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Emily M. Grant
University of Kentucky

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NOTES

Cost Conscious Justice: The Case for Wholly-Informed Discretionary Sentencing in Kentucky

*Emily M. Grant*¹

Kentucky is in the midst of a budget crisis that has no foreseeable termination date and, at the same time, is suffering from chronic prison overcrowding that is almost sure to get worse before it gets better. Sooner or later (and probably sooner), lawmakers will have to confront the undeniable connection of these two factors and undertake a full examination of the state's aggressive incarceration practices.²

INTRODUCTION

SINCE that observation was made eight years ago by Robert G. Lawson, Professor of Law at the University of Kentucky, the nation has suffered a crippling economic recession and, in 2010, recorded the highest national debt in the last twenty years.³ In the midst of immense budget shortfalls, America's incarceration costs continue to skyrocket. It is not surprising that the recent financial crisis has attracted an increased level of attention to the nation's allocation of fiscal resources and its costly incarceration practices called into question. In the words of former White House Chief of Staff Rahm Emanuel, "Never let a serious crisis go to waste. . . . [I]t's an opportunity to do things you couldn't do before."⁴ Albeit controversial, Emanuel's words ring true when considered in the context of reforming the failed and costly sentencing policies that today prevail in courtrooms nationwide. Now is the time to seize the opportunity to replace these failed practices with cost-conscious alternatives and finally curb America's insatiable appetite for incarceration.

As a result of shrinking revenues and ever increasing inmate populations,

1 JD, 2012, University of Kentucky College of Law. The author would like to sincerely thank Professor Robert G. Lawson for sharing his insight on this topic and offering constructive criticism throughout the composition process.

2 Robert G. Lawson, *Difficult Times in Kentucky Corrections – Aftershocks of a "Tough on Crime" Philosophy*, 93 Ky. L.J. 305, 333 (2004).

3 U.S. DEP'T OF THE TREASURY, DEBT POSITION AND ACTIVITY REPORT (2010), available at http://treasurydirect.gov/govt/reports/pd/pd_debtposactrpt_1011.pdf.

4 *A 40-Year Wish List*, WALL ST. J., Jan. 28, 2009, <http://online.wsj.com/article/SB123310466514522309.html>.

state correctional budgets are facing steep shortfalls.⁵ The Commonwealth of Kentucky has recently experienced one of the fastest-growing prison populations in the country.⁶ It was reported in 2010 that, over the past decade, Kentucky's inmate population had surpassed the national growth rate by thirty-two percent.⁷ These figures are even more palpable and troubling when converted into dollars. In 1990, the Commonwealth's spending on incarceration totaled \$140 million.⁸ By comparison, Kentucky's yearly incarceration spending registered at a staggering \$440 million in 2010.⁹ As the state is faced with its highest budget deficit on record, Kentucky's draconian sentencing laws are crying out for reform.

Kentucky's heavy-handed approach to sentencing might be easier to accept if supported, statistically or otherwise, by a need to combat an increase in violent crime. However, the Commonwealth's correctional budget spending, which is growing at a much higher rate than its total government spending, appears to be unjustified in light of the fact that Kentucky's serious crime rate is one of the lowest in the nation.¹⁰ As a matter of fiscal responsibility, Kentucky must restructure its current sentencing policies and seek out more cost effective alternatives to incarceration. To remain blindly committed to these costly sentencing policies, which yield incarceration rates that are largely disproportionate to Kentucky's relatively low violent crime rates, places the Commonwealth on an unsustainable path, both in terms of prison overcrowding for the criminal justice system and financial burden on the taxpayers who support it.

When faced with similar struggles to control its inmate population and incarceration costs, Kentucky's westward neighbor, Missouri, took action by implementing a sentencing structure premised on the wholly-informed discretion of its judges.¹¹ A comparison of the two neighboring states reveals that they employ sentencing structures that are light years apart. While

⁵ See Jack Brammer, *Lawmaker: Changing Criminal Code Would Save \$60 Million Over 10 Years*, LEXINGTON HERALD-LEADER, Jan. 20, 2011, <http://www.kentucky.com/2011/01/20/1604202/lawmaker-changing-criminal-code.html#more>.

⁶ *Id.*

⁷ *See id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See THE LEAKY BUDGET, KENTUCKY CHAMBER OF COMMERCE 2 (February 2010) (*available at* <http://www.kychamber.com/Dockycc1/governmentaffairs/LeakyBucket/LeakyBucketWhitePaper.pdf>) (stating that state corrections spending has increased by 44% since 2000, compared with total General Fund spending which has increased by 33%, and noting that "while Kentucky's incarceration rate was growing at a faster rate than the nation's, both its violent and property crime rates fell, by 13 and 14% respectively").

¹¹ See Press Release, Mo. Sentencing Advisory Comm'n, *Report Shows Missouri's Use of Recommended Sentences Reduces Recidivism Rates, Prison Population* (Oct. 15, 2007), *available at* <http://www.mosac.mo.gov/file.jsp?id=45463> [hereinafter Press Release, Mo. Sentencing Advisory Comm'n].

Kentucky seeks to ensure that criminal offenders receive “just deserts”¹² primarily through the use of rigid statutory rules that tightly restrict judicial discretion,¹³ Missouri relies fully on the use of wholly-informed judicial discretion to promote both just sentencing practices and an efficient allocation of limited state resources.¹⁴ These differing approaches taken by the two states have yielded opposite outcomes: while both the prison population and yearly cost of incarceration in Kentucky continue to rise, Missouri’s incarceration rate saw a continual decline in the two years following the implementation of its wholly-informed discretionary sentencing system in 2005.¹⁵

This Note seeks to shed light on the failing criminal justice laws and policies that have largely contributed to Kentucky’s budget crisis and proposes a new direction in the Commonwealth’s approach to sentencing. Part I briefly examines the shift in sentencing policy that has led to the upward trend in incarceration rates that currently plagues not only Kentucky, but also states nationwide. Part II introduces the rule–discretion continuum and focuses on the differing impacts that the rival sentencing structures have on incarceration rates. Finally, Part III outlines both the economic and social benefits of the wholly-informed discretionary sentencing model that has been successfully implemented in the neighboring state of Missouri and advocates for the adoption of similar reforms in Kentucky.

I. THE ROOT OF THE PROBLEM

A. *The Shift from Rehabilitative to Retributive Sentencing Policy*

In light of America’s current appetite for incarceration, one might find it surprising to learn that the dominant sentencing approach adopted by American courts beginning in the nineteenth century and enduring throughout the majority of the twentieth century was one premised on the rehabilitation of offenders.¹⁶ This rehabilitative approach afforded both federal and state trial judges “nearly unfettered authority to impose on [criminal] defendants any sentence from within the broad statutory ranges

¹² Lawson, *supra* note 2, at 317 (quoting Model Penal Code arts. 6 & 7 introductory cmt. at 13 (1985) (“The theory of just deserts was that an offender should receive in punishment as much as, and no more than he deserves.”)) (internal quotation marks omitted).

¹³ See *id.* at 337–39 (discussing the four statutory provisions within Kentucky’s persistent felony offender law that have the strongest impact on constraining judicial discretion).

¹⁴ See Michael A. Wolff, *Missouri’s Information-Based Discretionary Sentencing System*, 4 OHIO ST. J. CRIM. L. 95, 96 (2006).

¹⁵ *Id.*

¹⁶ Douglas A. Berman, *Foreword: Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 654 (2005).

provided for criminal offenses.”¹⁷ After all, it was widely accepted that the end goal—rehabilitation of offenders—would be achieved primarily through tailoring punishments to fit their individualized treatment needs, and the chief mechanism to facilitate this was through judicial discretion.¹⁸

The generally tumultuous times and notorious crime wave of the 1960s, however, greatly contributed to a drastic alteration in American sentencing jurisprudence.¹⁹ The increasing crime rates cast doubt upon the overall effectiveness of the rehabilitative model of corrections.²⁰ By the 1970s, the American public favored a “law and order” approach to sentencing that would utilize considerably harsher punishments in an effort to reestablish order in society.²¹ Mounting concerns expressed by criminal justice scholars regarding the unpredictability and potential disparate sentencing produced by such highly discretionary practices gave momentum to a budding reform movement focused on establishing a system premised on certainty and consistency.²² Judge Marvin Frankel dubbed the problem posed by allowing judges to brandish such tremendous sentencing power as “lawlessness in sentencing.” To address these concerns of disparate sentencing in America, Frankel called for the adoption of a “code of penal law” and the creation of a special “Commission on Sentencing” agency.²³

Conservative politics also played a heavy role in the nation’s shift from rehabilitative sentencing practices to the “lock ‘em up and throw away the key” mentality that prevails today.²⁴ Advocates on the political right led the charge arguing that “criminals generally could not be rehabilitated, it was pointless to attempt most treatments, and the only realistic solution was to incapacitate a criminal through the use of incarceration.”²⁵ Congress embodied the tough-on-crime movement into legislation with its passage of the Sentencing Reform Act of 1984, which led to the creation of the United States Sentencing Commission and its comprehensive guidelines for federal sentencing.²⁶ State legislatures responded to the calls for reform as well by greatly restricting judicial discretion through the enactment

¹⁷ *Id.*

¹⁸ *Id.* (“Such broad judicial discretion . . . was viewed as necessary to ensure that sentences could be tailored to the rehabilitative prospects and progress of each offender.”).

¹⁹ Lawson, *supra* note 2, at 314. (“Violence in the streets, burning and looting in inner cities, and rioting in a major prison system combined with [the assassinations of prominent Americans] . . . to create a much greater public fear of crime . . . and a very intense resentment of criminals.”).

²⁰ *Id.*

²¹ *Id.*

²² Berman, *supra* note 16, at 655.

²³ *Id.* at 656–57.

²⁴ *History (How Did We Get Here?)*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-criminal-justice-challenge/history-how-did-we-get-here> (last visited Dec. 28, 2011).

²⁵ *Id.*

²⁶ Berman, *supra* note 16, at 658.

of sentencing statutes that abolished parole, created narrow sentencing ranges for particular classes of offenses,²⁷ and adopted mandatory minimum penalties.²⁸ Sadly, these politically motivated decisions that, at the time, may have appeared to be relatively risk-free and isolated have had far-reaching effects beyond that of mere political expediency.

The lingering aftershocks of the policy decisions of the 1970s and 1980s have harshly affected the equitable administration of justice within the states and have led to serious budgetary concerns.²⁹ One of the states in which these negative impacts can be seen most prevalently is in Kentucky.³⁰ According to the PEW Center on the States, “[d]espite a decline in the prison population over the past two years, Kentucky has seen one of the nation’s fastest [incarceration] growths since 2000.”³¹ Between 2000 and 2010, Kentucky’s prison population has grown forty-five percent.³² The Commonwealth’s growth rate is tremendous, especially when compared to the nation’s total state prison population growth rate of only thirteen percent.³³ Moreover, since America first waged its war on crime, Kentucky’s prison population has grown a monumental 442 percent, from 3,723 inmates in FY 1980 to roughly 20,200 inmates in FY 2010.³⁴ This increase in prison population does not come without a price: Whereas general fund corrections spending was \$117 million in 1989, it has since skyrocketed by 338 percent, totaling \$513 million in FY 2009.³⁵

While these figures alone are cause for concern, it is more surprising that the surge in Kentucky’s prison population has been largely attributed to a shift in policy decisions, not crime rates.³⁶ For the past fifty years, Kentucky’s serious crime rate has been well “below that of the nation and of other southern states.”³⁷ The PEW Center’s statistics, however, point out

²⁷ *Id.* at 657.

²⁸ *Id.* at 664.

²⁹ See Lawson, *supra* note 2, at 318.

³⁰ Press Release, The Pew Charitable Trusts, Kentucky to Partner with the Pew Center on the States to Improve Public Safety, Contain Costs (Aug. 11, 2010), *available at* http://www.pewtrusts.org/news_room_detail.aspx?id=60365 [hereinafter Press Release, The Pew Charitable Trusts].

³¹ *Id.*

³² *Id.*

³³ *Id.* Because Kentucky’s crime rate is well below the national average, these statistics indicate that the dramatic increase in Kentucky’s incarceration rate as compared to the nation as a whole is attributable to factors other than an increase in criminal activity. See *infra* text accompanying note 37.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* See THE LEAKY BUDGET, KENTUCKY CHAMBER OF COMMERCE 2 (February 2010) (*available at* <http://www.kychamber.com/Dockycc1/governmentaffairs/LeakyBucket/Leaky-BucketWhitePaper.pdf>) (“According to FBI crime reports, Kentucky ranked 40th in the rate

that the Commonwealth's incarceration rate is well above average: "The 2009 incarceration rate in Kentucky (484 per 100,000 residents) is higher than the overall U.S. state incarceration rate (447 per 100,000 residents). The higher incarceration rates are true for both males and females. In fact, Kentucky has the sixth highest incarceration rate for females."³⁸ Kentucky's uniquely harsh penal code may help explain the disparity between crime and incarceration rates.

B. The Detrimental Evolution of the Kentucky Penal Code

Before examining the individual tough-on-crime policies that led to the population explosion in Kentucky's correctional facilities, it is important to point out that, like the national approach to sentencing, the Commonwealth's approach has not always been so draconian. The initial primary objective of the Kentucky Penal Code (the "Code") was to maintain "the state's [long-held] . . . commitment to the rehabilitation of offenders."³⁹ An examination of its provisions supports the inference that the Code was largely centered on discretion. For example, the 1974 Code afforded trial judges "virtually unlimited discretion" to use probation as an alternative to imprisonment⁴⁰ and encouraged them to do so as long as imprisonment of the offender was not deemed necessary as to ensure public safety.⁴¹ Moreover, the provisions gave courts considerable discretion to fix maximum penalties in cases "resolved by guilty pleas" and authorized judges to use discretion "to reduce penalties fixed by juries to lesser penalties" that better fit the individual crime.⁴² As a result of the provisions, parole boards enjoyed the authority to determine a convicted felon's eligibility for parole.⁴³ Finally, and perhaps most significantly, the Code did not constrain judicial discretion by providing for mandatory minimum sentences for any offense.⁴⁴

The Code clearly reflected the following philosophies on sentencing: 1) the state should impose the least rather than the most intrusive of punishments, 2) society's long-term interests are best served by restoring offenders to full status in their communities as soon as possible, and 3) imprisonment should never be allowed to become a routine or semiautomatic

of violent crime in 2006, the most recent year data is available.")

³⁸ *Id.*

³⁹ Lawson, *supra* note 2, at 334.

⁴⁰ Robert G. Lawson, *PFO Law Reform, A Crucial Step Toward Sentencing Sanity in Kentucky*, 97 Ky. L.J. 1, 11 (2008) [hereinafter Lawson, *PFO Law Reform*].

⁴¹ Lawson, *supra* note 2, at 334.

⁴² Lawson, *PFO Law Reform*, *supra* note 40, at 11.

⁴³ *Id.* at 10.

⁴⁴ *Id.* at 11.

punishment.⁴⁵

It is quite evident that the aforementioned provisions in the Kentucky Penal Code, if left unaltered, could not have produced the incarceration boom that currently exists in the Commonwealth.⁴⁶ When the Kentucky General Assembly modified the existing Code shortly thereafter, however, it became clear that these were philosophies of the past and signaled the legislature's whole-hearted allegiance to the tough-on-crime movement.⁴⁷

The sentencing weapon in Kentucky's well-stocked arsenal that most harshly curtails judicial discretion and cries out loudest for reform is the persistent felony offender (PFO) law.⁴⁸ PFO laws are most commonly described by the "baseball metaphor 'three strikes and you're out.'"⁴⁹ "Three strikes" laws enhance the "levels of imprisonment for [felonies committed by] habitual offenders and specifically [provide] for sentences of life imprisonment for commission of a third offense."⁵⁰ The 1974 session of the Kentucky General Assembly produced one of the toughest "three strikes" laws ever enacted by a state legislature.⁵¹ In its current form, Kentucky's "three strikes" law applies to nonviolent persistent felony offenders in the first degree as follows:

If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years nor more than twenty (20) years.⁵²

Therefore, under this law, persistent felony offenders who are convicted of Class C or D felonies "may be sentenced to extended terms that double the ordinary term of imprisonment provided for [such a felony] conviction."⁵³ This means that "a Class C felony committed by a non-persistent offender carries a maximum term of ten years while a Class C felony committed by a persistent offender carries a maximum term of twenty years."⁵⁴

A number of provisions within Kentucky's "three strikes" law directly

45 Lawson, *supra* note 2, at 335–36.

46 *Id.* at 334.

47 *Id.* at 335–36.

48 Lawson, *PFO Reform*, *supra* note 40, at 6–7.

49 *Id.* at 7.

50 Lawson, *supra* note 2, at 335.

51 See Lawson, *PFO Reform*, *supra* note 40, at 9.

52 KY. REV. STAT. ANN. § 532.080(6)(b) (West 2006 & Supp. 2011). A Class C felony carries a sentence of at least five but not more than ten years. KY. REV. STAT. ANN. § 532.020(1)(a) (West 2006). A Class D felony carries a sentence of at least one but not more than five years. § 532.020(1)(b).

53 KY. REV. STAT. ANN. § 532.080 cmt. (West 2006).

54 *Id.*

restrict a judge's discretion in sentencing. One of the most glaringly restrictive provisions states that "[i]f the offense the person presently stands convicted of is a Class A, B, or C felony, the person shall not be eligible for parole until the person has served a minimum term of incarceration of not less than ten (10) years."⁵⁵ This provision not only effectively forecloses a judge's discretion to impose a sentence of probation, shock probation, or conditional discharge for all repeat offenders except Class D felons, but it also imposes a mandatory minimum sentence of ten years before such an offender is eligible for parole.⁵⁶

While the use of the three strikes law against violent offenders may be justified, such long and costly incarcerations are unnecessary for nonviolent offenders, who are often more dangerous to themselves than the public. According to a field study conducted by Robert G. Lawson, Kentucky's law is "far more likely to be used against felony offenders who pose very little if any threat to public safety (shoplifters, auto thieves, low-level burglars, drug users, etc.)."⁵⁷ This is exemplified by a case in Fayette County, Kentucky, where a persistent felony offender, who stole goods valued at less than \$300 was indicted on two counts of third degree burglary, a Class D felony, carrying a sentence of one to five years.⁵⁸ Her PFO status, derived from the commission of prior nonviolent Class D felonies (possession of forged instruments), imposed an additional charge of PFO in the first degree and an enhanced penalty.⁵⁹ Thus, her one year sentence "for third degree burglary [was] . . . enhanced to ten years by the PFO [law], and she was [consequently] sent to prison for ten years for stealing less than \$300 worth of goods."⁶⁰

The extensive reach of Kentucky's PFO law undoubtedly all but guarantees population growth in the Commonwealth's already overcrowded correctional facilities and an increased burden on the state budget. According to the Kentucky Department of Corrections, the average cost to incarcerate one healthy inmate in FY 2006–2007 was \$18,613 per year.⁶¹ That number increased to \$26,578 per year for an unhealthy or aging inmate.⁶² Therefore, under the current PFO law, the Commonwealth of Kentucky spent about \$186,130 to incarcerate the above mentioned nonviolent offender for stealing a mere \$300 worth of goods. That figure is cause for concern to anyone with the slightest sense of fiscal responsibility. And if that calculation does not stir up concern about the tremendous

55 § 532.080(7).

56 Lawson, *PFO Reform*, *supra* note 40, at 13; § 532.080(7).

57 Lawson, *PFO Reform*, *supra* note 40, at 31.

58 *Id.* at 21; KY. REV. STAT. ANN. § 511.040(2) (West 2006).

59 Lawson, *PFO Reform*, *supra* note 40, at 21.

60 *Id.*

61 *Id.* at 31.

62 *Id.* at 31 n.109.

cost of Kentucky's predominant sentencing weapon of choice, this one will: while the PFO law, when first enacted, produced only seventy-nine enhanced sentences in 1980, by 2004 the number of PFO inmates serving extended terms had risen to an astounding 4,187.⁶³ Considering that this law is still in full force today, and that it serves as an incentive for persistent offenders to accept more severe sentences in exchange for dismissal of PFO charges,⁶⁴ its far-reaching impact on increasing the sentences of the inmate population and the cost to incarcerate them is practically immeasurable.

II. THE RULE-DISCRETION CONTINUUM

Despite the difficulty in reducing the exact impact of particular sentencing policies down to dollars and cents, an examination of the intricacies of a state's sentencing system can reveal a great deal about the effect its laws and policies have on its incarceration rate.⁶⁵ A state sentencing system can be described as rule-based or discretion-based.⁶⁶ This distinction is dependent mostly on the degree of leeway afforded to a judge in the sentencing process. Although this continuum concept was first introduced by Kevin Reitz, Professor of Law at the University of Minnesota, in questioning the impact of the Supreme Court's decision in *United States v. Booker* on the Federal Sentencing Guidelines, it is aptly suited for examining the stark differences in the state sentencing policies of Kentucky and Missouri and the consequential outcomes from the enforcement of the contrasting laws that accompany each regime.⁶⁷

A. Reitz's Continuum of Judicial Sentencing Discretion

Visualize a continuum that demonstrates the differences in sentencing systems and ranges from zero on the left side to ten on the right side.⁶⁸ Position zero on the left side represents a sentencing system in which judges are afforded primary discretion to hand down penalties so long as they fall within a broad statutory range for felony offenses and are permitted to consider individual facts and circumstances surrounding the defendant

⁶³ *Id.* at 31.

⁶⁴ *See id.* at 27–28.

⁶⁵ *See* Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 158 (2005).

⁶⁶ *Id.*

⁶⁷ *Id.* at 156–57 (applying the “rule–discretion” continuum to argue that the impact of the *Booker* decision on altering the command of the Federal Sentencing Guidelines from “mandatory” to “advisory” was “far less radical” than it appeared to be on its face).

⁶⁸ *Id.* Professor Reitz notes that no modern sentencing system fits squarely into position zero or position ten on the continuum, but they can be characterized as falling within these ranges. *Id.* at 159.

and the crime for which he is charged.⁶⁹ Essentially, in a discretion regime there are no rules circumscribing the judge's decision-making authority, other than the maximum penalty prescribed by statute, which may not be exceeded.⁷⁰ It is also important to note that where judicial discretion reigns, neither the legislature, sentencing commission, nor a reviewing court may interfere with the trial judge's unfettered discretion.⁷¹ On the other end of the continuum, at position ten, rests the rule-based system, one in which judges' discretion is tightly restricted in favor of legislative rules that dictate "a fixed and specific punishment in every case, with no judicial leeway permitted under any scenario."⁷² In order words, "[a]t position ten, someone with systemwide competence has mandated the exact sentencing outcome of every case in advance of its litigation, and judges are mere functionaries in the punishment process."⁷³

A system's position on the continuum is largely, if not wholly, determined by the policy choices of and laws implemented by state legislatures.⁷⁴ In gauging sentencing authority, the initial examination should involve a look at the sentencing recommendations set forth by the state legislature and the statutory language granting or withholding judicial authority to deviate from those recommendations.⁷⁵ In legislative parlance, this deviation authority is commonly referred to as "departure power."⁷⁶ Thus, the more lenient the departure language, the more likely that the sentencing scheme will fall on the discretion side of the continuum, or closer to position zero.⁷⁷ Conversely, if the statute employs an unyielding standard, the sentencing structure will likely be considered to be one that restricts judicial discretion and be placed on the rule end of the continuum, closer to position ten.⁷⁸ Additionally, several other important factors are at stake, including, most obviously, the following: "(1) the breadth or narrowness of statutory sentencing ranges and guidelines, (2) the simplicity or complexity of factual considerations that must be fed into guidelines calculations, and (3) the presence or absence of black-letter rules affixed to the sentencing

69 *Id.* at 158.

70 *Id.*

71 *Id.*

72 *Id.* at 158-59. *See* Wolff *supra* note 14, at 100 ("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.").

73 *Id.* at 159.

74 *See id.* (Professor Reitz notes that the utility of the continuum lies in its ability to gauge the level of involvement of the legislature in the sentencing process. He would seem to suggest that the more dominate the state legislature, the more likely the sentencing system is to be rule-based.).

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.*

process.”⁷⁹ It then follows that sentencing structures that impose narrowed statutory ranges, complex factual considerations (such as an offender’s prior criminal history), and highly prescriptive black letter rules (such as mandatory minimum sentences) are considered to be rule-based.⁸⁰

B. The Reitz Continuum in Action – Contrasting Kentucky and Missouri

It is quite evident from the examination in Part I of this Note that Kentucky’s use of mandatory minimums, extensive “three strikes” prescriptions, and statutory provisions that constrain judicial discretion in the use of probation and parole earn the system a position on the rule-based side of the Reitz continuum.⁸¹ For instance, the language of Kentucky’s “three strikes” law sharply prescribes a mandatory sentence for persistent felony offenders and grants virtually no departure power to sentencing judges.⁸² Furthermore, the law’s narrow sentence ranges for felony offenses, enhanced sentences based on prior criminal history, and black letter mandatory minimum penalties imposed upon persistent felony offenders convicted of Class A, B, or C felonies are all factors that constrain judicial sentencing authority.⁸³ The only departure power seemingly granted by Kentucky statute pertains to modification of a jury sentence deemed by the judge to be “unduly harsh.”⁸⁴ The judge in such cases is permitted to reduce the jury’s sentence, but only to the extent of the minimum prescribed elsewhere in the statute for the offense in question.⁸⁵ Just in case there is any question as to the drafters’ intent behind limited departure provisions, Kentucky’s Legislative Research Commission specified in its commentary that this provision is intended to provide “[c]ontrol over the judge’s discretion.”⁸⁶

Recognizing that “[n]o one seems to have proven that [rule based systems are] effective in promoting public safety by limiting judicial

⁷⁹ *Id.* at 160. Less conspicuous factors such as the cultural attitudes within the jurisdiction and “political crosscurrents between branches of government” should also be considered in evaluating a sentencing approach as these extra-judicial factors may influence whether judges (who are often elected by the legislature or the public) vested with departure power choose to exercise it or refrain from deviating from statutory prescriptions for fear that such action would be frowned upon as judicial activism. *See id.* at 160, 166.

⁸⁰ *Id.*

⁸¹ *See supra* text accompanying Part I.

⁸² *See* KY. REV. STAT. ANN. § 532.080(5)–(6) (West 2006 & Supp. 2011).

⁸³ *See* § 532.080(7).

⁸⁴ KY. REV. STAT. ANN. § 532.070(1) (West 2006).

⁸⁵ *Id.* When one considers the extra-legal incentives such as political and cultural cross-currents present in Kentucky, where trial judges are elected to the bench by the public, the meager departure power afforded by statute carries even less weight because judges will likely be reluctant to deviate from sentences prescribed by statute or a jury. *See supra* note 82.

⁸⁶ *See* § 532.070 cmt (West 2006).

discretion,”⁸⁷ policymakers in Missouri have implemented a sentencing scheme that is most contrary to the “one size fits all” approach taken by its neighboring state of Kentucky. While Part III provides a more in depth look of Missouri’s sentencing structure,⁸⁸ an initial examination reveals characteristics that distinguish Missouri’s practices from Kentucky’s rule-based system. Most glaringly, the general Missouri sentencing law provides for substantial judicial departure from the prescribed sentences for a given offense based on the court’s consideration of “all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant.”⁸⁹ Missouri judges are afforded additional discretion in sentencing in the case of Class C and D nonviolent felonies—the statute allows departure from the prescribed sentences for both classes of felonies (a term not to exceed seven years for Class C and four years for Class D) in the form of a substitute sentence of up to one year in the county jail.⁹⁰ Additionally, the breadth of Missouri’s sentencing ranges offers considerably greater flexibility in judicial decision-making and provides for lower minimum terms of imprisonment for Class A and B felonies. For instance, Missouri statutes provide a sentencing range of ten to thirty years or life imprisonment for conviction of a Class A felony.⁹¹ Class B felonies similarly carry a wider range of five to fifteen years of imprisonment.⁹² Compared to Kentucky’s narrow sentence ranges and higher minimum sentences for Class A and B felonies (twenty to fifty years imprisonment or life and ten to twenty years imprisonment, respectively),⁹³ it is evident that Missouri sentencing judges have greater discretionary tools at their disposal. Finally, Missouri, like Kentucky, enforces a persistent felony offender law. The Missouri PFO law, however, is advisory only – meaning that the court *may*, based on the judge’s assessment of the individual facts and circumstances, sentence a persistent offender who has pleaded guilty to or has been found guilty of an offense to an enhanced term of imprisonment.⁹⁴

Having established that Kentucky’s sentencing structure is appropriately cast as a rule-based system, and that Missouri’s is a wholly-informed discretionary system (meaning that the two lie at the opposite ends of the continuum), the question now becomes: What effect does a rule-based system have on fiscal efficiency? The obvious answer, if sheer numbers are any indication, is that a rule based system costs the state more

87 Wolff, *supra* note 14, at 101.

88 *See infra* text accompanying Part III.

89 MO. ANN. STAT. § 557.036(1) (West Supp. 2011).

90 MO. ANN. STAT. § 558.011 (West 1999).

91 *Id.*

92 *Id.*

93 KY. REV. STAT. ANN. § 532.060 (LexisNexis 2008).

94 MO. REV. STAT. § 558.016 (West Supp. 2011).

money. Under Kentucky's rule-based sentencing scheme, where judges have no choice but to impose the heavy penalties prescribed by statute and are afforded little to no departure power from those statutory mandates, the result is a higher incarceration rate and extended terms for convicted felons. It is simply intuitive that maintaining such a sentencing model will yield higher correction costs than one like Missouri's where judges have the flexibility to finely-tailor sentences to fit the profile of individual criminals⁹⁵—thus avoiding the problem of imposing drastically harsh and costly sentences only because they are required by mandatory minimums or other rigid laws but where circumstances otherwise do not merit such action. Undoubtedly, discretionary sentencing policies result in a lower incarceration rate and shorter individual prison terms due to the utilization of alternative sentences.

III. THE CASE FOR ENHANCED JUDICIAL DISCRETION IN SENTENCING

A. *An Introductory Look at Missouri's Wholly Informed Discretionary Sentencing*

The Missouri Sentencing Advisory Commission ("MOSAC") proudly advertises that "[j]udicial discretion is the cornerstone of sentencing in Missouri courts."⁹⁶ Thus, as one would expect, the wholly discretionary system of the aptly named "show me" state, which provides judges a spectrum of information upon which to base their sentencing decisions, lies on the opposite end of the rule-discretion continuum from that of Kentucky's rule-based system.

MOSAC's stated purpose is to offer sentencing recommendations "that will provide protection for society; promote certainty, consistency, and proportionality of punishment; recognize the impact of crime on victims, and *encourage rational use of correctional resources consistent with public safety*."⁹⁷ The commission is committed to the belief that "sentencing . . . is at its best when the decision makers have accurate and timely information about the offender, the offenses and the options available for sentencing."⁹⁸

MOSAC seeks to achieve its goal of providing such information through what is known as a Sentencing Assessment Report, which, prior to sentencing a convicted offender, is made available to judges, prosecutors, and defense counsel and contains information concerning:

⁹⁵ *Id.*

⁹⁶ *Recommended Sentencing User Guide 2007–2008*, MO. SENT'G ADVISORY COMM'N, 2 (Aug. 31, 2007), <http://www.mosac.mo.gov/file.jsp?id=45352>.

⁹⁷ *Details on Board or Commission*, MO. SENT'G ADVISORY COMM'N, <http://governor.mo.gov/boards/show/SENTENCE> (last visited Oct. 4, 2011) (emphasis added).

⁹⁸ *Recommended Sentencing User Guide 2007–2008*, *supra* note 99.

- (1) A rating of prior criminal history and the risk of re-offending, by using the offender risk factors;
- (2) An analysis of non-prison sentencing alternatives (where appropriate);
- (3) A recommendation for sentencing in accordance with these Sentencing Recommendations;
- (4) The percentage of the sentence that must be served before the offender is eligible for a parole guideline release, and the percent of sentence that offenders with that sentence and risk rating actually served before parole.⁹⁹

In 2010, MOSAC implemented further specialized information features to assist judges in performing comparative analyses as to (1) “the likelihood – under different sentencing options – that an offender with a specific prior criminal history who commits a specific offense will be reincarcerated” and (2) the cost to the state of each sentence option.¹⁰⁰ To predict the likelihood of recidivism for a particular offender, MOSAC provides risk-assessment ratings that “are based on [eleven] factors – including prior criminal history, the crime committed, the offender’s education, age and employment status.”¹⁰¹ In performing the comparative cost analysis of alternative sentences, the commission bases its assessment “on the average daily expense of [incarceration] . . . plus the cost of parole supervision after prison [versus] . . . the cost of supervising the offender on enhanced or regular probation.”¹⁰² The cost comparison between prison and probation yields a drastic but unsurprising deviation: a yearly prison sentence for one offender costs \$16,823; probation costs \$1,354 per year; and enhanced probation costs \$1,792 per year.¹⁰³

To illustrate the system’s mechanics, consider the following example: Suppose an offender has been found guilty of second-degree robbery.¹⁰⁴ In recommending a sentence, the system will take into account that the offender is a twenty-year-old male with “no prior felonies . . . a high school diploma[,] and . . . a part-time job [that he has held for] the past two

⁹⁹ *Id.*

¹⁰⁰ *Sentencing Information on www.mosac.mo.gov Now Includes Costs of Recommended Sentences and Risks of Reincarceration*, SMART SENT’G, 1 (Aug. 17, 2010), www.mosac.mo.gov/file.jsp?id=45502 [hereinafter *Sentencing Information*].

¹⁰¹ *Id.* at 2. Recidivism means incarceration due to a violation of supervision or committing a new offense within 2 years. *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* The Missouri model offers what it calls “enhanced probation” or a “community-structured sentence” which is a form of probation that requires intensive supervision (such as home-based electronic monitoring) and imposes strict conditions on the offender, which may include requiring him to attend “substance abuse or other community rehabilitative programs”. *Recommended Sentencing User Guide 2009–2010*, MO. SENT’G ADVISORY COMM’N, 4 (Oct. 29, 2009), <http://www.mosac.mo.gov/file.jsp?id=45346>.

¹⁰⁴ *Sentencing Information, supra* note 100, at 2. (Second-degree robbery is defined as, “a class B felony that carries a maximum prison sentence of 15 years.”).

months.”¹⁰⁵ Because he is suspected of substance abuse, however, he will be assigned an “above-average” risk rating.¹⁰⁶

Using data about other similarly-situated offenders statewide, the sentencing information will provide a presumptive sentence, a mitigating sentence, and an aggravating sentence.¹⁰⁷ The presumptive sentence is enhanced probation that, for five years, will cost the state \$8,960 total (\$1,792 per year).¹⁰⁸ The mitigating sentence is regular probation with a five-year cost of \$6,770 (\$1,354 per year).¹⁰⁹ The aggravating sentence is a five-year prison sentence, which would likely be reduced to 3.1 years given this offender’s profile.¹¹⁰ This prison sentence would cost \$54,724.¹¹¹ The recidivism rate for like offenders is 39.6 percent.¹¹² As an alternative, the recommended sentencing information provides for “shock probation,” which is “a 120-day prison [sentence] followed by probation . . . [that] has a recidivism rate of 39.2 percent.”¹¹³ In any case, the judge retains full discretion to impose the presumptive, mitigating, or aggravating sentence based on the particular circumstances of the offender and his crime.¹¹⁴

Now, suppose this same offender was convicted in Kentucky of the same nonviolent felony, a Class C felony, but had a prior conviction of criminal possession of a forged instrument in the second degree, a Class D felony.¹¹⁵ Under Kentucky’s persistent felony offender law, the judge would have no discretion in imposing a tailored sentence and would be legislatively bound to sentence the offender to a mandatory minimum term of incarceration of not less than 10 years.¹¹⁶ Only after completion of

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* MOSAC’s “risk assessment” is a measure of “the risk of the offender committing new offenses or other violations of supervision while on probation or parole.” In cases where the sentencing data produces an offender risk assessment of “above-average” or “average” the MOSAC recommendation will be the presumptive sentence. *Id.* at 4.

¹⁰⁷ *Id.* at 2–3. A “presumptive” sentence is informed by statewide sentencing data and the typical sentence handed down by Missouri judges for the offense in question. An “aggravated” or “mitigated” sentence is appropriate where, based upon the circumstances of a particular crime or the unique risk presented by the offender, either a more or less severe sentence is warranted. *Id.* at 2.

¹⁰⁸ *Id.* at 2.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 3.

¹¹¹ *Id.* (This figure is reached by adding together 3.1 years in prison at \$16,823 per year plus 1.9 years on parole at \$1,354 per year).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See *id.* at 2.

¹¹⁵ KY. REV. STAT. ANN. § 515.030 (West 2006) (“Robbery in the second degree is a Class C felony.”); KY. REV. STAT. ANN. § 516.060(2) (West 2006) (“Criminal possession of a forged instrument in the second degree is a Class D felony.”).

¹¹⁶ KY. REV. STAT. ANN. § 532.080(7) (West 2006 & Supp. 2011).

that ten-year sentence would the offender be eligible for parole.¹¹⁷ Thus, the total estimated incarceration cost to the Commonwealth of Kentucky would be \$186,130 for the mandatory ten-year sentence, not including parole expenses.¹¹⁸ Contrast that with \$54,724, the total cost of the five-year aggravating sentence that the offender likely would have received in Missouri.¹¹⁹ The results are not only shocking to the conscience, but are devastating to the Kentucky state budget.

B. Criticism and Defense of Wholly-Informed Discretionary Sentencing

Despite its cost-conscious approach to sentencing, which many states find appealing as budgetary concerns continue to mount, Missouri's sentencing structure has its critics. Opponents attack the Missouri model in the same manner that Judge Frankel attacked the rehabilitative sentencing practices of the twentieth century by arguing that discretionary sentencing leads to disparate and unpredictable degrees of punishments that can be disproportionate to the crime committed.¹²⁰ In response to such criticism, MOSAC's chair, former Missouri Supreme Court Chief Justice Michael Wolff acknowledges that "discretionary sentencing systems have produced disparate sentencing results that are somewhat determined by the personal assumptions and characteristics of the sentencers."¹²¹ Judge Wolff, however, argues: "What is often lacking is information – and the opportunity [for judges and prosecutors] to improve their professional performances – because they typically act in isolation."¹²² It would, thus, appear that the defects inherent in the use of a typical discretionary sentencing system are uniquely tempered by MOSAC's utilization of all available information to support a judge's exercise of discretion.¹²³

Furthermore, opponents of the discretionary approach are particularly vocal on MOSAC's decision to make data regarding the comparative cost of sentences as part of the information available to judges prior to sentencing. Critics, especially prosecutors and the tough-on-crime crowd, argue that "the cost of punishment is an irrelevant consideration when deciding a criminal's fate and that there is a risk of overlooking the larger social cost of

117 *Id.*

118 Lawson, *PFO Law Reform*, *supra* note 40, at 31 (citing the Kentucky Department of Corrections statistics for the year 2006–2007 estimating that the average cost to incarcerate one healthy inmate was \$18,613 per year). A ten-year sentence at a cost of \$18,613 per year equals a total cost to the Kentucky taxpayers of \$186,130.

119 *Sentencing Information*, *supra* note 100, at 3. Note that this comparison utilizes the most costly sentence that would likely be handed down under the Missouri law and the least expensive sentence that must be granted under Kentucky's PFO law.

120 Wolff, *supra* note 14, at 120.

121 *Id.*

122 *Id.*

123 *Id.*

crime.”¹²⁴ The opposition’s chief argument is focused on the rights of the victim to have his wrongdoer brought to justice, and the threat posed to public safety in allowing convicted criminals to forego a prison sentence.¹²⁵

Allied in support of the system, however, are defense lawyers and fiscal conservatives—unlikely bedfellows, to be sure—“who consider [the system] an overdue tool that will force judges to ponder alternatives to prison more seriously.”¹²⁶ Supporters of the system claim that judges would never check their good judgment at the door and focus exclusively on the cost of a sentence.¹²⁷ Rather, sentencing costs would only be a consideration in *nonviolent* cases, “circumstances where prison is not the only obvious answer.”¹²⁸ One Missouri judge argues, “[Cost] is one of a thousand things we look at — about the tip of a dog’s tail, it’s such a small thing. . . . [I]t is almost foolish not to look at it. We live in a what’s-it-going-to-cost? society now.”¹²⁹

Because Missouri’s cost comparison data program is such a recent addition (as of August 2010)¹³⁰ to its wholly-informed discretionary system, figures that gauge its impact on reducing incarceration numbers have yet to be released. Moreover, because there is no way to determine the subjective weight a particular judge attributes to comparative cost information, it may never be possible to quantify into dollars and cents the impact that providing judges with such information has on prison populations and correctional costs. Both supporters and opponents, though, agree that MOSAC’s cost revelation will undoubtedly raise awareness in the minds of sentencing authorities as to the enormous price tag that accompanies incarceration.¹³¹

C. Success of the Missouri Model

In spite of a slight increase in prison population over the last year, statistics show that since the implementation Missouri’s wholly-informed discretionary sentencing program six years ago, the state prison population has decreased, the recidivism rate has declined and, resultantly, the incarceration costs borne by taxpayers have lessened.¹³² From November

¹²⁴ Monica Davey, *Missouri Tells Judges Cost of Sentences*, N.Y. TIMES, Sept. 19, 2010, at A1.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *See id.*

¹²⁹ *Id.* (internal quotation marks omitted).

¹³⁰ *Id.*

¹³¹ *See id.*

¹³² *See* Press Release, Mo. Sentencing Advisory Comm’n, *supra* note 11 at 1; Press Release, Bureau of Justice Statistics, *Largest Increase in Prison and Jail Inmate Populations Since Midyear 2000* (June 27, 2007), available at <http://bjs.ojp.usdoj.gov/content/pub/press/>

2005, when the statewide program went into effect, through August 2007, the state's prison population declined by nearly 810 inmates.¹³³ For perspective, consider that "[i]n the year before the new system was implemented, Missouri's prison population increased by 855 [inmates]."¹³⁴ Notably, at the close of FY 2006, the state's prison population decreased by 2.9 percent – the largest margin in the nation—and Missouri was one of only eight states to reduce its prison population.¹³⁵ Insofar as Missouri was successful in decreasing its inmate population, the nation as a whole was not: that same year, the number of state and federal inmates increased by 2.8 percent to roughly 1.56 million inmates, the largest increase since FY 2000.¹³⁶

Missouri's sentencing structure has proven to be tremendously successful in terms of reducing taxpayer costs. A recent National Institute of Corrections report ranked Missouri among the states with the lowest annual incarceration cost per inmate.¹³⁷ In 2008, Missourians paid \$12,867 in incarceration costs per inmate, which is about forty-seven percent less than taxpayers of other states nationwide.¹³⁸ Studies have also shown that the commission's recommended sentencing reports have been accurate in predicting the likelihood of recidivism based on its weighing of the risk-assessment factors for each individual offender.¹³⁹ In cases where the actual sentences given by courts agreed with the recommended sentences, the number of repeat offenders was consistently lower.¹⁴⁰ For instance, "[w]hen the recommended sentence is probation and the actual sentence is also probation, which occurs in 77% of probation recommended sentencing, the recidivism rates are low."¹⁴¹ The few cases where judges diverge from the commission's recommended sentence show that the rate of recidivism is much higher.¹⁴²

pjimo6pr.cfm [hereinafter Press Release, Bureau of Justice Statistics]; MO. SENTENCING ADVISORY COMM'N, RECOMMENDED SENTENCING: BIENNIAL REPORT 2009 (2009), available at <http://www.mosac.mo.gov/file.jsp?id=45433>.

133 Press Release, Mo. Sentencing Advisory Comm'n, *supra* note 11.

134 *Id.*

135 Press Release, Bureau of Justice Statistics, *supra* note 132.

136 *Id.*

137 *Missouri: Overview of Correctional System*, NAT'L INST. CORRECTIONS, <http://nicic.gov/StateStats> (follow "Missouri" hyperlink; then follow "2008 Cost" hyperlink) (last visited Oct. 8, 2011) (showing that the national average taxpayer cost per inmate in 2008 was \$24,142).

138 *Id.*

139 See Press Release, Mo. Sentencing Advisory Comm'n, *supra* note 11; MO. SENTENCING ADVISORY COMM'N, *supra* note 132, at 50–56 (for a statistical analysis of the risk assessment factors and recidivism rates).

140 Press Release, Mo. Sentencing Advisory Comm'n, *supra* note 11.

141 MO. SENTENCING ADVISORY COMM'N, *supra* note 132, at 44.

142 *Id.* ("When the recommended sentence is Probation and the actual sentence is Prison then the recidivism rates are much higher, whether measured by new incarcerations or new

CONCLUSION

Missouri's recent success in reducing recidivism and bucking national trends of rising prison costs and incarceration rates through meaningful reforms are encouraging – especially considering that just five years ago, Missouri was facing the same correctional challenges Kentucky currently faces today. Missouri's success, however, did not materialize out of thin air. Missouri's reform policies emerged as a result of the willingness of its policy makers to face the source of its mounting budget problem and tackle it head-on. After all, the first step to recovery is admitting that there is a problem. That is why it is heartening that, despite Kentucky's continued adherence to failing criminal justice policies and its widening budget deficit, the out-of-control corrections spending and skyrocketing incarceration rates have not gone unnoticed.

At the urging of a bipartisan group of Kentucky's leading lawmakers in early 2010, the Kentucky General Assembly passed legislation to create the Task Force on the Penal Code and Controlled Substances Act, comprised of members from all branches of state government that are assigned to develop strategies for reducing recidivism while controlling corrections spending.¹⁴³ The task force's recent partnership with the PEW Center on the States further signals the state's budding commitment to reformation of its costly penal policies.¹⁴⁴ According to a press release issued by the office of Kentucky Governor Steve Beshear, “[t]he goal of the partnership is to give the state a better return on its public safety investment by analyzing the prison population and associated cost drivers to develop tailored policy options that will generate savings that could be reinvested in evidence-based public safety measures.”¹⁴⁵ Echoing the Democratic governor's sentiment and demonstrating that the Commonwealth's initiative garners bipartisan support, Kentucky Senate President David Williams, a Republican, stated:

As national chairman of the Council of State Governments, I have collaborated closely with the Pew Center on the States as they have worked in several states to develop thoughtful sentencing and corrections policies that maintain the security of citizens and ensure the effective use of tax dollars. I appreciate their involvement in Kentucky and look forward to implementing

convictions and the rates are similar to the recidivism rates for prison sentences. When the actual sentence is Probation and the recommended sentence is Prison, which occurs in 31% of prison recommended sentencing, the recidivism rates are also high.”).

¹⁴³ *State Initiatives: Kentucky*; RIGHT ON CRIME, <https://www.rightoncrime.com/reform-in-action/state-initiatives/kentucky/> (last visited Oct. 8, 2011).

¹⁴⁴ *Id.*

¹⁴⁵ Press Release, The Pew Charitable Trusts, *supra* note 30.

their policy suggestions.¹⁴⁶

If Governor Beshear and Senate President Williams are sincere in their goal to rehabilitate Kentucky's broken criminal sentencing system and control corrections spending through reducing prison population and incarceration costs, the Missouri model—with its proven success and feasibility of implementation—seems to be an obvious point of rescue. Namely, Missouri's reforms have successfully addressed the main policy goals of Kentucky lawmakers: to generate savings while reducing recidivism. Moreover, extra-legal factors that influence the feasibility of the Missouri policies such as the political crosscurrents and cultural attitude towards the judiciary are present in Kentucky. Given the Commonwealth's obvious incarceration and budget crises, it appears that—practically speaking—serious reforms like those implemented in Missouri would not be too tough of a sale to the Kentucky taxpayer. While comprehensively enhancing judicial discretion and providing judges with a comparative cost analysis of alternative sentences might not garner much support in fiscally sound times, in today's budget conscious world, a serious argument can be made that it is imprudent *not* to consider such measures. If Kentucky is ever to reform its sentencing policy, now – in the midst of one of the Commonwealth's darkest fiscal hours—is the time.

The lesson to be learned from Missouri's novel sentencing system is that states can push for reforms that both ensure the safety of their citizens and respect their dwindling budgets. Success is dependent upon the openness of Kentucky's policymakers to leave behind the stubborn "lock 'em up and throw away the key" mentality and accept that a tough on crime approach does not have to be tough on the Commonwealth's budget.

¹⁴⁶ *State Initiatives: Kentucky*, *supra* note 143.