

PAYGO FOR CRIMINAL SENTENCING: POLITICAL INCENTIVES AND PROCESS REFORM

JAMES W. GANAS*

The American criminal justice system is exceptional, characterized by uniquely high sentences and uniquely large numbers of incarcerated individuals. This regime is perpetuated by a political system that fetishizes Americans' short-term pushes for increased punitiveness when crime rates increase. Drawing on political process and representation reinforcement theories, this Note argues for a novel statutory solution that would help place a brake on retributive short-term preferences, while prioritizing criminal statutes that would challenge mass incarceration. This Note posits that by adopting state budgetary laws that mirror PAYGO budgetary rules and statutes, state legislatures can control the spiraling costs of administering local prison systems without jeopardizing legislators' political futures. Criminal sentencing PAYGO, like Minnesota's famous sentencing guidelines, would force policymakers to view criminal sentencing as a complete system, requiring tradeoffs and compromises. Through criminal sentencing PAYGO, states and their citizens can realize democratic and criminal justice administrative gains.

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INTRODUCTION

After George Floyd’s murder, America sat on the precipice of radical change in the criminal justice system. Transformational ideas like “defunding” the police were suddenly realistic.¹ Decarceral and abolitionist policies sat at the center of American discourse.² But

¹ See, e.g., Sam Levin, *These US Cities Defunded Police: “We’re Transferring Money to the Community,”* GUARDIAN (Mar. 11, 2021, 11:03 AM), <https://www.theguardian.com/us-news/2021/mar/07/us-cities-defund-police-transferring-money-community> [<https://perma.cc/6KYK-LXF6>] (noting that “some racial justice groups have successfully pressured municipal lawmakers to cut police funds and reinvest the money in services”).

² For example, Minneapolis’s quick move to defund the local police department was heralded and scrutinized, as a high-profile instantiation of abolitionist policy. See Eamon Whalen, *The Police Are Defunding Minneapolis*, MOTHER JONES (Aug. 30, 2022), <https://www.motherjones.com/politics/2022/08/minneapolis-police-defund-george-floyd-city-budget> [<https://perma.cc/Z8LM-VX24>] (“The idea was to take some of the \$193 million in [2020’s] police allotment and put it towards alternatives and social programs. Options included unarmed emergency responders and youth employment initiatives, among others.”). The move to defund the Minneapolis Police Department has not been successful, in large part, because of police resistance, voter antipathy, and concerns over political messaging. See, e.g., *id.* (detailing how over 300 officers have left the force since Floyd’s murder, which is over one-third of the Department, and how “[o]ver 200 have left with workers’ compensation settlement checks and lucrative disability pensions, based on claims that policing the protests gave them post-traumatic stress disorder”); Martin Kaste, *Minneapolis Voters Reject a Measure to Replace the City’s Police Department*, NPR (Nov. 3, 2021, 12:25 AM), <https://www.npr.org/2021/11/02/1051617581/minneapolis-police-vote> [<https://perma.cc/R674-8AMV>] (“Approximately 56% of voters rejected a ballot question that would have removed the Minneapolis Police Department from the city charter and replaced it with a ‘public-health oriented’ Department of Public Safety.”); Chris Cillizza, *Even Democrats Are Now Admitting ‘Defund the Police’ Was a Massive Mistake*, CNN (Nov. 5, 2021, 3:34 PM), <https://www.cnn.com/2021/11/05/politics/defund-the-police-democrats/index.html> [<https://perma.cc/JN3Y-HWD4>] (reporting on notable Democrats’ attempts, including Keith Ellison’s and

shortly after, a surge in violent crime³ re-energized calls for greater police surveillance and “tough-on-crime” policies.⁴ Protests against police violence swept large cities and small towns; so, too, did calls for increased punitiveness.⁵ These phenomena illustrate America’s uneasy relationship with crime and punishment: When polled, Americans say they want to end mass incarceration,⁶ but they want to impose larger

Jim Clyburn’s, to distance the Party from the “Defund the Police” slogan). As explored below, punitive backlash against criminal justice reform movements represents a significant hurdle to reform efforts.

³ See RICHARD ROSENFELD & ERNESTO LOPEZ, COUNCIL ON CRIM. JUST., PANDEMIC, SOCIAL UNREST, AND CRIME IN U.S. CITIES: NOVEMBER 2020 UPDATE 5–13, (2020) (describing significant increases across violent crimes); German Lopez, *A Violent Crisis: More Mass Shootings*, N.Y. TIMES (Apr. 17, 2022), <https://www.nytimes.com/2022/04/17/briefing/violent-crime-ukraine-war-week-ahead.html> [<https://perma.cc/RU77-L5WR>] (“Murders have spiked nearly 40 percent since 2019, and violent crimes, including shootings and other assaults, have increased overall. More tragedies, from mass shootings to smaller acts of violence, are likely to make headlines as long as higher levels of violent crime persist.”).

⁴ See, e.g., Kim Parker & Kiley Hurst, *Growing Share of Americans Say They Want More Spending on Police in their Area*, PEW RSCH. CTR. (Oct. 26, 2021), <https://www.pewresearch.org/fact-tank/2021/10/26/growing-share-of-americans-say-they-want-more-spending-on-police-in-their-area> [<https://perma.cc/EGT6-3K4J>] (“The share of adults who say spending on policing in their area should be increased now stands at 47%, up from 31% in June 2020. . . . 37% of adults now say spending on police should stay about the same.”); Asteed W. Herndon, *They Wanted to Roll Back Tough-on-Crime Policies. Then Violent Crime Surged.*, N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/us/politics/prosecutors-midterms-crime.html> [<https://perma.cc/Y5QJ-EAF4>] (examining the political backlash against “progressive prosecutors” in several cities who were elected in the wake of 2020’s protests against police violence); Katie Glueck & Ashley Southall, *As Adams Toughens on Crime, Some Fear a Return to '90s Era Policing*, N.Y. TIMES (Mar. 26, 2022), <https://www.nytimes.com/2022/03/26/nyregion/broken-windows-eric-adams.html> [<https://perma.cc/7D33-RVYP>] (describing Mayor Eric Adams’s shift to “broken windows” policing following a high-profile recent crime wave in New York City).

⁵ See, e.g., Herndon, *supra* note 4; Audra D.S. Burch, Weiyi Cai, Gabriel Gianordoli, Morigan McCarthy & Jugal K. Patel, *How Black Lives Matter Reached Every Corner of America*, N.Y. TIMES (June 13, 2020), <https://www.nytimes.com/interactive/2020/06/13/us/george-floyd-protests-cities-photos.html> [<https://perma.cc/XBE9-V5QY>] (reporting that more than 2,000 cities and towns had protests following George Floyd’s murder); German Lopez, *Want to End Mass Incarceration? This Poll Should Worry You.*, VOX (Sept. 7, 2016), <https://www.vox.com/2016/9/7/12814504/mass-incarceration-poll> [<https://perma.cc/G675-TQPE>] (finding that while “Americans agree there are too many people in prison,” Americans may generally support longer prison sentences for violent offenders in part because of “voters’ unawareness that violent crime has dramatically dropped over the past couple of decades”).

⁶ See Lydia Wheeler, *Poll: 3/4 of Americans Support Criminal Justice Reform*, HILL (Jan. 25, 2018, 11:54 AM), <https://thehill.com/regulation/370692-poll-3-4-of-americans-support-criminal-justice-reform> [<https://perma.cc/PBV6-VHDH>] (sharing the results of a poll by “the Republican-leaning Public Opinion Strategies,” finding widespread and bipartisan support for ending mandatory minimums for non-violent offenders, prioritizing rehabilitation as the main goal of the criminal justice system, and releasing non-violent offenders into parole, community service, or electronic monitoring programs); *91 Percent of Americans Support Criminal Justice Reform*, ACLU POLLING FINDS, ACLU (Nov. 16, 2017), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds>

punishments for individual crimes once those crimes become politically salient.⁷ Generally speaking, majorities of Americans support longer prison sentences in the short-term but recognize the evils of mass incarceration in the criminal justice system overall.⁸ How Americans

[<https://perma.cc/9MXW-Y8LU>] (“71 percent say it is important to reduce the prison population in America, including 87 percent of Democrats, 67 percent of Independents, and 57 percent of Republicans—including 52 percent of Trump voters.”); *Overwhelming Majority of Americans Support Criminal Justice Reform, New Poll Finds*, VERA INST. OF JUST. (Jan. 25, 2018), <https://www.vera.org/news/overwhelming-majority-of-americans-support-criminal-justice-reform-new-poll-finds> [<https://perma.cc/G5L5-TBQK>] (“87 percent[] disapprove of mandatory minimums, and instead express support for alternatives to incarceration, such as electronic monitoring, community service, and probation.”); Megan Brenan, *Fewer Americans Call for Tougher Criminal Justice System*, GALLUP (Nov. 16, 2020), <https://news.gallup.com/poll/324164/fewer-americans-call-tougher-criminal-justice-system.aspx> [<https://perma.cc/6JMU-XNVM>] (“Americans’ belief that the U.S. criminal justice system is ‘not tough enough’ on crime is now half of what it was in Gallup’s initial reading of 83% in 1992.”).

⁷ See Glueck & Southall, *supra* note 4. While Glueck and Southall focus on policing, political salience can also lead voters and public officials to take very punitive positions on sentencing for particular crimes. See, e.g., *McCain, Obama Disagree with Child Rape Ruling*, NBC NEWS (June 26, 2008, 5:22 AM), <https://www.nbcnews.com/id/wbna25379987> [<https://perma.cc/F5HL-MYF8>] (reporting on Barack Obama and John McCain’s strong disapproval of the Supreme Court’s ruling in 2008 that death penalties for people convicted of child rape violate the Eighth Amendment); Romy Ellenbogen, *Death Penalty for Child Rapists Bill Gets Bipartisan Support in Florida Legislature*, TAMPA BAY TIMES (Mar. 21, 2023), <https://www.tampabay.com/news/florida-politics/2023/03/20/death-penalty-child-rape-desantis-florida> [<https://perma.cc/VZY9-P48R>] (describing bipartisan efforts in Florida to make people convicted of child rape eligible for the death penalty); Susan Davis, *Congress Overturns D.C. Crime Bill with President Biden’s Help*, NPR (Mar. 8, 2023), <https://www.npr.org/2023/03/08/1161902691/d-c-crime-bill-biden-overturn> [<https://perma.cc/5VDE-RLFV>] (“The Democratic-held Senate approved a GOP-led resolution that will overrule [] Washington, D.C., city council’s rewrite of the criminal code for the nation’s capital. . . . At issue. . . are provisions to reduce the maximum penalties for crimes like armed carjacking from 40 years down to 24 . . .”).

⁸ See *supra* notes 6–7. Regardless of whether punitiveness is the American public’s short- or long-term goal, Americans’ opinions on crime and punishment certainly oscillate. The PAYGO-type scheme this Note proposes aims to stop the realization of punitive instincts. Criminal justice reform advocates understand this problem and attempt to fight it: “Elected leaders still fear being labeled ‘soft on crime,’ and the organized opposition, led by district attorney associations and the private corrections industry, is working hard to block sentencing and other reforms.” JILL MIZELL, THE OPPORTUNITY AGENDA, AN OVERVIEW OF PUBLIC OPINION AND DISCOURSE ON CRIMINAL JUSTICE ISSUES 1–2 (2014), <https://www.prisonlegalnews.org/media/publications/The%20Opportunity%20Agenda%20-%20An%20Overview%20of%20Public%20Opinion%20and%20Discourse%20on%20Criminal%20Justice%20Issues.pdf> [<https://perma.cc/C8VJ-STXC>]. Since “[m]ost Americans hear about crime through their local television stations . . . [i]ncreased fear of crime can derail any progress made by the criminal justice reform movement unless the public is ‘inoculated’ with a deeper understanding of the causes of and solutions to crime.” *Id.* at 2. Still, many of these same organizations recognize the significant progress that has been made in public opinion on criminal sentencing issues. See *id.* (“[M]ore and more members of the public and their . . . representatives are questioning whether the harsh penalties adopted at both the state and federal levels . . .”). For sources indicating that ordinary left/right

address the seeming contradiction of these views will determine whether and how America will finally address the crisis of mass incarceration. The ability of legislators to put a brake on this reflexive, short-term political preference will be critical in deconstructing the system of mass incarceration.

The American penal system is exceptional—featuring an exceptionally large proportion of the population in jails and prisons,⁹ exceptionally long punishments compared to other Western democracies,¹⁰ and an exceptionally large net (cast through probation and parole programs), which can easily draw in those not currently incarcerated.¹¹ America’s exceptionalism in criminal justice is animated and accompanied by the contradiction that the majority of Americans are uncomfortable with mass incarceration yet regularly demand “tough-on-crime” punishment.¹² Legislators who work with short-term election incentives at front of mind have little incentive to address Americans’ longer-term policy preferences. Politicians are rewarded by

political categorizations are less relevant in recent times on these issues see, for example, Kevin R. Reitz, *American Exceptionalism in Crime and Punishment: Broadly Defined*, in *AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT* 1, 3 (Kevin R. Reitz ed., 2017) (“Despite the outcome of the 2016 presidential election, this bipartisan sentiment [to reduce mass incarceration] has remained alive at the state and local levels, where most criminal justice is dispensed.”) and Brandon L. Garrett, *Conservatives Are Leading the Way as States Enact Criminal Justice Reform*, *SLATE* (Mar. 31, 2017, 4:42PM), <https://slate.com/news-and-politics/2017/03/conservatives-could-help-derail-trumps-tough-on-crime-policies.html> [<https://perma.cc/96PX-6TFH>] (“[C]riminal justice reform is still marching forward—and the momentum is largely coming from conservatives, working in their state governments. The conservative case for reform is obvious: Spending billions of dollars on prison expansion and lengthy sentences is outdated and ineffective.”). And, on the other side, Democrats have, in recent history, supported punitive sentencing reforms. See German Lopez, *The Controversial 1994 Crime Law That Joe Biden Helped Write, Explained*, *VOX* (Sept. 29, 2020, 10:25 AM), <https://www.vox.com/policy-and-politics/2019/6/20/18677998/joe-biden-1994-crime-bill-law-mass-incarceration> [<https://perma.cc/DPA6-82EH>] (reporting that after passage of the 1994 Crime Bill, “Biden reveled in the politics of the 1994 law, bragging after it passed that ‘the liberal wing of the Democratic party’ was now for ‘60 new death penalties,’ ‘70 enhanced penalties,’ ‘100,000 cops,’ and ‘125,000 new state prison cells’”).

⁹ See Reitz, *supra* note 8, at 3 (noting that, as of 2014, America imprisons over 700 people per 100,000, which is “7 times the average in western Europe, 6 times the Canadian rate, more than 4.5 times that in Australia, and almost 3.5 times New Zealand’s rate”).

¹⁰ See MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 170–71 (2014) (“Life sentences have become so commonplace that approximately one out of every nine people imprisoned in the United States is serving what some critics call ‘the other death penalty,’” whereas “[m]ost European countries do not permit [life without parole]” and in many European nations, so-called “lifers” are typically released in about twelve years).

¹¹ See JEREMY TRAVIS, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS INCARCERATION* 15 (Marc Mauer & Meda Chesney-Lind, eds., 2002) (“While the number of prisoners has quadrupled over the past two decades, the number of adults under criminal justice supervision through parole and probation agencies has more than tripled.”).

¹² See *supra* notes 4–8 and accompanying text.

the voting public for “tough-on-crime” responses to high-profile crimes or crime waves, irrespective of the public’s broader thoughts on the more abstract notion of “mass incarceration.”¹³ Addressing America’s penal crisis is thus, in part, a question of resolving this dichotomous relationship.

This Note proposes a novel legislative reform which can more accurately address the American public’s complex views, while preventing criminal sentences from spiraling ever-upward. This Note takes lessons from Minnesota’s presumptive sentencing guidelines¹⁴ and Congress’s “PAYGO” (shortened from “pay-as-you-go”) system and proposes that state legislatures in the United States adopt a rule modeled on a “pay-as-you-go” method of legislative spending for criminal sentences. As applied to spending bills, PAYGO requires revenue-decreasing or spending-increasing legislation to be offset by accompanying revenue-increasing or spending-decreasing measures in order to balance the net financial impact of the legislation. This Note proposes to improve on the congressional PAYGO system and state fiscal note processes by eliminating PAYGO’s easy waivability and by leveraging state sentencing commissions’ institutional capacity for neutral and long-range projections. Simply put, this system would require that when legislatures increase criminal sentences by a certain amount (as projected by a neutral institution such as a state sentencing commission), they identify another area of criminal punishment where they will reduce sentences by at least as much. Adopting such a system has two types of benefits: democratic benefits and criminal justice benefits. The system would require legislatures to respond more accurately to the overarching political will of voters while addressing mass incarceration by disincentivizing large-scale punitive initiatives. State-level presumptive guidelines indicate that this system would likely be successful and would have the added benefit of producing a more responsive legislature, which is a good in itself for a democratic system, independent of this proposed system’s other successes. This proposal emanates from the notion that there is a structurally analogous relationship between PAYGO and Minnesota’s presumptive sentencing guidelines: They each create an obligation to make system-wide tradeoffs when doing so would otherwise be politically implausible or unpopular. This proposal intends to improve PAYGO’s structure to create a procedure that can target the political incentives that lead

¹³ See, e.g., Peter K. Enns, *The Public’s Increasing Punitiveness and Its Influence on Mass Incarceration in the United States*, 58 AM. J. POL. SCI. 857, 857 (2014) (suggesting that public attitudes lead congressional attitudes on criminal justice issues).

¹⁴ See *infra* Part II.

to mass incarceration, while avoiding the pitfalls that bedevil PAYGO spending systems.

To be clear, PAYGO for criminal sentencing is not a value-neutral or zero-sum scheme in its conceptualization here. If lawmakers determine that they would like to simply *reduce* criminal sentences in an area, there is no concomitant obligation forcing lawmakers to simultaneously increase criminal penalties in another. Criminal sentencing PAYGO is more akin to a one-way ratchet¹⁵ that permits reallocation of resources so long as the total projected criminal sentences or financial cost remain below the mandated cap.¹⁶ It is, simply put, a proposal designed to reduce the number of people in prison.

Criminal sentencing PAYGO's "one-way ratchet" characteristic does not preclude abolition, though the proposal need not take a side in that long-running debate.¹⁷ Instead, criminal sentencing PAYGO is conceptualized here primarily as a harm mitigation technique to avoid the worst excesses of the criminal system's negative impact on marginalized groups.¹⁸

¹⁵ Criminal sentencing PAYGO would operate, in time, as a one-way ratchet *downward*. This runs counter to the typical effect of criminal legislation. Cf. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) (describing criminal law as "a one-way ratchet that makes an ever larger slice of the population felons"); Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223 (2007) (characterizing the political process of criminal law legislation as a "one-way ratchet" which means that "[c]riminal codes expand but don't contract").

¹⁶ One could also draw an analogy to a cap-and-trade system, internalized within the legislative process. In a cap-and-trade system, a "cap on greenhouse gas emissions that drive global warming is a firm limit," and the system operates by allowing "a market for companies to buy and sell allowances that let them emit only a certain amount." *How Cap and Trade Works*, ENV'T DEF. FUND, <https://www.edf.org/climate/how-cap-and-trade-works> [https://perma.cc/E5EJ-VTS2].

¹⁷ Abolitionist thinking is not monolithic, and criminal sentencing PAYGO may be conceptualized as an abolitionist solution or allied solution depending on the abolitionist framework utilized. To the extent that criminal sentencing PAYGO reduces the number of people in prison and the time they serve in prison, one could be justified in calling it "abolitionist" in nature. See, e.g., ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 20 (2003) ("The most immediate question today is how to prevent the further expansion of prison populations and how to bring as many imprisoned women and men as possible back into what prisoners call 'the free world.'"); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015) ("[A]bolition may be understood . . . as a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement."); John Washington, *What Is Prison Abolition?*, NATION (July 31, 2018), <https://www.thenation.com/article/archive/what-is-prison-abolition> [https://perma.cc/8GTH-CM2B] ("Other decarceration strategies include creating review processes to reevaluate sentence terms . . ."); Robert H. Ambrose, Note, *Decarceration in a Mass Incarceration State: The Road to Prison Abolition*, 45 MITCHELL HAMLINE L. REV. 732, 733 (2019) ("[P]rison abolition means striving to make prisons obsolete through crime prevention, sentencing reforms, and reevaluating what constitutes a crime.").

¹⁸ This Note utilizes the term "marginalized groups" to refer to the groups which political process theory, as informed by *Carolene Products'* footnote four, seeks to protect. United

Criminal sentencing PAYGO, as described in this Note, is a novel contribution to criminal justice literature. While Virginia has a law that utilizes a PAYGO-like scheme for criminal sentencing, it is very different from the program described here. The spending cuts or tax increases against which sentencing increases are offset in Virginia can come from anywhere in Virginia's spending, not from the criminal sentencing system itself.¹⁹ This means, for example, that an increase in criminal sentences for Crime X can be offset by cuts to the state education or welfare budgets, whereas in this Note's proposal, an increase in sentences for Crime X must be met with equal or greater decreases for Crime Y or several crimes.²⁰ The Virginia system, unlike criminal sentencing PAYGO, does not place a cap on overall criminal sentencing and is not fundamentally rooted in protecting marginalized groups, who are more likely to be recipients of public services that would be vulnerable to cuts under a system like Virginia's.²¹ While over the past several decades a

States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) (arguing that a heightened standard of scrutiny should apply to laws which target "discrete and insular minorities," a phrase still widely used in Equal Protection jurisprudence). These are, namely, religious, national, and racial minority groups. *Id.* Of particular importance, of course, is the criminal justice system's unique and disproportionately harmful impact on Black, Latino, and American Indian communities. *See, e.g.,* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> [<https://perma.cc/CL5W-ST3E>] (noting the overrepresentation of these groups in prisons relative to their share of the American population). *See also infra* notes 182–87 and accompanying discussion for further analysis of racial gaps in incarceration.

¹⁹ *See* Iris J. Lav, *PAYGO: Improving State Budget Discipline While Retaining Flexibility*, CTR. ON BUDGET & POL'Y PRIORITIES (Sept. 22, 2011), <https://www.cbpp.org/research/paygo-improving-state-budget-discipline-while-retaining-flexibility> [<https://perma.cc/WQF6-6DGU>] (noting that "[w]hen sentencing laws pass the public safety committee, Virginia lawmakers must go before the appropriations committee to identify cuts in other government services or increases in revenue to pay for the new law").

²⁰ As explored below, the tradeoff envisioned in this proposal is based on cumulative sentences derived from projected rates of prosecution for crimes relevant to the proposed piece of legislation. *See infra* note 95.

²¹ *See* Margaret Simms & Kilolo Kijakazi, *Structural Racism Places the Burden of Proposed Budget Cuts on People of Color*, URB. INST. (Mar. 21, 2017), <https://www.urban.org/urban-wire/structural-racism-places-burden-proposed-budget-cuts-people-color> [<https://perma.cc/NLG7-9KAD>] (describing how general budget cuts are more likely to negatively affect communities of color); *see also* CRISTOBAL DE BREY, LAUREN MUSU, JOEL MCFARLAND, SIDNEY WILKINSON-FLICKER, MELISSA DILIBERTI, ANLAN ZHANG, CLAIRE BRANSTETTER & XIAOLEI WANG, NAT'L CTR. FOR EDUC. STAT., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 2018 (Feb. 2019), <https://nces.ed.gov/pubs2019/2019038.pdf> [<https://perma.cc/69PY-MDTP>] (indicating that 88% of Black full-time undergraduates, 82% of Hispanic full-time undergraduates, and 74% of white full-time undergraduates receive financial aid, which are subject to cuts in education funding); Arthur Delaney & Ariel Edwards-Levy, *Americans Are Mistaken About Who Gets Welfare*, HUFFPOST (May 2, 2018), https://www.huffingtonpost.co.uk/entry/americans-welfare-perceptions-survey_n_5a7880cde4b0d3df1d13f60b [<https://perma.cc/KX3B-4C49>] (reporting that in 2016, 43% of Medicaid recipients were white, 18% were Black, and 30% were Hispanic, while those figures

small number of scholars have gestured at the theoretical possibility of something like criminal sentencing PAYGO,²² none have developed the concept with the academic attention provided here.

This Note proceeds in four Parts. In Part I, this Note situates its proposal in the long-running debate about the appropriate site of reform to protect marginalized groups most effectively. It then explains challenges associated with sentencing commissions at the state and federal levels as independent reasons for reformers to center their efforts on legislative reform. In Part II, this Note draws on lessons from Minnesota's presumptive sentencing guidelines regime. Under that regime, Minnesota fared comparatively well because its criminal sentencing broke the otherwise-operative one-way ratchet of increased punitiveness in criminal sentences. In Part III, this Note describes the congressional PAYGO system, how it may be improved, and how a PAYGO-like system can be adopted by states for criminal sentencing matters. Part IV describes the democratic and criminal justice benefits which could derive from criminal sentencing PAYGO's adoption.

I

POLITICAL PROCESS THEORY, SENTENCING COMMISSIONS, AND THE CENTRALITY OF LEGISLATIVE REFORM

This Note is concerned with pushing back on the one-way ratchet of increasing criminal sentences by taking advantage of a novel and politically justifiable legislative reform in the state legislative budgeting process. Alternative sentencing reform strategies focus upon the judiciary or expert state sentencing commissions as the most appropriate venues for sentencing reform. This Part draws upon political process

are 36.2%, 25.6%, and 17.2%, respectively, for food stamp recipients). According to the 2020 United States Census, America's white population constitutes 61.6% of all people living in the United States, the Black population is 12.4%, and the Latino population is 18.7%. See Nicholas Jones, Rachel Marks, Roberto Ramirez & Merarys Ríos-Vargas, *Improved Race and Ethnicity Measures Reveal U.S. Population Is Much More Multiracial*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html> [https://perma.cc/RTH8-QDXC].

²² See Aaron Rappaport, Commentary, *Sentencing Reform in California*, 7 HASTINGS RACE & POVERTY L.J. 285, 299–300 (2010) (describing a Virginia-like system in which “it might make sense to adopt a kind of ‘pay-as-you-go’ rule, which would allow increased sentences only if funds for the costs of punishment are allocated (or off-setting cuts are made) at the same time” in an otherwise unrelated article); W. David Ball, *Redesigning Sentencing*, 46 MCGEORGE L. REV. 817, 837–38 (2014) (describing a Virginia-like system before quickly dismissing it in an otherwise unrelated article); Ronald F. Wright, *The United States Sentencing Commission as an Administrative Agency*, 4 FED. SENT'G REP. 134, 136 (1991) (gesturing theoretically at federal criminal sentencing PAYGO for one sentence in an otherwise unrelated article).

theory, representation reinforcement theory, and the nondelegation doctrine in the states and at the federal level to explain this Note's focus on the central role of the legislature in reducing incarceration through sentencing process reform.

A. *Political Process Theory and Judicial Failures*

This Note's proposal challenges a genre of thinking that posits the judicial branch as the most effective institution in affirmatively addressing mass incarceration.²³ Broadly speaking, the judiciary does not have the capacity or will to end mass incarceration. Despite recent case law denouncing prison overcrowding and inhumane conditions, judicial solutions have been slow and piecemeal.²⁴ State-level injunctions are rare²⁵ and pose large administrative challenges when they do arise, as the judiciary has no power to enforce its decisions. For example, *Brown v. Plata* reduced California's prison population to 137.5% of capacity²⁶ but was deeply unpopular with the public.²⁷ And finally, the

²³ See, e.g., Rachel E. Barkow, *Criminal Justice Reform and the Courts*, U. CHI. L. REV. ONLINE (Oct. 15, 2019), <https://lawreviewblog.uchicago.edu/2019/10/15/criminal-justice-reform-and-the-courts-by-rachel-e-barkow> [<https://perma.cc/4232-9KQR>] (urging reformers to focus attention on federal court doctrine and appointments); Tracie A. Todd, *Mass Incarceration: The Obstruction of Judges*, 82 L. & CONTEMP. PROBS. 191, 205 (“[A]ny genuine effort to effectively reform the criminal justice system and reduce prison populations must include substantive involvement of state judges.”).

²⁴ *Brown v. Plata* affirmed the Northern District of California's order to reduce prison capacity, but was decided after more than twenty years of litigation. 563 U.S. 493, 493–506 (2011). As explored below, it took almost another half-decade for *Plata*'s effects to be felt. *Brown v. Plata* was also, however, a watershed moment of judicial reckoning with and denunciation of the fundamentally inhumane American penal system. The Supreme Court's rejection of prison overcrowding stemmed from the deleterious effect of prison crowding on the provision of medical services to inmates: “A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.” *Id.* at 511. The power of this sentiment is undercut principally by its obviousness.

²⁵ Alicia Bower, Comment, *Unconstitutionally Crowded: Brown v. Plata and How the Supreme Court Pushed Back to Keep Prison Reform Litigation Alive*, 45 LOY. L.A. L. REV. 555, 557 (2012) (describing injunctions like the one in *Plata* as “rare,” “drastic,” and a remedy of “exceptional gravity”).

²⁶ Joseph Hayes, Justin Goss, Heather Harris & Alexandria Gumbs, *California's Prison Population*, PUB. POL'Y INST. OF CAL. (July 2019), <https://www.ppic.org/publication/californias-prison-population> [<https://perma.cc/55Y6-KGKD>] (“Since 2017, California's institutional prison population has hovered at about 115,000 inmates—just below the Supreme Court mandated target of 137.5% of design capacity However, 13 of the 35 state-owned facilities individually operate beyond that capacity.”).

²⁷ See, e.g., *U.S. Voters Weigh in on Brown v. Plata, Case Involving Prison Overcrowding*, FARLEIGH DICKINSON U. PUBLICMIND (May 23, 2011), <http://publicmind.fdu.edu/2011/brownvplata/final.pdf> [<https://perma.cc/2EP6-EB7R>] (finding that sixty-three percent of respondents felt that “the court cannot order criminals to be released” despite poor conditions).

federal judiciary has shown little interest in enforcing constitutional provisions like the Eighth Amendment in this context,²⁸ which some argue provide a footing to reduce jail and prison populations.²⁹ While an initiative predicated on legislative changes does not avoid all of these problems,³⁰ the legislative branch is more capable of effecting change in the criminal justice system. The legislature decides on sentencing ranges and maximums through legislation,³¹ and it allocates funds to law enforcement agencies through its “power of the purse.”³² These features make the legislature a uniquely powerful site of reform in the criminal justice system.

Beyond these structural matters, focusing reform efforts at the legislative branch is necessary because of the relative failure of political process theory to shape the federal judiciary to prevent harms done to minority groups. In his famous articulation of political process theory, John Hart Ely wrote that judicial intervention is necessary where “the [political] *process* is undeserving of trust,” either because an in-group uses its inside status to choke off avenues of political change,

²⁸ The Eighth Amendment sees wider usage in other contexts. For instance, failure to provide healthcare in prison might run afoul of the Eighth Amendment’s prohibition of cruel and unusual punishment. See *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976). In a cruel qualification of this holding, the Supreme Court later held that prison officials may only be held liable for such violations if they are aware of and disregard “a substantial risk of serious harm . . . by failing to take reasonable measures to abate it.” *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

²⁹ See *infra* note 145.

³⁰ Universal uptake of any policy idea is unlikely, and no policy proposal will be a panacea across jurisdictional lines. However, judicial solutions to mass incarceration are *excessively* piecemeal. For instance, in the aftermath of *Brown v. Plata*, California submitted monthly reports on decarceration to the presiding three-judge panel. It took seven years for California to meet the judicially-prescribed population maximum. See Defendants’ December 2017 Status Rep. in Response to February 10, 2014 Ord., *Coleman v. Brown*, 952 F. Supp. 2d 901 (E.D. Cal. & N.D. Cal. 2013) (No. 2:90-cv-00520) (“The State’s prison population is approximately 134.9% of design capacity if the 2,376 infill beds are counted at 137.5%, and approximately 135.9% of design capacity if the 2,376 infill beds are counted at 100%.”). And California largely did so by constructing more prisons, not reducing the prison population. See Eva Hersowitz, *Taking on the Law Enforcement Lobby*, CRIME REP. (Apr. 15, 2022), <https://thecrimereport.org/2022/04/15/taking-on-the-law-enforcement-lobby> [<https://perma.cc/7TWQ-6EDX>] (noting that after the Supreme Court ruling of *Brown v. Plata*, Governor Brown “chose to spend \$315 million to increase the number of prisons and move inmates from overcrowded prisons to new facilities”).

³¹ See ALISON LAWRENCE, NAT’L CONF. OF STATE LEGISLATURES, MAKING SENSE OF SENTENCING: STATE SYSTEMS AND POLICIES 1 (2015), <https://documents.ncsl.org/wwwncsl/Criminal-Justice/sentencing.pdf> [<https://perma.cc/K8XV-APWJ>] (describing the state legislature’s power over how long offenders should be incarcerated).

³² See generally *Separations of Powers: Appropriation Powers*, NAT’L CONF. OF STATE LEGISLATURES (Nov. 17, 2022), <https://www.ncsl.org/about-state-legislatures/separations-of-powers-appropriation-powers> [<https://perma.cc/TYA2-QLP2>] (describing legislatures’ control over the appropriations process).

or because the elected majority group “systematically disadvantag[es] some minority group out of simple hostility or a prejudiced refusal to recognize commonalities of interests, . . . thereby denying that minority the protection afforded other groups by a representative system.”³³ For example, the lack of enforcement of the Eighth Amendment³⁴ and the paring back of Fourth and Fifth Amendments post-*Katz* and -*Miranda* can be viewed as outputs of the failure to meaningfully embrace political process theory (or what could alternately be described as the *success at rejecting* political process theory) after the theory’s height post-*Carolene Products*.³⁵ As Professor Aaron Tang has written:

I argue that the Court has gone further than to merely reject the political process theory of constitutional interpretation, under which powerless discrete and insular minority groups alone would be entitled to heightened judicial solicitude. In several doctrinal areas, the Court has reversed the theory’s core prescription by conferring extra constitutional safeguards upon entities that . . . possess an outsized ability to protect their interests through the ordinary democratic process—all while withholding similar protections from less powerful counterparts.³⁶

Alternatively, Michael Klarman has argued that the judiciary’s lack of protection for criminal suspects is in some cases endorsed by political process theory as conceptualized by John Hart Ely.³⁷ Regardless of the side on which one comes out on these theoretical matters, it appears straightforward that, at least at the federal level and in regard to claims derived from the federal Constitution, the courts have not played the meaningful role that supporters of political process theory may envision.

B. *Legislative Reform and Representation Reinforcement*

This Note instead builds on the scholarship of academics like Anita Krishnakumar. She posits that legislative solutions to problems facing underrepresented groups should have primacy over “John Hart Ely-inspired representation reinforcing ‘canons of construction,’ designed to encourage judges to use their role . . . to tip the scales in favor of

³³ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980).

³⁴ See *infra* note 145 and accompanying text.

³⁵ See, e.g., Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 767 n.96 (1991) (noting that the Burger and Rehnquist courts limited criminal procedure rights beyond the limitations imagined by political process theory).

³⁶ Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427, 1427–28 (2017).

³⁷ See Klarman, *supra* note 35, at 767 (“The fourth amendment’s prohibition on unreasonable searches and seizures can be conceptualized as serving two distinct values: (1) creating a zone of personal privacy . . . and (2) protecting against illegitimate exercise of discretionary authority Political process theory . . . rejects the first.”).

groups believed to be under-represented in the political process.”³⁸ While Professor Krishnakumar’s contribution has focused specifically on statutory interpretation as a locus for judicial intervention, her arguments for the advantages of legislative solutions to problems facing “discrete and insular minorities”³⁹ are just as relevant in the mass incarceration context. A legislative focus on criminal sentencing as a site of reform would “reach all legislation, not only [those laws] which eventually become[] the subject of litigation,” and a legislative focus “has the potential to empower traditionally disadvantaged interests at the lawmaking stage, rather than merely reduce the harm worked upon them at the statute-interpreting stage.”⁴⁰

But this Note also sits in an uneasy relationship to thinkers like Professor Krishnakumar. A disproportionate amount of the harm done through the criminal justice system is done to marginalized groups, and largely because of legislative interventions that passed with broad-based support.⁴¹ Pervasive criminalization of racial minorities in the United States has created a situation in which some form of intervention is necessary to counteract the most base and revanchist policies of America’s electoral majority. Analogously, for example, Christopher Slobogin posits that under an unnuanced version of political process theory, a law allowing random and widespread home searches would be permissible.⁴² But like extreme criminal sentencing’s creation of a political underclass, “such dragnets, however popular with the general population, could have a singularly oppressive long-term effect that would significantly affect the quality of political participation.”⁴³ Here, the negative effect on political participation stemming from America’s dual relationship with sentencing is rooted in the creation of a politically disenfranchised subgroup through the criminal system and the political system’s preference toward short-term reflexive punishment rather than more productive policy goals.

³⁸ Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. LEGIS. 1, 1 (2009).

³⁹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁴⁰ Krishnakumar, *supra* note 38, at 4.

⁴¹ Examples abound, but include, for instance: mandatory minimum sentencing laws; three-strikes laws; truth-in-sentencing laws; and disparities in penalties for certain racially-coded drugs as compared to other drugs. See James Cullen, *Sentencing Laws and How They Contribute to Mass Incarceration*, BRENNAN CTR. (Oct. 5, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/sentencing-laws-and-how-they-contribute-mass-incarceration> [<https://perma.cc/8Z97-E8UN>] (outlining these policies).

⁴² See Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1738 (2014).

⁴³ *Id.* at 1739.

C. Challenges Faced by Sentencing Commissions

As explored above and below, it is not clear that intervention through other government bodies would be as effective. There is a great capacity for backlash if voters are deprived of one of their most salient local political issues because of policy capture by a group of experts that mandate criminal penalties.⁴⁴ While traditionally viewed as a federal issue, the nondelegation doctrine is active in state governments as well; simply throwing sentencing determinations to executive agencies could well run afoul of this recently emboldened body of law.⁴⁵

To the extent that Justice Gorsuch's dissenting opinion in *Gundy v. United States*⁴⁶ represents the posture of the current Supreme Court toward the nondelegation doctrine, as appears likely,⁴⁷ there is greater

⁴⁴ For a brief introduction to the traditional roles and responsibilities of state sentencing commissions, see Kay A. Knapp, *State Sentencing Commissions and Guidelines*, 19 INTERGOVERNMENTAL PERSPECTIVE 18 (1993).

⁴⁵ For an example of right-wing agitation for broader state nondelegation doctrine, see Luke A. Wake, *Taking Non-Delegation Doctrine Seriously*, 15 N.Y.U. J.L. & LIBERTY 751, 751 (2022) (arguing that “[w]ith the notable exception of the Michigan Supreme Court, state courts” were mistaken in “fail[ing] to give serious consideration of non-delegation arguments” because of their views that open-ended delegations were necessary in light of the COVID-19 pandemic); Jason Juliano & Keith E. Whittington, *The Non-Delegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 643–45 (2017) (collecting state and federal nondelegation cases). See also *Separation of Powers: Delegation of Legislative Power*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 16, 2022), <https://www.ncsl.org/about-state-legislatures/separation-of-powers-delegation-of-legislative-power> [<https://perma.cc/D7KT-22SG>] (collecting expansive state case law); Edward H. Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine*, 34 J.L. ECON. & ORG. 27, 43 (2018) (finding twenty-two reversals of state statutes because of nondelegation issues between 1990 and 2010, prior to the contemporary nondelegation revival).

⁴⁶ 139 S. Ct. 2116, 2131 (2019). *Gundy* asked “[w]hether the Sex Offender Registration and Notification Act’s delegation to the Attorney General . . . violate[d] the constitutional nondelegation doctrine.” Brief for Petitioner at i, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086). Congress delegated to the Attorney General the authority to determine whether the Act’s reporting requirements would apply retrospectively “to the more than 500,000 people convicted of a sex offense before the law’s July 27, 2006 enactment.” *Id.* at 2.

⁴⁷ Chief Justice Roberts and Justice Thomas joined Justice Gorsuch’s dissent. 139 S. Ct. 2116 at 2131. Justice Kavanaugh did not participate in consideration of *Gundy* due to his recent appointment to the Court. *Id.* at 2130. After *Gundy*, Justice Ginsburg (who was in the *Gundy* plurality) was replaced by Justice Barrett. Justice Alito, who concurred in the *Gundy* judgment, wrote: “If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years [regarding nondelegation], I would support that effort.” *Id.* at 2131 (Alito, J., concurring). See also Hannah Mullen & Sejal Singh, *The Supreme Court Wants to Revive a Doctrine That Would Paralyze Biden’s Administration*, SLATE (Dec. 1, 2020, 12:56 PM), <https://slate.com/news-and-politics/2020/12/supreme-court-gundy-doctrine-administrative-state.html> [<https://perma.cc/9CLY-3EKT>] (“Justice . . . Kavanaugh wasn’t on the court in time to hear *Gundy*. But . . . in a separate opinion, he signaled his support for Gorsuch’s new, revived nondelegation doctrine. That makes five votes for resurrecting the nondelegation doctrine . . . even without Justice . . . Barrett, who . . . shares the conservative justices’ hostility to the administrative state.” (citing *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., issuing statement on denial of certiorari))). In his statement on the

reason to believe that the nondelegation doctrine could pose a real challenge to state and federal sentencing commissions. After all, Justice Gorsuch's issue with the Sex Offender Registration and Notification Act in *Gundy* was its "giving the nation's chief prosecutor the power to write a criminal code with his own policy choices," which could be adopted by sympathetic advocates to challenge the constitutionality of the U.S. Sentencing Commission.⁴⁸ Indeed, Justice Gorsuch's dissent in *Gundy* cites approvingly Justice Scalia's dissent in *Mistretta v. United States*,⁴⁹ which would have found the U.S. Sentencing Commission unconstitutional.⁵⁰ Placing hopes of sentencing reduction and decarceration in sentencing commissions therefore seems like a risky proposition. While *Gundy* applied to separation of powers concerns at the federal level and would not be binding on states per se, Supreme Court proclamations are persuasive on state courts,⁵¹ and many state constitutions derive their basic separation of powers structures from the federal Constitution.⁵² Nondelegation may force reformers' hands: One way or the other, focusing on the legislature as a site of criminal justice reform will be necessary.

denial of certiorari in *Paul*, Justice Kavanaugh wrote that Justice Gorsuch's *Gundy* analysis was "scholarly," "may warrant further consideration in future cases," followed a long line of precedent, was "thoughtful," and "raised important points." *Paul*, 140 S. Ct. at 342 (2019).

⁴⁸ *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting). In the course of his dissent, Justice Gorsuch refers, on three separate occasions, with slightly varied language, to the nation's chief prosecutor writing his own criminal code. *See id.*; *id.* at 2131; *id.* at 2148.

⁴⁹ 488 U.S. 361 (1989).

⁵⁰ *See Gundy*, 139 S. Ct. at 2140 n.62; *see also Mistretta*, 488 U.S. at 413 (Scalia, J., dissenting) ("[T]he products of the Sentencing Commission's labors . . . have the force and effect of laws. . . . I can find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws.").

⁵¹ *See, e.g.,* Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 799 (1995) (updating Neuborne's famous article *The Myth of Parity* to account, among other things, for the fact that "[u]nmistakable signals sent by the Supreme Court . . . during the Reagan/Bush years[] have made conscientious judges—both state and federal—skeptical about efforts to push individual rights law beyond settled doctrine"). Even where nonbinding, Supreme Court signals can push state-level jurisprudence in predictable directions. The concept of "lockstep jurisprudence" suggests that state courts often follow the Supreme Court's interpretive lead. *See, e.g.,* Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98 (1988) (formulating the "lockstep" concept in jurisprudence).

⁵² *See Separation of Powers: An Overview*, NAT'L CONF. OF STATE LEGISLATURES (May 1, 2021), <https://www.ncsl.org/about-state-legislatures/separation-of-powers-an-overview> [<https://perma.cc/S2A6-CKT6>] ("Forty state constitutions specify that government be divided into three branches: legislative, executive and judicial."); G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. OF AM. L. 329, 333 (2003) (noting important differences between state and federal separations of power, but remarking that "[t]he Federal Constitution offers what might be termed a relaxed version of the separation of powers"). Accordingly, it is sensible to postulate that nondelegation controls in state government would be *stricter* than at the federal level.

The attack on sentencing commissions by way of the nondelegation doctrine is not limited to the judicial branch. The American Legislative Exchange Council, a prominent conservative special interest group which proposes model legislation to state legislatures,⁵³ has recently developed a piece of model legislation which would create rulemaking review bodies which would have the capacity to overrule propounded regulations by state agencies.⁵⁴ For these reasons, advocates of reductions in criminal sentencing would be wise to supplement their efforts to protect marginalized groups by focusing on the legislative branch to a greater degree.

Putting aside the legal merits of nondelegation challenges to sentencing commissions, those challenges are animated by an intuitive sensibility that animates this Note's proposal: An independent agency either cannot or should not be the central agent driving decarceration in the United States. From the perspective of constitutional formalists, this is because commissions operate under broad congressional delegations un contemplated by America's founding generation. A major concern of this Note is different: that, as a matter of political strategy, taking citizens' voices away on matters of sentencing policy is inadvisable. In local and national elections, voters often point to crime as one of their key voting issues. No matter how inadvisable an expert may think them, similar proposals to take the *vox populi* away would be unthinkable for other salient issues, like the economy, abortion rights, or healthcare coverage. It is therefore the animating purpose of this Note to propose a mechanism to avoid popular backlash against expert control while simultaneously cabining the basest, most carceral urges of the legislature that stem from a short-term political mindset.

In this regard, the proposal of this Note differs slightly from those articulated by Professor Krishnakumar. Her work similarly focuses on the "fundamental inadequa[cy]" of "judicially-based solutions" and

⁵³ See generally Henry Farrell, *Conservatives Remade American State Politics. Here's How They Did It*, WASH. POST (Aug. 29, 2019), <https://www.washingtonpost.com/politics/2019/08/29/conservatives-remade-american-state-politics-heres-how-they-did-it> [https://perma.cc/6BDQ-Z2BM] (describing the American Legislative Exchange Council as a "network of state legislators, conservative philanthropies and wealthy donors, right-leaning advocacy groups, and private-sector businesses that drafts and disseminates 'model bill' proposals for state legislation.").

⁵⁴ See *Administrative Procedures Act*, AM. LEGIS. EXCH. COUNCIL, <https://www.alec.org/model-policy/administrative-procedures-act> [https://perma.cc/33JW-B2JK] (conferring on newly-founded "Joint Committees" the authority to review and void administrative rules). It is worth noting that because sentencing commissions are independent agencies located in *judicial branches* of state government, not all attacks on independent agencies will be applicable to those commissions. This Section endeavors only to outline potential future threats to the sentencing commission model based on rhetoric and argumentation in conservative legal scholarship and jurisprudence.

argues for a change in legislative process to create better policy outcomes for marginalized groups.⁵⁵ In her scholarship, the legislature would be forced to issue impact statements on the anticipated outcome of proposed policies on underrepresented groups as part of the traditional legislative process, as a “representation reinforcement framework.”⁵⁶ This Note shares similar ideological commitments, but rather than focusing on “a legislative commitment to greater representation of disadvantaged groups” as such,⁵⁷ it focuses on preventing criminal sentencing from being a one-way ratchet as a means of working toward a reduction in incarceration rates, which will benefit marginalized groups in concrete terms.

One obvious rejoinder would be that a larger role for the legislature than envisioned by advocates of sentencing commission primacy does not necessarily mean a more direct voice for the citizenry on criminal justice matters. State sentencing commissions must be appointed by someone, the argument would go, and those individuals must be democratically accountable. But appointment to state sentencing commissions is complex and defies simple categorization in these terms. While the governor alone holds the power to appoint sentencing commission members in a small minority of state sentencing commission schemes, in about seventy-seven percent of jurisdictions (seventeen of twenty-two categorized), appointment comes from various officials.⁵⁸ In Connecticut for instance, there are “23 commission members, some of whom are selected by the Governor, Chief Justice, President Pro Tempore of the Senate, Speaker of the House, Senate and House Minority Leaders, and Senate and House [Majority] Leaders.”⁵⁹ As a theoretical matter, the more diffuse a decisionmaking power is, the less likely that any individual lawmaker will be held accountable on that particular issue.⁶⁰ And that is only the complexity of one state—in others, prosecutors must be selected to the commission (New Mexico), judges must select other judges to sit on the commission (Alabama), and the chief justice

⁵⁵ Krishnakumar, *supra* note 38, at 2–3.

⁵⁶ *Id.* at 3.

⁵⁷ *Id.*

⁵⁸ Alexis Watts, *The Composition of Sentencing Commissions*, ROBINA INST. OF CRIM. L. & CRIM. JUST. (Aug. 5, 2016), <https://robinainstitute.umn.edu/articles/composition-sentencing-commissions> [<https://perma.cc/HAR6-A8WF>].

⁵⁹ *Id.*

⁶⁰ See PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 64 (1995) (“[T]he diffusion of accountability may express itself in [several] associated costs,” including that “information distortion may mean that no one unit or individual can be held accountable for poor analysis or misinformation” and “administrative inertia may mean that no one can be held responsible for a lack of action” among other accountability harms stemming from diffusion).

of the state supreme court chairs the commission *ex officio* (Ohio).⁶¹ Even in those states in which the governor has full appointment powers, it would fly in the face of political wisdom to believe that voters are more likely to vote for a gubernatorial candidate because of their views on prospective sentencing commission candidates rather than for a state legislative candidate because of their stated views on politically salient criminal sentencing legislation.⁶² This also supports the notion that legislators are held more responsible for sentencing policy and have an added incentive to mirror the public's will on the issue. The relative transparency and consolidation of criminal lawmaking in the legislature makes it a particularly good site of reform if the goal is to align the public's stated policy priorities with their policy outcomes.⁶³

Though the judiciary and sentencing commissions both face significant hurdles as effective forums for reducing incarceration, state legislatures themselves do not have an unchecked history regarding mass incarceration.⁶⁴ The following Sections lay out how legislatures can begin to address the carceral state: By drawing on lessons learned from "capacity constraint" tradeoffs in Minnesota's presumptive sentencing guidelines and the similar mechanism for tying legislative hands offered by the PAYGO model, this Note explores how criminal sentencing PAYGO offers a procedural path forward for decarceration efforts in the legislature.

II

CRIMINAL PUNISHMENT AS A TOTAL SYSTEM: LESSONS FROM MINNESOTA'S SENTENCING GUIDELINES

In *Sentencing in America, 1975–2025*, Michael Tonry gives significant attention to Minnesota's presumptive sentencing guidelines, which took effect in 1980.⁶⁵ Minnesota legislation "create[d] a specialized administrative agency, a 'sentencing commission,' with authority to

⁶¹ Watts, *supra* note 58.

⁶² See Stuart Minor Benjamin & Mitu Gulati, "Mr. Presidential Candidate: Whom Would You Nominate?", 42 LOY. L.A. L. REV. 293, 294 (2009) ("Presidential candidates inevitably claim that they will nominate better people than their competition will. But they are rarely pushed to name names prior to the election. When the matter of naming names comes up, candidates sidestep."). Benjamin and Gulati's analysis focuses on presidential candidates, but in state-level elections, with prospective appointments to positions voters are even less familiar with, there is less reason to imagine voters will be able to hold gubernatorial candidates accountable for their selections.

⁶³ For discussion of the legislature's ideal mixture of transparency and opacity in budget procedures, see *infra* Section IV.A.

⁶⁴ See *supra* note 41 and accompanying discussion.

⁶⁵ Michael Tonry, *Sentencing in America, 1975–2025*, 42 CRIME & JUST. 141, 155–58 (2013).

promulgate ‘presumptive’ sentencing guidelines.”⁶⁶ The system of tradeoffs this system mandated provides a theoretical model for the efficacy of criminal sentencing PAYGO.

Judge Marvin Frankel, the original proponent of the program, preferred promulgating guidelines through an administrative agency to solve for problems of political incentives. Frankel saw legislatures as “afflicted by high turnover, short attention spans, and tendencies to react emotionally to short-term emotions and political concerns,” making them unable to develop “rational, evidence-based policies.”⁶⁷ This justification for a presumptive sentencing guideline regime backed by an independent administrative agency mirrors the present-day approach of scholars like Professor Rachel Barkow⁶⁸ and indicates that criminal justice reforms have grappled with the short-term incentives of legislators for at least the last fifty years.

Most importantly, the commission interpreted “its enabling legislation to require that a ‘capacity constraint’ guide its decisions.”⁶⁹ The commission designed the sentences such that the new penalties would not result in a prison population exceeding ninety-five percent of Minnesota’s prison capacity.⁷⁰ Imposing a capacity constraint on criminal sentences “forced [the commission] to make trade-offs. If commissioners wanted to increase sentence lengths for particular offenses, they would have to be reduced for others.”⁷¹ The designers forced themselves to view criminal sentencing as a *system*, rather than a collection of singular entities.

The guidelines helped keep Minnesota’s prison populations below capacity, while prisons in other states experienced widespread overcrowding.⁷² This success is due in large part to the commission’s capacity constraint mechanism, which was predicated on the need to make tradeoffs between different sentences in the criminal sentencing system.⁷³ North Carolina had similar success with capacity constraints

⁶⁶ *Id.* at 156.

⁶⁷ *Id.*

⁶⁸ See RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 2 (“If we want better outcomes . . . we need to change the institutional framework we currently use to make criminal justice policy. Instead of policies designed to appeal to the emotions of voters . . . we need to create an institutional structure that creates a space for experts . . . to set policies.”).

⁶⁹ Tonry, *supra* note 65, at 156.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See *id.* at 157 (“Minnesota prisons operated within their capacities, during a period when prison populations were rising rapidly in most states and prisons in most states were overcrowded.”).

⁷³ *Id.* (“‘Population constraint’ policies in Minnesota, Washington, and North Carolina worked. During the periods when they were in effect, prison systems in all three states

tied to presumptive sentencing guidelines.⁷⁴ Between 1994, when North Carolina's guidelines took effect, and 2011, North Carolina's "imprisonment rate was essentially flat, fluctuating between 340 and 370 per 100,000 population and well below the rising national rate."⁷⁵ Empirical research suggests that the presence of capacity constraints is a central factor in whether sentencing guidelines will address or exacerbate mass incarceration.⁷⁶

The Minnesota system is not without flaws. The raw number of people incarcerated in Minnesota did increase in the 1980s.⁷⁷ Capacity constraints operate relative to the capacity which state penal facilities can handle, so an increase in the number of jails and prisons in a state can lead to an increase in raw totals without exceeding the constraint. This is precisely what happened in Minnesota.⁷⁸ Sentencing commission recommendations based on capacity constraints therefore have the potential to face lawmakers with a perverse incentive. States can continue to comply with constraints so long as they continue building new prison facilities. For that reason, this Note does not call for utilizing capacity constraints. This Note's policy proposal is, however, informed by Minnesota's approach to criminal sentencing as a system of tradeoffs. Even still, prison population growth in the 1980s and early 1990s was lower in states with population constraint mechanisms than in states which had presumptive sentencing guidelines without such mechanisms,⁷⁹ demonstrating the independent utility of tradeoff systems, even if constructed with less ideal mechanisms.

Minnesota and other capacity constraint jurisdictions teach a lesson applicable to legislatures—viewing criminal sentences as part of a criminal justice *system* requiring tradeoffs is critical for decarceration.

operated within capacity and limited prison population growth well below national and regional averages.”).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 157–58 (“A handful of studies have concluded that presumptive guidelines, especially with population constraints, help control prison population size” (first citing Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696 (1995); then citing Sean Nicholson-Crotty, *The Impact of Sentencing Guidelines on State-Level Sanctions: An Analysis over Time*, 50 CRIME & DELINQUENCY 395 (2004); and then citing DON SIEMEN, ANDRES RENGIFO & JAMES WILSON, OF FRAGMENTATION AND FERMENT: THE IMPACT OF STATE SENTENCING POLICIES ON INCARCERATION RATES, 1975–2002, NAT’L INST. OF JUST. (2006), https://www.vera.org/downloads/publications/Of_Fragmentation_and_Ferment.pdf [https://perma.cc/3J6K-PUGD])). Especially relevant here is the work of Nicholson-Crotty, who “concluded that guidelines incorporating capacity constraints tend to moderate imprisonment growth and that those not based on constraints exacerbate it,” based on a fifty-state empirical analysis of prison data between 1975 and 1998. Tonry, *supra* note 65, at 158.

⁷⁷ *Id.* at 157.

⁷⁸ *Id.*

⁷⁹ *Id.* at 157–58.

At present, there is little reason for legislators to make these tradeoffs. When a crime wave becomes politically salient, voters demand punitive responses.⁸⁰ But because voters' imaginations do not tie the increase in one punishment to the decrease in another, criminal sentences in America become a one-way ratchet. Except for certain high-profile cases,⁸¹ American sentences spiral upwards.

The PAYGO system for criminal sentencing described below operates similarly to Minnesota's presumptive sentencing guidelines on a theoretical level. Just as Minnesota required its commission to create tradeoffs between criminal sentences, criminal sentencing PAYGO would require legislatures to make tradeoffs in criminal sentences created through statute. But by not tying its tradeoffs to capacity limits, criminal sentencing PAYGO does not incentivize legislatures to finance the construction of new prison facilities. Implementing this system would represent a significant hurdle to the one-way ratchet that normally characterizes increases in legislative sentencing decisions. The following Part explores PAYGO as it currently exists at the federal level, before suggesting improvements critical to this Note's proposal.

III

DESCRIBING THE "PAYGO" SYSTEM: AN EXOGENOUS CHECK ON POLITICAL INCENTIVES

A. *PAYGO at the National and Theoretical Levels: A Brief Overview*

PAYGO "require[s] that new legislation not increase the federal budget deficit or reduce the surplus."⁸² The House and Senate each have their own versions of PAYGO.⁸³ There is also a statutory version of

⁸⁰ See *supra* note 4.

⁸¹ For instance, disparate racial impacts in the War on Drugs led to calls for reductions in sentencing disparities. The most infamous example of sentencing disparities is perhaps the difference in sentencing between crack and powder cocaine. See David Bjerck, *Mandatory Minimum Policy Reform and the Sentencing of Crack Cocaine Defendants: An Analysis of the Fair Sentencing Act*, 14 J. EMPIRICAL LEGAL STUD. 370, 371 (2017) ("In response to [controversy about crack cocaine sentencing disparities], there developed a strong bipartisan support to lessen the disparate treatment of crack relative to powder cocaine under the mandatory minimums, which eventually led to the passage of the Fair Sentencing Act of 2010"). The sentencing disparity was reduced in the Fair Sentencing Act of 2010, but not to a 1:1 level. See 21 U.S.C. § 841(b)(1)(B)(ii)-(iii) (showing that distribution of 500 grams of powder cocaine carries the same mandatory minimum as distribution of 28 grams of crack cocaine, which is approximately an 18:1 ratio).

⁸² *FAQs on PAYGO*, HOUSE COMM. ON THE BUDGET (July 13, 2020), <https://democrats-budget.house.gov/resources/reports/faqs-paygo> [<https://perma.cc/C4S9-RT4F>].

⁸³ *Id.* The House and Senate PAYGO models differ in several ways. Both "promote[] deficit neutrality in new legislation" by requiring spending decreases or revenue increases

PAYGO, which operates differently from the proposal contained in this Note.⁸⁴ The differences between House and Senate PAYGO are beyond the scope of this Note, as they largely concern procedural matters.⁸⁵ If a bill would raise the federal budget deficit by increasing spending or decreasing revenue, the balance must be offset by reducing spending or raising revenue somewhere else.⁸⁶ The Congressional Budget Office usually handles projections of the budgetary impact of the various spending and revenue proposals.⁸⁷

Like Minnesota's presumptive guidelines, PAYGO forces legislators to make tradeoffs when considering policy preferences. The system provides an exogenous check on the political incentives to increase spending and cut taxes without making unpopular cuts or tax increases elsewhere.⁸⁸ And crucially for the perceptual legitimacy of PAYGO as a model, its outcomes are in some sense "neutral": Lawmakers are allowed to spend on programs or cut taxes as much as they would like, so long as the programs are financed. One could conceive of alternative models for a PAYGO-like system that preferences certain results based on preferred policy outcomes. In 2011, the Republican House of Representatives leadership replaced PAYGO with the "CUTGO" rule, which "require[d] that policymakers pay for any bill to expand

when a spending bill or revenue-decreasing bill is proposed. *Id.* The models are different in several ways. Under the Senate version, the Senate may not cut Social Security or Postal Service funds to offset spending or revenue decreases. The House version, on the other hand, includes these categories of spending as eligible offsets. The timelines for budget neutrality also differ between the two. In the Senate, "legislation cannot increase the deficit in 1) the current year, 2) the budget year, 3) the six-year period including the current year, and 4) the eleven-year period including the current year." *Id.* The House rule only applies to the latter two time periods. Finally, the Senate PAYGO model includes a PAYGO "scorecard," which effectively means that if earlier legislation in the same session is budget-positive (resulted in a net gain in revenue or decrease in spending) later legislation need not be strictly budget-neutral, but can be budget-negative so long as the net loss does not exceed the net gain created by earlier legislation in the session. *Id.*

⁸⁴ *Id.* Statutory PAYGO, like the Senate version, is concerned with the overall effect of legislation in a session as measured by a "scorecard." If an Office of Management and Budget report summarizing the budgetary impact of legislation "shows that the legislation subject to PAYGO increased the federal deficit, the law requires the executive branch to cut spending by an amount sufficient to offset that increase." *Id.*

⁸⁵ *See id.* (describing the differences in the requirement to waive the rule in the House and Senate).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ This is not to say that federal lawmakers *always* make these tough choices. Loopholes exist in PAYGO which lawmakers can exploit to cast politically difficult decisions aside—this Note proposes mechanisms to close these loopholes. *See infra* Section III.B.

entitlement programs and do so as part of the same bill, while entirely exempting tax cuts from this discipline.”⁸⁹

Economically speaking, PAYGO may be an unwise policy. Progressive groups have attacked PAYGO for being “overly rigid” in its implementation on spending proposals, failing to account for the economic necessity of different spending levels in a boom period versus a recession.⁹⁰ But it is also true that PAYGO has effectively acted as a check on political incentives which would otherwise reward passing poorly designed and rash legislation.

For example, during debate over the Tax Cuts and Jobs Act of 2017, Statutory PAYGO would have forced the Republican Party to cut \$150 billion per year in spending to offset the tax cuts, including \$25 billion annually from Medicare.⁹¹ To avoid the political complications stemming from such massive cuts, the Republican leadership waived the PAYGO requirement.⁹² This anecdote also reveals a problem: For criminal sentencing PAYGO to be an effective tool for binding legislators, legislators must be curtailed in their ability to waive it. Otherwise, the “tradeoffs” legislators make on sentencing would be illusory and volitional.⁹³ For purposes of this Note’s policy structure, PAYGO is a useful analogy because it represents the legislative instantiation of Minnesota’s presumptive sentencing guidelines: that an exogenous system can provide effective political checks and counterincentives to ordinary electoral “politics as usual.” This Note therefore presses reforms to the PAYGO system that retain its structure of political incentives while improving upon its day-to-day workability. Operational differences between federal PAYGO and criminal sentencing PAYGO are described below.

⁸⁹ Robert Greenstein, *Commentary: House PAYGO Rule Could Help Advance Progressive Goals*, CTR. ON BUDGET & POL’Y PRIORITIES 1 (Dec. 3, 2018) (alteration in original), <https://www.cbpp.org/research/federal-budget/commentary-house-paygo-rule-could-help-advance-progressive-goals> [<https://perma.cc/CC23-B2S5>].

⁹⁰ See, e.g., *Unrig the Rules: The Case for Repealing Congressional PAYGO*, CONG. PROGRESSIVE CAUCUS CTR. 1 (Oct. 2020), https://rooseveltinstitute.org/wp-content/uploads/2020/02/RI_TheFlawedEconomicsofPAYGO_UPDATED_FactSheet_202010.pdf [<https://perma.cc/9BGR-AA3L>].

⁹¹ Heather Long, *Democrats Have Leverage in One Part of the GOP Tax Cut Process*, WASH. POST (Nov. 14, 2017, 8:27 AM), <https://www.washingtonpost.com/news/wonk/wp/2017/11/14/how-the-gop-tax-plan-could-leave-the-party-in-need-of-democrats-help> [<https://perma.cc/3TBR-KGBC>].

⁹² Tara Golshan, *Republicans Are Preventing Their Tax Bill from Triggering a \$25 Billion Cut to Medicare*, VOX (Dec. 21, 2017, 10:25 AM), <https://www.vox.com/policy-and-politics/2017/11/14/16651184/gop-tax-bill-medicare-cut-paygo> [<https://perma.cc/CP4Q-Z8QN>].

⁹³ See *infra* Section III.B.3 (advocating for reforms to curtail waivability).

B. Criminal Sentencing PAYGO as Adoptable and Efficacious for States

1. Structure

As envisioned in this Note, criminal sentencing PAYGO would be structured as follows: A legislature would adopt criminal sentencing PAYGO as a procedural rule or, to make the program more efficacious, as a statutory obligation, much as Congress has been subject to both statutory and discretionary/procedural PAYGO schemes. Adopting jurisdictions would then be subject to criminal sentencing PAYGO in a theoretically analogous manner as Congress is subject to PAYGO. To pass a bill which would increase criminal sentences in one area of the jurisdiction's criminal code, a legislature under PAYGO would be required to simultaneously pass a corresponding decrease in criminal sentencing in another area of the code, of equal or greater value.⁹⁴ As explored below, "value" can be expressed in dollars and cents as part of the fiscal note process that some state sentencing commissions already take part in. Alternatively, a bill's criminal sentencing "value" can also be expressed in terms of estimated per-year prison service, or "sentence time." That is, rather than measuring a proposal's impact on sentences as a monetary calculation, a commission can calculate a proposal's impact based on its effect on the aggregate number of years it would cause people to serve in prison.⁹⁵

While sentencing commissions have appropriate expertise in calculating both forms of "value" for legislatures, a sentence time calculation is more advantageous. It has the advantage of being one step of extrapolation shorter, as a dollars-and-cents calculation necessarily implies sentence time as part of its calculation. Two additional problems arise with a dollars-and-cents criminal sentencing PAYGO scheme. First, prison spending does not increase linearly,⁹⁶ making projection

⁹⁴ This means that criminal sentencing PAYGO can reduce criminal sentences in the overall criminal code but may not be used to increase them overall.

⁹⁵ By multiplying the projected offense and prosecution rate (X) for a certain crime by its projected average sentence length (Y), sentencing commissions can come up with a "sentence time" calculation (Z). If a commission found that a particular crime would be prosecuted 100 times (X) in a particular state, with an average sentence length of two years (Y), this would produce a "sentence time" calculation (Z) of 200 years (100 x 2 = 200). In a "sentence time" system, a proposal's "Z" product would need to be net zero or net negative to meet criminal sentencing PAYGO's strictures, by reducing sentences for crimes already on the books.

⁹⁶ This is because certain costs in the criminal system are "fixed" or "step-fixed." For example, unless enough prisoners from a facility are released or transferred to allow a prison to be closed, maintenance costs for the facility remain fixed, even if the marginal costs associated with housing an individual released prisoner are eliminated. See Christian Henrichson & Sarah Galgano, *A Guide to Calculating Justice-System Marginal Costs*, VERA

based on financial value subject to a greater margin of error. Second, within the same bill, decreased costs unrelated to *sentencing* could theoretically pass alongside increased sentences. This would make the bill a one-way increase in sentencing that is technically compliant with criminal sentencing PAYGO.⁹⁷ Therefore, a dollars-and-cents-based criminal sentencing PAYGO scheme would likely be less accurate and create potential loopholes which would fail to capture criminal sentencing PAYGO's possible value.

2. *Neutral Projections*

Under criminal sentencing PAYGO, when a legislator proposes a bill that would impact criminal sentencing, some neutral arbiter would need to determine whether the bill would have a net neutral or negative effect on criminal sentencing overall.⁹⁸ Processes already familiar to state legislative budgeting procedure can serve this function. “Nearly all states produce some sort of cost estimate of bills, typically called a ‘fiscal note,’” and “in 38 states and the District of Columbia” “[f]iscal notes are routinely prepared for all or substantially all bills that would have a significant fiscal impact.”⁹⁹ In many states with sentencing commissions, those agencies prepare fiscal notes for bills which would significantly

INST. OF JUST. 5 (May 2013) (citation omitted), <https://www.vera.org/downloads/publications/marginal-costs-guide.pdf> [<https://perma.cc/7VLH-8HUT>] (“In Massachusetts, for example, the average annual per-inmate cost of incarceration is \$46,000, whereas the marginal cost is only \$9,000.”).

⁹⁷ For instance, a bill could simultaneously increase criminal sentences while eliminating solitary confinement, which is itself a very costly program. See Kevin McCarthy & Hamid Y. Panah, *The Cost of Solitary Confinement*, BERKELEY UNDERGROUND SCHOLARS & IMMIGR. DEF. ADVOC. 4 (July 2022) (emphasis omitted), <https://imadvocates.org/wp-content/uploads/2022/07/Solitary-Cost-Report-AB2632.pdf> [<https://perma.cc/8924-5WNG>] (“This Report estimates the Mandela Act would save, at a minimum, an estimated \$61,129,600 annually based solely on a conservative estimate of the cost associated with solitary confinement.”). This would defeat the point of criminal sentencing PAYGO. The goal is not to decrease or keep steady the *costs* of the criminal system per se, but criminal sentences in particular. A sloppily written dollars-and-cents PAYGO scheme could allow the prison condition change to offset the criminal sentencing change.

⁹⁸ It should be noted that, although probationary sentences are outside of the scope of this Note’s proposal, the impact of a cost-internalizing solution like criminal sentencing PAYGO on the willingness of legislatures to utilize penalties other than traditional incarceration may be a fruitful area of research.

⁹⁹ Elizabeth McNichol, Iris J. Lav & Kathleen Masterson, *Better Cost Estimates, Better Budgets*, CTR. ON BUDGET & POL’Y PRIORITIES 1, 4 (Nov. 24, 2015), <https://www.cbpp.org/sites/default/files/atoms/files/10-15-15sfp2.pdf> [<https://perma.cc/XY8G-QWSJ>]. And of states that do not require fiscal notes in such sweeping circumstances, Washington and North Carolina *do* require them when proposed legislation would affect incarceration rates. *Id.* at 5, 20. Criminal sentencing PAYGO would supplement this system by providing teeth to fiscal notes.

impact criminal sentencing¹⁰⁰—they therefore have both the subject matter expertise and institutional memory to prepare effective notes for sentencing projections.¹⁰¹ And, in the wake of severe budget shortfalls in the states, state sentencing commissions have been increasingly relied upon for these types of projections.¹⁰² In North Carolina, for example, the state sentencing commission prepared two models for the state legislature amid debate on changes to criminal sentences.¹⁰³ The data underlying its recommendations were predicated upon “a database containing information on offenders’ criminal histories, sentences, time they were expected to serve, and other important characteristics,” and predictive estimations of prison population increases were then produced from this data over time.¹⁰⁴ Its simulation model predicted a June 2001 state prison population of 32,154; the actual average June 2001 prison population was 31,971.¹⁰⁵ Several other state sentencing commissions have utilized similar modeling techniques.¹⁰⁶ Data modeling and simulation technologies have, of course, developed exponentially in the time since, suggesting that sentencing commissions already have the institutional competency to accurately make the projections which criminal sentencing PAYGO would entail.

To make criminal sentencing PAYGO notes maximally effective, they would need to avoid pitfalls that plague fiscal notes in certain states: Thirty-three states (and the District of Columbia) assign fiscal notes to a neutral body, while sixteen do not.¹⁰⁷ Twelve states (and the District of Columbia) project fiscal impacts four or more years into the future, while the rest cover only the next one or two fiscal years.¹⁰⁸ As Elizabeth McNichol and colleagues argue, longer-range and neutral accountings are conducive to sensible public investment.¹⁰⁹ Given this Note’s concern about the punitive responses of legislatures to crime, or perceptions of crime, it is most responsible to task a neutral body with projections relating to sentencing regimes. Political branches of

¹⁰⁰ See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1288 (2005).

¹⁰¹ The fiscal note process indicates that for states in which sentencing commissions do not issue fiscal notes or sentencing commissions do not exist, existing processes can still be leveraged, if only for the comparably inefficient dollars-and-cents PAYGO described above.

¹⁰² See Daniel F. Wilhelm, *Sentencing Policy in Tough Budget Times: What Are States Doing*, VERA INST. OF JUST. 12–14 (2003) (discussing the projections produced by sentencing commissions in North Carolina and Kansas in light of state budget shortfalls).

¹⁰³ *Id.* at 13.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 14.

¹⁰⁶ See *id.* at 13.

¹⁰⁷ McNichol et al., *supra* note 99, at 2.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1–2.

government have often manipulated facially neutral instruments for discriminatory or otherwise inadvisable ends,¹¹⁰ and criminal sentencing PAYGO is no panacea to these inclinations if a neutral body is not involved in making projections.

3. *The Waiver Problem and Potential Solutions*

Waiver is perhaps the largest procedural hurdle to criminal sentencing PAYGO's workability. According to the Center on Budget and Policy Priorities, a nonpartisan think tank, "PAYGO played a key role in helping reduce and then eliminate the deficit" between its adoption at the federal level in 1990 and the late 1990s.¹¹¹ Beginning in the late 1990s, Congress began regularly "waiving PAYGO in response to the booming economy and several years of budget surpluses. In 2001 they waived PAYGO enforcement and approved very large tax cuts without offsets—a sharp departure from PAYGO discipline. This set the stage for other PAYGO exceptions."¹¹² Most notably, Congress let PAYGO lapse in 2002, before reinstating it in 2007.¹¹³ PAYGO has been on a cycle of instatement and lapse ever since.¹¹⁴ Worse still for the efficacy of PAYGO at the federal level, it does not apply to discretionary spending programs and its applicability to a particular piece of legislation may be waived by sixty senators and the majority of the House of Representatives (which is functionally what is required to pass most pieces of legislation that do not pass through the budget reconciliation process).¹¹⁵ In short, federal PAYGO is too easily waivable

¹¹⁰ See, e.g., Philip Shabecoff, *Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate*, N.Y. TIMES (Nov. 7, 1981), <https://www.nytimes.com/1981/11/07/us/reagan-order-on-cost-benefit-analysis-stirs-economic-and-political-debate.html> [<https://perma.cc/V2YM-D56D>] ("There is broad agreement that the [use of cost-benefit analysis formulas in policymaking] can be manipulated by choosing numbers that will produce the desired results." (alteration in original)); *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019) (finding that the Department of Commerce attempted to include a citizenship question on the United States Census that would suppress the response rate of noncitizens, thereby reducing federal funds, which are distributed based on state population).

¹¹¹ *The "Pay-As-You-Go" Budget Rule*, CTR. ON BUDGET & POL'Y PRIORITIES (Aug. 12, 2019), <https://www.cbpp.org/sites/default/files/atoms/files/policybasics-paygo.pdf> [<https://perma.cc/G4UZ-GHXB>].

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ In 2007, Congress reinstated PAYGO as a procedural rule, and in 2010, reinstated it as law. *Id.* Following the 2010 midterms, the newly Republican House of Representatives repealed its internal PAYGO procedure. *Id.* The House then reinstated the internal procedure in 2019. *Id.* The current federal PAYGO scheme is the result of internal House and Senate rules, as well as statute. See *FAQs on PAYGO*, *supra* note 82.

¹¹⁵ See *The "Pay-As-You-Go" Budget Rule*, *supra* note 111 (describing this voting rule); *Why Is a Simple Majority Usually Not Enough to Pass a Bill in the Senate?*, CBS NEWS (July 18, 2017, 6:41 PM), <https://www.cbsnews.com/news/>

for a simple cut-and-paste adoption of its structure to be efficacious. Confronting this problem is a major issue if criminal sentencing PAYGO is to capture the tradeoff benefits of a system like Minnesota's presumptive sentencing guidelines.

But there is nothing inherent to PAYGO which mandates that all subsequent adaptations of similar rules must suffer from this maladaptation. For one thing, state-level adoption of PAYGO would be most effective if passed through statute, rather than through procedural rules which are only binding on a certain chamber for as long as that chamber agrees to be bound.¹¹⁶ This would dovetail nicely with one of the primary advantages of criminal sentencing PAYGO—giving lawmakers a scapegoat for their inability to raise criminal sentencing. One of criminal sentencing PAYGO's projected virtues is the ability for lawmakers to say to their constituents, "I would increase criminal sentences if I could, but the laws we passed to save the state budget will not allow it."¹¹⁷ The more ironclad a PAYGO measure is, the more effective it is as a political deflection.

why-is-a-simple-majority-usually-not-enough-to-pass-a-bill-in-the-senate [https://perma.cc/75UY-QPGA] (noting the effective supermajority requirement for non-reconciliation bills and outlining the reconciliation process).

¹¹⁶ To take just one illustrative example, in the United States Senate, operating procedure may be changed by amendment of the Senate's standing rules, creation or amendment of a standing order, unanimous consent, establishment of a new procedure through practice, suspension of the rules, or informal voluntary agreement. See CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., EIGHT MECHANISMS TO ENACT PROCEDURAL CHANGE IN THE U.S. SENATE 1–2 (2020), <https://sgp.fas.org/crs/misc/IN10875.pdf> [https://perma.cc/6GCK-TYAM]. Of course, procedure may also be modified through statute or constitutional amendment, see *id.* at 2, as I advocate for in the present case. One additional reason that non-statutorily codified procedural rules are easier to amend than statutes or the Constitution is that non-statutory procedural rules need not pass through bicameralism and presentment. See *id.*

¹¹⁷ This is, of course, not to advocate for the ethical or policy-level wisdom of such statements, but to reflect the sorts of statements and attitudes about criminal law reforms that are commonplace in contemporary electoral politics, where budgetary concerns can provide political cover for decarceral policies while speakers simultaneously highlight their "tough-on-crime" bona fides. See, e.g., *Rising Prison Costs: Restricting Budgets and Crime Prevention Options: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 32–49 (2012) (statement of Brett L. Tolman, Shareholder, Ray Quinney & Nebeker, PC) (remarking that the speaker is not "soft on crime" but that Bureau of Prison expenditures are eating into the "budget flexibility for prosecutors," so advocating for "additional diversion and treatment capacity" as part of "hard and tough law enforcement policies"); Ronnie Ellis, *How a 'Tough-on-Crime' State Became Smart on Crime*, CRIME REP. (Apr. 18, 2011), <https://thecrimereport.org/2011/04/18/2011-04-how-a-tough-on-crime-state-became-smart-on-crime> [https://perma.cc/97BU-Y4XE] (describing the lobbying campaign for progressive criminal law reforms passed in Kentucky in 2011, including a closed-door conversation with a Kentucky House committee chairman in which the legislator reportedly asked "[y]ou're not asking us to vote for being soft on crime, are you?" to which the lobbyist responded, "[the bill] is not soft on crime; it's smart on crime" in view of Kentucky's budget shortfalls (alteration in original)). For an example of the power of tough-on-crime rhetoric, even among some civil rights leaders, see MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES

Criminal sentencing PAYGO could be bolstered as compared to federal budgetary PAYGO by enshrinement in state constitutions, or (in those jurisdictions that allow it) by statutory adoption that then governs future budgetary processes. A model, of a sort, can be drawn from a minority of states which require a supermajority to raise revenue. Sixteen states require such a supermajority—seven as a result of state constitutions with resulting applicability to every piece of tax legislation, and nine with a more limited, nonconstitutional, scope.¹¹⁸ These supermajority requirements were a salient feature of Newt Gingrich’s “Contract With America” ahead of the 1994 midterm elections.¹¹⁹ Even in states where constitutional amendment would be necessary to make a budgetary rule nonwaivable, it is worth noting that many of those states allow constitutional amendments through simple majority votes of state legislative chambers and the state’s citizens.¹²⁰ And, relatively speaking, state constitutional amendments are easy to adopt—of 1,116 state constitutional amendments put to voters between 2006 and 2022, 804 (72.04%) were adopted.¹²¹

One could justifiably ask whether, presuming the political will exists to pass statutory PAYGO or a state constitutional amendment, it would not be wise to seek more “radical” reforms instead. First, criminal sentencing PAYGO sets a cap on spending or “sentence time” incident to criminal sentencing indefinitely, and so it is a weighty decarceral policy in its own right. If enacted, criminal sentencing PAYGO could be

292 (2d ed. 2006). Davis recounts an interview in the now-defunct San Francisco Focus with Dr. Harry Edwards, the civil rights activist, former Black Panther, and architect of the 1968 Olympics Black Power protest. During a time of increased fear about gang-related violence in Southern California, in response to the question “what do you do if you’re a parent and you discover your 13-year-old kid is dealing crack?” Edwards said “Turn him in, lock him up. Get rid of him. Lock him up for a *long* time. As long as the law will allow, and try to make it as long as possible. I’m for locking ‘em up, gettin[g] ‘em off the street, put ‘em behind bars.” *Id.* (alteration in original).

¹¹⁸ *State Supermajority Rules to Raise Revenues*, CTR. ON BUDGET & POL’Y PRIORITIES 1 (Feb. 5, 2018), <https://www.cbpp.org/sites/default/files/atoms/files/PolicyBasics-StateSupermajorities-4-22-13.pdf> [<https://perma.cc/N2Y3-4MW2>]. In Arkansas, for instance, the supermajority requirement is only applicable “when increasing taxes that were in place when the rule was enacted in 1934.” Michael Leachman, Nicholas Johnson & Dylan Grundman, *Six Reasons Why Supermajority Requirements to Raise Taxes Are a Bad Idea*, CTR. ON BUDGET & POL’Y PRIORITIES 12 (Feb. 13, 2012), <https://www.cbpp.org/sites/default/files/atoms/files/2-13-12sfp.pdf> [<https://perma.cc/HZC4-ZM8J>]. Therefore, sales and alcohol taxes in Arkansas are not subject to a supermajority requirement. *Id.*

¹¹⁹ The House Republicans, led by Gingrich, proposed this supermajority requirement at the federal level. John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 483 (1995).

¹²⁰ See *Amending State Constitutions*, BALLOTEDIA, https://ballotpedia.org/Amending_state_constitutions [<https://perma.cc/B2HG-BTTN>] (describing each states’ constitutional amendment processes).

¹²¹ *Id.*

a widespread, quickly-felt policy change that takes years off of prison sentences—years which those in prison could instead spend with loved ones and in their communities. Second, criminal sentencing PAYGO is a policy that can be pitched to different audiences, including budget hawks¹²² and advocates for criminal reform, and can therefore plausibly pass without the sort of supermajorities that “radical” legislation would require. Third, criminal sentencing PAYGO does not preclude other decarceral policies.

C. Criminal Sentencing PAYGO and Political Plausibility

A skeptical observer would likely argue that PAYGO for criminal sentencing may be an intellectual head-scratcher and political nonstarter: One might presume (as more of a ready-at-hand heuristic than an empirical fact) that political institutions have little incentive to tie their own hands, thereby relinquishing their own power. It is, of course, within any legislature’s capacity to pass stricter or laxer criminal punishment schemes at times of their choosing, so one could reasonably ask why a political branch would opt to limit itself in this manner. At the same time, crime is a perennial political wedge issue and appearing “soft” on crime can be politically calamitous.¹²³ Passing criminal sentencing PAYGO could make legislative advocates look “soft” in the eyes of detractors in comparison to hardline challengers. Turning

¹²² For a representative example of this political strand, see Bruce Ledewitz, *This Is the Right Moment for the Democrats to Run a Fiscal Hawk*, PA. CAPITAL-STAR (Aug. 2, 2022), <https://www.penncapital-star.com/commentary/this-is-the-right-moment-for-the-democrats-to-run-a-fiscal-hawk-bruce-ledewitz> [<https://perma.cc/J6A8-EL4T>] (urging, from the pages of a Harrisburg, Pennsylvania op-ed page, for Democrats to run on a budget-focused platform).

¹²³ See, e.g., *Exit Polls 2022*, NBC NEWS (Nov. 8, 2022), https://www.nbcnews.com/politics/2022-elections/exit-polls?icid=election_nav [<https://perma.cc/A3T6-A8D5>] (indicating that 11% of 2022 midterm voters polled rated “crime” as the “issue[] [that] mattered most in deciding how [they] voted,” placing it in a tie for the third-most politically salient issue polled (alteration in original)); *id.* (showing that 52% of midterm voters polled trusted the comparatively hardline Republican Party to better “handle the issue of crime,” in comparison to 43% favoring the Democratic Party); Rachel E. Barkow & Kathleen M. O’Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1982 (2006) (documenting “[o]rganized groups [that] lobby for increased and mandatory penalties,” including prosecutors, victims’ rights groups, private prison companies, prison employees’ unions, rural advocacy groups, and the National Rifle Association, in addition to the general “dispersed public” (alteration in original)). For more academic work not grounded in contemporary polling data, see Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 87 AM. ECON. REV. 270, 270 (1997) (tracing politicians’ fear of “soft” on crime perception by finding that “[i]ncreases in the size of police forces are . . . disproportionately concentrated in mayoral and gubernatorial election years”); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 730–35 (2005) (identifying political incentives for harsher sentencing laws).

to these arguments in turn, it appears that criminal sentencing PAYGO is more intellectually and politically plausible than some critics would believe.

1. *Legislative Self-Limitation*

The creation of state-level sentencing commissions across America presents a similar, though not identical, puzzle: Why would a political branch delegate this uniquely politically powerful subject matter to a dispassionate body? States now widely use sentencing commissions: At least thirty-four jurisdictions have, or have had, sentencing commissions, most of which have promulgated sentencing guidelines.¹²⁴

Criminal sentencing PAYGO could directly appeal to legislators for a similar reason that sentencing guidelines and other criminal justice reforms have gained traction in recent years—since the 1990s, and to an even greater extent after the Great Recession and COVID-19 pandemic, states and localities have been in extreme budget turmoil.¹²⁵ As Professor Barkow notes, “recent sentencing reforms coincide with state efforts to cope with budget woes,” in large part because 1990s-era “get-tough policies led state spending on corrections to double from \$17.2 billion to almost \$35 billion.”¹²⁶ Indeed, some sentencing commissions “have been successful in tempering immediate political pressures for increased sentences by generating data on the costs of the proposals,” as

¹²⁴ Barkow & O’Neill, *supra* note 123, at 1978, 1994. The rise of sentencing commissions is made more impressive by the fact that the first of these institutions appeared in 1978, meaning that this new form of governance extended to a sizeable majority of American states in less than thirty years. *Id.* at 1994.

¹²⁵ See Barkow, *supra* note 100, at 1287 (“Examples abound of legislators emphasizing fiscal concerns in their newfound support for reduced sentencing.”); Juliene James, Ram Subramanian & Lauren-Brooke Eisen, *Fiscal Constraints Spur New Corrections Policies*, VERA INST. (Mar. 27, 2013), <https://www.vera.org/news/fiscal-constraints-spur-new-corrections-policies> [<https://perma.cc/UM5T-7XGZ>] (examining how the Great Recession era fiscal crisis “accelerated [state] efforts at large-scale reforms with the aim of overhauling expensive, ineffective sanctioning policies and incorporating data-driven policies and programs” (alteration in original)); Anshu Siripurapu & Jonathan Masters, *How COVID-19 Is Harming State and City Budgets*, COUNCIL ON FOREIGN RELS. (Mar. 19, 2021, 11:47 AM), <https://www.cfr.org/background/how-covid-19-harming-state-and-city-budgets> [<https://perma.cc/P9FN-8PZ8>] (“A distressing combination of dwindling tax revenues, record unemployment, and rising health costs have pushed [state and local governments] to cut back on spending for infrastructure and education Some still bear the scars of the 2008 financial crisis, which forced painful spending cuts to public services.”).

¹²⁶ Barkow, *supra* note 100, at 1287. For one interesting example of creative revenue enhancements to limit the fallout from overspending on the criminal justice system, see SARA DEUSTER, UNIV. OF KY. JAMES W. MARTIN SCH. OF PUB. POL’Y, SUNSET PROVISIONS IN THE LOCAL TAX CODE: BEST PRACTICES 11 (July 2022) (describing how “[i]nsufficient resources to fund the criminal justice system led to Yakima County [Washington] asking residents to approve a five-year . . . earmarked sales and use tax for criminal justice purposes”). Collection of the tax is slated to begin in 2023. *Id.*

“most sentencing commissions are required to produce resource impact statements or fiscal notes that alert the legislature to how a particular sentencing proposal will affect corrections resources.”¹²⁷

Criminal sentencing, as a political matter, is both salient and an ostensible one-way ratchet. But when weighed against budget strictures which have resulted in “softening” of the criminal justice system at the margins, a rational legislator may see the imposition of a system which ties the legislators’ hands as proverbial manna from heaven. If constructed with real teeth to stifle circumvention, a legislator could point to criminal sentencing PAYGO as the procedural brake and culprit behind her inability to maximize criminal sentencing in accord with punitive backlash—all the while being more likely able to campaign on her efforts to reduce government spending and keep the state’s fiscal house in order.

By analogy, the federal statutory PAYGO scheme (which, as explained above, is quite different in operation from the scheme this Note proposes), recently resulted in a legislative scramble to stave off more than \$100 billion in automatic cuts to Medicare.¹²⁸ Putting the wisdom and normative valence of such cuts to one side, funneling them through the PAYGO system makes such large-scale spending decreases more politically palatable than facial attacks on Medicare, given the popularity of Medicare and the relative inability of the average news consumer to effectively follow cuts which derive from more arcane statutory obligations.¹²⁹

¹²⁷ Barkow, *supra* note 100, at 1288. In states which require commissions to issue impact statements or fiscal notes, the path to criminal sentencing PAYGO is clear, and would require little in the way of additional institution-building. The impact statements or fiscal notes could essentially be given binding effect. Criminal sentencing PAYGO would demand only that if increases are made, decreases in equal or greater value also be made, as tallied by the reporting state sentencing commission, which is in any case often obligated to prepare such a report.

¹²⁸ See Lindsey McPherson & Aidan Quigley, *Both Parties Claim Wins in Massive Omnibus Spending Bill*, ROLL CALL (Dec. 20, 2022, 4:48 AM), <https://rollcall.com/2022/12/20/both-parties-claim-wins-in-massive-omnibus-spending-bill> [<https://perma.cc/752F-MJMY>].

¹²⁹ See James E. Dalen, Jennifer L. Plitt, Neha Jaswal & Joseph S. Alpert, *An Alternative to Medicare for All*, 132 AM. J. MED. 665, 666 (2019) (“In 2017, 82% of Americans said in a Pew Research poll that they do not trust the US federal government. Yet, polls of Americans are strongly supportive of Medicare, even though it is mandatory and administered by the federal government.”); WILLIAM A. GALSTON, BROOKINGS INST., WHY PRESIDENT BUSH’S 2005 SOCIAL SECURITY INITIATIVE FAILED, AND WHAT IT MEANS FOR THE FUTURE OF THE PROGRAM 2 (2007), <https://www.brookings.edu/wp-content/uploads/2016/06/20070921.pdf> [<https://perma.cc/3F4P-ZGYL>] (remarking that with Social Security, an entitlement program with similar political dynamics to Medicare, “the more [President Bush] talked about Social Security [privatization], the more support for his plan declined. . . . [P]ublic disapproval of President Bush’s handling of Social Security rose by 16 points from 48 to 64 percent—between his State of the Union address and June.” (alteration in original)).

Straightforward cuts to popular programs (like, unfortunately, long prison sentences) are accordingly less popular and easier to mobilize against than harder-to-understand cuts. Increased political capital for delivering budget cuts is therefore perhaps *more likely* in a system in which legislators preclude themselves from the ability to follow the short-term electoral desire to increase criminal sentences.

2. *The “Soft on Crime” Label*

Additionally, it is unclear that changes to lawmaking procedures would make individual legislators appear “soft” on crime. For one thing, inadvisable as such decisions may be on other grounds, criminal sentencing PAYGO would do nothing to stop political officials from pursuing other avenues traditionally associated with a “tough-on-crime” mentality.¹³⁰

At a greater level of abstraction, voters would perhaps be as likely to view criminal sentencing PAYGO-supporting legislators as “tough on budget” as “soft on crime.” The imposition of certain budgetary procedures does not appear to correlate with changes in public perception regarding legislators’ relationship with apparently-affected and politically salient issues. For example, the political cognoscenti have wrung their hands over former House Speaker Nancy Pelosi’s long-standing support for congressional PAYGO.¹³¹ Despite this attention to her and her party’s commitment to PAYGO, there is not a widespread correlative perception that Nancy Pelosi in particular or Democrats in general harbor animosity toward government spending, as, in fact, the Democratic Party is largely associated with support for increased

¹³⁰ One could think of near-endless possibilities for politicians to further express their tough-on-crime bona fides, including lower wages for prison labor, increased use of solitary confinement, greater restrictions on offenders’ post-confinement work prospects, etc. See, e.g., Levitt, *supra* note 122 (explaining how incumbent politicians are incentivized to increase police force size to indicate their tough-on-crime mentality); Mariana Richter, Barbara Ryser & Ueli Hostettler, *Punitiveness of Electronic Monitoring: Perception and Experience of an Alternative Sanction*, 13 EUR. J. PROB. 262, 270–71 (2021) (describing the use of electronic monitoring as a means of control that inflicts social, financial, and physical harms).

¹³¹ Robert B. Bluey, *Pelosi’s PAYGO Ploy*, HERITAGE FOUND. (Oct. 14, 2010), <https://www.heritage.org/budget-and-spending/commentary/pelosis-paygo-ploy> [<https://perma.cc/Z45V-7465>] (“PAYGO has become a gimmick House Speaker Nancy Pelosi . . . has used repeatedly to provide cover to her liberal allies.”); Ari Rabin-Havt, *Austerity Kills. PAYGO Must Go.*, JACOBIN (Dec. 14, 2020), <https://jacobin.com/2020/12/austerity-paygo-nancy-pelosi-democrats-biden> [<https://perma.cc/49KT-PC4G>] (“PAYGO . . . is one of the worst legacies of Nancy Pelosi’s speakership.”); Greenstein, *supra* note 89 (“Pelosi expressed interest in replacing CUTGO with PAYGO if Democrats regained the House. . . . PAYGO should prove useful—and could even prove crucial—to advancing key parts of [a progressive] agenda” (alteration in original)).

federal spending and expansion of the social safety net.¹³² Similarly here, it is not pellucid that support for a particular budgeting process would significantly impact popular perception regarding individual lawmakers', or a party's, relationship toward "crime" as a rhetorically-constructed subject of political contestation.

D. *Defusing Revanchist Responses and Perverse Incentives*

A potential critique¹³³ of criminal sentencing PAYGO is that state legislators could use the program to decrease sentences for crimes disproportionately committed by hegemonic groups¹³⁴ while increasing sentences for crimes disproportionately committed by underprivileged groups. This would frustrate a central purpose of criminal sentencing PAYGO, which is designed to utilize state legislative budget procedures to the benefit, not detriment, of marginalized communities. However, underlying crime data suggests that this well-meaning concern has the potential to distort the conversation about practical criminal justice reforms.

In viewing the potential for sentencing disparities across the economic axis, it is important to note that "persons living in poor households at or below the Federal Poverty Line . . . had more than double the rate of violent victimization as persons in high-income households" and crimes against impoverished individuals are disproportionately likely to have been committed by a non-stranger, whether an intimate partner, familial relative, or an acquaintance.¹³⁵ The relationships between the disproportionately high rate of violent

¹³² For a year-to-year comparison of Democratic Party member views on federal spending, see *Little Public Support for Reductions in Federal Spending*, PEW RSCH. CTR. 3 (Apr. 11, 2019), <https://www.pewresearch.org/politics/2019/04/11/little-public-support-for-reductions-in-federal-spending> [<https://perma.cc/PL3K-ZSKQ>] (finding plurality Democratic support for increasing spending in almost all politically salient topic areas, except for defense spending and anti-terrorism spending).

¹³³ America's history of racism is long and multifaceted, often taking new forms in response to external events and policy developments. This Section could not possibly predict every way in which this could occur, but it attempts to raise a relatively foreseeable response to criminal sentencing PAYGO and to deconstruct it. One could also imagine local prosecutors defying the PAYGO system by charging certain crimes at rates unanticipated by sentencing commissions when making their projections. For an analysis of this so-called "correctional free lunch" problem, see *infra* Section IV.B.

¹³⁴ For purposes of this Note, "hegemonic groups" means groups which benefit from comparative privilege in American society—namely upper to upper-middle class and white individuals.

¹³⁵ See ERIKA HARRELL, LYNN LANGTON, MARCUS BERZOFKY, LANCE COUZENS & HOPE SMILEY-MCDONALD, *HOUSEHOLD POVERTY AND NONFATAL VIOLENT VICTIMIZATION, 2008–2012*, at 1, 3 (Nov. 2014), <https://bjs.ojp.gov/content/pub/pdf/hpnnv0812.pdf> [<https://perma.cc/UA45-JLCL>].

victimization of poor individuals, combined with the disproportionate rates at which they personally know their offender, support the long-standing notion in criminology that poverty is a major contributor to one's likelihood to commit crime.¹³⁶ Indeed, abolitionist solutions to injustices in the criminal justice system largely proceed from the notion that crime can be greatly reduced or abolished through better care for impoverished individuals through a more expansive social safety net and more funding for public education, to name just two examples.¹³⁷ In turn, hegemonic economic groups are disproportionately likely to commit crimes that, broadly speaking, stem from their position of relative economic power: white-collar crimes.¹³⁸

But it is important to remember that criminal sentencing PAYGO is a *state-level* reform. White-collar crimes, which could theoretically be used as a decreasing lever so state legislators could increase sentences for crimes disproportionately committed by the poor, are much more

¹³⁶ See, e.g., Pablo Fajnzylber, Daniel Lederman & Norman Loayza, *Inequality and Violent Crime*, 45 J.L. & ECON. 1 (2002) (“Crime rates and inequality are positively correlated within countries and, particularly, between countries, and this correlation reflects causation from inequality to crime rates, even after controlling for other crime determinants.”). Marxist theory, from which abolitionism draws some of its intellectual tradition, posits a necessary correlation between economic class and crime rates, as crime is imposed by the dominant class to criminalize the proletariat. See Karl Marx, *Population, Crime, and Pauperism*, N.Y. DAILY TRIB., Sept. 16, 1859, at 6 (“Violations of the law are generally the offspring of economical agencies beyond the control of the legislator, but . . . it depends to some degree on official society to stamp certain violations of its rules as crimes or as transgressions only. . . . Law itself may not only punish crime, but improvise it.”). For an abolitionist embrace of the correlation between class and crime rates, see Mariame Kaba, *So You're Thinking About Becoming an Abolitionist*, MEDIUM (Oct. 30, 2020), <https://level.medium.com/so-youre-thinking-about-becoming-an-abolitionist-a436f8e31894> [<https://perma.cc/V6UJ-85FM>] (“Research and common sense suggest that economic precarity is correlated with higher crime rates.”).

¹³⁷ See Keeanga-Yamahtta Taylor, *The Emerging Movement for Police and Prison Abolition*, NEW YORKER (May 7, 2021), <https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition> [<https://perma.cc/TJ44-ERH7>] (“[Abolitionists] have a fundamental understanding that crime is a manifestation of social deprivation and the reverberating effects of racial discrimination, which locks poor and working-class communities of color out of schooling, meaningful jobs, and other means to keep up with the ever-escalating costs of life in the United States.” (alteration in original)).

¹³⁸ See *Quick Facts: Securities and Investment Fraud Offenses*, U.S. SENTENCING COMM'N (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Securities_Fraud_FY22.pdf [<https://perma.cc/8436-BRWZ>] (reporting that in Fiscal Year 2021, 96.5% of securities and investment offenders were men, 87.2% had no criminal history or little criminal history, and 31.9% of such crimes were committed by officers or directors of publicly traded companies, brokers, dealers or advisors); Michael L. Benson & Kent R. Kerley, *Life Course Theory and White-Collar Crime*, in CONTEMPORARY ISSUES IN CRIME AND CRIMINAL JUSTICE: ESSAYS IN HONOR OF GILBERT GEIS 121, 130 (Henry N. Pontell & David Shichor, eds., 2001) (finding that, relative to those who commit “street” crimes, perpetrators of white-collar crimes were more than twice as likely to be married, more than five times as likely to have a college degree, and more than eight times more likely to have assets over \$10,000).

likely than other crimes to be charged federally than at the state level.¹³⁹ Any sentencing commission projection upon which criminal sentencing PAYGO reform would be based would logically have to factor in the relative rates of non-prosecution at the state level for such crimes. Therefore, even if obstinate state legislators wanted to utilize such crimes as a decreasing lever, there would be little they could gain from this strategy. The kinds of crimes that are more likely to be prosecuted at the state level are those that are disproportionately committed by those of lower socioeconomic backgrounds—these crimes would likely have to be on *both sides* of a sentencing PAYGO reform, not just one side to the benefit of those from more privileged classes.

One of the most despicable facets of America's historical lineage and present-day instantiation of institutional racism is the degree to which the racial wealth gap has made Black people and other marginalized racial groups disproportionately poor, and white people disproportionately wealthy.¹⁴⁰ Following from abolitionists' and criminologists' insight that poverty is perhaps *the* main driver of crime rates, it is unfortunately the case that Black Americans are also disproportionately arrested for so-called "street" crimes,¹⁴¹ while white Americans are disproportionately arrested for white-collar crimes

¹³⁹ For example, murder is a crime over which the states have almost exclusive jurisdiction. But federal prosecutors may charge a white-collar crime "if it involves a federal agency, if it crossed state lines, or if it involved the banking system in any way." *Is White-Collar Crime Handled in Federal or State Court?*, SIMMRIN L. GRP., <https://www.simmrinlawgroup.com/faqs/is-white-collar-crime-handled-in-federal-or-state-court> [<https://perma.cc/JS8E-EZVC>]. In part because internet communications are routed through interstate wires, federal authority over white-collar cases is quite sweeping. See 18 U.S.C. § 1343 (criminalizing schemes to defraud or obtain property by means of false pretenses "by means of wire, radio, or television communication in interstate or foreign commerce" (emphasis added)); *United States v. Hoffman*, 901 F.3d 523, 546 (5th Cir. 2018) ("An interstate email . . . can serve as the necessary wire . . ."); *id.* at 546 n.12 ("With today's rampant use of email and other technology that often crosses state lines, it will usually not be hard to identify scores of wires that further a scheme."); *United States v. Selby*, 557 F.3d 968, 979 (9th Cir. 2009) (finding that the forwarding of one email was "sufficient to establish the element of the use of the wires in furtherance of the scheme").

¹⁴⁰ See Artika R. Tyner, *The Racial Wealth Gap: Strategies for Addressing the Financial Impact of Mass Incarceration on the African American Community*, 28 GEO. MASON L. REV. 885, 899 ("A conversation on the racial wealth gap that leaves out the role of mass incarceration is incomplete. For decades, African Americans have been disproportionately impacted by higher rates of arrest, convictions, and harsher, extended sentencing. This has led to missed opportunities for economic growth and wealth creation . . .").

¹⁴¹ See 2019: *Crime in the United States*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-43> [<https://perma.cc/A7GL-Z3QL>] (providing crime arrest data across demographic groups); see also *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045222> [<https://perma.cc/3ATF-45HG>] (providing baseline numbers of racial composition in the United States).

that are more likely to be committed by America's wealthy classes.¹⁴² As a result, the concern that criminal sentencing PAYGO would be used to accelerate criminal sentences against Black people and other marginalized groups in the criminal justice system is likely unfounded. Of course, racism in America is as old as America itself. No policy-oriented reform in the criminal justice system is a panacea for America's long history and present-day re-entrenchment of institutional racism. It is important also to note that sentences for "street" crimes are already higher than for other crimes.¹⁴³ This suggests first that the problem of increasing sentences for "street" crimes to reduce them for "white

¹⁴² See CYNTHIA BARNETT, FBI, THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME REPORTING (UCR) DATA 5 (2021), https://ucr.fbi.gov/nibrs/nibrs_wcc.pdf [<https://perma.cc/T3VX-P3LB>] (reporting that, based on crime data from the turn of the twentieth century, "[t]he majority of white-collar crime offenders are white males"). The demographic result is impacted by which "white-collar crime" one looks at, as a wide range of criminal offenses can fit under this generic categorization. This Section means only to provide a general overview, especially as crime offense data will inevitably vary from state to state.

¹⁴³ See George Pierpont, *Is White-Collar Crime Treated More Leniently in the US?*, BBC (Mar. 11, 2019), <https://www.bbc.com/news/world-us-canada-47477754> [<https://perma.cc/M2QS-28SX>] (reporting that judges frequently sentence white-collar criminals below the suggested range by the federal sentencing guidelines and that white-collar criminals often receive a "break" under the sentencing guidelines for being first-time offenders); see also Frank O. Bowman, III, *Nothing Is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 FED. SENT. RPT. 5, 7 (2012) (reporting the average federal sentence for fraud as 22.7 months, whereas that figure was 70.2 months for drug trafficking and 82.7 months for firearm crimes in the same period); John Gramlich, *U.S. Public Divided over Whether People Convicted of Crimes Spend Too Much or Too Little Time in Prison*, PEW RSCH. CTR. (Dec. 6, 2021), <https://www.pewresearch.org/short-reads/2021/12/06/u-s-public-divided-over-whether-people-convicted-of-crimes-spend-too-much-or-too-little-time-in-prison> [<https://perma.cc/4LMS-YTS2>] (detailing the relatively small sentences that fraud convictions receive in comparison to other crimes). It is difficult to adequately compare "street" and "white collar" sentences in part because specific crimes within these broad categories may not be adequate comparators to one another (for instance, comparing sentencing guidelines for murder versus embezzlement would not be a fair comparison). A comprehensive analysis of these relationships is outside the scope of this Note. However, prior empirical research studying attitudes about sentencing for robbery (street crime) and fraud (white-collar crime) have linked those particular crimes as relevant comparators. See Andrea Schoepfer, Stephanie Carmichael & Nicole Leeper Piquero, *Do Perceptions of Punishment Vary Between White-Collar and Street Crimes?*, 35 J. CRIM. JUST. 151 (2007) (studying the perceptual relationship between these crimes and sentencing length). Taking these crimes as just one example, in New York State, the sentence for first degree robbery is a minimum of five years imprisonment and a maximum of twenty-five years. See N.Y. PENAL L. § 160.15 (describing first degree robbery as a class B felony); *id.* § 70.00(2)(b), § 70.02(1)(a), § 70.02(3)(b) (setting sentencing guidelines for first degree robbery as a class B violent felony). Meanwhile, the sentence for first degree scheme to defraud in New York State carries a maximum of four years in prison. See *id.* § 190.65 (describing scheme to defraud as a class E felony); *id.* § 70.02(3)(d) (setting a maximum sentence for nonviolent class E felonies). This sentence length is less than third degree robbery. See *id.* § 160.05 (setting third degree robbery as a class D felony); *id.* § 70.02(3)(c) (setting a maximum sentence for class D felonies of seven years).

collar” crimes is not unique to criminal sentencing (if increases in “street” penalties could even be offset at the state level by reductions in “white collar” sentences, which seems unlikely for the reasons articulated above).

Simply put and broadly speaking, the class of crimes most likely to be committed disproportionately by privileged classes in society are white-collar crimes, and those crimes are unlikely to significantly affect criminal sentencing PAYGO calculations at the state level, because these crimes are predominantly charged in the federal system. To the extent some violations are charged under state fraud statutes, for example, rates of prosecution and comparatively low sentences make sentencing reduction in such crimes an ineffective method to increase sentences for other crimes under criminal sentencing PAYGO.

IV

PAYGO AND CRIMINAL SENTENCING: APPLYING LESSONS TO REDUCE MASS INCARCERATION

A PAYGO scheme for criminal sentencing would be modeled such that an increase in criminal sentences in one area would be met with corresponding criminal sentencing reductions in another area (by an equal or greater amount). This Part proceeds by examining two classes of benefits from such a system: democratic benefits and criminal justice benefits. Criminal sentencing PAYGO is a system designed to reduce criminal sentences which disproportionately affect marginalized communities, thereby addressing America’s uniquely punitive criminal system. It does so by leveraging the public will for decarceration while cabining the most reflexive punitive responses of legislatures. As a result, the system creates both democratic and criminal justice system benefits, which are explored below. This Part will also explore peculiarities of the criminal justice system which pose unique challenges to criminal sentencing PAYGO.

A. *Democratic Benefits*

Other proposals to counteract political incentives in criminal justice rely on the idea that voters and/or their representatives should have little voice in the process, given the American predilection toward punitiveness in criminal affairs.¹⁴⁴ Given the long history of American punitiveness, resulting in disparate outcomes for racial and economic

¹⁴⁴ See BARKOW, *supra* note 68, at 1 (“[W]e would get inferior outcomes [in specialized areas like criminal law] if . . . we relied upon the emotional preferences of the body politic or politicians’ intuitive guesses about what is likely to work.”); Tonry, *supra* note 65, at 156

subclasses, the archetypal *Carolene Products* groups, this desire to move away from legislative control is understandable. But as the basis for reforms to criminal justice policy, this line of thinking is impracticable and legally vulnerable.

Approaches rooted in reinterpretations of constitutional provisions in federal courts are impracticable, precisely because the Supreme Court has indicated an unwillingness to fully utilize the Eighth Amendment as a check on excessively long sentences.¹⁴⁵ While in ordinary parlance a life sentence without parole may be “cruel and unusual,” and while such a sentence is largely unique among Western democracies,¹⁴⁶ it has not been deemed legally problematic under the Constitution.¹⁴⁷ Given the ideological slant of the current Supreme Court, it is unclear why this would cease to be the case anytime soon.

Approaches rooted in increased powers for expert agencies, as Professor Barkow and Judge Frankel support,¹⁴⁸ are also legally vulnerable. Federal courts, and the Supreme Court in particular, have

(describing Judge Frankel’s view that political considerations make legislatures unable to develop well-considered criminal justice policy).

¹⁴⁵ Theoretically, the Eighth Amendment prevents punishments which are disproportionately long relative to the underlying crime. *See* *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (holding that the Eighth Amendment is directed “against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charges” (quoting *Weems v. United States*, 217 U.S. 349, 371 (1910))). But in practice, proportionality review is not robust. *See, e.g.*, *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding a life sentence for possession of 672 grams of cocaine); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding a fifty-year sentence imposed by a three-strikes rule triggered by the theft of \$150 worth of videotapes).

¹⁴⁶ *See* GOTTSCHALK, *supra* note 10, at 171 (“The extensive use of [life without parole] and life sentences in the United States stands in sharp contrast with practices in other developed democracies. In much of Europe, all prisoners ‘are in principle regarded as worthy of consideration for release.’” (quoting Dirk van Zyl Smit & Alessandro Corda, *American Exceptionalism in Parole Release and Supervision*, in *AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT* 441 (Kevin R. Reitz ed., 2017))). Meanwhile, in the United States, one out of every twenty-eight prisoners is serving life without parole. SENTENCING PROJECT, *STILL LIFE: AMERICA’S INCREASING USE OF LIFE AND LONG-TERM SENTENCES* 9 (2017).

¹⁴⁷ In *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court found life without parole sentences for juveniles to be unconstitutional, but there has been no similar finding for adults. *Cf.* *Graham v. Florida*, 560 U.S. 48, 79 (2010) (previously holding only that sentences of life without parole for juveniles convicted of *non-homicide* offenses are unconstitutional in violation of the Eighth Amendment). Circuit courts have encouraged the practice. *See, e.g.*, *United States v. Sierra*, 933 F.3d 95, 97 (2d Cir. 2019) (holding that mandatory minimum life sentences for defendants between ages eighteen and twenty-two do not violate the Eighth Amendment).

¹⁴⁸ *See* BARKOW, *supra* note 68, at 165 (“We need to establish expert agencies charged with instituting and evaluating criminal justice policies so that we get better outcomes.”); Tonyr, *supra* note 65, at 155–56 (“Judge Frankel argued that permanent administrative agencies would be much better situated than legislatures . . . to develop rational, evidence-based policies. An independent sentencing commission, he hoped, would be somewhat insulated from political pressures.”).

indicated a willingness to strip powers from independent agencies when they are overly insulated from political concerns.¹⁴⁹ This newfound interest manifests itself in the rediscovery of the nondelegation doctrine and a formalist prioritization of separation of powers concerns over functionalist administrability concerns.¹⁵⁰ State administrative law has also been hostile to the administrative state, particularly with regard to *Chevron* deference.¹⁵¹ The nondelegation doctrine poses a looming threat to the viability of reform centered on sentencing commissions, especially after *Gundy*.¹⁵²

A solution that runs through the legislative branch has other democratic benefits. Crime and punishment are among the issues voters care about the most, especially at the local level.¹⁵³ Undoing power to legislate about criminal issues could lead to further distrust of government, as voters would be effectively barred from participating through their representatives, which is the primary way most people take part in the political process.¹⁵⁴

Secondly, a criminal sentencing PAYGO scheme would do justice to the widespread urge to limit mass incarceration and the urge to increase criminal penalties in a particular area. As a result, crime waves would no longer be the tail wagging the dog of sentencing reform. A criminal sentencing PAYGO scheme would instead allow punitiveness to be

¹⁴⁹ See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010) (finding that an independent agency head with two levels of for-cause removal protection violated the Constitution); *Seila L. LLC v. CFPB*, 140 S. Ct. 2183 (2020) (finding an agency scheme unconstitutional where the agency was politically independent, wielded great power, powers were vested in a single agency head, and agency heads served five-year terms to avoid presidential control).

¹⁵⁰ See *supra* notes 45–54; *Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting) (arguing that too-vague powers granted to the Attorney General to determine which offenders must register for a sex offender registry violated the nondelegation doctrine). In a concurrence, Justice Alito indicated his willingness to back Justice Gorsuch's approach if the composition of the Court changed. *Id.* at 2131 (Alito, J., concurring).

¹⁵¹ See Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 *FORDHAM L. REV.* 555, 556–57 (2014) (“*Chevron* . . . has not been embraced with enthusiasm or consistency in state administrative law.”).

¹⁵² See *supra* notes 45–54 and accompanying discussion.

¹⁵³ See Megan Brennan, *Worry About Crime in U.S. at Highest Level Since 2016*, *GALLUP* (Apr. 7, 2022), <https://news.gallup.com/poll/391610/worry-crime-highest-level-2016.aspx> [<https://perma.cc/CH8L-RAH7>] (indicating that eighty percent of respondents worry about crime a “great deal” or “fair amount,” a finding which has been relatively consistent at least since 2001). See also *supra* note 4 for a discussion of the implications of crime fears on local politics.

¹⁵⁴ Jenny Oser, Jan E. Leighley & Ken Winneg, *People Who Participate ‘Beyond Voting’ Are Different*, *WASH. POST* (Dec. 28, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/12/28/people-who-participate-beyond-voting-are-different> [<https://perma.cc/4KZ5-4X3P>] (“Although only 50 to 60 percent of Americans vote in presidential elections . . . voting is still the most common form of political participation.”).

funneled into discrete policy areas without jeopardizing the maintenance of the system as a whole. Meanwhile, administrative systems which prioritize ending mass incarceration are vulnerable to popular backlash because they do not provide an escape valve for populist punitiveness. They attempt to address the problem by ignoring it, that is, by isolating policymaking from the democratic will without retaining a sizable role for the public in the process.¹⁵⁵ Criminal sentencing PAYGO allows for expression of policy goals of American voters while avoiding the excesses that result from over-concentration on short-term punitiveness. It puts a brake on ordinary political incentives which disproportionately harm marginalized groups, thus achieving the major goal that animates political process theory, but allows those determinations to affect wider swathes of individuals through the front-end lawmaking process, rather than the back-end judicial-interpretive process.¹⁵⁶

Further, budgeting processes that mix transparency with opacity incur democratic benefits.¹⁵⁷ Elizabeth Garrett and Adrian Vermeule's work on balancing "transparent" and "opaque" budget procedures provides a useful analog.¹⁵⁸ While "transparent" budgeting procedures have an intuitive appeal to constituents, they also open the door to increased manipulation of the legislative process by large interest groups.¹⁵⁹ On the other hand, little transparency means the public does not have the opportunity to hold lawmakers to account for budgeting decisions.¹⁶⁰ Garrett and Vermeule therefore propose voter-empowering modes of transparency that simultaneously eliminate the ability of interest groups to warp legislative outcomes in their favor.¹⁶¹

Criminal sentencing PAYGO operates similarly. However, instead of balancing the public will against the will of interest groups

¹⁵⁵ See *supra* note 149 and accompanying text.

¹⁵⁶ See Krishnakumar, *supra* note 38 (describing the lawmaking process as "reach[ing] all legislation, not only those laws which become the subject of litigation").

¹⁵⁷ See *supra* notes 131–32 and accompanying discussion (describing how changes to budget processes may be transparent sites of political debate, while simultaneously obscuring the relationship between legislators and underlying policies implicated by revisions to the budgeting process).

¹⁵⁸ See generally Elizabeth Garrett & Adrian Vermeule, *Transparency in the Budget Process* (Chi. Unbound, Coase-Sandor Working Paper Series in L. & Econ., Paper No. 278, 2006), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1594&context=law_and_econoecon [<https://perma.cc/RP6A-893J>].

¹⁵⁹ *Id.* at 3 ("A . . . tradeoff is that transparency ensures both accountability to voters . . . and also accountability to efficiency-reducing interest groups . . .").

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 17–38 (advocating, for example, for "delayed disclosure" regarding the details of budgetary deliberations, in order to maximize the advantage gleaned from keeping interest groups in the dark while maintaining the public's ability to assess legislators' performance at the ballot box).

by tempering transparency and opacity, criminal sentencing PAYGO utilizes a mixture of transparency and opacity to moderate the public's short-term retributivist will by forcing legislators to make tradeoffs between short-term punitiveness and long-term decarceration. As in Garrett and Vermeule's model, the public retains the ability to pass judgment on individual legislators. If a recent robbery spree—or the perception of one—leads the public to call for increased robbery sentences, the public could still oust a non-compliant member of the legislature from office for failing to be attentive to this wish. But, through its opaque procedure, criminal sentencing PAYGO provides legislators with the political cover to do justice to the goal of decarceration at the same time (while also allowing legislators to be attentive to calls for increased fiscal responsibility given tight budget constraints).

B. Criminal Justice Benefits

Criminal sentencing PAYGO is beneficial because it provides a check on ballooning criminal sentences. Where it is difficult for legislators to respond to the crime problem through sentencing reforms like three-strikes rules, mandatory minimums, or penalty increases, they may begin to conceptualize tackling crime through increased attention to the criminological benefits of programs which rest outside of traditional crime-control models.¹⁶² This can include anything from increased access to drug treatment programs,¹⁶³ pushing back the start time of the public school day,¹⁶⁴ and extending access to abortion and family planning services.¹⁶⁵ Additionally, an outside cap on criminal sentencing will benefit the system by preventing prison overcrowding—a good in itself.¹⁶⁶ But a criminal sentencing PAYGO system would also face structural challenges.

¹⁶² For an account of how political actors can begin to conceptualize issues like education as crime control policies, see MARK A.R. KLEIMAN, *WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT* 117–35 (2009).

¹⁶³ DAVIS, *supra* note 17, at 109.

¹⁶⁴ See KLEIMAN, *supra* note 162, at 123 (“Juvenile crime peaks between the end of the school day and the time adults get home from work. If the school day started later, and ended when the workday ends, there would be much less opportunity for residential burglary by juveniles during the school year.”).

¹⁶⁵ See, e.g., Abel Francois, Raul Magni-Berton & Laurent Weill, *Abortion and Crime: Cross-Country Evidence from Europe*, 40 INT'L REV. L. & ECON. 24, 24 (2014) (finding that the abortion rate has “significant and negative impact on crime rates, specifically, homicide and theft,” across sixteen Western European nations).

¹⁶⁶ Unlike a system predicated on capacity constraints, criminal sentencing PAYGO would work against overcrowding while not incentivizing political actors to escape the problem by constructing new jails and prisons.

One challenge arises from the “correctional free lunch” problem.¹⁶⁷ The correctional free lunch means that local prosecutors perceive state prison as a “costless option” because state prison is paid for by the state, whereas “local jails or county probation[] are paid for in part by local government. At that point, the county prosecutor can minimize costs to county government by choosing sanctions that substantially increase costs at the state level of government.”¹⁶⁸ As applied to criminal sentencing PAYGO, this problem could be pernicious because it could feasibly lead local prosecutors to charge state crimes at levels not originally anticipated by legislators when crafting sentencing tradeoffs as part of the PAYGO structure. At its worst, this could mean that criminal sentencing PAYGO did not reduce incarceration or maintain current incarceration levels, because local prosecutors use state prison as a backstop, and can often choose among a menu of crimes to charge to get the outcome of this “costless option.”¹⁶⁹

But the correctional free lunch is not a unique problem to criminal sentencing PAYGO and would continue to exist regardless of whether such a plan is enacted. Accordingly, plans to solve the correctional free lunch under PAYGO are the same as under our current system: States could issue carrots in the form of block grants to counties based on crime rates,¹⁷⁰ or states could impose “local costs to continuing increases of penal confinement,”¹⁷¹ including charging counties for the rates at which they send prisoners to state prisons. Criminal sentencing PAYGO precludes neither a carrot nor stick approach.

Criminal sentencing PAYGO may also be a useful tool in avoiding prison overcrowding. First, while criminal sentencing PAYGO is not synonymous with capacity constraints, the policy’s focus on maintaining or lowering incarceration rates without providing an inadvertent incentive for prison construction means that prison systems which are not currently overcrowded are unlikely to become overcrowded. It also means that prison systems which currently are above capacity will either stay at current levels or decline.¹⁷² In general, then, there is a preference against

¹⁶⁷ I would like to thank Professor David Garland for pointing out this issue.

¹⁶⁸ FRANKLIN E. ZIMRING, *THE INSIDIOUS MOMENTUM OF AMERICAN MASS INCARCERATION* 52 (2020); *see also* FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 140 (1991) (introducing and explaining the “correctional free lunch”).

¹⁶⁹ ZIMRING, *supra* note 168.

¹⁷⁰ W. David Ball, *Defunding State Prisons*, 50 CRIM. L. BULL. 1060, 1062–63 (2014) (“Rather than spending money to house a county’s prisoners, a state government would distribute this pool of money to its counties on the basis of per capita reported violent crime.”).

¹⁷¹ ZIMRING, *supra* note 168, at 59.

¹⁷² This sets aside the possibility that overcrowded prison systems could construct more facilities to deal with current numbers of prisoners, keeping raw numbers around the same while combatting overcrowding.

overcrowding, which is advantageous regardless of one's views on crime and punishment issues. Prison overcrowding leads to more violence,¹⁷³ higher incidence of Hepatitis C and other health problems,¹⁷⁴ and expensive programs to deal with these knotty, related issues.¹⁷⁵ Meanwhile, more crowded prisons tend to also increase rates of recidivism.¹⁷⁶

Furthermore, the United States already far exceeds other developed Western democracies in incarceration rates.¹⁷⁷ The problems of mass incarceration are undeniably urgent. The United States incarcerates over 700 individuals per 100,000, whereas no European nation exceeds 200 incarcerated individuals per 100,000.¹⁷⁸ Crime waves tend to cause more incarceration, and at time of writing, the United States is currently experiencing a major uptick in crime.¹⁷⁹ Without providing a roadblock to normal political incentives, the United States could conceivably begin to outpace the developed world even further in incarceration rates.¹⁸⁰ The United States is not starting from a baseline of normality in criminal justice, but operating from a position of dramatic overcrowding and a uniquely high incarceration rate at a time when there is reason to believe the incarceration rate may increase as an output of a perceived

¹⁷³ Gerald G. Gaes, *The Effects of Overcrowding in Prison*, 6 CRIME & JUST. 95, 95 (1985) (“[P]risons housing significantly more inmates than a design capacity based on sixty feet per inmate are likely to have high assault rates.”).

¹⁷⁴ *Id.* (finding a correlation between overcrowded prisons and high blood pressure); Rosa Zampino, Nicola Coppola, Caterina Sagnelli, Giovanni Di Caprio & Evangelista Sagnelli, *Hepatitis C Virus Infection and Prisoners: Epidemiology, Outcome and Treatment*, 7 WORLD J. HEPATOLOGY 2323, 2324 (“HCV [Hepatitis C Virus] infection can be easily transmitted due to overcrowded conditions . . .”). Around “30% of . . . HCV . . . infected people in the United States . . . pass through the prison system annually.” Sabrina A. Assoumou et al., *Cost-Effectiveness and Budgetary Impact of Hepatitis C Virus Testing, Treatment, and Linkage to Care in US Prisons*, 70 CLINICAL INFECTIOUS DISEASES 1388, 1388 (2019).

¹⁷⁵ See, e.g., Anne C. Spaulding & Jagpreet Chhatwal, ‘Nominal Pricing’ Can Help Prisons and Jails Treat Hepatitis C Without Breaking the Bank, STAT NEWS (Jan. 9, 2019), <https://www.statnews.com/2019/01/09/nominal-pricing-prisons-jails-treat-hepatitis-c> [<https://perma.cc/WN8X-R9PW>] (reporting that administering the HCV cure to people in prison costs more than \$25,000 per person).

¹⁷⁶ See Michael A. Ruderman, Deirdra F. Wilson & Savanna Reid, *Does Prison Crowding Predict Higher Rates of Substance Use Related Parole Violations? A Recurrent Events Multi-Level Survival Analysis*, PLOS ONE (Oct. 22, 2015), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0141328> [<https://perma.cc/8PME-BKKB>] (“The relationship between mass incarceration and crowding-related stress as well as prison violence and lack of access to [Substance Use Disorder] care may explain the finding that parolees who experienced higher levels of prison crowding had higher rates of parole violations . . .”).

¹⁷⁷ REITZ, *supra* note 8.

¹⁷⁸ *Id.* at 3. This statistic includes Russia, which the United States surpasses in incarceration rate by fifty-three percent. *Id.*

¹⁷⁹ Rosenfeld & Lopez, *supra* note 3, at 5–13.

¹⁸⁰ Because of the presence of laws like three-strikes rules and mandatory minimums, one would not expect the increase in incarceration in the United States and other developed nations to be the same, even if for structural reasons a crime wave was global in nature.

crime surge.¹⁸¹ Criminal sentencing PAYGO is an operational, pragmatic solution aimed at countering this lamentable status quo.

CONCLUSION

Of the shameful legacies of the United States' unique history of mass incarceration, perhaps the worst is its effect on marginalized groups, those whom representation reinforcement and political process theory are designed to protect.¹⁸² The results have been to perpetuate the racial wealth gap,¹⁸³ to expropriate the labor of people in prison for private gain,¹⁸⁴ and to systematically exclude millions of citizens, disproportionately people of color and the poor, from the political process.¹⁸⁵ Levels of electoral disenfranchisement in Black communities are extremely high as a result of their persistent criminalization by the American criminal justice system.¹⁸⁶ The status quo is not working:

¹⁸¹ See *supra* notes 1–5 and accompanying text.

¹⁸² See, e.g., Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 747 (1991) (“Under political process theory judicial review is deployed against systemic biases in legislative decision[-]making rather than against the outputs of a properly functioning political system.”).

¹⁸³ See Ames Grawert & Terry-Ann Craigie, *Mass Incarceration Has Been a Driving Force of Economic Inequality*, BRENNAN CTR. FOR JUST. (Nov. 4, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/mass-incarceration-has-been-driving-force-economic-inequality> [<https://perma.cc/82AS-6JQB>] (noting that “Black and Latino men and women make up more than half of all Americans who have been to prison” and that time in prison causes “a 52% reduction in annual earnings growth and little earnings growth for the rest of [offenders’] lives.”); Tyner, *supra* note 140 (emphasizing mass incarceration’s disproportionate impact on Black Americans as a driver of wealth inequality).

¹⁸⁴ See Daniele Selby, *How the 13th Amendment Kept Slavery Alive: Perspectives From the Prison Where Slavery Never Ended*, INNOCENCE PROJECT (Sept. 17, 2021), <https://innocenceproject.org/news/how-the-13th-amendment-kept-slavery-alive-perspectives-from-the-prison-where-slavery-never-ended> [<https://perma.cc/24DQ-6DEY>] (detailing how formal abolition of slavery through the Thirteenth Amendment excepted forced labor “as punishment for crime,” and how Louisiana’s Angola Prison began as a plantation which utilized the forced labor of individuals convicted of violating Black Codes and continues to utilize forced labor today).

¹⁸⁵ CHRISTOPHER UGGEN, RYAN LARSON, SARAH SHANNON & ROBERT STEWART, SENTENCING PROJECT, LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 2 (Oct. 25, 2022), <https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights> [<https://perma.cc/2MQL-WK55>] (“In 2022, an estimated 4.6 million Americans, representing 2 percent of the voting-age population, will be ineligible to vote due to [felony disenfranchisement] laws or policies.”); Janell Ross, *The Race-Infused History of Why Felons Aren’t Allowed to Vote in a Dozen States*, WASH. POST (May 24, 2016, 1:33 PM), <https://www.washingtonpost.com/news/the-fix/wp/2016/05/24/the-race-infused-history-of-why-felons-arent-allowed-to-vote-in-a-dozen-states> [<https://perma.cc/X2EY-D6TH>] (providing a historical account of felon disenfranchisement).

¹⁸⁶ UGGEN ET AL., *supra* note 185 (“Among the adult African American population, 5.3 percent is disenfranchised as compared to 1.5 percent of the adult non-African American population.”).

“prejudice” against marginalized groups is “seriously . . . curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities.”¹⁸⁷ In response, it may appear natural to reject the role of electoral politics and turn toward the courts or expert commissions. But as a matter of strategy, it is sensible to employ a multipronged effort and take seriously the capacity of state legislatures to artfully balance voters’ short-term preferences while working toward decreasing incarceration rates directly. By doing so, we may begin to counteract some of the most anti-democratic facets of America’s unique system of mass incarceration.¹⁸⁸

One could dismiss criminal sentencing PAYGO by remarking that it does not put a large enough thumb on the scale to end mass incarceration. However, if mass incarceration in the United States is to end, it must be because the voting public wants it to end. Excluding the public from participating is likely to result in strong backlash which would undo the goals reformers seek. But this is no reason for the punitive politics of incarceration to continue unchecked. Gladly, we are in an era in which most Americans recognize mass incarceration as a major problem. Criminal sentencing PAYGO provides an effective and structurally robust way for the people’s representatives to enshrine this recognition in policy.

¹⁸⁷ *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) (describing this situation as a justification for an increased judicial role in protecting religious, national, and racial minority groups).

¹⁸⁸ *See supra* notes 7–11 and accompanying text.