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THE REGULATION OF SENTENCING DECISIONS: WHY INFORMATION DISCLOSURE IS NOT SUFFICIENT, AND WHAT TO DO ABOUT IT

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ABSTRACT

This Article identifies a number of problems, both in practice and in theory, in what is denoted here as the "information disclosure model of sentencing regulation." While the disclosure model places a lack of information at the heart of the problem of inefficient sentencing policy, the present Article explains how the problem is better understood, not as informational, but as incentives based. A statutory appropriation requirement is described that seeks to correct an explained incentive to engage in myopic legislative decisionmaking; specifically, a one-year appropriation is required from a general budget fund into a statutorily created special reserve fund for any proposed change in sentencing policy projected to *increase* the correctional population. A survey of existing statutory appropriation requirements is provided and certain best practices are identified. In addition, a novel statutory provision is proposed: monies should be appropriated from the special reserve fund to the general fund if a bill is projected to *decrease* the correctional population. Such withdrawals from the special reserve fund made in the current fiscal period serve as concrete, immediate evidence of the fiscal benefits of less punitive criminal sentences, where such benefits are often realized only in the long run, and supply a novel incentive for legislators to engage in forward-looking, fiscally responsible sentencing policy. The present Article further contends that proposed changes in sentencing policy should *not* be subjected to cost-benefit analysis (as opposed to fiscal impact analysis as required under the statutory appropriation requirement), because the retributive value of a criminal sentence is extremely difficult to measure given the current state of estimation technology.

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INTRODUCTION

Since the early 1980s, there has been a historically unprecedented rise in state and federal prison populations in the United States. The number of prison inmates under the jurisdiction of federal correctional authorities, for example, has increased by almost 500%, from 24,363 prisoners in FY1980 to 145,416 prisoners in FY2011.[1] During that same time period, the number of prison inmates under the jurisdiction of state correctional authorities has increased by over 300%, from 304,844 prisoners to 1,248,815 prisoners.[2] The increasing number of prison inmates, combined with the rising per capita costs of incarceration, has made it increasingly more expensive for state and federal governments to operate and maintain their prison systems. From FY2000 to FY2013 alone, appropriations for the Federal Bureau of Prisons increased from $3.668 billion to $6.445 billion.[3] Likewise, from FY1986 to FY2012, state expenditures on corrections increased by almost 700%, from $6.7 billion to $53.2 billion, more than double the rate at which overall *total* state spending increased over that same time period.[4]

As a consequence of these trends, the state and federal prison systems have become increasingly overcrowded. In FY2011, for example, the federal prison system was 39% over its rated capacity (with high- and medium-security adult male prison facilities operating at 51% and 55%, respectively, over rated capacity).[5] The problem of prison overcrowding is even more acute at the state level. In California, for example, prison overcrowding has transformed into a wide-ranging fiscal crisis. In 2006, then-Governor Schwarzenegger proclaimed a state of public emergency in response to California's

1. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1981, at 2 (1982) [hereinafter PRISONERS IN 1981], *available at* http://www.bjs.gov/content/pub/pdf/p81.pdf; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011, at 2 (2012) [hereinafter PRISONERS IN 2011], *available at* http://www.bjs.gov/content/pub/pdf/p11.pdf.

2. PRISONERS IN 1981, *supra* note 1, at 2; PRISONERS IN 2011, *supra* note 1, at 2.

3. NATHAN JAMES, CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 1 (2014), *available at* http://www.fas.org/sgp/crs/misc/R42937.pdf.

4. *See* NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT: EXAMINING FISCAL 2011–2013 STATE SPENDING 7, 54 (2013), *available at* http://www.nasbo.org/sites/default/files/State%20Expenditure%20Report.pdf; NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT 5 tbl.1, 7 (1987), *available at* http://www.nasbo.org/sites/default/files/ER_1987.pdf. Note that dollar amounts are not adjusted for inflation.

5. *See* JAMES, *supra* note 3, at 19; PRISONERS IN 2011, *supra* note 1, at 13, 31.

prison population reaching a record level of 173,000.[6] Following this proclamation, litigation commenced in California federal court, with plaintiffs contending that a reduction in prison population was necessary to "bring the California prison system's medical and mental health care into constitutional compliance."[7] Although under federal law, a release of prisoners is a "remedy of last resort,"[8] the Ninth Circuit, nonetheless, found the prison conditions in California so egregious that judicial intervention was considered "the only means by which to enforce rights guaranteed by the Constitution."[9] In May 2011, the Supreme Court of the United States affirmed the Ninth Circuit's judicially imposed population cap on California's state prisons, holding that severe prison overcrowding was the primary cause of "serious constitutional violations" and "[n]eedless suffering and death."[10]

The dramatic rate of growth in state and federal correctional populations is not sustainable in the long run. Changes must be made to reduce prison populations while at the same time maintaining public safety and social order. A number of public policy options exist to address prison overcrowding and other forms of budgetary shortfalls resulting from the steady growth in correctional populations, including increasing the capacity of state and federal prison systems or investing in diversion or other rehabilitative programming. Policymakers might also consider revising the legislative measures implemented over the past three decades that have contributed to the growth in prison populations, including: (1) modifying mandatory minimum penalties, (2) eliminating ha-

6. *See, e.g.*, Proclamation, Arnold Schwarzenegger, Governor of the State of Cal., Office of the Governor, Prison Overcrowding State of Emergency Proclamation (Oct. 4, 2006), http://gov.ca.gov/news.php?id=4278 ("[A]ll 33 [California Department of Corrections and Rehabilitation] prisons are now at or above maximum operational capacity, and 29 of the prisons are so overcrowded that the [California Department of Corrections and Rehabilitation] is required to house more than 15,000 inmates in conditions that pose substantial safety risks . . . . I believe immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding.").

7. Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 888 (E.D. Cal. 2009).

8. *See* 18 U.S.C. § 3626(a)(3)(E) (2012) ("The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right."); H.R. REP. NO. 104-21, at 25 (1995).

9. *Coleman*, 922 F. Supp. 2d at 889.

10. Brown v. Plata, 131 S. Ct. 1910, 1923 (2011) (upholding order directing the State of California to reduce its prison population by 38,000 to 137.5% capacity within two years).

bitual-offender laws, (3) expanding residential reentry centers, (4) increasing the use of probation, (5) reinstating parole for federal prisoners, (6) expanding the use of good-time credits, and (7) repealing criminal statutes for certain low-level offenses (e.g., marijuana possession).

The present Article seeks to address this problem at its source by proposing a statutory appropriation requirement that seeks to change the incentive structure facing legislators. This proposal requires a one-year appropriation in the current fiscal period in an amount proportional to the expected fiscal impact of a proposed change in sentencing policy. Thus, it brings into the short-term costs that are often first realized only in the long run when current legislators are no longer in office and, accordingly, do not incur the political costs of a fiscal crisis.

Part I of this Article argues that due to distinct interest-group and political dynamics, officials charged with administering sentencing policy are incentivized to adopt sanctions that are suboptimal in the long run. Part I first explains that the public sides more easily with proregulatory forces in the context of sentencing policy, unlike in other substantive areas of regulation. By enacting longer prison sentences, legislators can reap political benefits from a general electorate that fails to perceive the substantial fiscal costs implied by changes in sentencing policy.

Part I next posits that legislators might choose to delegate sentencing power to an independent agency in order to avoid a harmful race to the bottom. One form of such delegation, denoted here as the "information disclosure model of sentencing regulation," is then examined.[11] Part I identifies a number of problems with this disclosure model, both in practice and in theory. Most importantly, the disclosure model places a lack of information at the heart of the problem of inefficient sentencing policy. The present Article, by contrast, characterizes the problem not as informational, but rather as incentives based. Structural aspects of the democratic process (e.g., electoral uncertainty, term limits) cause even perfectly informed political actors to adopt excessively shortsighted time horizons in public policy decisionmaking. In turn, these political actors enact criminal sentences that, while rational in terms of private electoral self-interests in the short run, are nonetheless suboptimal for society in the long-run.

11. The basic thrust of the information disclosure model can be summarized as follows: inefficient sentencing policy will obtain if legislators lack accurate and reliable official state estimates of the expected fiscal impact of proposed changes in sentencing policy.

Part II sets forth the main theoretical contribution of the Article, describing a statutory appropriation mechanism that corrects the socially suboptimal incentives identified in Part I. Specifically, for any bill projected to increase the correctional population, a one-year appropriation from the general budget fund into a statutorily created special reserve fund is required. The rationale for this statutorily mandated appropriation is to push some proportion of the expected fiscal costs of proposed changes in sentencing policy back into the current fiscal period in order to have legislators more fully *internalize* the fiscal costs imposed upon future taxpayers. Part II then surveys existing statutory appropriation requirements and identifies best practices on the basis of this survey. In addition, Part II proposes a novel statutory provision designed to appropriate money back into the general fund from the special reserve fund if a proposed bill is projected to *decrease* the correctional population.[12] This budgetary windfall creates a political incentive for legislators to engage in forward-looking, fiscally responsible, socially optimal sentencing policy. It also provides an immediate political benefit to offset the political cost of advancing a criminal justice bill that is readily characterized by opponents as "soft on crime." Part II concludes with a brief assessment of the relevant empirical evidence from Virginia.

Part III considers the claim that proposed changes in sentencing policy should be subjected to cost-benefit analysis (as opposed to fiscal impact analysis as required under the statutory appropriation requirement) in much the same way that the executive branch of the federal government scrutinizes proposed agency regulations. In theory, an expert agency such as a legislative budget office or a state sentencing commission could use cost-benefit analysis to determine if the expected social benefits of a proposed change in sentencing policy exceed the expected social costs. Part III contends that expert agencies should *not* use cost-benefit analysis to assess the merits of proposed criminal sentences. The rationale for this conclusion is that while it is theoretically possible to measure the *retributive benefit* of a proposed criminal sanction, [13] in practice the

12. A sponsor of such a bill would then be able to identify withdrawals from the special reserve fund in the current fiscal period (as well as the uses to which these withdrawals are subsequently put) as concrete, immediate evidence of the fiscal benefits of less punitive criminal sentences.

13. In this context, "retributive benefit" refers to "the effect of punishment in assuaging the indignation that serious crime arouses and in providing a form of nonfinancial compensation to the victim." *See* United States v. Craig, 703 F.3d 1001, 1004 (7th Cir. 2012) (Posner, J., concurring).

retributive value of a criminal sentence is extremely difficult to measure given the current state of estimation technology.

I.
THEORETICAL FRAMEWORK

This Part sets forth a theoretical framework intended to illuminate the rationale underlying the statutory appropriation requirement detailed in Part II.

A. Administering Crime

Although the regulation of sentencing decisions does, in many ways, fall neatly within the public choice model of regulatory agencies, there are important differences between typical regulatory agencies and the government agencies tasked with the regulation of sentencing decisions.

1. Interest Group Dynamics

Drawing heavily from the work of Professor Rachel Barkow,[14] Part I.A.1 summarizes how interest group dynamics in the context of sentencing policy differ from more conventional regulatory settings.

a. Weak Antiregulatory Forces

The political science and administrative law literature generally assumes that diffuse interests are weak.[15] Due to various coordination problems, large groups of individuals are difficult to organize and, therefore, underrepresented in public policymaking. If groups of individuals share a common interest in a particular policy and the benefits of that policy cannot be easily excluded from any other member of the group, then no single member has an interest to advocate for that policy.[16] And, as each individual waits for others to act, their shared policy objectives remain underprovided. The larger the interested group, the more difficult it becomes to surmount these barriers to mobilization. Under this approach to regulation, those who benefit from regulation (e.g., consumers) have little incentive to contribute costly effort or time to an initiative that

14. *See generally* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 724–30 (2005).

15. *See generally* Russell Hardin, Collective Action (1982); Mancur Olson, The Logic of Collective Action (1965).

16. This assumes that advocacy is costly.

may provide only limited individual private benefits.[17] Moreover, these diffuse benefits often imply substantial concentrated costs for the targets of regulation (e.g., private industry). These regulated entities are better organized and are assumed to suffer less from the types of collective actions problems that characterize diffuse interests. Therefore, these regulated entities, acting as organized special interest groups, are able to mobilize to defend their profit-making interests and to limit or remove the concentrated costs of proposed regulations that might otherwise serve to promote the greater social good.[18]

As Professor Barkow has convincingly argued, however, the regulation of sentencing decisions does not follow this conventional pattern.[19] For example, sentencing commissions regulate judges, who in turn regulate criminals. Neither the judiciary nor the individuals sentenced to prison fit neatly within the existing paradigm of agency control mechanisms. Unlike private industry, for example, the judiciary does not act to maximize financial profit.[20] The judiciary's views on optimal sentencing policy are likely to be quite diverse as such views are formed not on the basis of a shared profit motive, but rather represent a varied set of judicial ideologies and sense of what properly constitutes the optimal level of punishment in a given case.[21] Moreover, to the extent that the judiciary has a unified interest, there is little that judges can offer politicians in exchange for favorable legislation.[22]

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17. *See generally* James Q. Wilson, *The Politics of Regulation*, *in* THE POLITICS OF REGULATION 367 (James Q. Wilson ed., 1980); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

18. *See* Stigler, *supra* note 17, at 12.

19. *See* Barkow, *supra* note 14.

20. *See id*. at 728 (noting sentencing is not subject to market forces); *see also* Richard A. Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 6–10 (1993).

21. *See* Barkow, *supra* note 14, at 724; *see also* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 21 (1973) (decrying the "horrible" sentencing disparities that resulted from indeterminate sentencing); James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 274 (1999) (finding that variation in sentencing between typical judges narrowed with implementation of the Federal Sentencing Guidelines); Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 241, 291, 296 (1999) (same).

22. *See* Barkow, *supra* note 14, at 724. Further, a judge cannot challenge a sentencing agency's decisions in court. For example, the Sentencing Reform Act requires that the Sentencing Commission's rulemaking proceedings conform to the notice and comment requirements of the Administrative Procedure Act (APA). *See* 28 U.S.C. § 994(x) (2012). However, the Sentencing Commission's rules can-

In addition, while sentencing decisions do imply a traditional concentrated cost upon those convicted of crimes (as well as their loved ones, families, and local communities), this adversely impacted group is generally ill positioned to collectively mobilize and advocate in support of its position. Criminal sentences tend to impact individuals who do not have organizations or support networks protecting their interests ex ante, in part because those who receive criminal sentences in the future cannot readily self-identify in the present.[23] Moreover, those organizations that do exist to advocate on behalf of this class (e.g., the criminal defense bar) often lack financial resources, especially compared to state and federal prosecutors, and do not approach the lobbying power of traditional corporate targets of regulation.[24] Likewise, the set of individuals directly impacted by sentencing policy—those who have served, or who are currently serving, time in prison—tend to have relatively little political influence or power, and in many cases are excluded from the electoral process altogether.[25] This political disadvantage is further compounded by the fact that many offenders come from relatively disadvantaged socio-economic backgrounds and tend to lack the resources necessary to engage in various forms of education and lobbying campaigns that have proven effective in other political contexts.[26]

b. Powerful Proregulatory Forces

Under the traditional paradigm, the relatively more powerful lobbying force generally opposes greater regulation of industry. The regulation of sentencing decisions presents the opposite situation. Here, the relatively more powerful lobbying forces advocate

not be challenged in a court of law as arbitrary and capricious under the APA. *See* Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1028 (2006).

23. *See* Barkow, *supra* note 14, at 730.

24. *See generally* Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004).

25. *See generally* JEFF MANZA & CHISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006). In only two states (Maine and Vermont) can all prisoners, probationers, and parolees participate in elections. *See Map of State Criminal Disenfranchisement Laws*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/maps/map-state-felony-disfranchisement-laws (last visited Oct. 3, 2014). In seven states, some, but not all, persons with a felony conviction can vote. *See id.* In three states (Florida, Kentucky, and Iowa), all persons with a felony conviction are *permanently* disenfranchised. *See id.*

26. *See, e.g.*, Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1089 (1993).

for *more* regulation by government. As an example, Professor Barkow and others have suggested that prosecutors have a strong incentive to lobby for longer prison sentences.[27] Longer sentences render trials more costly for risk-averse criminal defendants. And, the more costly trials are (i.e., the longer the potential prison term), the less costly it is for prosecutors to obtain (or some might say, coerce) pleas from risk-averse criminal defendants.[28]

In addition to prosecutors, other powerful organized groups have clear incentives to lobby for increased and mandatory prison sentences. The business model adopted by the private prisons industry, for example, depends, in part, upon high rates of incarceration, and the industry has consistently pressed for longer sentences through extensive lobbying efforts and campaign contributions.[29] Similarly, corrections officer unions, as well as certain rural communities that have identified prisons as an important component of a broader, long-term strategy to stimulate local economic development, have lobbied for longer prison sentences.[30] Victims' rights

27. *See, e.g.*, Barkow, *supra* note 14, at 728; Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 97–100 (2003); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1440–42 (2008); *see also* Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 233 ("[P]rosecutors turn time-consuming and resource expensive investigations and trials into time-efficient pleas, and in doing so, they can keep the numbers of cases closed and the numbers of new cases that come in at a manageable equilibrium.").

28. *See* Barkow, *supra* note 14, at 728; *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2507–12 (2004) (demonstrating how risk preferences can skew the outcomes of plea bargaining); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1948 (1992) (contending that innocent defendants are likely more risk-averse than guilty defendants). The empirical evidence generally supports the contention that prosecutors lobby for longer criminal sentences in order to increase their bargaining power in the context of plea negotiations. *See* Barkow, *supra* note 14, at 732 (citing numerous examples where prosecutors have requested more stringent sentencing laws).

29. *See, e.g.*, Corrections Corp. of Am., Annual Report (Form 10-K), at 19–20 (Feb. 2, 2010) ("The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws. . . . [R]eductions in crime rates or resources dedicated to prevent and enforce crime could lead to reductions in arrests, convictions and sentences requiring incarceration at correctional facilities.").

30. *See* Barkow, *supra* note 14, at 729 & n.28. The notion that prison sentences can expand the prison system as a whole and spur economic development is in itself a questionable assumption. *See generally* Ryan Scott King, Marc Mauer & Tracy Huling, *An Analysis of the Economics of Prison Siting in Rural Communities*, 3 CRIMINOLOGY & PUB. POL'Y 453 (2004) (showing that prisons did not have a statistically sig-

groups, an increasingly influential political voice in this country,[31] add yet one more element to the set of powerful coordinated interests that are *pro*regulation, not *anti*regulation, with respect to sentencing policy.

c. An Uninformed Electorate

Finally, unlike other subject matter areas highlighted under the interest group model of regulation, the public tends to perceive itself as relatively well informed with respect to criminal justice issues and is, therefore, generally reluctant to entrust sentencing decisions to a body of outside experts (e.g., an administrative agency).[32] A substantial empirical literature shows, however, that voters are *not* particularly well informed about criminal justice matters, especially optimal sentence lengths. Voters, for example, tend to recall only the most salient examples of crime—most often violent crimes.[33] Moreover, most voters have no actual direct experience with crime.[34] Perceptions of the level of crime in the community are thus largely informed by local and national news media.[35] For a variety of reasons, however, the news media tends to focus its coverage primarily upon violent crimes, even though the vast majority of crimes committed in the United States are non-violent.[36] As a result, the news media's coverage of crime, as consumed and interpreted by the general public in a given jurisdiction, tends

nificant impact upon employment and income indicators in rural New York State from 1977 to 2000).

31. *See generally* David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004*, 28 PACE L. REV. 623 (2008).

32. *See* Barkow, *supra* note 14, at 728 ("When it comes to crime and sentencing, in contrast, the public does not readily perceive the same knowledge deficit.").

33. *See* Daniel Romer, Kathleen Hall & Sean Aday, *Television News and the Cultivation of Fear of Crime*, 53 J. COMM. 88, 88 (2003).

34. *See id.*

35. *See id.* at 749; *see also* KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 62 (1997) (estimating that over 90% of Americans use the media as a primary source of information about crime); Williard M. Oliver, *The Power to Persuade: Presidential Influence over Congress on Crime Control Policy*, 28 CRIM. JUST. REV. 113, 120 (2003) (citing to research finding that 95% of study respondents stated that "their primary source for information on crime was the media").

36. *See, e.g.*, Romer, Hall & Aday, *supra* note 33, at 99–103 (finding that exposure to overly crime-saturated local television news increases a widespread fear of violent crime that persists notwithstanding decreasing national crime rates and the fact that crime is concentrated in urban areas); *see also* Franklin D. Gilliam Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 562–63 (2000); Joseph F. Sheley & Cindy D. Ashkins, *Crime, Crime News, and Crime Views*, 45 PUB. OPINION Q. 492 (1981).

not to be closely correlated with the actual crime rate in that jurisdiction.[37]

Unfortunately, elected officials have not exhibited a strong enthusiasm for educating the public about sentencing policy and its true relationship to the actual rate of crime.[38] Instead of addressing the root causes of crime in society, it is often less politically costly for individual legislators to respond to a rise in the crime rate with the simple solution of longer prison sentences, positioning themselves in the process as "law-and-order" candidates who promise "to get tough on crime."[39] In other words, it is often politically expedient for elected officials to exacerbate the news media's portrayal of criminal justice issues, misleading an otherwise uninformed electorate as to the true rates of crime in the community. The officials respond to public fears of social unrest with the simple and uninspired solution of longer, more draconian criminal sentences, rather than carefully crafted policies designed to address the root of the crime problem.[40]

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37. *See* Barkow, *supra* note 14, at 752; *see also* DAVID GARLAND, THE CULTURE OF CONTROL 158 (2001) (stating that television provides "selective coverage of factual crime stories" and "unrealistic crime dramas" that "tend to distort public perceptions of the problem"); JULIAN V. ROBERTS ET AL., PENAL POPULISM AND PUBLIC OPINION 4 (2003) (arguing that the media should cover criminal cases in a way that will leave the public fully informed). This lack of information is especially problematic in light of research showing that individuals tend to exhibit less enthusiasm for harsher criminal sanctions when provided with more concrete information about criminal justice policy and practices. *See* BECKETT, *supra* note 35, at 108 ("The more exposure people have to non-sensationalistic accounts of real criminal incidents (from court documents rather than media accounts), the less punitive they become.").

38. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 4 (2007); Barkow, *supra* note 14, at 751.

39. *See, e.g.*, Albert W. Alschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 932 (1991) ("[P]oliticians fear endorsing any position that an opponent can characterize as 'soft on crime' in a 30-second television commercial."); Anthony N. Doob & Carla Cesaroni, *The Political Attractiveness of Mandatory Minimum Sentences*, 39 OSGOODE HALL L.J. 287, 299 (2001) (exploring why mandatory minimum sentences are so politically attractive); *see also* GARLAND, *supra* note 37, at 201–03 (explaining that the "get-tough" rhetoric of modern times is a means by which political actors are able to manufacture the illusion of control over social unrest, and is easily reducible to a sound bite). *See generally* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533–39 (2001).

40. Fashioning abstract criminal justice policy largely in the aggregate and from an ex ante perspective may give political actors a skewed assessment of the true social costs of longer sentences, further decreasing the likelihood of political actors publicizing the true rate of crime in the community. *See, e.g.*, Douglas A.

2. The Delegation Question

Given these interest-group dynamics, there would appear to be little incentive for legislators to *delegate* the authority to set sentencing policy to an external independent agency.[41] Legislators can benefit from a general electorate that fails to perceive the large fiscal costs associated with such sentences and generally believes that keeping people, especially people of color,[42] behind bars for as long as possible is a net positive for society.[43] At the same time legislators can satisfy the policy asks of influential, coordinated special interests.[44] So, why then have some state legislatures chosen to delegate sentencing power to an independent agency (e.g., a state sentencing commission)?

Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 107 (1999) (arguing that because political actors possess "no context for assessing and passing judgments on the actual person who will come to violate various criminal prohibitions," such actors "can really only consider criminal offenders as abstract and nefarious characters").

41. *See* Rachel E. Barkow & Kathleen M. O'Neil, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1983 (2006).

42. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2011) (contending that the political benefit derived from increased incarceration may additionally derive from its capacity to serve as a form of racial control, evolving over time as required by changing political circumstances and social standards, with the policies of the present criminal justice system displacing Jim Crow laws, which, in turn, displaced slavery). *But cf.* James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 45, 53–54 (2012) (observing that the New Jim Crow framework over-emphasizes the War on Drugs and ignores violent crimes, and suggesting that Alexander does not analyze the way imprisonment is now heavily stratified by class, even among African-Americans). Forman writes that the Jim Crow analogy "obscures the extent to which whites, too, are mass incarceration's targets," noting that "Alexander mentions them only in passing; she says that mass imprisonment's true targets are blacks, and that incarcerated whites are 'collateral damage.'" *Id.* at 58.

43. *See, e.g.*, MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 4–7 (1996); Barkow, *supra* note 14, at 730 ("[T]he public seems to agree that harsher punishments on a concentrated minority lead to diffuse benefits for society.").

44. *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS 9 (1999) ("Legislators will prefer to make policy themselves as long as the political benefits they derive from doing so outweigh the political costs; otherwise, they will delegate . . . ."); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 57 (1982) ("[A] greater reliance on precise legislative enactments and the legal system should occur where regulatory beneficiaries are diffused and those who bear the burdens are concentrated . . . .").

The answer to this question is not new to this Article: legislatures delegate sentencing power in order to avoid a harmful race to the bottom.[45] It is useful to first examine how the incarceration costs of a proposed change in sentencing policy are realized over time, and how an increase in the length of a criminal sentence leads to a "stacking effect," where the bulk of the fiscal costs implied by the longer sentence are first realized only in the long run.

a. Stacking-Effect Hypothetical

The following hypothetical describes how increasing a criminal sentence leads to a "stacking effect" in which the fiscal impact of a longer prison sentence is first realized only in the long run as additional prisoners sentenced under the new law incrementally enter the prison system each year. To start, suppose that each year 100 individuals are convicted and sent to prison for a given criminal offense, where the annual incarceration cost per inmate is $30,000. Assume further that in Year One, the legislature enacts a bill doubling the sentence length for this offense from five to ten years. Also, if the prison population increases by more than 450 inmates, then a large capital expenditure is required in the form of a new prison, where the cost of this capital expenditure is $50 million. The initial equilibrium prison population is 500.[46] The realization of incarceration costs over time is summarized in Table 1.

TABLE 1: COST OF LONGER PRISON SENTENCE BY YEAR

Year	Prison Population	New Prison	Incarceration Cost
Year One	500	No	$15,000,000
Year Two	500	No	$15,000,000
Year Three	500	No	$15,000,000
Year Four	500	No	$15,000,000
Year Five	500	No	$15,000,000
Year Six	600	No	$18,000,000

45. *See, e.g.*, Barkow & O'Neil, *supra* note 41, at 1985–86; Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179, 207–10 (2007) (examining Barkow & O'Neil); *see also* EPSTEIN & O'HALLORAN, *supra* note 44, at 224 (contending that delegation provides a "means to escape from legislative excesses").

46. For conceptual simplicity, suppose that 1/5 of the initial prison population has been incarcerated for one year, 1/5 of the population has been incarcerated for two years, and so forth, and that individuals are sent to prison only for this one criminal offense.

Year Seven	700	No	$21,000,000
Year Eight	800	No	$24,000,000
Year Nine	900	No	$27,000,000
Year Ten	1000	Yes	$30,000,000 + $50,000,000

Observe that the longer prison sentence has *no* fiscal impact until Year Six. Specifically, in the first five years, an equal number of prisoners enter and exit the prison system. In Year Six however, 100 new prisoners enter the system, but those inmates, who were first incarcerated in Year One, were incarcerated under the new law. Thus, these inmates will remain in prison until Year Ten. For the next five years, 500 additional prisoners, 100 per year, are "stacked" upon those inmates serving the longer ten-year prison sentence. It is not until Year Ten that the prison system arrives at the new steady-state equilibrium of 1000 inmates, with an equal number of individuals entering and exiting the prison system each year. Further, note that the $50 million in capital expenditures, which is an entirely predictable cost of the longer prison sentence in this example, is not realized until ten years after the initial change in sentencing policy. In other words, there are no short-run costs associated with the more punitive sentence—the expected fiscal costs of the longer prison sentence are purely long run in nature.

Yet, the cost structure examined in Table 1 is only part of the story. The following question still remains: how specifically does the realization of fiscal costs over time, as illustrated in Table 1, result in a harmful race to the bottom? The causal mechanism suggested here is electoral uncertainty.

b. The Impact of Electoral Uncertainty

Suppose that the longer prison sentence examined above yields an additional annual benefit to society of $3 million (in the form of incarceration, incapacitation, deterrence, and so forth). Even excluding the expected fiscal cost of a new prison, it should be clear that the sentencing change, although offering substantial societal benefits, is not cost-benefit justified in the long run. Specifically, in the long-run steady-state equilibrium, the longer prison sentence generates annual benefits of $3 million at an annual cost of $15 million (= $30,000 x 500), and this change in sentencing policy would therefore not be implemented by a welfare-maximizing social planner. Unlike the benign social planner, however, legislators must periodically participate in elections. To the extent that the outcomes of these elections are uncertain or unknown, legisla-

tors are not true long-run players and will, therefore, weigh long-run outcomes differently than would a welfare-maximizing social planner.[47]

In particular, suppose that a legislator in our hypothetical must stand for re-election every two years and has an equal chance of winning any re-election campaign (i.e., the probability of success is equal to one-half in any given election).[48] Importantly, assume further that a legislator incurs the full fiscal cost/benefit of enacted policies *only if* still in office at the time the fiscal cost/benefit is *first* realized.[49] Given this set of simplifying assumptions, the probability-discounted net electoral benefit to the individual legislator of the longer prison sentence over a ten-year time frame is strictly positive.[50]

Because the probability-discounted net benefit of the longer prison sentence is strictly positive, legislators will advocate for this more punitive sentence, despite the fact that the longer prison sentence is socially suboptimal in the long run. In this simplified hypothetical, a perfectly shortsighted legislator (i.e., a legislator who considers the fiscal impact of a proposed criminal sanction only in the current fiscal time period) will advocate for the longer prison sentence no matter how small the social benefit. This is because the

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47. Note that term limits would have a similar effect. In fifteen states, members of state legislatures serve in rotation (i.e., under enacted term limits). *See State Legislative Term Limits*, U.S. TERM LIMITS, http://termlimits.org/term-limits/state-term-limits/state-legislative-term-limits/ (last visited Nov. 23, 2014).

48. For simplicity, in the event that an electoral candidate loses an election, it is assumed that this candidate does not run for re-election in the future. Also, the re-election rate for incumbents will typically be higher than one-half. *See generally* Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942–2000*, 1 ELECTION L.J. 315 (2002) (investigating various explanatory factors for increasing incumbency advantage).

49. Economists and political scientists have long explored the idea that elections, while providing a fundamental mechanism of accountability, might also induce short-term bias. *See, e.g.*, William Nordhaus, *The Political Business Cycle*, 42 REV. ECON. STUD. 169 (1975). *See generally* Marcela Eslava, *The Political Economy of Fiscal Deficits: A Survey*, 25 J. ECON. SURV. 645 (2011) (surveying relevant literature on the political economy of fiscal deficits).

50. The *Net Benefit* may be represented as follows:

$$\textit{Net Benefit} = 3 + 3 + \frac{3+3}{2} + \frac{3+0}{4} - \frac{3+6}{8} - \frac{9+62}{16} = 4.2 > 0$$

where the denominator represents the probability that the legislator is still in office during the relevant time period, and the numerator represents the fiscal cost/benefit of the sentencing change incurred during the subsequent two-year term in office (expressed in millions of dollars).

longer prison sentence can be implemented at zero fiscal cost in the short run (i.e., over the next five years). As long as the proposed sentencing change implies some positive social benefit, such shortsighted legislators will choose to engage in "credit-card-sentencing policy," in which legislatures increase criminal sanctions without proper consideration of whether the resources necessary to fund such sanctions will be available in future fiscal periods.[51]

Thus, under this simple theoretical framework, legislators delegate sentencing power to an independent entity to reduce the occurrence of suboptimal "credit-card-sentencing policy." Part I.B examines one form in which such delegation has taken place: the "information disclosure model of sentencing regulation."

B. The Information Disclosure Model of Sentencing Regulation

The basic thrust of the information disclosure model of sentencing regulation can be summarized as follows: inefficient sentencing policy will occur if legislators lack reliable official state estimates of the fiscal impact of proposed changes in sentencing policy. These official state estimates, which lie at the heart of the information disclosure model of sentencing regulation, are known as "fiscal notes" or "fiscal impact statements," and are typically prepared by an independent legislative budget office or a state sentencing commission.[52] The contention is that a clear and rigorous assessment of the expected fiscal impact of a change in sentencing policy will help legislators, characterized by short-run bias, better allocate scarce budgetary resources and more accurately assess whether a proposed change in sentencing policy is likely to increase social welfare in the long run.

1. The Role of Fiscal Impact Statements

At least fourteen states have established, *by law*, special requirements for fiscal notes written in connection with criminal justice legislation—typically bills that increase sentence lengths or create new criminal offense categories.[53] Some states additionally require

51. S*ee* Richard S. Frase, *A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature*, 28 WAKE FOREST L. REV. 345, 367 (1993).

52. *See generally* MICHAEL LEACHMAN, INIMAI M. CHETTIAR & BENJAMIN GEARE, IMPROVING BUDGET ANALYSIS OF STATE CRIMINAL JUSTICE REFORMS: A STRATEGY FOR BETTER OUTCOMES AND SAVING MONEY (2012), *available at* https://www.aclu.org/files/assets/improvingbudgetanalysis_20120110.pdf.

53. *See id.* at 7 ("At least three of these states, Nevada, North Carolina, and Virginia, require specialized criminal justice fiscal notes only for bills that *increase* the length of criminal sentences.").

that the fiscal note be accompanied by a "prison impact statement," "population impact statement,"[54] or "correctional resources statement."[55] In Rhode Island, for example, the prison impact statement must "specify the effect in dollar amounts and additional bed space, additional staff and additional programs for the current fiscal year and estimates for the next two . . . succeeding fiscal years."[56]

2. Fiscal Impact Statements: Best Practices

There are a number of problems however, both in practice and in theory, with the information disclosure model of sentencing regulation and the manner in which fiscal impact statements are prepared in particular.

a. Problems in Practice

The manner in which many fiscal impact statements are currently prepared fails to meet certain important best practices. To start, most states that prepare fiscal impact statements fail to project the fiscal impact of proposed criminal sanctions at a reasonable time horizon.[57] This is particularly problematic with respect to proposed changes in sentencing policy, where the fiscal cost is often first realized only in the relative long run. In the hypothetical examined in Part I.A.2, for example, a fiscal impact analysis, limited in scope to one or two years, would incorrectly project the fiscal cost of doubling the sentence length from five to ten years as $0, where recall that the true fiscal cost amounts to $95 million over a ten-year period.

In addition, fiscal impact statements too frequently conclude that a proposed criminal sanction has an "indeterminate" fiscal impact. This entirely defeats the purpose of a fiscal note require-

54. *See, e.g.*, OHIO REV. CODE ANN. § 5120.51 (West 2014) ("If the director of rehabilitation and correction determines that a bill introduced in the general assembly is likely to have a significant impact on the population of, or the cost of operating, any or all state correctional institutions under the administration of the department of rehabilitation and correction, the department shall prepare a population and cost impact statement for the bill.").

55. *See, e.g.*, KAN. STAT. ANN. § 74-9106 (2014) ("When requested by the chairperson of a special or standing committee of the legislature, a fiscal impact and correctional resource statement shall be provided for bills amending any current crime or creating a new crime under the laws of the state of Kansas.").

56. R.I. GEN. LAWS ANN. § 42-56-39 (West 2014).

57. One study, for instance, found that fifteen of the twenty-nine states that prepare fiscal impact statements in connection with criminal justice bills do not provide an estimated fiscal impact beyond an average of two years. *See* LEACHMAN, CHETTIAR & GEARE, *supra* note 52, at 16.

ment.[58] Broadly speaking, there are two circumstances under which an indeterminate fiscal impact is provided: (1) the fiscal impact cannot be determined, *given all known available data*; and (2) the fiscal impact cannot be determined, because certain data, which is known to exist, have not been made available to the fiscal analyst. The fiscal note process should be structured to avoid the latter situation. As data collection often consumes more time than data analysis in preparing a fiscal impact statement, sufficient time must be set aside for the data collection process.[59] For example, South Dakota law states that the sponsor of legislation impacting state prison or county jail populations must "request and allow sufficient time to prepare a fiscal impact statement."[60] This must mean that the fiscal analyst is allotted sufficient time to analyze *and* collect the relevant data before the bill receives a committee hearing or passes out of committee.

b. Problems in Theory

Problems with the information disclosure model of sentencing regulation, however, extend beyond the manner in which fiscal impact statements are prepared. The disclosure model places a lack of information at the heart of the problem of inefficient sentencing policy, and assumes that legislators are imperfectly informed as to the expected fiscal impact of proposed changes in sentencing policy. It further assumes that these legislators would be less likely to enact criminal sentencing policies that future legislators would *not* deem cost justified if the expected fiscal impact of proposed sentencing changes was clearly disclosed and understood at the time of

58. *See id.* at 13 ("About 15 percent of the criminal justice fiscal notes prepared in the last three years provided no estimate of the budget impact, or indicated only whether it would be positive or negative.").

59. Allowing sufficient time to prepare a fiscal impact statement is especially important with respect to proposed amendments. Some bills may be amended late in the legislative session for the sole strategic purpose of avoiding fiscal impact scrutiny. This type of strategic behavior can be circumvented, however, if fiscal notes are updated whenever an amendment to a bill is adopted that has a fiscal impact. *See id.* at 10. Some states, such as Texas and North Carolina, require revised fiscal notes for amended bills. *See* N.C. GEN. STAT. ANN. § 120-30.45 (West 2014) (requiring that a committee that passes an amended bill with a fiscal impact obtain a new fiscal note); STATE OF TEX. LEGISLATIVE BUDGET BD., 83RD LEGIS., GUIDE TO FISCAL NOTES: INSTRUCTIONS FOR LEGISLATIVE BUDGET BOARD STAFF, 1st Sess., at 12 (2013), *available at* http://www.lbb.state.tx.us/Fiscal_Notes/Guide%20to%20Fiscal%20Notes%20Committee%20Staff.pdf. Kansas, by contrast, expressly exempts, by statute, amendments from its fiscal note requirement. *See* KAN. STAT. ANN. § 75-3715a (2014).

60. S.D. CODIFIED LAWS § 2-1-19 (2013).

enactment. The model seeks to resolve this problem by appointing an independent governmental agency, which is trusted, non-partisan, and sufficiently well funded, to disclose to legislators detailed and consistent information about the expected fiscal impact of proposed changes in sentencing policy. With this information in hand, the contention is that legislators will no longer unknowingly or naively enact criminal sentencing policies that are socially suboptimal in the long run.

This represents an overly sanguine view of legislative decisionmaking. There may be specific structural aspects of the democratic process (e.g., electoral uncertainty, term limits, and so forth) explaining why even perfectly informed legislators might fail to adopt a sufficiently long-run time horizon in their legislative decisionmaking. In the hypothetical examined in Part I.A.2, for instance, legislators were assumed to possess perfect information with respect to the fiscal impact of increasing the sentence length from five to ten years. Despite this perfect information, it was still in the best interest of a rational legislator to impose a criminal sanction that is socially suboptimal in the long run. More generally, informing legislators of the fiscal impact of proposed legislation may not change behavior given the short-term incentive structure of the electoral process. Even a legislator who is perfectly informed as to the true fiscal impact of a proposed change in sentencing policy may choose to support a particular criminal sentence as an optimal short-term private electoral strategy despite knowing that it is not beneficial for society as a whole in the long term.

One possible response to this critique is to argue that information disclosure is important, not necessarily because of its capacity to directly correct myopic legislative decisionmaking, but rather because of an indirect effect operating through the general electorate. Under this view, the fiscal note process serves to make the public aware of the fiscal impact of proposed changes in sentencing policy and, in turn, indirectly serves as an important check upon suboptimal legislative decisionmaking.[61] Of course, in order for this

61. *See, e.g.*, Bldg. Dep't, LLC v. DCBS, 43 P.3d 1167, 1170 (Or. Ct. App. 2002) (explaining that the "overarching objective" of a fiscal impact statement requirement "is to provide protections against arbitrary and inadequately publicized government conduct" and holding that the fiscal impact statements at issue were insufficient to satisfy this purpose for failing to "explain why the effect was undetermined or, more importantly, to allow potentially affected parties to evaluate their positions and understand what information, if any, [the agency] might need in order to make an informed decision"); Or. Funeral Dirs. v. Mortuary and Cemetery Bd., 888 P.2d 104, 107 (Or. Ct. App. 1995) (explaining that a fiscal impact statement satisfies the "purpose of providing protection against arbitrary and inad-

view to hold true, the public must be able to access these fiscal notes at relatively low cost.

Most states do, in fact, make fiscal notes available on the state legislature's website, although a number of states do not.[62] Even if fiscal notes are publicly available, however, the ordinary voter is unlikely to expend costly effort researching and downloading fiscal impact statements from the public websites of state legislatures. In fact, the ordinary voter may be wholly unaware of the fiscal note process itself.[63] Moreover, these fiscal impact statements are technical documents, employing a specialized methodology. Thus, insofar as the ordinary voter is unfamiliar with the techniques used to generate the fiscal impact estimate, the voter must take the projected fiscal impact at face value. This rhetorical posture is unlikely to appeal to most voters. Rather, this type of detailed, highly technical information is best exploited by easily mobilized, highly organized concentrated interests. Recall from Part I.A, however, that such concentrated interests are more likely to advocate in support of *more* sentencing regulation, not less.[64] These concentrated interests will therefore tend to seek to minimize public awareness of fiscal impact statements, instead of using them to highlight the budgetary implications of more punitive sentencing policy.

In short, the fundamental problem with the information disclosure model is that the problem of inefficient sentencing policy is conceived primarily as an informational one.[65] The present Article,

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equately publicized government conduct" if, when considered with the other information provided in the notice of proposed rulemaking, it *notifies* "persons who might be economically affected to evaluate their positions"); *see also* Dika v. Dep't of Ins. and Fin., 817 P.2d 287, 288 (Or. 1991) (finding that the fiscal impact statement at issue failed to adequately notify interested parties and, thus, failed to satisfy the statutory objective of providing "protections against arbitrary and inadequately informed governmental conduct").

62. *See* LEACHMAN, CHETTIAR & GEARE, *supra* note 52, at 24, 26–27. The following five states produce fiscal notes for some spending bills but do not make them publicly available online: Arkansas, Georgia, Massachusetts, Mississippi, and Rhode Island. *See id*. Nearly all states include a summary of the relevant provisions of the bill, and most states identify the bill's sponsor(s) and include the name and contact information of the lead fiscal analyst, improving the transparency of the fiscal impact statement by allowing direct questions to be directed to the lead analyst. *See id*.

63. There exists a large and important literature that assumes that ordinary citizens are characterized by a lack of access to expert opinion available to legislators. *See, e.g.*, Eric Maskin & Jean Tirole, *The Politician and the Judge: Accountability in Government*, 94 AM. ECON. REV. 1034 (2004).

64. *See supra* Part I.A.1.b.

65. *See* Tuxis Ohr's Fuel, Inc. v. Adm'r, Unemp't Comp. Act, 72 A.3d 13, 23 n.13 (Conn. 2013) ("[T]he fiscal impact statement and bill analysis are prepared

by contrast, identifies the problem as incentives based, and not the result of a lack of information. Under this view, it is therefore not sufficient to simply mandate disclosure of fiscal impact information. Instead, legislative incentives must be altered such that it is no longer rational for legislators to enact changes in sentencing policy that increase their private re-election prospects in the short run, but that are socially suboptimal in the long run. As discussed in the next Part, one way to accomplish this objective is to push some fraction of the expected fiscal costs of more punitive criminal sentences back into the current fiscal period in order to have legislators more fully *internalize* the fiscal costs imposed upon future taxpayers.

II.
THE STATUTORY APPROPRIATION REQUIREMENT

A small number of states have enacted statutes designed to make legislators more fully internalize the expected fiscal impact of longer prison sentences.[66] In particular, these states have strengthened fiscal note requirements by requiring, for any proposed bill projected to increase the state's correctional population, an appropriation from the general fund in an amount based upon the accompanying fiscal impact statement.[67] This is typically structured as a one-year appropriation from the state's general fund to a nonreverting special reserve fund created under the same statute, equal to the largest estimated annual increase in correctional operating costs over a statutorily defined time period.[68]

This Part begins with a survey of existing statutory appropriation requirements. On the basis of this survey, certain best practices are then identified. In addition, a novel statutory provision is discussed. This Part concludes with a brief assessment of the relevant empirical evidence from the state of Virginia.

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for the benefit of members of the General Assembly, solely for purposes of information, summarization and explanation.") (citations omitted).

66. *See* LEACHMAN, CHETTIAR & GEARE, *supra* note 52, 26–27; *infra* Part II.A.

67. In addition to a fiscal impact statement, these statutes also require a corresponding appropriation with any bill likely to increase the state's correctional population. *See* COLO. REV. STAT. ANN. § 2-2-703 (2014); TENN. CODE ANN. § 9-4-210 (2014); VA. CODE ANN. § 30-19.1:4 (2014); 1993 Neb. Laws 507 (codified at NEB. REV. STAT. §§ 50-129, 50-130 (1996)), *invalidated by* State *ex rel.* Stenberg v. Moore, 544 N.W.2d 344, 347 (Neb. 1996).

68. *See* sources cited *supra* note 67.

A. State Survey

Part I.A provides a brief survey of statutory appropriation requirements currently in effect, as well as a 1993 Nebraska statute that was struck down by the Nebraska Supreme Court in 1996 as an unconstitutional restriction upon future legislatures' power to legislate.

1. Tennessee

Tennessee was the first state in the country to enact a statute mandating that funds be appropriated from recurring revenues with respect to any law expected to increase the state jail or prison populations.[69] In 1985, the Tennessee General Assembly enacted legislation requiring that "[f]or any law . . . which results in a net increase in periods of imprisonment in state facilities, there shall be appropriated from recurring revenues the estimated operating cost of such law."[70] The appropriations amount made under the statute was to be equal to the amount reflected in an accompanying fiscal impact statement and was to be set equal to the highest projected annual operating cost over the next ten fiscal years.[71] These statutorily required appropriations were to be placed in a special reserve fund to be expended only for the following purposes: (1) "cancellation of bonds authorized but not yet sold;" and (2) "capital outlay for the department of correction."[72]

2. Colorado

Six years later, the Colorado General Assembly passed a similar statute requiring that funding must be expressly provided for any bill resulting in a net increase in periods of imprisonment in state correctional facilities.[73] The legislation states:

> [N]o bill may be passed . . . which would result in a net increase in periods of imprisonment in state correctional facilities unless, in such bill, there is an appropriation of moneys

69. *See* sources cited *supra* note 67.

70. Comprehensive Corrections Improvement Act of 1985, ch. 1, §§ 1–6 (codified as amended at TENN. CODE ANN. § 9-4-210 (2014)). "Operating costs" implies "all costs other than capital outlay costs." *Id.*

71. *See id.*

72. *Id.*

73. *See* 1991 Colo. Sess. Laws. 68 (codified at COLO. REV. STAT. ANN. § 2-2-703 (2014)); *see also* Diaz v. Romer, 801 F. Supp. 405, 413 (D. Colo. 1992) (stating that the Colorado Legislature has devised "a new approach to the sentencing of convicted felons, one that recognizes that there must be a commitment of financial resources concomitant with an increase in criminal sentences").

> which is sufficient to cover any increased capital constructions and any increased operating costs which are the result of such bill in each of the first five years in which there is a fiscal impact as a result of the bill.[74]

The statutorily required fiscal impact statement is prepared by the appropriations committee.[75] In 1993, the Colorado legislature created the "Corrections Expansion Reserve Fund," which sets aside funds that the Colorado General Assembly is to subject to annual appropriation for the purpose of complying with the statutory appropriation requirement.[76] This special reserve fund is nonreverting, meaning that "[a]ny unexpended or unencumbered moneys remaining in the fund at the end of any fiscal year shall remain in the fund and shall not revert to or be transferred to the general fund or any other fund of the state."[77]

3. Virginia

Of all the statutes surveyed in Part II.A, the Virginia statute has received most attention from scholars and public policymakers, and therefore this statute is examined in relatively greater depth.

In 1993, the Virginia General Assembly enacted legislation stating:

> For any law becoming effective on or after July 1, 1994, which results in a net increase in periods of imprisonment in state correctional facilities, a one-year appropriation shall be made from the general fund equal to the estimated increase in operating costs of such law, in current dollars, of the highest of the next ten fiscal years following the effective date of the law.[78]

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74. COLO. REV. STAT. ANN. § 2-2-703 (2014).

75. *See id.*

76. 1993 Colo. Sess. Laws. 119 (codified at COLO. REV. STAT. ANN. § 17-1-116 (2014)).

77. *Id.*

78. 1993 Va. Acts 804 (codified as amended at VA. CODE ANN. 30-19.1:4 (2014)). The legislation implemented key recommendations from a 1989 report examining prison and jail overcrowding in Virginia. *See* COMMONWEALTH OF VA. COMM'N ON PRISON & JAIL OVERCROWDING, FINAL REPORT, H.D. 1990-46, 1990 Sess., at 56 (1990), *available at* http://leg2.state.va.us/DLS/H&SDocs.NSF/4d54200d7e28716385256ec1004f3130/359ce1b5ccea4f3685255fda0075d590?OpenDocument ("The General Assembly should consider amending the *Code of Virginia* so that any proposed legislation which would have the effect of increasing the prison or jail population would become law only if the funds required to increase the capacity of the system commensurately are appropriated.").

This legislation was modified over the following two years. Specifically, the 1995 General Assembly directed the state sentencing commission to prepare fiscal impact statements.[79] In 1996, the General Assembly removed the Senate Finance and House Appropriations Committees from the fiscal note process altogether.[80] The 1996 General Assembly also created the "Corrections Special Reserve Fund as a special nonreverting fund on the books of the Comptroller."[81] The general assembly specified that monies in the special reserve fund must be used solely to cover the operating expenses of correctional facilities, including community programs that provide supervision or treatment.[82] The assembly also stipulated that such funds should not be expended prior to the first year in which the fiscal impact of any such bill covered under the legislation was expected to occur.[83] From 1994 to 1999, approximately $28.9 million was deposited into this special reserve fund in accordance with the statutory appropriation requirement.[84]

In 1999, a joint subcommittee was formed to review the 1993 legislation.[85] Significantly, the joint subcommittee concluded that the legislation had succeeded in compelling Virginia legislators to carefully consider the fiscal impact of bills likely to increase Virginia's correctional population.[86] The joint subcommittee also addressed several practical issues with respect to the implementation of the 1993 legislation, a number of which are discussed in detail below.

To start, the joint subcommittee addressed the more theoretical question of whether the legislative intent of the statutory appropriation requirement was to balance sentencing policies with correctional resources or, alternatively, to build up large cash reserves to support the operating expenses of new correctional fa-

79. *See* S. 2000-29, 2000 Sess., at 7 (Va. 2000) [hereinafter JOINT SUBCOMMITTEE REPORT], *available at* http://leg2.state.va.us/dls/h&sdocs.nsf/fc86c2b17a1cf388852570f9006f1299/983c2718b71d6aaa852568690058de1e/$FILE/SD29_2000.pdf.

80. *See id.* at 8.

81. *Id.*

82. *Id.*

83. *Id.*

84. *See id.*

85. *See* JOINT SUBCOMMITTEE REPORT, *supra* note 79, at 1.

86. *See id.* at 12 (citing as supporting evidence the fact that only fourteen bills falling within the scope of the statutory appropriation requirement were enacted during the six-year period following the passage of the original statute, and that of these fourteen bills, a significant majority had been amended in committee to reduce the projected fiscal impact).

cilities.[87] The subcommittee concluded that the intent of the legislation was to encourage careful consideration of the fiscal impact of proposed criminal justice bills on the state's correctional population.[88] The special reserve fund was "a means to accomplish this end, not an end in itself."[89] Thus, there was no need to accumulate a large fund balance.[90] Further, the statute originally required that monies in the special reserve fund be used only for the operating expenses of existing correctional facilities or certain community programs.[91]

Also, the statute originally required an appropriation equal to the highest estimated annual increase in operating costs of the proposed criminal sanction, calculated over the next *ten* fiscal years following the effective date of the sanction.[92] The joint subcommittee recommended a *six*-year look-forward period instead, expressing a lack of confidence in the accuracy of forecasts extending beyond six years and noting that this was the standard time horizon for capital outlay planning for new prison construction.[93] In addition, due to a potential impact on government workload, the joint subcommittee recommended that the scope of the statute should *not* be expanded to bills projected to impact the number of individuals in local or regional jails, juvenile detention homes, or community corrections programs.[94] The joint subcommittee, however, did recommend that, *for those bills included in the process*, the fiscal impact statement should include a calculation of the expected impact upon local and regional jails, juvenile detention facilities, and community corrections programs.[95]

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87. *See id.* at 16.

88. *Id.*

89. *Id.*

90. *See id.*

91. *See* 1996 Va. Acts 972 (current version at VA. CODE ANN. 30-19.1:4 (2014)). Interestingly, the joint subcommittee recommended that the Virginia legislation be amended to allow for expenditure of special reserve funds on capital expenses, including the cost of pre-planning studies, but not on operating expenses, with no restrictions placed upon the timing of such expenditures from the special reserve fund. *See* JOINT SUBCOMMITTEE REPORT, *supra* note 79, at 23.

92. *See* 1996 Va. Acts 972 (current version at VA. CODE ANN. 30-19.1:4 (2014)).

93. *See* JOINT SUBCOMMITTEE REPORT, *supra* note 79, at 20. Even if the bill was projected to have a minimal impact upon prison bed space during this six-year interval, the joint subcommittee concluded that there should be *no* minimum threshold dollar amount below which the special fund deposit would not be required. *See id.* at 24.

94. *See id.* at 19.

95. *See id.* at 19–20. Further, the joint subcommittee recommended that the legislation be amended to specify that the words "Cannot Be Determined" be

In 2000, the Virginia legislature adopted almost all of the findings and recommendations of the joint subcommittee report, and the statute was amended and reenacted as follows:

> A. The Virginia Criminal Sentencing Commission shall prepare a fiscal impact statement reflecting the operating costs attributable to and necessary appropriations for any bill which would result in a net increase in periods of imprisonment in state adult correctional facilities. The Department of Planning and Budget shall annually provide the Virginia Criminal Sentencing Commission with the operating cost per inmate.
>
> B. The Department of Planning and Budget, in conjunction with the Department of Juvenile Justice, shall prepare a fiscal impact statement reflecting the operating costs attributable to and necessary appropriations for any bill that would result in a net increase in periods of commitment to the custody of the Department of Juvenile Justice.
>
> C. The requirement for a fiscal impact statement includes, but is not limited to, those bills which add new crimes for which imprisonment or commitment is authorized, increase the periods of imprisonment or commitment authorized for existing crimes, impose minimum or mandatory minimum terms of imprisonment or commitment, or modify the law governing release of prisoners or juveniles in such a way that the time served in prison, or the time committed to the custody of the Department of Juvenile Justice, will increase.
>
> D. The fiscal impact statement of any bill introduced on or after July 1, 2002, that would result in a net increase in periods of imprisonment in state correctional facilities or periods of commitment to the custody of the Department of Juvenile Justice, shall include an analysis of the fiscal impact on local and regional jails, state and local pretrial and community-based probation services agencies and juvenile detention facilities.

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printed on the face of any proposed bill for which there was insufficient information to project the fiscal impact. *See id.* at 22. At the time, the state sentencing commission would include "NA" (Not Available) as the projected estimate of any bill for which there was insufficient data to calculate a fiscal impact. *Id.* The Department of Planning and Budget (DPB) would occasionally, if confronted with missing data, impute a minimum fiscal impact of three to five offenders and include, as a monetary estimate of the fiscal impact, an amount equal to $62,500. *See id.* The joint subcommittee also recommended that only one fiscal impact statement be prepared by the staff of the Virginia Criminal Sentencing Commission for all bills involving adult sentencing changes, conceiving the DPB's role in the fiscal note process as duplicative and unnecessary. *See id.* at 3.

E. The amount of the estimated appropriation reflected in the fiscal impact statement shall be printed on the face of each such bill, but shall not be codified. If the agency responsible for preparing the fiscal impact statement does not have sufficient information to project the impact, the fiscal impact statement shall state this, and the words "Cannot be determined" shall be printed on the face of each such bill.

F. The fiscal impact statement shall include, but not be limited to, details as to any increase or decrease in the offender population. Statements prepared by the Virginia Criminal Sentencing Commission shall detail any necessary adjustments in guideline midpoints for the crime or crimes affected by the bill as well as adjustments in guideline midpoints for other crimes affected by the implementation of the bill that, in the opinion of the Commission, are necessary and appropriate.

G. The agency preparing the fiscal impact statement shall forward copies of such impact statements to the Clerk of the House of Delegates and the Clerk of the Senate for transmittal to each patron of the legislation and to the chairman of each committee of the General Assembly to consider the legislation.

H. For each law enacted which results in a net increase in periods of imprisonment in state correctional facilities or a net increase in periods of commitment or the time committed to the custody of the Department of Juvenile Justice, a one-year appropriation shall be made from the general fund equal to the estimated increase in operating costs of such law, in current dollars, of the highest of the next six fiscal years following the effective date of the law. "Operating costs" means all costs other than capital outlay costs.

I. The Corrections Special Reserve Fund (the "Fund") is hereby established as a nonreverting special fund on the books of the Comptroller. The Fund shall consist of all moneys appropriated by the General Assembly under the provisions of this section and all interest thereon. Any moneys deposited in the Fund shall remain in the Fund at the end of the biennium. Moneys in the Fund shall be expended solely for capital expenses, including the cost of planning or preplanning studies that may be required to initiate capital outlay projects.[96]

96. 2000 Va. Acts 825, 833 (codified as amended at VA. CODE ANN. § 30-19.1:4 (2014)). This is the most recent version of the statute, with a couple of very minor changes made by Acts of the Virginia General Assembly in 2004 and 2007. Specifically, in subsection C, "mandatory" was amended to "mandatory minimum," and, in subsection D, "community corrections programs" was amended to "pretrial and

The Virginia legislation is provided in full here because many of its statutory provisions represent best practices as more fully discussed in Part II.C.[97]

4. Nebraska

On May 24, 1993, the Nebraska Legislature passed L.B. 507, codified in sections 50-129 and 50-130 of the state code.[98] Section 50-129 required that any legislation projected to increase the state's correctional population include an estimate of the expected increased correctional operating costs for the first four fiscal years during which the legislation was to be in effect.[99] Section 50-129 further instructed the Nebraska Legislature to provide, by specific itemized appropriation, an amount sufficient to meet the costs indicated in the fiscal impact statement.[100] Legislation projected to increase the state's correctional population and the appropriation was to be enacted at the same time.[101] Any bill that failed to include either the fiscal estimates or the appropriation was to be considered "null and void."[102] Section 50-130 provided that funds appropriated for increased correctional operating costs pursuant to section 50-129 be reserved and used as contingency funds by the Department of Correctional Services.[103] Under this section, these contingency

community-based probation services agencies." 2007 Va. Acts 133 (current version at VA. CODE ANN. 30-19.1:4 (2014)); 2004 Va. Acts 461 (current version at VA. CODE ANN. 30-19.1:4 (2014)).

97. In 2013, New Mexico State Senator Joseph Cervantes introduced legislation closely modeled after Virginia's statute. The major substantive difference between the two statutes is that expenditures from Virginia's special reserve fund are limited to "capital expenses, including the cost of planning or preplanning studies that may be required to initiate capital outlay projects," whereas monies in the New Mexico special reserve fund can be more broadly appropriated by the legislature for any "criminal justice purposes, including operational costs of the corrections department, courts, district attorneys and the public defender department." *See* S. 450, 51st Leg. 1st Sess. (N.M. 2013), *available at* http://legiscan.com/NM/text/SB450/id/727843/New_Mexico-2013-SB450-Introduced.pdf. Although the bill passed through the Senate Judiciary Committee, with a roll-call vote of eight for and one against, the bill subsequently died in committee. *See Legislative History of SB 450*, N.M.LEGISLATURE, http://www.nmlegis.gov/lcs/legislation.aspx?chamber=S&legtype=B&legno=450&year=13 (last visited Nov. 23, 2014).

98. 1993 Neb. Laws 507 (codified at NEB. REV. STAT. §§ 50-129, 50-130 (1996)), *invalidated by* State *ex rel.* Stenberg v. Moore, 544 N.W.2d 344, 347 (Neb. 1996).

99. *Id.*; *see also Moore*, 544 N.W.2d at 347.

100. *See Moore*, 544 N.W.2d at 347.

101. *See id.*

102. *See id.*

103. *See id.*

funds were to be appropriated to a separate budget program and could be expended *only* on adult inmate and juvenile per diem and medical expenses.[104]

The legislative history of the Nebraska statute illustrates the applicability of the theoretical framework set forth in Part I. It is clear from the floor debate on the proposed legislation that the legislative incentives predicted under this framework played a central role in the enactment of the legislation. Indeed, the legislative history strongly reinforces the theoretical framework, and illustrates the legislative incentives involved in introducing a criminal justice bill likely to increase the state's correctional population. For example, the possibility of intertemporal cost shifting is evidenced in the words of Senator Crosby who cautioned:

> When you bring a bill that has a large fiscal impact that is going to require a large amount of General Funds, we have to be straightforward about that, and not pretend that the money will be manufactured in somebody's basement . . . . It's going to come out of tax money. . . . [O]ne of the reasons we are in our current fiscal crisis is that we get all these programs that are initiated . . . and no money passed along with it. And eventually that catches up with us. *We have to fund them.*[105]

The legislative history also reveals a strong emphasis on "acting responsibly" as an elected public official.[106] It is clear that these state senators wished to act in furtherance of the public's best interest. But, these senators also recognized just how easy it is to increase criminal sanctions without giving proper consideration to the expected fiscal impact in the long run. This focus on opportunistic legislative behavior reinforces, contrary to the information disclosure model of sentencing regulation, the claim that the problem of inefficient sentencing policy is not so much informational as it is incentives based.

Acknowledging the importance of incentives, the Nebraska legislature set forth an incentives-based solution to prison overcrowding in the state.[107] Under the debated appropriation requirement, the sponsor of a criminal justice bill projected to increase the state's

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104. *See id.* at 347–48.

105. *See* NEB. S., FLOOR DEB. ON MAY 11, 1993, 93rd Neb. Leg., Reg. Sess., at 4827 (1993) (emphasis added).

106. *See id.* at 4829–30 (emphasis added) (quoting Sen. Kristensen as stating "If you're going to build prisons and you're going to increase the penalties, you've got to pay for it. . . . *This bill makes you live up to that responsibility*").

107. *See, e.g.*, Dennis Hoffman & Vincent J. Webb, *Prison Overcrowding in Nebraska: The Feasibility of Intensive Supervision Probation*, *in* NEBRASKA POLICY CHOICES

correctional population is now obligated to confront the very practical and strategic problem of finding the funding necessary to pay for some proportion of the estimated fiscal impact of the proposed bill.[108] In states with this appropriate mechanism, it is no longer simply a matter of convincing fellow legislators that the proposed criminal sentence is just or fair; the sponsor of the bill must further convince fellow legislators that the proposed sanction is also worth paying for. Budgetary resources are scarce. A required appropriation in the current fiscal period implies that revenue funds can no longer be devoted to other legislative initiatives or programs. Thus, the statutory appropriation requirement pits elected officials against each other in a legislative fight for limited funds.

Without such a mechanism in place, there is little incentive for a legislator to oppose more punitive sentencing policy and risk being characterized as "soft on crime."[109] This would hold true even if crime was not a pressing social issue because increasing the length of a given prison sentence is unlikely to pose a significant financial cost in the current legislative session. This is no longer the case, however, if the proposed change in sentencing policy now comes at the expense of government spending on other legislative initiatives or programs. By introducing a socially productive form of legislative bargaining, the statutory appropriation requirement increases the private cost to legislators of supporting more punitive sentencing policy, which, in turn, forces legislators to take more responsible account of the expected long-run fiscal impact of longer prison sentences.

B. A Separation of Powers Issue

There is an important constitutional separation of powers issue that arises in connection with these statutory appropriation requirements. Specifically, an argument can be made that such requirements impermissibly bind the power of future legislatures to legislate[110]—a practice commonly referred to as legislative en-

1, 3 (Russell L. Smith ed., 1988), *available at* http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1014&context=cpar.

108. *See id.*

109. *See supra* note 39 and accompanying text.

110. To the extent that these statutory appropriation requirements impose duties on executive officials, the argument does not extend to such officials who are legally obligated to follow the statute until it is amended or repealed. Likewise, to the extent that these appropriation requirements impose duties upon legislative budget offices, a court would likely interpret the statutory appropriation requirement as a rule of proceeding and conclude that this rule, so long as it is consistent with other rules, is binding upon legislative budget offices.

trenchment.[111] This issue was examined at length by the Nebraska Supreme Court in *State ex rel. Stenberg v. Moore*.[112]

The facts of the case are as follows: in 1995 the Nebraska Legislature passed L.B. 371, which contained various provisions projected to increase the average daily adult and juvenile inmate population in state correctional facilities.[113] No cost estimates, however, were formally included in the legislation, as required under section 50-129 of the enacted law, and no separate appropriations bill was submitted along with the enacted legislation, as also required under section 50-129.[114] Without such items, the legislation was rendered "null and void."[115] On June 20, 1995, Nebraska Attorney General Don Stenberg filed a petition for an original action in the Nebraska Supreme Court, seeking a declaratory judgment finding that sections 50-129 and 50-130 violated specific articles of the Nebraska state constitution.[116] The court granted the application to commence an original action.[117]

In its analysis of the case, the Nebraska Supreme Court explained the applicable constitutional rule:

> One legislature cannot bind a succeeding legislature or restrict or limit the power of its successors to enact legislation, except as to valid contracts entered into by it, and as to rights which have actually vested under its acts, and no action by one branch of the legislature can bind a subsequent session of the same branch.[118]

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111. *See generally* Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 379 (1987); *see also* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO L.J. 491, 509 (1997) (stating that legislative entrenchment is "inconsistent with the democratic principle that present majorities rule themselves"). *But see* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1666 (2002) (arguing that "entrenchment is both constitutionally permissible and, in appropriate circumstances, normatively attractive").

112. 544 N.W.2d 344 (Neb. 1996).

113. *Id.* at 346–47.

114. *Id.* at 346.

115. *Id.* at 347.

116. *Id.* at 346.

117. *Id.*

118. State *ex rel.* Stenberg v. Moore, 544 N.W.2d 344, 348 (Neb. 1996) (citing 82 CORPUS JURIS SECUNDUM STATUTES § 9 (1953)); *see also* Vill. of N. Atlanta v. Cook, 133 S.E.2d 585, 589 (Ga. 1963) (stating that one legislature "cannot tie the hands of its successors, or impose upon them conditions, with reference to subjects upon which they have equal power to legislate"); Atlas v. Wayne Cnty., 275 N.W. 507, 509 (Mich. 1937) ("The power to amend and repeal legislation as well as to enact it is vested in the Legislature, and the Legislature cannot restrict or limit its right to exercise the power of legislation by prescribing modes of procedure for

Unlike the U.S. Congress, which receives its grants of power from the U.S. Constitution, the Nebraska Legislature's power is plenary, limited by the provisions of the state constitution.[119] The court held that, absent a constitutional restriction on the legislative power, the state legislature's plenary power prohibited one legislature from demanding that a succeeding legislature include certain cost provisions and appropriations bills in all legislation projected to increase the state's correctional population.[120] The court struck down the statutory appropriation requirement as an impermissible restriction or limitation on the power of succeeding legislatures to enact legislation.[121]

To better understand what is constitutionally required in order not to bind future legislators to the statutory appropriation requirements under consideration here, it is instructive to compare the statutory appropriation requirement in Nebraska with that in Virginia.[122] Both statutes require a fiscal impact statement and corresponding one-year appropriation for any bill likely to increase the state's corrections population.[123] The Virginia statute, however, is more flexible and allows the succeeding legislatures freedom to

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the repeal or amendment of statutes; nor may one Legislature restrict or limit the power of its successors."). Note that what is true of statutes enacted by the legislature is also true of initiatives enacted by public vote, "for when the people pass an initiative, they exercise legislative power that is coextensive with that of the legislature." Wash. State Farm Bureau Fed'n v. Gregoire, 174 P.3d 1142, 1145 (Wash. 2007) ("A previously passed initiative can no more bind a current legislature than a previously enacted statute.").

119. *See Moore*, 544 N.W.2d at 349 ("The Nebraska Constitution is not a grant, but rather, is a restriction on legislative power, and the Legislature may legislate upon any subject not prohibited by the Constitution.").

120. *Id.*

121. *Id.*

122. Just as in Nebraska, the current legislature in Virginia cannot bind a succeeding legislature or restrict or limit the power of its successors to enact legislation. Article IV, section 14 of the Virginia Constitution sets forth the powers and limitations of the Virginia General Assembly, providing, in relevant part, that "[t]he authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted; and a specific grant of authority in this Constitution upon a subject shall not work a restriction of its authority upon the same or any other subject." VA. CONST. art. IV, § 14. Further, the Virginia Constitution "is a restraining instrument, and the General Assembly possesses all legislative power not prohibited by the constitution." Gallagher v. Commonwealth, 732 S.E.2d 22, 26 (Va. 2012); *see also* Town of Madison, Inc. v. Ford, 498 S.E.2d 235, 236 (Va. 1998) ("[T]he Virginia Constitution is a restriction of powers, establishing the limits of governmental action.").

123. *Compare* 1993 Neb. Laws 507 (codified at NEB. REV. STAT. §§ 50-129, 50-130 (1996)), *invalidated by* State *ex rel.* Stenberg v. Moore, 544 N.W.2d 344, 347 (Neb. 1996), *with* VA. CODE ANN. § 30-19.1:4 (2014).

take legislative action, shielding the statutory framework from judicial veto as a result.[124] In Virginia, a one-year appropriation must be made as part of the total budget bill in the year in which the legislation is enacted; in Nebraska, a separate appropriations bill was required.[125]

Likewise in Virginia, the appropriated funds are placed in the Corrections Special Reserve Fund and can be expended for capital expenses, including the cost of planning or pre-planning studies necessary to initiate capital outlay projects.[126] The Nebraska law, by contrast, required that the appropriated funds be used as contingency funds *only* for adult inmate and juvenile per diem and medical expenses, and *only* by the Department of Correctional Services.[127] The Nebraska statute also contained a provision stating that any legislation that failed to comply with the statutory appropriation requirement was to be considered "null and void"; Virginia's statute contains no such provision.[128]

In addition, even if a constitutional defect were located in Virginia's statute, the statute would be saved by a provision in Virginia's budget bill. The provision states that "[n]otwithstanding any other provision of law . . . the provisions of [the budget] shall prevail over any conflicting provision of any other law, without regard to whether such other law is enacted before or after this act."[129] Even if a court holds that the statutory appropriation requirement in Virginia is binding on succeeding legislatures, a future legislature would, nonetheless, still be free to ignore the statutory appropriation requirement. The budget bill thus supersedes the statutory appropriation requirement, and Virginia's appropriation mechanism cannot reasonably be interpreted to impermissibly restrict or limit the power of succeeding legislatures to enact legislation.[130]

More generally speaking, any statutorily imposed future appropriation merely expresses a *promise* or *intention* to appropriate some amount of money that is not binding upon subsequent legislatures,[131] and thus avoids the outcome that the *Moore* court sought

124. *See* Joan E. Putney, *Binding the Hands of Future Legislators: The Nebraska v. Moore Case*, VA. LEGIS. ISSUE BRIEF (July 11, 1996), http://dls.virginia.gov/pubs/briefs/BRIEF15.htm.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. 2013 Va. Acts 806.

130. *See* Putney, *supra* note 124.

131. *See, e.g.*, Frederick v. Presque Isle Cnty. Circuit Judge, 476 N.W.2d 142, 148 (Mich. 1991) (finding that a 1981 statute merely expressed a promise or inten-

to avoid.[132] The statutory appropriation requirements surveyed in Part II.A are therefore valid only as "rule[s] of legislative procedure enacted in statutory form," where future legislatures are free to pass laws that do not comply with the appropriation requirements.[133] Placing money in a special reserve fund in the current fiscal period and directing that these funds be used only for a specific purpose in the future, *subject to appropriation* by the legislature, merely expresses a promise to appropriate in the future that succeeding legislatures are perfectly free to disregard.[134]

Finally, *even if* the statutory appropriation requirement was somehow legally binding, the requirement is not practically binding. A future legislature can amend or repeal the statute mandating the appropriation in the first instance. Indeed, the appropriation requirement is binding on future legislatures only insofar as future legislators agree that the proposed statutory mechanism is a sensible solution to the inter-temporal externality problems identified in Part I.A. If a future legislature rejects the proposition that inter-temporal cost-shifting results in inefficient sentencing policy, then

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tion that the state would assume the responsibility of paying the fees of assigned appellate attorneys in the future and could not bind the legislature with respect to appropriations made in 1988).

132. *See* State *ex rel.* Stenberg v. Moore, 544 N.W.2d 344, 348 (Neb. 1996).

133. STATE OF TENN. OFFICE OF THE ATT'Y GEN., OP. NO. 08-195, EFFECT OF TENN. CODE ANN. § 9-4-210 ON GENERAL ASSEMBLY ELECTED AFTER ITS PASSAGE 4 (2008), *available at* http://www.tn.gov/attorneygeneral/op/2008/op/op195.pdf ("[T]o the extent that [the appropriation requirement] imposes limits on the General Assembly that are not in the Tennessee Constitution, the statute is not binding on a General Assembly. A subsequent General Assembly need not amend or repeal the statute to avoid its requirements.").

134. In *Associated Industries of Massachusetts v. Secretary of the Commonwealth*, the Massachusetts Supreme Judicial Court concluded that in order for there to be an appropriation a certain sum of money derived from the public revenue must be set aside "for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other." 595 N.E.2d 282, 286 (Mass. 1992) (citations omitted). The court rejected the plaintiff's contention that an appropriation occurs whenever public monies are set aside for a specific purpose, emphasizing that the monies must be set aside "in such manner that the executive officers of the government are authorized to use that money" and stating that "[i]t is not until the Executive Branch becomes authorized to use the monies that the monies are removed from the further control of the Legislature." *Id.* "Merely . . . placing [the monies] in a separate fund does not necessarily remove them from the Legislature's control," nor does "directing that [the monies] be used for a specific purpose, while at the same time acknowledging and providing that such use shall be 'subject to appropriation' by the Legislature" impermissibly impair the legislature's discretion in exercising its appropriative power as provided by the state constitution. *Id.*

that legislature could simply vote to repeal the statutorily created constraint on its ability to regulate sentencing decisions.[135]

An important assumption underlying this proposal, however, is that future legislators will *not* have an incentive to ignore or repeal the statutory appropriation requirement. Legislators will likely incur significant political costs in attempting to dismantle a formal statutory mechanism designed solely to promote fiscal responsibility and public accountability.[136]

C. Best Practices Defined

The statutes surveyed above all differ in important respects, suggesting a number of different ways to design a sensible statutory appropriation requirement. Part II.C identifies a set of best practices in terms of existing statutory provisions. In addition, Part II.C introduces a novel statutory provision not found in any existing legislation as a correction to an important asymmetry in the manner in which these statutory appropriation requirements presently operate.

1. Existing Statutory Provisions

Part II.C.1 introduces a set of best practices with respect to four key statutory provisions, each of which can be found in one or more of the statutes surveyed in Part II.A.

a. Proper Scope of Fiscal Impact Analysis

In the statutes examined above, the look-forward period (i.e., the period of time covered by the statutorily mandated fiscal impact

135. The current legislature cannot bar a future legislature from so acting, save perhaps by incorporating the statutory appropriation requirement as a provision in the state constitution. *See, e.g.*, Lenstrom v. Thone, 311 N.W.2d 884, 888 (Neb. 1981) ("*Unless restricted by some provision of the state or federal Constitution*, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose.") (emphasis added).

136. Specifically, in any given fiscal period the political costs of choosing to ignore a required appropriation or sponsoring a bill to repeal or amend the statutory appropriation requirement are assumed in this discussion to exceed the political benefits of formulating sentencing policy free of the implied statutory constraints. This inequality must hold true for any legislative delegation intended to operate as an effective commitment mechanism. *See, e.g.*, George Baker, Robert Gibbons & Kevin J. Murphy, *Informal Authority in Organizations*, 15 J.L. ECON. & ORG. 56 (1999) (providing a basic framing of the notion of "credible delegation"). Also, simple legislative inertia will likely play an important role in ensuring that the commitment mechanism endures from one legislative session to the next. *See, e.g.*, Richard Pierce, *Institutional Aspects of Tort Reform*, 73 CAL. L. REV. 917, 919 (1985).

statement) ranges from a minimum of four years in Nebraska to a maximum of ten years in Tennessee.[137] A fixed look-forward period is a flawed approach, however, and should be replaced with a properly constructed interval estimate.

A common justification for these fixed look-forward periods is that the accuracy of a fiscal forecast tends to diminish the further out in time the projection. Although conceptually simple, the use of an arbitrarily chosen threshold that remains constant across different fiscal impact analyses is an unnecessarily blunt response to estimation uncertainty. A better approach would be to model the reliability of the estimate explicitly by providing interval estimates of the expected fiscal impact for each fiscal period.[138] Specifically, a confidence interval could be estimated using standard statistical techniques, and the projected fiscal impact of the change in sentencing policy in each fiscal period could be set equal to the lower bound of this interval (or zero if the lower bound is negative). Table 2 summarizes this approach for a hypothetical sentence increase, from five to ten years in length:

TABLE 2: CONFIDENCE INTERVAL APPROACH TO FISCAL IMPACT ANALYSIS

Year	Estimated Confidence Interval	Projected Fiscal Impact	Projected Fiscal Impact Using Five-Year Look Forward Period
Year 5	$0	$0	$0
Year 6	($200,000, $400,000)	$200,000	$0
Year 7	($400,000, $800,000)	$400,000	$0

137. *See* sources cited *supra* note 67. Colorado's look-forward period operates slightly differently in that an appropriation must be made "in each of the *first* five years in which there is a fiscal impact as a result of the bill." *See* COLO. REV. STAT. ANN. § 2-2-703 (2014) (emphasis added).

138. Kim Hunt, *Sentencing Commissions as Centers for Policy Analysis and Research: Illustrations from the Budget Process*, 20 LAW & POL'Y 465, 474–75 (1998) (examining Monte Carlo analysis, which generates a single estimate and confidence interval of the forecasted impact of a policy change); *see also* CARL MATTHIES, VERA INST. OF JUSTICE, ADVANCING THE QUALITY OF COST-BENEFIT ANALYSIS FOR JUSTICE PROGRAMS 35 (2014), *available at* http://cbkb.org/wp-content/uploads/2014/03/Advancing-the-quality-of-CBA.pdf. If a statutorily imposed restriction or limitation on legislative decisionmaking can be undone, quickly and at relatively low cost, then future legislatures will simply renege on the decision to delegate made in the current time period. Accordingly, there would be no real sense that the statutorily created commitment mechanism constrains the optimizing decisions of future legislatures.

Year 8	($500,000, $1,300,000)	$500,000	$0
Year 9	(-$400,000, $2,800,000)	$0	$0
Year 10	(-$1,200,000, $5,200,000)	$0	$0
TOTAL		$1,100,000	$0

Under the proposed confidence interval approach, the estimated fiscal impact of the longer prison sentence is equal to $1.1 million—not $0, which is the estimated fiscal impact given a statutory look-forward period of five years.[139] This estimation strategy provides a more reliable estimate of the expected fiscal impact, recognizing the extent to which the reliability of a fiscal impact estimate decreases as the forecasting time horizon increases.[140]

All of the statutory appropriation requirements surveyed above, with the exception of the Colorado statute, only require fiscal impact statements to reflect the estimated increase in annual *operating* costs; they do not require the analysis to consider the estimated increase in *capital* expenses, such as prison construction costs.[141] Recall that the intended purpose of the statutory appropriation requirement is to force the present legislature to adopt a sufficiently long-run time horizon with respect to sentencing decisions,

139. *See supra* Table 2.

140. No provision is made in any of the statutes surveyed above for review of bills projected to have a fiscal impact upon local and regional jails, state and local community programs, or juvenile detention facilities. *See* sources cited *supra* note 67. Although expanding the fiscal impact review to include such correctional facilities would certainly increase the workload of fiscal analysts, this cost is offset by the benefits of a more accurate estimate of the fiscal impact of a proposed criminal sanction upon the corrections system *in its entirety*. The need for some form of cost internalization is especially acute with respect to local or regional jail facilities or community programs funded by local municipalities. This is because state actors can enact criminal sanctions leading to an increase in local or regional correctional populations, such as expanding the definition of certain low-level misdemeanor offenses, without incurring the full projected fiscal costs. *See, e.g.*, Mona Lynch, *Mass Incarceration, Legal Change, and Locale*, 10 CRIMINOL. & PUB. POL. 673, 682 (2011) ("[C]riminal justice policy is made and put into action at the municipal, county, state, and national levels, and the thousands of organizations that comprise this criminal justice network are, for the most part, relatively autonomous both horizontally and vertically."). By defining the scope of the fiscal analysis to include all such correctional facilities, the proposed statutory appropriation requirement will, therefore, serve not only to internalize the fiscal costs imposed upon succeeding state legislatures in *future* fiscal periods, but also the fiscal costs imposed upon local or regional legislatures in the *current* fiscal period.

141. *See* sources cited *supra* note 67.

correctly balancing both the short-run and long-run social benefits of proposed changes against the corresponding social costs.[142] Clearly, capital expenses are an important input in this weighing of social costs and benefits. Although there are a number of different ways to implement this cost internalization, the approach advocated here is to simply require that the estimated fiscal impact statement reflect the estimated increase in annual *average total costs*. "Average total costs" is defined here to mean all costs including capital outlay costs, with capital costs amortized over the expected lifespan of the capital asset.[143]

b. Features of the Special Reserve Fund

Best practices would allow special reserve funds to be appropriated by the legislature for either capital or operating expenses—there is no need to limit expenditures of special reserve funds to either type of expense. The statutes discussed in Part II.A, however, vary in terms of the limitations placed upon expenditures from the special reserve fund. Some statutes (e.g., Nebraska's) limit expenditures of special reserve funds to specific operational expenses of the corrections department,[144] whereas other statutes (e.g., Virginia's) limit expenditures of special reserve funds to capital expenses.[145] Further, the proposed 2013 New Mexico bill allows monies in the special reserve fund to be appropriated "by the legislature for any criminal justice purpose, including the operational costs of the corrections department, courts, district attorneys and the public defender department."[146] This is overly broad. Expenditures from the special reserve fund should be limited to spending on the correc-

142. *See supra* Part II.A.

143. Note that the use of average total costs as opposed to operating costs is recommended *not* to build up large cash reserves to fund new prison construction or to support the operating expenses of new correctional facilities—the special reserve fund is not a capital construction fund. *Cf., e.g.*, COLO. REV. STAT. § 24-75-302 (2014) (creating a capital construction fund in which funds may be appropriated for prison construction, including remodeling or renovation of existing corrections buildings or other physical facilities). Rather, in accordance with the more limited purpose of the statute, the intent is simply to provide an incentive for legislators, characterized by short-run bias, to properly balance criminal justice priorities with available correctional resources, and our proposed best practices advocate for the use of annual *average total costs* as opposed to annual *operating costs* as a proper strengthening of this incentive.

144. *See* 1993 Neb. Laws 507 (codified at NEB. REV. STAT. §§ 50-129, 50-130 (1996)), *invalidated by* State *ex rel.* Stenberg v. Moore, 544 N.W.2d 344, 347 (Neb. 1996).

145. *See* VA. CODE ANN. § 30-19.1:4 (2014).

146. *See supra* note 97 and accompanying text.

tions department, as these are the costs meant to be internalized under the statutory appropriation mechanism.

There are two other important constraints that should apply to monies in the special reserve fund. *First*, the fund should obviously be nonreverting, meaning that the fund balance remaining at the end of the fiscal year does not "revert" back to the general fund, but instead stays within the special reserve fund.[147] *Second*, there should be restrictions placed upon the timing of expenditures from the special reserve fund. For instance, in 2000, Virginia eliminated the following language from its statute: "money in the fund shall not be appropriated for expenditure prior to the first year in which the fiscal impact of any such bill is expected to occur."[148] The language was deleted in order to provide greater flexibility in the use of special reserve funds,[149] but too easily allows legislators to substitute spending appropriated from the general fund in the current fiscal period with spending appropriated from the special reserve fund in the subsequent fiscal period. Instead, the appropriation required under the fiscal impact statement should be placed in a separate account within the special reserve fund and should be appropriated for expenditure only when the fiscal impact of the bill for which the statutory appropriation was originally made is *first* realized.

c. The Utility of an Appropriations Schedule

Both the Colorado and Tennessee statutes contain interesting provisions that extend the required appropriation beyond one year. In Colorado, for example, section 2-2-703 states:

> [M]oneys sufficient to cover such increased capital construction costs and increased operating costs for the first five fiscal years in which there is a fiscal impact as a result of the bill shall be estimated by the appropriations committee, and after consideration of such estimate, the general assembly shall make a determination as to the amount of moneys sufficient to cover the costs, and such moneys *shall be appropriated in the bill in the form of a statutory appropriation from the general fund in the years affected*.[150]

Similarly, in Tennessee, section 9-4-210(a) states that the estimates of appropriations "may be adjusted to determine the amount of appropriations of recurring revenues to be repeated for the en-

147. This is true of all the statutes surveyed in Part II.A.

148. *See* JOINT SUBCOMMITTEE REPORT, *supra* note 79, at 23.

149. *See id.*

150. COLO. REV. STAT. ANN. § 2-2-703 (2014).

suing fiscal year," and "[*i*]*f no adjustment is made, then the amount of appropriations previously made shall be repeated*."[151]

In addition to a one-year appropriation based upon the Virginia model, best practices would include an appropriations schedule similar to the Colorado or Tennessee statutes. Specifically, an additional appropriation to the special reserve fund would be required in each of the four years following the initial one-year appropriation in an amount equal to the bill's estimated annual fiscal impact in that year.[152] Although this statutory provision implicates the constitutional concerns first raised in Part II.B, the future appropriations schedule should be understood as merely expressing a promise with regard to future appropriations from the general fund that is not binding upon subsequent legislatures.

Notwithstanding, the appropriation schedule satisfies an important political purpose in setting forth a concrete funding plan with respect to an enacted change in sentencing policy. While future legislatures are free to ignore the funding plans of prior legislatures, legislators who choose to do so arguably invite criticism from proponents of fiscal responsibility and public accountability.[153] Moreover, recall that the funds are specifically set aside for spending on corrections. Coordinated interests that benefit from this monetary set-aside (e.g., corrections staff) would likely protest any retraction of promised funds in a highly focused and organized manner. To the extent that these complaints have electoral ramifications for current legislators, the appropriation schedule, al-

151. TENN. CODE ANN. § 9-4-210 (2014) (emphasis added).

152. This assumes, of course, that no adjustment is made by the current legislature.

153. Suppose, for instance, that the legislature fails to put aside $50,000 as scheduled, depositing instead $0 into the special reserve fund. This defection will likely serve as a credible early-warning sign of future budgetary shortfalls (i.e., as a signal that the government is potentially signing checks that it cannot cash). Kansas' fiscal note legislation contains a unique provision that is similarly concerned with early-warning signs. The state sentencing commission is directed, under its enabling legislation, to "identify and analyze the impact of specific options for . . . reducing the number of prison admissions" if fiscal impact projections show that the state's "projections indicate that the inmate population will exceed available prison capacity within two years." KAN. STAT. ANN. § 74-9101(b)(15) (2014). This "early-warning system" accomplishes two objectives: (1) it alerts the legislature of a possible impending budget shortfall, and (2) it avoids putting legislators "in the sometimes politically perilous position of having to request 'options to reduce prison population' or formulate those options themselves." DANIEL F. WILHELM & NICHOLAS R. TURNER, VERA INST. OF JUSTICE, IS THE BUDGET CRISIS CHANGING THE WAY WE LOOK AT SENTENCING AND INCARCERATION? 9 (2002), *available at* http://www.vera.org/sites/default/files/resources/downloads/IIB_Budget_crisis.pdf.

though not legally binding, still provides a useful restriction on myopic, opportunistic legislative behavior.

d. The Problem of Indeterminate Fiscal Impacts

The statutes surveyed above all contemplate that if the fiscal analyst does not possess sufficient information to project a fiscal impact for a proposed bill, then the fiscal impact statement should be reported as *indeterminate*.[154] This, however, completely undermines the purpose of the information disclosure model to sentencing regulation, which views a lack of fiscal impact information as the reason for inefficient sentencing policy.[155] Informative fiscal impact statements are also critical to the success of the statutory appropriation requirement. Accordingly, policy ought to reduce the frequency of indeterminate fiscal impacts.[156] Specifically, a minimum default amount should be assigned to any bill for which the fiscal analyst does not possess sufficient information to estimate the fiscal impact. Although determining the appropriate size of this minimum default amount remains an open empirical question, some type of penalty or fine is needed to counter the strong legislative incentive to avoid fiscal impact scrutiny.[157]

2. A Novel Statutory Provision

Part II.C.2 proposes an additional manner in which monies can be withdrawn from the special reserve fund. The size of the reserve fund, even if following best practices for appropriation, is likely to be much larger than is presently the case in states such as Virginia. Money simply accumulating in a special reserve fund is relatively inefficient, however. As a result, there is likely to be pressure to withdraw money from the special reserve fund—particularly

154. *See* sources cited *supra* note 67.

155. *See supra* Part I.B.

156. *Cf.* Or. Cable Telecommc'ns Ass'n v. Dep't of Revenue, 240 P.3d 1122, 1130 (Or. Ct. App. 2010) (stating that state agencies must explain why a projection of fiscal impacts on small businesses is not feasible and requiring such agencies to make "necessary efforts to ascertain" the information required to project a fiscal impact).

157. In addition to a minimum default estimate, best practices would also require rigorous information provision and data collection. In New Mexico, for example, the proposed bill requires the corrections department to provide the operating cost per inmate and the number of inmates in adult correctional facilities, as well as admission and release data for all inmates in adult correctional facilities. *See supra* note 97. The bill also requires the judiciary to provide any requested data necessary to prepare fiscal impact statements. *Id.*

when the fund balance is large and in periods of fiscal crisis.[158] Part II.C.2 explains how money could be additionally withdrawn from the special reserve fund on the basis of fiscal impact statements projecting a *decrease* in the corrections population. Such a provision does not exist in any of the statutory appropriation requirements surveyed in Part II.A, and represents the main theoretical contribution of the present article.

Recall that Part I.A set forth the claim that proposing a longer prison sentence can imply a private political benefit in the short run, even if the longer prison sentence itself is *not* socially optimal in the long run.[159] The converse is also true. Due to the aforementioned "soft on crime" rhetoric,[160] proposing a shorter prison sentence can imply a private political *cost* in the short run, even if socially optimal in the long run.[161] Instead, the sponsor of such a bill must rely upon abstract notions of fiscal responsibility and public accountability to convince an otherwise generally ill-informed electorate that the less punitive criminal sentence is sound public policy. This is a difficult political argument to make, however, as there is rarely tangible evidence that the legislator can point to, in the current fiscal period, to support the less punitive sentence. The rationale underpinning our novel statutory provision is that a legislator can now use withdrawals from the special reserve fund in the current fiscal period as concrete, immediate proof of the fiscal benefits of less punitive sentencing policy.

As a specific example, legislatures tend to address the problem of prison overcrowding and other shortfalls in the corrections budget with a series of reactive policy initiatives, such as diversion or early-release programs based on good-time credits, in response to a looming fiscal crisis.[162] These measures are often much too

158. Like the two trust funds controlled by the Social Security Administration, the special reserve fund could be required, by law, to be invested in non-marketable securities issued and guaranteed by the "full faith and credit" of the federal government.

159. *See supra* Part I.A.1.c.

160. *See supra* note 39 and accompanying text.

161. *See* Alschuler, *supra* note 39; Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9 (1999).

162. *See* Brown v. Plata, 131 S. Ct. 1910, 1923 (2011) (stating that "[California] may employ measures, including good-time credits and diversion of low-risk offenders and technical parole violators to community-based programs" to reduce its prison population). *See generally* Nora V. Demleitner, *Good Conduct Time: How Much and for Whom? The Unprincipled Approach of the Model Penal Code: Sentencing*, 61 FLA. L. REV. 777 (2009) (offering a positive account of good time); James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217 (1982); Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U.

late, ad hoc, and overly broad. Moreover, such measures often release inmates prematurely, without a system of classification in place to select those inmates least likely to increase risk to the public.[163] Enacting a series of reactive reforms, often in a state of public emergency, is at best a temporary solution to the problem, and is surely inferior to rational, forward-looking measures designed to prevent overcrowding and other forms of fiscal crisis.[164] At present, however, there exists little incentive for a rational, forward-looking legislator to introduce such measures. The proposed statutory provision supplies this missing incentive by permitting a withdrawal from the special reserve fund *in the current fiscal period*, to the benefit of the legislator directly responsible for the expected budgetary windfall.[165]

Significantly, this model corrects an asymmetry in the manner in which such appropriation mechanisms presently operate.[166] Leg-

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COLO. L. REV. 679, 681–82 (1993) (noting how these reactive policy reforms transfer discretion on release of inmates from judges to correctional officials).

163. *See* Jacobs, *supra* note 162, at 220 (explaining that releasing prisoners for good time "shift[s] sentencing discretion from centralized parole authorities to prison guards, whose decisions are far less visible and are arguably more subject to abuse.").

164. *See, e.g.*, James Austin, *Using Early Release to Relieve Prison Crowding: A Dilemma in Public Policy*, 32 CRIME & DELINQUENCY 402, 415 (1986) (identifying potential financial and nonpecuniary victim costs and excessive discretion given to correctional administrators as a "dark side" of early release); Kevin A. Wright & Jeffrey W. Rosky, *Too Early Is Too Soon: Lessons from the Montana Department of Corrections Early Release Program*, 10 CRIMINOLOGY & PUB. POL'Y 881 (2011) (outlining inadequacies of alternative release procedures).

165. Provided the net effect of all enacted criminal sanctions in a given fiscal period is negative, in theory, there may be insufficient money in the special reserve fund to cover all statutorily required appropriations from the special reserve fund to the general fund; in other words, the proposed statutory provision assumes a non-zero fund balance. Empirically, the problem of a zero fund balance is likely to be small and would suggest that the appropriation requirement has generally succeeded in solving the larger problem of inefficient criminal sanctions. Note that this concern explains, in part, why best practices sought to maximize the size of the special reserve fund. To address the issue of non-zero fund balances, our proposed novel statutory provision could be modified such that the required appropriation is operable *only if* the existing fund balance is zero. Further, the fund itself could alternatively be enlarged by gifts, grants, donations, or bequests made to the fund by private citizens or other entities that want to maintain this statutorily created incentive for legislators to introduce bills projected to decrease the long-run equilibrium corrections population.

166. Interestingly, pressure applied by legislators on fiscal analysts to project large fiscal cost savings may expose and offset an existing bias to project small fiscal cost savings. That is, to the extent that current fiscal estimates tend to be downwardly biased, the proposed statutory provision introduces a competing upward

islators incur a cost in the current fiscal period if a proposed bill is projected to have a *negative* fiscal impact in the long run, but do not enjoy a corresponding benefit in the current fiscal period if a proposed bill is projected to have a *positive* fiscal impact in the long run. By allowing an appropriation from the special reserve fund when projecting decreases in the corrections population, the statutory appropriation mechanism forces legislators not only to internalize the *negative externalities* generated by *inefficient* sentencing policy, but also to internalize the *positive externalities* generated by *efficient* sentencing policy. Specifically, the sponsor of the bill can now point to the money appropriated from the special reserve fund to the general fund in the current fiscal period on the basis of the fiscal impact statement, as well as the uses to which such funds are subsequently put, as an immediate, concrete political accomplishment.[167] Thus, the legislator is given another way to explain to the general electorate how less punitive sentencing policy translates into fiscal cost savings, and is relieved of the difficult task of defending a potentially unpopular policy initiative with only a distant fiscal benefit.[168]

D. The Empirical Evidence

Part II.D further clarifies how the proposed statutory appropriation requirement operates and identifies several areas of imple-

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bias likely to counter it, potentially leading to more accurate fiscal estimates in general (i.e., across those projecting fiscal *costs* and fiscal *cost-savings*, respectively).

167. As has been stated, bills that are estimated to increase the corrections population will give rise to a fiscal impact statement indicating the average total cost increases, and an appropriation from the general fund to the special reserve fund must be made. *See supra* Part II.C.1.a. A similar procedure would apply to the appropriations schedule to the extent that such provision has been incorporated into the statutory appropriation requirement.

168. The link between the sponsor of the bill and the fiscal cost savings implied by the proposed bill can be made more robust. Suppose that a legislator has proposed a bill decreasing the sentence length for a given offense, resulting in a statutorily mandated one-year appropriation from the special reserve fund in an amount equal to $100,000. Instead of directly transferring $100,000 from the special reserve fund to the general fund, the individual legislator could be given a $100,000 appropriations credit towards any other bill of which she is a sponsor. For example, if the required appropriation for an education bill sponsored by this same legislator is also $100,000, then this legislator could use the credit obtained from the sentencing bill to satisfy the appropriation required for the education bill. The transfer to the general fund is, therefore, indirect. If the education bill is not passed, then the $100,000 would, of course, be directly appropriated to the general fund. The rationale for the added complexity is simply to more closely tie expected cost savings to the individual legislator directly responsible for such cost savings.

mentation where difficulties remain. For the sake of brevity, the discussion focuses exclusively on the state of Virginia.

1. Some Descriptive Facts

The number of fiscal impact analyses prepared pursuant to Virginia's statutory appropriation requirement has remained fairly constant over time.[169] With the exception of 2009,[170] the number of fiscal impact statements completed annually is typically in the range of 200 to 300.[171] The types of legislative changes requiring fiscal impact statements mainly involve the expansion or clarification of an existing crime or the establishment of a new crime.[172] In FY2012 and FY2013, "sex offenses" was the most common type of offense category for which a fiscal impact analysis was completed pursuant to the statutory appropriation requirement.[173] Other common offense categories included fraud/larceny, drugs, assault, and gangs/gang offenses.[174]

2. Difficulties Remain

For the most part, the Virginia legislation has succeeded in forcing legislators to carefully consider the fiscal impact of proposed criminal sanctions. The legislative history of Virginia bill H.R. 2269 provides an excellent example of how the statutory appropriation requirement has altered legislative incentives. Under the original version of the bill, any term of confinement imposed as the result of a mandatory minimum sentence had to be served consecu-

169. *See Legislative Impact Analysis for the 2013 General Assembly*, VA. CRIM. SENT'G COMMISSION 12 (March 18, 2013), http://www.vcsc.virginia.gov/Mar_11/Legislative%20Impact%20Analysis%202013.ppt.

170. *See id.* The variation in 2009 is likely explained by budget language introduced by the governor of Virginia in that same year. *See infra* note 180 and accompanying text.

171. *See Legislative Impact Analysis for the 2013 General Assembly*, *supra* note 169. Note that multiple fiscal impact statements may be produced for a given proposed bill, depending on the number of amendments to the bill or substitute versions proposed.

172. *See id.* at 13; *Legislative Impact Analysis for the 2012 General Assembly*, VA. CRIM. SENT'G COMMISSION 13 (March 19, 2012), http://www.vcsc.virginia.gov/Legislative%20Impact%20Analysis%202012%20HANDOUT.pdf.

173. *See Legislative Impact Analysis for the 2012 General Assembly*, *supra* note 172, at 14. This is not surprising as the legislation of sex offenses is unlikely to encounter substantial, coordinated pushback from powerful concentrated interests, and the class of convicted sex offenders is likely to be ineffective in mobilizing in support of its own interests.

174. *See id.*

tively with any other criminal sentence.[175] After the Virginia Criminal Sentencing Commission estimated, pursuant to the state's appropriation requirement, a $743,967 appropriation,[176] the bill was amended in committee to apply only to a limited set of sentences for certain child pornography offenses.[177] Rather than fight for this substantial one-year appropriation, the sponsor of the legislation limited the bill's scope, presumably to reduce the required one-year appropriation from $743,967 down to $50,000 and, in turn, to minimize the bill's political cost.[178]

Difficulties remain, however, in how the Virginia legislation has been implemented in practice. To start, a substantial majority of fiscal impact statements completed pursuant to the Virginia statute conclude that there is insufficient information to project a fiscal impact.[179] In response to this problem, the Virginia General Assembly passed an appropriations act in 2009 (Appropriations Act) that included new language relating to fiscal impact statements:

> [F]or any fiscal impact statement prepared by the Virginia Criminal Sentencing Commission pursuant to § 30-19.1:4 . . . for which the commission does not have sufficient information to project the impact, the commission shall assign a *minimum fiscal impact* of $50,000 to the bill, and this amount shall be printed on the face of each such bill, but shall not be codified.[180]

That is, rather than print the words "Cannot Be Determined" on the face of any proposed bill for which there is insufficient infor-

175. H.D. 2269, 2013 Gen. Assemb., Reg. Sess. (as offered by House of Delegates, Va. Jan. 16, 2013), *available at* https://lis.virginia.gov/cgi-bin/legp604.exe?131ûl+HB2269.

176. Va. Criminal Sentencing Comm'n, LD No. 13100817 Revised, Fiscal Impact Statement for Proposed Legislation H.B. No. 2269, at 1 (2012), *available at* https://lis.virginia.gov/cgi-bin/legp604.exe?131+oth+HB2269IMP (follow "01/16/13 House: Impact statement from VCSC (HB2269)" hyperlink).

177. H.D. 2269, 2013 Gen. Assemb., Reg. Sess. (Va. 2013), *available at* https://lis.virginia.gov/cgi-bin/legp604.exe?131ûl+HB2269ER.

178. *See id.*; Va. Criminal Sentencing Comm'n, LD No. Enrolled, Fiscal Impact Statement for Proposed Legislation H.B. No. 2269, at 1 (2013), *available at* https://lis.virginia.gov/cgi-bin/legp604.exe?131+oth+HB2269IMP (follow "03/04/13 House: Impact statement from VCSC (HB2269ER)" hyperlink).

179. *See, e.g.*, *infra* text accompanying notes 181–83.

180. 2009 Va. Acts 781 (emphasis added). Note that Virginia's statutory appropriation mechanism was not amended to reflect this change. Rather, the House of Delegates and the Senate inserted the applicable language into the budget bill and this requirement has remained in every budget adopted by the Virginia General Assembly since 2009. *See* 2013 Va. Acts 806; 2012 Va. Acts 3; 2011 Va. Acts 890; 2010 Va. Acts 874.

mation to project a fiscal impact, a minimum default amount of $50,000 is to be imputed as the fiscal cost of the proposed bill.

One would expect this provision in the Appropriations Act to incentivize legislators to provide the additional information or time necessary to complete the fiscal impact statements for bills with a likely expected fiscal impact of less than $50,000 and, in turn, to decrease the total number of bills for which the projected fiscal impact is classified as indeterminate. A quick survey of the available evidence, however, suggests that this additional provision has not fully resolved the problem of indeterminate fiscal impact estimates. In FY2013, for example, the Virginia General Assembly enacted twenty-five bills with fiscal impacts statements prepared pursuant to the statutory appropriation requirement.[181] Of these twenty-five bills, there was insufficient information to project the fiscal impact for *nineteen* of the twenty-five.[182] Likewise, in FY2012, there was insufficient information to project a fiscal impact for *eight* of the ten bills that required fiscal impact statements.[183] Obviously, a rate of completion of less than twenty-five percent of enacted bills falling within the scope of the statute severely undermines its effectiveness.

This analysis reveals an excessive reluctance on the part of fiscal analysts to posit reasonable assumptions that would allow for a fiscal impact to be estimated, sometimes in cases where an interval estimate approach would appear to yield values significantly above the $50,000 minimum default amount.[184] This is especially true with respect to legislative changes that expand or create a new crime.[185] Moreover, not only are fiscal impacts too often described

181. *See Legislative Impact Analysis for the 2013 General Assembly*, *supra* note 169, at 16–21.

182. *See id.*

183. *See Legislative Impact Analysis for the 2012 General Assembly*, *supra* note 172, at 16–19.

184. *See supra* Part II.C.1.a. Even in those isolated cases where an impact estimate of the proposed sentencing change is deemed indeterminate by the state fiscal analyst, the fiscal impact statement should still carefully explain why providing a fiscal impact estimate was impossible. This practice will serve to increase the transparency of the fiscal note process and allows the reader of the fiscal note to individually assess whether the conclusions contained therein are, indeed, justified. *See id.*; *see also* LEACHMAN, CHETTIAR & GEARE, *supra* note 52, at 13–14 ("Explaining why a budget impact estimate was impossible improves the transparency of the process, increasing trust" and "also allows the public to assess whether the fiscal note author's conclusion is justified.").

185. Consider Virginia bill S. 1083, which added several chemicals to the list of synthetic cannabinoids, and a number of synthetic stimulants (known as "bath salts") and other compounds, to Schedule I of Virginia's Drug Control Act. 2013 Va. Acts 785. Although the accompanying fiscal note stated that the bill would

as indeterminate, but the minimum default amount itself also often appears low in light of the proposed legislation. It is unlikely, for example, that the best fiscal impact estimate of H.B. 1746, which added numerous offenses to Virginia's definition of a violent felony,[186] is only $50,000.[187] Further, when sufficient information is available, the estimated fiscal impacts often appear low in light of the proposed legislation and tend to fall below the statutory threshold. For example, of the six bills with fiscal impacts enacted in FY2013 where sufficient information was available to prepare a fis-

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increase the need for state-responsible prison beds, the fiscal note also concluded that the impact of the bill could not be determined because the expected number of additional new felony convictions could not be estimated. VA. CRIMINAL SENTENCING COMM'N, LD NO. 13104499, FISCAL IMPACT STATEMENT FOR PROPOSED LEGISLATION S.B. NO. 1083 (2013), *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?131§um+SB1083 (follow "impact statement" hyperlink). Specifically, the fiscal note found that existing data were insufficient to identify Schedule I or II drug convictions that involved "bath salts" or the number of other incidents involving possession or sale of a substance affected by the bill. *Id.* at 3. This absence of data is, of course, not surprising given that the bill was only then defining the possession or sale of such substances as a crime. Given the presumed impetus for introducing the bill in the first instance (i.e., the dramatic rise in the use of synthetic marijuana in Virginia), the total number of convictions or incidents is unlikely to be two or fewer. Rather than conclude that the fiscal impact of the proposed bill was indeterminate, a set of reasonable assumptions should have been posited with respect to the expected number of new felony convictions, and an interval estimate should have been provided, with the required statutory appropriation as discussed in Part II.C.1.a set equal to the lower bound of the derived interval estimate.

186. *See* 2013 Va. Acts 424. The fiscal impact statement prepared in connection with the bill stated that "[o]verall, Virginia's circuit court judges comply with the sentencing guidelines recommendations in nearly 80% of all felony cases before them." VA. CRIMINAL SENTENCING COMM'N, LD NO. 13101862, FISCAL IMPACT STATEMENT FOR PROPOSED LEGISLATION H.B. NO. 1746, at 2 (2012), *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?131§um+HB1746 (follow "impact statement" hyperlink). It would seem to follow from this statement that the proposed bill would have resulted in longer prison terms for some large subset of total criminal offenders. The fiscal impact statement, however, concluded that because the *exact* number of offenders who would receive longer sentence recommendations in the future as a result of the proposed bill was unknown and could not be calculated, the estimated amount of the necessary appropriation could not be determined. *Id.*

187. *See* VA. CRIMINAL SENTENCING COMM'N, *supra* note 186. Given that the annual operating cost per prison inmate in Virginia is approximately $25,000, using the minimum default amount as an estimate of the fiscal impact implies that this far-reaching bill was projected to result in approximately two additional inmate-years, which is not plausible. *See* VERA INST. OF JUSTICE, THE PRICE OF PRISONS: VIRGINIA FACT SHEET 1 (2012), *available at* http://www.vera.org/files/price-of-prisons-virginia-fact-sheet.pdf.

cal impact statement, the estimated fiscal impact exceeded $50,000 in only one bill.[188]

If the intended purpose of the statutory appropriation requirement is primarily to encourage careful consideration of the fiscal impact of proposed criminal sanctions, then it is acceptable for legislators to underestimate the expected fiscal impacts. If the statutory appropriations are high enough to prompt costly bargaining among legislators all fighting for scarce resources, the legislation has achieved its intended purpose. This Article's untested hypothesis, however, is that Virginia's method of making appropriations on the basis of fiscal impact statements does not *fully* accomplish the legislation's intended objective. Additional steps should be taken, as outlined and explained in Part II.B, to ensure more reliable projections of the expected fiscal impact of bills likely to increase Virginia's jail or prison populations.

III.
AGAINST COST-BENEFIT ANALYSIS

Part II advocated for a more analytical, data-driven approach to sentencing policy. The statutory appropriation requirement relied upon sophisticated fiscal impact predictions, and best practices included a confidence interval approach to defining the appropriate fiscal impact estimates. These types of data-driven techniques, including the use of cost-benefit analysis, are increasingly found in a wide range of criminal justice contexts, such as parole hearings,[189]

188. *See Legislative Impact Analysis for the 2013 General Assembly*, *supra* note 169, at 16–21. The fiscal impact of H.B. 1847, which expanded the list of criminal street gang predicate offenses, was $574,916. *See id.* at 21. In 2012, the fiscal impact estimate for only one of the two bills for which there was sufficient information to generate an estimate exceeded $50,000. *See Legislative Impact Analysis for the 2012 General Assembly*, *supra* note 172, at 15–19 (noting a fiscal impact of $50,000 for bills where there was insufficient information to prepare a fiscal impact statement). The projected fiscal impact of this bill, which established/increased certain mandatory minimums with respect to Schedule I/II drug sale offenses, was relatively large and equal to $5,512,531. *See id.* at 16. The cost of the other bill, however, which added two offenses to the definition of "predicate criminal acts" for gang offenses, was small and equal to $3358. *See id.* at 18.

189. Parole boards are increasingly using risk assessment instruments in parole hearings. *See, e.g.*, John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391 (2006) (discussing different instruments that may be used); Jennifer L. Skeem & John Monahan, *Current Directions in Violence Risk Assessment*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 38 (2011) (discussing how risk assessment can be a component of deciding bail, sentencing, and parole).

place-based crime prevention,[190] and prisoner reentry.[191] Given this trend toward more sophisticated data-driven approaches to criminal justice, it seems reasonable to pose the following question: why not simply subject bills projected to increase the corrections population to some form of state-of-the-art, data-driven cost-benefit analysis (CBA) in lieu of the statutory appropriation requirement?

Although this suggestion is appealing in certain respects, Part III recommends that sentencing authorities should *reject* the use of full-scale CBA in assessing the merits of proposed changes in sentencing policy. Part III.A provides a very brief survey of the use of CBA in the criminal justice setting more broadly. Part III.B then exposes an important weakness in this approach as it specifically relates to sentencing policy. Specifically, the retributive benefit of proposed sentencing changes, an economic principle unique to sentencing policy, eludes accurate measurement given the current state of estimation technology. Finally, Part III.C argues that a mix of democratically elected representatives and judicial actors are better positioned at this point to perform the difficult task of evaluating the retributive value of proposed criminal sentences.

A. CBA and the Data-Driven Trend in Criminal Justice

CBA has been used to evaluate a number of different types of existing criminal justice programs, including the effectiveness of mental health[192] and drug courts,[193] electronic monitoring ser-

190. The police have embraced predictive policy technology that is enormously complex. *See, e.g.*, JENNIFER BACHNER, PREDICTIVE POLICING: PREVENTING CRIME WITH DATA AND ANALYTICS 21 (2013), *available at* http://www.businessofgovernment.org/sites/default/files/Predictive%20Policing.pdf; WALTER L. PERRY ET AL., RAND CORP., PREDICTIVE POLICING: THE ROLE OF CRIME FORECASTING IN LAW ENFORCEMENT OPERATIONS xix (2013).

191. Several jurisdictions are experimenting with social impact bonds as a financing mechanism for prisoner reentry. *See, e.g.*, Chris Fox & Kevin Albertson, *Payment by Results and Social Impact Bonds in the Criminal Justice Sector: New Challenges for the Concept of Evidence-Based Policy?*, 11 CRIMINOLOGY & CRIM. JUST. 395–96 (2011).

192. *See, e.g.*, M. SUSAN RIDGELY ET AL., RAND CORP., JUSTICE, TREATMENT, AND COST: AN EVALUATION OF THE FISCAL IMPACT OF ALLEGHENY COUNTY MENTAL HEALTH COURT (2007), *available at* http://www.rand.org/content/dam/rand/pubs/technical_reports/2007/RAND_TR439.pdf.

193. *See, e.g.*, MICHAEL W. FINIGAN ET AL., NPC RESEARCH, IMPACT OF A MATURE DRUG COURT OVER 10 YEARS OF OPERATION: RECIDIVISM AND COSTS I (2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219224.pdf; Shannon M. Carey & Michael W. Finigan, *A Detailed Cost Analysis in a Mature Drug Court Setting: Cost-Benefit Evaluation of the Multnomah County Drug Court*, 20 J. CONTEMP. CRIM. JUST. 315 (2003).

vices,[194] and prisoner re-entry programs.[195] In 2009, for example, the Washington State Institute for Public Policy (WSIPP) examined the effectiveness of a 2003 state law enabling the Department of Corrections to authorize "early-release time" for eligible non-violent property and drug offenders who demonstrated "good behavior" while incarcerated. The WSIPP concluded, on the basis of a CBA, that the enacted legislation generated a net social benefit of $1.88 per dollar of cost by (1) shortening the prison length of stay by sixty-three days, (2) decreasing the felony recidivism rates of prisoners released under the law by 3.5% (compared with similar offenders who stayed in prison an additional sixty-three days), and (3) increasing labor market earnings.[196]

In addition to assessing the effectiveness of existing criminal justice policies, CBA has also been used to assess the expected returns on investment for proposed criminal justice programs. In 2009, for instance, the North Carolina General Assembly formed the Youth Accountability Planning Task Force to examine a proposal to increase the age of juvenile jurisdiction from sixteen to eighteen.[197] Working in conjunction with the Vera Institute of Justice and other partners, the Task Force estimated that the policy change would yield a net benefit of $52.3 million per year.[198] Specifically, the CBA estimated the total cost to taxpayers of increasing the age of juvenile jurisdiction at $70.9 million per year, which included the costs of law enforcement, court administration, and other expenses.[199] It projected this annually reoccurring investment to generate $123.1 million per year in reoccurring benefits, which

194. *See, e.g.*, JOHN K. ROMAN ET AL., D.C. CRIME POLICY INST., THE COSTS AND BENEFITS OF ELECTRONIC MONITORING FOR WASHINGTON, D.C. (2012), *available at* http://www.urban.org/UploadedPDF/412678-The-Costs-and-Benefits-of-Electronic-Monitoring-for-Washington-DC.pdf; Stuart S. Yeh, *Cost-Benefit Analysis of Reducing Crime through Electronic Monitoring of Parolees and Probationers*, 38 J. CRIM. JUST. 1090 (2010).

195. *See, e.g.*, JOHN K. ROMAN & AARON CHALFIN, URBAN INST., DOES IT PAY TO INVEST IN REENTRY PROGRAMS FOR JAIL INMATES? (2006), *available at* http://www.urban.org/projects/reentry-roundtable/upload/roman_chalfin.pdf.

196. *See* ELIZABETH DRAKE ET AL., WASH. STATE INST. FOR PUB. POLICY, INCREASED EARNED RELEASE FROM PRISON: IMPACTS OF A 2003 LAW ON RECIDIVISM AND CRIME COSTS, REVISED 1 (2009), *available at* http://www.wsipp.wa.gov/rptfiles/09-04-1201.pdf.

197. *See* CHRISTIAN HENRICHSON & VALERIE LEVSHIN, VERA INST. OF JUSTICE, COST-BENEFIT ANALYSIS OF RAISING THE AGE OF JUVENILE JURISDICTION IN NORTH CAROLINA iii (2011), *available at* http://www.vera.org/files/cost-benefit-analysis-of-raising-the-age-of-juvenile-jurisdiction-in-north-carolina.pdf.

198. *See id.*

199. *Id.* at 11–17.

included cost savings to the adult corrections system, reduced victimization costs, and the long-term benefits of having fewer juveniles with adult criminal records.[200]

B. Valuing the Retributive Benefit of Criminal Sentences

In theory, an expert agency such as a legislative budget office or a criminal sentencing commission could perform a CBA similar to those described above to determine if the expected social benefits of a proposed change in sentencing policy exceed the expected social costs. The agency could use CBA as a filter or screen to distinguish those criminal sentences that increase social welfare from those that are purely the result of the harmful special interest group dynamics described in Part I.A.1. There is an important difficulty, however, that arises in the use of CBA to evaluate proposed changes in sentencing policy, and that is the question of how to properly value the *retributive benefit* of a criminal sentence.

Broadly speaking, retributive justice is a theory of punishment that considers proportionate punishment as an acceptable response to the commission of a crime.[201] Retributive justice is generally understood to be a deontological theory, meaning that a "proportionally just" punishment has an independent moral value separate and apart from some practical social value derived from its effects.[202] CBA, however, is a utilitarian or teleological theory insofar as punishment is viewed as solely the means to some other good, either general or individual. The socially efficient punishment determined by the relevant cost-benefit calculus may either exceed or fall short of the punishment required on the basis of "just desert."[203] Thus, these two distinct theories are typically conceptual-

200. *Id.* at 17–20.

201. *See, e.g.*, DAVID BOONIN, THE PROBLEM OF PUNISHMENT 35 (2008) ("Virtually everyone who has attempted to justify punishment, for example, firmly believes that punishment should be at least roughly proportionate to the severity of the offense."); Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 164 (2010) ("Retributivism . . . is centrally concerned with the imposition of punishment in proportion to an offender's moral desert."). *See generally* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005).

202. *See, e.g.*, ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 4 (2005) (stating that deterrence-oriented punishment policies pay insufficient attention to proportionality). *See generally* Sven Ove Hansson, *Philosophical Problems in Cost-Benefit Analysis*, 23 ECON. & PHIL. 163 (2007).

203. *See* VON HIRSCH & ASHWORTH, *supra* note 202.

ized as competing because each demands a different level of punishment to satisfy its dominant principles.[204]

According to the retributivist tradition, the appropriate sanction can be defined as a sanction that varies proportionately with the magnitude of the crime's harm. This can be represented formally as follows:

$$S_R = rH$$

where r denotes an exogenously given constant of proportionality, H the social harm caused by the criminal act, and S_R the optimally just level of punishment.[205] Under a simplified cost-benefit model, by contrast, the marginal social cost of punishment, cS_{CB}, which is assumed to vary linearly with the sanction itself (i.e., with S_{CB}), is set equal to the marginal social benefit, modeled here as a linear function of the crime's harm bH:

$$cS_{CB} = bH \Longrightarrow SCB = \left(\frac{c}{b}\right) H$$

Given this particular formulation of these two theories of punishment, the optimal sanctions are equal ($S_R = S_{CB}$) if and only if the following equation holds true[206]:

$$r = \frac{c}{b}$$

There is no reason to believe, however, that this equality will hold true with respect to a given crime.

Albeit a simplification, the above equations are intended to illustrate the basic thrust of the argument that the optimal sanction will vary depending upon the extent to which the punishment is either efficient or proportionally just. This Article tentatively suggests that this deontological/teleological distinction represents a false dichotomy. The justness of a criminal sanction, defined more

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204. *See, e.g.*, ANDREW VON HIRSCH, CENSURE AND SANCTIONS 17–19 (1993) (suggesting that retributivism at least requires an ordinal ranking of criminal offenses that sets the parameters of requisite punishment, whereas criminal law policies informed by CBA could lead to punishment of similar classes of offenders *differently* depending on the costs implied by that punishment).

205. Note that this equation implies that a given set of sentences is proportionally just if and only if relative sentences equal relative harms; i.e., if and only if:

$$\left(\frac{S_R^A}{H^A}\right) = \left(\frac{S_R^B}{H^B}\right).$$

206. *See* Joel Waldfogel, *Criminal Sentences as Endogenous Taxes: Are They "Just" or "Efficient"?*, 36 J. L. & ECON. 139, 143–44 (1993).

specifically as the extent to which a criminal sanction is proportional to the crime's harm, can be reconceptualized as a utilitarian benefit.[207] Specifically, a criminal sanction that is proportional to the harm caused by a criminal act implies a social benefit, which eventually becomes a social cost as the criminal sanction increasingly deviates from the optimal level implied by proportional justice. The retributive value of a particular sanction, therefore, can be seen as complementary to its utilitarian value, with the retributive value serving as merely an additional input in the cost-benefit calculus (e.g., as an inequality constraint in the applicable maximization program).[208]

Under this view, the problem associated with incorporating the retributive benefit of a criminal sanction into some form of CBA is not that the two theories of optimal punishment are irreconcilable. Rather, the retributive value of a criminal sanction is simply difficult to measure. In *United States v. Craig*, Judge Posner makes exactly this point.[209] In a concurring opinion, he states that when a judge must decide upon a criminal sentence, the social costs should, *in principle*, be compared with the benefits of imprisonment.[210] But Posner doubts whether judges could engage in a CBA of optimal sentencing severity because such analysis is likely to involve "enormous guesswork," particularly in assessing the "retributive value" of a criminal punishment.[211]

In theory, the retributive value of a criminal sanction can be measured using standard willingness-to-pay/willingness-to-accept

207. *Cf.* Chad Flanders, *Cost as a Sentencing Factor*, 77 MO. L. REV. 391, 400–02 (2012) (indicating that the legislature should be concerned with both social costs and retributivism).

208. This complementary weighing of retributive and utilitarian inputs is suggested by the Model Penal Code itself. *See* MODEL PENAL CODE: SENTENCING § 6B.03 (Tentative Draft No. 1, 2007) (stating that criminal sentences may be defined to effectuate one or more utilitarian goals within the boundaries of severity permitted under retributive/proportional justice principles); *see also* Rachel Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1298–99 (2005) ("[A] consideration of costs might assist the retributivist in achieving his or her goals because an analysis of costs might be a feasible substitute for the kind of proportionality analysis among crimes that retributivism endorses.").

209. 703 F.3d 1001, 1002–03 (7th Cir. 2012) (Posner, J., concurring) (urging the judiciary to consider the fiscal impact of imposing de facto life sentences).

210. *See id.* at 1004.

211. *Id.* By "retributive value," Posner means "the effect of punishment in assuaging the indignation that serious crime arouses and in providing a form of nonfinancial compensation to the victim." *Id.*

valuation methodologies.[212] In many cases, an individual likely would be willing to pay some amount of money in exchange for no criminal sanction imposed. For the direct victims of crime, the value of greater punishment is likely to be high because the victims of crime derive a utility—specifically, a retributive benefit —in seeing the perpetrator who caused them harm punished.[213] Likewise, society benefits in knowing that those who commit crimes are punished for such actions, and are not able to unjustly benefit from the commission of their crimes. This indirect benefit is likely smaller than the retributive benefits enjoyed by those who are the direct victims of crime. Measurement of these retributive benefits in practice is complicated by the fact that the victims of crime have an incentive to overstate or distort the true retributive value of a criminal sanction, and by the fact that it is unclear how best to aggregate the smaller, indirect benefit to society. The point here, however, is simply that the retributive benefit of a criminal sanction can, in theory, be monetized.

C. A More Limited Role for Expert Agencies

Assuming that the retributive benefit of a criminal sanction can be monetized and included as an input in a broader CBA of a proposed change in sentencing policy, the question is: which institutional actor is best positioned to perform this valuation exercise?

An elite body of independent experts should *not* attempt to value the retributive benefit of a proposed change in sentencing policy.[214] The retributive benefit of a criminal sentence is better

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212. *See generally* IAN J. BATEMAN ET AL., ECONOMIC VALUATION WITH STATED PREFERENCE TECHNIQUES: A MANUAL (2002); Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay-Willingness to Accept Gap, the "Endowment Effect," Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 95 AM. ECON. REV. 530 (2005) (examining the existence and interpretations of a possible gap between willingness to pay and willingness to accept).

213. *See* David B. Hershenov, *Restitution and Revenge*, 96 J. PHIL. 79, 79 (1999) (contending that punishment can be understood "as a *debt* the criminal pays to his victim(s) as compensation") (emphasis added).

214. Note that this argument takes as a basic premise the notion that criminal sanctions should be proportionally just. If this premise is not true, then the argument against CBA loses much of its theoretical force. In an engaging and important book, Professor Harcourt examines how the use of actuarial methods has distorted our conception of just punishment. *See* BERNARD E. HARCOURT, AGAINST PREDICTION: SENTENCING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 173–92 (2007). Harcourt contends that there now exists in our society an intuitive, deep-rooted sense that it is just to determine punishment in large part on the basis of actuarial risk assessment. *Id.* He suggests that what triggered this shift in our conception of just punishment is the production of technical knowledge itself; in

estimated by some combination of democratically elected representatives and judicial actors.[215] This does not imply, however, that there is no role for formal quantitative analysis in the regulation of sentencing policy. As described at length in Part II, a fiscal impact statement prepared pursuant to the statutory appropriation requirement should contain a fiscal impact analysis of the proposed change in sentencing policy. A fiscal impact analysis, however, is *not* the same as a CBA, which seeks to analyze the impact of proposed policy changes from multiple perspectives,[216] not just those of governmental entities.[217]

Interestingly, a number of important scholars and policymakers have suggested that the regulation of sentencing decisions should move towards some type of "full-cost model."[218] Under such

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other words, it is a case of justice conforming itself to developing technical knowledge. *See id*. Under this view, rehabilitation proves inadequate because it cannot be demonstrated to be technically correct. *See id*. Harcourt finds this deeply troubling, because it shows the extent to which technical knowledge directly influences and shapes our sense of justice. *See id*.

215. H.L.A. Hart famously proposed the following two-tier division of labor between judges and the legislature: consequences justify punishment on the institutional level, but the particular facts of a given case dictate individual's punishment. *See* H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, *in* Punishment & Responsibility 1, 8–12 (2d ed. 2008). In other words, the legislature should consider the costs of sentences, whereas judges should consider only the punishment the offender deserves based on the particular crime committed. *But see* Flanders, *supra* note 207, at 400–04 (contending that the distinction between the roles of the judiciary and the legislature is not as clear cut as the two-tier theory might otherwise suggest). *See generally* John Rawls, *Two Concepts of Rules*, 64 Phil. L. Rev. 3 (1955).

216. These perspectives include the impact of a proposed sentence upon victims, offenders, private industry, family members, the community, and so forth.

217. *See, e.g.*, Office of Fiscal & Program Review, Me. State Legislature, The Fiscal Note Process: An Overview 5 (2009) ("The fiscal impacts described in fiscal notes concentrate on the *direct* fiscal impact of the legislation on state government expenditures and revenue and the costs to local units of government. Fiscal notes do not try to assign a monetary value to the social benefits of a piece of legislation or conduct extensive modeling to determine the secondary and tertiary economic impacts (also known as 'dynamic' analysis . . .)."), *available at* http://www.maine.gov/legis/ofpr/other_publications/fiscalnote_process/overview124.pdf.

218. *See, e.g.*, Jordan M. Hyatt, Steven L. Chanenson & Mark H. Bergstrom, *Reform in Motion: The Promise and Perils of Incorporating Risk Assessments and Cost-Benefit Analysis into Pennsylvania Sentencing*, 49 Duq. L. Rev. 707, 737 (2011) ("There are three CBA models that are most prevalent in sentencing. First is the criminal justice system model, which limits costs to criminal justice expenditures . . . . Second is the direct-loss model. This adds limited tangible victims' costs to the first model. Third is the full-cost model. This model includes tangible victim costs and adds less tangible ones as well as outcome measures.").

a model, proposed criminal sentences would be subjected to CBA by an independent body of experts located within a legislative budget office or criminal sentencing commission.[219] Professor Chanenson, for instance, has argued that limiting quantitative analysis of proposed changes in sentencing policy to correctional population simulations "fails to adequately address per unit costs and outcomes by sentencing option and offense category, and does not include consideration of important aspects of program participation, recidivism and victimization."[220] This statement is undoubtedly true, but only in a more limited sense.

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219. *See id.* There is a similar push for courts to consider cost at sentencing. *See* Lynn S. Branham, *Follow the Leader: The Advisability and Propriety of Considering Cost and Recidivism Data at Sentencing*, 24 FED. SENT'G REP. 169 (2012) (providing a number of arguments for why judges should be provided with information comparing financial costs and recidivism risks of different sentencing options); Michael A. Wolff, *Missouri Provides Cost of Sentences and Recidivism Data: What Does Cost Have To Do With Justice?*, 24 FED. SENT'G REP. 161, 163 (2012) (arguing that judges should be provided with information on cost of recommended sentences if requested by judge); Michael A. Wolff, *Missouri's Information-Based Discretionary Sentencing System*, 4 OHIO ST. J. CRIM. L. 95, 101 (2006) (describing how sentencing information in Missouri now includes the resources available to other components of the justice system); *cf.* S. 1, 2013 Gen. Assemb., 2013 Sess. (Vt. 2013) (proposing legislation mandating that courts consider the approximate financial cost of available sentences), *available at* http://www.leg.state.vt.us/docs/2014/bills/intro/S-001.pdf. *But see* Chad Flanders, *Cost and Sentencing: Some Pragmatic and Institutional Doubts*, 24 FED. SENT'G REP. 164, 164–68 (2012) (contending that judges may not use available cost data at sentencing; that if judges do use such data, judges will do so without uniformity, leading to unjust disparities in sentencing; and that the legislature is better suited to make what are in effect budgetary decisions); Flanders, *supra* note 207, at 395 ("Cost should be, at most, a marginal consideration in sentencing and should not be something that judges are *urged* to consider as a primary sentencing factor."); Ryan W. Scott, *How (Not) to Implement Cost as a Sentencing Factor*, 24 FED. SENT'G REP. 172, 175 (2012) ("Rather than asking individual judges to decide, on an ad hoc basis, whether and how costs should matter—creating a serious risk of inter-judge disparity—the [sentencing commission should set] presumptive-sentencing ranges applicable to all judges in all courts."); Ryan W. Scott, *The Skeptic's Guide to Information Sharing System at Sentencing*, 2013 UTAH L. REV. 345. *See generally* Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351 (2005).

220. Hyatt, Chanenson & Bergstrom, *supra* note 218, at 723–24; *see also* Rachel Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1606 (2012) ("A sound evaluation of sentencing laws must look at not only the costs but also the benefits of these laws."). *See generally* David S. Abrams, *The Imprisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905 (2013); Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 365 (2004).

Extending the collection and maintenance of criminal justice databases beyond prison populations and annual incarceration costs to other criminal justice variables, such as recidivism rates, seems like an enormously useful project. Indeed, a handful of states presently authorize or mandate such data collection. Pennsylvania, for example, empowers its sentencing commission to "[c]ollect systematically and disseminate information regarding effectiveness of parole dispositions and sentences imposed."[221] North Carolina's sentencing commission has a statutory mandate to collect data and regularly report on both adult and juvenile recidivism rates.[222] But this increased data collection is socially beneficial only insofar as the newly collected data is used to improve the accuracy and precision of correctional population forecasting models.[223] Newly collected data on variables such as recidivism rates should not be used to calculate victimization costs or other indirect costs, as part of a larger project to determine if a proposed criminal sanction is social welfare increasing. Rather, quantitative variables, such as recidivism rates, should be used *only* to improve the accuracy and precision of the fiscal impact statements themselves.

In sum, the present Article rejects CBA of individual criminal sentences in favor of a more limited type of quantitative analysis predicated upon the rational use of overall correctional resources and the containment of jail and prison populations. The claim is that full-blown CBAs performed by an independent body of experts should not bind sentencing policy because some combination of legislators and judges can better assess the overall justness of a criminal sentence and can more accurately value the retributive benefit. Under our proposed statutory appropriation requirement, the quantitative analysis and required fiscal impact statements merely establish a minimum threshold in terms of funding commitments by the government. There is no need for an independent expert agency to more broadly determine if the expected social benefits of a proposed change in sentencing policy, including the retributive benefits, exceed the expected social costs. By reserving the final cost-benefit determination to judges and democratically elected leg-

221. 42 PA. CONS. STAT. ANN. § 2153(a)(11) (2014).

222. *See* N.C. GEN. STAT. § 164-47 (2014).

223. Using such techniques, prison population forecasting has proven, over time, to be fairly accurate and reliable. *See, e.g.*, Thomas W. Ross & Susan Katzenelson, *Crime and Punishment in North Carolina: Severity and Costs Under Structured Sentencing*, 11 FED. SENT'G REP. 207, 210 (1999) (stating that estimates provided by North Carolina's sentencing commission have been accurate to within 1% of the actual prison population).

islators, expert agencies must only perform the less arduous task of estimating the fiscal impact of proposed changes in sentencing policy.

CONCLUSION

Unlike the information disclosure model of sentencing regulation, this Article's proposed statutory appropriation mechanism recognizes that any promises made in the current fiscal period to increase corrections expenditures in future fiscal periods are not *credible*. One response to this lack of credibility would be to "make" the legislature commit to future spending in the current fiscal period. The present legislature, however, cannot bind the hands of future legislatures by committing its successors to make specific appropriations in future legislative sessions. The response to the cost-shifting problem identified here is to make the current legislature internalize some fraction of expected future costs by requiring a one-year appropriation in the current fiscal period in an amount proportional to the expected fiscal costs of the proposed change in sentencing policy. The appropriations requirement bolsters the credibility of the legislature's promise to fund larger correctional populations in the future when the fiscal impact of the change in sentencing policy is first realized. Identifying the socially optimal level of cost internalization is an interesting empirical question left open as a topic for future research.