

Missouri's Information-Based Discretionary Sentencing System

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While sentencing regulators reassess how discretion can be controlled following *Blakely v. Washington*¹ and *United States v. Booker*,² the Missouri Sentencing Advisory Commission has embarked on an information-based system to make its wholly discretionary system effective. The Commission has implemented a system for providing judges, prosecutors and defense counsel prompt and focused pre-sentence information as to:

- the offense,
- offender characteristics and risk status,
- a management plan for managing the offender in the community, an institutional setting, or both,
- the Commission's sentencing recommendations, and
- Parole Board guidelines and data on the Board's releasing decisions.

The goal is to support the exercise of discretion with the best information practicable. Since statewide implementation of the new system in November

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¹ *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that a sentence violated the Sixth Amendment right to trial by jury where state's maximum guidelines sentence was enhanced based on statutory aggravating factors found by the judge).

² *United States v. Booker*, 543 U.S. 220 (2005) (applying *Blakely* to the Federal Sentencing Guidelines); see also Douglas A. Berman, *Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653 (2005) (discussing the opportunities presented by *Booker* and *Blakely* for legislative sentencing reform); Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377 (2005) (discussing how “*Blakely* has created both short-term chaos and long-term opportunities for sentencing reform”).

2005, there has been a decline in prison population, and a general acceptance among its users.³

The states are appropriately referred to as laboratories of democracy.⁴ The various approaches to sentencing in the states confirm that observation.⁵ The purpose of this article is to set forth the efforts of Missouri's current Sentencing Advisory Commission [hereinafter Commission] to collaborate with probation, corrections, and parole personnel, and with judges to fashion a system that is just, proportionate, and that wisely uses the state's resources. The context of these efforts is set by Missouri's sentencing laws that recognize broad judicial discretion and make the Commission's recommendations advisory.⁶

When Missouri in 2003 established its third sentencing commission in fifteen years, there was no question that the legislative model would be based on discretion.⁷ The two earlier commissions did interesting work, but had little or no influence on sentencing practices. Those of us appointed to the 2003 Commission might have asked whether this was one form of legislated insanity—to do the same thing over again and expect different results.⁸ But our challenge was to make a

³ Success cannot be measured by a reduction in prison population, but only by a reduction in recidivism. This is a comment I received on an earlier draft of this article from Mark D. Mittleman, a St. Louis lawyer recently appointed to the Sentencing Advisory Commission, and Judge Michael Marcus, an Oregon circuit court judge who has written extensively on sentencing. Articles by Judge Marcus are cited in this paper. I am grateful to Mr. Mittleman and Judge Marcus for their thoughtful comments and have used some in revising this article.

⁴ The phrase is derived from the dissenting opinion of Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932): "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." See generally Michael A. Wolff, *Exploring Judicial Behaviors in the Laboratories of Democracy*, 83 JUDICATURE 267 (2000) (discussing judicial decision-making on the state-level in the context of state institutions and democratic processes).

⁵ Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005) [hereinafter Frase, *State Sentencing Guidelines*]; MODEL PENAL CODE: SENTENCING § 7.07B app. at 50–139 (Preliminary Draft No. 4 2005); see also Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425 (2000); Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1351–59 (2005) [hereinafter Miller, *A Map of Sentencing*].

⁶ MO. REV. STAT. § 558.016 (Supp. 2003).

⁷ See HAROLD CASKEY, ARRESTING THE OVERFLOW: ALTERNATIVES TO PRISON OVERCROWDING AND EXPANSION IN MISSOURI AND THE NEED FOR GUIDED JUDICIAL DISCRETION (2003) (paper distributed to legislators and policy makers by Senator Caskey, principal sponsor of S.B. 5, 92nd Gen. Assembly, 1st Sess. (Mo. 2003) that contained the new version of the Sentencing Advisory Commission, MO. REV. STAT. § 558.019 (Supp. 2005)).

⁸ There was no question that Missouri sentencing was sufficiently harsh to be producing large increases in the prison population. CASKEY, *supra* note 7. In a state-by-state comparison of sentencing patterns, Missouri ranked fairly high. *Id.* Sentencing behavior is not all that drives prison populations up; legislative changes that create new felony offenses have had a substantial impact.

system that would influence the discretion of judges and prosecutors in sentencing decisions.

The fundamental question for the Commission in 2003 was: What can we do to make judges and lawyers pay attention to our recommendations and to follow them?

The Commission's answer: fully informed discretion.⁹

In promulgating its system of recommendations, the Commission proclaimed: "Judicial discretion is the cornerstone of sentencing in Missouri courts."¹⁰ Missouri has a "fully voluntary system."¹¹ The judge is free to impose any sentence within the punishments set by statute.¹² There is no appellate review, except for a contention that a sentence is contrary to statute.¹³

There is no overt guidance in Missouri law as to the purposes for punishment. The judges approach sentencing pragmatically and, to a degree, subjectively.¹⁴ Whatever underlying purposes may be inherent in the law, in reality sentences in cases of violent felonies are primarily for "just deserts" and incapacitation with little or no concern for the eventual rehabilitation of the offender or other goals. For lower levels of offenses, judges may articulate a therapeutic rationale, consistent with public safety, for imposing probation as punishment, or for imposing short-term incarceration followed by a period of community supervision. Experienced prosecutors and wise judges know that these offenders—even if sent to prison—will return to the community. It is, therefore, in the community's interest to address their needs in hopes of preventing recidivism.

⁹ MISSOURI SENTENCING ADVISORY COMMISSION, RECOMMENDED SENTENCING: REPORT AND IMPLEMENTATION UPDATE 11–13 (2005), available at <http://www.mosac.mo.gov>. All Commission documents are available on the website, and will be referred to in footnotes in this article.

¹⁰ *Id.* at 11.

¹¹ "Fully voluntary guidelines provide nonbinding suggestions that the judge is free to adopt, modify, or disregard when imposing a sentence. There is no need for the judge to provide a reason for declining to follow the guidelines." Chanenson, *supra* note 2, at 409.

¹² Missouri's sentencing laws are an accumulation of provisions built up over the thirty years since a revision that borrowed extensively from the Model Penal Code, and therefore are not immediately understandable or obviously coherent. An excellent explanation of those various provisions is set forth in the Commission's 2005 Report, MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, at 14–17.

¹³ See *State v. Cook*, 440 S.W.2d 461, 463 (Mo. 1969) ("[T]here can be no complaint of excessive punishment when it is within limits imposed by law.").

¹⁴ In the years 1993–2003, Professor Robert J. Levy, now emeritus professor of law at the University of Minnesota Law School, and I conducted a series of sentencing workshops at St. Louis University School of Law, where I was a professor before being named to the Supreme Court in 1998. These workshops were attended by state trial judges from varying backgrounds around the state. The judges were thoughtful and dedicated to their work, which is largely done in solitude. They were great teachers of sentencing practices. I am grateful to Professor Levy for his comments on an earlier draft of this article, as well as his insights over the years, and to Professor Steven Chanenson, who conducts a similar program at Villanova and offered helpful comments on this article.

The Commission's approach is to develop a sentencing system that will help all actors in the system—judges, attorneys, probation officers, prison officials, and paroling authorities—to focus on shared information as to the circumstances of offenses, the needs and characteristics of offenders, and the particular plans for the management of each offender. The point is to get sentences that are not only “just,” but effective in reducing future criminal behavior.

The Commission's recommendations have been integrated into a system that features the following:

1. The Commission's sentencing recommendations are set forth in a grid¹⁵ based upon three years of data that reflect sentencing practices of Missouri's judges, with an emphasis on suggesting alternatives to incarceration for lower level felonies, particularly non-violent felonies.
2. The Commission's recommendations as to severity are based upon an offender's prior criminal history.
3. The Commission's recommendations are incorporated into the pre-sentence investigation reports provided to judges, which have been reformatted as Sentencing Assessment Reports.¹⁶ These reports contain a targeted discussion of the offense, the risk factors of the offender, a management plan, the Commission's recommendation, and the Parole Board guidelines for release where a prison sentence results from the offense.
4. To assist prosecutors and defense attorneys in plea negotiations, and for judges who wish to impose sentence without ordering a Sentencing Assessment Report, the website (www.mosac.mo.gov) has an Automated Recommended Sentencing Information feature that allows the user to get the recommendations of the Commission by simply entering the crime charged and the offender's past criminal history.
5. Both the Sentencing Assessment Report and the Automated Recommended Sentencing Information feature of the website will calculate the risk assessment score—which depends on a number of characteristics of the offender. The Parole Board's release guidelines, which are based on risk assessment scoring, are disclosed to the user.¹⁷ The Sentencing Assessment Report and the Automated Recommended Sentencing Information disclose the

¹⁵ An example of the grid is set forth in Figure 2, *infra* p. 109.

¹⁶ MO. REV. STAT. § 557.026 (2000) details when and how the pre-sentence investigation reports shall be prepared, presented and used.

¹⁷ The formal name of the Parole Board is the Board of Probation and Parole, which is a division of the Department of Corrections that oversees probation and parole officers who supervise offenders and prepare reports to the courts, including the Sentencing Assessment Reports.

percentage of the sentence that the offender with a particular risk score can be expected to serve for a particular offense.

The Commission's premise is that the discretion in the system, exercised by trial judges and lawyers, should be retained, but should be fully informed by the factors listed above. The Commission expects to study the effects of this system continuously over the years. One issue that the Commission is interested in testing is the impact upon recidivism when sentencing and prison time served are both based upon risk related factors. Such an analysis should also indicate which sentences are effective for particular crimes and offenders. By effective, I mean that the sentence is not counterproductive and does not encourage the offender to re-offend, but improves the prospects for avoiding future criminal behavior by the offender.

In a data-based system of recommended sentences, there could well have been a significant number of sentences in the data set that were unduly harsh, given the circumstances of the offense and the characteristics of the offender.¹⁸ As a starting point for promulgating a system of recommended sentences, however, we recognize the trade-off is that a system of sentencing recommendations based upon recent sentencing behavior of judges statewide comes with a sense of legitimacy. These are not sentencing recommendations that the Commission pulled from the air or from Commission members' own sense of what sentences seem appropriate. Assembling the data does show that judges in a wide variety of crimes have imposed sentences that are far more lenient, and reliant upon community supervision, than the data show for average or typical sentences. To the extent such a system can show options in incarceration, including the option of the "shock" sentence that involves a short prison stay, prosecutors and judges can learn about sentencing choices that may be more effective than sentences that follow the traditional patterns.¹⁹

When the Commission published its first sentencing recommendations in 2004, skeptics on the trial bench darkly predicted that the Commission was launching Missouri on a first step toward the loathsome system of federal

¹⁸ Judge Marcus, *see supra* note 3, observes in a comment on an earlier draft of this article that "three-years data reflecting sentencing practices may codify misinformed and undirected sentencing—though it may be tactically necessary for achieving change among judges." My underlying belief is that judges respond to information they find useful and helpful and it is therefore important for a sentencing advisory commission to give judges information on the effectiveness of sentences.

¹⁹ When the Sentencing Advisory Commission developed its information-based system in 2004, we did not have the benefit of reviewing the literature, especially regarding the experiences in Canada and Scotland that are summarized by Marc L. Miller in *A Map of Sentencing*, *supra* note 5, at 1371–76. To some extent, the system we have adopted in Missouri attempts to achieve what Miller proposes as a "sentencing information system." *Id.* at 1370–91. Our pragmatic starting point is the same: "[w]hat have other judges done?" *Id.* at 1363. This question is posed, *infra* at p. 103 in this paper's section, "The Work of the Current Commission," where the Commission's first question is posed: "What do judges do in similar cases?"

guidelines.²⁰ *Blakely* gave the state's Commission some credibility on the matter of discretion, and has led to fairly widespread acceptance of the system of recommended sentences promulgated by the Commission. Before *Blakely* and *Booker*, we decided to label our work "sentencing recommendations," not "guidelines," because the federal system had so sullied the term "guidelines." *Blakely* and *Booker* helped make Missouri's system gain acceptance, because they appear to preclude the kind of rule-based guideline system that state judges had found so odious about the federal system.

I. STRATEGIES FOR THE SENTENCING ADVISORY COMMISSION

There is a strong urge to be regulatory in the approach to sentencing on the part of sentencing commissions,²¹ an urge that Missouri law does not recognize. With the *Blakely-Booker* weakening of the rule-based system, the remaining choices appear to be a presumptive system or an advisory (or voluntary) guidelines scheme.²² The advisory guidelines reserve to the sentencing judge²³ the full range of punishments authorized by statute; but can these Commission recommendations be influential?

When it comes to influencing sentencing behavior, commissions near the "rule" end of the rule-discretion continuum make their rules and expect that they will be enforced. The extreme example has been the federal guidelines system, pre-*Booker*.²⁴ Its rule-driven system never had to win the hearts and minds of

²⁰ Missouri judges' general view of the federal sentencing system would agree with the observation of Michael Tonry in *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37, 46 (2005):

At the individual case level, judges and prosecutors see themselves as in the business of doing justice. When laws or guidelines prescribe sentences that are much harsher than practitioners think reasonable or just, there is a problem. When laws require that sentences be calculated by means of mechanical scoring systems, as the Federal Guidelines did, rather than by looking closely at the circumstances of individual cases, there is a problem. The Federal Guidelines placed judges in a situation where oaths they swore—to enforce the law and to do justice—pulled in different directions, and different judges reconciled the tension in different ways. (footnote omitted.)

²¹ See MODEL PENAL CODE: SENTENCING REPORT, at 1–5 (Preliminary Draft No. 4 2005).

²² This is described as the "rule-discretion continuum" by Kevin R. Reitz in *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 156–160 (2005). For a recent description of various state schemes, see Frase, *State Sentencing Guidelines*, *supra* note 5, at 1194–1208.

²³ Missouri retains a vestige of jury sentencing for defendants who have prior offenses. See MO. REV. STAT. § 557.036 (2000). Before 2003, unless a defendant waived, the jury would recommend a punishment within the statutory limits when it returned a guilty verdict. In 2003, the statute was amended to provide a bifurcated trial with a sentencing phase. See James R. Wyrsh, *Bifurcated Jury Trials in Non-Capital Criminal Cases*, 61 J. MO. B. 39 (2005).

²⁴ I do not mean to suggest that the federal sentencing commission's work has been easy. It is, after all, detailed and voluminous; published decisions on the guidelines are numerous. See KATE

judges—just their obedience. If one looks only at judicial behavior, the federal rule-based system appeared to be somewhat successful in at least influencing sentencing behavior. No one seems to have proven that this system was effective in promoting public safety by limiting judicial discretion. Discretion, like water, flows downhill. Not surprisingly the discretion in a rules system can find its way to the prosecutors' offices, whose charging decisions and plea negotiations became dominant.²⁵

II. THE "HEARTS AND MINDS" APPROACH

The starting point for the Missouri Sentencing Advisory Commission was how to influence judicial discretion. There are other actors—notably, prosecutors, probation officers, and others—whose hearts and minds also must be won. The challenge is daunting because of the varying attitudes and influences of all the various actors—law enforcement, prosecutors, defense attorneys, probation officers, judges, prison officials, the Parole Board, and parole officers. Unless the Commission can give these actors something they need, they have no reason to pay attention to us.

What these actors need is information, not just about the offender and the offense, but about the resources and behaviors of the other actors in the system. Our perception of the need for an information-based system was influenced by our review of the work of previous commissions and why they had been so lacking in influence.

III. A BRIEF HISTORY OF MISSOURI'S COMMISSIONS

Missouri already had established two sentencing commissions prior to 2003, whose history might lead us to believe that we are wasting our time in trying to produce a sentencing system that is advisory only. The first Commission, established in 1989, had a limited function: to study whether there were sentencing disparities in Missouri.²⁶ The first Commission released reports that concluded

STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

²⁵ See Gerald W. Heaney, *The Reality of Guidelines Sentencing*, 44 ST. LOUIS U. L.J. 293 (2000); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211 (2004)

²⁶ MO. REV. STAT. § 558.019.8 (Supp. 1990).

that there were, indeed, disparities in sentencing.²⁷ That said, the first Commission did highlight significant and persistent disparities.²⁸

The Commission was expanded and given the task in 1994 of gathering data on sentencing practices and promulgating voluntary sentencing guidelines based on the data.²⁹ The framework the second Commission produced was useful, but largely ineffectual in affecting sentencing decisions. What was useful about the Commission's work was the organization of the many crimes and punishments in a coherent fashion. Missouri has a criminal code that, over the years, has been riddled with scores of offenses, many of which are rarely prosecuted, and a hodge-podge of sentencing options.³⁰ The 1994 Commission produced grids of offenses, all juxtaposed as to prior criminal history, and set out ranges of punishments for various categories of offenses. All of the ranges established were based on data on prior sentencing decisions.³¹

These voluntary guidelines of the second Commission were distributed to the bench and bar and were the subject of numerous training sessions. Having done its work, the Commission ceased having meetings and eventually went out of business. A study that assessed the impact of the Commission's work found that the guidelines had little or no impact on sentencing decisions.³² Most judges and lawyers knew little about them. The Commission's recommendations were, eventually, set forth on the first page of the pre-sentence investigation form, but the recommendations had no bearing on the recommendation made by the probation officer writing the report. The study found that plea negotiations were the principal reason the guidelines were not followed. For better or for worse, this

²⁷ MISSOURI SENTENCING ADVISORY COMMISSION, ANNUAL REPORT (1994). The Commission found significant disparities for various felonies, between sentences imposed upon blacks and whites and between men and women. Sentences of whites and women were less severe than those for blacks and men.

²⁸ It may be noteworthy that judges in metropolitan areas, that is, St. Louis County, the City of St. Louis, Jackson County (which contains Kansas City), Platte County and Clay County have judges that are selected under Missouri's nonpartisan court plan. *See* MO. CONST. art. V, § 25(a). The Missouri Plan, which also covers the appellate courts, involves the nomination of three candidates to the Governor, the Governor's appointment of one of the three, and periodic retention elections where the vote is "yes" or "no" for retention. In the state's 109 other counties, which are mostly rural, judges are elected in partisan elections. It may be that judges subject to election opponents, as distinct from those subject to the yes-or-no retention question, are more sensitive to what they perceive to be their electorate's wishes. No data has been gathered, however, that supports this speculation.

²⁹ MO. REV. STAT. § 558.019.6 (1994).

³⁰ *See* MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, at 14–17.

³¹ MISSOURI SENTENCING ADVISORY COMMISSION, ADVISORY SENTENCING GUIDELINES USERS MANUAL (1997). The current Commission's method of organizing its system of recommended sentences is based on the earlier Commission's work.

³² Robert Robinson, Arnold Parks, & Mara Aruguete, Attitudes Toward and the Use of Sentencing Guidelines Among Missouri Circuit Judges (Feb. 2003) (unpublished monograph, on file with author).

meant that defense counsel were routinely agreeing, in plea negotiations, to sentences that exceeded the Commission's recommendations.³³

Not only have there been wide disparities in the severity of sentences from judicial circuit to judicial circuit, there are localized differences in the use of plea negotiations. In some circuits, all guilty pleas are "open," that is, the judge has available the full range of punishments upon the plea, and the judge usually orders a pre-sentence investigation report. In other circuits, the prosecution and defense agree upon a sentence to be recommended to the court; if the trial judge accepts the recommendation, the matter is concluded. If the judge rejects the plea negotiation, the defendant may withdraw the plea. In such circuits, judges are following the norm established by the criminal rules, that the judge may not participate in plea negotiations.³⁴ The judge, however, indirectly participates where the judge refuses to accept the sentence recommended by the prosecution and defense. The judge's refusal allows the guilty plea to be withdrawn, which results either in further negotiations with a result more to the judge's liking, or to a trial.³⁵ A variation of this plea practice is to have a negotiation that results in a range of punishments available to the trial judge. If the trial judge wishes to sentence outside of the range, the plea agreement is voided, and the guilty plea may be withdrawn. There is little or no evidence that lawyers negotiating pleas and judges imposing sentences were making reference to the guidelines promulgated by the second Sentencing Advisory Commission.³⁶

IV. THE WORK OF THE CURRENT COMMISSION

If the current Sentencing Advisory Commission's advisory approach influences sentencing decisions, it will only be because those in the system want it to work. Any effort to change discretionary governmental behavior depends on workers who know the system being committed to changing it. In this advisory regime, information is the only currency the Commission possesses to buy compliance.

The 2003 Commission's starting point, therefore, was to gather and disseminate information. The first challenge was to organize the information so that it would be useful. A second challenge was to obtain and share information that had previously been guarded by those who held it. The overall goal became making everyone in the system smarter: judges, attorneys, probation officers,

³³ MO. R. CRIM. P. 24.035, provides post-conviction remedy for inadequacy of representation in a guilty plea. There appear to be no cases raising such a claim where defense counsel agreed to a sentence in excess of the Commission's recommendations.

³⁴ MO. R. CRIM. P. 24.02(d).

³⁵ MO. R. CRIM. P. 24.02(d)(4).

³⁶ Robinson, Parks & Aruguete, *supra* note 32.

prison officials, and paroling authorities. Each would have access to the same information.

The shared information consists of:

1. Information on the offense and the offender. For each offense, data are available as to past sentencing practices; the Commission's recommendations are based on these data. As to the offender, the data are organized in accordance with the risk factors that include prior criminal history, age, substance abuse, education and employment status at the time of offense and sentencing.³⁷
2. Risk assessment criteria, previously used only by the Parole Board in its releasing decisions and largely unknown to other actors in the system.
3. Sentencing options, which include non-incarceration alternatives available through the Department of Corrections and in the community.³⁸
4. Parole Board releasing guidelines and practices, which previously had not been available to the other actors.³⁹
5. Individualized recommendations as to appropriate sentences, including specific "offender management plans" to meet the needs and issues of individual offenders.

If information is going to be useful in fashioning an appropriate sentence and in meeting the needs of an offender, it must be communicated from those involved with the offender, from arrest and prosecution through probation or parole.

But what information about the offense—and the offender—will be useful in sentencing? To be useful, the information should (1) help achieve the goals and purposes of the Commission, and, especially, (2) address the goals of the sentencing judge.

The purposes and goals of the Sentencing Advisory Commission are to develop a "uniform policy that will ensure certainty, consistency, and proportionality of punishment, recognize the impact of crime on victims, and

³⁷ MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, at 72–74

³⁸ A current list of non-incarceration alternatives is maintained on the Commission's website, Missouri Sentencing Advisory Commission, Missouri Alternative Sentencing Resources <http://www.mosac.mo.gov/AltSentResources.htm> (last visited Sept. 14, 2006).

³⁹ See MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, app. E. at 79–84 (The Board of Probation and Parole Guideline Matrices, showing prison time in months); *id.* at 85 (Parole Board Releases: Time Served by Offense Group and Risk Category). On the "Automated Sentencing Information" feature of the Commission's website, this data is reported on request when an offender's offense, prior criminal history and risk scoring factors are entered. Missouri Sentencing Advisory Commission, Automated Recommended Sentencing Information, <http://www.mosac.mo.gov> (follow "Automated Recommended Sentencing Information" hyperlink) (last visited Sept. 14, 2006).

provide protection for society.”⁴⁰ The Commission also expressed an interest in minimizing “sentencing disparity” and promoting “a rational use of correctional resources consistent with public safety.”⁴¹

What do judges think they are doing when they are making sentencing decisions? The judges’ perspectives range from retribution or “just deserts” to some notions of therapeutic conditions that will meet the needs of offenders. An individual judge will give varying consideration to these goals depending upon the offense and the offender. For certain violent offenders, a judge will impose a just-deserts sentence that will result in incapacitation and retribution; for offenders who can be “saved” or “corrected,” the judge may very well impose a community sentence that attempts to address some of the issues of the offender in hopes of avoiding future criminal behavior.⁴²

To address the sentencing from the judges’ perspectives, the Commission believes these four questions are important:

1. What do judges do in similar cases?
2. What resources are available—in prison or in the community—to construct and impose a sentence that fits the offender and the crime?
3. What is the risk that the offender will re-offend?
4. What does a sentence really mean? If an offender is sentenced to a certain term in prison, how long is the offender actually likely to serve before being paroled?

The last question, answered through the Parole Board’s willingness to share its release guidelines and actual release data, brought a lot of good will from judges. Most judges said they had been in the dark as to the Parole Board’s decision making process and that, except where a statute specified a minimum time to be served, they did not know what a particular term of years’ sentence would mean.

Another question—answers to which are not yet statistically analyzed—is whether the particular sentence will meet the judge’s goal of avoiding future criminal behavior. For now, we rely on the judge’s own best judgment. The challenge is to provide an analytical framework, and supporting information, for answering that question.

⁴⁰ Missouri Sentencing Advisory Commission, Purposes and Goals, available at <http://www.mosac.mo.gov/purposegoals.htm> (last visited Sept. 14, 2006).

⁴¹ *Id.*

⁴² This is an attempt to have a “hybrid sentencing system that gives appropriate scope to all legitimate sentencing purposes.” Richard S. Frase, *Punishment Purpose*, 58 STAN. L. REV. 67, 68 (2005).

V. ORGANIZING THE OFFENSES

To further the goal of having all actors use the same language, and to share information over time, the Commission organized the state's criminal offenses into the same five categories as used by the Parole Board. They are:⁴³

- Violent Offenses
- Sex and Child Abuse Offenses⁴⁴
- Non-Violent Offenses
- Drug Offenses
- DWI (Driving While Intoxicated) Offenses

Within each of these categories and for each felony class, there are more or less serious offenses, as determined by sentences actually imposed for those crimes. The Commission categorized those as high, medium, and low severity—based upon the disposition and length of sentences that have been imposed for these crimes.

For each offense, the Commission assigned a presumptive sentence, along with a mitigating and aggravating sentence. Mitigating and aggravating sentences are based mainly on the circumstances of the offense, but do not take into account victim's issues and other offender behavior.⁴⁵ Factors that may be considered mitigating or aggravating are listed in the grid developed for each category of offenses. For example, in assault cases, judges generally impose sentences that are more or less harsh depending upon the seriousness of the victims' injuries. Thus, to continue the assault example, the grid for assault lists as an aggravating factor that "[t]he defendant caused severe physical or emotional trauma to the victim of the offense."⁴⁶

The sentencing grids for each category of offenses list the actual sentencing data on each offense over three recent years. At first look, it is startling to see how many offenders receive probation sentences for what would seem to be fairly serious offenses. An example is first-degree robbery, a class A felony.⁴⁷ There were 1,350 offenders sentenced for first-degree robbery in the three-year period;

⁴³ MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, at 79–84.

⁴⁴ Some of these offenses are violent; the sentencing practices and the Commission's recommendations, reflect that fact. MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, at 26–29.

⁴⁵ *Id.* at 22–40.

⁴⁶ *Id.* at 23.

⁴⁷ MO. REV. STAT. § 569.020 (2000). Missouri has felonies of classes A through D, depending upon the penalty range, and some unclassified offenses, which the Department of Corrections and the Sentencing Advisory Commission place in the A–D category that most closely matches the penalties. MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, at 18. The A–D categories are set forth in footnote 51, *infra*.

996 of them received prison terms, which means that 354 such offenders did not. The data on offenses are listed as such:

OFFENSE SEVERITY

Class A Violent

Offense	Description	RSMO Statute	Offense Severity	Sentence Count	of which Prison Sentences	Avg. Prison Sent. Yrs.	Avg. Percent Prison Dips.
10021	Murder – 1st Degree	565.020	High	303	303	30.0	100%
10031	Murder – 2nd Degree	565.021	High	672	666	23.2	99%
12010	Robbery – 1st Degree	569.020	Med	1,350	996	14.8	74%
12035	Pharmacy Robbery – 1st Degree	569.025	Med	8	7	17.1	88%
13025	Domestic Assault – 1st Degree – Persistent Domestic Violence Offender	565.072	Med	2	1	25.0	50%
13100	Assault of Law Enforcement Officer – 1st Degree	565.081	Med	65	44	18.4	68%
16010	Kidnapping	565.110	Med	55	40	17.0	73%
31151	Discharge or Shoot Firearm at/or from Motor Vehicle at person, vehicle, or building	571.030	Med	4	4	8.8	100%
13009	Domestic Assault – 1st Degree – Serious Physical Injury	565.072	Low	27	16	15.6	59%
13011	Assault – 1st Degree – Serious Physical Injury	565.050	Low	375	243	17.0	65%
13027	Domestic Assault – 1st Degree – Prior Domestic Violence Offender	565.072	Low	3	2	10.0	67%
13028	Domestic Assault – 2nd Degree – Persistent Domestic Assault Offender	565.073	Low	1	-	-	0%
13060	Assault w/ Intent to Commit Bus Hijacking w/ Weapon	578.305	Low	2	-	-	0%
26165	Elder Abuse – 1st Degree	565.180	Low	2	1	15.0	50%
36006	Knowingly Infect Another w/HIV by Blood/Blood Produce, Organ, Sperm, or Tissue Donation	191.677	Low	1	-	-	0%
36007	Recklessly Infect Another w/HIV when Actor Knowingly Infected	191.677	Low	1	-	-	0%
36322	Elder Abuse – 1st Degree	565.180	Low	6	1	15.0	17%

FIGURE 1. This is a list of class A violent offenses. Data are three years of sentences. The label high, medium, or low severity is based on the sentences actually given for an offense in the three-year period. The high, medium and low severity are categories within each felony class and offense group. This is shown in the grid in Figure 2.⁴⁸

⁴⁸ MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, at 24.

To some observers, these data may be a sign of unacceptable disparities in sentencing. If you do the crime, you do the time, the saying goes. But this begs the question: What is the crime? From the data, it is apparent that not all first-degree robbery cases, though they carry the same statutory definition, are the same “crime.” Another fairly common example is statutory rape: if an eighteen year-old has sex with a thirteen-year-old, the eighteen-year-old commits the crime.⁴⁹ If, however, the offender is forty-five years old and the victim is thirteen years old, it is the same crime, but most judges would punish the eighteen-year-old offender far less severely than the forty-five-year-old. Such differences may help explain why thirty-five percent of those convicted of first-degree statutory rape did not receive a prison sentence.⁵⁰ What some would see as disparities can probably be better explained by viewing them as different crimes, even though the statutory definition may be the same.

Figure 2 shows the grid for class C violent offenses and shows the data on sentencing for each. The classifications of A, B, C, and D are statutory definitions.⁵¹

⁴⁹ First-degree statutory rape is defined as: “Sexual intercourse with another person who is less than fourteen years old.” MO. REV. STAT. § 566.032 (2000).

⁵⁰ MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, at 28. Department of Corrections data show that 50% of Missouri offenders under age twenty-two received probation for first-degree statutory rape while only 7% of offenders over age forty received probation in 2004 and 2005.

⁵¹ A, B, C, and D felonies are listed in MO. REV. STAT. § 558.011 (Supp. 2004):

The authorized terms of imprisonment, including both prison and conditional release terms, are:

- (1) For a class A felony, a term of years not less than ten years and not to exceed thirty years, or life imprisonment;
- (2) For a class B felony, a term of years not less than five years and not to exceed fifteen years;
- (3) For a class C felony, a term of years not to exceed seven years;
- (4) For a class D felony, a term of years not to exceed four years.

Sentencing Standards for Violent Offenses		Prior Criminal History				
Felony Class C (Data 2004)		Level I	Level II	Level III	Level IV	Level V
Offense Severity	<i>Percent Prison Disposition</i>	22.0%	32.6%	56.2%	54.0%	62.9%
	<i>Avg. Prison Sentence</i>	5.0	5.2	5.1	5.6	4.9
	High					
	Mitigating	Probation	Probation	Shk/Trt	3	5
	Presumptive	CSS	CSS	4	5	7
	Aggravating	3	4	5	7	7
	Medium					
	Mitigating	Probation	Probation	CSS	Shk/Trt	4
	Presumptive	CSS	CSS	Shk/Trt	4	5
	Aggravating	3	3	4	5	7
	Low					
	Mitigating	Probation	Probation	CSS	Shk/Trt	3
	Presumptive	Probation	CSS	Shk/Trt	3	4
Aggravating	3	3	3	4	6	

FIGURE 2. There are 19 class C violent offenses listed in Figure 2 ranging from involuntary manslaughter (high severity) to aggravating stalking (low severity).⁵² The abbreviations on the grid are CSS—Community Structured Sentence, an intense form of probation; and Shk/Trt—shock probation, involving up to 120 days of incarceration which can include drug or alcohol treatment followed by probation. The numbers on the grid are prison terms in years. The explanations of the prior criminal history levels are laid out in Figure 3.

VI. ORGANIZING THE SENTENCES

Missouri statutes provide for three basic varieties of sentences: prison, probation, and a “shock probation” sentence.⁵³ The so-called shock probation sentence deserves a brief explanation. Shock probation is the imposition of a prison sentence in which the judge specifies that the offender is to be evaluated by prison officials within 120 days of the start of the sentence; the judge receives the report on the offender’s evaluation, and then has the discretion to release the offender on probation for the duration of his sentence or for a period of time in which the person is on probation on a suspended imposition of sentence.⁵⁴ Successful completion of a suspended imposition of sentence results in no record

⁵² MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, at 24.

⁵³ MO. REV. STAT. § 559.115 (Supp. 2005) is the statute authorizing “shock probation.” That statute reads, in part: “[A] circuit court only upon its own motion and not that of the state or the offender shall have the power to grant probation to an offender anytime up to one hundred twenty days after such offender has been delivered to the Department of Corrections but not thereafter.”

⁵⁴ MO. REV. STAT. § 559.115 (Supp. 2005); MO. REV. STAT. § 217.362 (2006) (suspended execution); MO. REV. STAT. § 217.785 (2006) (suspended imposition).

of conviction, though there has been a guilty plea or a finding of guilt.⁵⁵ Commonly called the 120-day sentence, the shock incarceration statute originally was passed with the notion of giving an offender a “shock” by sending him or her to prison for up to 120 days which was thought to be a cautionary measure to ensure successful completion of probation. Since its inception, the 120-day sentence has become rather widely used, and includes short-term drug treatment in prison, as well as evaluation of certain sex offenders to determine whether they can be managed on probation or could be kept in prison for the duration of their sentences.⁵⁶ Over the years, there has been a substantial decrease in the number of offenders sentenced to thirty, sixty, or ninety days county jail incarceration, perhaps because there is no provision for state payment after sentencing; those confinements are paid for by the counties. The fact that the state pays for the 120-day state prison sentence has undoubtedly led to its increasing use to avoid imposing jail costs on the sentencing judge’s home county. The shock-probation statute has, for that reason, served both its intended purpose of reducing time spent in prison, but in all likelihood also has increased the number of offenders that have been subjected to short-stay prison sentences rather than time in county jails.

Over the last twenty years there has been an evolution in the probation sentence as well. Probation supervision sentence ranges from minimal reporting requirements through very intense supervision, which may include frequent drug testing, community-based drug treatment, GED requirements, job training, and other community efforts of meeting offenders’ needs.⁵⁷ A “probation” sentence usually is considered by the public to be a minimal sentence; however, at the intensive end of the probation supervision continuum, the sentence actually can be quite restrictive or intrusive, as is the completion of a drug court program.

To recognize the widely varying methods of probation supervision, the Commission’s recommendations describe two forms of “probation.” The first is listed simply as probation, which means only the requirement of periodically reporting to a probation officer, and meeting other minimal supervision requirements.⁵⁸ The second “probation” sentence is described in the

⁵⁵ A suspended execution of sentence, on the other hand, does result in a conviction because a sentence actually is imposed. When a person under suspended imposition of sentence violates probation, the judge can sentence the offender to any sentence within the statutory range. If the person has a suspended execution of sentence, the judge’s sentencing option on a probation violation is limited to executing the sentence previously imposed. *See* MO. REV. STAT. § 559.036.3 (2000); 19 MO. PRAC., CRIM. PRAC. & PROC. § 24.5 (2005).

⁵⁶ MO. REV. STAT. § 559.115.2 (Supp. 2005). The 120-day program is available for evaluation of sex offenders who plead guilty or are found guilty of class B sex offense felonies. Section 559.115.5. Evaluation in this program is not available for those who are found to be predatory sex offenders. MO. REV. STAT. § 558.018 (2006).

⁵⁷ The Commission listed probation alternatives in its 2005 Report. MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, at 44–45.

⁵⁸ *Id.* at 19.

recommendations as a “Community Structured Sentence (CSS).”⁵⁹ This sentence involves intensive supervision with the options of acquiring a GED, job counseling, drug treatment, and so forth, in the community, under the supervision of the probation officer.

By dividing the probation sentence between simple “probation” and “Community Structured Sentence (CSS),” the Commission makes two points to the judges. First, that some, if not all, probation sentences really are punishments that involve significant restrictions to the offender’s liberty. Second, that there are alternatives to imprisonment that do not imply leniency or disregard public safety.

VII. ORGANIZING AN OFFENDER’S CRIMINAL HISTORY

The Commission organized criminal histories into five levels, which are labeled on the sentencing grid (in Figure 2, for example) as Level I–Level V. Level I is essentially a first offender, defined as “no prior unrelated felony finding of guilt and no more than three misdemeanors or jail sentences of thirty days or more.” These levels are set forth in Figure 3. The first two levels of criminal history encompass those who have not previously been incarcerated in a state or federal prison.

Level I	No prior unrelated felony finding of guilt and no more than three misdemeanor/jail sentences of thirty days or more.
Level II	No prior prison incarceration and no more than two unrelated felony findings of guilt.
Level III	No more than one prior prison incarceration and no more than three unrelated felony findings of guilt.
Level IV	No more than two prior prison incarcerations and no more than four unrelated felony findings of guilt.
Level V	More than two prior prison incarcerations or more than four unrelated findings of guilt.

FIGURE 3. This Figure explains the five categories of prior criminal history.⁶⁰

As the grid in Figure 2 shows, the offender’s prior criminal history drives the severity of the sentence. The greater the criminal history, the more severe the recommended sentence—but the severity of sentence is very much affected by the offense group. For example, a criminal history Level III, class A violent offense of medium severity has a recommended sentence of twelve years while the recommended sentence for a comparable drug offense is a 120-day shock or treatment sentence.

⁵⁹ *Id* at 18, 44–45.

⁶⁰ MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, at 72–73.

VIII. CALCULATING THE OFFENDER'S RISK ASSESSMENT CATEGORY

There are a number of offender characteristics, in addition to an offender's prior criminal history, that are correlated statistically with the risk of re-offending. These include age, substance abuse, education level, and employment. Each of these risk factors is given a numerical score, based upon what the statisticians have found is the factor's correlation with recidivism. Positive scores are associated with low risk of recidivism and negative scores are associated with high risk. The scoring system is as follows, with each factor assigned a numerical weight (-1 to +2) based upon the factor's statistical correlation to recidivism.

Offense-Related Factors

1. Prior unrelated findings of guilt misdemeanor/jail sentences of 30+ days:
 - Three or less.....0
 - Four or more.....-1
2. Prior unrelated felony findings of guilt:
 - None.....1
 - One.....0
 - Two or more..... -1
3. Prior prison incarcerations:
 - None.....0
 - One or more.....-1
4. Five years without a finding of guilt or incarceration:
 - Yes.....1
 - No.....0
5. Revocations of probation or parole:
 - No.....0
 - Yes.....-1
6. Recidivist related present offense:
 - No.....0
 - Yes.....-1

Other Risk-Related Factors

7. Age:
 - 45 and over.....2
 - 35-44.....1
 - 22-34.....0
 - 21 and under.....-1
8. Prior escape:
 - No.....0
 - Yes.....-1
9. Substance abuse (DOC substance abuse test and verified drug history):

- No.....1
- Yes.....0
- 10. Education:
 - GED or educational attainment 12th grade or better.....1
 - Below 12th grade..0
- 11. Employment (Status at time of arrest or sentencing whichever is more favorable):
 - Full time for 3 months or more.....1
 - Part time or full time for less than three months.....0
 - Unemployed.....-1

FIGURE 4. This is a list of risk factors, with the numerical score for each, based upon the factor's correlation with the risk of recidivism. The first six are the prior criminal history, and the last five are offender characteristics. A score of 4-7 is rated "good;" 2-3 is "above average;" 0-1 is "average;" -1 to -2 is "below average;" and -3 to -8 is "poor."⁶¹

The Risk Assessment Scale, which is set forth in Figure 4, is used to calculate a risk score. As shown, the risk scores are "good," "above average," "below average," and "poor."⁶² This information may be useful to the sentencing judge in making a choice between prison or community-based sentence.

The risk assessment methodology is also available in the Automated Sentencing Information section of the Commission's website (www.mosac.mo.gov) so that prosecutors and defense attorneys may use it in plea negotiations. The significance of the risk assessment methodology is that it is the same methodology used by the Parole Board in its guidelines for release decisions.⁶³ The Parole Board's risk scoring is slightly more extensive because the Parole Board has three factors that it uses that are based upon behavior while in

⁶¹ MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, at 72-73.

⁶² The last validation of the Board of Probation and Parole's risk assessment measure was completed in 2005 and indicated that the risk measure predicted a 37% difference between the "Poor" risk and "Good" risk after three years from release.

Offender Success: Three years after release in 2001

Salient Factor Risk Score	Percent Successful
Poor	33%
Below Average	35%
Average	43%
Above Average	54%
Good	70%

Missouri Department of Corrections

⁶³ MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, at 79-84.

prison; obviously, these institutional behavioral factors are not present at the time of sentencing.⁶⁴

Using the common assumption that the risk score probably will not change very much during a prison term, the judge, attorneys, and others can determine fairly well when the offender would be released if he or she is given a prison term. The Parole Board also has released its actual data for each offense, at each risk level,⁶⁵ which tend to show that the Board is a bit more conservative in practice than its own guidelines would indicate. The Board's decisions—like those of the sentencing judges—are discretionary. This accounts for the discrepancy between the guidelines of the Parole Board and the data on the Board's decisions in the various offense categories.

On the sentencing assessment reports prepared prior to sentencing by probation officers, the Parole Board's guidelines range for the offense and the offender is disclosed, as well as the actual data on releasing decisions for that offense in that risk category.

IX. ORGANIZING THE SENTENCING ASSESSMENT REPORT

For many years, probation officers have prepared pre-sentence investigation reports at the request of trial judges prior to sentencing. These reports contain details of the offense, extensive information about the offender's education and family background, and a recommendation as to whether the offender should be sent to prison or given probation. There are about 1,200 probation officers in Missouri who write pre-sentence reports.⁶⁶ Some in urban areas prepare these

⁶⁴ Because the statistically correlated risk factors may be considered less valid in some sex offender cases than in felonies generally, the probation officers on July 1, 2006, began using a risk scale that was developed to correlate certain offender characteristics with the risk of re-offending. The STATIC-99 rates offenders from low to high risk of re-offending based only upon static, that is, unchangeable, factors that have been shown in the literature to correlate with sexual recidivism in adult males. The factors include prior sex offense convictions, prior non-sexual convictions, unrelated victims, stranger victims, male victims, and whether the offender has lived with an intimate partner. The STATIC-99 evaluation is available at time of sentencing, and does not depend on an interview with the offender. See Andrew Harris, Amy Phenix, R. Karl Hanson & David Thornton, "STATIC-99 Coding Rules" (Revised 2003), available at http://ww2.psepc-sppcc.gc.ca/publications/corrections/pdf/Static-99-coding-Rules_e.pdf.

A more elaborate evaluation is available for Class B felony sex offenders under the state's 120-day "shock" sentencing program under section 559.115.5. This statutory provision allows the judge to send an offender to prison for a 120-day evaluation and then to decide whether to continue the offender in prison or to place the offender in the community on probation that may contain some restrictive conditions.

⁶⁵ MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, at 85. The Parole Board guidelines use the word "excellent" instead of "good." The Commission concluded that "excellent" may be too optimistic a term for describing risk at time of sentencing, though, statistically, the word "good" as used by the commission means the same thing. *Id.* at 79–84.

⁶⁶ Estimate provided by J. Scott Johnston, chief state supervisor.

reports full-time and do no probation or parole supervision. Other probation officers write reports and also are involved in offender supervision.

The new format for these reports, called the Sentencing Assessment Report, is less extensive in describing the social and educational family history of the offender, and instead is focused on addressing specific risk factors that have been identified in the risk factor analysis. The report contains details of the offense, as well as an opportunity for the victim's information to be presented. The new report format standardizes the assessment of the offender by using an evaluation of the risk, based upon the scale discussed above.⁶⁷ In 2005, the Board of Probation and Parole completed over 6,200 pre-sentence investigations, which accounts for over half of new prison commitments and one-third of new probations. Using the Sentencing Assessment Report as a vehicle for the Commission's recommended sentences should enhance their impact.

Under the former pre-sentence investigation system, probation officers were historians. Under the Sentencing Assessment Report system, they are planners. The main idea is that the report should be organized around factors that affect risk of re-offending, and provide the officer's professional judgment as to how the offender should be managed—whether in prison or in the community—so as best to reduce the chances of re-offending.⁶⁸

The former pre-sentence investigation reports often contained extensive social history, including how the offender did in school, his or her family circumstances, and other information that was based on a social work assessment. Social history occasionally has been criticized as misleading and the subject of demagoguery by one side or the other. Some of the social history, however, has been retained at the request of some judges.

The Commission believes the information on risk factors is more valuable than social history. Extensive social history might be valuable to a person who is marrying an offender but the judge is sentencing, not marrying. The Sentencing Assessment Report follows a "less is more" strategy. The Commission and the probation officers, in redesigning the report around risk factors that are statistically correlated to their chance of re-offending, have taken a much more focused approach. Addressing discrete issues that are statistically correlated with risk is far more effective than an unfocused discussion of social history.⁶⁹

⁶⁷ Samples of Sentencing Assessment Reports are on the Commission's website, available at <http://www.mosac.mo.gov>.

⁶⁸ This is similar to an approach described by Judge Michael Marcus as "transforming the role of the probation officer," in *Sentencing Support Tools and Probation in Multnomah County*, EXECUTIVE EXCHANGE, Spring 2004, at 3. See also Judge Michael Marcus, *Justitia's Bandage: Blind Sentencing*, 1 INT'L J. PUNISHMENT & SENTENCING 1 (2005), available at <http://www.smartsentencing.com>.

⁶⁹ For examples, in other contexts, of instances when less information is superior to more information, see MALCOLM GLADWELL, *BLINK* (2005).

A most important new portion of the Sentencing Assessment Report is the Offender Management Plan. This is the probation officer report writer's assessment of how best to meet the needs of the offender, whether the sentence is to be served in prison, in the community, or in some combination of the two. This is the officer's best judgment as to what management strategies will best reduce the risk of re-offending. The conclusion of the report incorporates the recommendations of the Commission, as well as the percentage of time likely to be served, and the Parole Board's guidelines, if a prison sentence is imposed.

The real leadership in changing Missouri's pre-sentence reports came from those who work on the inside of the system. The idea of integrating these pieces of information into the Sentencing Assessment Report came from the chairman of the Parole Board and the state's chief probation supervisor. The actual design of the report, and the testing of the formats, was done by a very dedicated team of probation officers from six selected judicial circuits around the state—some urban, some suburban, and some rural. This "implementation team" was extraordinarily valuable in making criticisms and suggestions of the Commission's approach that resulted in a series of modifications designed to make the system more workable.⁷⁰ Judges from throughout the state were invited to focus groups and other programs to critique the new system.

The implementation team met almost every month, for over a year, with the chair and staff of the Commission participating in most sessions. At the same time the implementation team was fine-tuning the format and approach, the team was developing materials and methodologies for training the 1,200 or so probation officers to do the reports in this format on a statewide basis. They were also aided by the statisticians from the Department of Corrections, notably David Oldfield, the author of much of the Commission's work, in automating the system that the probation officers use in preparing reports. The new Sentencing Assessment Report format was implemented in all judicial circuits in the state November 1, 2005.

X. IS THE NEW SYSTEM WORKING?

It will take at least one year's data to assess, by the measure of prison population, whether one of the goals of the information-based sentencing system will work. Since November 1, 2005, when the new Sentencing Assessment Report system went statewide to all judicial circuits, there has been a net decrease in

⁷⁰ For example, in the Commission's initial report in 2004, the severity of sentence was driven not just by prior criminal history, but by the full range of risk factors. Members of the implementation team rather quickly noted that this methodology resulted in more punitive sentences being recommended for youthful offenders, because youthful age is a negative factor in the risk assessment categorization. The initial use of risk assessment status as the criterion for severity of sentence, rather than prior criminal history, would have resulted in sentencing offenders to harsher sentences depending on who they are, rather than what they did. The Commission responded by changing the grids to refer only to criminal history.

prison population through May 2006. While seven months is too short a time to detect any long-term trends, the results have been encouraging. The data on the per-day increase or decrease in prison population since February, 2005, are shown in Figure 5. The months from November 2005 to the present are the most interesting; all but one show significant decreases.

DOC Institutional Population: January 2005–February 2006

	Population	Change	Rate Per Day	Cum. In FY06
Jan 05	29,906	50	1.61	
Feb 05	30,065	159	5.48	
Mar 05	30,240	175	5.65	
Apr 05	30,260	20	0.67	
May 05	30,167	-93	-3.00	
Jun 05	30,219	52	1.73	
Jul 05	30,359	140	4.52	4.52
Aug 05	30,416	57	1.84	3.18
Sep 05	30,531	115	3.83	3.39
Oct 05	30,654	123	3.97	3.54
Nov 05	30,507	-147	-4.90	1.88
Dec 05	30,446	-61	-1.97	1.23
Jan 06	30,380	-66	-2.13	0.75
Feb 06	30,142	-238	-8.50	-0.32
Mar 06	30,210	68	2.19	-0.03
Apr 06	30,123	-87	-2.90	-0.32
May 06	30,051	-72	-2.32	-0.50

FIGURE 5: Month-by-month per-day increases or decreases in Missouri's overall prison population from January 2005.⁷¹

The Department of Corrections statisticians attribute the low population growth in the first months of fiscal year 2006 to a decline in new term admissions and to an increase in the use of 120-day sentences.⁷² The increase in 120-day sentences, and corresponding decrease in prison terms longer than 120 days, is an expected outcome of using the Commission's recommendations.⁷³ To contrast the data shown in the Figure, the average growth in fiscal year 2005 was 2.34 per day.⁷⁴ This 2.34 daily increase may not seem like much, but it basically means that the state would require a new prison every two years if 2.34 is the daily growth rate—the prison system's population would at that rate grow by about 855 persons

⁷¹ MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, at 72–73.

⁷² Memorandum from David Oldfield, Director of Research, Missouri Department of Corrections, to Judge Wolff 1 (Jan. 30, 2006) (on file with author) [hereinafter Oldfield Memorandum].

⁷³ *Id.*

⁷⁴ *Id.*

per year. From 1994 through 2004, the Missouri prison system experienced a doubling of its prison population from about 14,000 prisoners to over 30,000.⁷⁵

By contrast, the growth rate in fiscal year 2006 at the end of January 2006 was 0.73 per day,⁷⁶ and as Figure 5 shows, there was a negative growth rate in the first four months after the sentencing assessment report was implemented statewide.⁷⁷

We expect to be studying the effect of the Sentencing Assessment Report system on recidivism rates over a period of years. Another area for study is the persistent question of disparities in sentencing. Disparities that are based on differences in the circumstances of the offense are not particularly troubling, as discussed above. More controversial, of course, are disparities that may be attributed to the characteristics of an offender. When the Commission started its work, it gathered data, which are published in the 2005 report on the website, that show substantial disparities in the use of probation from area to area among the state's forty-five judicial circuits; disparities in the use of and length of prison sentences; and disparities in the use of the 120-day sentences.⁷⁸

One would hope that the information-based system that has been established will eliminate some of these overall disparities and gross differences in the frequency of use of the various sentences. The first measurements of compliance based upon 660 offenders from the six pilot sites in 2005 indicated that overall there was an 83% agreement between the range of the recommended sentences and the actual sentence. For non-violent and drug offenses, where the use of alternative sentences is the greatest, the compliance was 86%. Four percent of the sentences were below the Commission's recommendations and 13% overall were above the Commission's recommendations. The preliminary analysis also established that using a measure of prior criminal history to indicate the severity does agree with actual sentencing practices.

XI. THE NEXT STEP: WHICH SENTENCES ARE EFFECTIVE?

With a system that gathers and analyzes data in a consistent fashion, there is potentially a powerful analytical approach. Specifically, we should ask, for each category of offense, and each risk category of offenders, which sentence is the most effective in reducing recidivism?

A study of Missouri's drug court divisions, which have spread to thirty-five of Missouri's forty-five judicial circuits,⁷⁹ purports to show that recidivism among

⁷⁵ CASKEY, *supra* note 7.

⁷⁶ Oldfield Memorandum, *supra* note 72.

⁷⁷ *Id.*

⁷⁸ MISSOURI SENTENCING ADVISORY COMMISSION, *supra* note 9, at 54–65.

⁷⁹ INSTITUTE OF PUBLIC POLICY, TRUMAN SCHOOL OF PUBLIC AFFAIRS, UNIVERSITY OF MISSOURI-COLUMBIA, STATE OF THE STATE ON DRUG COURTS IN MISSOURI 2 (2005).

drug court graduates is less than 10 percent,⁸⁰ as distinct from probation—25% recidivism—and prison—44% recidivism (reincarceration) within three years.⁸¹ This suggests that some strategies are better than others.⁸²

Some judges believe that for lower level felonies—particularly nonviolent ones—prison terms are more likely to result in re-offending than some community-based sentences. It should be possible, within a few years, to quantify and analyze data to show, as a generalized proposition, which sentences—and of what setting and length—are most effective in reducing recidivism and which sentences are likely to be counterproductive for particular offenses committed by offenders in different risk categories. Since public safety is an important goal, our sentencing practices should be highly influenced by data that show how courts can best reduce crime through well-informed sentencing.

⁸⁰ *Id.* at 4.

⁸¹ PROFILE OF INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION IN 2005, available at <http://www.doc.mo.gov/pdf/Offender%20Profile%20FY05.pdf> (last visited Sept. 14, 2006). Recidivism rates are shown:

Recidivism rates for Drug Court Graduates, Probationers and Parolees At December 31, 2005

Time under Supervision	Drug Court Graduates	Probation	First Parole Release
Two years	5.2%	19.5%	33.4%
Three years	10.2%	25.2%	44.0%

⁸² Drug courts have been established to deal with the large number of substance abuse cases that are presented as criminal offenses. The criteria for admission into drug court vary from judicial circuit to judicial circuit in Missouri, and so a full analysis of their effectiveness—compared to other forms of probation—is hard to assess. Judges throughout the state, including me, have actively supported drug courts' expansion. The drug court program has attracted substantial political support and has been effective in bringing financial resources to support drug treatment programs. Drug courts offer a super-intense probation model that the participants, including successful graduates of drug courts, find effective. In some areas, mental health courts also are being developed, along the same basic model, to deal with diverting offenders who are more defined as mental health cases than criminal offenders. These courts may be the result of so many mentally ill people being excluded from supportive mental health services, who then commit offenses and come to the criminal justice system. The success of a drug court, or a mental health court, may depend upon the charismatic qualities of the judge or other personnel as much as on a standardized method of proceeding. The role of a judge in a drug court setting, for instance, is quite different from that of a judge in an adjudicative or sentencing context. For a skeptical view as to the usefulness of drug courts, see Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2004). There is no doubt that criminal courts in recent years have been receiving large numbers of persons who have drug problems, alcohol addiction (as indicated by driving-while-intoxicated charges), and mental health problems. For many of these persons neither prison nor traditional probation is appropriate. Courts, correctional authorities, and law enforcement officials have been hard-pressed to find effective alternatives to the traditional criminal justice system for these people.

XII. CONCLUSION

Based on my previous government work I avoid the use of the word “reform.” When reformers reform, they usually convey the message that the people in the system to be reformed are defective. “Lawless” is a word that has been used to describe indeterminate sentencing schemes driven by discretion.⁸³ Lawless, then, is used to describe the people involved. Of course, the remedy for lawlessness is law—law to direct the behavior of those who are defective.

There is no doubt that discretionary sentencing systems have produced disparate sentencing results that are somewhat determined by the personal assumptions and characteristics of the sentencers. By some measures, too, some sentences are unjust in that they are disproportionate to the offenses. Some sentences are counterproductive in that they may contribute to producing future criminal activity, thus wasting scarce correctional resources.

Acknowledging defects in a discretionary sentencing scheme does not, however, concede that the decision makers in the system are defective. Judges and prosecutors, by their own sense of their respective professional roles, believe that they are trying to do justice. To say this is to recognize decent motives. What is often lacking is information—and the opportunity to improve their professional performances—because they typically act in isolation. Judges are sometimes not well informed as to alternatives to incarceration that might be available and useful for some offenders. Justice to them may be simply picking the right number of years to send an offender to prison. The information the Sentencing Advisory Commission seeks to make available suggests that there are norms to be discerned in data from their judicial peers, alternatives to be considered that may enhance public safety, and care to be taken in wisely using scarce correctional resources.

Will Missouri’s discretionary information-based system succeed? That depends, ultimately, on the success of the efforts to make sentencing decision makers better informed. The assumption is that better information will produce better outcomes. The effects of this system can be measured to determine if this assumption is correct. I hope these measurements will show improvements in the quality of justice in Missouri.

⁸³ See Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972); see also Berman, *supra* note 2.