Marquette Law Review

Volume 95
Issue 4 *Summer 2012*

Article 15

The Earned Release Revolution: Early Assessments and State-Level Strategies

Jesse J. Norris

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 Marq. L. Rev. 1551 (2012).
Available at: http://scholarship.law.marquette.edu/mulr/vol95/iss4/15

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

THE EARNED RELEASE REVOLUTION: EARLY ASSESSMENTS AND STATE-LEVEL STRATEGIES

JESSE J. NORRIS*

Reacting to widespread budget crises, many states are experimenting with earned release (also known as "early release") legislation to help cut correctional costs. This earned release revolution is a stark reversal of earlier trends toward determinate sentencing. Implementing earned release policies appropriately could help bring about a new sentencing era characterized by lower rates of incarceration and higher levels of public safety. However, earned release is potentially vulnerable to abuse and prone to backlash, and must be planned and implemented carefully to avoid endangering the public, fostering injustice, or failing to realize hoped-for budgetary savings.

This Article outlines a set of principles for ensuring the success of earned release, using Wisconsin as a case study because of its unusually complex array of earned release policies over the last decade. After a preliminary evaluation of Wisconsin's recent earned release policies, this Article presents four principles for an effective earned release system. Specifically, state policymakers dealing with earned release legislation should (a) prevent injustice by monitoring for bias and requiring structured, recorded decision-making; (b) provide for effective implementation through strategic governance; (c) ensure earned release is compatible with public safety; and (d) complement earned release with other measures designed to decrease incarceration.

This Article also uses preliminary data to respond to recent work on earned release and sentence modification. First, in response to arguments for the superiority of judicial rather than administrative sentence modification, the Article provides evidence that judicial sentence modification mechanisms may widen racial disparities. Second,

* Ph.D. in Sociology, University of Wisconsin-Madison; J.D., University of Wisconsin Law School. Dr. Norris was a visiting assistant professor of sociology at Beloit College for the 2010–2011 academic year, and is currently a staff attorney for the Dane County Circuit Court. He would like to thank Walter Dickey and Cecelia Klingele for their valuable comments on earlier drafts of this Article.

addressing the concern that administratively-run earned release might exacerbate racial disparities, I show that this has not occurred in Wisconsin. Finally, I demonstrate that Wisconsin's expanded earned release programs, in their first full year of implementation, only released about 100 inmates who would not have been released that year anyway (about .5% of the state's prison population). While this does not prove that earned release can never be a major factor in reducing prison populations, it does reinforce the Article's argument for supplementing earned release with other incarceration-lowering policies.

I. INTRODUCTION 1554
II. EARNED RELEASE: NATIONAL TRENDS AND WISCONSIN'S CURRENT SYSTEM 1559
A. *Earned Release's Rapid Rise* 1559
B. *Wisconsin: Five Sentencing Systems in Twelve Years* 1564
C. *Earned Release Mechanisms for Wisconsin State Prisoners* 1567
1. Parole Release 1568
2. Compassionate Release 1568
3. Program-Based Release 1571
4. Sentence Adjustment 1572
5. Earned Release from Probation 1573
6. ERRC Release 1573
7. Positive Adjustment Time 1574
8. Risk Reduction Sentence 1575
9. Certain Early Release 1576
10. Earned Release from Extended Supervision 1577
D. *Shifts in Decision-Making Authority* 1577
III. DESIGNING AND IMPLEMENTING EARNED RELEASE: LESSONS FROM WISCONSIN AND GENERAL PRINCIPLES FOR STATE-LEVEL STRATEGIES 1578
A. *Evaluating Wisconsin's Earned Release Mechanisms* 1579
1. Reducing the Judicial Role in Earned Release Decisions 1579
2. Broadening Compassionate Release 1588
3. Prioritizing Public Safety 1592
4. Addressing Reentry and Revocations 1595
5. Multiplying Mechanisms 1599
6. Uneven Implementation 1602
7. The Need for Additional Resources and Judicial Education 1603

B. What States Should Do to Ensure the Effectiveness of Earned Release: Four Principles 1606
1. Avoiding Injustice: Data Gathering and Structured Decision-Making 1606
a. Transparent Monitoring of the Implementation of Earned Release 1607
b. Ensuring Principled, Recorded Decision-Making 1609
2. Ensuring Implementation Through Strategic Governance 1615
3. Making Earned Release Compatible with Public Safety 1621
4. Complementing Earned Release with Additional Measures to Reduce Incarceration 1623
C. Implications for Rule-of-Law Sentencing 1629
IV. CONCLUSION 1631

I. INTRODUCTION

Earned release[1] is on the rise nationwide. In response to historic budget shortfalls in the wake of the financial crisis, numerous states expanded opportunities for offenders to leave prison before their maximum release dates, and many more are considering such plans.[2] This earned release revolution is encouraging because it is a move toward a criminal justice system that achieves public safety without relying on unnecessarily high incarceration rates. After all, the United States has had the highest incarceration rate in the world since 2002,

1. Earned release, as this Article employs the term, refers to any policy allowing offenders to be released from a confinement or community supervision sentence earlier than the maximum term originally imposed by the court. The more common term "early release" is misleading because it suggests that offenders are released before they served the sentence intended by the judge. This misunderstanding can unnecessarily prejudice the public against earned release. Accordingly, some scholars avoid using the term "early release," because "[l]etting offenders out after the minimum term that the judge said was appropriate is not an 'early' release—it is a release before the maximum." Todd R. Clear & Dennis Schrantz, *Strategies for Reducing Prison Populations*, 91 PRISON J. 138S, 147S–48S (2011). Given these concerns, this Article employs the term "earned release." Referring to the release as "earned" is appropriate because authorities tend to permit release before the maximum only for inmates with good records of behavior or success in rehabilitative programs. The only exception is compassionate release, in which the inmate is released not because of anything he or she has done but because of his or her advanced age or "extraordinary health condition." *See* WIS. STAT. § 302.113(9g) (2009–2010) (stating that certain inmates serving bifurcated sentences may request a sentence modification if they have terminal illness). However, since candidates for compassionate release will have normally served several years of prison already, and have effectively lived out the last several years of their active lives in prison, one could say that they have served enough of their sentence to have "earned" the right to a more dignified death (or in the case of advanced age, a more dignified final phase of life).

2. Angela Couloumbis, *Rendell Signs Bills on Early Prison Release*, PHILA. INQUIRER, Sept. 26, 2008, at B5 (discussing passage into law of legislation creating compassionate release, and a type of sentence allowing for earned release after completing certain programs and engaging in good behavior); Monica Davey, *Safety Is Issue as Budget Cuts Free Prisoners*, N.Y. TIMES, Mar. 5, 2010, at A1 ("[A]bout half the states . . . have tinkered with parole, early release programs and sentencing laws or are considering doing so."); Gary Emerling, *D.C. Aims to Save Money by Releasing Inmates: Up to 80 Percent Could Qualify to Leave Prison Early*, WASH. TIMES, Apr. 2, 2009, at A1 (discussing mayor's plan for earned release policy allowing as much as 80% of Washington, D.C.'s inmates to achieve earned release); John Hill, *Fewer Behind Bars: Prison 'Good Behavior' Incentive Works*, PROVIDENCE J., Dec. 12, 2009, at A1 (discussing new sentence credit policy expanding the amount of credit inmates can earn for good behavior); *SB 500 a Step in Prison Reform*, SEACOAST ONLINE (Feb. 28, 2010), http://www.seacoastonline.com/articles/20100228-OPINION-2280313 (discussing New Hampshire proposed legislation requiring release of inmates with good behavior after serving their minimum sentence).

many times the rate of any other democratic, industrialized country.[3] Yet these new earned release policies have already sparked a political backlash in some states, in a few cases resulting in their cancellation or suspension.[4] Despite these problems, today's budgetary realities, together with a widespread shift away from tough-on-crime policies, suggest that earned release could continue to spread.

This raises a vital question for state policymakers: how can the state plan and implement earned release in a way that results in significant cost savings without harming public safety or causing other problems? This question is exceedingly important, not only because it affects public safety, but also because the way it is answered will affect the trajectory of criminal justice reform across the country. Besides increasing risks to the public, poorly implemented earned release policies could foster injustice, widen racial and geographic sentencing disparities, weaken confidence in the criminal justice system, and lead to confusion and frustration among inmates and criminal justice actors.[5] Such outcomes could cause a backlash that stalls or reverses the process of criminal

3. Sara Wakefield, *Invisible Inequality, Million Dollar Blocks, and Extra-Legal Punishment: A Review of Recent Contributions to Mass Incarceration Scholarship*, 12 PUNISHMENT & SOC'Y 209, 209 (2010). As of 2007, 756 of every 100,000 people in the United States were incarcerated. ROY WALMSLEY, WORLD PRISON POPULATION LIST 1, 3 tbl.2 (8th ed. 2009). Among Canada, Australia, and the major countries of Northern and Western Europe, the incarceration rate per 100,000 ranges from 63 (in Denmark) to 153 (in the United Kingdom). *Id.* at 3–5 tbls.2–5. Particular populations are incarcerated at considerably higher rates. For example, the U.S. African-American male incarceration rate is 4,749 per 100,000, six times the rate for white males. HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 1, 21 tbl.18 (2010).

4. John O'Connor, *Illinois Ends Secret Prison-Release Plan*, SEATTLE TIMES, Dec. 15, 2009, http://www.seattletimes.nwsource.com/html/nationworld/2010638353_apusprisonssecretrelease.html (describing an unpublicized process of earned release that gave inmates "good time" credit before they had earned it, resulting in some offenders being released after less than two weeks of confinement); *Release of Inmates to Stop; Lawmakers Must Find Funds*, KY. POST, Feb. 1, 2003, at 1K; *see also supra* notes 57–59 and accompanying text (noting the recent backlash and reform that took place in Wisconsin). For a discussion disputing many of the claims made by critics of the Illinois early release program, including the claim that the releases were secret or endangered the public, see MALCOLM C. YOUNG, BLUHM LEGAL CLINIC NORTHWESTERN UNIV. SCHOOL OF LAW, SETTING THE RECORD STRAIGHT: THE TRUTH ABOUT "EARLY RELEASE" FROM ILLINOIS PRISONS 16–17 (2010), *available at* http://blogs.chicagotribune.com/files/setting-the-record-straight.pdf.

5. *See infra* III.A.1. and III.B.1.

justice reform, leaving the country mired semi-permanently in the incarceration-focused, "tough-on-crime" paradigm of the 1990s.[6]

This Article answers the question posed above by analyzing the earned release mechanisms of a single state, Wisconsin, and drawing on its lessons, as well as scholarly sources, to formulate tentative general principles for successful earned release policies. Wisconsin is a fitting case study because of its recent experience with several distinct sentencing regimes, and the unusually large number of earned release mechanisms that have been in effect at some point over the last decade.

Recent earned release reforms have been the subject of relatively little research. Since legislation expanding earned release has not become popular until recently, few empirical analyses of these policies exist.[7] Professor Cecelia Klingele advocates for judicial sentence modification as a potentially more transparent, sustainable, and accountability-enhancing form of earned release.[8] In another article, Professor Klingele analyzes the "early demise of early release" in some states and articulates three principles to guide earned release policies.[9] This Article, while in broad agreement with Professor Klingele's analysis in her latter article, develops a complementary approach focusing on different issues.[10] Professor Kelly Hannah-Moffat's forthcoming article analyzes the use of risk assessment tools in general

6. *See* Sheila R. Rule, *Prisons, Crime and Budgets: Time for a New Paradigm*, HUFFINGTON POST (Mar. 10, 2011), http://www.huffingtonpost.com/sheila-r-rule/prisons-crime-and-budgets_b_834079.html.

7. *See* Clear & Schrantz, *supra* note 1, at 138S ("Although there has been a great deal of policy activity trying to reduce the size of prison populations, especially in the last few years, very little of this activity has received rigorous evaluation."). Most of the existing academic literature analyzes relatively narrow issues, such as current proposals for "second-look" judicial earned release and compassionate release. *See, e.g.*, William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850 (2009) (discussing rationale for compassionate release and evaluating when compassionate release is proper); Richard F. Frase, *Second Look Provisions in the Proposed* Model Penal Code *Revisions*, 21 FED. SENT'G REP. 194, 194–202 (2009).

8. Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 514–20 (2010) [hereinafter Klingele, *Changing the Sentence*].

9. Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415 (2012) [hereinafter Klingele, *Early Demise*].

10. For example, Klingele discusses the need to acknowledge limits to institutional capacity, present the case for earned release in moral terms (rather than selling it as a budgetary fix), and to further develop the principles underlying earned release. Without disputing these principles, this Article offers a more "instrumental" (as Professor Klingele puts it) approach to guiding earned release policy. *Id.* at 450–58.

and contends that their use may help achieve lower prison populations, presumably by facilitating earned release when the risk for recidivism is low.[11]

Professor Bernard Harcourt, responding to Hannah-Moffat, contends that policymakers should focus on reducing prison admission rather than increasing earned release.[12] His argument is based on the prediction that risk assessment tools used to inform earned release decisions will be biased against minorities, and on empirical research showing that prison admissions, and not sentence length, were the real driver behind increasing prison populations.[13]

This Article makes four contributions to the literature on earned release. First, in response to Professor Klingele's argument for increasing the role of judges in earned release, I argue that administrators should hold most of the responsibility for earned release decisions. As part of this argument, I present preliminary empirical data demonstrating extreme geographical disparities in one of Wisconsin's judicial earned release mechanisms, which may have contributed to Wisconsin's already abysmal racial disparities in imprisonment.[14]

Second, to address Professor Harcourt's concerns, I use recent data to demonstrate that the implementation of the earned release mechanisms in effect from 2009, which was administered chiefly by state officials with the aid of risk assessment tools, was not racially skewed.[15] However, these earned release programs accounted for only about 5%

---

11. Kelly Hannah-Moffat, *Actuarial Sentencing: An "Unsettled" Proposition* CRIMINOLOGY & PUB. POL'Y (forthcoming 2012) (manuscript at 3, 4, 10, 30).

12. Bernard Harcourt, *Risk as a Proxy for Race*, 11 CRIMINOLOGY & PUB. POL'Y (forthcoming 2012) (manuscript at 2, 9).

13. *Id.*

14. As of 2002, Wisconsin incarcerated a higher percentage of its African-American population than any other state, according to statistics produced by the federal government. *Black Incarceration Here Highest in U.S.*, CAP. TIMES (Madison, Wis.), Apr. 11, 2002, at 4A. Wisconsin is also among the five states with the highest ratio between African-American and white imprisonment rates. MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 10 tbl.5 (2007), *available at* http://www.sentencingproject.org/Admin\Documents\publications\Crd_stateratesofincbyraceandethnicity.pdf. Moreover, Wisconsin has the nation's highest racial disparity for drug crime sentences. Crocker Stephenson, *State Leads in Prison Drug Gap*, MILWAUKEE J. SENTINEL, May 6, 2008, at A1. See COMM'N ON REDUCING RACIAL DISPARITIES IN THE WIS. JUSTICE SYSTEM, FINAL REPORT (2008), *available at* ftp://doaftp04.doa.state.wi.us/doadocs/web.pdf, for a discussion on ways to reduce Wisconsin's racial disparity in the criminal justice system.

15. *See infra* note 250–253.

of the releases that occurred during their existence, and most of the releases only reduced the inmate's prison sentence by a year or less.[16] Only 107 inmates released through an earned release mechanism in 2010 (corresponding to about 0.5% of the state's prison population) would not have been released that year anyway.[17] These results support this Article's argument that, because earned release may, in many cases, have a relatively small impact on incarceration, states need to complement earned release with other policies reducing prison admissions.

The third and most general contribution of this Article is that it analyzes earned release policy in a uniquely comprehensive way, outlining basic principles for prudent and effective implementation.[18] Finally, this Article's discussion of the Wisconsin reforms is the first detailed evaluation of a state's recent earned release legislation since the beginning of the earned release revolution.

Part II provides background on national trends in sentencing reform, including the recent spread of earned release legislation; briefly overviews Wisconsin's five sentencing eras; and outlines the current earned release mechanisms in Wisconsin's criminal justice system. In Part III, this Article evaluates Wisconsin's earned release reforms of 2009 and 2011, describing both positive elements and some issues of concern. On the positive side, Wisconsin's 2009 reforms reduced the judicial role in most earned release mechanisms, significantly broadened the scope of compassionate release, were careful to avoid endangering public safety, allowed for modification of community supervision (parole and extended supervision) sentences, and took initial steps to address offender reentry and to reduce revocation rates for those serving community supervision sentences.[19] The uneven implementation and funding of these policies, the imperfect communication with the judiciary, and the complexity and large number of the mechanisms are causes for concern with the 2009 policies.[20]

16. E-mail from Anthony Streveler, Wis. Dep't of Corr., to author (Jan. 27, 2012).

17. *Id.* The average daily prison population in 2010 was 20,015. Dee J. Hall, *Behind Bars in Wisconsin: Prison Population Drops 13.6%*, WIS. STATE J., Jan. 13, 2011, at A1.

18. This Article is the first to do so, with the exception of Klingele's complementary article. *See supra* notes 9–10 and accompanying text.

19. *See infra* Part III.A.

20. *See infra* Part III.A.5–.7.

Wisconsin's 2011 legislation abolished several of its 2009 earned release mechanisms and gave judges a stronger role in earned release, but retained the broadened scope of compassionate release, the policy focuses on reducing revocation and recidivism rates, and the ability to modify probation sentences.[21] As part of its analysis of these changes, this Article argues that while there are a variety of defensible earned release arrangements, executive branch actors should have most of the responsibility for earned release, with judges playing a secondary, more limited role.

Drawing on Wisconsin's experience and recent criminal justice and governance research, this Article then presents four tentative principles to guide the successful design and implementation of earned release legislation in other states. Specifically, state policymakers dealing with earned release legislation should (a) prevent injustice by monitoring for bias and requiring structured, recorded decision-making; (b) ensure effective implementation through strategic governance; (c) prevent earned release from harming public safety; and (d) complement earned release with other measures designed to decrease incarceration in ways consistent with public safety. Implemented in this way, earned release can play an important role in moving toward a new, more sustainable sentencing era involving less incarceration and enhanced public safety. In addition to these benefits, this approach to earned release could help bring the rule of law to sentencing decisions, thereby correcting the long-lamented "lawlessness" of sentencing.[22] Part IV briefly summarizes this Article's arguments, and discusses promising areas for future scholarship.

II. EARNED RELEASE: NATIONAL TRENDS AND WISCONSIN'S CURRENT SYSTEM

A. Earned Release's Rapid Rise

During the 1990s, most U.S. states shifted from an indeterminate sentencing system—in which parole boards had wide latitude to release inmates—to determinate systems requiring inmates to serve far larger proportions of their sentence.[23] Though described as "truth-in-

21. *See, e.g.*, 2011 Wis. Act 38, § 93b (amending WIS. STAT. § 973.09(3)(d)(intro.) to give the sentencing court the authority to modify an inmate's period of probation).

22. *See infra* Part III.B.1.b.

23. PAULA M. DITTON & DORIS J. WILSON, U.S. DEP'T OF JUSTICE, BUREAU OF

sentencing," these measures did not set sentences in stone. Rather, states adopting determinate sentencing still employed earned release mechanisms such as parole and sentence credit for good behavior.[24] By the year 2000, of the forty-two states that had adopted truth-in-sentencing practices, twenty-nine of them required inmates to serve only 85% of their sentences—the level required to receive federal funding under one federal program.[25] Several other states required less: four states only required 50%, and three states required between 50% and 85%.[26]

Truth-in-sentencing and other "tough-on-crime" policies, combined with a mild economic recession, caused many states to experience severe budget crises and prison overcrowding in the early 2000s.[27] In response, over thirty states enacted major reforms that cut costs by reducing prison populations and combated recidivism by investing more resources in drug treatment, intensive community supervision, and other measures.[28] As part of this trend, some states revised their truth-in-sentencing schemes to reduce incarceration. Eight states introduced new earned release provisions, and twenty states scaled back mandatory minimum sentencing laws or other harsh penalties.[29] These widespread

---

JUSTICE STATISTICS SPECIAL REPORT: TRUTH IN SENTENCING IN STATE PRISONS 1–3 (1999), *available at* http://bjsdata.ojp.usdoj.gov/content/pub/pdf/tssp.pdf.

24. *Id.* at 1.

25. *Id.* at 2 tbl.1, 3; Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §§ 13701–04 (2006) (referring to violent offenders).

26. DITTON & WILSON, *supra* note 23, at 2.

27. *See* JUDITH A. GREENE, FAMILIES AGAINST MANDATORY MINIMUMS, POSITIVE TRENDS IN STATE-LEVEL SENTENCING AND CORRECTIONAL POLICY 6 (2003), *available at* www.famm.org/Repository/Files/82751_Positive%20Trends.pdf (describing recent trends in criminal justice reforms at the state level as a result of state budget crises); JUDITH GREENE & KEVIN PRANIS, JUSTICE STRATEGIES, TREATMENT INSTEAD OF PRISONS: A ROADMAP FOR SENTENCING AND CORRECTIONAL POLICY REFORM IN WISCONSIN 58–59 (2006), *available at* http://www.csdp.org/research/Wisconsin_Report_Treatment_Instead_of_Prisons_Jan_06.pdf.

28. GREENE & PRANIS, *supra* note 27, at 58–59.

29. *Id.*; *see also* ALISON LAWRENCE, NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE SENTENCING AND CORRECTIONS LEGISLATION 2007 ACTION, 2008 OUTLOOK 10–13 (2008), *available at* http://www.ncsl.org/print/cj/07sentencingreport.pdf (outlining recent and forthcoming changes to corrections and sentencing policy at the state level); JON WOOL & DON STEMEN, VERA INSTITUTE OF JUSTICE, CHANGING FORTUNES OR CHANGING ATTITUDES? SENTENCING AND CORRECTIONS REFORMS IN 2003, at 2–7 (2004), *available at* http://www.vera.org/publication_pdf/226_431.pdf (discussing 2003 changes in state-level sentencing policy); Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at A1.

reforms have prompted observers to speak of a shift from the "tough-on-crime" mentality of the 1990s to a "smart-on-crime" paradigm.[30]

With the 2008 financial meltdown and the ensuing deep recession, budgetary pressures on states increased dramatically, setting off a new wave of criminal justice reform.[31] These reforms have involved various elements, but earned release is probably the most visible and prominent, and certainly the most controversial, cost-saving strategy. Numerous states have recently passed earned release reforms—amounting to thirty-six states in the last decade—and others are considering such legislation.[32] In several states, earned release policies have already come

30. GREENE, *supra* note 27, at 5. This trend is also consistent with the "rule-of-law sentencing" approach, which seeks to promote well-reasoned sentencing decisions and a strategic restructuring of corrections, both based on using the tools most likely to achieve just punishment and public safety. *See* Michael E. Smith & Walter J. Dickey, *Reforming Sentencing and Corrections for Just Punishment and Public Safety*, *in* SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY, at 1, 5–6 (Papers from the Executive Sessions on Sentencing and Corrections No. 4), *available at* http://www.ncjrs.gov/pdffiles1/nij/175724.pdf.

31. As the Detroit News observed,

> Kentucky, Minnesota, New York, Rhode Island, Texas and Washington are among more than a dozen states that tweaked their sentencing structure in 2009—from raising the bar on what constitutes a felony, to narrowing the definition of a habitual offender or removing mandatory minimum sentences for some crimes.
>
> At the same time, states are investing more in programs—from mental health services, to substance abuse treatment and job training—that research has shown to reduce recidivism . . . ."

Karen Bouffard, *Gov's Plan to Release Inmates Under Fire*, DETROIT NEWS, Mar. 8, 2010, at A1 (discussing the Michigan governor's legislative proposals to increase opportunities for earned release and the already-enacted increase in parole release).

32. *See id.*; Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247 app. at 1288–92 (2011) (presenting a comprehensive chart of recent earned release reforms at the state level); Michael M. O'Hear, *The Early-Release Renaissance: Reflections and a Legislative Update*, MARQ. UNIV. L. SCH. FACULTY BLOG (Feb. 25, 2011), http://law.marquette.edu/facultyblog/2011/02/25/the-early-release-renaissance-reflections-and-a-legislative-update/; *see also* JUDITH GREENE & MARC MAUER, THE SENTENCING PROJECT, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES (2010), *available at* http://www.sentencingproject.org/doc/publications/publications/inc_downscalingprisons2010.pdf (examining how four states—New York, Michigan, New Jersey, and Kansas—have significantly reduced their prison population and thus the cost of operating their respective prison systems); CHRISTINE S. SCOTT-HAYWARD, VERA INSTITUTE OF JUSTICE, THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 9–11 (2009) (discussing changes some states have made in the length of prison terms to help cut costs); Klingele, *Changing the Sentence*, *supra* note 8, at 485–94 (discussing the rise of different types of earned release mechanisms in various states).

under fire for allegedly endangering public safety.[33] But the cumulative impact of earned release and other reforms has resulted in the stabilization of the U.S. prison population, which actually dropped slightly in 2010.[34] Some states, including Wisconsin, experienced significant decreases in imprisonment.[35]

For the purposes of this Article, I assume that public safety can be increased even while reducing the prison population, that some form of earned release is justified and necessary, and that the nation would benefit from the establishment of a new sentencing era.[36] This smart-on-crime era would be characterized by falling incarceration levels, increased opportunities for earned release, widespread reliance on alternatives to incarceration, and substantial investments in programs proven effective in preventing crime and integrating offenders into society.[37] Transitioning to such an era is all the more urgent given the growing evidence of the general harmfulness of over-incarceration and,

33. *See* Klingele, *Early Demise*, *supra* note 9, at 429–39 (analyzing cases of failed earned release policies); Dee J. Hall & Mary Spicuzza, *Slow Start to Earned Release: State's New Prison Program Draws Criticism for Robbing Judges of Sentencing Power and a Failure to Realize Savings*, WIS. STATE J., Mar. 21, 2010, at A1.

34. Hall, *supra* note 17 (noting a drop in the nation's state prisoner population in 2010, the first drop in 38 years).

35. *Id.*

36. *See* ALISON LAWRENCE, NAT'L CONFERENCE OF STATE LEGIS., CUTTING CORRECTIONS COSTS: EARNED TIME POLICIES FOR STATE PRISONERS 1–4 (2009), *available at* http://www.pewcenteronthestates.org/uploadedFiles/Earned_time_report_%20NCSL.pdf?n=6022; Clear & Schrantz, *supra* note 1, at 152S–53S (discussing ways to reduce prison populations and the public safety implications). *See generally* Nora V. Demleitner, Editor's Note, *Replacing Incarceration: The Need for Dramatic Change*, 22 FED. SENT'G REP. 1 (2009) (discussing the need for dramatically lowering the federal prison population while focusing on improving public safety, and strategies for accomplishing this); Ben Trachtenberg, Note, *State Sentencing Policy and New Prison Admissions*, 38 U. MICH. J.L. REFORM 479 (2005) (analyzing factors influencing lower rates of imprisonment in certain U.S. states, and making recommendations for lowering prison populations generally).

37. *See generally* Jim Webb, *Why We Must Fix Our Prisons*, PARADE (Mar. 29, 2009), http://www.parade.com/news/2009/03/why-we-must-fix-our-prisons.html ("With so many of our citizens in prison compared with the rest of the world, there are only two possibilities: Either we are home to the most evil people on earth or we are doing something different—and vastly counterproductive. Obviously, the answer is the latter."). America's higher rates of incarceration are caused mainly by government policies, not differing crime rates. *See* MARC MAUER, RACE TO INCARCERATE 33 (2d ed. 2006); Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 54S–60S (2011) (reviewing research showing the lack of evidence that prisons reduce recidivism, and presenting some evidence that imprisonment increases crime).

in particular, incarceration's devastating effect on African-American individuals and communities.[38]

The present economic and political climate is ideal for ambitious reforms of this nature. There have long been voices on the left calling for major criminal justice reform. But now even conservative Republicans, such as Newt Gingrich and Grover Norquist, have begun a national campaign (dubbed "Right on Crime") focused on "intelligently reducing" the prison population.[39]

Earned release policies are potentially important in bringing about a new sentencing era, and not just because their botched implementation might lead to a return to tough-on-crime policies, which could drive the country's unnecessarily high incarceration rates even higher.[40] They are also important because they can help lower prison populations, motivate offenders to cooperate with rehabilitative programs and engage in

38. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 7 (2010); HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES (2008), *available at* http://www.hrw.org/sites/default/files/reports/us0508_1.pdf (reviewing racial discrimination in the War on Drugs); Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419, 436 (2005) (demonstrating that racist assumptions, and not legitimate policy considerations, cause the disproportionate enforcement of drug laws on African-Americans in Seattle); Klingele, *Early Demise*, *supra* note 9, at 418–22 (analyzing the "problem of overincarceration"); Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. 87S, 91S–95S (2011) (discussing evidence for racial bias at each decision point in the criminal justice system); Jesse J. Norris, *State Efforts to Reduce Racial Disparities in Criminal Justice: Empirical Analysis and Recommendations for Action*, 47 GONZAGA L. REV. 493 (2012); Devah Pager, Bruce Western & Bart Bonikowski, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 789–90 (2009) (recognizing that discrimination against ex-felons can be worse for blacks than whites); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151 (2004) (documenting the astoundingly high rates of black imprisonment); Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1 (2008) (documenting the negative effects of drug policies on black communities); *see also* INTERN'L CTR. FOR SCIENCE IN DRUG POL'Y, EFFECT OF DRUG LAW ENFORCEMENT ON DRUG-RELATED VIOLENCE: EVIDENCE FROM A SCIENTIFIC REVIEW 15 (2010), *available at* http://www.iscsdp.org/docs /ICSDP-1%20-20%FINAL.pdf (reviewing evidence that enforcing drug laws actually increases violence); Katherine Beckett, Kris Nyrop & Lori Pfingst, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 107–09 (2006) (demonstrating that racist assumptions may have a role in the disproportionate enforcement of drug laws on African-Americans in Seattle).

39. Newt Gingrich & Pat Nolan, *Prison Reform: A Smart Way for States to Save Money and Lives*, WASH. POST, Jan. 7, 2011, www.washingtonpost.com/wp-dyn/content/article/2011 /01/06/AR2011010604386.html.

40. *See supra* Part I.

serious post-release planning, and stimulate policymakers to build and improve upon programs facilitating offender reentry into society.[41] At the same time—as argued in Part III—states should not rely exclusively on earned release, which can be less effective and sustainable than other complementary reforms that reduce prison admissions.

B. Wisconsin: Five Sentencing Systems in Twelve Years

Remarkably, Wisconsin has experienced five distinct sentencing systems within twelve years. Until December 31, 1999, an indeterminate sentencing system—paradoxically still referred to as the "new law"—made inmates eligible for discretionary parole release after serving 25% of their sentences or a minimum of six months.[42] Inmates usually had to be released after serving two-thirds of their sentences.[43]

Beginning in the year 2000, Wisconsin switched to a completely different system, sentencing all felons under a determinate sentencing scheme known as "truth-in-sentencing."[44] Under truth-in-sentencing (TIS), which is still in force today despite several changes in the past decade, courts impose a "bifurcated sentence" by specifying the precise periods of imprisonment and extended supervision (the term used instead of "parole").[45] From 2000 to October 2009, the Parole Commission played no part in TIS inmates' release, and "good time," which reduced prison terms for good behavior, no longer existed.[46]

---

41. *See supra* notes 29, 32, 36, 38 and accompanying text.

42. *See* WIS. STAT. § 302.11 (2007–2008). For certain "serious" felonies, the mandatory release date was only "presumptive," and thus the Parole Commission had the option of not releasing the inmate after serving two-thirds of the sentence. *Id.* § 302.11(1g). Disciplinary infractions could extend inmate's mandatory release date. *Id.* § 302.11(2). The "old law" refers to the previous indeterminate sentencing system, which applies to offenders who committed crimes before June 1, 1984. Meredith Ross, *Sentence Modification and Early Release for TIS Inmates*, WIS. DEFENDER, Winter/Spring 2005, at 4, 4 & n.4, *available at* http://www.wisspd.org/html/publications/WdefWinSpr05/ WinSpr2005.pdf.

43. WIS. STAT. § 302.11(1) (1995–1996).

44. WIS. STAT. § 973.01(1), (6) (2009–2010) (specifying that offenders who commit crimes on or after that date are not eligible for parole); *see also* Brenda R. Mayrack, Note, *The Implications of* State ex rel. Thomas v. Schwartz *for Wisconsin Sentencing Policy After Truth-in-Sentencing II*, 2008 WIS. L. REV. 181, 191–94.

45. WIS. STAT. § 973.01(2) (2009–2010).

46. 1997 Wis. Act 283, § 419(4); WIS. STAT. § 973.01(6) (2009–2010) (indicating parole release is unavailable for inmates sentenced under truth-in-sentencing); WIS. STAT. § 973.01(4) (indicating the inapplicability of "good time" to truth-in-sentencing inmates).

During the TIS-I period, from 2000 to 2003, Wisconsin's sentencing system was among the most restrictive in the nation.[47] Inmates had to serve every day of their sentences, and potentially more because negative conduct reports actually increase sentences.[48] Only Wisconsin and Alaska required inmates to serve 100% of the sentence.[49] Moreover, in a number of states TIS applied only to violent crimes, but in Wisconsin it applied to all felonies.[50] In Wisconsin, as in other states, truth-in-sentencing legislation led to serious budgetary problems, prompting the revaluation and reform of sentencing policy. As critics predicted,[51] Wisconsin's truth-in-sentencing sharply increased sentences, potentially costing the state billions of dollars.[52]

---

47. *See* GREENE & PRANIS, *supra* note 27, at 17.

48. WIS. STAT. § 302.11(2) (2007–2008).

49. *Id.*; ALASKA STAT. §§ 12.55.125(f) (Supp. 2009); ALASKA STAT. § 33.20.010(a) (2010); WIS. STAT. § 973.01(4), (6) (2007–2008).

50. WIS. STAT. § 973.01(1) (2011). For example, Georgia restricts truth-in-sentencing to the "seven deadly sins": violent offenses for which inmates are ineligible for parole. TIMOTHY CARR, "TRUTH IN SENTENCING" IN GEORGIA (2008), *available at* http://www.dcor.state.ga.us/pdf/TruthInSentencing.pdf. In 2002, several other states, including Kentucky, Maryland, New York, and Oklahoma, had abolished parole only for violent offenders or certain violent offenders. *See* RE-ENTRY POLICY COUNCIL, *Parole Status by State*, http://reentrypolicy.org/jc_publications/parole_status_by_state;file (last visited Feb. 15, 2012). Mississippi recently narrowed its truth-in-sentencing system to exempt many drug offenders. *See* MISS. CODE ANN. § 47-7-3(1)(h) (2011). In Connecticut, nonviolent offenders must serve 75% of their sentences before being eligible for parole, while some violent offenders must serve 85%, and the worst violent offenders must serve 100% of their sentences. CONN. GEN. STAT. ANN. § 54-125a (West 2009). Pennsylvania recently restored parole for nonviolent offenders. Press Release, Chuck Ardo, PA Governor Rendell Orders Continuation of Parole of Non-Violent Offenders (Oct. 20, 2008), *available at* http://www.reuters.com/article/2008/10/20/idUS225719+20-Oct-2008+PRN20081020. The federal grant system that encouraged the adoption of truth-in-sentencing only required states to apply it to violent crimes. 42 U.S.C. § 13704 (2006).

51. For example, University of Wisconsin Law School Professor Walter J. Dickey wrote that truth-in-sentencing would likely necessitate new prison construction, though he acknowledged that no one really knew what the result of the legislation would be. Walter J. Dickey, *Thinking Strategically About Correctional Resources*, 2000 WIS. L. REV. 279, 279 (introducing Timothy Edwards, *The Theory and Practice of Compulsory Drug Treatment in the Criminal Justice System: The Wisconsin Experiment*, 2000 WIS. L. REV. 283); WISCONSIN CRIMINAL PENALTIES STUDY COMMITTEE, FINAL REPORT, at xvii (1999) (summarizing Walter J. Dickey's dissent).

52. For discussion on how this "inadvertent lengthening of sentences" may have cost the state billions of dollars, see Steven Elbow, *Democrats Want to Reduce State's Ballooning Prison Population*, CAP. TIMES (Madison, Wis.) (Dec. 3, 2009), http://host.madison.com/ct/news/local/govt_and_politics/article_a8068f6a-13ac-5700-bf49-82f6172b1675.html (estimating costs of $2.5 billion between 1999 and 2019); Mary Zahn & Gina Barton, *$1.8 Billion*, MILWAUKEE J. SENTINEL, Nov. 21, 2004, at A1; and Editorial,

Budgetary savings were one of the main motivations behind revisions to truth-in-sentencing, known as TIS-II, which brought about the third sentencing system since 1999. When Governor Scott McCallum signed the TIS-II legislation in 2002, he described the legislation as "avoid[ing] millions of dollars in additional incarceration costs[,] . . . creat[ing] a mechanism to reward prisoner rehabilitation[, and] allow[ing] consideration of cost-effective alternatives to prison . . . ."[53] TIS-II lowered maximum penalties for some crimes and established new earned release mechanisms, including sentence adjustment, compassionate release, and earned release through two rehabilitative programs.[54]

Wisconsin's 2009 earned release reforms, inaugurating the fourth sentencing system within a decade, were even more dramatic. Passed as part of budgetary legislation in 2009, these TIS-III or "Act 28" measures created several new earned release mechanisms.[55] The general effect of the legislation was to shift most of the power over earned release decisions from judges to state officials, including the Earned Release Review Commission (ERRC)—formerly known as the Parole Commission—and the Department of Corrections (DOC).

Reform Truth in Sentencing, MILWAUKEE J. SENTINEL., Nov. 28, 2004, at J4. Over the last decade, Wisconsin's prison population has increased by 14%, and is expected to increase another 25% by 2019 if measures are not taken to stem this growth. Elbow, *supra*.

53. Gov. Veto Message, SSJR2AB1, *2001 Legis. Bill Hist. WI A.B. 1*, 2002 Spec. Sess., (Wis. 2002).

54. 2001 Wis. Act 109, § 1143m (amending WIS. STAT. § 973.195 (2009–2010) to its current form); WIS. STAT. § 302.113(9g) (2007–2008) (allowing inmates who are over age sixty-five and have served five years or who are over sixty and have served ten years, or who have a prognosis of less than six months to live, to apply to a judge for sentence reduction if first approved by the prison's Program Review Committee); WIS. STAT. § 302.045(2) (2007–2008) (providing for earned release after completing the Challenge Incarceration Program); WIS. STAT. § 302.05(3) (2007–2008); WIS. STAT. § 973.01(3g) (2007–2008) (allowing for earned release after completing the Earned Release Program). The Challenge Incarceration Program was created in 1991, 1991 Wis. Act 39, § 3131q, but only with the advent of truth-in-sentencing in 2000 did completing the program entitle the inmate (whether sentenced under truth-in-sentencing or the old system) to earned release. 1997 Wis. Act 283, §§ 195, 196 (creating WIS. STAT. §§ 302.045(3), (3m) (1997–1998)). The Wisconsin substance abuse program was created in 1989, but became an automatic earned release program (called Earned Release Program) after legislation passed in 2003. *See* 2003 Wis. Act 33, § 2505 (creating WIS. STAT. § 302.05(3) (2003–2004)). Since it only occurred one year later, this 2003 legislation could be considered part of the TIS-II legislation.

55. *See, e.g.*, 2009 Wis. Act 28, § 25 (creating WIS. STAT. § 15.01(2) (2009–2010)); 2009 Wis. Act 28, § 27 (creating WIS. STAT. §15.06(6) (2009–2010)); *see also infra* Part II.B.

The most recent change, ushering in the fifth sentencing regime in twelve years, was the result of Wisconsin's 2010 Republican landslide, which brought Governor Scott Walker to power and gave Republicans majorities in both houses of the Wisconsin legislature.[56] Governor Walker had campaigned on a promise to end earned release, and in mid-2011, a broad swath of measures was finally enacted.[57] This legislation abolished most of the earned release mechanisms created in 2009, and shifted most of the earned-release decision-making power from the executive branch to judges, while retaining a small sub-set of the 2009 reforms.[58]

C. Earned Release Mechanisms for Wisconsin State Prisoners

This Part provides an overview of the statutory mechanisms through which Wisconsin state prisoners can currently be released before the maximum term of their sentence, as well as the mechanisms that were created in 2009 and abolished in 2011.[59] Five statutory forms of earned release are presently available to at least some inmates: (1) parole release, (2) compassionate release, (3) program-based mechanisms, (4) sentence adjustment due to age or extraordinary health condition, and (5) earned release from probation. Another five statutory earned release mechanisms were abolished in 2011: (1) ERRC release, (2) positive adjustment time, (3) risk reduction sentence, (4) "certain" earned release, and (5) earned release from extended supervision.[60]

---

56. Jessica Vanegeren, *GOP Sweep Likely Means More State Furloughs, Fewer on BadgerCare*, CAP. TIMES (Madison, Wis.) (Nov. 3, 2010), http://host.madison.com/ct/news/local/govt-and-politics/elections/article_69f86356-e74d-11df-b068-001cc4c002e0.html.

57. *See* 2011 Wis. Act 38; *see also* Patrick Marley, *Walker Signs Bill Repealing Early Release*, MILWAUKEE J. SENTINEL (July 19, 2011), http://www.jsonline.com/news/statepolitics/125814448.html; Steve Schultze, *Walker Says No to Early Release*, JSONLINE (Feb. 19, 2009), http://www.jsonline.com/blogs/news/39858997.html.

58. *See* WIS. LEGISLATIVE COUNCIL, ACT MEMO: 2011 WISCONSIN ACT 38, REPEAL OF EARLY RELEASE, http://legis.wisconsin.gov/lc/publications/act/2011/act038-sb057.pdf (summarizing the effect of the legislation on early release). *See generally* Part II.C.

59. Wisconsin also has common law forms of sentence modification, but these are not relevant to this Article's analysis of earned release mechanisms. I analyze these doctrines in another article. Jesse J. Norris, *Should States Expand Judicial Sentence Modification? A Cautionary Tale*, 35 HAMLINE L. REV. 101, 115–32 (2012).

60. WIS. LEGISLATIVE COUNCIL, *supra* note 58, at 1.

1. Parole Release

For inmates who committed offenses before December 31, 1999, the Parole Commission retains the discretionary authority to release them earlier than their release date.[61] However, over the last two decades the Parole Commission has become increasingly reluctant to release inmates to community supervision, and has thus released a larger share of inmates near or on their mandatory release dates.[62] Previously, the Commission released inmates after serving, on average, 50% of their sentences.[63]

The 2009 sentencing reforms changed the name of the Parole Commission to the ERRC, but the 2011 measures restored its original name.[64] From 2009 to 2011, the ERRC played a role in several other earned release mechanisms.[65] As described below, the ERRC was the main decision-maker for ERRC release, compassionate release, and two of the three forms of positive adjustment time. It remains to be seen whether, in line with the state's general policy at that time of facilitating earned release, the ERRC granted eligible inmates parole earlier than the Parole Commission.

2. Compassionate Release

TIS-II legislation also created an earned release mechanism applicable to inmates of advanced age or with less than six months to live. TIS-III significantly broadened these provisions, dropping the requirement of a terminal condition.[66] The term "compassionate

61. WIS. STAT. § 304.06 (2009–2010).

62. Interview with Walter J. Dickey, George H. Young Chair, Univ. of Wis. Law Sch., Former Sec'y, Wis. Dep't of Corr. (Apr. 10, 2009); *see also* State v. Wood, 2007 WI App 190, ¶ 3, 305 Wis. 2d 133, 738 N.W.2d 81 (quoting a 1994 letter from Governor Tommy Thompson to the Department of Corrections secretary urging the department "to pursue any and all available legal avenues to block the release of violent offenders who have reached their mandatory release date"). The mandatory release date occurred after the inmate has served two-thirds of the prison sentence. *See supra* note 42 and accompanying text.

63. *See supra* note 42 and accompanying text. "The percentage of the prison sentence served was somewhat higher for shorter sentences, and significantly lower for extremely long sentences, but the overall average was fifty percent." Interview with Walter J. Dickey, *supra* note 62.

64. 2009 Wis. Act 28, § 25 (amending WIS. STAT. § 15.02 (2007–2008) to change the name of the Parole Commission to the Earned Release Review Commission); 2011 Wis. Act 38, § 1 (amending WIS. STAT. § 15.02 (2009–2010) to change the name of the Earned Release Review Commission to the Parole Commission).

65. *See* WIS. STAT. § 304.06 (2009–2010).

66. WIS. STAT. § 302.113(9g) (2007–2008). Inmates in prison for a class B felony were

release" in Wisconsin has traditionally referred to a DOC procedure for granting parole for health reasons, which is still applicable to non-TIS inmates.[67] This Article uses the term "compassionate release" for the earned release mechanism applying to TIS inmates because it has become a nationally recognized generic term for statutes allowing earned release for age or health reasons.

Under the TIS-II statute, known as geriatric/terminal release, an inmate who had less than six months to live, or who was either over sixty-five years old and had served over five years of the prison sentence, or over sixty years old and had served over ten years, could apply to the prison's Program Review Committee for earned release.[68] If the Committee determined the inmate's release to be in the public interest, the inmate could petition the sentencing judge to grant the release.[69] This statute is no longer applicable because the TIS-III legislation replaced it with a similar but more permissive earned release mechanism, which was available to all TIS inmates.[70]

---

ineligible. *Id.* *See generally* Gregory J. O'Meara, *Compassion and the Public Interest: Wisconsin's New Compassionate Release Legislation*, 23 FED. SENT'G REP. 33, 33–34 (2010). For discussions of age- and health-related releases generally, see TINA CHIU, VERA INSTITUTE OF JUSTICE, IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE (2010); John A. Beck, *Compassionate Release from New York State Prisons: Why Are So Few Getting Out?*, 27 J.L. MED. & ETHICS 216 (1999) (discussing New York's deficiencies in its compassionate release and suggesting change); Berry III, *supra* note 7; Nadine Curran, *Blue Hairs in the Bighouse: The Rise in Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 225 (2000); Timothy Curtin, *The Continuing Problem of America's Aging Prison Population and the Search for a Cost-Effective and Socially Acceptable Means of Addressing It*, 15 ELDER L.J. 473 (2007); Jason S. Ornduff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 ELDER L.J. 173 (1996) (considering various ways to handle aging inmates); Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse Than the Disease?*, 3 WIDENER J. PUB. L. 799, 818–32 (1994) (surveying compassionate release statutes across the United States).

67. Wis. Dep't Corr., Div. of Adult Insts., Extraordinary Circumstances/Compassionate Release, Department of Corrections Internal Management Procedure (Apr. 1, 2012). It allows release because of "[a]dvanced age, infirmity or disability of the inmate, need for treatment or services not available within a correctional institution, a sentence to a term of imprisonment that is substantially disparate from the sentence usually imposed for a particular offense, or other circumstances warranting an earned release." *Id.*

68. WIS. STAT. § 302.1135 (2009–2010), *repealed by* 2011 Wis. Act 38, § 47. Terminally ill inmates had to obtain affidavits from two physicians diagnosing a terminal condition. *Id.* The inmate needed to have had less than six months to live, even with "life-sustaining treatment provided in accordance with the prevailing standard of medical care." *Id.*

69. *Id.*

70. *Id.*; *see also* 2011 Wis. Act 38, § 47.

The TIS-III legislation removed the judicial role in the release decision, retained the age and length of sentence provisions, and required an "extraordinarily health condition" rather than a terminal condition for applicants not meeting the age and length of sentence requirements.[71] An extraordinary health condition can include any condition, including "advanced age, infirmity, or disability of the person or a need for medical treatment or services not available within a correctional institution."[72]

To apply for compassionate release from 2009 to 2011, an inmate submitted a petition to the ERRC. If the applicant did not meet the age and length of sentence requirements, he or she had to provide affidavits from two physicians documenting the extraordinary health condition.[73] If the ERRC rejected the petition, the inmate could appeal to a court, which would review the decision under the deferential abuse of discretion standard, and the inmate could not apply again until a year later.[74]

The 2011 legislation altered the procedure slightly but retained the provision allowing for compassionate release because of an extraordinary health condition. Instead of applying to the ERRC, the inmate applies to the prison's Program Review Committee.[75] The Committee may reject the petition if it determines that the release would not be in the public interest.[76] If the Committee believes the release would be in the public interest, the court holds a mandatory hearing.[77] If the inmate proves "by the greater weight of the credible evidence" that his or her release would be in the public interest, the court must release the inmate.[78]

71. *Id.*; 2011 Wis. Act 38, § 45.

72. 2011 Wis. Act 38, § 45.

73. *Id.* § 302.1135(3), *repealed by* 2011 Wis. Act 38, § 47.

74. *Id.* § 302.1135(8), (9), *repealed by* 2011 Wis. Act 38, § 47. Indigent inmates pursuing compassionate release may be represented by a public defender, though the State Public Defender has the power to decide whether to represent the inmate. *Id.* § 302.1135(10), *repealed by* 2011 Wis. Act 38, § 47. This is also the case under the current law. WIS. STAT. § 302.113(9g)(j) (2009–2010).

75. 2011 Wis. Act 38, § 45 (creating WIS. STAT. § 302.113(9g)(c)).

76. *Id.* (creating WIS. STAT. § 302.113(9g)(cm)).

77. *Id.* (creating WIS. STAT. § 302.113(9g)(d)).

78. *Id.* (creating WIS. STAT. § 302.113(9g)(e)).

3. Program-Based Release

Program-based release mechanisms are another method of sentence reduction arising from TIS-II legislation. Completing either the Earned Release Program (ERP) or Challenge Incarceration Program (CIP) entitles inmates release to parole or extended supervision.[79] For TIS inmates to take advantage of these programs, the judge must declare the offender eligible at sentencing.[80] The ERP, originally a residential drug treatment program,[81] was temporarily expanded by TIS-III legislation to apply to those without drug treatment needs.[82] The Challenge Incarceration Program (CIP), created in 1990, is a rigorous "boot camp" program, which was also originally designed for drug treatment but was broadened by TIS-III legislation.[83] The 2011 (TIS-IV) legislation reversed these changes, changing the name from Earned Release Program to "Wisconsin substance abuse program," and restricting CIP to offenders with substance abuse problems.[84]

79. WIS. STAT. § 302.045(3m) (2009–2010); WIS. STAT. § 302.05(3)(c) (2009–2010), *amended by* 2011 Wis. Act 38, §§ 19, 26–27. For TIS inmates, the remainder of the prison term is added to the inmate's extended supervision. WIS. STAT. § 302.045(3m) (2009–2010); WIS. STAT. § 302.05(3)(c) (2009–2010), *amended by* 2011 Wis. Act 38, §§ 19, 26–27.

80. WIS. STAT. § 302.045(2)(cm) (2009–2010); WIS. STAT. § 302.05(3)(a)(2) (2009–2010); WIS. STAT. § 302.05(3)(c)(2) (2007–2008), *amended by* 2011 Wis. Act 38, § 27; *see also* Ross, *supra* note 42, at 7. TIS-I inmates—who were sentenced before ERP existed—can, with the Department's approval, petition the judge to declare them eligible for ERP. Initially, the Department's policy was not to allow TIS-I inmates to petition the judge, but after *State v. Johnson*, the Department now allows TIS-I inmates to do so, once they have demonstrated they are statutorily eligible. State v. Johnson, 2007 WI App 41, ¶ 17; 299 Wis. 2d. 785; 730 N.W.2d. 661; *see also* Memorandum from Office of the Public Defender, Earned Release Program 4-40–41 (2007), *available at* http://www.wisspd.org/htm/ATPracGuides/SER/ERP .pdf.

81. WIS. STAT. § 302.05 (2009–2010), *amended by* 2011 Wis. Act 38, § 19 (changing the name from the "Earned Release Program" to the "Substance Abuse Program"); Tony Streveler, *Earned Release Program: An Overview of the Eligibility Criteria and Program*, WIS. DEFENDER, Fall 2003, at 4, 6 (2003).

82. The change was from "Substance abuse program" to "Earned release program" in the 2009 Act and then back to "Substance abuse program" in the 2011 Act. *See* 2011 Wis. Act 38, § 16 (amending 2009 Wis. Act 28, §§ 2703–04 (amending WIS. STAT. § 302.045(2) (2009–2010))).

83. WIS. STAT. § 302.045(2) (providing that the program is available to those with drug treatment needs or other treatment needs related to their criminal offense); Timothy A. Nelson, *Challenge Incarceration Program: An Overview*, WIS. DEFENDER, Fall 2003, at 16, 16–17 (noting the previous requirement that inmates have a substance abuse treatment need).

84. WIS. STAT. § 302.05(1)(am) (2009–2010); *id.* § 302.045(2)(d).

4. Sentence Adjustment

The TIS-II reforms included "sentence adjustment," a statutory earned release mechanism that went into effect in 2003.[85] With the exception of offenders convicted of the most serious crimes, all TIS inmates can apply to the sentencing court for sentence adjustment after serving 75% or 85% (depending on the offense classification) of their prison sentences, regardless of when their offenses occurred.[86] In response to an inmate's timely sentence adjustment petition, the sentencing judge may order the inmate's earned release.[87] The time the judge removes from the prison portion of the offender's sentence shifts to the extended supervision portion, so that the overall length of the bifurcated sentence remains the same.[88] The statute permits judges to grant sentence adjustments if the inmate has made significant rehabilitative or educational progress, if the penalties for the offense have been lowered, if the inmate is subject to a sentence in another jurisdiction, if the inmate is an illegal immigrant who will be deported upon release, or if the adjustment would be "otherwise in the interests of justice."[89] The 2009 TIS-III legislation phased out sentence adjustment, making it unavailable for inmates who committed crimes after October 1, 2009 (TIS-III inmates).[90] However, the 2011 legislation restored sentence adjustment in its original form.[91]

85. WIS. STAT. § 973.195 (2007–2008). Inmates with the offense classification A or B, which together covered most violent crimes, could not apply for sentence adjustment. *Id.*

86. *Id.*; State v. Tucker, 2005 WI 46, ¶¶ 2, 23, 279 Wis. 2d 697, 694 N.W.2d 926; State v. Trujillo, 2005 WI 45, ¶¶ 25, 30, 279 Wis. 2d 712, 694 N.W.2d 933.

87. WIS. STAT. § 973.195 (2009–2010). TIS-I inmates use the TIS-II offense classifications for the purpose of determining when they can apply for sentence adjustment. *Tucker*, 2005 WI 46, ¶ 23.

88. WIS. STAT. § 973.195(1r)(g).

89. *Id.* § 973.195(1r)(b). Under the language of the statute, the district attorney or victim can veto the sentence adjustment, but the Supreme Court of Wisconsin ruled that the DA's ability to block sentence adjustment is unconstitutional because it violates the state's separation of powers doctrine. State v. Stenklyft, 2005 WI 71, ¶ 105, 281 Wis. 2d 484, 697 N.W.2d 769 (Abrahamson, C.J., concurring in part and dissenting in part). Judges can thus take into account the district attorney's objection to granting the petition, but the ultimate decision is for the judge. *Id.* ¶ 82. Courts have not ruled on whether the victim veto is unconstitutional.

90. WIS. STAT. § 973.195(1r)(a) (2009–2010) (providing that inmates could only petition a court for sentence adjustment for sentences imposed before October 1, 2009).

91. 2011 Wis. Act 38, § 94 (removing the provision phasing out judicial sentence adjustment in WIS. STAT. § 973.195(1r) (2009–2010)).

5. Earned Release from Probation

From 2009 to 2011, the DOC could grant an early discharge once an offender on probation had served 50% of the probation sentence.[92] The legislation originally provided that the sentencing court could grant earned release from probation when certain criteria were met, but Governor Doyle used his line-item veto powers to eliminate these provisions.[93] Consequently, the DOC had full discretion whether to grant the earned release, with no requirement to notify or gain approval from a judge.[94] The 2011 legislation changed the procedure so that the court, not the DOC, makes the final decision about whether to discharge the offender's probation.[95]

6. ERRC Release

What this Article refers to as ERRC release is essentially a non-judicial version of sentence adjustment, created by the 2009 legislation but abolished in 2011. Between 2009 and 2011, TIS-I and TIS-II inmates could choose to petition the ERRC for release after serving 75% or 85% of their sentences, instead of petitioning the sentencing court as in sentence adjustment.[96] If the inmate had previously petitioned the court for sentence adjustment for any of the sentences for which the inmate is incarcerated, the inmate was ineligible to petition for ERRC release through this mechanism for any sentence currently being served.[97] ERRC release at 75% was available to inmates who committed their offense before October 1, 2009, and who were convicted of misdemeanors or class F through I felonies.[98] ERRC release at 85% was available to inmates who committed offenses before the same date and

92. 2009 Wis. Act 28, § 3392d (creating WIS. STAT. § 973.09(3)(d) (2009–2010)). The legislation also amended a statute to allow discharge from parole or probation to enable the offender to enroll in the armed forces. 2009 Wis. Act 28, § 2772 (amending WIS. STAT. § 304.071).

93. *See* 2009 Wis. Act 28, § 3392d.

94. *See id.*

95. 2011 Wis. Act 38, § 93b (amending WIS. STAT. § 973.09(3)(d) (2009–2010)).

96. WIS. STAT § 304.06(1)(bg)(3) (2009–2010) (allowing inmates whose crimes were committed earlier than October 1, 2009, to petition the ERRC for release after serving 75% of their sentence); *id.* § 304.06(1)(bg)(4) (allowing inmates whose crimes were committed earlier than October 1, 2009, to petition the ERRC for release after serving 85% of their sentence).

97. *Id.* § 304.06(1)(bg)(3)–(4).

98. *Id.* § 304.06(1)(bg)(3).

who were convicted of class C to E felonies.[99] The ERRC had complete discretion whether to approve release, based on essentially the same criteria listed above for sentence adjustment.[100] The ERRC had to notify the sentencing court of its intention to release an inmate through this mechanism, and the court could veto the release if it held a hearing on the matter within sixty days of being notified of the inmate's planned release.[101]

7. Positive Adjustment Time

From 2009 to 2011, positive adjustment time (PAT) allowed inmates with good behavior to shorten their sentences by 33%, 25%, or 15%, depending on their offense of conviction.[102] Inmates convicted of certain offenses, ranging from offenses against vulnerable people to "offenses related to ethical government," were ineligible for PAT release.[103] "Track A" PAT (PAT-A), which was run by the DOC rather than the ERRC, allowed offenders convicted of non-violent misdemeanors or non-violent class F to I felonies to be released after serving 67% of their sentences (or one day off for each two days of good behavior).[104] Under "Track B" PAT (PAT-B) and "Track C" PAT (PAT-C), the ERRC could release an inmate who had served 75% or 85% of his or her sentence, respectively.[105] PAT-B applied to offenders convicted of non-violent misdemeanors or class F to I felonies, including those classified as violent offenses.[106] PAT-C applied to offenders convicted of class C to E felonies.[107]

99. *Id.* § 304.06(1)(bg)(4). The only difference is that the provision allowing release because of changed sentencing policies was removed.

100. *Id.* § 304.06(1)(bn).

101. *Id.* § 304.06(1)(bk)(2).

102. *See* WIS. STAT. § 302.113(2)(b) (2009–2010), *repealed by* 2011 Wis. Act 38, § 38; WIS. STAT. § 304.06(1)(bg)(1), (2) (2009–2010), *repealed by* 2011 Wis. Act 38, § 58.

103. WIS. STAT. § 302.113(2)(b) (2009–2010), *repealed by* 2011 Wis. Act 38, § 38; WIS. STAT. § 304.06(bg)(1), *repealed by* 2011 Wis. Act 38, § 58.

104. WIS. STAT. § 302.113(2)(b) (2009–2010), *repealed by* 2011 Wis. Act 38, § 38. The use of the term "shall" in this provision may have led to the impression that earned release is mandatory if the inmate has earned time through PAT-A, but the department interpreted it as discretionary. E-mail from Anthony Streveler, Wis. Dep't of Corr., to author (Jan. 18, 2011).

105. WIS. STAT. § 304.06(1)(bg)(1)–(2) (2009–2010), *repealed by* 2011 Wis. Act 38, § 58. This amounted to one day off for every three days of good behavior for PAT-B or one day off for every 5.7 days of good behavior for PAT-C.

106. *Id.*

107. *Id.* Violent offenders may qualify for PAT-C, provided their offense was not

Because inmates only began accruing PAT after October 1, 2009, PAT may have reduced the confinement sentences of many inmates only slightly.[108] Certain types of disciplinary infractions could reduce the amount of PAT that inmates accumulate.[109] For all three types of PAT release, the judge could veto the release, but only after holding a hearing.[110]

Although the 2011 measures abolished PAT beginning on August 3, 2011, inmates who had accrued PAT between October 1, 2009, and August 3, 2011, can still achieve reductions in their sentences.[111] To do so, the inmate petitions the court, which may either reject the petition without a hearing or release the inmate after holding a hearing.[112]

8. Risk Reduction Sentence

In force from 2009 to 2011, the risk reduction sentence permitted inmates, excluding those convicted of certain offenses, to be released by the DOC after serving 75% of the sentence.[113] As with program-based mechanisms, the judge had to declare the inmate eligible for a risk reduction sentence at sentencing.[114] To be sentenced to a risk reduction sentence, inmates had to agree to be evaluated for their "criminogenic factors" and to participate in programming or treatment.[115] The DOC was required to prepare a treatment plan for the inmate based on his or her risk of reoffending, and the inmate had to complete the treatment

committed against a vulnerable person or otherwise excluded under the statute. *Id.*

108. Interview with Meredith Ross, Dir., Frank J. Remington Ctr., Univ. of Wis. Law Sch. (Feb. 16, 2010).

109. The language of the statutes specifies that inmates can earn a day of PAT after serving a certain number of days in which "he or she does not violate any regulation of the prison or does not refuse or neglect to perform required or assigned duties." WIS. STAT. § 304.06(1)(bg)(1)–(2); *id.* § 302.113(2)(b). The DOC will likely interpret this to mean that major conduct reports, but not minor infractions, prevent inmates from earning PAT. Interview with Meredith Ross, *supra* note 108.

110. WIS. STAT. § 304.06(1)(bk) (2009–2010), *repealed by* 2011 Wis. Act 38, § 59.

111. 2011 Wis. Act 38, § 96 (creating WIS. STAT. § 973.198(1), which deals with sentence adjustment and positive adjustment time for inmates sentenced between October 1, 2009, and August 3, 2011).

112. 2011 Wis. Act 38, § 96 (creating § 973.198(3), which outlines the hearing to be held by the sentencing court).

113. WIS. STAT. § 973.031 (2009–2010), *repealed by* 2011 Wis. Act 38, § 92; WIS. STAT. § 302.042 (2009–2010), *repealed by* 2011 Wis. Act 38, § 13.

114. WIS. STAT. § 973.031 (2009–2010), *repealed by* 2011 Wis. Act 38, § 92.

115. *Id.*

plan before release.[116] Unique among the new earned release mechanisms, when the DOC released an inmate under the risk reduction sentence, the extended supervision portion of the sentence was not lengthened by the amount of incarceration that the inmate did not serve.[117] That is, earned release through a risk reduction sentence shortened the overall length of the bifurcated sentence.

The 2011 measures repealed the legislation authorizing risk reduction sentences. However, offenders sentenced to risk reduction sentences under the previous law may still achieve release after serving 75% of their sentences, if the DOC determines that the treatment plan was successfully completed and the inmate maintained a good behavior record.[118]

9. Certain Early Release

"Certain early release," which was created in 2009 and repealed in 2011, took its name from the statute's reference to "certain persons" eligible for release.[119] Under certain early release, the DOC could release eligible inmates within a year of their original release date, if approved by the Secretary of Corrections and either the inmate's prison social worker or the inmate's community corrections agent.[120] Only inmates serving sentences for misdemeanors or nonviolent class F through I felonies were eligible.[121] The prison social worker or community corrections agent was required to have "reason to believe" that the inmate would not engage in "assaultive activity" in the community.[122] The statute did not clarify how they were to make such a determination. After this prerequisite was met, the Secretary of Corrections made the final decision whether to release the inmate.[123] Governor Doyle vetoed a provision in the legislation that would have

116. WIS. STAT. § 302.042 (2009–2010), *repealed by* 2011 Wis. Act 38, § 13.

117. Interview with Meredith Ross, *supra* note 108.

118. 2011 Wis. Act 38, § 14m (creating WIS. STAT. § 302.043, outlining the procedure for inmates currently serving risk reduction sentences to be released under the terms of the prior risk reduction sentence system).

119. WIS. STAT. § 302.113(9h) (2009–2010), *repealed by* 2011 Wis. Act 38, § 46. Subsection 9(h) was repealed in its entirety.

120. *Id.*

121. *Id.* § 302.113(9h)(c)(1).

122. *Id.* § 302.113(9h)(c)(2).

123. *Id.* § 302.113(9h); WIS. ADMIN. CODE DOC § 302.41 (current through 659 Wis. Admin. Reg. (Nov. 1, 2010)).

allowed a court to veto the release decision.[124] The 2011 legislation completely abolished certain early release.[125]

10. Earned Release from Extended Supervision

The 2009 TIS-III legislation authorized the DOC to reduce community supervision sentences, including extended supervision and probation sentences.[126] From 2009 to 2011, once an offender had served a minimum of two years of extended supervision while meeting the conditions of supervision, the DOC could discharge the offender early from the supervision sentence.[127] Before doing so, the DOC had to determine that the discharge would be in the interests of justice and provide notice to the victim of the intention to grant the discharge.[128] The 2011 legislation eliminated this form of earned release.[129]

D. Shifts in Decision-Making Authority

Under TIS-II, all the statutory earned release mechanisms available to TIS inmates required approval by a judge, either at sentencing or when the inmate requested earned release.[130] That changed under TIS-III, which placed a large amount of the decision-making responsibility with the ERRC and DOC. The judge had to pre-approve Risk

124. *See* 2009 Wis. Act 28, § 2739 (creating WIS. STAT. § 302.113(9h) (2009–2010)); Governor Jim Doyle, Veto Message 3 (Jun. 29, 2009), *available at* http://www.doa.state.wi.us/debf/pdf_files/2009-11VetoMessage.pdf.

125. *See* 2011 Wis. Act 38, § 46.

126. TIS-II legislation included a provision allowing inmates to petition a court to change the conditions of their extended supervision sentences, within one year before their release to extended supervision, or after they have served one year of their supervision sentences. WIS. STAT. § 302.113(7m)(e) (2007–2008). This relates not to the length of extended supervision, but to the rules the offenders are required to follow as a condition of their extended supervision sentence. This is a form of sentence modification, since it changes the substance of the sentence, but it is not a form of earned release, since it does not change the duration of supervision.

127. WIS. STAT. § 973.01(4m) (2009–2010), *repealed by* 2011 Wis. Act 38, § 90.

128. *Id.*

129. 2011 Wis. Act 38, § 91 (amending WIS. STAT. § 973.01(7) (2009–2010) to prohibit the department of corrections from discharging the defendant from any custody or supervision until the entire sentence has been served).

130. The only forms of earned release available during that time for TIS inmates were program-based mechanisms and sentence adjustment. For program-based mechanisms, the judge decides at sentencing whether the defendant is eligible to participate in these programs. *See supra* note 92 and accompanying text. Through sentence adjustment, the judge has the discretion to release the inmate before the offender has served the maximum incarceration sentence. *See supra* notes 58–72 and accompanying text.

Reduction Sentences and program-based mechanisms, and judges could veto PAT release and ERRC release after holding a hearing.[131] The judge had no role, however, in certain early release, compassionate release, or earned discharge from community supervision, or in the final decision to release inmates after serving a Risk Reduction Sentence or completing the ERP or CIP programs.[132] The 2011 legislation (which could be called TIS-IV) reversed this trend, placing most of the earned release authority in judges.[133] Under the current system of earned release—with the exception of pre-truth-in-sentencing inmates eligible for parole—the judge either initially declares the defendant eligible for an earned release program (as in Wisconsin's substance abuse program or Challenge Incarceration Program) or makes the final decision whether to approve an offender's release from prison or probation.[134]

III. DESIGNING AND IMPLEMENTING EARNED RELEASE: LESSONS FROM WISCONSIN AND GENERAL PRINCIPLES FOR STATE-LEVEL STRATEGIES

This Part first evaluates Wisconsin's new earned release statutes, and then identifies general principles for successful implementation of earned release mechanisms, drawing in part on the lessons from Wisconsin's experiences. In 2009, Wisconsin multiplied the number of earned release mechanisms, creating potential confusion and interaction problems.[135] Furthermore, the mechanisms were implemented in an uneven manner, and it seemed unclear whether the state would provide the additional resources necessary to implement the mechanisms successfully. On the other hand, the reduction of the judicial role in earned release, the significant broadening of compassionate release, and the careful attention paid to public safety, suggest that the 2009 earned release mechanisms could have been applied consistently and could have resulted in significant cost savings without increasing risks to the public.[136] However, the 2011 legislation returned nearly all earned

131. *See supra* notes 77, 104, 110 and accoumpanying text.

132. *See supra* notes 96, 114, 120, 121, 129 and accompanying text; WIS. STAT. § 302.042(4) (2009–2010), *repealed by* 2011 Wis. Act 38 § 13.

133. *See* WIS. LEGISLATIVE COUNCIL, *supra* note 59, at 2 ("The Act moves the authority to discharge from the department to the court . . . ."); Part II.C.

134. *See supra* notes 89–91, 98, and 130.

135. *See* 2009 Wis. Act 29, §§ 2703–2712 (amending WIS. STAT. § 302.05 (2009–2010) to be the "earned release program," which later was amended by 2011 Wis. Act 38).

136. *See infra* Parts III.A.1–.3.

release power to judges, increasing the risk of geographic and racial disparities.[137] In support of my argument that administrative officials and not judges should have most of the responsibility for earned release, I present preliminary data indicating dramatic geographic disparities in the application of a judicial earned release mechanism, which may have reinforced racial disparities.

Second, influenced by both Wisconsin's experience and previous scholarship, this Article proposes four principles for the successful implementation of earned release legislation. States experimenting with earned release should (1) provide for measurements and internal controls to prevent injustice or disparity in earned release decisions; (2) structure earned release decisions to avoid increasing risks to public safety; (3) employ strategic governance to ensure that earned release mechanisms actually manage to release a substantial number of inmates; and (4) complement earned release with other measures meant to reduce incarceration. As part of this discussion, I respond to the concerns of Professor Harcourt by using initial data to show that the expanded earned release mechanisms in effect from 2009 to 2011 did not exacerbate racial disparities and that earned release was responsible for a small, though non-trivial percentage of total releases. Finally, this Part concludes by briefly discussing ways in which the Article's proposals may contribute in a new way toward the development of a "rule-of-law sentencing" approach.

A. Evaluating Wisconsin's Earned Release Mechanisms

1. Reducing the Judicial Role in Earned Release Decisions

The respective roles of administrative officials and judges in earned release have varied widely over the last decade and a half. Before truth-in-sentencing, parole officials had nearly all the power over earned release. From 2001 to 2009, judges had most of the earned release authority, but the 2009 reforms gave a much larger share of the decision-making power to administrative officials.[138] The 2011 legislation reversed these changes, vesting virtually all significant power over

137. 2011 Wis. Act 38, § 37 (amending WIS. STAT. § 302.113(2) (2009–2010)).

138. *See, e.g.*, 2009 Wis. Act 29, § 2702 (amending WIS. STAT. § 302.045(3) (2009–2010)), explaining that the ERRC would determine an inmate's eligibility for parole).

earned release in judges.[139] This Part argues that it is preferable for judges to play, at most, a minor role in earned release decisions.

This Part supports this normative claim in two ways. First, it argues that state actors are, on the whole, better positioned than judges to make earned release decisions. Second, it demonstrates that in practice, judge-centered earned release (sentence adjustment under TIS-II) resulted in vast geographic disparities, which may have reinforced racial inequality in sentencing. However, more limited roles for judges in earned release, including the ability to veto earned release after a hearing or to shorten a sentence through common law mechanisms in certain circumstances,[140] are potentially appropriate and useful components of earned release systems.

State officials, such as those in the DOC and the Parole Commission, are arguably better equipped than judges to make earned release decisions. State actors have comprehensive, intimate knowledge of the inmate's behavior and attitudes while the inmates are incarcerated; are more qualified than judges to use scientifically validated risk assessment procedures to determine which offenders are at the highest risk of re-offending; and process enough cases to ascertain whether similar offenders have typically been released, allowing them to achieve some measure of consistency.[141] In addition, when centralized administrative actors make release decisions based on the relative risk of different offenders, prisoners develop incentives to avoid disciplinary infractions and complete rehabilitative programs, thus decreasing recidivism after these offenders are released.[142] If judges in some areas rarely grant

139. *See, e.g.*, 2011 Wis. Act 38, § 45 (creating WIS. STAT. § 302.113(9g) and giving the court the authority to review the department's determination that an inmate is eligible for release due to an extraordinary health condition and to hold a hearing to determine if release is in the public interest); 2011 Wis. Act 38, § 93b (amending WIS. STAT. § 973.08(3)(d)(intro.) (2009–2010) and giving the sentencing court the sole authority to discharge someone from probation early).

140. *See infra* Part II.D; Norris, *supra* note 60, at 132–34.

141. *See* David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, J. LEGAL STUD. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1800840 (using statistical analysis to demonstrate that judges vary significantly in whether they send minority offenders to prison rather than probation); *see also* Ilyana Kuziemko, *Should Prison Inmates Be Released via Rules or Discretion?*, Q.J. ECON. (forthcoming 2012) (manuscript at 11) ("[I]f some of the disparities in punishment are due to statistical discrimination, then because parole boards have substantially more information than do earlier actors, they may be less prone to discrimination.").

142. For example, using parole data from Georgia, Kuziemko shows that abolishing parole led inmates to commit more infractions, complete less programming, and recidivate at

earned release, making earned release more unpredictable, these incentives may not be clear enough to positively influence inmate behavior.

On the other hand, Professor Klingele argues that judicial sentence modification is more transparent, politically sustainable, and accountability-enhancing, given that judges are knowledgeable about local conditions, accountable to the local electorate, and obligated to explain their decisions in open court.[143] While there is merit to this argument, in practice judges may not have the detailed knowledge of local conditions needed to make superior earned release decisions. Moreover, the fact that judges are elected may make them unwilling to approve even meritorious releases, because of their fear of being branded "soft on crime" by political opponents.[144]

Another reason to give state officials most of the responsibility for earned release is that, on an aggregate level, state officials are likely to grant earned release in a more consistent manner than judges, avoiding racial and geographic disparities. Available data indicates that Wisconsin's judge-centered earned release system under TIS-II—specifically, the mechanism known as sentence adjustment—resulted in

---

a higher rate after release. Kuziemko, *supra* note 142 (manuscript at 30); *see also* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 70–71 (2003) (reviewing evidence that parole may increase public safety).

143. Klingele, *Changing the Sentence*, *supra* note 8, at 514–20.

144. Indeed, the release of an offender became an issue in a recent Wisconsin Supreme Court election. *See* Robert L. Brown, *Toxic Judicial Elections: A Proposed Remedy*, ARK. LAW., Fall 2009, at 12, 13 (describing an "egregious and offensive" advertisement by Justice Michael Gableman, which suggested falsely that his opponent, Justice Louis B. Butler, Jr., had found a loophole that allowed a child molester to be released and commit additional offenses); *see also In re* Judicial Disciplinary Proceedings Against Gableman, 2010 WI 62, ¶ 63, 325 Wis. 2d 631, 784 N.W.2d 631 (split decision in which three justices concluded that Justice Gableman's ad, while "distasteful," had not violated Supreme Court Rule 60.06(3)(c), while the other three participating justices concluded that the ad did violate the rule). For discussions of the way that the "tough-on-crime" mentality—and a desire not to appear "soft"—can affect how elected judges judge, see Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, and Ripe for Disqualification*, 52 ARIZ. L. REV. 317 (2010) (proposing that judges who run on "tough on crime" platforms to win elections have effectively made themselves impartial and biased and should thus recuse themselves from all criminal cases); and Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. Rev. 1101 (2006) (examining how the media affects a judge's impetus to appear—or be—"tough on crime" and proposing that states should adopt recusal measures to protect defendants from due process violations due to impartiality).

enormous geographic disparities, which may have worsened the state's already abysmal racial disparities.[145]

In Racine and Kenosha Counties, which together account for 11.5% of the state's African-American prison population, judges only approved about 1% of sentence adjustment petitions during 2005 and 2006.[146] Milwaukee County accounts for 67% of the state's African-American inmates.[147] While this might understate the number of petitions granted, the only available data on Milwaukee County indicates an even lower approval rate (.3%).[148] If the Milwaukee County data is accurate, or if Milwaukee County's true rate is similar to that of Kenosha and Racine Counties, then as of 2007, about 79% of the state's

145. *Id.*; *see infra* Part III.B.2; *infra* notes 146–147.

146. Wis. Dep't of Corr., Racial Disparities Analysis (2007) (on file with author). Sixty-nine inmates sent petitions to Racine County Judges in 2005, but none were approved. William Rosales, Sentence Adjustment Petition Data (2007) (on file with author). In 2006, three out of 117 were approved in Racine County. *Id*. In Kenosha County, there were twenty-one petitions in 2005 and five in 2006, but none were granted in either year. *Id*. Dividing the number of petitions granted in the two counties (3) over the total number of petitions (212) yields an approval rate for both counties of 1.4% for 2005/2006.

The author derived the sentence adjustment petition approval statistics from a dataset created by attorney and sociologist William E. Rosales, who used raw data from the Consolidated Court Automation Programs. Petitions for sentence modification are filed with the sentencing judge, so the county of conviction, not the county of actual imprisonment, is referred to in this discussion. WIS. STAT. § 973.198(1).

147. Wis. Dep't of Corr., *supra* note 146; Rosales, *supra* note 146. Only 1 out of 115 petitions was granted in 2005, and none of the 153 petitions were granted in 2006.

148. Rosales, *supra* note 146; *see also* William E. Rosales, *Sentence Adjustment Petitions: An Update*, WIS. DEFENDER, Winter/Spring 2007, at 1, 4 (indicating that, according to a court staff member, Milwaukee courts were unaware of the codes for sentence adjustment for an unspecified period). It should be noted that the dataset includes data from 2002 through 2006, though the 2002 through 2004 data was not analyzed in this Article, due to the low number of sentence adjustment petitions in that time period. Although we do not know when the Milwaukee courts were allegedly unaware of the codes for sentence adjustments, it seems that they became aware of them by 2004, because more sentence adjustment petitions were recorded for 2004 than for 2005 and 2006. Rosales, *supra* note 146. It is possible that other counties had problems with data entry, but there is no evidence that this is the case. In any event, even if the Milwaukee data understates the true approval rate, there are other reasons to believe that the Milwaukee approval rate was unusually low. *See* LEGAL ASSISTANCE TO INSTITUTIONALIZED PERSONS PROJECT, § 973.195 SENTENCE ADJUSTMENT *PRO SE* PACKET: REVISED TO INCLUDE 2011 WISCONSIN ACT 38 CHANGES 7 (2012), *available at* http://law.wisc.edu/fjr/laip/sentence_adjustment_pkt_act_38_2012.pdf (singling out Milwaukee County as having especially low rates of approval); LEGAL ASSISTANCE TO INSTITUTIONALIZED PERSONS PROJECT, SENTENCE ADJUSTMENT *PRO SE* PACKET 7 (2005), *available at* http://www.wisspd.org/htm/ATPracGuides/Training/ProgMaterials/Conf 2005/Ross/SA.pdf (suggesting that Milwaukee judges in particular require certain kinds of proof before even considering adjustment petitions).

black prison population was convicted in counties in which the 2005/2006 average approval rate was about 1%.[149] By contrast, in the 67 counties with few blacks sentenced to prison, judges approved on average 15% of sentence adjustment petitions.[150] About 67% of the state's white prison population was convicted in these counties, and about 77% of the state's white prison population lives in those counties or in Dane or Rock County, which had higher approval rates than Milwaukee, Racine, and Kenosha.[151]

If the 2005/2006 Milwaukee data is accurate, petitions filed by inmates convicted in overwhelmingly white, rural counties were over eighteen times more likely to be granted than those from the urban counties in which the vast majority of the state's African-American prison population were sentenced.[152] This would have likely reinforced the state's racial disparities in imprisonment, by shortening sentences for inmates from overwhelmingly white counties but rarely if ever doing so for inmates from more diverse counties. However, lacking individual-level data, it is impossible to demonstrate with certainty that these geographic disparities would have impacted racial disparities.[153] Even if

149. This 79% figure was generated by adding the percentage of the state's black prison population accounted for by Milwaukee, Racine, and Kenosha counties. Wis. Dep't of Corr., *supra* note 146. The average approval rate was .8%. This was calculated by dividing the number of granted requests in 2005 and 2006 in the three counties by the number of total requests. Rosales, *supra* note 146.

150. This figure was generated by calculating the overall approval rate of the 67 counties for 2005 and 2006, and averaging the two rates. Consol. Ct. Automation Programs, *supra* note 146.

151. One of the counties with a large African-American prison population, Dane County, which accounts for about 8% of the state's black prison population, has a 2005/2006 approval rate of 17%, slightly higher than the rate for predominantly white counties. Wis. Dep't of Corr., *supra* note 146; Consol. Ct. Automation Programs, *supra* note 146. Rock County, which accounts for 2.7% of the state's black prison population, had an unusually high 2005/2006 approval rate, averaging 37%. Wis. Dep't of Corr., *supra* note 146; Consol. Ct. Automation Programs, *supra* note 146. While this may indicate that African-Americans have a greater chance of achieving sentence adjustment in these counties, it should be noted that a large proportion of prison inmates from these counties (54% in Rock County and 45% in Dane County) are white.

152. Dividing the average approval rate in the 67 overwhelmingly white counties (15%), by the average approval rate of Milwaukee, Racine, and Kenosha Counties together yields a ratio of 18.75 to one. Rosales, *supra* note 146; *see supra* note 151 and accompanying text.

153. This said, if the Milwaukee data is accurate, there would only be two ways that increased racial disparities could not result from these geographic disparities, and neither are real possibilities. First, if most of the sentence modifications granted in overwhelmingly white counties were granted to black inmates, this could potentially lead to equitable results on the aggregate level. Yet given the small proportion of black inmates convicted in those counties

Milwaukee is excluded, the data still demonstrate striking geographic disparities between counties, which could have potentially affected racial disparities.[154]

These geographic disparities could be due mainly to the large workloads of urban courts, or they could result from a number of different factors. Regardless, administrative decision-makers would most likely grant earned release with much less geographic disparity than judges, because these statewide actors would apply the same considerations and methodology to inmates regardless of location. It is possible that due to the nature of the communities to which the inmates will be returning, or the types of offenses committed in different areas, the rate of earned release will vary somewhat among geographic areas. However, the wide disparities under judicial sentence adjustment would be highly unlikely to occur if state officials alone were in charge of earned release.[155]

The more limited role of judges under TIS-III may be an example of an appropriate and useful role for judges in an earned release system. To review, during the TIS-II period from 2003 to 2009, trial court judges were the principal actors with discretionary power to reduce sentences. TIS-III reduced the judicial role considerably, allowing judges to veto earned release only for positive adjustment time releases and ERRC release, and then only if the judges hold a hearing within the time limit.[156]

(usually less than 10% and sometimes less than 5%), this is extremely unlikely. Dep't of Corr., *supra* note 146. Second, if the sentence modifications in Dane or Rock County were given to blacks at highly disproportionate rates, it is possible that this could at least partially prevent the geographic disparities from causing racial disparities, by compensating somewhat for the fact that 79% of the state's black prison population was convicted in counties in which judges rarely if ever grant sentence modifications. *See supra* note 150 and accompanying text. Yet since only Rock County (which accounts for just 2.7% of the black prison population) had a rate of approval that was significantly higher than average, such an effect cannot realistically be expected to erase or substantially reduce the overall racial disparity.

154. As noted above, Dane County, which represents about 8% of the state's black prison population, has an approval rate similar to that of the mainly white counties, and Rock County, where 2.7% of the state's black inmates were convicted, had a higher approval rate. *See supra* note 151 and accompanying text. Depending on how many of these sentence adjustments went to African-Americans, this might have had a balancing effect, preventing the low approval rates in Kenosha and Racine County from contributing to racial disparities.

155. *See supra* notes 141–145 and accompanying text.

156. Neither TIS-II nor TIS-III affected the power of courts, under three common law or constitutional doctrines, to reduce sentences in response to a motion.

In practice, this requirement may have discouraged judges from blocking earned release decisions, particularly for judges in populous urban areas with heavy caseloads. On the other hand, there was a possibility that judges would hold perfunctory hearings that nearly always result in vetoing the earned release. This does not seem to have occurred. Data from the first year of the new earned release system show that courts declined to hold a hearing in 72% of cases.[157] When a hearing was held, judges blocked the release 51% of the time.[158] This relatively low rate of hearings probably indicates that judges trusted administrators to make sound release decisions.

By giving power to both a parole-type commission (the ERRC) and judges, these two earned release mechanisms—PAT and ERRP release—represented a curious melding of the TIS-II judge-centered approach and the pre-TIS parole system. The authors of the 2009 reforms may have thought that preserving a role for judges was necessary to keep the "truth-in-sentencing" character of the system intact, but in fact most truth-in-sentencing states have never relied exclusively on judicial forms of earned release.[159]

Alternatively, lawmakers may have decided to retain a judicial veto to enhance the political legitimacy of the mechanisms, and reduce the likelihood of negative public safety impacts. Since judges are accountable to the communities that elected them, they may be more reluctant to approve earned releases than state officials. State agency officials, such as DOC and ERRC personnel, could potentially feel pressure to make questionable release decisions to save costs or reduce overcrowding because they are accountable to other administrators, not the voters. Indeed, recent earned release legislation in other states has already run into controversy for allegedly unwise releases.[160]

Giving judges veto power over decisions is one way to reduce such abuses and prevent the ensuing political backlash. The advantage of

157. E-mail from Anthony Streveler, *supra* note 104.

158. *Id.*

159. *See supra* Part II.A. The only mechanism for which the judicial veto seems particularly out of place is positive adjustment time; even those inmates who get their sentence reduced for good behavior must obtain judicial approval before being released. *See supra* Part II.C. This differs from the typical "good time" statute, which in Wisconsin, while it existed, automatically reduced inmates' sentences when they avoided major disciplinary infractions. *See* WIS. STAT. § 973.01 (2009–2010), *repealed by* 2011 Wis. Act 38, §§ 88–89.

160. *See* Klingele, *Changing the Sentence*, *supra* note 8, at 494–97. *See generally supra* note 4 and accompanying text; Klingele, *Early Demise*, *supra* note 9.

Wisconsin's approach from 2009 to 2011 was that state officials were initially in charge of the process, potentially reducing the disparities that could result from a judge-focused earned release system, and only when judges were willing to hold a hearing could they intervene in the process. This system made it less likely that certain judges would veto all earned release applications, potentially causing geographic or racial disparities.

The ability of Wisconsin judges to reduce sentences in response to common law sentence modification motions is an even better example of an appropriate role for judges in earned release. Judges in Wisconsin state courts may only grant these common law sentence modifications when the facts of the case conform to specific doctrines.[161] For this reason, sentence modification motions are normally granted only in relatively unusual circumstances.[162] The main common law doctrine, new-factor sentence modification, requires a court to find that a "new factor" occurred after sentencing or prior to sentencing without the knowledge of the parties at sentencing, and that a sentence modification is thus needed to avoid injustice.[163] Since judges are more qualified than state officials to consider the relevance of particular facts for abstract notions of justice, it may be more appropriate for judges to decide such issues. However, if administrative officials have control over an entire state's earned release system, these officials can be trained to consider the same types of factors, as discussed below.[164]

Despite making a normative argument, this Part does not articulate a general principle for states to follow to successfully implement earned release. In choosing what roles, if any, to assign to judges in the earned

161. Katherine R. Kruse & Kim E. Patterson, Comment, *Wisconsin Sentence Modification: A View from the Trial Court*, 1989 WIS. L. REV. 441, 443, 446–48. *See generally* Norris, *supra* note 60.

162. *See* Kruse & Patterson, *supra* note 170, at 462. Some examples of new factors approved by appellate courts include "new information about the defendant's criminal record, post-conviction assistance to law enforcement, misunderstandings about the consequences of the sentence, a clarification to the law relevant to the sentence, the existence of an untreatable psychological condition, a reduction of the defendant's restitution, and a conflict of interest on the part of the person who prepared a psychological report on the defendant." Norris, *supra* note 60, at 13.

163. Rosado v. State, 70 Wis. 2d. 280, 288–89, 234 N.W.2d 69, 73 (1975) (defining a new factor as "fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties").

164. *See infra* Part III.B.1.b.

release process, state policymakers must make public policy judgments based on the values that are most important to them. This may involve compromising among competing considerations, such as the importance of uniformity and fairness on the one hand, and the value in making electorally accountable officials responsible for decisions that will impact their constituencies on the other.

The shift toward judicial control created by the 2011 legislation,[165] however, may have gone too far. For inmates sentenced after the year 2000 (truth-in-sentencing inmates), the only currently available earned release mechanisms are sentence adjustment, compassionate release, and modification of probation (which all require judicial approval) as well as program-based mechanisms (which require that a judge declare the offender eligible at sentencing).[166] Since compassionate release is not applicable to most offenders, and early discharge of probation does not apply to prison inmates, most inmates have only two realistic options for earned release: sentence adjustment and program-based release. Program-based release is only available to those with substance abuse problems, and there are a limited number of spots available.[167] This leaves judicial sentence adjustment—with its extreme geographic, and possibly racial, disparities[168]—as the most widely-applicable form of earned release.

Moreover, for those who accrued positive adjustment time between 2009 and 2011, judges can now reject their petition for earned release without any hearing, and must hold a hearing to grant positive adjustment time.[169] This reverses the situation in force between 2009 and 2011, which required judges to hold a hearing before rejecting a petition.[170] The 2011 change creates incentives for busy courts to dismiss all petitions for positive adjustment time, which could further

165. *See, e.g.*, 2011 Wis. Act 38, § 45 (giving the court the authority to review the department's determination that an inmate is eligible for release due to an extraordinary health condition and hold a hearing to determine if release is in the public interest); 2011 Wis. Act 38, § 93b (amending WIS. STAT. § 973.08(3)(d)(intro.) (2009–2010) and giving the sentencing court the sole authority to discharge someone from probation early).

166. *See supra* Part II.C.

167. *See supra* note 98 and accompanying text.

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

169. 2011 Wis. Act 38, § 96 (creating WIS. STAT. § 973.198(3), which gives the court authority to deny a petition outright or hold a hearing, and WIS. STAT. § 973.198(5), which dictates how positive adjustment time should be applied to a bifurcated sentence).

170. WIS. STAT. § 304.06(1)(bk)(1), *repealed by* 2011 Wis. Act 38, § 59.

disadvantaged offenders from populous counties (where most of the state's minorities reside).[171]

Whatever the division of labor between judges and administrators, the principles articulated later in this Part will still be applicable. This said, a system with minimal or no judicial involvement will likely be easier to manage and implement in a flexible way, since the autonomy of judges may make them less susceptible to influence than state officials. For example, if policymakers are concerned that state officials are not approving meritorious requests for release, they could fire or discipline the officials. This would obviously not be a possibility for elected judges.

2. Broadening Compassionate Release

A second positive aspect of Wisconsin's 2009 earned release legislation is that the provisions for compassionate release were far broader than in the previous statute. The TIS-II statute known as "terminal/geriatric release," in force from 2003 to 2009, allowed judges to release TIS inmates with either less than six months to live, who were sixty-five years old and had served five years of their sentence, or who were sixty years old and had served ten years of their sentence.[172] The judge could only exercise that authority after the prison's Program Review Committee signed off on the request.[173] The 2009 legislation

171. 82% of inmates who were convicted in Milwaukee County (the most populous county in the state) were African-American. *See* Wis. Dep't of Health Servs., Wisconsin Population Estimates, http://www.dhs.wisconsin.gov/population/ (indicating that Milwaukee County has a population nearly twice that of the second most populous county, Dane County). Roughly 70% of the African-Americans in Wisconsin reside in Milwaukee County. U.S. Census Bureau, Wisconsin Quick Facts, http://quickfacts.census.gov/qfd/states/55000.html (indicating that the 2010 population of Wisconsin was 5,686,986 and that 6.3% of the population was African-American); U.S. Census Bureau, Milwaukee County Quick Facts, http://quickfacts.census.gov/qfd/states/55/55079.html (indicating that Milwaukee County has a population of 947,735, of which 26.8% are black); *see also African Americans in Wisconsin*, WIS. DEP'T OF HEALTH SERVICES, http://www.dhs.wisconsin.gov/health/minorityhealth/mhpop/africanameripop2009.htm ("Nearly 90% of Wisconsin's African American population lives in the following six counties, all of which are located in Southeastern or Southern Wisconsin, including Milwaukee, Dane, Racine, Kenosha, Rock, and Waukesha. When looking at African Americans as a percent of the total county population Milwaukee County tops this list, with 25.6%."); WIS. DEP'T OF HEALTH SERVICES, *Hispanics/Latinos in Wisconsin*, http://www.dhs.wisconsin.gov/health/minorityhealth/mhpop/hispaniclatinopop.htm ("As of 2008, two-thirds of Wisconsin's Hispanic/Latino population was concentrated in Milwaukee, Dane, Racine, Kenosha, and Brown counties.").

172. WIS. STAT. § 302.1135 (2009–2010), *amended by* 2011 Wis. Act 38, § 47.

173. *Id.*

made several improvements.[174] The 2011 measures left some of these changes in place, but gave judges veto power and made certain inmates ineligible for compassionate release.[175]

First, while retaining provisions that allowed release for those of a certain age who have served a certain amount of time in prison, the 2009 statute removed the terminal diagnosis requirement and instead required a showing of an "extraordinary health condition."[176] This condition, which had to be documented by affidavits from two physicians, could include age, infirmity, disability or a condition that cannot be treated in the institution.[177] This essentially allowed the ERRC to release inmates because of virtually any age- or health-related problem.[178] This is similar to New Jersey's statute and the proposed *Model Penal Code Revision*'s compassionate release provision, both of which give judges broad discretion to decide when age, health, or disability justifies release.[179] Such flexibility is important because compassionate release decisions are likely to be very fact specific, hinging on the particulars of the inmate's condition and the likelihood that he or she could commit crimes if released. Fortunately, the 2011 reforms did not reverse this change in the law.[180]

Second, from 2009 to 2011, administrators alone made compassionate release decisions, as the judge did not have to pre-approve each release.[181] While it is ultimately a public policy judgment

174. *See infra* Part III.A.

175. 2011 Wisconsin Act 38, § 45 (creating WIS. STAT. § 302.113(9g)).

176. 2009 Wis. Act 28, § 2729y (amending WIS. STAT. § 302.1135(3) (2009–2010), which was repealed by 2011 Wis. Act 38, § 47).

177. WIS. STAT. 302.113(9g)(a)(1), *repealed by* 2009 Wis. Act 28.

178. However, it is possible that since the legislation does not mention "illness," that a grave illness that does not qualify as an infirmity or disability would not be grounds for release. This said, if a serious illness will prevent an inmate from committing further crimes for the rest of his life, this can fairly be described as a disability or infirmity. Thus the absence of the term "illness" should not pose an obstacle to meritorious compassionate release requests.

179. In New Jersey, "A motion may be filed and an order may be entered at any time . . . amending a custodial sentence to permit the release of a defendant because of illness or infirmity of the defendant or . . . changing a sentence for good cause shown upon the joint application of the defendant and prosecuting attorney." N.J. CT. R. 3:21-10(b) (2009); *see also* Frase, *supra* note 7, at 195 (analyzing proposal to change *Model Penal Code*'s compassionate release provisions).

180. *See* 2011 Wis. Act 38, § 45 (retaining the previous definition of "extraordinary health condition," and allowing release of those with such conditions).

181. WIS. STAT. § 302.1135 (2009–2010), *repealed by* 2011 Wis. Act 38, § 47. Section 302.1135(8) did permit a person to obtain judicial review of a decision to deny compassionate

whether judges should retain the right to veto earned release decisions, it makes for a simpler process to remove the judicial veto. In addition, since the ERRC would have had comprehensive information about the offender's crime and conduct in prison, a sense of when other petitions have been granted, and extensive knowledge about the inmate's physical abilities, the ERRC was well-positioned institutionally to make compassionate release decisions in a consistent and public safety-protective manner. The fact that the Program Review Committee's approval was no longer necessary was also a welcome change, because it removed an additional, potentially duplicative bureaucratic obstacle.[182]

The 2011 legislation requires that the compassionate release be approved first by the prison's Program Review Committee and then by a judge, who is required to hold a hearing.[183] The inmate must "prov[e] by the greater weight of the credible evidence" that the release would be in the public interest.[184] While there are reasons to prefer that the decision be made by administrators alone, it is understandable that the legislature wanted the judge to make the final determination. The "greater weight" standard (which has been in effect since compassionate release was passed as part of the TIS-II legislation) seems appropriate, because it is not a high standard (like "clear and convincing evidence," the standard applicable for "new factor" sentence modification[185]) that would present an additional obstacle toward compassionate release.

Third, the 2009 legislation applied to inmates convicted of class B felonies, which expanded the pool of inmates eligible under the statute, but the 2011 legislation reversed this change.[186] Class B felonies include such crimes as first-degree reckless homicide, second-degree intentional homicide, and first-degree sexual assault. The policy judgment reflected in the pre-2009 statute and the 2011 legislation—that the most serious and violent criminals should never be released on age or health

release by filing a common law writ of certiorari. For a detailed analysis of the changes made to the compassionate release statute by Act 28, see O'Meara, *supra* note 66, at 34.

182. *See* O'Meara, *supra* note 66, at 34.

183. In this respect, the 2011 legislation returns compassionate release to the procedure established by the TIS-II legislation. 2011 Wis. Act 38, § 45 (creating WIS. STAT. § 302.113(9g)(cm), which requires the sentencing court to hold a hearing after the Program Committee has determined modification is appropriate); *see also* O'Meara, *supra* note 66, at 34.

184. 2011 Wis. Act 38, § 45 (creating WIS. STAT. § 302.113 (9g)(e)).

185. State v. Franklin, 148 Wis. 2d 1, 7–9, 434 N.W.2d 609, 611 (1989).

186. 2011 Wis. Act 38, § 47, *repealing* WIS. STAT. § 302.1135 (2009–2010). The statute simply omits the classification-based limitations the statute previously contained. *Id.*

grounds—is easy to sympathize with. However, one could argue that decision-makers should always have the discretion to release an inmate who is so incapacitated by an illness, such as paralysis or advanced dementia, that additional offenses are impossible. Such an approach would allow each case to be evaluated on its own merits, without excluding offenders based on their offense.

The principle behind this policy can be articulated as follows. The additional incarceration that an incurably sick or disabled offender would experience if he or she is not released would have some abstract punishment or retributive value. But this value, even in this case of the most serious offenders, will often be outweighed by the lack of risk to the public, the potential cost savings to the public, and the benefits for the dignity and quality of the life of the offender and his or her family. Only an actor familiar with the all the facts is in a position to decide whether compassionate release is justified in a particular case.

Indeed, compassionate release statutes are an example of an earned release mechanism that by its very nature should be broad and bureaucratically uncomplicated. Obviously, the narrower the rules, the fewer health-incapacitated inmates will be released. More onerous and multi-layered bureaucratic requirements are also certain to reduce the number of those released by slowing down the process, discouraging potential applicants, and giving more actors the opportunity to veto requests.

The small numbers of inmates released through most compassionate release statutes across the country makes this simplicity and broadness all the more important.[187] Indeed, over the last two years, only six inmates achieved compassionate release, a small fraction of the thirty to fifty inmates who die in prison each year.[188] The general principles

187. *See* CHIU, *supra* note 66, at 6–8 (showing, based on a study of 15 states and the District of Columbia, that states rarely use their geriatric release statutes); Cara Buckley, *Law Has Little Impact on Compassionate Release for Ailing Inmates*, N.Y. TIMES, Jan. 30, 2010, at A17 (describing how in New York and several other states, compassionate release statutes were on the books but often resulted in only a small handful of releases per year).

188. This said, it is possible that many or most of the inmates who died could not have been released through compassionate release, either because their deaths were unexpected or because they were ineligible due to being convicted of a Class A offense. E-mail from Anthony Streveler, Wis. Dep't of Corr., to author (Nov. 19, 2011) [hereinafter E-mail from Anthony Streveler Nov.] (providing fact that six inmates had been released). Fifty-two inmates died in 2002, forty-three in 2003, forty in 2004, thirty-one in 2005, forty-five in 2006, forty-three in 2007, forty-five in 2008, forty-two in 2009, twenty-five in 2010, and forty-nine in 2011. E-mail from Bonnie Utech, Records Custodian, Wis. Dep't of Corr. (Feb. 15, 2012).

developed below, in particular the principle of responsive governance discussed in Part III.B.2, may help in preventing the under-use of compassionate release. In any case, if policymakers want to realize the full potential of compassionate release, they should consider instituting a process in which all gravely ill or elderly eligible inmates are automatically considered, instead of relying on individual inmates to obtain a diagnosis and petition for earned release on their own accord.

3. Prioritizing Public Safety

Another encouraging development in Wisconsin's 2009 earned release legislation was the careful, if uneven, attention paid to ensuring that release is compatible with public safety. The legislation required the state to develop empirically validated criteria for approving earned release and, as a result, the DOC implemented an improved system for evaluating the risks posed by individual inmates.[189] The earned release legislation also focused on nonviolent offenders, making violent offenders eligible for only a small number of relatively restrictive earned release mechanisms.[190]

First, the legislation directed the ERRC and DOC to develop scientific criteria for evaluating the likelihood that an individual offender will commit certain offenses.[191] At the same time, this "validated and objective assessment of the inmate's criminogenic factors and risk of reoffending" only applies to two of the many earned release mechanisms.[192] Even though its use is only statutorily required for two

189. Interview with Anthony Streveler, Wis. Dep't of Corr. (May 5, 2010) [hereinafter Interview with Anthony Streveler May]; E-mail from Anthony Streveler, Wis. Dep't Corrections (Dec. 5, 2011).

190. 2009 Wis. Act 28, § 2751. For example, PAT-B and PAT-C release were available to some inmates convicted of violent offenses, but these releases were subject to the discretionary approval of the ERRC and the judge. *See supra* notes 125–27, 130 and accompanying text. Similarly, some violent offenders were eligible for compassionate release, but compassionate release requires an extraordinary health condition and is subject to discretionary approval as well. *See supra* notes 75 and accompanying text. ERRC release was not available to those convicted of Class A or B felonies, which include the most serious violent crimes. *See supra* notes 99, 100 and accompanying text; WIS. STAT. §§ 940.01, 940.02, 940.05, 940.225 (indicating that first-degree intentional homicide is a Class A felony, several forms of homicide, and first-degree sexual assault, are Class B felonies).

191. WIS. STAT. § 302.042(2)(a) (2009–2010), *repealed by* 2011 Wis. Act 38, § 13 (requiring the DOC to "[c]onduct a validated and objective assessment of the inmate's criminogenic factors and risk of reoffending" to release an inmate through a risk reduction sentence).

192. *Id.*

forms of earned release, in practice the DOC and ERRC used an improved risk assessment tool for deciding upon other releases, as well as deciding upon the intensity of supervision that offenders will be subject to upon release.[193] As long as the evaluation instrument is empirically valid, this is surely preferable to ad hoc decisions based on informal reviews of inmates' institutional conduct and post-release plans.

Although the DOC had long used a methodologically problematic instrument, the DOC has developed an improved assessment procedure.[194] The Justice Center performed a sophisticated analysis of the state's current risk evaluation instrument, proposing specific changes that would result in significant improvements.[195] For example, the analysis found that the old instrument classified too large a percentage of offenders as high-risk, making it less useful for distributing resources toward offenders who pose the greatest risk, and suggested ways to correct the problem.[196] The DOC adopted a new instrument correcting these flaws, which was immediately implemented and used for all the 2009–2011 earned releases.[197]

In any case, as mentioned below, care must be taken to avoid giving undue weight to these assessment tools, especially when other considerations not incorporated by the tools are relevant to recidivism.[198] Professor Hannah-Moffat has identified a number of potential problems with relying on risk assessment in sentencing-related decisions, such as the potential for overreliance on risk assessment because of excessive trust in its predictive ability, confusion between correlation and causation, and potential bias against women and minorities.[199]

193. Risk reduction sentences required this assessment, and positive adjustment time (PAT-B and PAT-C) did not apply to those determined to have a high risk of reoffending through an "objective risk assessment instrument." WIS. STAT. § 973.01(3)(d) (2009–2010), *repealed by* 2011 Wis. Act 38, § 88; *see also* Interview with Anthony Streveler May, *supra* note 189.

194. Interview with Anthony Streveler May, *supra* note 189; *see also* MIKE EISENBERG ET AL., COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, VALIDATION OF THE WISCONSIN DEPARTMENT OF CORRECTIONS RISK ASSESSMENT INSTRUMENT, at iv, vii–ix (2009), *available at* http://www.wi-doc.com/PDF_Files/WIRiskValidation_August%202009.pdf.

195. EISENBERG ET AL., *supra* note 194, at vii–viii.

196. *Id.* at iv–vii.

197. Interview with Anthony Streveler May, *supra* note 189.

198. *See infra* notes 199–201.

199. *See* Hannah-Moffat, *supra* note 11 (manuscript at 14–15, 17).

Practitioners need to be made aware of these limitations and biases. In particular, given Professor Harcourt's claim that risk assessment instruments will increase racial disparities, care should be taken to ensure the tools are not unfairly disadvantageous to minorities.[200] However, so far in Wisconsin, this may not be a problem: the analysis of the old risk assessment tool showed that it did not result in racial bias.[201]

Second, under the 2009 earned release measures, violent and more serious offenders were ineligible for some of the mechanisms. For other mechanisms, they had to serve significantly longer proportions of their sentences before being eligible for earned release.[202] This said, the complexity of the eligibility criteria for the various mechanisms might appear excessive, and invite public criticism or even ridicule. For example, a risk reduction sentence may have applied to someone convicted of a violent class B felony such as second-degree intentional homicide but not to someone who interfered with a police GPS device (an offense specifically excluded by the statute).[203] Third, the ability of the judge to veto some earned release decisions meant that someone

200. *See* Harcourt, *supra* note 12 (manuscript at 2, 9).

201. EISENBERG ET AL., *supra* note 194, at 25; E-mail from Anthony Streveler, *supra* note 16.

202. The risk reduction sentence statute did not apply to those convicted of various offenses, many of them violent, such as kidnapping and reckless homicide, but it still applied to many violent offenders. WIS. STAT. § 973.031 (2009–2010), *repealed by* 2011 Wis. Act 38, § 92. "Certain early release" was only available for inmates convicted of nonviolent offenses, and as a further precaution, the prison social worker or extended supervision agent must have had a "reason to believe" that the offender would not engage in assaultive activity in the community. *See supra* note 84 and accompanying text. PAT-A earned release at 67% of the sentence was only available to those convicted of misdemeanors and certain nonviolent felonies, and those convicted of sex offenses and certain other offenses were ineligible. PAT-B earned release allowed inmates convicted of violent offenses and certain nonviolent offenses to be released up to 25% earned. WIS. STAT. § 304.06(1)(bg)(1) (2009–2010), *repealed by* 2011 Wis. Act 38, § 58. As with PAT-A, those convicted of sexual and other specified offenses were ineligible. *Id.* PAT-C release was available for those convicted of more serious felonies, including violent offenses, but many offenses, including certain violent and sex offenses, were excluded. *Id.* § 304.06(1)(bg)(2), *repealed by* 2011 Wis. Act 38, § 58. Thus, violent offenders are often ineligible for earned release, and when they are, they cannot gain release as early as nonviolent offenders.

203. WIS. STAT. § 973.031 (2009–2010), *repealed by* 2011 Wis. Act 38, § 92 (excluding those convicted of WIS. STAT. § 946.465, which prohibits tampering with GPS devices). As Judge Richard Sankovitz noted, "The list of exceptions is peculiar and may be subject to change with future legislation. For example, [Risk Reduction Sentences] sentencing is not available in second degree homicide cases, but it is available in first degree homicide cases." Richard J. Sankovitz, *Sentencing Toolbox Department Q&A: Risk Reduction Sentences*, THIRD BRANCH, Winter 2010, at 6, 6, *available at* http://www.wicourts.gov/news/thirdbranch/docs/winter10.pdf.

accountable to communities has a role in the decision. As noted above, this may result in extra attention being paid to the release of violent or other serious offenders, perhaps reducing the number of released offenders who commit serious crimes.

While these features cannot prevent earned release from causing any public safety problems, the fact that there were numerous measures in place to protect public safety could have potentially blunted the public reaction to particular incidents of releasees committing serious crimes. As it happened, the 2011 repeal of most of the 2009 earned release mechanisms did not seem to be stimulated by any particular event (such as a releasee committing a terrible crime), but rather by the political preferences of new officeholders.[204] As discussed in Part III.B below, ensuring that earned release is compatible with public safety is a core principle for successfully implementing earned release, and treating violent offenders differently than nonviolent offenders is one potentially defensible way to do this.

4. Addressing Reentry and Revocations

A final positive element in the 2009 legislation was the introduction of three measures (only one of which was repealed in 2011) to reduce recidivism and revocations from probation or extended supervision. These include mechanisms allowing for earned release from community supervision sentences,[205] requirements that the DOC work to lower revocation rates,[206] and the establishment of the Council on Offender Reentry.[207] The availability of new funding for some of this work is a positive sign, but implementation remains uncertain.

First, as described in Part II, a judge can discharge an offender from probation if the offender has successfully completed half of the probation term, and from 2009 to 2011, the DOC could unilaterally release offenders from either probation or extended supervision.[208] Such policies are potentially very significant because the majority of prisoners

204. *See supra* note 57–59 and accompanying text.

205. 2009 Wis. Act 28, § 2666 (amending Wis. Stat. § 301.03(3) (2009–2010)).

206. 2009 Wis. Act 28, § 2669h (creating WIS. STAT. § 301.068 (2009–2010), which establishes community services to reduce recidivism).

207. 2009 Wis. Act 28, §§ 34(g) (creating WIS. STAT. § 15.145 (2009–2010), which describes the Council); 2009 Wis. Act 28, § 2669k (creating WIS. STAT. § 301.095, which establishes the function of the Council).

208. WIS. STAT. § 973.01(4m) (2009–2010), *repealed by* 2011 Wis. Act 38 § 90; WIS. STAT. § 973.09(3)(d) (2009–2010), *amended by* 2011 Wis. Act 38 § 93b.

entering Wisconsin state prisons have been revoked from probation or extended supervision for technical violations, rather than for committing a new offense.[209] The longer the period of supervision, the more likely technical violations are to occur.[210] When offenders have successfully completed a large proportion of their supervision sentence and the judge or administrative decision-maker believes them to be a low public safety risk, it is appropriate to shorten their sentences. Besides allowing community corrections resources to be spent on higher-priority offenders, modifying these sentences should reduce the prison population by lowering the number of revocations. Since 2009, the DOC has discharged at least sixty-five offenders from extended supervision (parole) and twenty-two from probation, resulting in an overall reduction of 145 years of supervision.[211] This is not an overwhelming amount, but it indicates the DOC's willingness to implement this earned release policy.

Second, the 2009 legislation requires the DOC to provide training and skill development to community corrections officers with the goal of

---

209. "Dr. Tony Fabelo, Director of Research, Justice Reinvestment Initiative, CSG Justice Center . . . reported that [Wisconsin] revocations without a new sentence accounted for 50% of prison admissions in 2000 and 61% of admissions in 2007." WIS. LEGIS. COUNCIL, SPECIAL COMMITTEE ON JUSTICE REINVESTMENT INITIATIVE OVERSIGHT 6 (2010), *available at* http://legis.wisconsin.gov/lc/publications/rl/rl_2009_12_jrio.pdf; *see also* BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: PROBATION AND PAROLE VIOLATORS IN STATE PRISONS, 1991, at 2 (1995) (defining a technical violation as any violation of the conditions of parole other than a new conviction for a criminal offense); COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, JUSTICE REINVESTMENT IN WISCONSIN ANALYSES & POLICY OPTIONS TO REDUCE SPENDING ON CORRECTIONS AND INCREASE PUBLIC SAFETY 4 (2009), *available at* http://nicic.gov/Library/023753 ("Between 2000 and 2007, the number of people admitted to prison [in Wisconsin] who did not comply with the conditions of their community supervision increased 40 percent. The number of people admitted to prison who committed new offenses, however, decreased 11 percent."); Todd R. Clear and James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARVARD L. & POL'Y REV. 307, 317–18 (2009) (arguing that technical revocations could be eliminated with "minimal public safety implications" by employing alternative sanctions for rule violations).

210. David E. Olson & Arthur J. Lurigio, *Predicting Probation Outcomes: Factors Associated with Probation Rearrest, Revocations, and Technical Violations During Supervision*, 2 JUST. RES. & POL'Y 73, 82 (2000) (using Illinois probation data to show that "sentence length was a predictor of probation revocation and technical violations but not of new arrests").

211. E-mail from Anthony Streveler, Wis. Dep't of Corr. (Dec. 5, 2011). The Department of Corrections calculated that these releases reduced total supervision by 53,071 days, which is over 145 years. *Id.*

reducing recidivism and reducing the overall revocation rate.[212] The Department appears to have succeeded in reducing revocation rates at least somewhat over the last two years.[213] However, the 2009 budget did not initially allocate additional resources to implement this statute, and the legislation does not specify exactly what the department must do, other than report on its progress.[214]

This said, a ten-million dollar fund, "Becky Young Community Corrections" fund, was finalized by the state government in 2010.[215] These funds will make possible a variety of new programs and initiatives, including the statutorily-mandated efforts to reduce revocations. Implementation so far has already resulted in the hiring of employment coordinators to help those on probation or extended supervision to find employment, additional staff to evaluate the effectiveness of programs, new vocational training for inmates, and expanded mental health services for offenders.[216]

The legislature passed a version of the bill setting a goal of reducing the revocation rate by 25%, but then-Governor Doyle vetoed this provision.[217] Without a definite goal or specific directions, the fate of this provision depends on the ingenuity and sustained attention of the DOC. Ideally, the vast savings that could result from substantially reducing revocations would motivate the department to aggressively implement this statutory mandate. But no one should assume this will occur. Notably, the process of requesting the Becky Young funds requires the department to create a comprehensive plan for its implementation of the new community corrections legislation, which

212. 2009 WIS. Act 28, § 2669h (creating WIS. STAT. § 301.068 (2009–2010), dealing with community services aimed at reducing recidivism and specifically § 301.068(5), which required the Department of Corrections to provide training to probation, parole, and extended supervision agents).

213. E-mail from Anthony Streveler, *supra* note 16 (explaining that overall revocation rates have been falling, and sending internal data showing lower rates of revocations over the past two years for women).

214. 2009 Wis. Act 28, § 2669h (creating WIS. STAT. § 301.068(6) (2009–2010), which was vetoed in part to remove the specific 25% reduction in recidivism goal).

215. Press Release, Lena Taylor, Taylor Applauds Final Approval of Becky Young Community Justice Funds: Bi-partisan Investment in Reducing Recidivism Caps Work on Corrections Reform (Mar. 16, 2010), http://www.legis.wi.gov/senate/sen04/news/Press/2010/pr2010-014.asp.

216. WIS. DEP'T OF CORR., BECKY YOUNG COMMUNITY CORRECTIONS RECIDIVISM REDUCTION STATUS FY 2011 REPORT 2, 5–6 (Jul. 14, 2010).

217. 2009 Wis. Act 28, § 2669(h); WIS. STAT. § 301.068.

may serve to focus the department's efforts.[218] There was no such plan, in contrast, for the implementation of the other earned release and sentencing reforms under TIS-III.

Third, the 2009 legislation established a Council on Offender Reentry, which is to coordinate reentry programs throughout the state.[219] The legislation requires the council to investigate potential funding sources for reentry initiatives, including federal funds; to promote collaboration and coordination among different agencies and non-state entities relating to offender reentry; to encourage public input and participation; to promote research and evaluation of reentry programs; and to review existing reentry programs to ensure there is evidence they are effective.[220] The federal government has already awarded the state a $1.5 million grant for reentry initiatives.[221] If the Council focuses on achieving all of its goals, as opposed to focusing mainly on how to secure federal grants, it could help reduce recidivism and revocations (and thus the prison population) by expanding reentry efforts and improving their effectiveness. However, there is no indication yet how active this council will be, and virtually no information about its activities is available to the public. Unfortunately, the Council did not meet for the first time until December 2010, over a year after the legislation passed.[222]

These three developments all represent ways for the state to reduce revocations and recidivism through the better use of correctional resources in the community. As discussed below in Part III.B.4, such strategies should be a key element accompanying any earned release reform, because of their potential to cut corrections costs and reduce prison populations in ways consistent with public safety. However, effective implementation of these three provisions is not guaranteed.

218. Interview with Anthony Streveler May, *supra* note 189.

219. 2009 Wis. Act 28, § 34g (creating WIS. STAT. § 15.145(5) (2009–2010), establishing the Council on Offender Reentry); 2009 Wis. Act 28, § 2669k (creating WIS. STAT. § 301.095 (2009–2010), describing the duties of the Council on Offender Reentry).

220. 2009 Wis. Act 28, § 2669k (creating WIS. STAT. § 301.095 (2009–2010)).

221. Wisconsin Department of Corrections, Department-Wide Transfer Announcement, Program & Policy Analyst: Advanced Second Chance Act Coordinator (Sept. 2010) http://www.wi-doc.com/Employment_pdf/Transfer%20PPA%20Adv%209% 2010%20DEPT.pdf.

222. E-mail from Anthony Streveler, Wis. Dep't of Corr. (Jan. 17, 2011) (indicating that the Council did not meet until December 2010); 2009 Wis. Act 28. The opinions expressed here are mine, not Mr. Streveler's.

As discussed below, ongoing, organized efforts are needed to ensure implementation.[223]

5. Multiplying Mechanisms

One potential disadvantage of Wisconsin's earned release system is the multiplication and frequent alteration of earned released mechanisms over time. After Act 28 went into effect in 2009, there were no fewer than ten earned release mechanisms applying to at least some offenders.[224] It seems likely a smaller number of mechanisms would cause less confusion (and lead to less litigation on the nature of the mechanisms and their interrelationships with one another). At the same time, the large number of mechanisms might have salutary effects by broadening the availability of earned release and increasing the chances that one of the mechanisms will be effective. Regardless, the topsy-turvy history of earned release over the past decade and a half also compounds the problem of complexity by potentially reducing actors' confidence in the permanence of the mechanisms.

Obviously, there is something to be said for simplicity. Simple legislation—creating a smaller number of mechanisms giving decision-makers ample discretion—would be far less confusing to inmates, judges, lawyers, and prison officials, and require less (if any) litigation to clarify. Creating numerous and complex earned release mechanisms may cause interaction and compatibility problems, potentially necessitating expensive litigation and a prolonged rule-making process.

However, it is possible that establishing numerous earned release mechanisms could have beneficial results. For example, the large number of mechanisms means that more inmates are eligible, and may give many inmates more than one chance at earned release. It also allows mechanisms to be tailored to particular classes of inmates—for example, ERRC release was presumably designed to make it easier for TIS-I and TIS-II inmates to achieve release than under the original judicial version of sentence adjustment.[225] It certainly worked: 469 inmates were released through ERRC release from 2009 to its repeal in 2011, accounting for 75% of the total earned releases during that time.[226]

223. *Infra* Part III.A.6.

224. *See* 2009 Wis. Act 28, §§ 2703–12 (creating WIS. STAT. § 302.05, which outlined the earned release program).

225. *See supra* Part II.C.

226. E-mail from Anthony Streveler Nov., *supra* note 188.

Moreover, the more mechanisms there are, the more likely it is that one of them will actually work, and succeed in releasing a sizable number of inmates without public safety incidents. For example, if the additional programming needed for the implementation of certain mechanisms never materializes, or if judges fail to make inmates eligible for risk reduction sentences or program-based release, officials could rely on other mechanisms.[227] If one mechanism turns out to be most effective in releasing individuals who do not recidivate, the legislature could abolish the other mechanisms, benefitting from the quasi-experimental nature of the multiple mechanisms.[228]

Finally, when there are a large number of mechanisms, then even when political winds shift, politicians wishing to appear tough on crime may abolish some of the mechanisms but not others, allowing earned release to continue at a similar pace. In fact, though current Republican Governor Scott Walker promised to repeal the new earned release legislation, he did not repeal all of it: eligibility for compassionate release based on an "extraordinary health condition" and earned release from probation (two 2009 reforms) remain in force, as does judicial sentence adjustment.[229]

Another problem is that, viewed over time, Wisconsin's multi-pronged earned release system may seem like an ever-shifting mess, which could undermine confidence in the system and create uncertainty about the future. To review, Wisconsin long had an indeterminate sentencing system, featuring sentence credit and parole release, both of which the legislature abolished in 2000.[230] From 2000 to 2003, truth-in-sentencing (TIS-I) was in full force, but the legislature failed to pass the earned release mechanisms that had been expected to accompany truth-

227. For example, under the reforms in place from 2009–2011, even if the judge did not sentence an offender to a risk reduction sentence, he or she could be released through positive adjustment time. *See supra* notes 94, 111 and accompanying text.

228. Ideally a similar process would occur on a larger scale, in which earned release mechanisms that have been shown to be effective in some states would be adopted and further improved in other jurisdictions. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 403–04 (1998) (explaining a philosophy of law and governance centering on local units free to innovate in pursuit of common objectives, drawing on good practices from other units).

229. *See supra* note 58 and accompanying text; WIS. STAT. § 302.113(9g)(b) (2009–2010) (compassionate release); WIS. STAT. § 973.09(3)(d) (2009–2010) (earned release from probation); WIS. STAT. § 973.195(1r) (2009–2010) (sentence adjustment).

230. *See supra* Part II.B.

in-sentencing.[231] This meant a dramatic change from indeterminate sentencing to one of the most restrictive truth-in-sentencing regimes in the country.[232]

In 2003, inaugurating TIS-II, the legislature finally passed several earned release mechanisms, all of them vesting power mainly in trial court judges.[233] However, this did not settle matters; considerable litigation was necessary to determine various questions about the legislation, such as its application to TIS-I inmates.[234] During this time, a *Wisconsin Law Review* article described the state's truth-in-sentencing law as "ambiguous," "confusing," and "inchoate,"[235] and Meredith Ross, the director of the Frank J. Remington Center, a legal clinic serving prisoners, observed that the "law governing sentence modification and earned release is a mess."[236]

As if matters were not confusing enough, in 2009 the legislature, through its TIS-III legislation, began phasing out the main TIS-II earned release mechanism (sentence adjustment), created several new earned release mechanisms, restored sentence credit, and vested power in administrative officials for nearly all earned release mechanisms, while reducing or eliminating the judicial role.[237] Then, merely two years later in 2011, the Walker administration turned this all on its head, establishing the fifth sentencing era in less than twelve years, by abolishing most of the 2009 mechanisms and vesting almost all the earned release authority in judges.[238]

---

231. State v. Trujillo, 2005 WI 45, ¶ 33, 279 Wis. 2d 712, 694 N.W.2d 933 (Abrahamson, C.J., dissenting) (noting that the "undisputed history of TIS-I and TIS-II" shows that "the legislature did not intend TIS-I to go into effect until TIS-II was adopted with reduced penalties").

232. *See supra* Part II.B.

233. *See supra* Part II.B.

234. Mayrack, *supra* note 44, at 194 (citing State v. Stenklyft, 2005 WI 71, 281 Wis. 2d 484, 697 N.W.2d 769; State v. Tucker, 2005 WI 46, 279 Wis. 2d 697, 694 N.W.2d 926; *Trujillo*, 2005 WI 45, 279 Wis. 2d 712, 694 N.W.2d 933).

235. *Id.* at 194.

236. Ross, *supra* note 42, at 13.

237. *See supra* Part II.C.

238. *See, e.g.*, 2011 Wis. Act 38, § 45 (amending WIS. STAT. § 302.113(9g) (2009–2010) (giving the court the authority to review the department's determination that an inmate is eligible for release due to an extraordinary health condition and hold a hearing to determine if release is in the public interest)); 2011 Wis. Act 38, § 93b (amending WIS. STAT. § 973.08(3)(d)(intro.) (2009–2010) (giving the sentencing court the sole authority to discharge someone from probation early); *see supra* notes 134–135.

All four of these transitions were rather abrupt and dramatic. Given this turbulent history, inmates, judges, lawyers, and lawmakers may be reluctant to invest too much time or resources in whatever earned release mechanisms exist, if they expect the legislature to change everything within a few years anyway.

To avoid these problems, states should carefully consider the timing and content of legislative changes. It is inadvisable to pass historic sentencing reforms while delaying accompanying legislation: in Wisconsin, this created a uniquely harsh system, drove steep increases in imprisonment, and fostered litigation.[239] States should try to ensure that the mechanisms they choose to establish are sustainable in the long term and have clearly defined relationships to one another. States may want to consider a simple earned release system with a small number of mechanisms, which gives the relevant actors discretion that is appropriately guided but not with such complexity that implementation becomes problematic. For example, a state may choose to establish a broad compassionate release statute, a sentence credit mechanism allowing the sentence to be reduced as much as 25% for good behavior, and a parole-like mechanism permitting an additional reduction of as much as 25%.

6. Uneven Implementation

One problem with the various earned release mechanisms created in 2009 was their uneven implementation. As noted earlier, about seventy-five percent of earned releases from 2009 to 2011 occurred through a single mechanism (ERRC release).[240] The three types of positive adjustment time—PAT-A, PAT-B, and PAT-C—were applied to two, fifty-four, and thirty-nine inmates, respectively.[241] Ironically, those non-violent offenders the legislature indicated were most deserving of release—those eligible for PAT-A, or one day off for each two days of good behavior—were actually released the least often.[242] Fifty-four of the total releases were through "certain" earned release, about nine percent of the total.[243] Program-based release accounted for forty-two of

239. *See supra* Part II.B.

240. *See supra* Part II.C.3.

241. *See supra* Part II.C.3.

242. E-mail from Anthony Streveler Nov., *supra* note 188. This discrepancy was possibly due to the fact that the Department of Corrections secretary, and not the ERRC as with PAT-B and PAT-C, had decision-making authority for PAT-A releases.

243. *Id.*

the releases.[244] Not a single inmate was released through a risk reduction sentence.[245]

What is perhaps the most disappointing is that only four inmates have been released through the new compassionate release provisions, a small fraction of the thirty to fifty inmates who die each year.[246] It is possible that many of these inmates died unexpectedly, were ineligible for compassionate release, or remained potentially dangerous to the public up to their last day. Yet it seems possible that at least some of these inmates would have been eligible for compassionate release and would have posed no public safety risk. If this is the case, releasing them earlier could have saved the state large sums in medical bills and allowed the prisoners more dignified and comfortable deaths. In Part III.B.2 below, I discuss how policymakers can prevent potential implementation problems.

7. The Need for Additional Resources and Judicial Education

Two final issues with Wisconsin's 2009 earned release forms were the state's slowness in devoting the additional resources needed to implement earned release effectively and at least minor problems with educating and communicating with judges about the mechanisms. While the Becky Young funds will allow additional resources to be spent on community corrections (including for the goal of reducing revocations), new resources may also be needed for prison programs. Judicial education may have been lacking as the measures first went into effect, but subsequent efforts appear to have been adequate.[247]

Additional financial resources would probably have been necessary for the measures to fully succeed, because some of the mechanisms, particularly the risk reduction sentence, required the inmate to have completed certain programming.[248] Since prison programs were already spread thin among the prison population, an expansion of programs was

244. *Id.*

245. *Id.*

246. *Id.*; *see supra* note 188 and accompanying text. I should note that while Mr. Streveler provided me with this data, the opinions expressed here about implementation are mine alone.

247. Interview with Anthony Streveler May, *supra* note 189.

248. 2009 Wis. Act 28, § 2699m (creating WIS. STAT. § 302.042 (2009–2010), describing the Risk Reduction Program).

needed.[249] The failure of the legislature to enhance the budget for prison programs calls into question the viability of these mechanisms.

Three considerations, however, may have reduced the seriousness of this issue. First, under the Risk Reduction Sentence, the DOC had complete discretion regarding what programs to include in an inmate's individual plan, and the flexibility to alter it at any time.[250] This could have allowed the inmates to complete their plans and achieve release through the Risk Reduction Sentence, though hopefully not by forgoing programming necessary for reducing the inmate's risk to the public.[251] Second, in many cases inmates would have been eligible for release through Positive Adjustment Time, which did not explicitly require certain programming, at the same time as they were eligible for release through the Risk Reduction Sentence.[252] Third, the DOC has plans to begin systematically applying the evidence-based principle, often stressed by the Justice Center, that intensive resources and intervention strategies should be directed toward the highest-risk offenders.[253] Despite the lack of new funds for prison programs, the application of this principle could ensure that offenders most likely to commit additional crimes or particularly serious crimes would have the highest priority for programming.

Judicial education and outreach were important even for the 2009 reforms, because judges retain some role in several of the mechanisms. In particular, for the risk reduction sentence, judges had to declare the inmate eligible at sentencing. While there were some organized efforts to educate judges about the new mechanisms, it is not obvious what state officials would have told the judges, beyond explaining the details of how the mechanisms work.[254] The statute contains no hint about

249. The DOC has the discretion to adjust an inmate's treatment plan if necessary. *See* Governor Jim Doyle, *supra* note 124, at 4 ("This partial veto preserves the intent of the provision to direct the department to develop a program plan for the inmate that is designed to reduce the risk of reoffending and allows for flexibility to modify the plan as needed."). However, the lack of additional programming could still have stalled earned release if the DOC had been reluctant to alter treatment plans. If earned releases would have occurred without necessary programming, because treatment plans were scaled back, this could have threatened public safety.

250. WIS. STAT. § 302.042 (2009–2010).

251. *Id.*

252. *See supra* Part II.C.6–.7.

253. Interview with Anthony Streveler May, *supra* note 189.

254. *Id.* (indicating that the DOC had held several meetings with judges to discuss the new earned release mechanisms).

which inmates should be made eligible for the risk reduction sentence; it only says that certain inmates are eligible, and that a judge must sentence them to a risk reduction sentence for them to serve one.[255] Likewise, it was unclear when judges were supposed to exercise their ability to hold hearings about releases under ERRC release or positive adjustment time. The lack of guidance (particularly from the statutes themselves) may have contributed to the sparse and uneven implementation of these mechanisms.[256]

More broadly, the earned release authorities must cultivate a relationship with the state's judiciary for the mechanisms to be implemented smoothly. Soon after the reforms were passed, prison officials told inmates to send letters to the judge requesting to be made eligible for program-based release mechanisms that were newly open to certain inmates.[257] The problem is that there is uncertain legal authority for judges to review such letters. Not only are the letters ex parte, and potentially contrary to legislative intent, but they would presumably need to be presented as (or interpreted as) sentence modification motions for judges to respond to them.[258] If the DOC had communicated with judges prior to instructing the inmates to write letters, judges and inmates alike could have been spared from considerable confusion and waste of time.

All of this said, it is not surprising that, in tough budgetary times, new spending for prison programs was unavailable, and overall, judicial education efforts were probably sufficient.[259] The point here is that states need to plan in advance for these elements of the implementation process. In the portion on general principles below in Part III.B, these issues are identified as two important tasks, among others, for policymakers to accomplish to ensure that earned release actually results in significant numbers of inmates being released.

This Part, in its preliminary evaluation of Wisconsin's earned release mechanisms, has identified both positive aspects of and issues of concern with the 2009 and 2011 earned release legislation.

255. WIS. STAT. § 973.031(2009–2010), *repealed by* 2011 Wis. Act 38, § 92.

256. Perhaps judges will, as a matter of course, sentence nearly all eligible inmates to risk reduction sentences. One judge claimed to have been doing exactly this: imposing a risk reduction sentence whenever the inmate is statutorily eligible. Anonymous interview (2010).

257. Interview with Meredith Ross, *supra* note 108.

258. For an explanation of Wisconsin sentence modification law, see Norris, *supra* note 60.

259. *See supra* note 234 and accompanying text.

Encouragingly, the 2009 legislation took several steps to protect public safety, reduced the judicial role while retaining a veto as a check on state officials, and improved the applicability and workability of the compassionate release statute. However, the mechanisms were overly numerous and complex, the additional financial resources needed for implementation did not appear (with the exception of community corrections funds), and implementation was quite uneven. While the 2011 legislation reduced the number of mechanisms and retained some positive aspects of the 2009 reforms, it inappropriately vested nearly all the earned release authority with judges. Drawing on both these experiences and additional sources, this Article next presents four principles for the successful implementation of earned release at the state level.

B. What States Should Do to Ensure the Effectiveness of Earned Release: Four Principles

To ensure effectiveness in the broadest sense, earned release legislation in any state should accomplish four main objectives. First, it should provide for measurement and internal controls to make sure that earned release does not cause injustice, such as by operating arbitrarily or by deepening racial or other sentencing disparities. Second, policymakers should engage in strategic, responsive governance so that earned release results in a substantial number of inmates being released earlier than would have occurred otherwise. Third, states should take special care to prevent earned release mechanisms from endangering public safety. Fourth, and most importantly for curtailing corrections costs, states should accompany new earned release measures with other policies aimed at reducing incarceration in ways consistent with public safety.

1. Avoiding Injustice: Data Gathering and Structured Decision-Making

States should accomplish two important tasks to prevent earned release mechanisms from fostering injustice. First, states should monitor the implementation of earned release in a systematic, transparent fashion, enabling any disparities or other problematic results to be analyzed and corrected. Second, states should require decision-makers to use a structured, principled methodology for making and explaining earned release decisions, to avoid arbitrary decisions or the development of overly narrow decision-making customs.

a. Transparent Monitoring of the Implementation of Earned Release

The production of publicly available and reliable statistics on earned release is essential for ensuring the fairness of the process. Unfortunately, such data has not always been available in Wisconsin. While data on the Act 28 earned release programs has been available, no data was ever publicly available about judicial sentence modification. Using non-public data sources I was able to discover, as noted briefly above, that that the rate of approval of sentence adjustment petitions varied dramatically by county, which may have reinforced racial disparities.[260] Such extreme geographic disparity is virtually certain to be unjust, because it is simply too vast to be accounted for by the varying details of the cases.[261] If such data had been made public, it could have been used by judges, defense attorneys, or policymakers to reduce some of this disparity.[262] For example, if judges had had access to information about approval rates in other counties and the types of cases receiving sentence adjustment, this disparity might well have dissipated. Specifically, judges who were reluctant to grant any sentence adjustments might have started to grant them if they understood that other judges had been doing so for years.

Presumably, Wisconsin's geographic disparities in earned release decisions at least somewhat diminished from 2009 to 2011, since statewide administrative agencies were the main actors in charge of earned release. This is because applying the same methodology to prisoners across the state would be unlikely to result in earned release being rarely granted to offenders in some counties but commonly granted to offenders from elsewhere.[263]

However, racial disparities are endemic within all stages of the criminal justice system in the United States, and are in dire need of attention.[264] Wisconsin in particular has among the worst—or even the very worst, depending on the measure—racial disparities in imprisonment in the country.[265] It is important that all sentencing,

260. *See supra* notes 146–150 and accompanying text.

261. *See id*; *see also* Norris, *supra* note 38. As a matter of common sense, it is difficult to believe that the objective situations of the inmates in the various counties were so different that it was justified to virtually never grant sentence adjustments in some counties, while granting nearly half of them in other counties.

262. *See supra* note 247 and accompanying text.

263. *See supra* notes 248–49 and accompanying text.

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

265. *See supra* note 14 and accompanying text.

earned release, and other criminal justice data be regularly compiled and made public. The absence of publicly available data severely limits the ability of citizens and policymakers to respond to disparities and other problems that exist.

This issue is particularly important given Professor Harcourt's compelling argument that the increased use of risk assessment instruments in earned release may reinforce racial disparities.[266] This effect could occur because minorities will often have a larger number of previous offenses, caused, in part, by heavier policing and drug enforcement in inner cities (despite the fact that different racial groups use and sell illegal drugs at similar rates).[267] Because of the inherent unfairness and drastic social consequences of racial disparities in the criminal justice system, it is an urgent task for states to measure the effects of their policies, including earned release, on racial disparities.[268] However, preliminary data indicates that the 2009 expansion of earned release did not increase disparities.

From 2009 to 2011, 666 inmates achieved earned release from Wisconsin prisons.[269] In reviewing these discretionary releases the department certainly consulted its newly validated risk assessment tool, though it is unclear how much of a role it played in each release decision. So far, these earned releases have not exacerbated racial disparities. The releases between 2009 and 2011 were 44.5% black, and the prison population during that time ranged from 43% to 44% black.[270] If anything, blacks have been slightly overrepresented in earned releases. Hispanic inmates were also released at a rate virtually equivalent to their proportion in the prison population.[271]

266. *See* Harcourt, *supra* note 12 (manuscript at 2, 8–9).

267. *Id.*; Norris, *supra* note 38 (manuscript at 3–4); ALEXANDER, *supra* note 38, at 7; (nothing that "[s]tudies show that people of all colors *use and sell* illegal drugs at remarkably similar rates").

268. *See generally* ALEXANDER, *supra* note 38.

269. E-mail from Anthony Streveler, *supra* note 104.

270. This is based on data obtained from the Department of Corrections in January 2011. E-mail from Anthony Streveler, *supra* note 104.

271. E-mail from Anthony Streveler, *supra* note 104. The total number of releases—including those released to another prison sentence being served consecutively—was 685. *Id.* Eleven of the releasees were Native American, 3 were Asian or Pacific Islander, 302 were white, and 64 were Hispanic. *Id.* On January 31, 2010, the inmate population was about 3% Native American, 1% Asian/Pacific Islander, 43% African-American, 9% Hispanic, 44% white, and 0.5% unknown. *Id.* In June 2009, the racial/ethnic breakdown had been nearly the same, though with a slightly larger proportion of African-Americans: about 3% Native American, 1% Asian/Pacific Islander, 44% black, 9% Hispanic, 0.5% unknown, and 44%

The production and public availability of high-quality data on earned release is an essential element of a successful earned release system for any state. No state, and no stage in the criminal justice process, is immune from racial disparities or other potential biases. Only when state officials and the public have the relevant data can progress occur. In addition, the availability of high-quality data on earned release will also allow policymakers to measure the effects of the policies—on such things as public safety, disparities, and prison population—and adjust them accordingly.

b. Ensuring Principled, Recorded Decision-Making

Another critical method for ensuring fairness and avoiding injustice is the enforcement of standards for principled decision-making. When decision-makers must engage in and record an informed, structured reasoning process, this reduces the appearance (and reality) of arbitrary decision-making. This reasoning process can be informed by several considerations: the permitted legal justifications for earned release, the original purposes of the sentence, facts about the individual offender and the environment into which he or she will be released, and the results of risk assessment tools estimating the future chance of recidivism. This model is informed by the rule-of-law sentencing approach, which seeks to make sentencing decisions the product of a reasoning process involving the application of a legal standard to facts, as opposed to ad hoc, intuitive decisions or overly formulaic determinations based on two-dimensional sentencing grids.[272]

---

white. *Id.* Asian-Americans were slightly over-represented, and Native Americans slightly under-represented, in earned releases, but given the small numbers involved, this could be due to chance rather than systematic bias.

272. *See generally* Michael M. O'Hear, *Appellate Review of Sentence Explanations: Learning from the Wisconsin and Federal Experiences*, 93 MARQ. L. REV. 751, 782–89 (2009) [hereinafter O'Hear, *Appellate Review*] (presenting eleven rules for the explanation of sentences that build on the similar approach based on Wisconsin case law); Smith & Dickey, *supra* note 30, at 6–7 (expounding the rule-of-law approach); Michael E. Smith, *Let Specificity, Clarity, and Parsimony of Purpose Be Our Guide*, 20 LAW & POL'Y 491 (1998). Professor O'Hear also presents a cogent rationale for improving sentencing explanations, based on evidence about procedural, substantive justice, transparency, and information-sharing benefits. O'Hear, *Appellate Review*, *supra*, at 753–62; *see also* Michael M. O'Hear, *Explaining Sentences*, 36 FLA. ST. U. L. REV. 459, 479–80 (2009) [hereinafter O'Hear, *Explaining Sentences*] (making the case for a robust requirement for judges to explain their sentences, since the explanation process may attenuate the effect of common psychological biases on judges and better predispose defendants for rehabilitation). For a similar perspective that focuses on probation decision-making, see Wayne A. Logan, *The Importance*

In rule-of-law sentencing, the judge begins by specifying which statutorily approved sentencing objectives, such as public safety and just punishment, are of greatest importance to the particular case.[273] Then the judge considers various facts relevant to sentencing, such as mitigating or aggravating factors; substance abuse, or other behavioral or psychological issues; the availability of informal social control in the community (such as family or work relationships); and the availability and effectiveness of various potential sanctions.[274] Finally, the judge uses these facts to reason about which punishments, and how much punishment, would be needed to achieve the objectives of punishment.[275] Arguably state actors should engage in a similar process in their earned release decisions, and should record their decision-making rationale, just as judges do.

Besides enhancing fairness, measures to enforce a principled, recorded reasoning process may add to the legitimacy, sustainability, and effectiveness of earned release by increasing transparency and the quality of the decisions, improving inmate conduct, and preventing abuses of the earned release system. First, as Professor Klingele has discussed, the lack of transparency in parole decisions was a main factor in the large-scale abandonment of indeterminate sentencing.[276] Providing transparency through logically explained and publicly available decisions may make earned release systems more acceptable to the public and, thus, more sustainable.[277] Second, when decision-makers are forced to articulate a reasoning process they may make decisions that are in greater accord with reality. Third, offenders who perceive the decision-makers to have made a fair and reasoned decision may be more motivated to improve their behavior and post-release plan, because they may feel treated with respect and dignity, and believe that the decision-makers will respond appropriately to improvements in the offender's behavior or plans.[278] As the psychological literature on

of Purpose in Probation Decision Making, 7 BUFF. CRIM. L. REV. 171 (2003).

273. *See* Smith & Dickey, *supra* note 30, at 5–6.

274. *See id.* at 6–7.

275. *Id.* at 6. Smith and Dickey argue that public safety should always trump just punishment if the objectives conflict. *Id.* Thus, an offender should receive a noncustodial sentence if such a sentence is more consistent with public safety, even if the judge finds that the inmate deserves a prison sentence. *See id.*

276. Klingele, *Changing the Sentence*, *supra* note 8, at 497–98.

277. *See id.*

278. *See id.* at 517.

procedural justice has demonstrated, people react far more positively to adequately explained decisions.[279] Fourth, employing a structured reasoning process might make it more difficult to quickly release large numbers of inmates, when doing so would be inconsistent with public safety. Such a process would ensure that administrators individually analyze each case, enabling them to identify those who pose a high risk. Fifth, a required reasoning process could prevent earned release authorities from developing institutional customs in which certain relevant factors and not others are taken into account, or in which most inmates are nearly always released within the same narrow window of the percentage of time served.[280]

Each component of the decision-making process is critical. First, decision-makers should have access to the complete sentencing transcript.[281] If the judge determined that certain sentencing objectives were more important than others, or that a certain condition (such as drug treatment or restitution) was necessary to fulfill an objective, decision-makers should take this into account. When the transcript is not available to the decision-makers (who only know the final sentence imposed), they are unable to abide by the sentencing judge's intentions.

Second, decision-makers should consider the available facts about the individual offender, including such things as aggravating and mitigating factors in the original offense, institutional conduct, program participation, post-release plans, and the availability of treatment and supervision in the community.[282] Third, the decision-makers should review the results of a scientifically validated risk assessment

279. *See* O'Hear, *Explaining Sentences*, *supra* note 272, at 479–80 (discussing procedural justice research and arguing that well-explained sentences signals respect for defendants and, thus, may encourage institutional adjustment and rehabilitation). Defendants who hear such explanations may also be less likely to appeal the decisions to courts.

280. Of course, such customs could develop anyway, but a structured reasoning process would at least create the opportunity for officials to take a broad range of factors into consideration and tailor release decisions to each inmate's situation.

281. O'Hear, *Appellate Review*, *supra* note 272, at 760 ("A thorough sentence explanation creates a permanent record of what the judge found to be important about the case and why. This information may be valuable in a number of respects."). Obviously, without the entire transcript, it would be impossible to evaluate the sentence explanation in context.

282. Each of these could potentially inform decision-makers' conclusions about (1) whether the offender deserves earned release as a matter of justice and (2) whether releasing the offender at that time poses a danger to the community. *See* Klingele, *Early Demise*, *supra* note 9, at 452–56 & n.186 (discussing the need for clarity about the permissible reasons for earned release).

instrument, while being cautious in their interpretation of it. Decision-makers should be familiar enough with the methodology of such analyses to identify their weaknesses, and to know when they may be less helpful.[283] For example, when the model does not take into account certain offense characteristics that are important for a particular case, the decision-makers may give the risk assessment results less weight than in other cases.

Fourth, decision-makers should have access to sentencing data, allowing them to tell whether the offender's sentence was unusually long for the offense or how often they have released similar offenders in the past.[284] Access to such comparative data could promote greater consistency.[285] When more than one decision-maker is involved in earned release, achieving some measure of consistency may be impossible without access to such data.

Fifth, decision-makers need to structure their decisions with reference to the permissible reasons for earned release, as explained in statutes and case law. For example, several of the earned release mechanisms that exist now or recently existed (sentence adjustment, ERRC release, PAT-B, and PAT-C) allow or allowed earned release

283. For general reviews of the disadvantages of actuarial decision-making in criminal justice, see BERNARD HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 109–92 (2007); Hannah-Moffat, *supra* note 11 (manuscript at 10–12); and Harcourt, *supra* note 12 (manuscript at 2, 8–9) (debating the usefulness of risk assessment in earned release decisions).

284. Even if the sentence was particularly long for the offense, this does not necessarily mean earned release authorities should release the inmate earlier. Particularly if the judge, in the sentencing transcript, provided a rationale for the long sentence, it may be appropriate to defer to the judge's judgment and refrain from taking this issue into account. This is an additional reason why it is important for decision-makers to have access to the full sentencing transcript. More generally, access to sentencing data may allow earned release decisions to correct, at least to some degree, disparities among sentences that are apparently unjustified.

285. *See* 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, 1357–70 (2005) (discussing the need for sentencing data, and the potential of sentencing information systems to fulfill this need for consistency). Decades ago, Judge Marvin Frankel decried the "wild array of sentencing judgments without any semblance of the consistency demanded by the ideal of equal justice." MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 7 (1973). Without access to information about the sentences other judges give for comparable offenses (or the earned releases granted to inmates with comparable offenses, institutional behavior, and post-release plans), earned release may suffer from similarly dramatic and unjustifiable variation. This said, it is possible to achieve "excessive uniformity," by demanding that cases similar in certain discrete ways be treated identically (as has happened, to some degree, through mandatory minimum sentences). Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 271, 275–77 (2005).

because of an inmate's "conduct, efforts at and progress in rehabilitation, or participation and progress in education, treatment, or other correctional programs"; because the inmate is subject to a sentence in another jurisdiction or is subject to deportation upon release; or when earned release is "otherwise in the interests of justice."[286] This last clause is particularly significant.

The "interests of justice" language gave the decision-maker (the judge, the ERRC, or both, depending on the mechanism) broad authority to reduce sentences for any defensible reason. This clause was originally included in the TIS-II legislation allowing judges to reduce sentences to 75% or 85% of the original sentence.[287] The intent of the clause was to give judges the freedom to grant sentence reductions whenever justified, even if this involves merely reconsidering the original facts of the case or the offender's behavior while incarcerated.[288] This is in contrast to Wisconsin's common law sentence modification doctrine, which allows judges to alter sentences only because of facts unknown at sentencing or that happened after sentencing, and forbids judges from shortening sentences because of good behavior or rehabilitation.[289] Thus, the "interests of justice" language in the current earned release mechanisms gives decision-makers virtually unhindered discretion regarding the specific reasons for approving earned release.

For example, if an inmate were inexplicably sentenced to a longer term than others with similar offense characteristics, or than a co-defendant with equal or greater culpability, the decision-maker might conclude that additional confinement is unnecessary to achieve deserved

286. WIS. STAT. §§ 973.195(1r)(b)(4)–(5) (2009–2010).

287. WIS. STAT. § 304.06(1)(bg)(3) (2009–2010) (allowing inmates whose crimes were committed earlier than October 1, 2009, to petition the ERRC for release after serving 75% of their sentence); *id.* § 304.06(1)(bg)(4) (allowing inmates whose crimes were committed earlier than October 1, 2009, to petition the ERRC for release after serving 85% of their sentence).

288. Professor Walter. J. Dickey, who participated in a committee drafting the sentence adjustment statute, confirms that this was the committee's intent. Under the committee's understanding of the statute, the judge can grant a sentence adjustment "in the interests of justice" based solely on a reconsideration of the original facts of the case. Interview with Walter J. Dickey, supra note 62.

289. State v. Kluck, 210 Wis. 2d 1, 7–8, 563 N.W.2d 468, 471 (1997); State v. Champion, 2002 WI App 267, ¶ 6, 258 Wis. 2d 781, 654 N.W.2d 242 (holding that rehabilitation did not qualify as a new factor for TIS inmates, despite the fact that they are not eligible for parole, because this would contradict the public policy behind truth-in-sentencing legislation); State v. Krueger, 119 Wis. 2d 327, 335, 351 N.W.2d 738, 742 (Wis. Ct. App. 1984).

punishment or public safety.[290] Likewise, if the inmate provided significant assistance to police after conviction, the authority may decide that this weighs in favor of his earned release, either because it reduces his likelihood of reoffending or because it indicates that a shorter sentence would be more just. In this way, corrections officials may choose to allow earned release even for reasons that would not normally be considered, except perhaps by judges, in release decisions.

A critic might object that parole or corrections officials are not well-suited for deciding what is just and unjust, given their lack of legal training. However, these officials must nonetheless be trusted with such decisions when authorized by statute. First, some elementary training can give non-lawyer officials the tools they need to reason about justice and the relationship between particular facts and the purposes of the sentence. Second, it is worth pointing out that many have criticized contemporary sentencing practices for being essentially lawless, rather than the result of applying a legal standard to the facts.[291] Reasoning through a sentencing or earned release decision does not come naturally to anyone, but rather must be learned. Officials in such situations should abide by the plain intent of the legislation, which in this case clearly directed state officials to determine what is in the interests of justice.

A general catch-all provision allowing release when "otherwise in the interests of justice" is probably a useful and appropriate element of earned release legislation for all states to consider. Such a provision can prevent decision-makers from unduly narrowing their inquiry, and ignoring facts that are relevant to the objectives of the sentence. As long as decision-makers are trained to engage in a logical reasoning process that considers all the relevant facts, purposes of the sentence, and permitted grounds for release, there is little reason to think a catch-all clause would be subject to abuse. The vast majority of decisions would probably center around rehabilitation and post-release

290. The ERRC and the judge (and the DOC as well, which plays a role in many earned release decisions) should have access to comparative data on the length of sentences. If the offender was sentenced to a substantially longer term than others with the same offense and characteristics, without explanation in the sentencing transcript or reasonable inferences that would explain the discrepancy (for example, the presence of a particular aggravating factor), then this should weigh in favor of release, since earned release would be in the interests of justice. Of course, if public safety for some reason indicates that earned release is inappropriate, this may trump more abstract considerations of injustice.

291. *See* Smith & Dickey, *supra* note 30, at 4–5.

circumstances, with miscellaneous justice-related concerns appearing relatively rarely.

In sum, officials should require decision-makers to explain and record (with reference to the relevant law, facts, and objectives of the sentence) the reasons for approving or denying an earned release request. This requirement could increase the quality of decision-making, improve inmate conduct, increase the political legitimacy and sustainability of earned release, keep decision-makers from unnecessarily restricting the factors they consider, and prevent mass releases that are not in the interest of public safety.[292]

2. Ensuring Implementation Through Strategic Governance

For earned release legislation to fulfill its purpose, it must result in significant numbers of inmates being released earlier than they would have been otherwise. Yet the failure to make the necessary budgetary and administrative changes may drastically curtail the effectiveness of these mechanisms. If this occurs, very few inmates may be released, rendering the legislation virtually worthless as means to cut corrections spending and lower the prison population.

When states pass new earned release legislation, legislatures or state agencies should commission studies that evaluate what preconditions are necessary to ensure the earned release mechanisms actually accomplish their goals. At least five elements should be considered: programming requirements, judicial education, administrative obstacles, collaborative planning, and limiting the number of veto points in decision-making. More generally, a commitment to strategic, collaborative governance—involving planning, continual monitoring, and responding in a timely way to obstacles as they arise—will enhance the effectiveness of earned release mechanisms. This principle corresponds to recent sociological research detailing the weaknesses existing in even quite sophisticated forms of governance.[293]

For example, in the European Union (EU), in a governance process known as the Open Method of Coordination, each country creates

292. For more detailed suggestions on how to implement rule-of-law sentencing, see O'Hear, *Explaining Sentences*, *supra* note 272, at 479 (developing proposals for further requirements to explain sentences).

293. Jesse J. Norris, *From Ballymun to Brussels: Forms of Partnership Governance in Irish Social Inclusion Policy*, *in* IRISH BUSINESS AND SOCIETY: GOVERNING, PARTICIPATING & TRANSFORMING IN THE 21ST CENTURY 296, 303–04 (John Logan et al. eds., 2010).

comprehensive analyses of the weaknesses of its social protection systems, detailed strategic plans for new policies that would remedy these weaknesses, and implementation reports detailing each country's progress in each policy area.[294] These documents are regularly evaluated by the European Commission and other member states, in terms of common objectives agreed to by all countries.[295] Similar processes exist at the country level, with each municipality creating its own strategic plans for improving various policy areas.[296] While this collaborative approach has had many positive effects, constant attention is still necessary to ensure positive results.[297]

In particular, as my own research on EU anti-poverty and employment policy has demonstrated, central government actors are often insufficiently responsive to the problems of implementation as they occur on the ground.[298] This is true even in systems self-consciously designed by policymakers to establish a more collaborative and effective mode of governance.[299]

While specific approaches to reform vary, many observers now agree that effectively implementing ambitious government policies necessitates a strong commitment to good governance, involving strategic planning, cross-sectoral collaboration, non-state participation, regular empirical evaluations, independent monitoring, and transparency.[300] While the influence of such ideas is spreading, state governments are inconsistent in their approach to strategic

294. Jonathan Zeitlin, *The Open Method of Coordination in Question*, *in* THE OPEN METHOD OF COORDINATION IN ACTION: THE EUROPEAN EMPLOYMENT AND SOCIAL INCLUSION STRATEGIES 19, 19–21 (Jonathan Zeitlin & Phillipe Pochet eds., 2005) [hereinafter THE OPEN METHOD OF COORDINATION] (outlining the structure of the OMC); *see also Social Protection & Social Inclusion*, EUROPEAN COMM'N: EMPL'T, SOC. AFFAIRS AND INCLUSION, *available at* http://ec.europa.eu/social/main.jsp?catId=750&langId=en (last visited June 1, 2012) (providing a brief overview of the present OMC system with regard to social protection and social inclusion).

295. Zeitlin, *supra* note 294, at 21.

296. Norris, *supra* note 293 at 301.

297. *See id.* at 303–04.

298. *See id.*

299. *See id.* at 299–300.

300. *See* LAURA EDGAR, CLAIRE MARSHALL AND MICHAEL BASSETT, PARTNERSHIPS: PUTTING GOOD GOVERNANCE PRINCIPLES IN PRACTICE 5–6 (2006), *available at* http://lin.ca/Files/11119/2006_partnerships.pdf (listing principles of good governance); Tony Bovaird & Elke Löffler, *Evaluating the Quality of Public Governance: Indicators, Models and Methodologies*, 69 INT'L REV. ADMIN. SCI. 313, 322 (2003) (noting prevalence of good governance paradigm).

governance.[301] Generally, state-level governance systems in the United States are far less advanced than these European processes. For example, nothing resembling the Open Method of Coordination exists, and even basic strategic plans outlining the government's intentions for policy implementation are done relatively infrequently.[302] Given this context, how can states effectively implement earned release policies while avoiding common governance problems? While a comprehensive analysis is not possible here, addressing five key issues can help states implement earned release effectively.

First, when earned release mechanisms require program completion before release, states should assess whether additional resources need to be devoted to these programs. If additional resources are necessary but are not available, inmates who could have gained earned release through the mechanisms may not be able to enroll in and complete the programming in time.[303]

Second, when judges play an important role in earned release, policymakers need to engage in a well-organized effort to educate them and other relevant actors about these mechanisms. This should go beyond mere education about the mechanisms, instead providing judges with detailed information relevant to earned release (and sentencing more broadly), and with opportunities for involvement at various levels in any criminal justice reform. In fact, as argued in Part III.C below, judicial education and more general judicial involvement in criminal justice reform may be critical to the elusive task of bringing the rule of law to sentencing.

Third, states must also address potential obstacles within states agencies to ensure implementation proceeds smoothly. As shown in a recent *New York Times* report and a Vera Institute study on compassionate release statutes in various states, few people have been released through these statutes, despite the large numbers of eligible

301. One indication that the influence of these ideas is spreading is the popularity in law review articles of the "democratic experimentalist" approach originally articulated by Charles Sabel and Michael Dorf. *See generally* Dorf & Sabel, *supra* note 228. Indeed, a Westlaw Next search for "democratic /2 experimentalism" yields over 600 secondary sources.

302. As noted below, there was no strategic plan for implementing Act 28 earned release mechanisms, though such a plan did exist with regard to the Becky Young funds. While nothing like the OMC exists in the United States, non-profit organizations have sometimes created something somewhat similar, by undergoing similar projects in several states. The primary example here is the Justice Center of the Council of State Governments. *See infra* notes 313–318 and accompanying text.

303. *See supra* Part III.A.7.

inmates.[304] If a state agency formally or informally creates internal rules for the governance of earned release that, purposefully or not, discourage earned release—or encourage earned release even when it would endanger public safety—state policymakers need to respond to such problems by working with the agencies to find solutions.[305] Such an observation may seem obvious, but state agencies often have problems with being responsive in real time, as opposed to waiting until an evaluation is commissioned to consider meaningful change.[306] Similarly, if certain procedures (such as a risk assessment instrument or the actual process for an earned release mechanism) need to be developed to allow for implementation, policymakers should ensure this occurs without delay.

Moreover, when administrative personnel—perhaps accustomed to the previously restrictive earned release regime—appear reluctant to approve earned release requests, states must evaluate the situation and decide whether replacing the personnel, retraining them, or changing their incentives is necessary. Similar efforts may be necessary when other relevant actors play a role in maintaining or increasing the prison population, such as community supervision officers, who in some cases may view a revocation and re-incarceration as a success rather than a failure. More generally, having established channels for communicating problems with on-the-ground implementation to higher policy-making levels is important to ensure responsiveness.[307]

An example of a constructive approach to overcoming institutional obstacles occurred in Milwaukee in 2010. The Milwaukee Police Chief was concerned that the new earned release programs would endanger

304. *See supra* note 80 and accompanying text.

305. As an example, "certain early release" sounds relatively simple on paper, but the DOC made it into a multi-step process that took so long and put so many people's reputations on the line that it may have discouraged the use of this mechanism. Specifically, the proposed release was first sent to the social worker for evaluation, then the extended supervision agent, then the director of community supervision, and finally to the Secretary of Corrections. Interview with Meredith Ross, *supra* note 108.

306. *See supra* note 285 and accompanying text.

307. This has been discussed elsewhere in terms of establishing "vertical co-ordination mechanisms" for communication between different levels of administration, from lower-level government staff to mid-level administrators to national policymakers. *See* Norris, *supra* note 293, at 312; *see also* Jonathan Zeitlin, *The Open Method of Coordination in Action: Theoretical Promise, Empirical Realities, Reform Strategy*, *in* THE OPEN METHOD OF COORDINATION, *supra* note 294, at 447, 458.

his efforts to reduce crime in the city.[308] During meetings between Milwaukee Police and DOC staff, the two sides worked out a plan to avoid public safety problems related to releasees.[309] This involved reallocating community corrections agents to ensure that those released are closely monitored, including after normal working hours.[310] In addition, they agreed to increase information sharing between the police and the DOC, to facilitate the reentry of offenders into society.[311]

This example illustrates how policymakers can overcome institutional obstacles. Collaborative problem-solving between the two agencies improved communication, breaking down institutional barriers. Without these meetings, the police might have become zealous opponents of earned release—for example, they might have spoken at court hearings to oppose earned release decisions.

Fourth, it is important for actors involved in implementation to participate in a collaborative, transparent planning process. This would involve the creation of publicly available, regularly updated strategic plans detailing the planned implementation of the earned release mechanisms (and other related reforms where applicable), the systematic consultation of other agencies and non-state individuals and entities, and the actual implementation of the plans. Another important element would be a broad-based implementation committee, including representatives from the ERRC, different agencies within the DOC, and other state agencies involved in implementation (such as local social services and police). This committee, which could include judges, victims' rights advocates, community members, and perhaps even former inmates, would meet regularly to exchange information, monitor implementation, and make suggestions for change.[312]

Finally, states should consider carefully the design of their legislation or regulation, including whether the decision-making process gives too

308. Scott Bauer, *Prison Release Gets a Second Look—Nonviolent Inmates Let Out to Cut Costs*, ST. PAUL PIONEER PRESS, May 5, 2010, at B3; *News: Chief: Prisoners' Release May Impact Crime Rate* (WISN television broadcast Jan. 21, 2010), *available at* http://www.youtube.com/watch?v=vKDl4oqYRP0.

309. Bauer, *supra* note 308.

310. *Id.*

311. *Id.*

312. Such a committee might resemble a more specific and focused version of criminal justice councils. These councils, such as the Milwaukee County Criminal Justice Council, involve collaboration among a number of stakeholders dedicated to improving the effectiveness of the criminal justice system. *See generally* Alan J. Borsuk, *Get Smart?*, MARQ. LAW., Fall 2011, at 20.

many actors veto power over earned release decisions. It may make sense to give more than one actor a role in the process, perhaps to avoid unwise decisions made by a single actor who feels pressure to release inmates. However, the more veto points or bureaucratic hurdles that exist, the more likely it is that the process will stall and rarely result in release. If proper checks are placed on executive officials responsible for earned release, such that there is little concern that they will abuse their power by releasing too many inmates, then it may not be necessary to allow other actors (such as judges) to veto their decisions. Requirements to record and explain the reasoning process, and the use of validated risk assessment instruments, might serve as sufficient constraints on decision-makers.

In addition to these suggestions, the three-fold methodology of the Justice Center of the Council for State Governments offers a promising template for states to use in planning and implementing earned release reforms. The Justice Center has overseen the implementation of this strategy, at least partially, in several states (among them Kansas, Texas, Connecticut, and Wisconsin).[313] First, Justice Center experts analyze crime and criminal justice data, identify neighborhoods with large numbers of people under supervision, document the need for additional services and resources in these areas, and "develop[] practical, data-driven, and consensus-based policies that reduce spending on corrections to reinvest in strategies that can improve public safety."[314] Second, experts assist policymakers in effectively implementing the policies, including by contributing to implementation plans and progress reports.[315] Third, the Justice Center ensures that policymakers regularly receive updates on the new measures' impacts on the prison population, recidivism, and crime.[316] The focus of this strategy on reinvesting resources in ways designed to increase public safety and measuring the results of reforms is consistent with the thrust of this Article's recommendations.

313. *Work in the States*, COUNCIL OF STATE GOV'TS JUSTICE CTR., http://justicereinvestment.org/states (last visited June 1, 2012).

314. *See* COUNCIL OF STATE GOV'TS JUSTICE CTR., JUSTICE REINVESTMENT: A DATA-DRIVEN APPROACH TO REDUCE CORRECTIONS SPENDING AND REINVEST SAVINGS IN STRATEGIES THAT CAN DECREASE CRIME AND STRENGTHEN NEIGHBORHOODS 2 (2010), *available at* http://justicereinvestment.org/files/JR_Overview_2010.pdf.

315. *Id.*

316. *Id.*

In sum, policymakers need to consider—while drafting legislation, while planning for implementation, and during implementation itself—whether everything is in place for the earned release mechanisms to succeed in releasing significant numbers of inmates, while at the same time avoiding harms to public safety. If additional correctional resources are needed, such as rehabilitative programming or community supervision, the state should be prepared to provide them as soon as they are needed. Policymakers should systematically educate, and remain in communication with judges and other relevant actors, to ensure they understand how to play their part in implementing the mechanisms. When legislative, regulatory, or administrative factors threaten the effectiveness of earned release programs, policymakers should be ready to take action to remove these obstacles. The formation of an ongoing implementation or monitoring committee, with members from various interested government and non-government entities, ideally with at least one full-time staff member, is an important element in ensuring the effectiveness of earned release.[317] Limiting the number of veto points in earned release decision-making is another method for preventing implementation problems. In any case, as suggested by recent social science research, the key is to engage in a continual process of strategic governance, monitoring implementation and arranging for innovative problem-solving efforts when problems arise.[318]

3. Making Earned Release Compatible with Public Safety

Since earned release measures increase the number of offenders in the community, policymakers in all states need to ensure that earned release does not endanger public safety. There are three chief methods for accomplishing this aim. First, states could apply earned release mostly to those offenders who have not been convicted of violent crimes, sexual crimes, or other particularly serious crimes. Second, states should use an empirically validated risk assessment tool for making individual release decisions, though without relying on it excessively. Third, policymakers should devote additional resources to

317. *See* Norris, *supra* note 293, at 305 (noting the importance of staff members in activating and administering innovative governance programs).

318. *See* Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271, 276 (2008) (emphasizing the role of regular monitoring and comparison across units in enhancing accountability in contemporary forms of governance).

community supervision, reentry programs, and other measures intended to reduce recidivism among those released. These strategies are important for the political survival of earned release, which is vulnerable to public relations problems if releasees commit new offenses.

First, earned release mechanisms should favor offenders who are less likely than others to reoffend, and perhaps focus on non-violent offenders. As noted above, many of Wisconsin's earned release mechanisms that were passed in 2009 but abolished in 2011 applied only to non-violent offenders, and those that did apply to violent offenders required these inmates to serve a larger portion of their sentences.[319] States can select a variety of policy options, such as banning earned release for all violent felons, varying the percentage of the sentence the inmate must serve depending on the offense classification, and increasing the number of actors with veto power over the release of more serious offenders.

It is a legitimate question whether the violent–nonviolent distinction is empirically valid as a predictor of recidivism, as opposed to a strategy for making earned release politically palatable. It may be true that certain violent offenders are no more likely than nonviolent offenders to commit additional offenses—for example, someone who murders a spouse might be at lower risk for recidivism than a burglar.[320] Even if the violent–nonviolent distinction lacks hard empirical backing, it may be justified because of the greater value society places on life as opposed to property. That is, even if particular violent offenders may be less likely to commit additional crimes, the risk such offenders pose to life and limb, however small, may justify erring on the side of caution. Ideally, however, earned release policies would only restrict eligibility based on empirically valid criteria.

States should also adopt scientifically valid risk assessment instruments, though without relying excessively on them. Wisconsin's old instrument was developed in the 1980s, and suffered from numerous methodological flaws.[321] Fortunately, resources are available to states to help reform these instruments. As described earlier, the Justice Center

319. *See supra* note 101 and accompanying text.

320. *See* Klingele, *Early Demise*, *supra* note 9, at 450–52 (discussing evidence that some non-violent offenders have higher rates of recidivism, and arguing against categorically excluding violent offenders from earned release).

321. EISENBERG ET AL., *supra* note 194, at iii–iv; *see supra* note 189 and accompanying text.

performed a thorough analysis of Wisconsin's risk assessment procedure, which resulted in the much improved assessment tool now in use.[322] While risk assessment instruments are useful, decision-makers need to recognize their limitations and avoid making decisions based solely on the instruments, instead of evaluating all the relevant facts. In particular, as stressed recently by Professor Harcourt, policymakers should ensure that risk assessment does not unfairly disadvantage minorities.[323]

Finally, policymakers in all states should accompany earned release legislation with measures shown to reduce recidivism among those released. Among these measures could be increased resources for community supervision; intensive supervision programs; offender reentry initiatives; increased rehabilitative and mental health services; and job training and placement programs, including programs directed specifically toward those who have achieved earned release. Resources directed toward generally improving conditions in the areas where most offenders reside, as the Justice Center advocates, is also a worthwhile strategy for reducing recidivism and crime in general.[324] As discussed previously, Wisconsin established a Council on Offender Reentry, and directed the DOC to establish services to reduce recidivism among those serving community supervision sentences.[325] However, without additional resources and coordinated efforts at implementation, such measures may be limited in their impact.

4. Complementing Earned Release with Additional Measures to Reduce Incarceration

States must recognize that new earned release legislation in isolation may do relatively little to decrease correctional costs. A lack of necessary programs, judicial vetoes, hesitant or understaffed state agencies, delays in developing the procedures needed for implementation, or other factors could easily result in only a small trickle of earned releases. In Wisconsin, for example, despite the creation of multiple new forms of earned release, only 666 inmates were released through them, and most of them were already going to be

322. Interview with Anthony Streveler, *supra* note 185.
323. *See* Harcourt, *supra* note 12 (manuscript at 2, 8–9).
324. *See supra* notes 258–259 and accompanying text.
325. *See supra* Part III.A.

released in the same year.[326] In 2010, the first full year of implementation for the measures passed in 2009, only 107 of the earned releases (corresponding to about .5% of the prison population) would not have occurred sometime that year anyway.[327]

Because earned release in many cases may do relatively little to decrease incarceration, states should engage in several parallel strategies to reduce prison populations, doing their best to integrate and ensure the consistency of the measures. Importantly, these complementary strategies to reduce incarceration may be more sustainable than earned release, which is vulnerable to backlash from the public and political opponents.[328] Indeed, Wisconsin Governor Scott Walker campaigned on a promise to end earned release, but says he plans to reduce prison admissions to keep corrections spending in check.[329]

These complementary strategies may also be more effective in reducing the overall prison population.[330] Studies demonstrate that increases in prison admissions, not the length of sentences, were overwhelmingly the main cause behind the growing incarceration rates of the 1990s.[331] In Wisconsin, it seems clear that the vast majority of the overall drop in Wisconsin's prison population was caused by policies other than earned release. In particular, a broad range of diversion programs providing alternatives to incarceration was effective in

326. *See supra* note 13 and accompanying text.

327. *See supra* note 13 and accompanying text.

328. *See supra* Part II.A.

329. The current secretary of the Department of Corrections says that he and the Governor will "continue to implement innovative strategies to hold prison populations down while keeping our communities safe," mentioning flexible sentencing, community-based programs, and re-entry initiatives. Hall, *supra* note 17.

330. The likelihood of opposition to earned release has caused some state lawmakers to avoid earned release proposals, focusing on other criminal justice reforms instead. An Idaho official said that "the measures the state's already taking—problem-solving courts, developing alternatives to incarceration, treatment programs, and a 'violation matrix'—offer better hope of results. We have really seen a significant reduction, . . . [and we're a thousand inmates below where we thought we'd be in 2008." Betsy Z. Russell, *Eye on Boise: Prisons: Spending Less Now* . . ., SPOKESMAN-REVIEW (Boise, Idaho) (Feb. 5, 2010, 8:36 AM), http://www.spokesman.com/blogs/boise/2010/feb/05/prisons-spending-less-now/ (internal quotation marks omitted) (quoting Idaho Corrections Director Brent Reinke).

331. John F. Pfaff, *The Causes of Growth in Prison Admissions and Population* 37–38 (Working Paper 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990508 (presenting research demonstrating that "(1) prison admissions, rather than time served, have been the primary driver of prison growth, and that (2) at least since the late 1980s, the main force behind rising admissions has been rising felony filings (and filings per arrest)").

reducing prison admissions, along with re-entry programs, additional drug treatment, and efforts to reduce revocation rates.[332]

A variety of strategies are available to reduce the prison population. Among them are (a) systematic efforts to reduce revocations from probation, parole, or extended supervision; (b) reentry programs aimed at preventing recidivism; (c) additional resources or statutory authority for prison diversion programs such as drug courts; (d) reducing statutory penalties or adjusting sentencing guidelines downward for certain nonviolent offenses; and (e) prosecutors and judges using their discretion to seek probation and treatment rather than incarceration for drug-related crimes and other minor offenses. As a detailed discussion of these options is beyond the scope of the Article, this Part reviews each of them only briefly.

Strategies for reducing the revocation rate of offenders serving community supervision sentences, along with limitations on the sentences judges can impose after revocation, are among the most promising methods of reducing incarceration. In many areas, revocation rates are extremely high, and offenders revoked for technical offenses often account for a large proportion of new prison inmates.[333] Some states have succeeded in dramatically reducing revocation rates, resulting in significant savings.[334] Restrictions on post-revocation sentencing may also be effective in reducing prison populations. A measure preventing judges from sentencing offenders after revocation for more than six months of incarceration passed the Wisconsin legislature, only to be vetoed by Governor Jim Doyle.[335] Several states already place similar restrictions on the incarceration of offenders serving community supervision sentences.[336]

---

332. E-mail from Anthony Streveler, *supra* note 104.

333. *See supra* note 209 and accompanying text; *see also* Clear & Schrantz, *supra* note 1, at 141S (noting that for states with high rates of technical revocations, reducing these revocations can be an important strategy for reducing prison population).

334. Cindy Horswell, *Texas Cuts Costs Amid Prison Reform: New Treatment Programs Credited as Prison Population Slows*, CHRON.COM (Dec. 15, 2009), http://www.chron.com/news/houston-texas/article/Treatment-efforts-credited-as-prison-population-1750304.php ("The state reports a dramatic 25 percent drop in parole violators being returned to prison while the number of those being paroled has increased by 3 percent."); Adam Serwer, *When Slim Budgets Mean Better Prisons*, AMER. PROSPECT (Mar. 18, 2009), http://www.prospect.org/cs/articles?article=when_slim_budgets_mean_better_prisons (noting that Justice Center-supported reforms in Kansas led to a 48% decrease in revocations).

335. 2009 WI Act 28, § 2726 (renumbering and amending WIS. STAT. § 302.113(9)).

336. ALISON LAWRENCE, NAT'L CONFERENCE OF STATE LEGS., PROBATION AND

Reentry programs also show promise as a strategy to reduce incarceration. The federal Second Chance Act of 2007 provided federal funds to states for programs aimed at promoting the integration of offenders into communities and thus reducing recidivism.[337] Over 100 million dollars in grants were available for the 2010 fiscal year.[338] More than just a funding phenomenon, interest in reentry policy around the country has reached such a level that observers now commonly speak of a "reentry movement."[339] The movement appears to have spawned a number of effective approaches for reducing recidivism.[340] States hoping to reduce corrections spending would benefit from investing state resources in reentry efforts, in addition to pursuing federal grants. As noted above, Wisconsin has established a Council on Offender Reentry to coordinate and study reentry programs, though it is too early to evaluate its progress.[341]

Diversion programs, which divert inmates to treatment and non-custodial sanctions instead of incarceration, are another very useful tool for decreasing prison populations. Evaluations of diversion programs have shown that they can reduce incarceration without increasing public safety risks.[342] Specialized courts such as drug courts, which function as diversion programs, have also succeeded in reducing incarceration and recidivism.[343] However, caution must be exercised to ensure that the programs do not simply "widen the net" by prosecuting those who

---

PAROLE VIOLATIONS: STATE RESPONSES 4–5 (2008), *available at* http://www.ncsl.org/print/cj/violationsreport.pdf.

337. Michael M. O'Hear, *The Second Chance Act and the Future of Reentry Reform*, 20 FED. SENT'G REP. 75, 75–76 (2007) [hereinafter O'Hear, *Second Chance*]; *Second Chance Act*, NATIONAL RE-ENTRY RESOURCE CENTER, http://www.nationalreentryresourcecenter.org/about/second-chance-act (last visited June 1, 2012).

338. O'Hear, *Second Chance*, *supra* note 337, at 76.

339. *See, e.g.*, Jeremy Travis, *Reflections on the Reentry Movement*, 20 FED. SENT'G REP. 84, 84–85 (2007).

340. *Id.*

341. *See supra* Part III.A.4.

342. Henry J. Steadman & Michelle Naples, *Assessing the Effectiveness of Jail Diversion Programs for Persons with Serious Mental Illness and Co-Occurring Substance Use Disorders*, 23 BEHAV. SCI. & L. 163, 168–70 (2005).

343. *See* C. WEST HUDDLESTON, III, ET AL., NAT'L DRUG CT. INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 6–8 (2008), *available at* http://www.ndci.org/sites/default/files/ndci/PCPII1_web%5B1%5D.pdf (summarizing research on drug court effectiveness).

would previously have been ignored (or treated leniently) by the criminal justice system.[344]

Reducing criminal penalties and lowering sentencing guidelines for particular offenses may also be effective means of reducing incarceration without endangering the public. These measures could range from making possession of small amounts of marijuana or other drugs punishable only by a fine to lowering the maximum penalties for other nonviolent offenses and victimless crimes. Several cities and states have recently decriminalized or are currently considering decriminalizing marijuana, often motivated by the potential budgetary savings.[345] Repealing harsh sentencing laws, such as three-strikes provisions and mandatory minimum sentences, could lead to significant savings in a number of states. In fact, several states have recently repealed mandatory minimum sentences.[346]

Even if criminal penalties remain the same, prosecutors and judges can make a significant difference by acting within their discretion to

---

344. William G. Meyer & A. William Ritter, *Drug Courts Work*, 14 FED. SENT'G REP. 179, 180 (2002) (defending drug courts against claims of "net widen[ing]," by noting the absence of evidence for such an effect).

345. Jim Altman, *Bill to Ease Pot Law Penalties Draws Fire*, HARTFORD COURANT (Conn.), Mar. 20, 2010, at B3 (noting aim of decriminalizing marijuana possession is to "save the state the expense of prosecuting relatively minor drug offenses."); Tim Johnson, *Mexico Bristles as Some U.S. States Move to Relax Marijuana Laws*, STAR-LEDGER (Newark, N.J.), Mar. 26, 2010, at 9 (discussing impact on Mexico of U.S. states decriminalizing small amounts of marijuana possession); Terry Date, *Testimony Heard on Marijuana Bill: Legislation Would Decriminalize Small Amounts*, EAGLE-TRIB. (N. Andover, Mass.) (Apr. 7, 2010), http://www.eagletribune.com/newhampshire/x908930224/Testimony-heard-on-marijuana-bill (awaiting recommendation from committee on bill that would decriminalize marijuana possession of a quarter-ounce or less); Norma Love, *NH House Approves Decriminalizing Marijuana*, BOSTON.COM (Mar. 10, 2010), http://www.boston.com/news/local/new_hampshire/articles/2010/03/10/nh_house_considering_decriminalizing_marijuana/; Craig McCoy et al., *Philadelphia to Ease Marijuana Penalty*, PHILA. INQUIRER (Apr. 5, 2010), http://articles.philly.com/2010-04-05/news/24956838_1_marijuana-court-system-possession-of-small-amounts (discussing new policy of fining marijuana possession of less than thirty grams rather than add to criminal record); William M. Welchand & Donna Leinwand, *Slowly, States Are Lessening Limits on Marijuana*, USATODAY.COM (Mar. 9, 2010), http://www.usatoday.com/news/nation/2010-03-08-marijuana_N.htm.

346. Jeremy Peters, *Albany Reaches Deal to Repeal '70s Drug Laws*, N.Y. TIMES, Mar. 26, 2009, at A1; *see also* Families Against Mandatory Minimums, *State Responses to Mandatory Minimum Laws*, FAMILIES AGAINST MANDATORY MINIMUMS (Feb. 24, 2010), http://www.famm.org/Repository/Files/State%20Responses%20to%20Mandatory%20Minimum%20Laws%20Alphabetically%20_2-23-10_%5B1%5D.pdf (describing how Rhode Island, Michigan, New Mexico, Indiana, Louisiana, Mississippi, and North Dakota have eliminated certain mandatory minimum sentencing statutes).

favor treatment, community supervision, and other programs over incarceration. Arguably, the most crucial step in both reducing prison populations and diminishing the deep racial disparities in the criminal justice system is to drastically scale back the War on Drugs, focusing on treatment rather than punishment. This would mean refraining in most cases from sentencing drug offenders to incarceration unless they have committed other non-drug offenses that clearly indicate that incarceration is needed to protect the public. After all, whites and blacks use illegal drugs at the same rates, yet African-Americans are many times more likely to be stopped, searched, arrested, charged, convicted, and sentenced to prison for drug crimes.[347] In some states, blacks are from twenty to fifty times more likely to be incarcerated for drug offenses.[348] In general, policy changes meant to reduce racial disparities should usually serve to decrease prison populations (that is, unless they move toward parity by imprisoning more whites).

These complementary strategies are important for states to consider in tandem with earned release reforms, in part because they may be more sustainable, even in the short term. Indeed, earned release plans in some states have been discontinued shortly after their inception.[349] Most of these other strategies are unlikely to cause controversy, since, for example, few are likely to complain about a drop in the rate of revocations for technical violations of parole. Moreover, because these strategies all operate to reduce incarceration at the front end, they are likely to be more effective than earned release in reducing incarceration levels and corrections costs.

Wisconsin's recent history bears this out. The vast majority of the recent drop in Wisconsin's prison population was due to diversion programs and other reforms, not earned release.[350] Likewise, among the state's various criminal justice reforms, only earned release attracted significant controversy.[351] Indeed, as mentioned above, Governor Walker largely repealed earned release, but he has also stated that he

347. *See* ALEXANDER, *supra* note 38, at 7; *see also supra* note 38 (addressing racial disparities in the criminal justice system).

348. *Id.*

349. *See supra* Part II.A; Klingele, *Early Demise*, *supra* note 9, at 432–35.

350. *See supra* note 290 and accompanying text.

351. However, other reforms were not completely immune from criticism: a scathing news report uncovered glaring flaws of one Milwaukee diversion program. Ben Poston & Daniel Bice, *Some Cases in Deferred Prosecution Process Raise Eyebrows*, JSONLINE (Dec. 12, 2010), http://www.jsonline.com/watchdog/watchdogreports/111733029.html.

supports efforts to lower correction costs by lowering prison admissions.[352]

C. Implications for Rule-of-Law Sentencing

One advantage of this four-pronged approach to earned release reforms is that it could help achieve the elusive goal of bringing the rule of law to sentencing. As Judge Marvin Frankel observed, sentencing has long been characterized by the absence of law.[353] This can result in arbitrary decisions unguided by a legal standard, and wide disparities among similar offenders. Popular approaches to narrow sentencing discretion, particularly sentencing guidelines, have been overly formulaic, giving undue attention to two factors only: the offense category and the number of previous offenses.[354] Professors Michael Smith and Walter Dickey of the University of Wisconsin Law School have proposed the "rule-of-law sentencing" model, which is highly promising but has not yet been achieved in practice.[355]

This model, described in more detail above in Part III.B.1, is a compelling approach to bringing a legal reasoning process to judicial sentencing decisions. Yet it remains unclear how rule-of-law sentencing might be implemented. Proponents of rule-of-law sentencing may have presumed originally that a comprehensive statute or common law doctrine imposed from above could, if enforced by appellate courts, cause rule-of-law sentencing to gain hold among trial court judges. However, even though the Wisconsin Supreme Court decision in *State v. Gallion* conforms rather closely to the ideas of rule-of-law sentencing, appellate courts have declined to reverse inadequately reasoned sentences, and the impact of the ruling on sentencing is unclear.[356]

This Article suggests an alternative model for the diffusion of rule-of-law sentencing, based on two main mechanisms. First, the administrative officials making earned release decisions—which are after all a form of sentencing decision—should be required to record their reasoning process with reference to sentencing objectives, relevant facts, and elements of the sentence. Ideally, community supervision

352. *See supra* note 59 and accompanying text.

353. *See* Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972) (reprinting the 1971 lecture); *see also* FRANKEL, *supra* note 282, at 7.

354. *See* Smith & Dickey, *supra* note 30, at 5.

355. *See id.*

356. *See* Norris, *supra* note 60.

agents would also engage in a similar reasoning process when deciding how to enforce conditions of parole, including whether to recommend revocation, since these decisions are in effect sentencing decisions as well. By expanding the structured, recorded exercise of discretion from judges to other government actors involved in sentencing-related decisions, this approach would bring the rule of law to the administrative state, enhancing both procedural justice and the quality of decision-making.

Second, judges should be encouraged to become actively involved in every aspect of criminal justice reform. This could enhance rule-of-law sentencing by (a) increasing their knowledge of what sentencing options are already available and what programs have been shown to be most effective; (b) disseminating knowledge about innovative sentencing practices such as new kinds of courts or diversion programs; (c) increasing judges' awareness of general issues in criminal justice reform, such as the factors driving racial disparities and the growing movement to sentence lower-level offenders to treatment and supervision rather than prison; and (d) fostering a dialogue among judges about the proper use of sentencing discretion.[357] If more judges became involved and these four results occurred, this could foster the development of rule-of-law sentencing norms in a bottom-up fashion. Such a development may be more productive than relying on legal doctrines like *Gallion* to change sentencing practices.

Increasing the participation of judges may also improve the governance of criminal justice reforms by taking into account the judicial role and individual judges' perspectives, in these reforms. Indeed, a review of local criminal justice policy councils indicated that

357. The most difficult aspect of bringing the rule of law to sentencing is arguably the task of giving judges the information they need to determine what punishment will achieve public safety. This is because judges rarely have access to rich information about which programs are available in prison and in the community, their effectiveness, and the existence of social supports in the offender's community. In the absence of realistic information about the usefulness of their sentencing options, judges' fact-finding at sentencing is often mainly confined to noting mitigating and aggravating factors. Without data on recidivism, judges are unlikely to know whether intensive community sanctions, another prison diversion program, or a prison term is more likely to protect public safety. Judges in such situations might understandably err on the side of incarceration because of its temporary incapacitation effect, even when noncustodial sanctions may be more effective in the long term. Widespread judicial involvement in criminal justice reforms may enhance judge's knowledge of these matters, improving their ability to impose sentences that best accomplish the objectives of the sentence.

the presence and especially leadership of a judge was often the main factor behind the success of the council.[358] Encouragingly, the Wisconsin legislation mandating the creation of a Council on Offender Reentry specifically requires a judge or former judge to serve on the council.[359] More generally, Professors Cecelia Klingele, Michael Scott, and Walter Dickey have argued compellingly that "reimagining criminal justice" should involve "judges as organizers" who take an "active role in problem-solving."[360]

Indeed, each criminal justice reform—whether it is the creation of reentry policy councils, the introduction of new earned release mechanisms, the use of alternative courts like drug courts, or experimentation with intensive community sanctions—presents a myriad of needs for judicial education and opportunities for judicial involvement. By integrating judges into sentencing policy and by having non-judicial sentencing decision-makers abide by reasoning requirements similar to those required of judges, the rule-of-law sentencing approach may take root in a sustainable way.

IV. CONCLUSION

This Article uses the example of Wisconsin and recent scholarship to develop general lessons for other states with earned released policies. Wisconsin's 2009 earned release legislation had several positive elements, including a decrease in the judicial role, a widening of compassionate release, special attention to protecting public safety, and initiatives to reduce recidivism and revocations from community supervision sentences. It suffered, however, from uneven implementation and excessive complexity, and never had the additional resources that were probably needed for full implementation (with the exception of new funding for community corrections).

Drawing on Wisconsin's example and recent criminal justice and governance scholarship, this Article outlines four principles for states to

358. *See* RICHARD P. STOKER, STATE JUSTICE INST. CTR. FOR EFFECTIVE PUB. POLICY, FIVE REASONS WHY JUDGES SHOULD BECOME MORE INVOLVED IN ESTABLISHING, LEADING, AND PARTICIPATING ON COLLABORATIVE, POLICY-FOCUSED TEAMS 2–6 (2006), *available at* http://www.wicourts.gov/about/organization/programs/docs/judgerolereport.pdf.

359. WIS. STAT. § 15.145(5) (2009–2010).

360. Cecelia Klingele et al., *Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 982–85 (2010).

use in ensuring the success of earned release legislation. These include provisions for preventing injustice through transparent monitoring and structured decision-making, ensuring implementation through strategic governance, making earned release compatible with public safety, and complementing earned release with other, perhaps more effective and sustainable, methods of reducing prison populations and correctional costs. Along with increasing the effectiveness of earned release policies, these principles may help achieve the goal of bringing the rule of law to the sentencing process.

The Article also provides some preliminary empirical responses to pressing questions about earned release. First, in support of the argument that administrators, rather than judges, should be the main actors behind earned release, I present data showing wide geographic disparities in the approval rates under the judicial sentence adjustment mechanism, which may have reinforced the state's racial disparities. Second, responding to concerns that using risk assessment tools to inform earned release decisions would exacerbate racial disparities, this Article shows that this did not occur in Wisconsin's expanded earned release mechanisms in effect from 2009 to 2011. Third, supporting claims that earned release may have a relatively small role to play in reducing the prison population, I show that even Wisconsin's numerous new earned release mechanisms had little impact on the state's prison population.

Earned release policy is a high-stakes game, with potentially vast consequences. Unwisely implemented measures could cause backlashes that prevent policymakers from breaking out of the tough-on-crime paradigm of the 1990s, reinforcing the escalating prison costs and over-incarceration the paradigm brought about. Well-executed reforms, in contrast, could help bring about a new sentencing era, characterized by less imprisonment and enhanced public safety. This Article's proposed principles for successfully planning and implementing earned release reforms are intended both to serve as a tentative guide for states, and to encourage a dialogue among academics and practitioners about best practices in this area of criminal justice reform.

Further research on this topic should systematically assess how the earned release revolution has fared in other states. Have some states succeeded in releasing significant numbers of inmates without causing public safety problems? Has decreasing prison admissions been a more successful strategy reducing prison populations? Has earned release

worsened or improved racial disparities in any states? Research answering these questions could potentially test the four principles advocated in this article, determining whether their use predicts the success of earned release mechanisms.