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## SENTENCING, DRUGS, AND PRISONS: A LESSON FROM OHIO

*Jelani Jefferson Exum\**

PRISON overcrowding has become a familiar story. Current data shows that more than 1 in 100 adults in America—over 2 million people—are incarcerated, earning the United States the distinction of having the highest incarceration rate in the world.<sup>1</sup> It should not be a surprise, therefore, that state and federal prisons are reaching and exceeding capacity. Nor should it be a shock that drug offenders take up many of the beds in those overcapacity prisons. Relative to other crimes, drug sentencing in the United States has been increasingly harsh since the 1970s, and the prison population is feeling the effects of that overly punitive approach.<sup>2</sup> In 1980, 40,000 people were imprisoned in America for drug crimes; however, that number jumped to 450,000 in 2005.<sup>3</sup> Incarceration at these rates is an incredibly expensive enterprise. In fiscal year 2009, states spent a total of \$52.3 billion on corrections, including building and operating prisons.<sup>4</sup> With the current economic crisis and state budgets being stretched thin, the costs of maintaining an ever-growing prison

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\* Visiting Associate Professor, University of Michigan Law School; Associate Professor of Law, University of Kansas. The ideas in this paper were presented as part of the “Overview: Where We Are and How We Got Here” panel at the Ohio Sentencing Policies and Practices, Costs and Consequences symposium sponsored by the Toledo Law Review on Feb. 18, 2011) (Douglas Berman, Margaret Cole Love, and Cecelia Klingele, co-panelists).

1. PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 3 (2010), [http://www.economicmobility.org/assets/pdfs/EMP\\_Incarceration.pdf](http://www.economicmobility.org/assets/pdfs/EMP_Incarceration.pdf). See also Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1 available at <http://www.nytimes.com/2008/04/23/us/23prison.html> (“The United States has less than 5 percent of the world’s population. But it has almost a quarter of the world’s prisoners.”).

2. MARC A. LEVIN, BUCKEYE INST. FOR PUB. POLICY SOLUTIONS, SMART ON CRIME: WITH PRISON COSTS ON THE RISE, OHIO NEEDS BETTER POLICIES FOR PROTECTING THE PUBLIC 6 (2010) [hereinafter SMART ON CRIME], available at [http://www.buckeyeinstitute.org/uploads/files/buckeye-smart-on-crime\(1\).pdf](http://www.buckeyeinstitute.org/uploads/files/buckeye-smart-on-crime(1).pdf). Further, in 2000, the average sentence for a drug crime in the federal system was 75.6 months while the average sentence for all federal felony was 58 months. U.S. BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, NCJ 189737, FEDERAL CRIMINAL CASE PROCESSING, 2000 WITH TRENDS 1982-2000, at 12 tbl.6 (2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fccp00.pdf>.

3. SMART ON CRIME, *supra* note 2, at 6.

4. NAT’L ASS’N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT, FISCAL YEAR 2009, at 54 (2010), available at <http://www.nasbo.org/LinkClick.aspx?fileticket=w7RqO74IIew%3d&tabid=79>.

population are becoming impossible to sustain, prompting government officials to start discussing solutions.<sup>5</sup>

For the most part, the discourse on how to handle the prison overcrowding dilemma has been approached as a reactive policy matter. State governments have discussed whether it is safer or more efficient to begin releasing nonviolent prisoners or to increase the rate of good time accrual to shorten the portion of sentences that are actually served.<sup>6</sup> Policymakers and legislators have even raised the possibility of building more prisons or adding prison beds.<sup>7</sup> Yet, there has been reluctance to adjusting the front-end laws of sentencing as a lasting solution to the prison overcrowding situation.<sup>8</sup> Though the idea of drug treatment programs as an alternative to incarceration has been discussed in several states, officials in only a few states are beginning to discuss such reforms as long-term sentencing law and policy shifts rather than as short-term solutions couched in the current budgetary concerns.<sup>9</sup> This essay focuses on drug laws in

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5. See generally, e.g., Symposium, *Ohio's Sentencing Policies and Practices, Costs and Consequences*, 42 U. TOL. L. REV. 859 (2011).

6. See Editorial, *Indiana's Answer to Prison Costs*, N.Y. TIMES, Jan. 17, 2011, at A24, available at <http://www.nytimes.com/2011/01/18/opinion/18tue2.html> (discussing Indiana Governor Michigan Daniels's approach to sentencing and parole reform). See also Heather Gillers, *Daniels-Backed Prison Reform Is Dealt a Blow by Prosecutors*, INDIANAPOLIS STAR, Feb. 15, 2011, at A1, available at <http://www.indystar.com/article/20110215/NEWS05/102150376/1001/SPORTS0107/Daniels-backed-prison-reform-dealt-blow-by-prosecutors?odyssey=nav|head> (quoting member of the Indiana Senate's Corrections Committee as saying, "We just don't accept the idea that because the Department of Correction has a bed problem that we should be releasing serious felons back on the street.").

7. See, e.g., Mary K. Reinhart, *Budget Woes Could Spur Sentencing Reforms*, ARIZ. GUARDIAN, Oct. 11, 2010 (on file with the University of Toledo Law Review) (explaining that Arizona's fiscal year 2011 budget includes funding for 6,000 additional prison beds and a 2,000-bed expansion of a private prison).

8. John Murphy, the head of the Ohio Prosecuting Attorneys Association, has been quoted as saying, "You don't write sentences to fit the budget." See Alan Johnson, *Treatment, Not Prison, Now Is Looking Good*, COLUMBUS DISPATCH (Feb. 3, 2011, 02:56 AM) [hereinafter Johnson, *Treatment, Not Prison*], [http://www.dispatch.com/live/content/local\\_news/stories/2011/02/03/copy/treatment-not-prison-now-is-looking-good.html](http://www.dispatch.com/live/content/local_news/stories/2011/02/03/copy/treatment-not-prison-now-is-looking-good.html).

9. See generally MARC LEVIN, TEXAS CRIMINAL JUSTICE REFORM: LOWER CRIME, LOWER COSTS (2010), available at <http://www.texaspolicy.com/pdf/2010-01-PP04-justicereinvestment-ml.pdf> (explaining that Texas has undergone sweeping criminal justice reforms designed to produce long-term reductions in crime as well as costs). See also Editorial, *supra* note 6 (explaining that Indiana Governor Mitch Daniels has proposed reforms that would include a restructured parole system and drug treatment for addicts). Oklahoma is also an example of a state that has been framing its proposed criminal justice reforms in terms of budget necessities. See Tom Lindley, *Oklahoma Lawmakers Seek to Strike Budget Balance for Prisons*, OKLAHOMAN, Dec. 5, 2010, <http://newsok.com/oklahoma-lawmakers-seek-to-strike-budget-balance-for-prisons/article/3520793> (quoting Oklahoma Speaker of the House, Kris Steele, as saying, "I can tell you from a fiscal standpoint ... (and) from a human resource standpoint we are going to have to do something different"). The same is true in Arizona where Rep. Cecil Ash, the chair of a legislative committee studying sentencing, has been quoted as saying, "The purpose isn't to let people out of prison early; the purpose is to stop wasting resources." Dianna M. Nández, *Arizona Mandatory-Sentencing Laws Targeted*, ARIZ. REPUBLIC, Nov. 18, 2010, <http://www.azcentral.com/arizonarepublic/local/articles/2010/11/18/20101118arizona-mandatory-sentencing-laws.html>. See also Alan Johnson, *Prison Reform Awaits Kasich*, COLUMBUS DISPATCH (Dec. 12, 2010, 03:02

Ohio in order to emphasize the importance of thinking about sentencing decisions' long-term consequences when determining sentencing laws on the front-end. First, this essay explains the current problem of prison overcrowding in greater depth. The essay then turns specifically to the sentencing of drug offenses in Ohio, using federal drug sentencing as a point of comparison. Ultimately, this essay concludes that the atmosphere in Ohio is ripe for readjusting sentencing attitudes so that the consequences of sentencing become proactive lawmaking concerns rather than after-the-fact reactions to a current economic situation.

### I. PRISON OVERCROWDING: THE CURRENT PROBLEM

Prison systems throughout the nation, including the federal system, are experiencing massive strain. The Bureau of Justice Statistics reported that as of December 2008, “[t]hirteen states and the federal system operated at more than 100% of their highest capacity, and 19 states operated at between 90% and 99%.”<sup>10</sup> Recent statistics are not any better. In October 2010, news stories reported that Kansas had officially run out of beds for its male prisoners.<sup>11</sup> It has been projected that by 2020, Kansas will be nearly 2,000 prisoners over capacity.<sup>12</sup> A month later, reports out of West Virginia revealed that some of their inmates now have to sleep on mattresses on the floor of the local jails to help absorb some of the state prison overflow.<sup>13</sup> Florida is feeling the crunch as well, with approximately 102,000 people in prison and a budget of \$2.4 billion to figure out how to deal with them.<sup>14</sup> Arizona has a total population of close to 6.5 million but a prison population of 40,000 inmates—an estimated 10 times greater than it was 30 years ago.<sup>15</sup> Indiana’s prison count has grown by a stunning 41% between 2000 and 2009, with 55% of prison admissions in 2008 being property or drug offenders.<sup>16</sup> The Oklahoma Department of Corrections has sought

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AM) [hereinafter Johnson, *Prison Reform Awaits Kasich*], [http://www.dispatch.com/live/content/local\\_news/stories/2010/12/12/copy/prison-reform-awaits-kasich.html](http://www.dispatch.com/live/content/local_news/stories/2010/12/12/copy/prison-reform-awaits-kasich.html) (quoting Ohio Governor-elect John Kasich as saying, “But corrections reform is critical. It’s one of the big cost sinks that we have.”).

10. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, STATE AND FEDERAL PRISON FACILITY CHARACTERISTICS, available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=133> (last visited Apr. 5, 2011).

11. Joe Lambe, *With More Prisoners and No Place to Put Them, Kansas Faces Tough Choices*, KAN. CITY STAR, Oct. 9, 2010, at A1, available at <http://www.kansascity.com/2010/10/09/2294825/with-more-prisoners-kansas-faces.html>.

12. *Id.*

13. Ashley B. Craig, *Official Says Inmates Sleeping on Jail Floors*, CHARLESTON DAILY MAIL (W. Va.), Nov. 11, 2010, <http://www.dailymail.com/News/statenews/201011101214>.

14. Gray Rohrer, *Florida Senators Look to Texas for Prison System Cuts*, SUNSHINE STATE NEWS (Fla.) (Jan. 25, 2011, 3:55 AM), <http://www.sunshinestateneews.com/story/florida-senators-look-texas-prison-system-cuts>.

15. Nájñez, *supra* note 9.

16. JUSTICE CENTER, THE COUNCIL OF STATE GOVERNMENTS, JUSTICE REINVESTMENT IN INDIANA: SUMMARY REPORT & POLICY FRAMEWORK 3 (2010), available at <http://www.in.gov/legislative/interim/committee/reports/CCECDB1.pdf>.

emergency funds from the state and estimates that it needs \$592 million to operate.<sup>17</sup> The situation is so dire in California that a federal court has declared the overcrowded prison system “criminogenic” and ruled that it deprives prisoners of constitutionally adequate medical and mental health care.<sup>18</sup> Of course, prisons bursting at the seams combined with increasingly limited budgets have led many governments to scramble to figure out what can be done about their prison systems.

Ohioans are having many of the same discussions taking place all over the nation. Ohio currently faces an estimated budget shortfall of \$8 billion.<sup>19</sup> As in many other states, this budget crisis has come to Ohio at the same time its prisons are more than full. Ohio’s prison population is 33% over capacity and estimates say that if nothing changes, Ohio will need 5,330 more beds by 2018.<sup>20</sup> It currently costs an average of \$69.19 per day to incarcerate one inmate in Ohio, amounting to \$25,254 per inmate per year.<sup>21</sup> With those rates, it is no surprise that Ohio now spends billions on prisons—\$1.29 billion in 2008.<sup>22</sup> The 7.3% of its total budget that Ohio spends on corrections makes prisons one of the largest categories in the entire Ohio budget.<sup>23</sup> The extremely strained prison system and consequently overburdened state budget have led Ohio lawmakers to come to bipartisan support for Senate Bill 10 and its mirror House Bill 86, a massive criminal justice reform measure that would shorten sentences for inmates who complete certain programs in prison and divert nonviolent drug offenders from prison to treatment.<sup>24</sup> As with most reform legislation, even with bipartisan support, it is unlikely that reforms in Ohio will completely solve the prison overcrowding and expense problem.<sup>25</sup> Therefore, as Ohio legislatures—as well

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17. Lindley, *supra* note 9.

18. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, No. C01-1351 TEH, 2009 WL 2430820, at \*3 (E.D. Cal. Aug. 4, 2009). This issue is currently under consideration by the U.S. Supreme Court following oral argument. See *Schwarzenegger v. Plata*, No. 09-1233, 2010 WL 4859507, at \*1 (Nov. 30, 2010) (Oral Argument).

19. SMART ON CRIME, *supra* note 2, at 3.

20. *Id.*

21. *Id.* at 5.

22. *Id.* at 3.

23. *Id.*; *Prison Reform Awaits Kasich*, *supra* note 9.

24. Johnson, *Treatment, Not Prison*, *supra* note 8. For an explanation of Senate Bill 10, see [http://law.utoledo.edu/students/lawreview/PDF/SeitzUpdates\\_SB10.pdf](http://law.utoledo.edu/students/lawreview/PDF/SeitzUpdates_SB10.pdf). The text of House Bill 86 can be found at [http://www.legislature.state.oh.us/BillText129/129\\_HB\\_86\\_EN\\_N.html](http://www.legislature.state.oh.us/BillText129/129_HB_86_EN_N.html). Since the Toledo Sentencing Symposium, Ohio Gov. John Kasich has signed House Bill 86 into law. Though the bill makes some changes to cocaine sentencing, it is not a complete overhaul of the mandatory minimum sentencing approach. See Alan Johnson, *Sentencing-Overhaul Law to Reduce Ohio’s Prison Population*, COLUMBUS DISPATCH, June 30, 2011, available at <http://www.dispatch.com/content/stories/local/2011/06/30/sentencing-overhaul-to-reduce-prison-population.html> (“It is projected that the reform law will save taxpayers \$46.3 million over three years, while reducing the prison population by about 7.5 percent. State prisons now hold 50,655 inmates, about 31 percent over the design capacity.”).

25. Though the reform has bipartisan support, as well as support in all branches of government, there are still critics. For instance, the Ohio Prosecuting Attorneys Association has expressed serious concerns about several aspects of the bill. See Karen Kasler, *Prison Reform Plan May Cut Budget*, WKSU NEWS, Feb. 2, 2011, <http://www.wksu.org/news/story/27387>; Julie Stewart, Op-

as governments in other states—think through the myriad of possible options in addressing the current prison situation, now is the perfect time to think about systematic changes to sentencing law and policy that go beyond simply responding to today's budget predicament. In thinking about why such a long-term approach is imperative, it helps to consider the disastrous results caused by the increasingly punitive sentencing of drug offenses—a group of offenses for which consequences were not main concerns when the sentencing laws were enacted and increased over time.

## II. THE IMPACT OF DRUG SENTENCING: A FOCUS ON OHIO

A great deal of the growth in the U.S. prison population comes from the significant increase in the incarceration of drug offenders. As previously stated, the drug offender population in America increased from 40,000 in 1980 to 450,000 by 2005.<sup>26</sup> This drastic increase has been seen in Ohio as well, with drug offenders now accounting for 15% of prison admissions when they constituted only 10% of prison commitments in 1981.<sup>27</sup> In 2008, offenders in Ohio were convicted of fourth degree and fifth degree felony offenses—the lowest level of felony offenses—at a rate of 56% of total prison admissions.<sup>28</sup> Of the 2008 Ohio prison commitments, 35% were fourth and fifth degree drug offenders—the single largest category of low-level offenders.<sup>29</sup>

The effect on the Ohio prison system from this high rate of drug offender imprisonment has been profound. These fourth and fifth degree property and drug offenders used 4,756 beds, costing Ohio an estimated \$121 million in 2008.<sup>30</sup> And, despite the state's budget concerns, the nonviolent prison population continues to be a significant portion of the drug offender population. As of November 2010, there were 8,514 drug offenders in Ohio prisons, with 3,759 being convicted of simple possession and 3,948 convicted of the more serious crime of trafficking.<sup>31</sup> As this data indicates, drug offenses—and low level drug offenses, at that—are big contributors to Ohio's overcrowded prison conditions. This state of affairs is due to the number of drug offenders convicted in the Ohio system and the length of sentences Ohio mandatorily imposes upon drug offenders. Similar to the federal system, Ohio statutes impose mandatory minimum sentences on many drug offenses.<sup>32</sup> Also similar to the federal system, as the number of people serving drug offenses increases over time in Ohio, a lot of pressure is put on Ohio's prison system. A closer look at Ohio drug-

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Ed., *Bipartisan Plan Would Reform Ohio's Criminal Justice System*, CLEVELAND PLAIN DEALER (Feb. 27, 2011, 03:09 AM), [http://www.cleveland.com/opinion/index.ssf/2011/02/bipartisan\\_plan\\_would\\_reform\\_o.html](http://www.cleveland.com/opinion/index.ssf/2011/02/bipartisan_plan_would_reform_o.html); Johnson, *Treatment, Not Prison*, *supra* note 8.

26. SMART ON CRIME, *supra* note 2, at 6.

27. *Id.*

28. JUSTICE CENTER, *supra* note 16, at 12.

29. *Id.* at 14.

30. *Id.*

31. SMART ON CRIME, *supra* note 2, at 13.

32. *Id.* at 6.

possession sentencing laws compared to federal drug sentencing reveals that disregarding the consequences of sentencing laws can lead to an overburdened prison system that is not sustainable over time.

Two controlled substances have been the subject of sentencing controversy in recent drug reform conversations—marijuana and crack cocaine. The Ohio sentencing laws for each category of controlled substance exemplify how harsh sentencing laws can strain a prison system. Marijuana possession is a helpful offense to study due to the growing number of people who favor decriminalizing marijuana use and possession, suggesting that enough of the public may be agreeable to an overall reduction in marijuana possession sentences.<sup>33</sup> Upon initial glance, Ohio's marijuana sentencing laws may not appear overly stringent. When compared to the federal marijuana laws, however, Ohio marijuana sentencing is relatively strict. In Ohio, the possession of less than 100 grams of marijuana is a citable offense only, carrying a fine of \$150.<sup>34</sup> An offender does not face the possibility of jail time until possession reaches 200 grams or more, for which the penalty increases to a possible sentence of 6 months to 1 year imprisonment.<sup>35</sup> A mandatory minimum sentence is not triggered until an offender possesses 20,000 grams (or 20 kilograms), and then the minimum is 8 years in prison.<sup>36</sup> By contrast, under federal law a mandatory minimum of 5 years applies to the possession of 100 kilograms of marijuana.<sup>37</sup> The federal system imposes a mandatory minimum of 10 years imprisonment to the possession of 1,000 kilograms of marijuana.<sup>38</sup> This comparison shows that Ohio's mandatory minimum sentencing for marijuana is more severe than federal sentencing, with 20 kilograms receiving at least 8 years in prison in Ohio when it takes 100 kilograms for a 5-year prison sentence under federal law.

Crack cocaine sentencing is another controversial area where Ohio's sentencing laws are harsher than the federal laws in some aspects. Debates about the sentencing of crack possessors have been contentious for some time because of the disparity between the sentences applicable to crack offenders and those applicable to powder cocaine offenders in most jurisdictions, though crack and powder cocaine are simply different forms of the same drugs. This disparate treatment is usually discussed along racial lines and seen as a main contributor to racial disparities in imprisonment rates.<sup>39</sup> For example, in its 2002 Report to

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33. See Lydia Saad, *U.S. Support for Legalizing Marijuana Reaches New High*, GALLUP, Oct. 19, 2009, <http://www.gallup.com/poll/123728/u.s.-support-legalizing-marijuana-reaches-new-high.aspx> ("U.S. public support for legalizing marijuana was fixed in the 25% range from the late 1970s to the mid-1990s, but acceptance jumped to 31% in 2000 and has continued to grow throughout this decade.").

34. OHIO REV. CODE ANN. §§ 2925.11(C)(3)(b), 2929.28(A)(2)(a)(v) (West 2010).

35. *Id.* § 2925.11(C)(3)(c).

36. *Id.* § 2925.11(C)(3)(f).

37. 21 U.S.C. § 841(b)(1)(B) (2006).

38. *Id.* § 841(b)(1)(A).

39. See Lucia Graves, *Crack-Powder Sentencing Disparity: Whites Get Probation, Blacks Get A Decade Behind Bars*, HUFFINGTON POST (Aug. 3, 2010, 03:48 PM), [http://www.huffingtonpost.com/2010/08/02/crack-powder-sentencing-d\\_n\\_667317.html](http://www.huffingtonpost.com/2010/08/02/crack-powder-sentencing-d_n_667317.html); Phillip Smith, *Sentencing: Ohio Senate Passes Bill to Equalize Crack/Powder Cocaine Disparity by*

Congress, the U.S. Sentencing Commission found that an “overwhelming majority” of crack offenders were black—91.4% in 1992 and 84.7% in 2000.<sup>40</sup> Like the federal system, blacks have been disproportionately incarcerated in Ohio. The Ohio Office of Criminal Justice Services reported that at midyear 2005, Ohio incarcerated blacks at an alarming rate of 2,196 per 100,000 U.S. residents and incarcerated whites at a rate of 344 per 100,000 U.S. residents.<sup>41</sup> Also similar to the federal system, Ohio law treats crack cocaine offenders much more harshly than it treats powder cocaine offenders.

Under Ohio law, courts shall impose a third degree felony prison term of 1 to 5 years for 25 to 100 grams of powder cocaine or 5 to 10 grams of crack cocaine.<sup>42</sup> A mandatory prison term for second degree felonies of 2 to 8 years applies to possession of 100 to 500 grams of powder cocaine or 10 to 25 grams of crack cocaine.<sup>43</sup> The harshest sentencing mandate, a first degree sentencing range of 3 to 10 years, applies to the possession of 500 to 1000 grams of powder cocaine and 25 to 100 grams of crack cocaine under Ohio law.<sup>44</sup>

Without using sentencing ranges, federal laws also impose mandatory sentencing minimums on cocaine offenders. Though a disparity in the sentencing of crack and powder cocaine offenders still remains in the federal system, federal law has recently changed from the 100:1 sentencing ratio that has existed since the 1980s to the current 18:1 ratio.<sup>45</sup> The Fair Sentencing Act of 2010 raised the minimum amount of crack required to trigger a 5-year mandatory minimum sentence from 5 to 28 grams and the amount of crack required to generate a 10-year mandatory minimum from 50 to 280 grams.<sup>46</sup> Powder cocaine still requires 500 grams for a mandatory minimum sentence of 5 years imprisonment and 5000 grams (or 5 kg) for a mandatory minimum sentence of 10 years.<sup>47</sup>

Though both the Ohio and federal systems punish crack offenses more harshly than powder cocaine offenses, Ohio’s minimum imprisonment terms for crack offenders are harsher than the federal approach. While it takes 280 grams of crack to get a 10-year mandatory minimum imprisonment sentence in the federal system, an offender can get a 10-year sentence of imprisonment for 100

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*Raising Sentences*, STOPTHEDRUGWAR.ORG (Oct. 26, 2007, 12:00 AM), [http://stopthedrugwar.org/chronicle/2007/oct/26/sentencing\\_ohio\\_senate\\_passes\\_bi](http://stopthedrugwar.org/chronicle/2007/oct/26/sentencing_ohio_senate_passes_bi).

40. UNITED STATES SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 62 (2002), *available at* [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/200205\\_RtC\\_Cocaine\\_Sentencing\\_Policy/200205\\_Cocaine\\_and\\_Federal\\_Sentencing\\_Policy.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf).

41. *See* OHIO OFFICE OF CRIMINAL JUSTICE SERVICES, PRISON AND JAIL INMATES AT MIDYEAR 2005, *available at* [http://www.publicsafety.ohio.gov/links/ocjs\\_prisonandjailinmates\\_midyearch2005.pdf](http://www.publicsafety.ohio.gov/links/ocjs_prisonandjailinmates_midyearch2005.pdf). Though alarming, the rate of incarceration of blacks compared to whites in Ohio is similar to the federal incarceration of blacks at a rate of 2,290 per 100,000 U.S. residents and of whites at a rate of 412 per 100,000 U.S. residents.

42. *See* OHIO REV. CODE ANN. § 2929.14(A)(3) (West 2010).

43. *Id.* § 2929.14(A)(2).

44. *Id.* § 2929.14(A)(1).

45. *See* Fair Sentencing Act of 2010, 21 U.S.C. § 841 (effective Aug. 3, 2010).

46. *Id.* § 841(b)(1)(A), (B).

47. *Id.*



grams of crack under Ohio law. With drug sentences that can be more severe than in the federal system, Ohio faces the same problem as the federal system, but to a greater degree—a substantial percentage of prisoners are incarcerated for a lengthy amount of time for drug offenses.

Ohio lawmakers have made some strides in addressing the effect of drug sentencing generally on the prison population, but those efforts do not completely rethink harsh drug sentences. As of September 2010, there are a recorded 79 drug courts in Ohio.<sup>48</sup> These courts are designed to provide an alternative to incarceration for nonviolent, low-level drug offenders.<sup>49</sup> Ohio drug courts operate as specialized units within existing courts, such as the Court of Common Pleas, Municipal Court, Juvenile Court, and Family Court.<sup>50</sup> While these drug courts offer a helpful alternative to incarceration and may reduce recidivism of offenders, current drug courts are not equipped and do not have the capacity to handle all drug possession cases, so only a relatively small percentage of drug cases get diverted to drug courts.<sup>51</sup> Furthermore, the previously discussed numbers of low-level drug offenders admitted to Ohio prisons demonstrate that drug courts alone do not solve the prison overcrowding problem.

The Ohio legislature has to refocus on the length of prison sentences imposed on drug offenders if they actually are to relieve the prison system's burden. It is not that the Ohio legislature has not at all considered changing drug sentencing, but those sentencing changes have not been discussed in a manner that would actually alleviate the prison overcrowding situation. For instance, in the 2007-2008 legislative session, the Ohio Senate passed Senate Bill 73, which would have eliminated the disparity in sentencing between crack and powder cocaine offenses.<sup>52</sup> The bill, however, would have done away with the disparity by raising sentences for powder cocaine offenses to make them as harsh as those for crack cocaine offenses.<sup>53</sup> While the effect would have been sentencing parity, the consequence would have been even more drug offenders serving longer prison sentences and an estimated increase of \$25 million a year in prison costs.<sup>54</sup> Though Senate Bill 73 never became law, it shows the legislature's discomfort in rethinking drug sentencing in a way that would lower the prison population on the front-end by shortening drug sentences overall.

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48. See *Ohio Drug Courts*, SUPREME COURT OF OHIO, [http://www.sconet.state.oh.us/JCS/specDockets/drug\\_courts/courtList.pdf](http://www.sconet.state.oh.us/JCS/specDockets/drug_courts/courtList.pdf).

49. SMART ON CRIME, *supra* note 2, at 13.

50. See *Ohio Drug Courts*, *supra* note 48.

51. See SMART ON CRIME, *supra* note 2, at 14. See also CENTER FOR COURT INNOVATION, THE FUTURE OF DRUG COURTS: HOW STATES ARE MAINSTREAMING THE DRUG COURT MODEL 19 (2004) (explaining some of the successes and limitations of Ohio drug courts).

52. Alan Johnson, *Two Prison Bills Could Be Merged*, COLUMBUS DISPATCH, Nov. 26, 2008 [hereinafter Johnson, *Two Prison Bills Could Be Merged*], [http://www.dispatchpolitics.com/live/content/local\\_news/stories/2008/11/26/copy/PRISON\\_CRACK.ART\\_ART\\_11-26-08\\_B2\\_E4C0U2N.html?sid=101](http://www.dispatchpolitics.com/live/content/local_news/stories/2008/11/26/copy/PRISON_CRACK.ART_ART_11-26-08_B2_E4C0U2N.html?sid=101).

53. *Id.* See also Smith, *supra* note 39.

54. See Johnson, *Two Prison Bills Could Be Merged*, *supra* note 52. See also Smith, *supra* note 39.

Much of this hesitation is due to the political pressure legislatures feel not to appear soft on crime.<sup>55</sup> But, as costs continue to rise and space in prisons becomes scarce, this may be the time when governments across the nation find the courage to take prison population projections and other consequences into account and reduce the lengths of sentences for drug crimes and other overly punished offenses.

### III. GOING FORWARD BY THINKING AHEAD

Prison populations and budget deficits in Ohio and other states have reached such a height that something has got to give. The upward trend of drug offender admissions to prison coupled with the possibility of long periods of incarceration produced by mandatory minimum sentencing teaches an important lesson, though. Sentencing laws based on the usual, political, “tough on crime” approach—an approach not backed by studies on the effect of such sentences on deterrence, recidivism, or prison population—get us to where Ohio and many other states are today. As the effect of harsh drug sentencing reveals, considering the potential consequences of sentencing laws must become a part of the discourse on setting sentencing lengths for any offenses. Hopefully, as Ohio lawmakers, lawmakers in other states, and lawmakers in the federal government continue to go forward in thinking about and experiencing sentencing reforms, drug sentencing will serve as an example that back-end consequences should always be in the forefront of sentencing law and policy decisions.

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55. See Editorial, *Evidence-based Savings*, AKRON BEACON J., Apr. 16, 2009, <http://www.ohio.com/editorial/opinions/43083752.html> (“Fearful of the criticism ‘soft on crime,’ state lawmakers are unlikely to include Ted Strickland’s sentencing reforms in the next two-year state budget.”).