecuting crimes) (both implying that the available sentence for a certain crime must meet its seriousness). State sentences that are far more lenient than federal sentences often prompt federal prosecutors to look to the severity of the federal sentences to satisfy this interest.

269. See Oakley, *supra* note 96, at 2249 (suggesting greater efforts at coordinating federal and state judicial activity through "interrelated systems of state and federal jurisdiction" will help relieve the burden on federal courts and bring about the needed consistency between the courts). There are presently too many federal prosecutions.

270. Representative Hughes is a Democrat from New Jersey.

271. Remarks at Brookings Institution, Conference on Federalism, May 13, 1993. See also Wallace, *supra* note 3, at 52.

States Supreme Court Chief Justice Earl Warren furthered:²⁷² "it is essential that we achieve a proper jurisdictional balance between federal and state court systems, assigning to each system those cases most appropriate."²⁷³

The need for harmony between state and federal courts has become so urgent that it has prompted nationally coordinated efforts by both the state and federal systems.²⁷⁴ Chief Justice Rehnquist describes the optimal concurrent role of the federal judiciary as "complimentary, not of supplanting state court systems."²⁷⁵ S.B. 2 will answer these calls for help by imposing lengthier sentences that will more often satisfy the "federal interest" in prosecuting crack offenses, especially the minor ones.²⁷⁶ Without such a bridge, the federal courts will be denied their needed relief from the barrage of drug cases now being prosecuted in federal courts.²⁷⁷

4. States Resume Their Traditional Role

Former U.S. Supreme Court Justice Hugo Black²⁷⁸ wrote "federalism means that the federal courts should endeavor to protect federal rights and interests in ways that will not unduly interfere with the legitimate activities

272. Earl Warren was nominated to serve as the Supreme Court Chief Justice in 1953 by President Eisenhower. This was in response to the sudden death of the previous Chief Justice Fred Vinson on September 8, 1953. Warren was, at that time, the Governor of California. Warren's tenure as Chief Justice of the Supreme Court extended from 1953-1969. For a discussion of Justice Warren's notable characteristics, see Dennis J. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922 (1983); Bernard Schwartz, *Chief Justice Warren and 1984*, 35 HASTINGS L. J. 975 (1984).

273. Earl Warren, *Address by the Chief Justice of the United States*, 26 A.L.I. PROC. 27, 33 (1959).

274. Organizing a coordinated agenda for overlapping state and federal jurisdiction was one of the several reasons for the National Conference on State-Federal Judicial Relationships. See Peters, *supra* note 87, at 1892 (summarizing the purposes and discussions at the National Conference on State-Federal Judicial Relationships at which Ellen Peter was one of three chief reporters).

275. See Rehnquist, *Seen Darkly*, *supra* note 104, at 5. However, "Congress no longer tries to match the states or to fill in the gaps between them, but instead is trying to outdo them Drugs are one such area." Wallace, *supra* note 3, at 51.

276. See *supra* note 261 (discussing the complaint of federal prosecutors that state sentences are too lenient thus compelling federal prosecutors to prosecute in federal court).

277. See *supra* note 253 and accompanying text (discussing the ever increasing and problematic number of drug cases brought to federal court). Despite numerous states enacting sentencing statutes, the availability of the federal guidelines appears to be a strong incentive for prosecutors to pursue criminal litigation in federal court. See Peters, *supra* note 87, at 1891. Therefore, it is necessary that these state sentencing statutes provide for comparable opportunities for the federal prosecutors in order to curtail forum shopping.

278. Justice Black was appointed to the Supreme Court by President Franklin D. Roosevelt. Black's tenure on the Supreme Court extended from 1937-1971. In 1952, as a Senior Associate Justice, Black served as Acting Chief Justice following the sudden death of previous Chief Justice Fred Vinson. Later that year Earl Warren, Governor of California, was nominated by President Eisenhower. For discussions of the notable accomplishments of Justice Black, see Roger K. Newman, *Black and Brown*, 29 U. S.F. L. REV. 635 (1995).

of the states.”²⁷⁹ Clearly the states prefer to handle the majority of the drug violations that occur within their borders.²⁸⁰ This is consistent with the Framers’ contemplation of federalism and traditional state police powers.²⁸¹ With comparable sentences for crack, the states may resume their traditional role as the regulator of local drug violations.²⁸² This is not to say that the

279. *Younger v. Harris*, 401 U.S. 37, 44 (1971). Chief Justice Rehnquist stated:

The federal courts have evolved over the last two hundred years and can continue to do so. Perhaps because they could not agree on what role the federal courts should play . . . the framers of the Constitution largely left such questions to Congress. In doing so, however, the framers provided two important guideposts. The federal courts were not intended to supplant state courts, but to compliment them and federal courts were to be a distinctive judicial forum of limited jurisdiction, performing the tasks that the state courts, for political or structural reasons, could not.

Rehnquist, *Seen Darkly*, *supra* note 104, at 5. See also Wallace, *supra* note 24, at 8 (referring to federal jurisdiction over traditionally state crimes, he stated, “The framers of the Constitution would be astonished.”). For a historical view of the country’s adherence to federalism, see Thomas A. Baker, *A Catalogue of Judicial Federalism in the United States*, 46 S.C. L. REV. 835 (1995).

280. See *supra* note 24 (setting forth the relative contribution of states and federal law enforcement agencies in arresting drug offenders—1.1 million to 21,799) and *infra* note 287 (discussing the few reasons states relinquish their jurisdiction to federal courts). For a discussion of the advantages of state courts, see Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953 (1991).

281. More efficient use of federal courts so as not to step on the states “turf” is a perpetual issue with concurrent jurisdiction. See Rehnquist, *Seen Darkly*, *supra* note 104, at 7. (“We should consider whether federal criminal justice resources can be better devoted to the war on crime in a manner that supports state efforts and preserves a more traditional allocation between state and federal criminal jurisdictions.”). The federal governments’ assumption of jurisdiction over crimes is traditionally an area within the state’s police powers. See Wallace, *supra* note 24, at 8. There is also a truncated brand of federalism, grounded primarily in the Tenth Amendment and generally known as “states’ rights,” which values individual liberty only to the extent that state governments chose to protect it. States rights may be a mainstream concept these days, particularly among conservatives concerned about the growth of the federal government and federal regulation. See ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (Free Press, 1990). However, this concept has a checkered past. See Wallace, *supra* note 24, at 8.

Most federal judges are seriously concerned about the number and types of crimes being handled by the federal courts that were previously dealt with in the state systems. See Rehnquist, *Seen Darkly*, *supra* note 104, at 6-7.

For general discussion of federalism and federalization of crime, see Paul A. LaBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999 (1985); Larry E. Gee, Comment, *Federalism Revisited: The Supreme Court Resurrects the Notion of Enumerated Powers by Limiting Congress’ Attempt to Federalize Crime*, 27 ST. MARY’S L.J. 151 (1995).

282. States resuming their traditional role, see *supra* note 281, will take more than just higher crack sentences. Congress will also have to curtail its over-federalization of criminal law. “Although legislative efforts are necessary in some areas, simple congressional self-restraint is called for in others, specifically, the federalization of crimes and creation of new causes of action.” See Rehnquist, *Welcoming Remarks*, *supra* note 104, at 1660. “Congressional action is often the key to proper resolution of conflict between state and federal judicial systems.” *Id.* Federal criminal justice resources can be better devoted to the

federal courts have no role in drug prosecutions, they clearly do.²⁸³ There are numerous theories as to when such federal jurisdiction is appropriate.²⁸⁴ One well-established instance is when there is a "substantial" federal interest.²⁸⁵ The Federal Courts Study Committee has urged the Department of Justice, in federally prosecuting drug offenses, "to target the relatively small number of cases that the state courts cannot or will not effectively prosecute."²⁸⁶ State

war on crime in a manner that supports state efforts and preserves the more traditional allocation between state and federal courts. See Rehnquist, *Seen Darkly*, *supra* note 104, at 8. For a general discussion of the congressional trend to over-federalize, see Wallace, *supra* notes 3 & 24.

283. See *infra* note 281 (discussing theories as to when federal jurisdiction is appropriate).

284. One commentator argues that federal jurisdiction is appropriate when local authorities are overwhelmed by the conduct in question or when local authorities are unwilling or unable to face up to the problem. See Kathleen Sullivan, *Remarks at Overlapping and Separate Spheres: A Three-Branch Roundtable on State and Federal Jurisdiction* (Mar. 7, 1994) (transcript on file with author). Of course the problem with this approach is that any under-financed local police force would be adequate reason for federal jurisdiction. Also, a pattern of unsuccessful attempts to prosecute a particular crime or type of crime would likewise be a call for federal jurisdiction. Others argue that federal criminal jurisdiction is appropriate only when federal resources or expertise are needed to combat "sophisticated criminal enterprises." See COMMITTEE ON LONG-RANGE PLANNING, *supra* note 105, at 21. Yet another approach would be for Congress to exercise their jurisdiction to define what crimes and what aggravating factors are to be considered and decide what the applicable penalties are for this conduct in state courts. See Beale, *supra* note 81, at 1008-15. This approach would raise the issue of whether the federal government can force the state to handle cases in a certain way without conditional spending. See *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress may not "commande[r] the legislative process of the states by directly compelling them to enact or enforce a federal regulatory program."). This issue has also surfaced in numerous challenges to the Brady Bill, which requires states to search the criminal background of applicants for a firearm permit. See *Mack v. United States*, 865 F. Supp. 1372 (D. Ariz. 1994); *McGee v. United States*, 863 F. Supp. 321 9 (S.D. Miss. 1994); *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994). A very insightful and appropriate manner to conceptualize the federal prosecution problem is to separate the question of when federal resources are needed in a particular case with the very different question of whether it is necessary to employ federal courts as the forum to do so. See Beale, *supra* note 81, at 1008-15. This approach would allow federal interests to be satisfied in the more equipped forum of the states. *Id.* This has been done before, when federal funds were earmarked for local police, prosecutors, and prisons. See Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, §§ 31701-31702, 108 Stat. 1890 (1994). H. Scott Wallace summarizes the appropriate exercise of concurrent jurisdiction by stating "concurrent jurisdiction is valuable in vindicating civil rights and in pursuing state or local corruption or police brutality, when local authorities effectiveness might be compromised by political pressures." Wallace, *supra* note 24, at 8.

285. Over two decades ago, after extensive review, the National Commission on Reform of Federal Criminal Laws developed legislation limiting federal prosecution to cases "where there is a substantial federal interest, such as involvement of inter-state criminal enterprises, the protection of civil rights, or where state and local enforcement . . . is impeded by local corruption or conflicts." See Wallace, *supra* note 3, at 55. See also note 284 (discussing the appropriate exercise of federal jurisdiction over a crime).

286. See Wallace, *supra* note 3, at 23.

courts, of course, could continue to use federal courts in a complimentary role as they have in the past.²⁸⁷ By occupying their intended "complimentary"²⁸⁸ role, the federal courts could proceed with these limited number of drug prosecutions with the level of competence they were intended to possess.²⁸⁹

5. Reduced Cost to States

Any resulting increase in state prosecution of crack offenses will be made more feasible by the cost savings of S.B. 2 on the prison system.²⁹⁰ While prison terms will inevitably be more frequent and longer for crack violations,²⁹¹ the savings resulting from S.B. 2, as a whole, will more than compensate for this fact.²⁹² Prison terms for F-5 crack violations will be reduced by 10%,²⁹³ and the Commission further projects that the presumption against prison²⁹⁴ for F-4 and F-5 offenses will result in a prison reduction of 17.5% from the previous sentencing scheme.²⁹⁵ Prison sentences for F-3s are

287. Generally, states refer cases to the federal system when there is a large amount of drugs involved in the offense (18 states), when there is federal involvement in the investigation (15 states), and when there is an opportunity for asset forfeiture where the state had no power to seek such forfeiture (6 states). See COCAINE AND POLICY, *supra* note 13, at 135-36. This data was based upon a survey of the states that sought information about whether the federal statutes' harsher penalties for crack affected a states decision to refer crack cases to the federal system for prosecution. *Id.* The 100:1 ratio was cited as a reason for referral. *Id.*

288. See *supra* note 275 and accompanying text (quoting Chief Justice Rehnquist on the proper concurrent role of the federal judiciary) and *supra* notes 284-87 (discussing when federal jurisdiction is proper).

289. "The country has long expected a high quality of justice from the federal courts." Rehnquist, *Seen Darkly*, *supra* note 104, at 4.

290. See *supra* notes 295-300 (discussing the savings resulting from S.B. 2).

291. See *supra* part IV(B)(5) (discussing the impact that S.B. 2 will have on prison terms served by crack offenders). For a general discussion of sentencing guideline impact on prison populations, see Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696 (1995).

292. See *infra* notes 295-300 (discussing the overall savings to the Ohio prison system as a result of S.B. 2). For a general discussion of current sentencing guidelines on the prison population, see Thomas A. Marvell, *Sentencing Guidelines and Prison Population growth*, 85 J. CRIM. L. & CRIMINOLOGY 696 (1995); MICHAEL H. TONRY, *SENTENCING REFORM IMPACTS* 102 (1987).

293. See COMM'N REPORT, *supra* note 139, at 56. This is consistent with most state guidelines reforms, which are generally motivated by a desire to gain better control over escalating prison populations. See Frase, *Lessons for States*, *supra* note 191, at 123.

294. See *supra* notes 166-171 (discussing the sentencing treatment S.B. 2 affords to F-4 and F-5 offenses).

295. See COMM'N REPORT, *supra* note 139, at 56. This reduction of low-level offenders was presented in the congressional hearings regarding the reduction of the 100:1 ratio to a 1:1 ratio. H.R. REP. NO. 272, 104th Cong., 1st Sess. 16 (1995) (dissenting views). It was presented that by eliminating the 21% of federal drug law violators that are classified as "low-level" security risks would dramatically reduce the federal prison population. *Id.* (referring to a statement by Kathleen M. Hawk, Director of Bureau of Prisons, Oversight Hearing on Matters Relating to Federal Prisons).

projected to drop approximately 5%.²⁹⁶ The only potential increases are for F-1s and F-2s which could increase by 1%.²⁹⁷

The net result of S.B. 2's sentencing scheme is an estimated decrease in the prison population of 5,359 by the year 2002.²⁹⁸ This translates into a prison population reduction savings of \$63,187,969, in addition to the estimated \$10,517,423 savings resulting from construction savings.²⁹⁹ Therefore, Ohio has created a sufficiently efficient sentencing scheme such that it can now afford to adequately punish crimes, such as crack offenses, that it feels are more dangerous and worthy of more severe sentences, without devastating other branches of the criminal justice system.

D. Empiricism Introduced Into Sentencing Scheme: A Step Toward the Future

In order to arrive at consistent and workable crack sentences, states and Congress could likely benefit from an empirical approach to the problem. There is evidence that such an approach can be facilitated by the use of a permanent sentencing commission.³⁰⁰ One commentator particularly well-versed in current state sentencing reform trends, Professor Richard Frase,³⁰¹ states that state sentencing commissions "achieve a relatively balanced and stable compromise on key issues."³⁰² Of the seventeen states that have enacted

296. COMM'N REPORT, *supra* note 139, at 56.

297. *Id.* This reflects S.B. 2's intent to remain tough on the more serious crimes, not only in the area of drug offenses, but for all types of serious offenses.

298. *Id.* at 60. Of particular significance to this savings figure is the channeling of "low level felons and newly misdemeanor thieves" away from prison. *Id.* They would be equally divided among CBCF's, halfway houses, electronically monitored house arrest, and intensive supervision which would result in a savings of 14.5 million to local governments. *Id.*

299. *Id.*

300. See Frase, *Lessons for States*, *supra* note 190, at 129. He states:

One of the most important features of sentencing guidelines is their empirical research component This empirical component has become more and more important as states have begun to focus on the goal of predicting and preventing future prison overcrowding. Such predictions require detailed information on current sentencing practices, and the development of sophisticated computer models which can combine data . . . on factors known to impact on inmate populations.

Id.

301. Professor of Criminal Law at the University of Minnesota and author of *Sentencing Guidelines in the States*, 6 FED. SENT. REP. 123 (1993); *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J. L. & PUB. POL. 279 (1993); *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQUALITY 601 (1993); [hereinafter Frase, *Uncertain Future*]; *Defendant Amenability to Treatment or Probation as a Basis for Departure Under the Minnesota and Federal Sentencing Guidelines*, 3 FED SENT. REP. 328 (1991).

302. See Frase, *Lessons for States*, *supra* note 190, at 125 (analyzing the benefits of state guidelines). These state guidelines receive much less criticism than the federal guidelines because they are more balanced. *Id.* In addition to the extensive research conducted by these

their own presumptive sentencing guidelines,³⁰³ all except Alaska have established a permanent sentencing commission or similar body with authority to study sentencing practices and recommend guidelines.³⁰⁴ Ohio has joined this recent trend by creating a sentencing commission capable of doing the research and weighing competing policies in crack sentencing, and exploring the implications of various sentencing schemes.³⁰⁵ Unlike the deeply troubled federal guidelines, such state sentencing guidelines are currently thriving.³⁰⁶ The gathering of state sentencing commission research data will enable future comparisons among jurisdictions on the effectiveness of their different sentencing schemes and contribute to a common and successful sentencing scheme.³⁰⁷

CONCLUSION

S.B. 2 reflects what our founding fathers intended the legislative process to entail. Through extensive research and painstaking studies, the Ohio Com-

missions, "a larger, more representative sentencing commission (in terms of commission composition) helps." *Id.* For an in depth discussion of the Minnesota state guidelines and the superior balance that they achieve relative to the federal guidelines, see generally Frase, *Uncertain Future*, *supra* note 302, at 601.

303. The states that have adopted sentencing guidelines, and the dates that they take effect are as follows: Alaska (1980); Minnesota (1980); Pennsylvania (1982); Florida (1983); Michigan (1984); Washington (1984); Utah (1985); Wisconsin (1985); Delaware (1987); Oregon (1989); Tennessee (1989); Virginia (1991); Louisiana (1992); Kansas (1993); Arkansas (1994); North Carolina (1995); Ohio (1996). States that have considered but rejected guidelines are Connecticut, Maine, New York, South Carolina, the District of Columbia, and Colorado. For an excellent discussion of the trends and general characteristics of state sentencing guidelines, see generally Frase, *Lesson for States*, *supra* note 190.

304. *Id.* at 123. For discussion on the role of new sentencing commissions and their guidelines, see Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 MO. L. REV. 1077 (1992); David Boerner, *The Role of the Legislature in Guidelines: Sentencing in the "Other Washington,"* 28 WAKE FOREST L. REV. 381; Frase, *Uncertain Future*, *supra* note 302.

305. See *supra* note 209 (discussing the Ohio Criminal Sentencing Commission and its research).

306. Frase, *Lessons for States*, *supra* note 190, at 123.

307. See Frase, *Lessons for States*, *supra* note 190, at 127 ("Control [over escalating prison populations] is made possible by the greater uniformity and predictability of guideline sentences."). For an example of the use of such measures, see Frase, *Uncertain Future*, *supra* note 302, at 632 (Minnesota inmate populations relative to adult arrests remained fairly constant from the mid-1970s through 1991, while similar measures for the nation as a whole began at about the same level in 1975, but were 80% higher by 1991). See also Oakley, *supra* note 96, at 2248 (proposing an "integration model" of concurrent jurisdiction and concluding that "in the long run we should expand our efforts at coordination of state and federal judicial activity until we have reached the point of virtual integration . . . would feature discrete and inter-related systems of state and federal courts, but with more dependable and conclusive mechanisms than currently exist for allocation of jurisdictional power.").

mission and the General Assembly have enacted a sentencing scheme that fairly and proportionately reflects the impact of crack to society.³⁰⁸ While the process behind S.B. 2 is commendable, its effect upon the larger scheme of criminal justice is perhaps its greatest accomplishment. In the midst of the numerous problems presented by modern concurrent jurisdiction, especially in the area of crack sentencing, S.B. 2 has made a needed compromise. By taking a “middleground” approach to crack sentencing, S.B. 2 has contributed to a reduction of the state-federal punishment gap. Its moderate sentences will now be more likely to satisfy federal prosecutors, who are continually dissatisfied with the available state crack sentences, and, thus, keep more prosecutions in the state courts. The federal docket will finally get its needed relief, while at the same time creating a federal-state relationship more consistent with the notions of federalism. S.B. 2's sentencing scheme will also reduce the overall cost to Ohio's prison system, compensations for any potential increase in state prosecutions stemming from S.B.2. The empirical component added to state sentencing by S.B. 2 will not only help rectify problems created by past sentencing schemes, but extend into the future.

DAN HAUDE

308. For a discussion of many of the competing concerns when sentencing drugs, see William W. Wilkins et. al., *Competing Sentencing Policies*, 28 WAKE FOREST L. REV. 305 (1993).

