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How (Not) to Implement Cost as a Sentencing Factor

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I. Introduction

The Missouri Sentencing Advisory Commission (MSAC) recently made national headlines for its decision to make information available to sentencing judges about the costs of various punishment options. The idea is entirely sensible. Confronted with a severe economic downturn, state legislatures are desperate to cut spending. It would be irresponsible, and probably impossible, to completely ignore the price tag attached to different forms of punishment. Better information about the projected costs of imprisonment, compared to cheaper alternatives such as probation, might persuade judges in some cases to forgo a prison sentence. In an era of mass incarceration, even incremental steps in that direction deserve consideration.

Despite the best of intentions, however, Missouri's program is timid and unlikely to have any meaningful effect. The state makes customized case-by-case cost information available on a website, but sentencing judges have no obligation to take that information into account—or even look it up. The Missouri initiative rests on the heroic assumption that voluntary information sharing, standing alone, will powerfully influence sentencing patterns and thereby save money for the state. The premise is unsound. Most previous experiments with “sentencing information systems” have collapsed because of judicial disinterest, and the available data suggest that Missouri's system faces similar challenges. Even proponents of the cost information initiative seem eager to deny that it will make any real difference.

At the same time, circulating information about punishment cost might fuel inter-judge sentencing disparity, driven not by legitimate differences between offenses and offenders but by different attitudes among judges about the proper role of costs in determining a sentence. No doubt some judges will embrace the new information enthusiastically, but others will do so only selectively, and many will ignore it. That result is in tension with the state legislature's directive to the Commission to examine and address “disparities” in sentencing for “offenders convicted of the same or similar crimes and with similar criminal histories.”¹

There are better ways of calibrating sentencing decisions to available corrections resources. For decades, sentencing commissions in Minnesota and other states have taken

costs into account at a systemic level, using projected prison resources as a key variable in setting presumptive guideline sentencing ranges. The approach has proven so effective that the American Law Institute is poised to make presumptive guidelines, driven in part by resource constraints, into a central part of the newly revised Model Penal Code: Sentencing. If Missouri is serious about taking costs into account at sentencing—and it should be—then it should do so systematically, rather than relying on ad hoc and voluntary decisions in individual cases.

II. Missouri's Sensible Idea

The operation of Missouri's cost information system is straightforward. On a website maintained by the Commission, judges and lawyers can enter detailed information about key offense and offender characteristics, including 11 factors linked with the risk of recidivism.² The website then offers recommended, aggravated, and mitigated sentencing options. Under the new initiative, the website also reports a detailed projection of the total costs of each option, annually and in total.³ The online tool makes clear, for example, that incarceration costs the state \$16,823 per year per offender, compared to \$1,354 per year for probation and \$1,792 per year for “enhanced” probation.⁴

The Commission's goal in making cost information available is to encourage the selection of cheaper forms of punishment, rather than imprisonment.⁵ That is a sound objective. Battered by what the National Governors Association calls “the most difficult fiscal environment since the Great Depression,” states face an urgent need to reduce prison costs.⁶ In many states, fiscal conservatives have joined forces with progressives to highlight the staggering economic and social costs of mass incarceration.⁷ More than 40 states, including Missouri, made cuts to expenditures on corrections in 2009–2010.⁸

On two grounds—one philosophical, the other practical—some commentators have criticized Missouri's initiative for its emphasis on the costs of punishment. Neither, however, undermines the state's good reasons for attention to prison costs.

First, some scholars and prosecutors have suggested that cost ought to be irrelevant at sentencing because it

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bears no relation to the severity of the offense, the harm caused to victims, or the blameworthiness of the offender.⁹ The criticism highlights the tension between retributive and utilitarian justifications for punishment, one of the most fundamental and enduring disputes in the philosophy of criminal law. But no real-world criminal justice system can completely ignore costs, at least at a systemic level.¹⁰ And virtually all states and the federal system take a “laundry list” approach in defining purposes of punishment, embracing both retributive and utilitarian objectives in a manner that leaves room for cost as a sentencing factor.¹¹ Missouri is no exception. The legislature has explicitly directed the Commission to consider “the resources of the department of corrections and other authorities” in making its sentencing recommendations.¹² The central question, then, is not *whether* but *how* to take punishment costs into account.

Second, while acknowledging the importance of cost considerations, some prosecutors and advocates for victims have expressed concern that information about punishment costs will be a distraction.¹³ Prison carries serious costs for the state, they agree, but so does crime. In some cases, a prison sentence might produce a net savings by preventing future crime, whether through incapacitation or deterrence. The concern is that giving judges exact projections of punishment costs risks overemphasizing the costs and underemphasizing the benefits of imprisonment.

It is doubtful, however, that detailed projections will cause judges to fixate on costs. Sentencing judges in Missouri have been permitted for decades to consider costs using a rough sense that imprisonment is more expensive than other options.¹⁴ For judges who are inclined to care, Missouri’s tool simply improves the accuracy of that estimate. Moreover, the Missouri system is hardly insensitive to countervailing concerns about the costs of crime. It produces a detailed risk assessment profile of each offender, offering an estimated percentage chance of recidivism for each form of punishment.¹⁵ Although the costs of repeat offenses are necessarily more speculative than the annual price of a prison bed, Missouri does far better than most states in supplying judges with information about offenders’ risk of recidivism and, accordingly, the benefits of incarceration.

III. Missouri’s Misguided Approach

Despite its worthy objectives, Missouri’s approach to cost as a sentencing factor is fundamentally misguided. The state makes information available to judges about the costs of punishment in individual cases, but does not require that judges pay any attention to the information. The state’s voluntary model rests on the unrealistic assumption that access to information, standing alone, will meaningfully affect sentencing outcomes. It also risks exacerbating inter-judge sentencing disparity, with some judges placing more emphasis on cost concerns than others.

A. Voluntariness

Contrary to the suggestion of some critics, Missouri law does not formally incorporate costs into sentencing decisions. Instead, the state simply makes information about possible sentences available to judges online. Judges are under no obligation to consult the website. Even if they do, they are under no obligation to look specifically at the information about the costs of punishment options. And even if they do, they are under no obligation to factor those costs into any sentence in any way.

This purely voluntary, case-by-case approach is no accident. As the name implies, Missouri’s Advisory Sentencing Commission is authorized only to provide “recommendations” to judges about appropriate sentences.¹⁶ Sentencing judges enjoy complete discretion to disregard the Commission’s advice.¹⁷ The Commission stresses that Missouri’s system is “purely voluntary” and that “[j]udicial discretion is the cornerstone of sentencing in Missouri courts.”¹⁸ Neither the legislature nor the Commission provides formal guidance about eligible purposes of punishment. Judges are free to ignore cost information—or any other information supplied by the Commission—for any reason and without explanation. Nothing in state law requires judges to articulate reasons for their sentences, either in writing or in open court.¹⁹ And no appellate review of sentences is available, except to the extent that a sentence is contrary to statute.²⁰ In the “Show Me State,” it seems, sentencing judges have sent a clear message: “Show me if you must, but then leave me the heck alone.”

Nonetheless, the Commission is hopeful that its work will influence sentencing outcomes. The assumption is that providing judges with more and better information will improve the choices they make at sentencing.²¹

There is reason to doubt that the state’s purely voluntary information-sharing model can succeed.²² Missouri’s approach bears a striking resemblance to “sentencing information systems” launched by courts in Canada, Scotland, and Australia.²³ Those systems began from the same premise that better information would promote more rational sentencing outcomes, and system designers worked closely with judges to design interactive systems that made statistics readily available and useful.

Yet most of those experiments have faltered, and none has been shown to affect sentencing outcomes. In Canada, a sentencing information system collapsed in the late 1980s, after just a few years, because judges declined to use it.²⁴ The system’s architect was dismayed to learn that “[j]udges do not, as a rule, care to know what sentences other judges are handing down in comparable cases.”²⁵ In Scotland, the High Court of Justiciary adopted a sentencing information system in 2002, but the system has atrophied and is now essentially dormant.²⁶ A national commission on sentencing in Scotland found that judges rarely use the system, and as a result it “does not have anything other than the most marginal of impacts on the imposition of sentences.”²⁷ One sentencing information system, in

New South Wales, Australia, has stood the test of time, operating continuously since 1988. But the General Assembly of New South Wales rejected a “purely voluntary” model more than a decade ago, enacting “standard non-parole sentencing periods” that set presumptive sentences for serious offenses.²⁸ No research on any sentencing information system has established an effect on sentencing outcomes.

In Missouri, research suggests that the state’s information system faces similar challenges gaining traction among sentencing judges. In 2009, the Commission surveyed lawyers and judges about the extent to which they take advantage of various forms of sentencing assessment.²⁹ One question addressed the online automated sentencing information system, and the response was discouraging. Just 13.5 percent of judges indicated that they “regularly” use any information from the website when considering plea agreements.³⁰ And that figure apparently overestimates overall use of the system. Judge Wolff has suggested, based on anecdotal evidence, that the website is relied upon more heavily for plea agreements than in other cases.³¹ If not even 2 in 10 judges regularly use the website, even in the category of cases where it is most popular, then only a tiny fraction can be expected to specifically make use of cost information.

Indeed, proponents of the new initiative seem eager to deny that it will have any meaningful effect on sentencing outcomes. Judge Gary Oxenhandler, a member of the Commission, has predicted that the new information “will have little impact on judges’ decisions”³² because the cost of punishment is “about the tip of a dog’s tail, it’s such a small thing.”³³ This is a strange but revealing line of defense. If circulating information about punishment costs will not make any real difference, then why bother?

None of this suggests that voluntary information sharing can have no useful effect. At the margins, cost information may nudge sentencing courts to select less expensive forms of punishment in close cases. Also, the Commission’s decision to make cost information available to lawyers as well as judges will increase the visibility of the cost projections and the likelihood that they receive attention. But the experiences of similar information-sharing efforts in other jurisdictions, along with the available data about judges’ habits in Missouri, suggest that the effects will be modest. If the state is serious about taking costs into account at sentencing, this is a timid first step.

B. Inter-Judge Disparity

At the same time, circulating information about the costs of punishment options runs a risk of exacerbating inter-judge sentencing disparity. Some judges may find cost information highly salient, some may deem it categorically irrelevant, and others may disagree about the circumstances in which it ought to matter. In a purely voluntary case-by-case system like Missouri’s, those differences of opinion can translate into concrete differences in outcomes depending on which judge happens to be assigned to the case.

For decades, inter-judge sentencing disparity—differences in outcomes driven not by differences between offenders and offenses but by the philosophy, preferences, and biases of sentencing judges—has prompted calls for sentencing reform at the state and federal level. According to reformers, inter-judge disparity offends fundamental rule-of-law values such as equality, objectivity, and consistency,³⁴ breeds disrespect for courts, and undermines the deterrent effect of criminal law by making punishment less certain and predictable.

Missouri appears to share that view. The legislature has charged the Commission to study “disparities . . . among the various circuit courts with respect to the length of sentences imposed and the use of probation for offenders convicted of the same or similar crimes and with similar criminal histories.”³⁵ To promote inter-judge consistency, it has also directed the Commission to base its recommendations in part on data concerning statewide sentencing practices.³⁶ Pursuant to those directives, the Commission issued a report in 2005 finding substantial disparity between courts, both in the use of probation and in the length of prison terms.³⁷

According to Judge Wolff, the Commission’s “hope” is that the state’s voluntary information-based system will “eliminate some of these overall disparities and gross differences.”³⁸ But that is a rather extravagant assumption. No research on sentencing information systems, for example, has concluded that better access to information has the effect of reducing inter-judge disparity. Nor have other experiments with voluntary information sharing, such as “sentencing councils,” helped to promote consistency between judges.³⁹

Information sharing alone is particularly unlikely to promote inter-judge consistency with respect to facts, such as the cost of punishment, whose relevance is hotly contested. Reasonable people—such as the contributors to this symposium—can reach different conclusions about whether and how sentencing courts ought to take account of the costs of punishment. No doubt Missouri judges will reflect the same range of views. Some will embrace the new cost information, many will resolutely ignore it, and some will rely on it selectively. The effects on sentencing outcomes, if any, will be uneven. From the perspective of defendants, whose cases are randomly assigned to judges, the introduction of cost information as a variable therefore will feel unpredictable and arbitrary.

Again, proponents seem strangely comfortable with this result. Judge Wolff defends the system by noting that “some judges might never look at the price tags” even though they are available to everyone.⁴⁰ Other state officials similarly have predicted that “some judges may choose to ignore the data” even if their colleagues find them persuasive.⁴¹ One court administrator has flatly proclaimed that judges in his circuit would never consider costs at sentencing.⁴² If those predictions are accurate, then Missouri’s voluntary approach has an important downside, purchasing any cost savings at the price of consistency and rationality.

III. An Alternative Model

A tradeoff between lower costs and more ephemeral values such as consistency and rationality might be worthwhile if there were no other options. But Missouri's voluntary information-sharing approach is not the only way of taking costs into account at sentencing. Other states, including Minnesota, have adopted presumptive sentencing guidelines that explicitly calibrate sentencing ranges to available corrections resources. That approach has proven successful in holding down incarceration rates, saving the state money while simultaneously promoting inter-judge consistency and rationality.

Minnesota, a pioneer in sentencing reform, has long made the cost of punishment an important factor in its sentencing guidelines. Although state law treats public safety as the "primary consideration," it also instructs the Sentencing Guidelines Commission when "establishing and modifying" the guidelines to consider "correctional resources, including but not limited to the capacities of local and state correctional facilities."⁴³ The Commission has taken that responsibility seriously, calibrating guideline sentencing ranges to help ensure that incarceration rates do not exceed available prison beds. Presumptive guidelines make that task easier because the Commission can predict the effect of changes in sentencing rules with confidence, improving the accuracy of cost projections.

The presumptive-guidelines model has proven successful in managing corrections costs. Since launching its guidelines in 1978, the state's prison and jail populations have grown at rates well below the national average.⁴⁴ Minnesota has avoided serious prison overcrowding of the kind that has plagued other states, an achievement Richard Frase calls "remarkable" considering the rise in felony convictions.⁴⁵ As of 2009, Minnesota boasts the nation's second-lowest imprisonment rate, at 179 per 100,000 residents, compared to the national state average of 445 and Missouri's rate of 509.⁴⁶ Although state-to-state comparisons are hazardous because of differences in crime rates and demographics, it is noteworthy that Minnesota has experienced prison growth "markedly below" and Missouri "dramatically above the national benchmark."⁴⁷

Several other states have followed Minnesota's lead, adopting presumptive guidelines systems that explicitly take into account resource constraints. Researchers have found that those systems, on average, perform better than others at holding down incarceration rates.⁴⁸ To be sure, no state's success in restraining prison growth can be attributed solely to its guidelines, and similar results are certainly possible through other means.⁴⁹ Nonetheless, the Minnesota model has provided an attractive example. Recognizing the state's extraordinary track record, the American Law Institute is poised to adopt the Minnesota model as the basic framework for its revised Model Penal Code: Sentencing.⁵⁰ In particular, the draft MPC provisions call for a sentencing commission and presumptive guidelines designed, in part, to produce "sentencing outcomes that may be accommodated by the existing or funded correctional resources of the state."⁵¹

Critics of the Missouri initiative should be more comfortable with the presumptive-guidelines approach to cost as a sentencing factor. Whereas Missouri encourages judges to rely on costs in setting individual sentences on a case-by-case basis, Minnesota takes costs into account at a systemic level. For prosecutors and victims' advocates, that means that cost concerns will not be a distraction because the guideline range will already reflect the commission's judgment about available resources, leaving the sentencing judge to focus on the individual offense and offender. For retributivist scholars and commentators convinced that costs should be irrelevant, the guideline range and individual sentencing decisions can remain focused on desert. The MPC: Sentencing draft, for example, embraces Norval Morris's "limiting retributivism" and would require that sentences fall within a range of severity proportional to "the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders."⁵² Because most modern approaches to desert are ordinal rather than cardinal, identifying which offenses are more and less serious rather than specifying a precise punishment to be imposed,⁵³ the presumptive-guidelines model should be able to accommodate them by squeezing the upper limits of the punishment continuum to reflect resource constraints.

At the same time, the Minnesota model better accomplishes other objectives of sentencing reform. The guidelines are designed to promote the state's "public policy to maintain uniformity, proportionality, rationality, and predictability in sentencing."⁵⁴ Rather than asking individual judges to decide, on an ad hoc basis, whether and how costs should matter—creating a serious risk of inter-judge disparity—the commission sets presumptive-sentencing ranges applicable to all judges in all courts. The drafters of the MPC: Sentencing have concluded that shifting responsibility for systemwide resource management from individual judges to a sentencing commission is both more effective and more fair to offenders.

Judges and legislators in Missouri understandably may be reluctant to support presumptive guidelines. At present, the state's judges enjoy absolute discretion to impose any sentence within the statutory range, with no obligation to give reasons and no possibility of appeal. In the presumptive-guidelines model, by contrast, judges must impose a sentence within the guideline range unless they find substantial circumstances justifying a departure, and sentences are subject to appellate review.⁵⁵ Given the (deservedly) awful reputation of the severe, inflexible, and complex federal Sentencing Guidelines, state judges have good reason to be wary. Adopting a presumptive-guidelines model would require legislative buy-in, since state law presently forecloses any kind of presumptive sentence.⁵⁶ And it would require attention to a host of logistical details, from funding for research on cost projections to constitutional requirements for fact-finding at sentencing.

Yet the Minnesota model is widely admired and has gained support from the state's judges and lawyers.⁵⁷ Compared with the mandatory federal system that predated *United States v. Booker*,⁵⁸ the presumptive guidelines envisioned by the ALI are far simpler and the departure standard much more flexible.⁵⁹ The specter of the federal system should not frighten off state reformers looking for effective ways to control costs while promoting consistency, rationality, and transparency in sentencing.

Today, alas, Missouri's voluntary case-by-case information-sharing system serves as a perfect illustration of how *not* to implement cost as a sentencing factor. But if Missouri and other states are serious about taking costs into account at sentencing—and they should be—then there are viable alternatives. Hopefully the Sentencing Advisory Commission, the legislature, and the state's judges will be willing to venture beyond these modest first steps.

Notes

- ¹ Mo. ANN. STAT. § 558.019.6(2) (West 2011).
- ² The website is available at <https://www.courts.mo.gov/rs/>.
- ³ Michael Wolff, *Missouri Provides Cost of Sentences and Recidivism Data: What Does Cost Have to Do with Justice?*, 24 FED. SENT'G REP. 161 (2012).
- ⁴ *Sentencing Information on www.mosac.mo.gov Now Includes Costs of Recommended Sentences and Risk of Reincarceration*, SMART SENTENCING (Mo. Sentencing Advisory Comm'n), Aug. 17, 2010, at 2, available at www.mosac.mo.gov.
- ⁵ *Id.* at 1 (announcing the availability of cost information "to help Missouri judges, attorneys and probation officers identify sentences that . . . are most cost-effective").
- ⁶ NAT'L GOVERNORS ASS'N, STATE EFFORTS IN SENTENCING AND CORRECTIONS REFORM, Oct. 27, 2011, at 1–2 (noting that corrections costs are driven primarily by growth in prison populations), available at <http://www.nga.org/files/live/sites/NGA/files/pdf/1110SENTENCINGREFORM.PDF>.
- ⁷ A useful clearinghouse is the "Right on Crime" website, available at <http://www.rightoncrime.com>.
- ⁸ See NAT'L GOVERNORS ASS'N, *supra* note 7, at 1, 7.
- ⁹ See, e.g., Chad Flanders, *Cost as a Sentencing Factor: Missouri's Experiment*, 77 Mo. L. REV. ____ (forthcoming 2012), manuscript at 5–6, available at <http://ssrn.com/abstract=1920274> (discussing the moral intuition that "what matters, first and foremost if not exclusively is the nature of the offender's crime").
- ¹⁰ Even an airtight philosophy of punishment, agreed upon by everyone as achieving perfect justice, would have to be rejected if it required the investment of, say, 250 percent of the nation's gross national product.
- ¹¹ See, e.g., 18 U.S.C. § 3553(a) (2006) (federal system) (eligible purposes of punishment include retribution, deterrence, incapacitation, and other goals); N.C. GEN. STAT. ANN. § 164-42(b)(5) (2010) (North Carolina statute directing the sentencing commission to take corrections resources into account).
- ¹² Mo. REV. STAT. § 558.019.6(3)(d) (2011).
- ¹³ See, e.g., Deniz Koray, *New Sentencing Matrix Shows Missouri Judges the Cost of Prison*, COLUMBIA MISSOURIAN, Sept. 29, 2010, available at <http://www.columbiamissourian.com/stories/2010/09/29/new-sentencing-matrix-shows-judges-cost-prison/> (remarks of Dan Knight, prosecuting attorney for Boone County); Monica Davey, *Missouri Tells Judges Cost of Sentences*, N.Y. TIMES, Sept. 18, 2010, available at <http://www.nytimes.com/2010/09/19/us/19judges.html> (remarks

- of Professor Paul Cassell; Scott Burns, executive director of the National District Attorneys Association; and Robert McCulloch, prosecuting attorney for St. Louis County).
- ¹⁴ See *Jones v. State*, 658 S.W.2d 504, 506 (Mo. Ct. App. 1983) (at sentencing "a judge may appropriately conduct an inquiry broad in scope, largely unlimited . . . as to the kind of information he may consider") (internal quotation marks omitted); *Sincup v. Blackwell*, 608 S.W.2d 389, 394 (Mo. 1982) (Seiler, J., dissenting) (noting that "[t]he purposes of probation" include "to alleviate the costs to society of keeping an individual in prison").
- ¹⁵ Michael Wolff, *supra* note 3, at 161–63.
- ¹⁶ Mo. REV. STAT. § 558.019.6(3) (2011).
- ¹⁷ Mo. REV. STAT. § 558.019.7 (2011) ("Courts shall retain discretion to lower or exceed the sentence recommended by the commission as otherwise allowable by law. . . .").
- ¹⁸ Mo. SENTENCING ADVISORY COMM'N, RECOMMENDED SENTENCING: REPORT AND IMPLEMENTATION UPDATE 11–13 (2005).
- ¹⁹ See Mo. REV. STAT. § 558.019 (2011); Mo. R. CRIM. P. 29.07(b) (2010) (requiring only that the court "pronounce [the] sentence").
- ²⁰ See *State v. Cook*, 440 S.W.2d 461, 463 (Mo. 1969).
- ²¹ Michael A. Wolff, *Missouri's Information-Based Discretionary Sentencing System*, 4 OHIO ST. J. CRIM. L. 95, 96–97 (2006) (explaining the Commission's conclusion that "fully informed discretion" is the way to "make judges and lawyers pay attention to our recommendations and to follow them").
- ²² I develop this argument at greater length elsewhere. See Ryan W. Scott, *Information Sharing at Sentencing: A Skeptic's Guide*, at 31–37 (work in progress), available at http://works.bepress.com/ryan_scott/3/.
- ²³ Wolff, *supra* note 21, at 99 n.19.
- ²⁴ Marc Miller, *Sentencing Reform "Reform" Through Sentencing Information Systems*, in *THE FUTURE OF IMPRISONMENT* (Michael Tonry ed. 2004) at 121, 130.
- ²⁵ *Id.* (quoting Anthony Doob, *Sentencing Aids: Final Report* (1989) (unpublished manuscript)).
- ²⁶ THE SENTENCING COMM'N FOR SCOTLAND, THE SCOPE TO IMPROVE CONSISTENCY IN SENTENCING 14 (2006).
- ²⁷ *Id.* at 37.
- ²⁸ Arie Freiberg, *Australia: Exercising Discretion in Sentencing Policy and Practice*, 22 FED. SENT'G REP. 204, 207 (2010).
- ²⁹ Karl R. Kunkel et al., SURVEY OF MISSOURI CRIMINAL TRIAL JUDGES, PROSECUTORS, AND CRIMINAL DEFENSE ATTORNEYS CONCERNING PERCEPTIONS OF THE SENTENCING REPORT PROCESS (2009), available at <http://www.mosac.mo.gov/file.jsp?id=45497>.
- ³⁰ *Id.* at 50 (most judges disagreed with the statement that they "regularly" used the information, with a mean score of 6.98 on a 9-point scale where 9 represented "strongly disagree").
- ³¹ Wolff, *supra* note 3, at 163.
- ³² Koray, *supra* note 13.
- ³³ Davey, *supra* note 13.
- ³⁴ The most influential arguments for inter-judge consistency appear in MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5, 10 (1973).
- ³⁵ Mo. REV. STAT. § 558.019.6(2) (2011); see also *id.* (directing the Commission to examine disparities in capital sentencing based on economic and social class).
- ³⁶ *Id.* § 558.019.6(3)(c) (2011).
- ³⁷ Mo. SENTENCING ADVISORY COMM'N, *supra* note 18, at 54–65.
- ³⁸ Wolff, *supra* note 21, at 118.
- ³⁹ Sentencing councils were groups of district judges, serving on the same court, who met on a strictly voluntary basis for "roundtable discussions" about upcoming sentencing decisions. See Michael H. Tonry, *Sentencing Councils*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1483, 1483 (Sanford H. Kadish ed., 1983); Shari S. Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*,

- 43 U. CHI. L. REV. 109, 145–47 (1975); CHARLES D. PHILLIPS, SENTENCING COUNCILS IN THE FEDERAL COURTS: AN EVALUATION 86–95 (1981). For a fuller discussion of sentencing councils and obstacles to effective information sharing by sentencing courts, see Scott, *supra* note 22.
- 40 Davey, *supra* note 13.
- 41 Heather Ratcliffe, *Missouri Judges Get Penalty Cost Before Sentencing*, ST. LOUIS POST-DISPATCH, SEPT. 14, 2010, available at http://www.stltoday.com/news/local/crime-and-courts/article_924097a5-9f4d-54bb-80ca-4cc4160dde7c.html.
- 42 *Id.* (quoting St. Louis County Circuit Court administrator Paul Fox).
- 43 MINN. STAT. § 244.09, subd. 5(2) (2010).
- 44 Richard Frase, *Sentencing Guidelines in Minnesota, 1978–2003*, 32 CRIME & JUST. 131, 196–99 (2005).
- 45 *Id.* at 198.
- 46 BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009, app. tbl. 9 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf>. The imprisonment rate, as defined by the Bureau of Justice Statistics, is the number of prisoners sentenced to more than one year per 100,000 residents. *Id.* at 13.
- 47 Kevin R. Reitz, *Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces*, 84 TEX. L. REV. 1784, 1789 (2005).
- 48 See AM. LAW INST., MODEL PENAL CODE: SENTENCING, REPORT 74–77 (2003) (Kevin R. Reitz, Reporter) [hereinafter ALI REPORT]; Sean Nicholson-Crotty, *The Impact of Sentencing Guidelines on State-Level Sanctions: An Analysis Over Time*, 50 CRIME & DELINQ. 395 (2004); Jon Sorensen & Don Stemen, *The Effect of State Sentencing Policies on Incarceration Rates*, 48 CRIME & DELINQ. 456 (2002).
- 49 Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the Post-Blakely Era*, 17 FED. SENT'G RPTR. 233 (2005).
- 50 ALI REPORT, *supra* note 48, at 50–57.
- 51 MODEL PENAL CODE § 6B.02(9) (Tentative Draft No. 1 2007).
- 52 *Id.* § 1.02(2)(a)(i) & cmt. b. The commission and sentencing judges would be free to pursue utilitarian objectives, such as deterrence and incapacitation, where reasonably feasible and within those retributive limits. *Id.* § 1.02(a)(ii) & cmt. b.
- 53 See, e.g., Paul Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1835 (2007); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 CRIMINOLOGY & PUB. POL'Y 1293, 1304 (2006).
- 54 MINN. STAT. § 244.09, subd. 5(2) (2010).
- 55 State v. Jackson, 749 N.W.2d 353, 360 (Minn. 2008); Minn. Sent'g Guidelines pt. II.D; MODEL PENAL CODE §§ 6B.04, 7.ZZ (Tentative Draft No. 1 2007).
- 56 Mo. REV. STAT. § 558.019.7 (2011).
- 57 MICHAEL TONRY, SENTENCING MATTERS 72 (1998).
- 58 543 U.S. 220 (2005).
- 59 ALI REPORT, *supra* note 48, at 115–19.