

Good Conduct Time for Prisoners: Why (and How) Wisconsin Should Provide Credits Toward Early Release

Michael O'Hear

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GOOD CONDUCT TIME FOR PRISONERS: WHY (AND HOW) WISCONSIN SHOULD PROVIDE CREDITS TOWARD EARLY RELEASE

MICHAEL O'HEAR*

Wisconsin is one of about twenty states not offering good conduct time (GCT) to prisoners. In most states, prisoners are able to earn GCT credits toward accelerated release through good behavior. Wisconsin itself had GCT for more than a century, but eliminated it as part of a set of reforms in the 1980s and 1990s that left the state with what may be the nation's most inflexible system for the release of prisoners. Although some of these reforms helpfully brought greater certainty to punishment, they went too far in eliminating nearly all meaningful recognition and encouragement of good behavior and rehabilitative progress. This Essay explains why and how Wisconsin should reinstitute GCT, drawing on social scientific research on the effects of GCT, public opinion surveys in Wisconsin and across the United States regarding sentencing policy, and an analysis of the GCT laws in place in other jurisdictions. Although the Essay focuses particularly on Wisconsin's circumstances, the basic argument for GCT is more generally applicable, and much of the analysis should be of interest to policymakers in other states, too.

I.	INTRODUCTION	488
II.	WISCONSIN'S PATH TO HYPER-DETERMINACY.....	492
	A. <i>Hyper-Indeterminacy, 1889–1984</i>	492
	B. <i>Moderate Indeterminacy, 1984–1999</i>	496
	C. <i>Hyper-Determinacy, 1999–2009</i>	498
	D. <i>Moderate Determinacy, 2009–2011</i>	504
	E. <i>Hyper-Determinacy: Destination or Detour?</i>	508
III.	THE DUBIOUS CASE FOR HYPER-DETERMINACY	510
	A. <i>Democratic Accountability</i>	510
	B. <i>Victim Rights</i>	513
	C. <i>Public Safety</i>	516

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IV. PUBLIC SUPPORT FOR INDETERMINACY AND GOOD CONDUCT TIME	522
A. <i>Support for Indeterminacy in Wisconsin</i>	522
B. Support for Indeterminacy in the Nation as a Whole	526
V. GOOD CONDUCT TIME IN OTHER JURISDICTIONS.....	529
A. <i>Overview</i>	529
B. <i>Specific Jurisdictions</i>	532
1. Federal System	532
2. Illinois	534
3. Washington.....	536
VI. GOOD CONDUCT TIME IN THE EMPIRICAL LITERATURE	538
VII. A PROPOSAL FOR GOOD CONDUCT TIME IN WISCONSIN	542
A. <i>The Case for Good Conduct Time: A Recapitulation</i>	542
B. <i>How to Structure Good Conduct Time in Wisconsin</i>	544
1. Maximum Amount of GCT Discount	544
2. Conditions for Earning GCT	545
3. Offense-Based Exclusions and Limitations	547
4. Disciplinary Sanctions	547
5. Deferral of GCT Release	548
6. Relationship to Extended Supervision.....	549
7. Fair Notice	550
8. Effective Date and Retroactivity	550
C. <i>Differences From 2009 Reforms</i>	551
VIII. CONCLUSION.....	552

I. INTRODUCTION

When a person commits a wrong against his community, that person deserves to be censured and even, in extreme cases, to be physically excluded from the community. However, when the wrongdoer fully atones for his bad conduct, he deserves no less to be restored to full membership in the community. Even in cases of great harm, where full atonement may seem impossible, the wrongdoer's efforts to achieve some meaningful degree of atonement should be recognized and encouraged by the community. The tireless quest for the lost sheep, the joyful welcoming of the prodigal son—these parables resonate deeply in western culture and highlight our obligation not merely to condemn

wrongdoing, but also to do what we can to make reconciliation possible and to restore the wrongdoer to the community.¹

This intuitive moral logic underlay the Supreme Court's extraordinary decision in *Graham v. Florida*, which banned the sentence of life without the possibility of parole for most crimes committed by juveniles.² In explaining why this sentence violated the Eighth Amendment's Cruel and Unusual Punishments Clause, the Court observed that the sentence denies

any meaningful opportunity to obtain release, no matter what [the offender] might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes.³

The prisoner's efforts to improve himself and atone for his wrongdoing, the Court suggests, should be reciprocated by society through a meaningful consideration of early release.⁴

A similar moral logic points to the essential injustice of any sentencing system that is wholly devoid of any flexibility as to release dates. In the 1990s, dozens of states adopted laws that substantially curtailed parole, which had long been the standard mechanism in the United States for recognizing and encouraging good conduct and rehabilitative progress by prisoners.⁵ However, few of these "truth in sentencing" (TIS) laws entirely eliminated back-end flexibility. For instance, many states limited the new parole restrictions to their most serious violent offenders.⁶ Moreover, even for the violent offenders, about half of the TIS laws preserved some possibility of parole.⁷ Among the remaining states that eliminated parole, nearly all retained the

1. For a more extensive statement of these ideas about atonement and its relationship to punishment, see Michael M. O'Hear, *Solving the Good-Time Puzzle: Why Following the Rules Should Get You Out of Prison Early*, 2012 WIS. L. REV. 195, 214–22.

2. 130 S. Ct. 2011, 2034 (2010).

3. *Id.* at 2033.

4. *See id.* For a more complete discussion of this aspect of *Graham*, see Michael M. O'Hear, *Not Just Kid Stuff? Extending Graham and Miller to Adults*, 78 MO. L. REV. 1087, 1101–05 (2013).

5. *See* WILLIAM J. SABOL, KATHERINE ROSICH, KAMALA MALLIK KANE, DAVID P. KIRK & GLENN DUBIN, URBAN INST., *THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS* 7 (2002).

6. *Id.* at 9.

7. *Id.* at 20.

possibility of “good conduct time” (GCT) release—that is, early release based on the accumulation of credits for good behavior in prison.⁸ Typically, these states permitted release at the eighty-five percent mark (assuming all possible GCT credits were earned), while three states set even earlier release possibilities.⁹

In 1998, Wisconsin adopted what may have been the nation’s most rigid TIS law. The law was distinctive in combining three features: (1) it was not limited to serious violent crimes, but covered all felonies; (2) it not just scaled back but entirely eliminated the possibility of parole release; and (3) it made no allowance for early release based on good conduct time.¹⁰ Another aspect of the law greatly enhanced the practical significance of the new system’s extraordinary inflexibility: statutory maximum sentences were raised across the board.¹¹ The predictable result was a dramatic increase in the real length of time that Wisconsin prisoners were required to serve.¹² The enhancement of the statutory maxima was only partly undone by trailer legislation in 2002, which also made a small gesture in the direction of back-end flexibility by creating a new opportunity for judicial sentence modification.¹³ Modest in design, this new provision has been rarely utilized in practice.¹⁴ Wisconsin continues to have what may be the nation’s most extreme TIS system.¹⁵

Wisconsin’s TIS law has often been criticized, and rightfully so, as a colossal waste of taxpayer money¹⁶—a contributor to a bloated state prison population that is twice that of neighboring Minnesota’s, despite the remarkably similar size and crime rates of the two states.¹⁷

8. *Id.*

9. *Id.* at 21–23.

10. Michael M. O’Hear & Darren Wheelock, *Imprisonment Inertia and Public Attitudes Toward “Truth in Sentencing,”* 2015 BYU L. REV. (forthcoming 2015) (manuscript at 11), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418282, archived at <http://perma.cc/F9UZ-8XCM>.

11. *Id.*

12. Mary Zahn & Gina Barton, *Locked In: The Price of Truth in Sentencing*, MILWAUKEE J. SENTINEL, Nov. 21, 2004, at 1A.

13. O’Hear & Wheelock, *supra* note 10 (manuscript at 17–18).

14. Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 MARQ. L. REV. 1551, 1582 n.148 (2012).

15. *See, e.g.*, Zahn & Barton, *supra* note 12.

16. *See, e.g., id.* (estimating cost of TIS as \$1.8 billion for inmates admitted through 2025).

17. Michael M. O’Hear, *Mass Incarceration in Three Midwestern States: Origins and Trends*, 47 VAL. U. L. REV. 709, 717–19, 735, 740 (2013).

However, the fundamental flaw of the Wisconsin system is not fiscal in nature, but ethical. The TIS laws of other states have preserved meaningful opportunities for inmates to earn early release, even if these opportunities are now significantly more limited than they were a generation ago.¹⁸ To varying degrees, these other TIS laws embody a hope and expectation that prisoners will work to better themselves during their time behind bars. They send a message that society will recognize rehabilitative progress and positive behavior and would like to welcome prisoners back to the community sooner rather than later. Wisconsin's law, by contrast, sends the harshly dismissive message that nothing much is expected of prisoners—that society simply wishes to exclude them for as long as possible. Wisconsin's TIS sentences are cruel for much the same reason as the sentences found unconstitutional in *Graham*: they deny “any meaningful opportunity” to obtain early release, “no matter what [the offender] might do to demonstrate that [his] bad acts . . . are not representative of his true character,” and no matter how hard he might work at “attempting to atone for his crimes and learn from his mistakes.”¹⁹

To be clear, I do not intend to argue in this Essay that TIS sentences are unconstitutional; tilting at that particular windmill can await another day. Rather, my present purpose is to argue for *legislative* change to an exceptionally harsh sentencing system. Legislators, no less than judges, should be mindful of the ethical significance of the penal laws they adopt and maintain.

To argue that Wisconsin's TIS system has gone too far is not necessarily to seek a return to the pre-TIS system of largely uncontrolled and unpredictable parole release.²⁰ My aim is considerably more modest: the institution of a new system of good conduct time credits that would permit release, at the earliest, after an inmate has served two-thirds of his prison sentence. Such a system would restore meaningful recognition of good behavior in prison, but would still avoid the worst vices of the old system, which permitted release as early as the one-quarter mark of the sentence.

The Essay proceeds as follows. Part II briefly recapitulates the history of parole, good conduct time, and truth in sentencing in Wisconsin. Part III critically examines the case that has been made for

18. See SABOL ET AL., *supra* note 5, at 18–23.

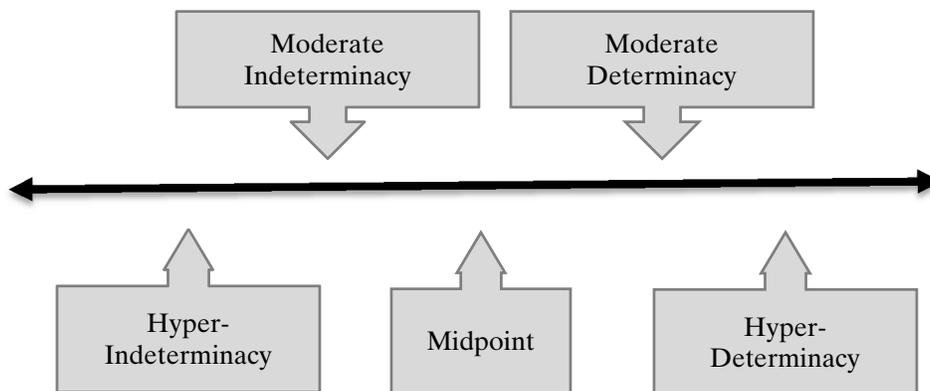
19. *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010).

20. The pre-TIS system is described in more detail in Part II below.

truth in sentencing in Wisconsin. Part IV examines polling research and demonstrates that GCT is consistent with the values and policy preferences of most Wisconsin voters. Part V surveys the widespread use of GCT in other U.S. jurisdictions. Part VI considers what the empirical literature has to say about GCT, highlighting the potential for GCT to reduce prison misconduct, recidivism, and corrections budgets. Part VII presents a specific proposal for reinstating GCT in Wisconsin. Finally, Part VIII concludes.

II. WISCONSIN'S PATH TO HYPER-DETERMINACY

Over the past generation, Wisconsin has had four distinct regimes governing release dates from prison. These regimes have varied considerably in their determinacy – that is, the degree of certainty at the time a sentence is imposed about how much time the defendant will actually serve behind bars before release. Schematically, these regimes might be conceptualized as lying on a continuum:



This Part briefly describes each of Wisconsin's four recent regimes and then considers what lessons may be drawn from the history.

A. *Hyper-Indeterminacy, 1889–1984*

For most of the twentieth century, Wisconsin's corrections system might be fairly described as one of hyper-indeterminacy. The system's roots lie deep in the nineteenth century, reflecting certain fundamental changes in American penal practices and attitudes during that time period.

In the years between the Revolution and the Civil War, imprisonment largely displaced execution, public whipping, and other forms of corporal punishment as the standard sentence for serious crimes in the United States.²¹ For as long as there have been prisons, however, corrections officials have struggled to maintain institutional order.²² Initially, the whip was the chief enforcer of discipline.²³ However, whipping behind prison walls provoked some of the same criticisms as had whipping in the public square—criticisms grounded in humanitarian sensibilities and hopes for offender rehabilitation.²⁴ As two keen observers of the early penitentiaries queried,

To what point are corporal chastisements reconcilable with the object of the penitentiary system itself, which is the reformation of the guilty? If this pain be ignominious, does it not go directly against the end which we propose to obtain, viz., to awaken the morality of an individual, fallen in his own opinion?²⁵

By the 1850s, prison reformers seeking more humane and effective techniques for maintaining discipline hit upon the idea of good conduct time.²⁶ The award of credits toward early release created a positive incentive for prisoners to follow prison rules, while the threat of losing credits already earned created a negative incentive that seemed less barbarous than the whip.²⁷

Following the national trend, the Wisconsin Legislature adopted good conduct time in 1860.²⁸ For each month of good conduct, the State Prison Commissioner was authorized to reduce an inmate's sentence by as many as five days, subject to annulment by the Governor for subsequent misconduct.²⁹ Highlighting the Legislature's reintegrationist

21. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 73–75, 77–82 (1993).

22. *See, e.g.*, G. DE BEAUMONT & A. DE TOQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES, AND ITS APPLICATION IN FRANCE* 39–47 (Francis Lieber trans. 1833) (discussing disciplinary techniques at earliest American penitentiaries).

23. *Id.* at 41–42.

24. *See* FRIEDMAN, *supra* note 21, at 74, 76 (describing nineteenth-century criticisms of public whipping).

25. DE BEAUMONT & DE TOQUEVILLE, *supra* note 22, at 44.

26. THOMAS G. BLOMBERG & KAROL LUCKEN, *AMERICAN PENOLOGY: A HISTORY OF CONTROL* 75 (2010).

27. *Id.*

28. Act Relating to the Discipline of Convicts in the State Prisons, ch. 324, 1860 Wis. Laws 321.

29. *Id.* § 1, 1860 Wis. Laws at 321–22.

aims, the same enactment also gave corrections officials the authority to reward an inmate's record of "good character for obedience, industry and integrity" with a restoration of citizenship upon release from prison.³⁰

The adoption of GCT in Wisconsin and other states foreshadowed a far more dramatic expansion of sentencing indeterminacy in the decades following the Civil War. This shift was associated with the emergence of a new "progressive penology," which sought to develop more scientific and humane approaches to offender rehabilitation.³¹ "Classical penology" had emphasized general deterrence as the overriding aim of punishment; this orientation called for a system of graduated penalties based on the severity of the offense, which left little room for varying the length of incarceration based on the inmate's performance behind bars.³² Progressive thinkers, however, rejected the classical assumption that crime resulted from a rational cost-benefit calculus by criminals.³³ The progressives saw little point in using punishment to try to send finely calibrated deterrence messages to the general public, but were instead more interested in identifying the individual rehabilitative needs of each offender and tailoring the prison experience, including its duration, to those needs.³⁴

In line with the new thinking, Wisconsin significantly expanded and regularized good conduct time in 1880.³⁵ While under the 1860 law a prisoner might earn at most about two months of good conduct time per year, the 1880 law permitted a full six months per year for longer-serving inmates.³⁶ Moreover, while the 1860 law had made the reduction of sentences purely a matter of official discretion, the 1880 law specified, "Every convict who . . . shall conduct himself in a peaceful and obedient manner, and faithfully perform all the duties required of him, *shall be entitled* to a diminution of time from the term of his sentence."³⁷

30. *Id.* § 3, 1860 Wis. Laws at 322.

31. BLOMBERG & LUCKEN, *supra* note 26, at 70-71.

32. *Id.* at 32-34.

33. *See id.* at 71.

34. *Id.*

35. Act to Promote Good Order and Repress Crime, ch. 238, 1880 Wis. Laws 274.

36. *Id.* § 1, 1880 Wis. Laws at 274-75; *see also* Act Relating to the Discipline of Convicts in the State Prisons, ch. 324, § 1, 1860 Wis. Laws 321, 321-22.

37. Act to Promote Good Order and Repress Crime § 1, 1880 Wis. Laws at 274-75 (emphasis added).

Although GCT continued its national expansion in the progressive period, eventually becoming established in all forty-six states by 1910,³⁸ parole proved to be the preeminent institutional expression of the new penology. The device was pioneered by New York's Elmira Reformatory, which was built as a model progressive institution in 1876.³⁹ The hope was to "instill in offenders a self-regulated discipline because release dates were to be based on visible proof of reformation. Once satisfactory progress had been demonstrated, the offender would be released to enter into a period of community supervision"⁴⁰ The idea caught on quickly, and forty-one states had parole laws in place by 1910.⁴¹ By 1942, the final holdout states, all located in the South, were also on board.⁴²

Wisconsin's first parole law, adopted in 1889,⁴³ reflected the new national emphasis on penal flexibility. Under this law, judges were authorized to impose a "general sentence of imprisonment."⁴⁴ Such a sentence specified no particular duration, but instead turned the defendant over to prison authorities for what might prove to be any amount of time between the statutory minimum and the statutory maximum "depending upon [the defendant's] conduct and the evidences of [his] probable reformation."⁴⁵ Thus, for instance, a robber receiving a general sentence might have spent anywhere from one to seven years in prison,⁴⁶ a child rapist anywhere from ten to thirty years,⁴⁷ and an arsonist anywhere from three to fourteen years⁴⁸—all at the discretion of the State Board of Supervision.⁴⁹ This level of extreme uncertainty in release dates may fairly be characterized as "hyper-indeterminacy."

38. BLOMBERG & LUCKEN, *supra* note 26, at 75.

39. *Id.* at 72–73.

40. *Id.* at 73.

41. *Id.* at 76.

42. Joan Petersilia, *Probation and Parole*, in THE HANDBOOK OF CRIME & PUNISHMENT 563, 567–68 (Michael Tonry ed., 1998).

43. Act of April 15, 1889, ch. 390, 1889 Wis. Laws 551.

44. *Id.* § 1, 1889 Wis. Laws at 551. Excluded were those defendants convicted of first- or second-degree murder who had previously been convicted of a felony and served a term of imprisonment. *Id.*

45. *Id.* at 552.

46. WIS. STAT. § 4378 (1889).

47. *Id.* § 4381.

48. *Id.* § 4399.

49. See Act of April 15, 1889 § 1, 1889 Wis. Laws at 552.

Parole and good conduct time remained central pillars of the Wisconsin criminal justice system for many decades thereafter. As the era of hyper-indeterminacy was coming to a close in the early 1980s, the GCT system established in 1880—a full century earlier—remained intact,⁵⁰ augmented by the possibility of additional credits for inmates “whose diligence in labor or study surpasses the general average.”⁵¹ Meanwhile, parole had been restructured a bit from its earliest form, but remained an area of vast discretion and indeterminacy. Judges no longer imposed a “general sentence,” but set a specific term of years that, in effect, merely established the maximum amount of time the offender might serve behind bars.⁵² The State Department of Health and Social Services, which administered the prison system, could release an offender on parole as soon as he had served one-half of the statutory minimum for the offense.⁵³ Indeed, statutory minima were not much of a constraint on parole since only Class A felonies included a statutory minimum in the state’s general felony classification system.⁵⁴

B. Moderate Indeterminacy, 1984–1999

In Wisconsin and elsewhere, regimes of hyper-indeterminacy reflected the ascendance of progressive penology through much of the twentieth century. However, indeterminacy and progressive penology came under sustained attack from both the Left and the Right in the 1970s, and states increasingly looked for new approaches. From the Left, criticisms focused on the need for fairer processes and more uniform treatment of similar cases; all of the discretion that went along with parole seemed to invite arbitrary or discriminatory decision making.⁵⁵ From the Right, the call was for toughness—an end to the coddling of criminals by soft-hearted judges and corrections officials, particularly against the backdrop of long-term, dramatic increases in the American crime rate in the 1960s and 1970s.⁵⁶ Underlying both lines of criticism was an emerging consensus that corrections officials were

50. WIS. STAT. § 53.11(1) (1981–1982).

51. *Id.* § 53.12(1). Under this provision, good conduct time was earned at a rate of one day for each six days of above-average diligence. *Id.*

52. *See id.* § 973.01(1).

53. *Id.* § 57.06(1).

54. *Id.* § 939.50(3).

55. Michael Tonry, *Sentencing in America, 1975–2025*, in 42 CRIME AND JUSTICE: A REVIEW OF RESEARCH 141, 151–52 (Michael Tonry ed., 2013).

56. FRIEDMAN, *supra* note 21, at 404, 411–12, 449–52.

simply incapable of reliably rehabilitating criminals through the progressive model of individualized evaluation and treatment.⁵⁷

In response to these criticisms, five states eliminated discretionary parole between 1975 and 1983.⁵⁸ Wisconsin's Legislature gave serious consideration to doing the same in 1980, but a bill to that effect was ultimately defeated by conservatives who were holding out for something even tougher.⁵⁹

Wisconsin reformers proved more successful in 1984, perhaps aided by a temporary abatement of tough-on-crime politics in the state.⁶⁰ The state first adopted voluntary sentencing guidelines for judges, which were intended to reduce disparities in punishment while preserving judicial sentencing discretion.⁶¹ Then, just two weeks later, Democratic Governor Anthony Earl signed into law new restrictions on parole.⁶² As with the sentencing guidelines bill, liberal Democratic Representative David Travis served as lead sponsor of the parole legislation,⁶³ which reflected the Left's process-based critique of the old indeterminate system more than the Right's toughness agenda. The new law included three key features: (1) corrections officials could no longer hold inmates until the end of their imposed sentences, but were now required to release inmates on parole no later than the two-thirds mark of the sentence (the "mandatory release date");⁶⁴ (2) corrections officials were now required to hold inmates until they had reached at least the one-quarter mark of the sentence or six months, whichever was greater;⁶⁵ and (3) prisoners in state custody lost the ability to earn good conduct time.⁶⁶

57. JAMES Q. WILSON, *THINKING ABOUT CRIME* 168–70 (1975).

58. Joan Petersilia, *Parole and Prisoner Reentry in the United States*, in 26 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 479, 496 (Michael Tonry & Joan Petersilia eds., 1999).

59. See WIS. FELONY SENTENCING GUIDELINES COMM., *REPORT OF THE WISCONSIN FELONY SENTENCING GUIDELINES COMMITTEE* 11–12 (1983) (noting that bill to eliminate parole was defeated and replaced with bill calling for new mandatory minimum sentences).

60. See *id.* at 13 (noting that sentencing was not a decisive issue in gubernatorial or legislative races in 1982 and that debate over sentencing discretion had "abated").

61. WIS. LEGISLATIVE COUNCIL STAFF, *INFORMATION MEMORANDUM* 84-4: THE FELONY SENTENCING GUIDELINES LAW 9–10 (1984).

62. Act of May 10, 1984, 1983 Wis. Act 528, 1983 Wis. Sess. Laws 2104.

63. *Id.* (parole reform); Act of April 25, 1984, 1983 Wis. Act 371, 1983 Wis. Sess. Laws 1625 (guidelines).

64. 1983 Wis. Act 528, § 2, 1983 Wis. Sess. Laws at 2105.

65. *Id.* § 18, 1983 Wis. Sess. Laws at 2107.

66. *Id.* § 2, 1983 Wis. Sess. Laws at 2105.

These changes established a new system that might be fairly labeled “moderate indeterminacy.” For instance, in the new system, an offender sentenced by a judge to twelve years in prison might get out any time between three years and eight years. Although such a sentence still had considerable indeterminacy, the new system nonetheless contrasted markedly with the old, in which the same sentence might have resulted in any amount of time in prison up to twelve years.

C. Hyper-Determinacy, 1999–2009

Wisconsin’s system of moderate indeterminacy proved much less durable than the prior system of hyper-indeterminacy. The sentencing regime adopted in 1984 was doomed by a decade-long spike in violent crime; a related, massive increase in the size of the state’s prison population; and an intensification of political partisanship in the area of penal policy.

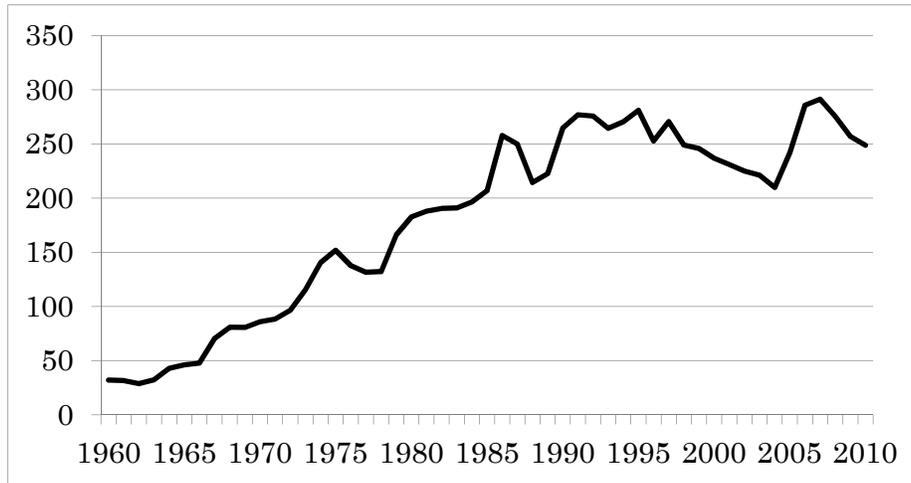
As indicated in Figure 1, Wisconsin’s violent crime rate increased sharply between 1960 and 1980, temporarily leveled off in the early 1980s, and then climbed to a new peak in 1995—a peak that was nearly ten times higher than the 1963 valley. Chronically high levels of violent crime in the 1990s helped to fuel public distrust of the criminal justice system and provided the impetus for a plethora of new tough-on-crime laws.⁶⁷

Even without an increase in toughness, a surge in violent crime would have produced a surge in imprisonment, and that is precisely what Wisconsin experienced. As indicated in Figure 2, Wisconsin’s imprisonment rate grew every single year from 1972 through 2003, and then hit an all-time high in 2006, reaching a level more than nine times that of the early 1970s. Such explosive growth pushed Wisconsin’s prison system into a position of chronic overcrowding, even notwithstanding an extraordinary prison-building boom.⁶⁸

67. *See, e.g.*, Act of April 13, 1994, 1993 Wis. Act 281, 1993 Wis. Sess. Laws 1087; Act of December 10, 1993, 1993 Wis. Act 97, 1993 Wis. Sess. Laws 637; Act of August 3, 1989, 1989 Wis. Act 31, 1989 Wis. Sess. Laws 54.

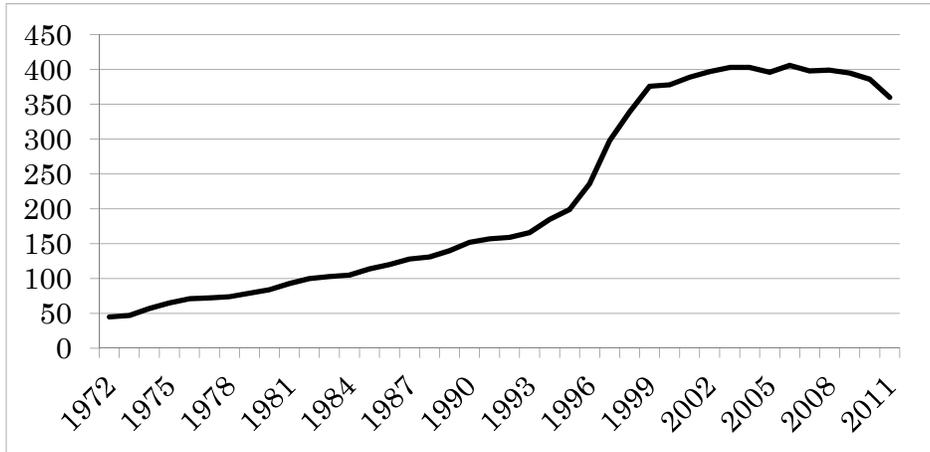
68. In 1974, Wisconsin’s prison population was below the state’s total designed bed capacity, but by 1982 the population had grown to 120% of capacity. *See* WIS. DIV. OF CORR., FISCAL YEAR SUMMARY REPORT OF POPULATION MOVEMENT, at tbl.1 (1974); WIS. LEGISLATIVE FISCAL BUREAU, ADULT AND JUVENILE CORRECTIONS PROGRAMS, at Attachment II (1983). Beds increased by more than 50% in the next decade, but the system only fell further behind; by 1992, the prison population was nearly 130% of capacity. WIS. DEPT OF CORR., FISCAL YEAR SUMMARY OF POPULATION MOVEMENT, at tbl.1 (1992).

Figure 1
Wisconsin violent crime per 100,000 residents, 1960–2010⁶⁹



69. “Violent crime” refers here to the four violent “index” crimes tracked by the Federal Bureau of Investigation: homicide, rape, robbery, and aggravated assault. The data come from the FBI’s annual reports entitled *Crime in the United States*, which are available back to 1995. *Uniform Crime Reports*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/ucr> (last visited Nov. 7, 2014), archived at <http://perma.cc/97ML-Y7SD>. Older reports are available online from LLMC Digital. LAW LIB. MICROFORM CONSORTIUM, <http://www.llmcdigital.org/titleresults.aspx?searchtype=0&set=80524&volume=&part=&page> (last visited Nov. 7, 2014), archived at <http://perma.cc/4AF-436K>.

Figure 2
Wisconsin imprisonment per 100,000, 1972–2011⁷⁰



70. “Imprisonment” here refers only to those incarcerated persons sentenced to prison and does not include those incarcerated in local jails. Older data come from PATRICK A. LANGAN ET AL., U.S. DEP’T OF JUSTICE, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925–86 (1988). More recent data come from the Bureau of Justice Statistics’ annual *Prisoners* reports. *Publications & Products: Prisoners*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=pbse&sid=40> (last visited Nov. 7, 2014), archived at <http://perma.cc/99VG-H6XT>.

Fortunately for the new Department of Corrections (DOC), which was carved out of the Department of Health and Social Services in 1990,⁷¹ a few safety valves were available to prevent a complete system meltdown. One such safety valve was the Intensive Sanctions Program (ISP), created by the Legislature in 1991 to address overcrowding by establishing an intermediate option between prison and regular parole supervision.⁷² Through the early and mid-1990s, the DOC released hundreds of inmates to the ISP each year, and used the ISP as an alternative to revocation for even greater numbers of probationers and parolees.⁷³ However, the DOC was criticized for failing to screen and supervise ISP participants adequately.⁷⁴ Eventually, in 1997, an ISP participant was arrested for a double-homicide, which provoked a political and media firestorm, with leading Democrats trying to pin the responsibility on Republican Governor Tommy Thompson.⁷⁵

But the most important safety valve, by far, was discretionary parole—even in its constrained, post-1984 form. An absence of objective parole criteria meant that the DOC's Parole Commission had considerable freedom to liberalize release in times of prison overcrowding.⁷⁶ And, sure enough, as prison admissions exploded in the 1990s, the parole safety valve was soon opened wide, and it became almost unheard of for Wisconsin inmates to remain in prison until their mandatory release dates.⁷⁷ As a result of this liberalization, the average prison time served before release dropped by seven percent between 1990 and 1998, even though the average prison sentence *increased* by

71. Act of August 3, 1989, 1989 Wis. Act 31, § 3023, 1989 Wis. Sess. Laws 54, 697.

72. TOMMY G. THOMPSON, *POWER TO THE PEOPLE: AN AMERICAN STATE AT WORK* 183–84 (1996).

73. INTENSIVE SANCTIONS REVIEW PANEL, *FINAL REPORT: SUBMITTED TO GOVERNOR TOMMY G. THOMPSON* 7 (1998).

74. *Id.* at 3.

75. Jim Stingl, *Suspect Triggered 158 Alerts, Log Shows*, MILWAUKEE J. SENTINEL, Aug. 28, 1997, at 1B.

76. Patrick J. Fiedler, *The Wisconsin Department of Corrections: An Expensive Proposition*, 76 MARQ. L. REV. 501, 513–15 (1993).

77. In 1990, more than forty percent of the males released from prison in Wisconsin were required to wait until their mandatory release date, but in 1991, that figure dropped to less than thirty percent, and in 1992, to less than fifteen percent. WIS. LEGISLATIVE FISCAL BUREAU, INFORMATION PAPER #53: ADULT CORRECTIONS PROGRAM 6 tbl.III (1993). Mandatory releases eventually dropped below ten percent in 1994 and remained low through the mid-1990s. WIS. LEGISLATIVE FISCAL BUREAU, INFORMATION PAPER #54: ADULT CORRECTIONS PROGRAM 11 tbl.4 (1997).

eight percent in the same time period.⁷⁸ As these trends became publicized, parole, like the ISP, became a lightning rod of controversy.⁷⁹

Even Governor Thompson, who was in a sense responsible for the liberalization of parole,⁸⁰ recognized that early release for prisoners cut against the grain of tough-on-crime politics, which were intensifying considerably in the 1990s.⁸¹ Running for reelection in 1994, Thompson himself vowed to end parole for violent criminals.⁸² Thompson's principal political rival, Democratic Attorney General Jim Doyle, then picked up the "truth in sentencing" call and was first out of the blocks with a specific reform proposal in 1996.⁸³ Doyle's proposal, however, followed the lead of most TIS jurisdictions in maintaining some indeterminacy; the Attorney General would have permitted inmates to earn GCT and thereby obtain release as early as the eighty-five percent mark of their sentences.⁸⁴

Although Doyle's GCT proposal was far less generous than the pre-1984 system, which permitted day-for-day credits for longer-serving inmates,⁸⁵ it became a target of ridicule from the Thompson camp. Releasing prisoners after they serve just eighty-five percent of their sentences, sniffed Thompson's spokesman, is not truth in sentencing.⁸⁶

The Doyle-Thompson rivalry, the partisan backlash against the supposed softness and mismanagement of the ISP and parole, and a sharp rightward tilt in the Legislature in the 1990s⁸⁷ may have made

78. Mike Flaherty, *Truth in Sentencing: End of Parole Could Jam Prisons, Boost Budget*, WIS. ST. J., Apr. 12, 1998, at 1A, available at 1998 WLNR 5462617.

79. See, e.g., John Welsh, *Longer Sentences, Shorter Terms; Average Prison Stay in Wisconsin Has Been Decreasing*, State Journal Analysis Finds, WIS. ST. J., Mar. 15, 1998, at 1A, available at 1998 WLNR 5478707 (noting that Parole Chair was called "most dangerous man in Wisconsin" by Kenosha County District Attorney).

80. The Parole Chairperson in a gubernatorial appointee. WIS. STAT. § 15.145(1) (2011–2012).

81. See Tonry, *supra* note 55, at 150.

82. JOE FONTAINE, WIS. SENTENCING COMM'N, SENTENCING POLICY IN WISCONSIN: 1975–2005, at 24 (2005).

83. *Id.* at 25.

84. O'Hear & Wheelock, *supra* note 10 (manuscript at 10).

85. *Id.*

86. *Doyle Urges Halt to Early Releases; Report Shows Felons Are Serving Shorter Sentences Than Six Years Ago*, WIS. ST. J., Oct. 15, 1996, at 3B, available at 1996 WLNR 4488619.

87. Democrats controlled both legislative chambers in the 1980s, but Republicans took the Senate in 1993 and the Assembly in 1995. WIS. LEGISLATIVE REFERENCE BUREAU, 2011–2012 WISCONSIN BLUE BOOK 256 (2011).

inevitable that the final version of TIS, adopted in 1998,⁸⁸ would be harsher and more rigid than either Doyle or Thompson had initially proposed. In contrast to Thompson's initial campaign promise, the final TIS law was not limited to violent criminals.⁸⁹ And, in contrast to Doyle's proposal, the final law made no allowance for good conduct time.⁹⁰ Moreover, the law also included a fifty percent, across-the-board increase in maximum sentences.⁹¹

The arguments for TIS advanced by Doyle, Thompson, and other proponents sounded three distinct themes. First, proponents argued that TIS would reduce crime by giving prison sentences a stronger deterrent force and by incapacitating dangerous offenders for longer periods of time.⁹² Second, proponents argued that TIS advanced democratic values by shifting power over punishment from the unelected members of the Parole Commission to the state's elected judiciary.⁹³ Finally, proponents also framed TIS as a victims' rights measure; it was said that victims would benefit from having greater certainty as to the release dates of their offenders.⁹⁴

The first argument simply perpetuated the Right's longstanding critique of parole as too lenient. The second two in some respects echoed the Left's process-oriented critique of parole in the 1970s, but with a focus on the interests of victims and voters, rather than on those of offenders. Missing from the public discussion seemed to be any of the humanitarian, reintegrationist sensibilities that had propelled the creation of the indeterminate system in the nineteenth century.

In any event, when the TIS law took effect in 1999,⁹⁵ Wisconsin abruptly moved from a system of moderate indeterminacy to one of hyper-determinacy. A state fiscal crisis shortly thereafter and related

88. Act of June 15, 1998, 1997 Wis. Act 283, 1997 Wis. Sess. Laws 2096.

89. O'Hear & Wheelock, *supra* note 10 (manuscript at 11).

90. *Id.*

91. *Id.*

92. *Id.* (manuscript at 14).

93. *Id.* (manuscript at 12–13).

94. For instance, a leading supporter in the Senate argued, "Our current system of penalizing and imprisoning people is a fraud perpetrated on the victims We've probably all heard . . . the stories from district attorneys that tell us there's no way they can tell a victim how long somebody will be behind bars" Richard P. Jones, *Senate Easily Passes Bill to End Parole: It Would Take Effect in '99*, MILWAUKEE J. SENTINEL, May 2, 1998, at 1A, available at 1998 WLNR 5756084 (quoting Senator Joanne Huelsman) (internal quotation marks omitted).

95. Act of June 15, 1998, 1997 Wis. Act 283, § 456, 1997 Wis. Sess. Laws 2096, 2412–43.

concerns over the DOC's burgeoning budget helped to motivate some softening of the new regime in 2002.⁹⁶ However, the system's hyper-determinacy remained largely intact. Although the 2002 law created new opportunities for judges to modify sentences,⁹⁷ there was no reason to think that this would become a routine feature of penal practice, as parole and good conduct time had once been. Indeed, one study found an almost laughably low success rate of 0.8% for sentence modification petitions in three of the state's largest counties (Milwaukee, Racine, and Kenosha).⁹⁸

D. Moderate Determinacy, 2009–2011

Although more extreme than in other states, Wisconsin's turn to hyper-determinacy was part of a broader national trend in the 1990s. Indeed, one study determined that forty-two states had TIS laws in place by the end of the decade.⁹⁹ As with the earlier wave of parole reforms in the 1970s and 1980s, the new TIS laws reflected continuing public frustration with historically high rates of violent crime, a loss of confidence in the effectiveness of rehabilitative programming, and a mistrust of criminal justice professionals¹⁰⁰ (albeit without much of the due-process and equal-protection orientation of the first wave).

As the 1990s gave way to the 2000s, the national pendulum seemed to swing back in the opposite direction. In part, this resulted from state fiscal crises associated with the recessions of 2001 and 2007–2009, which forced many states to consider whether they could really afford all of the

96. O'Hear & Wheelock, *supra* note 10 (manuscript at 16–18).

97. See Norris, *supra* note 14, at 1566, 1613.

98. *Id.* at 1583 n.149.

99. SABOLET AL., *supra* note 5, at 7.

100. See, e.g., FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 159–60, 173–74 (2001) (discussing impact of chronic fear of crime and politics of mistrust of government on penal policies in the 1990s). This is not to say that, in adopting TIS, American policymakers simply followed public preferences in a straightforward, unproblematic way. For instance, much research establishes that political and media elites play an important role in fanning public fear of crime. MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 37 (2004). Additionally, political and media elites can also define the range of policy responses that are on the table for public discussion. There is no reason, for example, to think that Wisconsin adopted the nation's most extreme TIS law because Wisconsin voters had uniquely strong views about TIS. Rather, hyper-determinacy resulted from a series of calculated decisions made by Wisconsin's political elites that were not made by the political elites in other states.

tough-on-crime measures that had been adopted in the 1990s.¹⁰¹ In part, the determinacy pendulum reversed course because the rehabilitation pendulum also reversed course: the “nothing works” mantra of the 1970s and 1980s was replaced with a new hope that more rigorously “evidence-based” approaches would yield significant reductions in recidivism rates.¹⁰² Increased confidence in rehabilitation, in turn, promotes increased acceptance of flexible penal systems that are designed to encourage and reward rehabilitative progress—much as happened in the late nineteenth and early twentieth centuries. Finally, with crime rates going through a period of sustained decline,¹⁰³ public concern over crime and general punitiveness also dropped.¹⁰⁴ Consistent with these changes, national opinion surveys began to reveal high levels of public support for alternatives to incarceration.¹⁰⁵ Little wonder, then, that a good three-dozen states adopted new early release opportunities for prisoners between 2000 and 2010.¹⁰⁶

Wisconsin came late to the party. Finally, in 2009, the state adopted significant changes to its system of hyper-determinacy. Jim Doyle, now serving as Governor, pushed through the Democratic Legislature a complicated set of reforms that, in a sense, recreated parole and good conduct time with new names.¹⁰⁷ Some of the important features included: (1) creation of new opportunities for early release based on good behavior in prison (“positive adjustment time”), amounting to as much as one-third off the prison term;¹⁰⁸ (2) transfer of authority over sentence-adjustment from the judiciary to a new Earned Release Review Commission (ERRC);¹⁰⁹ (3) expansion of “compassionate release,” which permitted release by the ERRC for inmates based on

101. See, e.g., Daniel F. Wilhelm & Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?*, 15 FED. SENT’G REP. 41 (2002).

102. Roger K. Warren, *The Most Promising Way Forward: Incorporating Evidence-Based Practice into State Sentencing and Corrections Policies*, 20 FED. SENT’G REP. 322, 322 (2008).

103. FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE*, at v (2007).

104. PRINCETON SURVEY RESEARCH ASSOCS. INT’L FOR THE NAT’L CTR FOR STATE COURTS, *THE NSCS SENTENCING ATTITUDES SURVEY: A REPORT ON THE FINDINGS* 13 (2006); Mark D. Ramirez, *Punitive Sentiment*, 51 CRIMINOLOGY 329, 337 (2013).

105. O’Hear & Wheelock, *supra* note 10 (manuscript at 35–39).

106. Michael M. O’Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1248 (2011).

107. O’Hear & Wheelock, *supra* note 10 (manuscript at 18–20).

108. Norris, *supra* note 14, at 1574–75.

109. *Id.* at 1572–74.

terminal illness or other qualifying medical conditions;¹¹⁰ and (4) authority for the DOC to release certain inmates who were within one year of their original release dates.¹¹¹ Public defenses of these reforms focused on their capacity to save corrections costs and on the need to provide better incentives for good behavior and rehabilitative effort.¹¹²

Although these changes moved Wisconsin away from hyper-determinacy, they fell far short of a return to the moderate indeterminacy of 1984–1999, and are probably better characterized as a new regime of moderate determinacy. In the pre-TIS system (moderate indeterminacy), nearly all inmates qualified for release at the one-quarter mark of the sentence; in comparison to the mandatory release date (two-thirds), this meant that inmates through good behavior and generous treatment by the Parole Commission might knock off more than sixty percent of the maximum time of imprisonment.¹¹³ By contrast, the Doyle reforms seemed designed to reduce the period of initial confinement by at most only about one-third—this was the maximum benefit that could be earned through positive adjustment time. Moreover, even this one-third reduction was limited to just the least serious offenders (those convicted of nonviolent misdemeanors and Class F through I felonies); more serious offenders qualified for smaller reductions of twenty-five or fifteen percent, or none at all.¹¹⁴ Other aspects of the Doyle reforms were even more limited. For instance, the ERRC could only provide sentence adjustment after seventy-five or eighty-five percent of the prison term had been served, depending on the seriousness of the offense.¹¹⁵

Republicans nonetheless wasted no time in castigating Doyle's proposal as a "complete gutting of truth in sentencing."¹¹⁶ Echoing the

110. *Id.* at 1568–70.

111. *Id.* at 1576.

112. See, e.g., Steven Elbow, *Doyle's Vetoes Rankle Friends and Foes: Both Sides of the Aisle Irked as Governor Strips Budget of Key Prison Release Terms*, CAP. TIMES, July 8, 2009, at 17, available at 2009 WLNR 13042629 ("Doyle's earned release plan was presented last spring as a way to chip away at a burgeoning prison population . . ."); Mark Pitsch, *Prisoner Proposal Defended: Critic Says Plan Guts Sentence Law*, WIS. ST. J., Feb. 19, 2009, at A1, available at 2009 WLNR 3327502 ("The proposal, unveiled Tuesday as part of the state's 2009–11 budget, could save millions of dollars while also providing rehabilitation incentives to prisoners, Corrections Secretary Rick Raemisch said.").

113. O'Hear & Wheelock, *supra* note 10 (manuscript at 8); see also Norris, *supra* note 14, at 1574

114. Norris, *supra* note 14, at 1574.

115. *Id.* at 1573–74.

116. Pitsch, *supra* note 112 (internal quotation marks omitted).

original arguments for TIS, opponents of Doyle's plan invoked both public-safety and democratic-accountability considerations. "We're not talking about Boy Scouts here," said one Republican leader, "We're talking about some dangerous people that are going to be released."¹¹⁷ Another observed, "With judges you have accountability Judges are elected and they're re-elected by the people. The nameless faceless bureaucrats on this [ERRC] will be able to release whoever they want with no accountability."¹¹⁸

In 2009, Republicans could do little but complain. In 2010, however, they swept to power in Madison, led by a new Governor, Scott Walker.¹¹⁹ Since Walker expressly campaigned against the Doyle reforms in his run for office,¹²⁰ there should be little surprise that the reforms were repealed in 2011.¹²¹ Supporters of the repeal bill reiterated the same sorts of criticisms of early release that they had advanced in 2009. For instance, one leading Republican charged, "Early release has allowed hundreds of high-risk inmates to get out of jail before serving their time . . . and Wisconsin will undoubtedly be a safer place to live, work and raise a family now that dangerous criminals will be kept behind bars where they belong."¹²² To such criticisms, though, was added the charge that the Doyle reforms had not even proven much of a money saver.¹²³ In their first year, for instance, only 158 inmates were released early, which fell far short of the 500 to 1,000 projected by Doyle.¹²⁴ If there was some irony in attacking early release as both too reckless and too conservative, that irony was apparently lost on Republicans, who effectively reinstated the system of hyper-determinacy that prevailed from 1999 to 2009.

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

118. *Id.*

119. Norris, *supra* note 14, at 1567.

120. *Id.*

121. See WIS. LEGISLATIVE COUNCIL, ACT MEMO: 2011 WIS. ACT 38, REPEAL OF EARLY RELEASE (2011), available at <http://legis.wisconsin.gov/lc/publications/act/2011/act038-sb057.pdf>, archived at <http://perma.cc/XQU3-TGAP>.

122. Liam Marlaire, *Walker Signs Bill Ending Early Release Program*, LEADER-TELEGRAM, July 20, 2011, http://www.leadertelegram.com/news/front_page/article_28a54483-63d1-5197-ad70-6f255a35fa8d.html, archived at <http://perma.cc/S4YB-3DH6> (internal quotation marks omitted).

123. *Id.*

124. Ben Poston, *Sentencing Reform Results Fall Short: Early Prison Releases, Cost Saving Are a Fraction of Year-Ago Estimate*, MILWAUKEE J. SENTINEL, July 10, 2010, at 1A, available at 2010 WLNR 13920379.

E. Hyper-Determinacy: Destination or Detour?

One question raised by the foregoing history is whether Wisconsin is on a policy trajectory that will always lead back to hyper-determinacy. Put differently, do the rejections of moderate indeterminacy in 1998 and of moderate determinacy in 2011 demonstrate that *any* meaningful degree of indeterminacy is a political non-starter in Wisconsin?

For at least four reasons, I do not think the history supports such a conclusion. First, taking the long view, Wisconsin has had parole and good conduct time for the vast majority of its existence as a state. From the wider historical perspective, hyper-determinacy remains little more than a short-term experiment; its lifespan has still been no longer than that of the moderate indeterminacy system set up in 1984. The extraordinary dynamism—the constant churning of new waves of reform—that has marked sentencing and corrections policy nationally¹²⁵ and in Wisconsin¹²⁶ since 1970 should make us very hesitant to view any given aspect of current policy as set in stone. Such hesitancy should be especially strong as to aspects of policy that cut against penal practices that, until relatively recently, were accepted by Wisconsinites with little apparent controversy.

Second, the history demonstrates that Wisconsin normally remains within the national mainstream of sentencing and corrections policy. Wisconsin adopted good conduct time and parole in the nineteenth century at about the same time that most other states did so. Similarly, a century later, Wisconsin imposed new constraints on indeterminacy in the same era that many other states were also taking action to bring more uniformity and due process to their sentencing and corrections systems. Then, when Wisconsin adopted its TIS law in 1998, it was riding a wave that rolled over more than forty other states (albeit with less extreme results). Likewise, when Wisconsin adopted its 2009 early release reforms, it was taking part in a widespread national trend. The 2011 repeal put Wisconsin back in an outlier position, but the state's general tendency to move in sync with national trends in this area suggests that the current regime will not likely last indefinitely. Many other states are reaping significant financial gains from softening the harsh penal systems that were developed in the 1990s, and are doing so

125. Tonry, *supra* note 55.

126. See, e.g., O'Hear & Wheelock, *supra* note 10 (manuscript at 5–21) (describing waves of reform in Wisconsin since 1990).

without any apparent adverse effect on crime rates.¹²⁷ There is nothing in Wisconsin's history to suggest that it will prove an obstinate holdout against reforms that are generally embraced elsewhere.

Third, in retrospect, it is easy to see that the adoption of hyper-determinacy in 1998 resulted less from a sudden recognition of certain timeless principles of justice or a playing out of the inherent logic of crime control, than from the confluence of various circumstances that were specific to the mid- and late 1990s, or perhaps somewhat more broadly to the latter portion of the twentieth century—circumstances that are no longer present, or at least not to the same degree. As indicated in Figure 1, rates of violent crime in the state have stabilized or dropped since the long period of nearly constant increases between the mid-1960s and mid-1990s. As indicated in Figure 2, rates of imprisonment have stabilized or dropped since the long period of nearly constant increases between the mid-1970s and the mid-2000s. These increases threatened to overwhelm Governor Thompson's DOC, and as the agency struggled to cope, Democrats tried to use its difficulties for partisan political advantage—a strategy that exacerbated the politicization of sentencing policy in the 1990s and sharpened the partisan competition over who could be toughest on crime. At the same time, confidence in rehabilitation may have been at a singularly low ebb in the 1990s; the past decade, by contrast, has witnessed a proliferation of drug courts and other treatment-oriented initiatives in Wisconsin, many of which have been funded by the state's growing Treatment Alternatives Diversion grant program.¹²⁸

Fourth, and finally, although current conditions are much closer to those of 2011 than to those of 1998, there are also good reasons to doubt that the repeal of the Doyle reforms in 2011 represented some sort of definitive repudiation of indeterminacy. Repeal swiftly followed the election of Governor Scott Walker and new Republican legislative majorities in 2010—electoral results that probably had much less to do with criminal justice policies than with a broader national backlash

127. See, e.g., COUNCIL FOR STATE GOV'TS JUSTICE CTR., LESSONS FROM THE STATES: REDUCING RECIDIVISM AND CURBING CORRECTIONS COSTS THROUGH JUSTICE REINVESTMENT (2013), available at http://csgjusticecenter.org/wp-content/uploads/2013/04/FINAL_State_Lessons_mbedit.pdf, archived at <http://perma.cc/H3AK-LXVC>.

128. See UNIV. OF WIS. POPULATION HEALTH INST., TREATMENT ALTERNATIVES AND DIVERSION (TAD) PROGRAM: PARTICIPANT OUTCOME EVALUATION AND COST-BENEFIT REPORT (2007–2013), at 1 (2014), available at <https://uwphi.pophealth.wisc.edu/about/staff/van-stelle-kit/tad-2014-outcomes-report.pdf>, archived at <http://perma.cc/J6JR-479H>.

against President Obama and his health-care reforms, as well as unhappiness with a chronically sluggish economy.¹²⁹ Indeed, it is hard to see the repeal as anything but the byproduct of an extraordinary and perhaps unprecedented surge in partisanship in Madison in the 2009–2011 time period.¹³⁰ A Democratic Governor pushed reforms through a Democratic Legislature; then, when Republicans took control of state government, they promptly pushed through a repeal of the same reforms before they had been in place long enough to prove themselves. This smacks more of knee-jerk partisanship than reasoned policy choice, especially in light of the seemingly inconsistent criticisms that the reforms were both too conservative and too reckless.¹³¹ Certainly, the survey data discussed in Part IV below belie any suggestion that Wisconsin voters share the inflexible stance on TIS that was embodied in the repeal.

III. THE DUBIOUS CASE FOR HYPER-DETERMINACY

As indicated in Part II, there have been essentially three arguments advanced for hyper-determinacy in Wisconsin. Each of the three has some force, but they do not persuasively dictate such an extreme policy as Wisconsin has. Each is considered in more detail below. For present purposes, I am particularly interested in exploring the extent to which good conduct time may be reconciled with the basic normative values that underwrite hyper-determinacy.

A. Democratic Accountability

Sentencing judges in Wisconsin are elected, while members of the Parole Commission and Earned Release Review Commission have not been.¹³² This difference in democratic accountability has led to arguments that judges are more appropriate decision makers when it

129. See, e.g., Craig Gilbert, *River of Red Buries the Blue*, MILWAUKEE J. SENTINEL, Nov. 3, 2010, <http://www.jsonline.com/news/statepolitics/106589258.html>, archived at <http://perma.cc/7REN-DGNY> (noting that the economy was “overwhelmingly the top concern” of Wisconsin voters in 2010 and that “Republican[s] made gains across the board” in Midwest).

130. See, e.g., James B. Kelleher, *Up to 100,000 Protest Wisconsin Law Curbing Unions*, REUTERS, Mar. 12, 2011, available at <http://www.reuters.com/article/2011/03/13/us-wisconsin-protests-idUSTRE72B2AN20110313>, archived at <http://perma.cc/4SQM-B6CS> (describing flight of Democrat senators to Illinois).

131. See *supra* Part II.D.

132. See Act of June 29, 2009, 2009 Wis. Act 28, § 34, 2009 Wis. Sess. Laws 179, 185.

comes to punishment than appointed commissioners.¹³³ There may indeed be some symbolic and practical value to giving locally elected judges some say over punishment, which promotes the perception, and perhaps also to some extent the reality, that punishment is grounded in the particular needs and values of the community most directly harmed by the offense.¹³⁴ Even granting this value, however, the democratic accountability argument does not provide strong support for hyper-determinacy. The argument suffers from at least four flaws.

First, the argument exaggerates the differences in the democratic accountability of judges and commissioners. On the one hand, local judicial elections have notoriously low turnouts and offer little useful information to aid voters' decisions.¹³⁵ As to sentencing specifically, a few cases in a judge's career may generate substantial media coverage, but the vast majority of a judge's sentencing decisions fly well below the public's radar screen. Democratic accountability for these decisions is far more theoretical than actual. On the other hand, while appointed commissioners may not face elections themselves, they are accountable to Governors, who are much more likely to experience a closely contested, closely covered, high-turnout race than is a trial-court judge. While the democratic accountability of commissioners may be indirect, it is real, and it sometimes affects practice in important ways. For instance, after the high rate of parole grants in Wisconsin became a matter of public controversy in the 1990s, the grant rate dropped

133. See, e.g., James E. Doyle, *Wisconsin Needs "Truth in Sentencing,"* 20 WIS. BAR CRIM. L. NEWS 17, 18 (1997); Pitsch, *supra* note 112.

134. I develop an argument along these lines in Michael M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123, 2152–55 (2010).

135. See, e.g., Diane S. Sykes, *The State of Judicial Selection in Wisconsin*, MARQ. LAW., Spring 2009, at 64, 69 ("Judicial campaigns in Wisconsin have historically suffered from a different sort of problem: Most were low-interest affairs in which the candidates had relatively modest budgets and limited opportunities to communicate with voters about their qualifications, experience, and judicial philosophy. The media paid little attention. . . . It could reasonably be argued that these old-style judicial elections provided so little information to the voting public as to make judicial elections nothing more than meaningless contests about name recognition."). Although elections for the Wisconsin Supreme Court have become much better-financed in recent years, *id.*, local judicial elections remain quiet affairs. For instance, in 2012, Milwaukee County elected ten Circuit Court judges, eight of whom ran unopposed. WIS. LEGISLATIVE REFERENCE BUREAU, 2013–2014 WISCONSIN BLUE BOOK 877 (2013). The highest vote total for any of the twelve candidates was less than 85,000. *Id.* By contrast, later in 2012, President Barack Obama won more than 332,000 votes in Milwaukee County. *Id.* at 920. Even Republican candidate Mitt Romney, who lost badly in Milwaukee County, received almost twice as many votes as the biggest judicial winner. *Id.*

precipitously.¹³⁶ To be sure, parole boards more commonly go about their business without much media scrutiny, but that is no different than the experience of the average trial-court judge.

Second, the local accountability of judges is a two-edged sword. While local communities undoubtedly have a legitimate interest in the way that crime is punished, so, too, does the state as a whole. After all, it is the state that promulgates the criminal code, the state in whose name a prosecution is conducted, and the state that will implement (and pay for) the sentence that is handed down. The state may quite appropriately wish to avoid wide county-to-county disparities in sentences imposed for the same crime and also to ensure that limited state correctional resources, particularly prison beds, are put to their best crime-reducing use. Locally accountable judges, however, have little incentive to prioritize such legitimate statewide interests. Indeed, there is even something of a free-rider problem in the disjunction between who imposes and who pays for a prison sentence: to local judges, state prisons are essentially a free resource, and, as with any free resource, we can expect this one to be over utilized.¹³⁷

Third, while some democratic accountability is properly viewed as an important source of legitimacy in our American governmental system, such accountability is not an absolute value that trumps all else in all situations. The fact that an official decision maker faces the voters from time to time may be *sufficient* to give some legitimacy to that official's decisions, but it is not *necessary*. Rather, our governmental system is premised on checks and balances involving diverse official actors whose legitimacy is grounded in different ways. Federal judges, for instance, get their legitimacy not from direct democratic accountability, but from the appointment and confirmation process and from observance of the procedural and jurisprudential principles that give judicial decision making its distinctive character. Likewise, the heads of executive agencies do not, in general, face the voters themselves, but gain legitimacy by virtue of their accountability to

136. See WIS. LEGISLATIVE FISCAL BUREAU, INFORMATIONAL PAPER #55: ADULT CORRECTIONS PROGRAM 6 (2001) (noting that 75% of male first releases from prison were to discretionary parole in 1997–1998, but only 33.5% in 1999–2000).

137. In theory, appellate review might help to ensure that locally elected sentencing judges attend to statewide interests, but in practice appellate courts across the country have almost uniformly resisted such a role. O'Hear, *supra* note 134, at 2125. Wisconsin is no exception. Michael M. O'Hear, *Appellate Review of Sentence Explanations: Learning From the Wisconsin and Federal Experiences*, 93 MARQ. L. REV. 751, 762–76 (2009).

elected chief executives and legislators, their observance of due process, and their subject-matter expertise.

Indeed, to claim that punishment should be exclusively in the hands of democratically accountable officials proves far too much. This would require, for instance, that the Secretary of Corrections and all of his prison wardens should also be elected, for the myriad decisions they make about the *quality* of the prisoner's experience—in what institution is the prisoner housed, how the prisoner is disciplined for rules infractions, how much contact the prisoner is allowed with family members, what rehabilitative programming and employment opportunities are made available, how much protection is provided from sexual abuse, and so forth—seem no less consequential than decisions about the *quantity* of time served. Once it is conceded that appointed officials may properly make some of the state's most important decisions relating to punishment, there is no obvious reason why they should be categorically excluded from the one particular decision of release date. Rather, it seems more natural to think that this decision, like so many others in our governmental system, should be subject to checks and balances involving multiple decision makers, each with their own strengths and weaknesses.

Finally, and perhaps most importantly in the present context, however strong one's doubts that a parole commission can be reconciled with basic democratic values, such doubts have little relevance to good conduct time. As structured in Wisconsin before 1984 and in my proposal in this Essay, good conduct time simply does not involve the same sort of exercise of official discretion that has been associated with parole. Rather, GCT credits are awarded in an automatic, formulaic way based on the relatively objective facts of a prisoner's good conduct. The formula is dictated by the democratically accountable legislature. Although underlying disciplinary decisions may embody some exercise of official discretion, the effect of these disciplinary decisions on an inmate's release date is much less direct and consequential than a parole commission's exercise of its plenary power over release.

In sum, democratic values do not clearly preclude even a traditional parole commission, and much less do they rule out a system of good conduct time.

B. Victim Rights

It is easy to see why some victims might object to indeterminacy. Some may feel it important to their recovery for the legal system to provide immediate, clear, definitive answers to their questions about

what exactly will be done to their victimizers. Some may feel that any lenience shown to an offender symbolically devalues the wrongfulness of the offense and their experience of victimization. Some may wish to take precautions before their victimizer is released and find it inconvenient—or even terrifying in some cases—not to know well in advance when the release will occur. Some risk serious trauma through an unexpected encounter with their offender on the outside.

These are all very legitimate concerns and should be taken seriously by policymakers.¹³⁸ Indeed, in light of these concerns, I would not favor a return to a general system of hyper-indeterminacy.

Yet, there remain at least three reasons not to go to the opposite extreme of hyper-determinacy in all cases. First, and most fundamentally, the criminal-justice system primarily exists to serve public interests, not the preferences of private victims. Publicly accountable prosecutors may decide whether and how to charge and plea-bargain cases independently of victim preferences. Judges may receive victim impact statements at sentencing, but are not bound by the victim's penal recommendations.¹³⁹ The system can and should try to support victim recovery, but this has never been thought a singular, overriding objective to the detriment of all other public interests.

Second, while many victims undoubtedly wish to maximize determinacy, this is not the situation facing all, and perhaps not even most, of the offenders sent to prison. For instance, in Wisconsin, more than fifty-seven percent of the men admitted to prison in 2011 and 2012 were sent there for one of the following reasons: operating while intoxicated, drug offenses, bail jumping/escape, or otherwise violating conditions of community supervision.¹⁴⁰ In such cases, it is often not

138. Survey results confirm that Wisconsin voters care about victim interests. In a July 2014 poll of registered voters in the state, more than eighty-one percent said that it was “very important” or “absolutely essential” for the criminal justice system to keep victims informed about their cases and help them to understand how the system works. MARQ. UNIV. LAW SCH. POLL, MARQUETTE LAW SCHOOL POLL—JULY 17–20, 2014, at Q28b (2014) [hereinafter 2014 TOPLINES], available at <http://law.marquette.edu/poll/wp-content/uploads/2014/07/MLSP22Toplines.pdf>, archived at <http://perma.cc/QMV6-FCAK>.

139. See WIS. STAT. § 972.14(3)(a) (2011–2012).

140. WIS. LEGISLATIVE FISCAL BUREAU, INFORMATIONAL PAPER 56: ADULT CORRECTIONS PROGRAM 41 (2013). Note that my figure includes those in the “unsentenced” category, which “generally includes admissions to the prison system of individuals who are alleged to have violated their probation, parole, or extended supervision, and offenders serving time in prison as an alternative to the revocation of probation, parole, or extended supervision.” *Id.* at 10.

clear that there is any particular victim who has interests distinct from those of the general public. Moreover, even in cases that do have discrete, identifiable victims, it is important to remember that victim experiences and preferences are far from monolithic, and may evolve over time. Many property offenses, of course, are impersonal in nature and involve corporate victims; here, concerns about emotional trauma and affronts to human dignity seem out of place. Even individuals who have been personally victimized may have attitudes that are not wholly punitive;¹⁴¹ for instance, some may hope above all else that something positive will come out of the terrible thing that has happened to them and be quite open to indeterminate dispositions that support offender rehabilitation and eventual reintegration into the community. In any event, in light of the great diversity of victim experiences and preferences, it would be a mistake in the name of victims to adopt a uniform rule of hyper-determinacy for all cases. Governor Thompson's original proposal that TIS be limited to cases of *violent crime*¹⁴² seems much closer to the mark, although even that may have been an unduly rigid approach.

Third, and finally, the sorts of victim interests that are said to support determinacy may be accommodated reasonably well within a system of limited good conduct time. While we may easily appreciate the consternation of the victim who is told, "Your offender may be released at any time in the next twelve years," it seems a very different matter to say, "You may be confident that your offender will spend the next eight years behind bars and possibly even an additional four beyond that." Concerns may be further mitigated if each interested victim is provided with periodic updates regarding his offender's accrual or loss of good conduct time and current projected release date.¹⁴³ This

141. See, e.g., Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 271 (2005) (noting diversity of reasons given by victims for participating in victim-offender mediation, including "to help the offender change behavior").

142. See *supra* Part II.C.

143. The DOC already makes release date information available through its public website. *General Public-Offender Search*, WIS. DEPARTMENT CORRECTIONS, <http://offender.doc.state.wi.us/lop/> (last visited Nov. 8, 2014), *archived at* <http://perma.cc/7MUM-CQ3Y>. The DOC also provides notification to registered victims of changes in inmate status through its VOICE for Victims program. *Notification Services*, WIS. DEP'T CORRECTIONS, <http://doc.wi.gov/victim-resources/notification-services> (last visited Nov. 8, 2014), *archived at* <http://perma.cc/552A-BWPV>. There seems no reason that good conduct time information could not be added to these services.

kind of system would provide victims with ample opportunity to prepare for release. It would also diminish the sense of an offense-denigrating “early” release. Rather than an after-the-fact exercise in lenience, the operation of good conduct time can and should be viewed as an integral part of the sentence, with its purpose and parameters clearly laid out by the judge in open court.¹⁴⁴ If this were accomplished, any arguments against GCT based on victim rights would lose most or all of their force.

C. Public Safety

Proponents of hyper-determinacy in Wisconsin have a curiously equivocal stance when it comes to public safety. On the one hand, they have not hesitated to play on public fears of violent predators. For instance, when notorious child-killer Gerald Turner was paroled in the late 1990s, Governor Thompson declared that this was “the best example yet of why Wisconsin needs the truth in sentencing initiative [he] proposed.”¹⁴⁵ Similarly, critics of Governor Doyle asserted that his 2009 reforms allowed “hundreds of high-risk inmates to get out of jail.”¹⁴⁶ Yet, at other times, prominent TIS proponents like Scott Walker have asserted, “Truth-in-sentencing wasn’t necessarily to make sentences longer, it was to make them certain.”¹⁴⁷ As a result of concerns about the potential budgetary impact of TIS, proponents most heavily emphasized the process values of democratic accountability and finality for victims, and often downplayed claims of enhanced severity.¹⁴⁸ Proponents liked to hold out the hope that judges would correct for the loss of parole by proportionately reducing the length of their imposed sentences.¹⁴⁹ But, of course, if this happened, then the Gerald Turners

144. I have suggested some specific language judges might use in O’Hear, *supra* note 1, at 225–26.

145. David Callender, *Gov Talks Tough on Sentencing*, CAP. TIMES, Jan. 31, 1998, at 1A, available at 1998 WLNR 2463935.

146. Marlaire, *supra* note 122.

147. Sarah Wyatt, *Lawmakers at Odds Over Prison Time: Budget Bills Differ on Truth in Sentencing*, MILWAUKEE J. SENTINEL, Apr. 7, 2002, at 2B, available at 2002 WLNR 3626291 (internal quotation marks omitted).

148. See, e.g., Matt Pommer, *Huge Savings Claimed for “Truth in Sentencing,” but Prison Expert Dickey Calls Numbers “Fiction,”* CAP. TIMES, June 4, 1997, at 4A, available at 1997 WLNR 2411960 (quoting Scott Walker as saying, “While it’s still very debatable whether truth in sentencing will require any additional money, how can you put a price tag on peace of mind for victims and their families? It’s invaluable . . .” (internal quotation marks omitted)).

149. See, e.g., Flaherty, *supra* note 78 (“Assembly Speaker Scott Jensen, R-Waukesha, said costs shouldn’t rise too much because judges will adjust their sentences to match the amount of time they believe criminals should actually serve in prison.”).

of the world would not spend one extra day in prison under the new regime.

In truth, there is no necessary relationship between determinacy and severity, and hence no necessary relationship between determinacy and public safety. There is nothing to stop judges from increasing or decreasing their imposed sentences as determinacy is increased or decreased so as to maintain a more-or-less constant level of incapacitation for high-risk offenders, especially if indeterminacy functions transparently within a relatively narrow range at the end of the prison term.¹⁵⁰

There are two potential wrinkles with the introduction of a new good conduct time system, as I propose. First, if GCT is made available to already-sentenced inmates, then the sentence cannot take account of the possible credits. In light of this concern, as well as a deference to the reasonable expectations of victims, the retroactivity of any new GCT system should be strictly limited.

A second wrinkle is this: while judges could offset the anticipated effect of GCT in most cases, they would not be able to do so in those cases in which they would like the defendant to serve a maximum or near-maximum prison term. Consider, for instance, an armed robber with a long history of prior convictions. A judge might think that such a defendant represents such a grave threat to public safety that he should be incapacitated for as long as possible. The statutory maximum period of initial confinement for armed robbery, a Class C felony,¹⁵¹ is twenty-five years.¹⁵² However, with the introduction of good conduct time, a judge could no longer guarantee that the defendant would actually serve twenty-five years before release; with maximum good conduct time, in fact, the defendant might get out in sixteen years and eight months (that is, two-thirds of twenty-five years).

This limitation should not be seen as a significant threat to public safety. First, even with a potential one-third reduction, maximum sentences in Wisconsin remain very high by any reasonable standard. Indeed, in many cases these maximums still reflect the impact of the

150. See, e.g., Kevin A. Wright & Jeffrey W. Rosky, *Too Early Is Too Soon: Lessons from the Montana Department of Corrections Early Release Program*, 10 CRIMINOLOGY & PUB. POL'Y 881, 888 (2011) (noting that some Montana judges changed their sentencing practices so as to make offenders ineligible for controversial early release program).

151. WIS. STAT. § 943.32(2) (2011–2012).

152. *Id.* § 973.01(2)(b)(3).

across-the-board increases of 1998.¹⁵³ Consider again the example of more than sixteen years in prison for armed robbery. In most of the rest of the world, sentences of even ten years in prison are exceedingly rare.¹⁵⁴ In Germany, fifteen years in prison is viewed as such a long time that even life-sentenced inmates must be considered for release at that point.¹⁵⁵ Indeed, even in Wisconsin up to 1994, armed robbers were subject to *mandatory* release at thirteen years and four months.¹⁵⁶ If anyone doubts that sixteen years in prison is likely to make a big difference in the public-safety threat posed by a robber, they should simply consider from their own life experiences the changes and maturation that occur in most people between the ages of twenty-one (the average age of sentenced armed robbers in Wisconsin¹⁵⁷) and thirty-seven.¹⁵⁸

Second, in high-risk cases, there is good likelihood that prison terms can be lengthened through the application of special sentence-enhancement statutes or the use of consecutive sentences on multiple counts. Indeed, the very consideration that would warrant a finding of high risk—that is, repeated criminality—means that recidivism-based enhancers are more likely to apply and that multiple counts are more

153. The Criminal Penalties Study Committee, which proposed the new penalty classification scheme that was enacted in the 2002 TIS reform law, adopted as a general rule that maximum initial terms of confinement should conform to mandatory release dates in the pre-TIS system. CRIMINAL PENALTIES STUDY COMM., FINAL REPORT 21–22 (1999). However, the Committee recommended upward adjustments to this baseline for many crimes, including such important crimes as sexual assault, sexual assault of a child, and robbery. *Id.* at 26–29.

154. See, e.g., Michel Tonry, Sentencing Reform in America, 1975–2025, at tbl.1.3 (2013) (unpublished manuscript, copy on file with author) (showing that sentences greater than 120 months occur in no more than 1.1% of cases in seven western European nations).

155. Dirk van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 FED. SENT'G REP. 39, 40 (2010).

156. See WIS. STAT. § 943.32(2) (1993–1994) (classifying armed robbery as Class B felony); Act of April 6, 1994, 1993 Wis. Act 194, § 9, 1993 Wis. Sess. Laws 919, 920 (raising maximum for Class B felony from twenty to forty years). Under the old system of mandatory release, *supra* Part II.B, an armed robber receiving the pre-1994 maximum sentence of twenty years would have subject to mandatory release at the two-thirds mark of the sentence, or thirteen years and four months.

157. BRENDA R. MAYRACK, WIS. SENTENCING COMM'N, RACE & SENTENCING IN WISCONSIN: SENTENCE AND OFFENDER CHARACTERISTICS ACROSS FIVE CRIMINAL OFFENSE AREAS 24 (2007).

158. See, e.g., Catherine Lebel & Christian Beaulieu, *Longitudinal Development of Human Brain Wiring Continues from Childhood Into Adulthood*, 31 J. NEUROSCIENCE 10937, 10943 (2011) (discussing MRI evidence of continued brain development of young adults well into their twenties).

likely to be available. Consider once again the armed robber. If he has a prior felony conviction in the past five years, then his maximum term of imprisonment would increase by six years.¹⁵⁹ If he has two prior convictions for armed robbery or any other “serious” felonies, then he would be subject to a life term.¹⁶⁰ Moreover, if he has a prior felony conviction and carried a firearm in the present armed robbery, then he would be guilty of another felony (felon in possession) for which he would face the possibility of a consecutive sentence.¹⁶¹ Additional counts and consecutive sentences might also be available for multiple victims, for nonconsensual entry into a building in connection with the robbery, for sexual assault in connection with the robbery, for injury to a law enforcement officer in connection with the arrest, and in many other plausible circumstances. Assuming that prosecutors make full use of the charging tools available to them in the most serious cases, it should be quite unusual for judges to be limited to a twenty-five-year sentence (less good conduct time) when they reasonably believe that something longer is required for public safety.

Third, it is important to bear in mind that the one-third reduction in prison time is not automatic, but must be earned through good conduct. For many high-risk inmates, the same characteristics that would make them prone to criminality, e.g., impulse-control deficits, would also tend to make disciplinary infractions more likely behind bars, and hence lead to the denial or loss of GCT.¹⁶²

159. WIS. STAT. § 939.62(1)–(2) (2011–2012).

160. *Id.* § 939.62(2m).

161. *Id.* § 941.29.

162. See Richard Tewksbury, David Patrick Connor & Andrew S. Denney, *Disciplinary Infractions Behind Bars: An Exploration of Importation and Deprivation Theories*, 39 CRIM. JUST. REV. 201, 202 (2014) (“Regardless of the violent or nonviolent nature of disciplinary infractions, inmates engaging in any type of institutional misconduct are more likely to return to a prison upon release.”). There has been some debate in the literature over whether there is a relationship between a tendency to engage in serious criminal misconduct and a tendency to violate low-level prison rules that prohibit behavior that would be lawful outside of prison. SCOTT D. CAMP, GERALD G. GAES, NEAL P. LANGAN & WILLIAM G. SAYLOR, FED. BUREAU OF PRISONS, *THE INFLUENCE OF PRISONS ON INMATE MISCONDUCT: A MULTILEVEL INVESTIGATION 5* (2003). However, recent research has found similarities between inmates who commit serious infractions and inmates who commit low-level infractions. *Id.* Additionally, a recent meta-analysis of sixty-eight studies of “what works” in reducing violations of prison rules found that “programs that were most effective in reducing prison misconducts also generated lower recidivism rates . . . in the community” Sheila A. French & Paul Gendreau, *Reducing Prison Misconducts: What Works!*, 33 CRIM. JUST. & BEHAV. 185, 210 (2006). The authors conclude that their analysis “reinforces the view that prison misconduct behavior is a reasonable proxy for antisocial behavior in the

Fourth, it is also important to bear in mind that release based on good conduct time will not be to complete liberty in the community, but to the period of “extended supervision” (ES) that must be served at the end of a prison term under TIS.¹⁶³ ES may include many conditions set by the sentencing judge and the DOC,¹⁶⁴ the violation of which could result in a swift return to custody.¹⁶⁵

Fifth, notwithstanding the operation of good conduct time, sexually violent offenders—probably the group of offenders who inspire the most intense public-safety concerns—would still be subject to indefinite civil commitment upon their “release” from prison.¹⁶⁶ Indeed, the state has used this authority aggressively over the past two decades, with hundreds of offenders institutionalized as “sexually violent persons” and only seventy-five actually succeeding in ever obtaining discharge from inpatient commitment.¹⁶⁷

Sixth, as an additional safeguard, a new good-time program could include an override feature permitting the DOC to continue to hold inmates notwithstanding their good-time credits if there is some specific, persuasive reason to think that their good conduct in prison is not indicative of likely success in avoiding new offenses after release. A determination to this effect might be based, for instance, on such considerations as a significant, unaddressed, crimogenic mental health issue, such as drug addiction; a failure to take advantage of work, education, and programming opportunities in prison; and the absence of a viable plan to obtain employment and housing after release. Such an override feature should, of course, include appropriate procedural safeguards and place a burden of proof on the DOC.

Seventh, and most fundamentally, the facile assumption that longer incarceration means greater public safety must be rejected. As we’ve moved beyond the “nothing works” era of the late twentieth century,¹⁶⁸

community.” *Id.* In the same vein, a recent study of more than 16,000 released Minnesota prisoners found that institutional discipline was a statistically significant predictor of recidivism. Grant Duwe & Valerie Clark, *Blessed Be the Social Tie That Binds: The Effects of Prison Visitation on Offender Recidivism*, 24 CRIM. JUST. POL’Y REV. 271, 272, 285 (2013).

163. WIS. STAT. § 973.01(2) (2011–2012).

164. *Id.* § 302.113(7).

165. *Id.* § 302.113(8m)–(9).

166. *See generally* WIS. STAT. ch. 980 (2011–2012).

167. WIS. LEGISLATIVE FISCAL BUREAU, INFORMATIONAL PAPER 54: CIVIL COMMITMENT OF SEXUALLY VIOLENT PERSONS 16–17 (2013).

168. *See, e.g.*, WASH. STATE INST. FOR PUB. POLICY, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS,

Americans have increasingly come to recognize that the *qualitative* dimensions of incarceration may be just as important as the *quantitative* when it comes to public safety. In one recent survey, for instance, a full eighty-seven percent of respondents, including eighty-five percent of Republicans, agreed that “[i]t does not matter whether a non-violent offender is in prison for 18 or 24 or 30 months What really matters is that the system does a better job of making sure that when an offender does get out, he is less likely to commit another crime.”¹⁶⁹ A GCT program can support the rehabilitative mission of the prison system by giving prisoners more hope and more incentive to take advantage of positive opportunities behind bars;¹⁷⁰ by promoting institutional security and order;¹⁷¹ and by facilitating the movement of low-risk inmates out of prison, which can alleviate dangerous and dispiriting overcrowding¹⁷² and save money that can then be reinvested in expanded and improved programming for offenders. Indeed, across the country, many states are now discovering that they can reduce recidivism, and hence crime rates, through just such a “justice

AND CRIME RATES 1 (2006) (“We find that if Washington successfully implements a moderate-to-aggressive portfolio of evidence-based options, a significant level of future prison construction can be avoided, taxpayers can save about two billion dollars, and crime rates can be reduced.”); French & Gendreau, *supra* note 162, at 189 (noting that empirical literature on “what works” has identified certain principles of correctional treatment that have produced “impressive reductions in recidivism”); Aaron Knapp, *Shaving Off Time Served: Officials Say Program Allowing Early Release from Prison Getting Results*, J. TIMES, Dec. 31, 2013, at A1 (noting lower recidivism rates of Wisconsin prisoners who have gone through state’s Earned Release Program than for eligible inmates who did not participate).

169. PEW CTR. ON THE STATES, PUBLIC OPINION ON SENTENCING AND CORRECTIONS POLICY IN AMERICA 5 (2012) [hereinafter PEW 2012].

170. See, e.g., LYNNE GOODSTEIN, U.S. DEP’T OF JUSTICE, DETERMINATE SENTENCING AND THE CORRECTIONAL PROCESS: A STUDY OF THE IMPLEMENTATION AND IMPACT OF SENTENCING REFORM IN THREE STATES—EXECUTIVE SUMMARY 37 (1984) (noting increased program participation in Illinois prisons after implementation of new GCT program that required program participation for full credit); Nora V. Demleitner, *Good Conduct Time: How Much and For Whom? The Unprincipled Approach of the Model Penal Code: Sentencing*, 61 FLA. L. REV. 777, 788 (2009) (noting “dramatic[]” increase in number of inmates participating in federal drug abuse program after Congress changed law to permit a one-year credit for successful completion).

171. See French & Gendreau, *supra* note 162, at 207 (discussing findings of meta-analyses that behavioral programs have proven effective in reducing prison misconducts); Beth M. Huebner, *Administrative Determinants of Inmate Violence: A Multilevel Analysis*, 31 J. CRIM. JUST. 107, 109 (2003) (noting research showing that “inmates involved in educational and vocational programming or work are less likely to assault prison staff or inmates”).

172. Some empirical research has found a relationship between crowding and inmate misconduct. CAMP ET AL., *supra* note 162, at 22.

reinvestment” strategy.¹⁷³ With such experiences in mind, there is no reason to assume that a significant overall reduction in incarceration—which may or may not actually result from the implementation of a good-time program¹⁷⁴—would diminish public safety; indeed, just the opposite may occur.¹⁷⁵

IV. PUBLIC SUPPORT FOR INDETERMINACY AND GOOD CONDUCT TIME

Surveys in both Wisconsin and the nation as a whole reveal that public attitudes toward sentencing are much less rigidly punitive than is sometimes supposed. Indeed, large majorities reject hyper-determinacy and favor more flexible approaches to prisoner release. In this Part, I first summarize the Wisconsin data and then discuss complementary national findings.

A. Support for Indeterminacy in Wisconsin

The Marquette University Law School Poll has conducted regular telephone surveys of Wisconsin voters since 2012.¹⁷⁶ The surveys of July 2012, July 2013, and July 2014 focused particularly on sentencing-related issues and, as detailed below, produced remarkably consistent results. The margin of error in each of these surveys was less than plus or minus four percentage points.¹⁷⁷

173. See generally COUNCIL FOR STATE GOV'TS JUSTICE CTR., *supra* note 127.

174. The national data make clear that indeterminacy provides no guarantee of reduced imprisonment. Indeed, the most comprehensive studies have found that parole is associated with *higher*, not lower, imprisonment rates. See Don Stemen & Andres F. Rengifo, *Policies and Imprisonment: The Impact of Structured Sentencing and Determinate Sentencing on State Incarceration Rates, 1978–2004*, 28 JUST. Q. 174, 190 (2011). However, GCT may operate differently than other forms of indeterminacy in that it relies less centrally on official discretion. Cf. *id.* at 194 (asserting that eliminating discretionary parole may lead to lower imprisonment rates because doing so “insulates release decisions from politics, emotion, and the social forces that may lead to higher incarceration rates over time”).

175. See Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, in 38 CRIME AND JUSTICE: A REVIEW OF RESEARCH 115, 178 (Michael Tonry ed., 2009) (“[A] key finding of our review is that the great majority of studies point to a null or criminogenic effect of the prison experience on subsequent offending.”).

176. More information about the Poll is available through its website *Marquette University Law School Poll*, MARQ. U. L. SCH. POLL, <https://law.marquette.edu/poll/> (last visited Nov. 8, 2014), archived at <http://perma.cc/G8WS-4YX7>.

177. Complete results and data from each survey can be found at *Results & Data*, MARQ. U. L. SCH. POLL, <https://law.marquette.edu/poll/results-data/> (last visited Nov. 8, 2014), archived at <http://perma.cc/LAH5-HGM3>. The 2014 Poll was comprised of 804 Wisconsin registered voters. *Methodology: Marquette University Law School Poll, July 2014*,

Although none of the three surveys asked directly about good conduct time, the results nonetheless strongly suggest that most Wisconsin voters would be open to a well-designed GCT proposal. Some of the most pertinent results included strong support for each of the following statements:

- “Criminals who have genuinely turned their lives around deserve a second chance”: 85% of Wisconsin voters agree, while only 10% disagree.¹⁷⁸
- “If the prison system did more to foster rehabilitation, Wisconsin would be a safer place”: 70% agree, 20% disagree.¹⁷⁹
- “Wisconsin should recognize prisoners’ rehabilitative accomplishments by awarding credits toward early release”: 67% agree, 24% disagree.¹⁸⁰
- In determining a prisoner’s release date, it is important to take into account his “record of good behavior in prison”: 88% say either “very important” or “somewhat import,” while only 11% say “not important.”¹⁸¹

MARQ. U. L. SCH. POLL, <http://law.marquette.edu/poll/wp-content/uploads/2014/07/MLSP22Methodology.pdf>, archived at <http://perma.cc/AZM2-XH2E>. Both landline (sixty-seven percent of the sample) and cell phone (thirty-three percent of the sample) numbers were included in the random digit dialing technique. *Id.* The margin of error for a single percentage in a sample of 804 respondents is plus or minus 3.5 percentage points. *Id.*

The 2012 and 2013 Polls were administered in the same manner. The 2013 Poll was comprised of 713 Wisconsin registered voters and had a margin of error of 3.7 percentage points. *Methodology: Marquette University Law School Poll, July 2013*, MARQ. U. L. SCH. POLL, available at <https://law.marquette.edu/poll/wp-content/uploads/2013/07/MLSP17Methodology.pdf>, archived at <http://perma.cc/L3H8-XA9C>. The 2012 Poll was comprised of 697 registered voters and had a margin of error of plus or minus 3.8 percentage points. *Methodology: Marquette University Law School Poll, July 5–8, 2012*, MARQ. U. L. SCH. POLL, available at https://law.marquette.edu/poll/wp-content/uploads/2012/09/MLSP8_Methodology.pdf, archived at <http://perma.cc/TCM4-9TYF>.

178. MARQ. UNIV. LAW SCH. POLL, MARQUETTE LAW SCHOOL POLL TOPLINES—JULY 5–8, 2012, at Q26a (2012) [hereinafter 2012 TOPLINES], available at https://law.marquette.edu/poll/wp-content/uploads/2012/09/MLSP8_Toplines.pdf, archived at <http://perma.cc/9A5S-2P3Z>.

179. *Id.* at Q26b.

180. *Id.* at Q26c.

181. MARQ. UNIV. LAW SCH. POLL, MARQUETTE LAW SCHOOL POLL, JULY 15–18, 2013, at Q24 (2013) [hereinafter 2013 TOPLINES], available at <https://law.marquette.edu/poll/results-data/>, archived at <http://perma.cc/8F6B-WK2C>.

Perhaps most remarkably, we found that 55% of voters in 2012,¹⁸² and 54.5% of voters in 2013,¹⁸³ agreed that “[o]nce a prisoner has served at least half of his term, he should be released from prison and given a less costly form of punishment if he can demonstrate that he is no longer a threat to society.”¹⁸⁴ If adopted, such a reform would at least arguably be a far more radical departure from hyper-determinacy than the Doyle reforms of 2009–2011.¹⁸⁵ Moreover, in 2014, an even higher percentage of respondents (66.4%) agreed with a more moderate version of the statement, calling for potential release at the two-thirds mark of the prison term.¹⁸⁶

To be sure, we also found substantial support for truth in sentencing: sixty-three percent in 2012¹⁸⁷ and sixty-six percent in 2013.¹⁸⁸ But, given comparable levels of support for various forms of indeterminacy, it is clear that not all TIS supporters equate TIS with hyper-determinacy. Recall, in fact, that many states have adopted “truth in sentencing” laws that are not nearly as rigid as Wisconsin’s.¹⁸⁹ Indeed, for purposes of our survey, we defined “truth in sentencing” by reference to the abolition of parole,¹⁹⁰ so much of the popular support for TIS may result from particular negative associations with parole in Wisconsin,¹⁹¹ rather than from a more generalized opposition to indeterminacy.

Support for more flexible approaches likely comes in part from a widespread belief that the correctional system can and should do more to promote prisoner rehabilitation. Again, seventy percent agreed that “[i]f the prison system did more to foster rehabilitation, Wisconsin would be a safer place.”¹⁹² Similarly, 74.1% of respondents indicated that it was “very important” or “absolutely essential” for the criminal-justice system to rehabilitate offenders and help them to become

182. 2012 TOPLINES, *supra* note 178, at Q26g.

183. 2013 TOPLINES, *supra* note 181, at Q19.

184. 2012 TOPLINES, *supra* note 178, at Q26g.

185. *See supra* Part II.D.

186. 2014 TOPLINES, *supra* note 138, at Q30.

187. 2012 TOPLINES, *supra* note 178, at Q25c.

188. 2013 TOPLINES, *supra* note 181, at Q23.

189. *See* SABOLET AL., *supra* note 5, at 7–9.

190. MARQ. UNIV. LAW SCH. POLL, MARQUETTE LAW SCHOOL POLL—JULY 15–18, 2013, at Q21 (2013), available at <https://law.marquette.edu/poll/wp-content/uploads/2013/07/MLSP17Instrument.pdf>, archived at <http://perma.cc/NA9S-8W3C>.

191. *See supra* Part II.C.

192. 2012 TOPLINES, *supra* note 178, at Q26b.

contributing members of society.¹⁹³ We have indeed come a long way from the era of “nothing works.”

Support for flexibility also likely comes in part from a desire for the state to do a better job of reserving expensive prison beds for the truly dangerous. Note, for instance, the way that the question about halfway release was framed: “once a prisoner has served at least half of his term, he should be released from prison and given *a less costly form of punishment . . .*” Further underscoring the importance of cost considerations was the high level of support we found for this statement:

Prisons are a government spending program, and just like any other government program, they should be put to the cost-benefit test. States should analyze their prison populations and figure out if there are offenders in expensive prison cells who can be safely and effectively supervised in the community at a lower cost.¹⁹⁴

More than fifty-five percent of Wisconsin voters indicated that the foregoing better reflected their views than this contrasting statement: “People who commit crimes belong behind bars, end of story. It may cost a lot of money to run prisons, but it would cost society more in the long run if more criminals were on the street.”¹⁹⁵

Yet, there is also reason to believe that much of the support for flexibility derives from moral considerations, and not just instrumental objectives like reducing recidivism and saving money. For instance, a full fifty-eight percent of our respondents indicated that recognizing rehabilitative accomplishments with earlier release would be “the right thing to do” even if it did not reduce crime.¹⁹⁶ Similarly, fifty-four percent of our respondents felt that “[e]ven if truth in sentencing does not reduce crime, it would still be the right thing to do.”¹⁹⁷ Additionally, we found no statistically significant relationship between fear of crime and support for either TIS or halfway release.¹⁹⁸ Our results were thus consistent with earlier research indicating that public support for some

193. 2014 TOPLINES, *supra* note 138, at Q28c.

194. MARQ. UNIV. LAW SCH. POLL, *supra* note 190, at Q19, Q20.

195. *Id.*; 2013 TOPLINES, *supra* note 181, at Q20.

196. 2012 TOPLINES, *supra* note 178, at Q26d.

197. *Id.* at Q25d.

198. O’Hear & Wheelock, *supra* note 10 (manuscript at 29, 42).

penal policies is influenced more by moral-symbolic than instrumental considerations.¹⁹⁹

Although our Wisconsin data point to widespread public receptivity to more flexible penal policies, they also highlight some areas of sensitivity that must be taken into account by reformers. Simply put, many Wisconsin voters are skeptical that there are large numbers of prisoners who ought at present to be released. We found that fifty-eight percent of our respondents disagreed with the statement that “[m]any of the people who are locked up in prison do not deserve to be there.”²⁰⁰ Moreover, only thirty-seven percent agreed, and forty-eight percent disagreed, with the statement that “[m]any of the people who are locked up in prison could be safely released without endangering the community.”²⁰¹ These views may be related to the common perception that sentences tend to be overly lenient, especially for recidivists.²⁰² To be sure, earlier research makes clear that these sorts of views are based on misinformation about the criminal justice system—incorrect generalizations from the very small percentage of cases that are covered in the media.²⁰³ In principle, then, it seems possible that some of the skepticism might be overcome through a public education campaign. Still, reservations about the justice and safety of a large-scale program of early releases might lend support to reform approaches whose impact will unfold only at relatively slow pace, giving the public some reassurance that releases will not be indiscriminate or overwhelm community-supervision systems.

B. Support for Indeterminacy in the Nation as a Whole

A multitude of recent national polls help to confirm and further illuminate results from the Marquette Law School Poll in Wisconsin. Although these polls are national in nature, it should be recalled that Wisconsin is a “purple” state that sits somewhere close to the nation’s

199. Tom R. Tyler & Robert Boeckmann, *Three Strikes and You Are Out, But Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 LAW & SOC’Y REV. 237, 255 (1997).

200. 2012 TOPLINES, *supra* note 178, at Q27d.

201. *Id.* at Q27e.

202. We found that sixty-two percent agree that the “courts are too lenient with criminals,” while nearly eighty-four percent agree that we “need tougher prison sentences for repeat offenders.” 2013 TOPLINES, *supra* note 181, at Q16–17.

203. TONRY, *supra* note 100, at 34–36.

political center of gravity.²⁰⁴ Thus, Wisconsin's public opinion in the highly politicized field of criminal justice is not likely much different from what one might find in the nation as a whole.

National surveys find considerable interest in reducing the size of the U.S. prison population. The Pew Center, for instance, found that forty-five percent of respondents believe that we lock up too many people today, as against only twenty-eight percent who believe that the prison population is "about right" and thirteen percent who think we lock up too few.²⁰⁵

In part, these attitudes may reflect fiscal concerns. For instance, seventy-eight percent said that it would be acceptable to reduce prison time for low-risk, nonviolent offenders in order to close budget deficits.²⁰⁶ However, it may be that the public's desire is less to reduce corrections spending per se than to reallocate the dollars in ways that more cost-effectively protect public safety. Consider these results:

- Eighty-four percent agree that "[s]ome of the money that we are spending on locking up low-risk, non-violent inmates should be shifted to strengthening community corrections programs like probation and parole."²⁰⁷

204. Wisconsin was among the nation's most hotly contested states in both the 2000 and 2004 Presidential elections. In 2000, Democrat Al Gore defeated Republican George W. Bush by fewer than 6,000 votes out of more than 2.5 million cast. WIS. LEGISLATIVE REFERENCE BUREAU, 2001–2002 WISCONSIN BLUE BOOK 936 (2001). In 2004, Democrat John F. Kerry edged out Bush by barely 11,000 votes out of nearly three million cast. WIS. LEGISLATIVE REFERENCE BUREAU, 2005–2006 WISCONSIN BLUE BOOK 936 (2005). Although Barack Obama won more convincing victories in 2008 and 2012, neither Republican Senator Ron Johnson in 2010 nor Democratic Senator Tammy Baldwin in 2012 managed to win even fifty-two percent of the vote. WIS. LEGISLATIVE REFERENCE BUREAU, 2013–2014 WISCONSIN BLUE BOOK 880, 920 (2013); WIS. LEGISLATIVE REFERENCE BUREAU, 2011–2012 WISCONSIN BLUE BOOK 882 (2011); WIS. LEGISLATIVE REFERENCE BUREAU, 2009–2010 WISCONSIN BLUE BOOK 932 (2010). In gubernatorial politics, Republican Scott Walker defeated Democrat Tom Barrett by about 125,000 votes out of more than two million cast in 2010, and then again by about 170,000 out of nearly 2.5 million in a nationally prominent recall election in 2012. WIS. LEGISLATIVE REFERENCE BUREAU, 2013–2014 WISCONSIN BLUE BOOK, *supra*, at 912; WIS. LEGISLATIVE REFERENCE BUREAU, 2011–2012 WISCONSIN BLUE BOOK, *supra*, at 912. Of course, the facts that Republican Walker and Democrat Obama both won in 2012, and that Wisconsin is represented in the U.S. Senate by both Republican Johnson and Democrat Baldwin, demonstrate the closely divided character of the state's politics.

205. PEW 2012, *supra* note 169, at 2.

206. *Id.* at 4.

207. *Id.* at 1.

- Eighty-five percent would accept reducing prison time for low-risk nonviolent offenders in order to reinvest in alternatives.²⁰⁸
- Eighty-seven percent agree that “[p]risons are a government program, and just like any other government program they need to be put to the cost-benefit test to make sure taxpayers are getting the best bang for their buck.”²⁰⁹
- Sixty percent say that sending fewer nonserious offenders to prison may be justified by the availability of alternatives that decrease reoffending.²¹⁰
- Sixty-three percent disfavor mandatory sentencing laws for nonviolent drug crimes, and sixty-seven percent say that the government should focus on providing treatment for drug users rather than prosecuting them.²¹¹

Implicit in these findings are beliefs that rehabilitation is a feasible goal for many offenders. These views are more explicit in a number of other findings:

- Fifty-eight percent say that prevention or rehabilitation should be the top priority for dealing with crime, as opposed to only nineteen percent who favor longer sentences and more prisons.²¹²
- Seventy-nine percent agree that “under the right conditions, many offenders can turn their lives around.”²¹³
- Sixty-one percent said it was “very important” to put nonviolent offenders in treatment/job/education programs.²¹⁴

208. *Id.* at 4.

209. *Id.* at 7.

210. CHRISTOPHER HARTNEY & SUSAN MARCHIONNA, NAT’L COUNCIL ON CRIME & DELINQUENCY, ATTITUDES OF US VOTERS TOWARD NONSERIOUS OFFENDERS AND ALTERNATIVES TO INCARCERATION 8 (2009).

211. PEW RESEARCH CTR., AMERICA’S NEW DRUG POLICY LANDSCAPE: TWO-THIRDS FAVOR TREATMENT, NOT JAIL, FOR USE OF HEROIN, COCAINE 1 (2014).

212. PRINCETON SURVEY RESEARCH ASSOCS. INT’L FOR THE NAT’L CTR FOR STATE COURTS, *supra* note 104, at 20.

213. *Id.* at 22 (internal quotation marks omitted).

214. *Id.* at 38.

For nonviolent offenders, in particular, the public seems open to early release in a number of circumstances. The Pew Center found that eighty-six percent would accept reduced prison time for completion of programs, eighty-three percent for good behavior in prison, and seventy-seven percent for age or illness.²¹⁵

V. GOOD CONDUCT TIME IN OTHER JURISDICTIONS

A review of the GCT laws in other jurisdictions helps to confirm that this particular form of indeterminacy has been found broadly acceptable in the United States, and also serves to highlight some of the specific policy decisions that must be made if Wisconsin chooses to reinstitute good conduct time. This Part begins with a general overview of the laws of other states and then focuses on a few jurisdictions in more detail.

A. Overview

Good conduct time has proven a remarkably durable feature of American penal policy. As noted above, good conduct time made its U.S. appearance more than one hundred and sixty years ago, and was established in all forty-six states by 1910.²¹⁶ More than seventy years later, in 1982, Professor James Jacobs reported that good conduct time was still employed in forty-six states.²¹⁷ Of course, Wisconsin would eliminate good conduct time just two years later, and the Badger State was hardly alone in curtailing or eliminating good conduct time in that time period. My 2012 study, however, found GCT still in place in twenty-nine states, a clear majority.²¹⁸ Moreover, there has been a recent trend in favor of GCT, with at least ten states expanding

215. PEW 2012, *supra* note 169, at 4.

216. *See supra* Part II.A.

217. James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 226 (1982).

218. O'Hear, *supra* note 1, at 197. This is just the number of states with good conduct time for inmates in state prisons. If one also included states that permitted good conduct time for inmates in local jails, the number would be higher. *See, e.g.*, WIS. STAT. § 302.43 (2011–2012) (“Every inmate of a county jail is eligible to earn good [conduct] time in the amount of one-fourth of his or her term for good behavior if sentenced to at least 4 days . . .”). Note also that my count distinguishes good conduct time, which provides credits for good behavior, from earned time, which provides credits for participation in certain rehabilitative programs. O'Hear, *supra* note 1, at 197 nn.10–11. *See generally* ALISON LAWRENCE, NAT'L CONFERENCE OF STATE LEGISLATURES, CUTTING CORRECTIONS COSTS: EARNED TIME POLICIES FOR STATE PRISONERS (2009).

eligibility or otherwise liberalizing their programs since 2003.²¹⁹ Additionally, GCT has been approved as part of the American Law Institute's ongoing Model Penal Code: Sentencing project.²²⁰

The amount of good conduct time available varies considerably by jurisdiction, and within some jurisdictions based on offense type and other considerations.²²¹ Seven states offer day-for-day credit or better to at least some classes of inmates; in these states, a sentence might effectively be cut in half based on good conduct.²²² Other states are much stingier, awarding only three or four days of credit per month.²²³ Still other states have quite elaborate systems that defy easy characterization.²²⁴ The norm, however, seems to be in the range of ten to twenty days per month, or a reduction in sentence length of twenty-five to forty percent.²²⁵

In general, good conduct time is awarded automatically to eligible inmates, although the statutes of two states expressly contemplate an inmate-by-inmate monthly review as a condition of granting credit.²²⁶ Most GCT states make credit available to all or nearly all of their prison inmates, but other states have adopted a wide range of categorical

219. O'Hear, *supra* note 106, app. at 1288–92 (Colorado, Delaware, Louisiana, Maine, Nebraska, Nevada, Texas, Washington, Wisconsin, and Wyoming). Note that the ten include Wisconsin, which adopted and then repealed good conduct time as part of the 2009 Doyle reforms. *See supra* Part II.D.

220. AM. LAW INST., MODEL PENAL CODE: SENTENCING — TENTATIVE DRAFT NO. 3, § 305.1 (2014).

221. O'Hear, *supra* note 106, app. at 1288–92. The remainder of this Section is adapted from, and closely tracks, O'Hear, *supra* note 1, at 200–02. For further details of specific state laws and statutory citations, see O'Hear, *supra* note 106, app. at 1288–92. Even more detailed information about the GCT programs in fifteen southern states circa 2001 can be found in TODD EDWARDS, COUNCIL OF STATE GOV'TS, CORRECTIONAL GOOD-TIME CREDITS IN SOUTHERN STATES (2001).

222. These states are Alabama, Illinois, Louisiana, North Carolina (for impaired driving offenses only), Oklahoma, Texas, and West Virginia. O'Hear, *supra* note 1, at 200 n.18.

223. Delaware inmates cap out at three days per month, as do South Carolina inmates serving time on no-parole offenses, while Maine limits good conduct time to four days per month. *Id.* at 200 n.19.

224. Examples include Oklahoma and New Jersey. *Id.* at 200 n.20.

225. Different states express this idea differently. Alaska and New York offer one-third off the sentence. Nevada offers a credit of twenty days per month, as does South Carolina for paroleable offenses. Colorado and Wyoming offer a credit of fifteen days per month. New Hampshire offers a credit of 12.5 days per month. Kentucky, Maryland, and Rhode Island offer a credit of ten days per month. South Dakota offers a credit of either four or six months per year, depending on the length of the sentence. *Id.* at 200 n.21.

226. N.H. REV. STAT. ANN. § 651-A:22(I) (2007 & Supp. 2013); TENN. CODE ANN. § 41-21-236(a)(3) (2010).

exclusions. For instance, some exclude inmates who have committed serious violent or sexual offenses,²²⁷ or who have killed a law enforcement officer.²²⁸ Others require that an inmate work or participate in an education or rehabilitative program in order to be eligible for good conduct time.²²⁹

Once awarded, credits may be forfeited for misconduct. Normally, any fresh criminal offense committed in prison or any violation of prison rules will suffice. A few states limit forfeiture by statute to more serious violations.²³⁰ Other states, however, are even more expansive than the norm in what can lead to forfeiture. New York, for instance, authorizes forfeiture for “bad behavior” and “failure to perform properly . . . [assigned] duties.”²³¹ Once forfeiture is ordered, corrections officials have broad discretion in determining how much good conduct time to take away.²³² In many states, they also have discretion either to restore lost good conduct time²³³ or to suspend forfeitures.²³⁴ In any event, the

227. Louisiana and Maine are examples. *Id.* at 200 n.23.

228. OKLA. STAT. ANN. tit. 57, § 138(A) (West 2004 & Supp. 2014).

229. States falling into this category include Massachusetts, Missouri, Oklahoma, and Texas. O’Hear, *supra* note 1, at 200 n.25.

230. For instance, New Jersey’s statute speaks in terms of “flagrant misconduct,” and Michigan’s of “major misconduct.” *Id.* at 200 n.26.

231. N.Y. CORRECT. LAW § 803(1)(a) (Consol. 2005 & Supp. 2014).

232. This discretion is limited by statute in some states in a variety of ways. For instance, Delaware specifies that *all* good conduct time is lost when certain inmates are convicted of a fresh crime. DEL. CODE ANN. tit. 11, § 4382(a) (2007). Rhode Island has a simple day-for-day rule: “[f]or every day [that] a prisoner [is] shut up or otherwise disciplined for bad conduct . . . there shall be deducted one day” from the prisoner’s good-conduct time. R.I. GEN. LAWS § 42-56-24(d) (2006 & Supp. 2013). Illinois caps forfeiture at one year per infraction, 730 ILL. COMP. STAT. ANN. 5/3-6-3(5)(c) (West 2007 & Supp. 2014), and Louisiana at 180 days, LA. REV. STAT. ANN. § 15:571.4(B)(3) (2012 & Supp. 2013).

233. ALA. CODE § 14-9-41(f)(2) (LexisNexis 2007); 730 ILL. COMP. STAT. 5/3-6-3(5)(c) (West 2007 & Supp. 2014); MD. CODE ANN., CORR. SERVS. § 3-709(c) (LexisNexis 2008); MICH. COMP. LAWS ANN. § 800.33(5) (West 1998 & Supp. 2014); N.H. REV. STAT. ANN. § 651-A:22(IV)(c) (2007 & Supp. 2013); OKLA. STAT. ANN. tit. 57, § 138(A) (West 2004 & Supp. 2014); OR. REV. STAT. § 421.121(4) (2013); R.I. GEN. LAWS § 42-56-24(e) (2006 & Supp. 2013); W. VA. CODE ANN § 28-5-27(f) (LexisNexis 2013); N. CAROLINA DEP’T OF CORR., DIV. OF PRISONS, POLICY & PROCEDURE MANUAL, ch. B, § .0111(c) (Sept. 5, 2013), *available at* http://www.doc.state.nc.us/dop/policy_procedure_manual/b0100.pdf, *archived at* <http://perma.cc/63WH-5DAG>.

234. DEL. CODE ANN. tit. 11, § 4382(b) (2007); TEX. GOV’T CODE ANN. § 498.004(a), (c) (West 2012).

decision-making procedures are internal, administrative procedures, without the protections normally associated with criminal trials.²³⁵

B. Specific Jurisdictions

1. Federal System

The federal criminal justice system is no one's idea of lenient. In 1984, Congress adopted a new sentencing regime that eliminated parole and set the federal system on a track to rapidly escalating penalties.²³⁶ However, a longstanding good-time provision remained part of the new regime. To this day, at the end of each year of imprisonment, a federal inmate may receive up to fifty-four days of good-time credit,²³⁷ which can add up to about a fifteen percent reduction in prison time — a rather

235. See, e.g., ALA. CODE § 14-9-41(f)(2) (LexisNexis 2007) (Commissioner of the Department of Corrections decides based on evidence submitted by the warden in charge); COLO. REV. STAT. § 17-22.5-301(3) (2013) (“[G]ood time authorized . . . shall not vest and may be withheld or deducted by the department.”); ME. REV. STAT. tit. 17-A, § 1253(9)(B) (2006 & Supp. 2013) (“Any portion of the time deducted from the sentence . . . may be withdrawn by the chief administrative officer of the state facility . . .”); MD. CODE ANN., CORR. SERVS. § 3-709(a) (LexisNexis 2008) (“If an inmate violates the applicable rules of discipline, the Division [of Correction] may revoke a portion or all of the diminution credits . . .”); NEV. REV. STAT. ANN. § 209.451(3) (LexisNexis 2013) (“The decision of the director regarding a forfeiture is final.”); N.J. STAT. ANN. § 30:4-140 (West 2008) (“In case of any flagrant misconduct the board of managers may declare a forfeiture . . . as to them shall seem just.”); see also *Wolff v. McDonnell*, 418 U.S. 539, 560–62, 568–70 (1974) (holding that Due Process Clause requires fewer procedural protections in connection with loss of good conduct time than in connection with revocation of parole; inmates do not have right to confront and cross-examine adverse witnesses or right to counsel in prison disciplinary proceedings).

236. Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 772–76, 783 (2006); see also Michael M. O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 730–32 (2002). Although precise cross-system severity comparisons are not possible, some sense of the federal system’s relative harshness can be seen through sentencing patterns in drug cases, which probably constitute the most practically significant area of overlap between federal and state criminal dockets. In the most recent years for which data are available, federal courts sentenced 96.5% of drug traffickers to prison, U.S. SENTENCING COMM’N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at tbl.12 (2013), while state courts in the nation’s seventy-five largest counties only imprisoned forty-five percent of their drug traffickers, BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 29 tbl.24 (2013). Moreover, the average (mean) prison sentence in the federal system for drug traffickers was seventy-two months, U.S. SENTENCING COMM’N, *supra*, at tbl.13, as compared to only forty-nine months in the seventy-five largest counties, REAVES, *supra*, at 30 tbl.25.

237. 18 U.S.C. § 3624(b)(1) (2012).

modest benefit compared to what many states offer. Moreover, at the end of a year, if the Bureau of Prisons determines that an inmate “has not satisfactorily complied with . . . institutional regulations,” then the Bureau may award no credit or some other amount less than fifty-four days.²³⁸

The Bureau has promulgated a detailed schedule of prohibited acts and available sanctions, including the forfeiture and disallowance of good conduct time.²³⁹ Additional regulations spell out mandatory losses of GCT in certain circumstances.²⁴⁰ For instance, narcotics use in prison is considered a “greatest severity level prohibited act,” and thus results in a mandatory disallowance of at least forty-one of the fifty-four days of possible credit in the year in which the violation occurred, as well as a potential forfeiture of up to 100% of already-earned good conduct time.²⁴¹ By contrast, the use of obscene language is a “low severity level prohibited act,” and, for a second offense in six months, will “ordinarily” result in the disallowance of only one to seven days of good conduct time.²⁴²

Despite a very long list of violations that may result in a loss of good conduct time,²⁴³ the vast majority of federal prisoners benefit from the program. In FY 2011, for instance, more than sixty-three percent of

238. *Id.* The amount of good conduct time is reduced to forty-two days for inmates who have not earned and are not making satisfactory progress toward earning a GED. 28 C.F.R. § 523.20(c) (2013). On the other hand, federal law does provide for up to an additional year of credit for participation in a drug abuse program. Demleitner, *supra* note 170, at 787–88. There has been some controversy over the way that the federal Bureau of Prisons (BOP) calculates GCT credits. *See id.* at 785 (“Since the BOP deducts good time from the days actually served by the prisoner rather than the sentence imposed by the judge, the maximum amount of good time per year is effectively forty-seven days.”). The Supreme Court affirmed the BOP’s approach in *Barber v. Thomas*, 130 S. Ct. 2499, 2511 (2010). The United States Department of Justice supports an increase in the amount of GCT available, both for traditional good time and for program completion. Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL’Y 1, 42 (2013).

239. 28 C.F.R. § 541.3.

240. *Id.* § 541.4.

241. I assume in this example an inmate sentenced for an offense committed on or after April 26, 1996. *See id.* § 541.4(a)(2).

242. *Id.* § 541.3 tbl.1.

243. To give a sense of the frequency of infractions in the federal prison system, one study found that about three percent of inmates were involved in some sort of misconduct in a single month in 2001. CAMP ET AL., *supra* note 162, at 17. Inmates averaged 2.23 prior incidents of misconduct. *Id.* at 33 tbl.1.

prisoners exiting federal institutions did so on the basis of GCT.²⁴⁴ The federal system thus demonstrates that a jurisdiction committed to the truth-in-sentencing ideal²⁴⁵ and known for its toughness can also maintain a robust GCT program.

2. Illinois

Illinois, Wisconsin's neighbor to the south, has a GCT system that is both more complex and, for many offenders, much more generous than that of the federal system. Illinois's basic good-time rule offers day-for-day credit—potentially a fifty percent reduction in sentence length.²⁴⁶ However, Illinois excludes a long list of offenses, mostly of a violent or sexual nature, from the basic rule and limits good conduct time in these cases to 4.5 days per month²⁴⁷—essentially, the same as the federal rule. The day-for-day system dates to Illinois's determinate sentencing law of 1977, which eliminated parole in the state.²⁴⁸ Exclusions from day-for-day credit were subsequently adopted in truth-in-sentencing legislation in the 1990s.²⁴⁹

In addition to this “statutory sentence credit,” Illinois also makes available “supplemental sentence credit” to some offenders.²⁵⁰ This aspect of the Illinois good-time system recently endured a period of

244. This number was obtained through a search of the Federal Criminal Case Processing Statistics database maintained by the Bureau of Justice Statistics of the U.S. Department of Justice. *Federal Criminal Case Processing Statistics*, BUREAU OF JUST. STAT., <http://www.bjs.gov/fjsrc/> (last visited Nov. 8, 2014), archived at <http://perma.cc/5E9W-SMEB>.

245. Congress promoted the spread of TIS laws in the 1990s through its truth-in-sentencing grants to state correctional systems. PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEP'T OF JUSTICE, *TRUTH IN SENTENCING IN STATE PRISONS 1* (1999).

246. 730 ILL. COMP. STAT. ANN. 5/3-6-3(a)(2.1) (West 2007 & Supp. 2014). The day-for-day rule was adopted as part of Illinois's determinate sentencing law of 1977, which also abolished parole. GOODSTEIN, *supra* note 170, at 19.

247. 730 ILL. COMP. STAT. 5/3-6-3(a)(2), (2.3)–(2.6). Those convicted of first-degree murder or terrorism are prohibited from receiving any sentence credit. 730 ILL. COMP. STAT. 5/3-6-3(a)(2)(i).

248. MALCOLM C. YOUNG, *WHITE PAPER: GOOD CONDUCT CREDIT IN ILLINOIS 1* (2012), available at <http://www.usprisonculture.com/blog/wp-content/uploads/2012/02/White-Paper-Good-Conduct-Credit-in-Illinois-22-Jan-2012.pdf>, archived at <http://perma.cc/M2TR-WXUJ>.

249. See ILL. ADM. CODE tit. 20, § 107.120(g) (2013).

250. *Id.* § 107.107. Illinois also offers “program sentence credit” for participation in various types of programming. *Id.* This sort of credit I would label “earned time” and distinguish from “good conduct time.” See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 218, at 1. The Illinois regulations also spell out rules for various other good-time programs that apply to certain long-serving inmates who are subject to one of various earlier sentencing and corrections systems. ILL. ADM. CODE tit. 20, § 107.107.

substantial public controversy. In 1990, in order to deal with prison overcrowding, the Illinois Legislature authorized the Department of Corrections to give inmates up to 180 days of GCT beyond the regular day-for-day system.²⁵¹ Between 1990 and 2009, the Department maintained a policy of deferring this discretionary credit until after at least sixty days had been served in prison.²⁵² Beginning in 2009, the Department ended this sixty-day rule.²⁵³ Under the new system, due to the interplay between day-for-day credits, supplemental GCT, and credit for time served in jail during criminal proceedings, an offender with a short (one- or two-year) sentence might be released from prison only a few days after entering.²⁵⁴ In ways that echoed the contemporaneous public controversy over the Doyle reforms in Wisconsin, the media in Illinois publicized the new release policy and presented what was likely a misleading picture of its effect on public safety.²⁵⁵ In response, the whole supplemental program was first suspended, and then the sixty-day rule was legislatively reimposed.²⁵⁶ With this restriction restored, the Department may once again award up to 180 days of supplemental sentence credit.²⁵⁷

Both statutory and supplemental sentence credit may be lost through bad conduct in prison.²⁵⁸ Illinois does not appear to have the sort of detailed schedule of specific sanctions for particular infractions that the federal system has. However, inmates may not be deprived of more than one year of credit for any one infraction, and lost credit may be restored later.²⁵⁹

251. YOUNG, *supra* note 248, at 2.

252. *Id.* at 3.

253. *Id.*

254. *Id.*

255. *Id.*

256. See Patrick Yeagle, *Illinois Starts Giving Prison Inmates Release Credits: IDOC Adopts Reformed Program to Lower Prison Population*, ILL. TIMES, Feb. 28, 2013, <http://illinoistimes.com/article-11086-illinois-starts-giving-prison-inmates-release-credits.html>, archived at <http://perma.cc/U32Q-A362>.

257. ILL. ADM. CODE tit. 20, § 107.210 (2013).

258. *Id.* § 107.150(c).

259. 730 ILL. COMP. STAT. 5/3-6-3(c) (West 2007 & Supp. 2014). The Department may unilaterally revoke up to thirty days of credit in a twelve-month period, but must obtain approval for more extensive sanctions from the Prisoner Review Board. ILL. ADM. CODE tit. 20, § 107.150(c). Parallel rules govern the restoration of lost credits. *Id.* § 107.160(c). In addition to losing credits for infractions, inmates may also lose up to 180 days for filing a frivolous lawsuit against the state. 730 ILL. COMP. STAT. 5/3-6-3(d). Additionally, sex offenders are ineligible for credit unless they have completed or are participating in sex

As of mid-2012, nearly three-quarters (74.7%) of Illinois's prison population qualified for day-for-day credit, while an additional twenty percent earned statutory sentence credit at a reduced rate.²⁶⁰ In 2013, in the first half-year of the revived supplemental sentence credit program, 1,974 inmates (or about four percent of the prison population) received an average of 114.3 days of supplemental credit.²⁶¹ During the same time, 126 inmates had supplemental credit revoked, with an average penalty of 26.9 days.²⁶²

The Illinois story illustrates the political dangers of a good-time system that is so generous as to permit releases almost immediately upon entry to prison. But the larger, if much quieter, story from Illinois is that the vast majority of offenders entering the state's prisons over the past four decades have qualified for day-for-day credits without particular controversy. In the first wave of national sentencing reform (1975–1984), Illinois and Wisconsin took directly opposite approaches. While Wisconsin eliminated good conduct time and preserved parole, Illinois eliminated parole and preserved GCT. Illinois's approach has clearly proven the more durable.

3. Washington

Like Illinois, Washington has a good-time system that is both more complex and more generous than the federal system. Washington's basic good-time rule provides for a one-third reduction in prison terms.²⁶³ However, inmates convicted of a serious violent offense or a Class A felony sex offense may only earn a ten percent reduction.²⁶⁴ Washington refers to GCT as "earned release time," or ERT.²⁶⁵ A portion of ERT, referred to as "earned time," is based on participation

offender treatment, unless treatment is not made available by the Department. *Id.* at 5/3-6-3(4.6).

260. ILL. DEP'T OF CORR., FISCAL YEAR 2012 ANNUAL REPORT 50 (2013).

261. ILL. DEP'T OF CORR., ANNUAL REPORT FOR SUPPLEMENTAL SENTENCE CREDIT, MARCH 2013–SEPTEMBER 2013 (2014).

262. *Id.*

263. WASH. REV. CODE ANN. § 9.94A.729(3)(d) (West 2010 & Supp. 2014).

264. WASH. ADMIN. CODE § 137-30-030(1)(b) (2011).

265. *Id.* § 137-25-020.

in approved programs, including work and school,²⁶⁶ although inmates are not penalized if programs are not available.²⁶⁷

In 2003, Washington temporarily increased the maximum ERT to fifty percent of the prison term, but the law had a sunset provision and was permitted to expire in 2010.²⁶⁸ One study found that close to one-quarter of the inmates released from Washington prisons in the first thirteen months of the program were eligible for the fifty percent reduction.²⁶⁹ These inmates were estimated to serve sixty-three fewer days on average as a result of the enhanced ERT program.²⁷⁰ Interestingly, those released under the program were found to have lower recidivism rates relative to appropriate comparison groups released before the fifty percent rule went into effect.²⁷¹

Under whatever rule earned, ERT may be lost for the commission of a “serious infraction,”²⁷² a category that is defined by regulation and encompasses a wide range of offenses from possession of an alcoholic beverage to escape.²⁷³ However, lost ERT may later be restored if the inmate manages to avoid any additional serious infractions over a twelve-month period.²⁷⁴

Inmates who have reached their “earned release date,” that is, the release date taking into account any ERT reductions, may be required to present to the Department of Corrections a viable release plan, including approved residence and living arrangements.²⁷⁵ Release may be denied if the plan is unsatisfactory from the standpoint of recidivism risk or in other specified ways.²⁷⁶ In recent years, substantial numbers of inmates, amounting to between sixteen and twenty-three percent of all

266. *Id.* § 137-30-030(3)(a). For instance, inmates under the thirty-three percent rule are eligible for five days of earned time per month. *Id.* § 137-30-030(3)(a)(3).

267. E.K. DRAKE, R. BARNOSKI & S. AOS, WASH. STATE INST. FOR PUB. POLICY, INCREASED EARNED RELEASE FROM PRISON: IMPACTS OF A 2003 LAW ON RECIDIVISM AND CRIME COSTS, REVISED 2 n.7 (2009).

268. Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415, 429–30 (2011).

269. DRAKE ET AL., *supra* note 267, at 4.

270. *Id.* at 8 n.26.

271. *Id.* at 7.

272. WASH. ADMIN. CODE § 137-30-030(2)(c) (2011).

273. *Id.* § 137-25-030.

274. *Id.* § 137-30-070(2)(b).

275. WASH. REV. CODE § 9.94A.729(5)(b) (West 2010 & Supp. 2014).

276. *Id.* § 9.94A.729(5)(c).

releases, have been delayed under this provision, typically by two to three months.²⁷⁷

Although Washington, like Illinois, has recently undergone a process of first liberalizing and then tightening up GCT, the basic one-third rule has proven a stable, durable feature of Washington's nationally well-regarded sentencing and corrections system.²⁷⁸

VI. GOOD CONDUCT TIME IN THE EMPIRICAL LITERATURE

Although corrections officials have viewed GCT as a helpful device for managing prisoners since the nineteenth century, a pair of academic researchers could, as late as 1989, lament the absence of "any systematic empirical research" on the impact of GCT in practice.²⁷⁹ They observed, "There is no empirical evidence that supports or refutes the proposition that good time acts as an important tool in controlling the prison environment, or that identifies the relationship between good time release policies and prisoner behavior in the community."²⁸⁰

Twenty-five years later, we now have an increasingly substantial body of systematic empirical research on GCT. The most rigorous studies attempt to quantify the impact within a particular state of a change to GCT policies. The effects on which these studies focus are prison misconduct, recidivism and crime rates, prison-population size,

277. WASH. DEP'T OF CORR., EARNED PRISON RELEASE 2 (2013).

278. See, e.g., RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 141, 146 (2013) (noting that Washington sentencing system has been "remarkably stable for several decades" and praising Washington sentencing commission as "effective and well regarded"). Washington's recidivism rate has been consistently below both Wisconsin's and the national average, PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 11 (2011), reflecting steady declines in the state's repeat offending since 1990, WASH. STATE INST. FOR PUB. POLICY, WASHINGTON STATE RECIDIVISM TRENDS: ADULT OFFENDERS RELEASED FROM PRISON (1990–2006), at 2 (2011). Washington's policymaking in the criminal-justice area has been supported by a unique and nationally recognized policy-analysis agency, the Washington State Institute for Public Policy. See John Kamensky, *What You Can Learn from the Rise of "Moneyball Government,"* GOV'T EXECUTIVE, July 26, 2013, <http://www.govexec.com/excellence/promising-practices/2013/07/what-you-can-learn-rise-moneyball-government/67544/?oref=dropdown>, archived at <http://perma.cc/4MSC-L6EY>. Washington was a pioneer in such areas as the "three strikes" law, ZIMRING ET AL., *supra* note 100, at 4, and modern civil commitment and sex offender registration laws, Richard G. Wright, *From Wetterling to Walsh: The Growth in Federalization in Sex Offender Policy*, 21 FED. SENT'G REP. 124, 127 (2008).

279. David Weisburd & Ellen S. Chayet, *Good Time: An Agenda for Research*, 16 CRIM. JUST. & BEHAV. 183, 187 (1989).

280. *Id.* at 190.

and cost-savings. Summarized in more detail below, these studies are generally favorable to GCT.²⁸¹ However, because there is so much variation in state sentencing and corrections policies, caution should be exercised in generalizing from any one state's experience with expanding or restricting GCT; a reform that succeeds or fails in one policy environment might well produce quite different results elsewhere.

Florida: In 1983, Florida eliminated discretionary parole, but instituted an extremely generous GCT system in order to prevent a large increase in the prison population,²⁸² thus echoing Illinois's 1977 policy changes.²⁸³ Under the new regime, between 1986 and 1994, the average time served was only thirty-nine percent of the sentence.²⁸⁴ Then, in 1995, the Legislature imposed a new cap on GCT, requiring that offenders sentenced for crimes committed on or after October 1 of that year serve eighty-five percent of their terms.²⁸⁵ In order to measure the impact of this restriction of GCT on prisoner misconduct, researchers studied the disciplinary records of 305,228 offenders sentenced to prison in Florida between 1990 and 2001.²⁸⁶ After controlling for twenty-three variables, including those relating to offense

281. I summarize here only the post-1989 research on GCT. There are some earlier publications discussing the impact of GCT policy reforms, but most suffer from fundamental methodological flaws. For a discussion of these issues, see William D. Bales & Courtenay H. Miller, *The Impact of Determinate Sentencing on Prisoner Misconduct*, 40 J. CRIM. JUST. 394, 395–96 (2012). Some of the more sophisticated work in the first generation of scholarship focused on emergency release policies implemented in Illinois and Colorado in order to address prison overcrowding. Weisburd & Chayet, *supra* note 279, at 189. These studies found no difference in the recidivism rates of early-release and regular-release inmates. *Id.* In any event, apart from qualitative difficulties with some of the earlier research, it also seems preferable to focus on more recent studies because of the very different policy environment that exists now than in the 1980s. I omit from textual discussion a 1997 New Jersey parole-restriction law, which was found in one study, counter-intuitively, to result in a reduced rate of violent misconduct among inmates covered by the law. CANDACE MCCOY & PATRICK MCMANIMON, JR., NEW JERSEY'S "NO EARLY RELEASE ACT": ITS IMPACT ON PROSECUTION, SENTENCING, CORRECTIONS, AND VICTIM SATISFACTION 71 (2004). Because parole rewards good behavior in a less reliable, transparent fashion than GCT, the relationship between parole and inmate misconduct may be quite different than the relationship GCT and misconduct.

282. Bales & Miller, *supra* note 281, at 395.

283. YOUNG, *supra* note 248, at 1–2.

284. Bales & Miller, *supra* note 281, at 395.

285. Kerensa N. Pate, Florida's Truth in Sentencing Effectiveness on Recidivism Rates 10 (Apr. 1, 2010) (unpublished Ph.D. dissertation, Florida State University), available at <http://diginole.lib.fsu.edu/cgi/viewcontent.cgi?article=4099&context=etd>, archived at <http://perma.cc/XAA2-XGT8>.

286. Bales & Miller, *supra* note 281, at 396.

severity and criminal history,²⁸⁷ the researchers found that new-law prisoners had 91.1% greater odds of committing a prison infraction over a five-year period than did the old-law prisoners.²⁸⁸

A different researcher, however, found a more positive effect from the Florida determinate sentencing law, specifically, on recidivism rates.²⁸⁹ Based on an analysis of 182,929 offenders released from Florida prisons between 1995 and 2005,²⁹⁰ and controlling for twenty-four variables,²⁹¹ the researcher found that the new-law offenders had a lower rate of felony re-offense than the old-law offenders.²⁹² For instance, the odds of re-imprisonment for a new felony after three years were 26.9% lower for the new-law offenders than the old-law offenders.²⁹³ It is not clear why offenders in the more determinate regime had reduced recidivism; possibilities include enhanced specific deterrence and more time in prison to complete rehabilitative programs.²⁹⁴

New York: In 1997, New York's Legislature authorized a Merit Time Program, which allowed for certain non-violent inmates to earn up to a one-sixth reduction of the minimum term of confinement if they achieved significant programmatic objectives and avoided any serious disciplinary infractions.²⁹⁵ In 2007, the State's Department of Corrections Services performed a systematic review of the Program's first few years.²⁹⁶ By 2006, New York had released about 24,000 inmates under the Program, on average about six months before their court-established minimum terms.²⁹⁷ The Department of Corrections Services determined that the Program had saved taxpayers about \$372 million in operating costs and \$15 million in capital construction.²⁹⁸ Additionally, the Department found a lower recidivism rate among the early-release

287. *Id.* at 398 tbl.2.

288. *Id.* at 400. The finding was statistically significant at a level of $p < .001$. *Id.*

289. Pate, *supra* note 285, at 50.

290. *Id.* at 37, 39.

291. *Id.* at 46.

292. *Id.* at 50. The finding was statistically significant at a level of $p < .001$. *Id.*

293. *Id.*

294. *Id.* at 75–77.

295. N.Y. DEP'T OF CORR. SERVS., MERIT TIME PROGRAM SUMMARY: OCTOBER 1997–DECEMBER 2006, at i (2007), available at http://www.doccs.ny.gov/Research/Reports/2007/Merit_Time_Through_2006.pdf, archived at <http://perma.cc/J673-8DPY>.

296. *Id.*

297. *Id.*

298. *Id.* at 15.

inmates than among nearly all other comparison groups.²⁹⁹ For instance, thirty-one percent of the early-release inmates were returned to prison within three years, as compared to a thirty-nine percent figure for all others.³⁰⁰

North Carolina: In 1994, North Carolina adopted a new Structured Sentencing Act (SSA), which abolished the state's prior GCT system.³⁰¹ Pre-SSA inmates were "credited with 'good time' equal to half of their sentences, and were potentially eligible for parole."³⁰² Under the SSA, by contrast, inmates were limited to "earned time" based on program participation, which could at most reduce their sentences by seventeen percent.³⁰³ Beginning in late 1994, some inmates were admitted to the North Carolina prison system under the old GCT rules and some under the new SSA, depending on the date on which they committed their offense.³⁰⁴ Taking advantage of this "natural experiment" involving two inmate groups admitted at the same time under different rules,³⁰⁵ researchers analyzed the disciplinary records of nearly 7,000 offenders who entered prison during the transitional period.³⁰⁶ Controlling for eight variables, including offense of conviction and prior incarceration, the researchers found a much higher rate of discipline (nearly twenty percent higher) among the SSA inmates than the pre-SSA inmates.³⁰⁷ Complementing this result, the researchers also found in interviews that "disciplinary system personnel and nearly all of the administrators, correctional officers, and case managers expressed the opinion that SSA inmates are harder to manage and present more disciplinary problems than [pre-SSA] inmates."³⁰⁸

299. *Id.* at iii.

300. *Id.*

301. John M. Memory, Guang Guo, Ken Parker & Tom Sutton, *Comparing Disciplinary Infraction Rates of North Carolina Fair Sentencing and Structured Sentencing Inmates: A Natural Experiment*, 79 PRISON J. 45, 45 (1999).

302. *Id.* at 46.

303. *Id.*

304. *See id.*

305. *Id.* at 53–54.

306. *Id.* at 60 tbl.1.

307. *Id.* at 57, 65.

308. *Id.* at 62. Another group of researchers has replicated the quantitative results in a separate study using more control variables. JAMES J. COLLINS ET AL., RESEARCH TRIANGLE INST., EVALUATION OF NORTH CAROLINA'S STRUCTURED SENTENCING LAW 54–56 (1999). They found that the SSA inmates "had higher overall infraction rates—25% higher for males and 55% higher for females." *Id.* at 76.

Washington: The Washington State Institute for Public Policy conducted a thorough study of the impact of the 2003 expansion of earned time.³⁰⁹ Controlling for thirteen variables, the Institute compared the recidivism rates of inmates released under the new law with the recidivism rates of three appropriate comparison groups.³¹⁰ Those released earlier under the more generous GCT law exhibited small, but statistically significant reductions in felony recidivism.³¹¹ Taking into account the economic value of reduced recidivism plus savings in the costs of imprisonment, the Institute calculated that each early release under the new law saved \$15,359.³¹² The Institute also calculated an average cost of \$8,179 from each release as a result of lost incapacitation.³¹³ Nonetheless, the benefits remained significantly larger than the costs, with about \$1.88 in benefits for each \$1 in cost.³¹⁴

In sum, four of five studies discussed here point to benefits from GCT laws in such areas as prison discipline, recidivism, and corrections budgets. The fifth study, by contrast, pointed to negative effects on recidivism. It should be recalled, however, that this study did not deal with a state that *eliminated* GCT, but rather shifted from an extremely generous, Illinois-type program to a more restrained, federal-type program. Even if some rolling back of extremely generous programs can produce recidivism-related benefits, one should not infer that full elimination would necessarily be even more beneficial, especially in light of the more positive recidivism findings in New York and Washington.

VII.A PROPOSAL FOR GOOD CONDUCT TIME IN WISCONSIN

A. *The Case for Good Conduct Time: A Recapitulation*

The key points of the preceding five parts of this Essay can be summarized as follows:

- Good conduct by prisoners should be encouraged and recognized. Policies along these lines send an important message that we hope and expect prisoners to use their time behind bars constructively and to emerge from imprisonment prepared to resume their lives

309. For background, see *supra* Part V.B.3.

310. DRAKE ET AL., *supra* note 267, at 6.

311. *Id.*

312. *Id.* at 8.

313. *Id.* at 9.

314. *Id.*

in the community as law-abiding citizens. Conversely, rigidly invariable prison terms embody a harshly exclusionary attitude that seems to deny the offender's capacity for improvement. As the Supreme Court has recognized, a hopeless prison term is morally and sometimes even constitutionally suspect.

- For almost as long as prisons have been used as a standard form of punishment in the United States, it has been recognized that GCT credits are a useful tool for promoting institutional order and prisoner rehabilitation, and preferable on pragmatic and humanitarian grounds to a purely punitive disciplinary strategy. Even through all of the national ferment in sentencing and corrections policy in the final quarter of the twentieth century, most states chose to retain GCT, and empirical research is increasingly providing support for this choice.
- Fairly or not, parole had acquired some very negative associations by the time it was abolished in Wisconsin in the late 1990s. It is important to remember, though, that GCT and parole have quite distinct histories and structures. Indeed, Wisconsin had GCT for several decades before it implemented parole. Meanwhile, Illinois, Washington, and the federal system provide illustrations of jurisdictions that chose to retain GCT even after eliminating parole. There is nothing unusual or illogical about having the one and dispensing with the other.
- The arguments made against parole in Wisconsin either do not apply, or apply with much less force, to good conduct time.
- There is nothing undemocratic about an elected legislature imposing new rules for the way that a prison sentence is executed, even if doing so modestly diminishes the discretionary power of judges over punishment.
- Good conduct time can be implemented in ways that are transparent to victims and provide ample advance notice of when offenders will be released.
- There is no reason that good conduct time must necessarily result in significantly earlier releases for high-risk inmates, and, indeed, as the empirical research suggests, GCT may actually enhance public safety by supporting prisoners' rehabilitative efforts, improving order and discipline in prisons, and helping to move low-risk inmates out of costly prison beds.

- Polling results indicate that Wisconsin voters would welcome more flexibility with release dates, especially if this could be accomplished without compromising public safety. Voters are especially attuned to whether policies in this area “do the right thing” in a moral-symbolic sense.

B. How to Structure Good Conduct Time in Wisconsin

The case for GCT is a strong one, but, in deciding how to structure such a program in Wisconsin, it is also important to take into account a variety of additional considerations. Victims, and for that matter also offenders and other stakeholders, deserve a transparent system that makes decisions in a reasonably objective, predictable way. In light of their local knowledge and accountability, it is appropriate for judges still to play a leading—if no longer quite so hegemonic—role in setting the basic parameters of punishment. Rewards for good conduct should be proportional to the significance of the conduct. Corrections officials should have some ability to defer release dates when it is clear to them that public safety would otherwise be jeopardized. The administrative burdens on corrections and court personnel should be minimized.

These various considerations are sufficiently in tension with one another that no specific reform proposal can hope to accommodate all of them fully. The goal cannot be a perfect or cost-free system, but must rather be a balanced system that reflects a due regard for all of the relevant interests and avoids unnecessary or excessive costs in relation to any of them.

In my view, Washington’s GCT system exhibits just this sort of a good balance. It is, moreover, a time-tested system in a state that has long been regarded as a national leader in the criminal-justice field.³¹⁵ In broad outline, then, my proposal would be for Wisconsin to adopt the Washington model, although, as detailed below, I would favor deviations from this model in a few specific respects.

1. Maximum Amount of GCT Discount

Washington’s maximum GCT discount, amounting to one-third of the prison term, lies in the middle range nationally. It is, for instance, roughly midway in generosity between the federal and Illinois laws. To be sure, reasonable arguments could be made for a federal-level (fifteen

315. See *supra* note 278.

percent) or an Illinois-level (fifty percent) credit, or any point between those extremes. No research has identified a “magic number” that maximizes benefits and minimizes costs. The goal is to provide meaningful encouragement and recognition of good conduct in prison without reintroducing such variability or unpredictability into the system that judicial sentencing decisions would lose their significance or victims would be put in an unfair position for the purpose of release preparations. Washington’s one-third rule seems to strike the balance appropriately, and has also been endorsed recently by other commentators.³¹⁶ It is also in line with the thirty percent GCT discount included in the American Law Institute’s ongoing Model Penal Code: Sentencing project.³¹⁷ Moreover, polling results in Wisconsin—finding two-thirds support for release as early as the two-thirds mark of the sentence—suggest that a properly designed one-third discount might find wide support among voters, and materially more so than a one-half discount.³¹⁸

A one-third discount could be implemented through a credit system of fifteen days per month. Every month that an inmate earns the maximum possible GCT would be treated, in effect, as 1.5 months served. Projected release dates could be automatically adjusted at the end of each month to reflect GCT.

2. Conditions for Earning GCT

Views differ on whether and to what extent GCT should be available simply for remaining discipline-free, as opposed to exhibiting more affirmative evidence of pro-social behavior or rehabilitative effort. Again, Washington’s approach strikes an appealing balance: *maximum* GCT requires “participat[ion] in approved programs, including work and school,”³¹⁹ but the credit does not depend entirely on this.

Remaining discipline-free for a significant period of time is an accomplishment that merits recognition, particularly in light of the many

316. For instance, Professor Richard Frase, in his recent comprehensive blueprint for reform of U.S. sentencing systems, also supports a maximum one-third GCT discount, tied in part to program participation. For his defense of this approach, see FRASE, *supra* note 278, at 69–71. Dean Demleitner favors a similar approach. Demleitner, *supra* note 170, at 796. The United States Department of Justice has also recently endorsed GCT reforms that would permit up to a one-third discount, based in part on program completion. Larkin, *supra* note 238, at 42.

317. AM. LAW INST., *supra* note 220, §305.1.

318. See *supra* Part IV.A.

319. WASH. ADMIN. CODE § 137-30-030(3)(a) (2011).

restrictions imposed on prisoners; the profound stresses of life in often-overcrowded institutions; and the mental illnesses, addictions, anger, learning disabilities, poor education and socialization, youth, and general immaturity that so many inmates bring with them to prison. On the other hand, a straight one-for-two credit seems an excessive reward for simply avoiding infractions, especially for older or longer-serving inmates who have had ample opportunity to adjust to prison life and develop habits of compliance.³²⁰ For many inmates, something more can and should be expected for full GCT—pro-social behavior that is more effortful and that offers more promise of a successful reintegration into free society. Yet, there are potential administrative difficulties and inequities with making credit depend fully on programming; this ties GCT to the capacity and willingness of resource-starved corrections systems to make programming available to inmates, to the fit between an inmate's needs and abilities and the programs available at the particular institution to which the inmate is assigned, and to the fairness of the lower-level correctional employees who may make key decisions about admission to and expulsion from the programs they manage.³²¹

To balance the competing interests, it is possible that individually customized, adjustable formulas could be devised for earning GCT. However, in order to maximize transparency and limit administrative costs, it seems preferable to adopt a simple half-and-half approach for everyone: remaining discipline-free is rewarded at a rate of 7.5 days per month (a potential one-sixth discount), which doubles to fifteen days per month (one-third) during months of active program participation.³²²

320. See, e.g., Liqun Cao, Jihong Zhao & Steve Van Dine, *Prison Disciplinary Tickets: A Test of the Deprivation and Importation Models*, 25 J. CRIM. JUST. 103, 107 (1997) (“[D]isciplinary infraction rates are relatively high at the start of the prison sentences and peak within the first six to nine months of incarceration; thereafter, infraction rates show a steady downward trend over one’s stay in prison.”); Richard Tewksbury et al., *supra* note 162, at 203 (“Age has consistently been found to be the most important indicator for the likelihood of both violent and nonviolent disciplinary infractions.”).

321. Cf. MALCOLM C. YOUNG, BLUHM LEGAL CLINIC NORTHWESTERN UNIV. SCH. OF LAW, *SETTING THE RECORD STRAIGHT: THE TRUTH ABOUT “EARLY RELEASE” FROM ILLINOIS PRISONS* 14 (2010), available at <http://blogs.chicagotribune.com/files/setting-the-record-straight.pdf>, archived at <http://perma.cc/7D5B-GJTF> (noting that Illinois dropped program participation requirement for GCT in 1975 “since the Department [of Corrections] did not have enough programs for all prisoners who desired and were eligible to engage in them, [and] it was unfair to deny good time to prisoners who through no fault of their own could not participate in programs”).

322. Dean Demleitner supports a similar approach, Demleitner, *supra* note 170, at 794–95, as does the Model Penal Code: Sentencing project, AM. LAW INST., *supra* note 220, § 305.1. Note, too, that the pre-1984 Wisconsin system also had a mixed approach, with

The Department of Corrections can by regulation define what programs qualify for the enhanced GCT, perhaps taking into account the best available evidence regarding which activities tend to reduce recidivism risk.

3. Offense-Based Exclusions and Limitations

Many states, including Illinois and Washington, have implemented multi-tier GCT systems, in which some offenders earn credits at reduced rates or are excluded from GCT altogether based on their offense of conviction or criminal history. In this regard, the more uniform federal system offers the most appealing model. This is consistent with ideals of simplicity and transparency. Sentencing judges, attorneys, offenders, victims, and members of the public should be able quickly and easily to determine the potential impact of GCT on a prison term with minimal need for legal research or complex math. A one-third discount for everyone is straightforward to comprehend and calculate.

Multitier systems seem intended to deny or delay release for the classes of offenders who are believed to be the most dangerous. Yet, these offenders have also presumably received the longest sentences. To then also preclude or restrict their ability to earn GCT seems a double penalty. Moreover, the safeguard operates crudely and without regard to the full array of potentially important risk factors — risk factors that may change considerably over the course of a very long sentence. It would be better to address public-safety concerns regarding potential GCT releases of truly dangerous inmates through a more nuanced decision-making process closer to the release date. More about this below.

4. Disciplinary Sanctions

Some or all of the otherwise-available GCT should be withheld in months in which a substantial violation of prison rules is found. Some effort should be made to prevent arbitrariness in the sanctioning system and wide institution-to-institution disparities. For instance, Wisconsin should follow Washington's lead in defining by regulation precisely which infractions can result in a loss of GCT.³²³ Whether the full amount, or only a fraction, of potential GCT should be withheld ought

maximum GCT requiring "diligence in labor or study [that] surpasses the general average." WIS. STAT. § 53.12(1) (1981–1982).

323. WASH. ADMIN. CODE § 137-25-030.

to be a matter of discretion, taking into account the usual sorts of considerations that go into disciplinary decisions.

In some jurisdictions, including Washington, sanctions may include a forfeiture of already-earned GCT or a prospective loss of GCT in future months.³²⁴ Washington offsets the severity of such sanctions by permitting inmates to request that lost GCT be restored.³²⁵

These aspects of the Washington system seem in tension with the goals of simplicity and transparency, and also heighten concerns about arbitrariness and disparity. Wisconsin has now been running a prison disciplinary system for many years without a generalized ability to sanction inmates with a loss of *any* GCT, so it should not be viewed as necessary to arm corrections officials with heavy GCT sanctions in most cases now. Losses beyond the current month should be restricted to only the most severe infractions, such as those that could be prosecuted as felonies in their own right outside the prison context.³²⁶ Additionally, the most GCT that can be lost for a single infraction should be capped at some specific amount—say, one year, as Illinois does. And, if retroactive and prospective losses of GCT are minimized in this way, then there should be no need for a restoration system.

5. Deferral of GCT Release

In general, it seems fair to assume that the inmates who are most successful at accelerating their release dates with GCT will be among the safer bets for succeeding after release. However, there will undoubtedly be some inmates who, notwithstanding good performance in prison, seem to present unacceptable risks at release. As discussed above, Washington addresses this concern with a law that provides for continued incarceration for some inmates who do not have a release plan that satisfies certain standards, including those related to risk of re-offense and community safety.³²⁷

Washington's approach—that is, requiring an approved release plan that adequately addresses basic risk issues before accrued GCT may be “cashed in”—seems a sensible safeguard, although its impact in practice

324. *See, e.g., id.* § 137-30-030(2)(c).

325. *Id.* § 137-30-070(2).

326. *Cf. Demleitner, supra* note 170, at 796 (“In light of the long prison sentences many inmates currently serve, good time should become irrevocable at a point to avoid the ongoing threat of loss of good time credits. Surely prison systems have other, more immediate and harsher sanctions available should serious misconduct occur.”).

327. WASH. REV. CODE § 9.94A.729(5)(C) (West 2010 & Supp. 2014).

may be unnecessarily broad; in some recent years, nearly one-quarter of Washington's releases have been delayed.³²⁸ Indeed, the state has undertaken measures to try to reduce these delays, such as providing rental vouchers for inmates whose release is deferred because of a lack of approved living arrangements.³²⁹

In addition to making resources available to inmates in aid of reentry, Wisconsin should also adopt protections so as to minimize the risk that GCT releases will be delayed excessively by official arbitrariness, bureaucratic inertia, or purely subjective views of risk. If an inmate who has submitted a timely release plan is deferred beyond a certain point—say, six months³³⁰—then the Department of Corrections should be required to provide a written explanation of why the inmate has not yet been released, with reference to an appropriate risk-needs assessment tool, and a specific plan for what the inmate must do in order to achieve release.

6. Relationship to Extended Supervision

An inmate released based on GCT would be treated like any other inmate released at the conclusion of the initial term of confinement. The inmate would be required to serve the full term of extended supervision under his sentence, which must be no less than twenty-five percent of the unreduced term of initial confinement.³³¹ If revoked and returned to prison,³³² then the inmate would be eligible to resume earning GCT toward the new period of confinement.

Current rules provide for extensions by the Department of Corrections of the initial release date based on various types of misconduct.³³³ The new possibility of loss of GCT should largely or entirely obviate the need for these penalty provisions. They might be eliminated, or more clearly restricted to the most severe misconduct in situations in which there is no additional GCT to be lost.

328. WASH. DEP'T OF CORR., *supra* note 277, at 2.

329. *Id.*

330. Delays in Washington have averaged between two and four months in recent years, *id.*, so a similar system in Wisconsin would not likely result in large numbers of plans delayed beyond six months.

331. WIS. STAT. § 973.01(2)(d) (2011–2012).

332. *Id.* § 302.113(9)(am).

333. *Id.* § 302.113(3).

7. Fair Notice

When imposing a prison term, the sentencing judge should be required to state that the offender will be eligible to earn a limited time off for good behavior in prison and to indicate when the offender will be released if he earns the maximum amount of GCT. The judge should also make clear that earning this maximum amount will require the offender not only to stay out of trouble in prison, but also to participate in programs that will help to prepare the offender for a successful return to the community.

The DOC should be required to maintain up-to-date information on its website regarding how much GCT each inmate has earned and the current projected release date of each inmate in light of GCT credits.³³⁴ GCT credits and adjustments to release dates should also be incorporated into the DOC's victim notification service.³³⁵ Given contemporary technological capabilities and the sort of straightforward, objective, limited GCT system described here, there is no reason for interested victims ever to be caught off guard by a GCT release. Additionally, in the further interest of transparency, the DOC should be required to make public annual reports of how much GCT credit it is awarding and revoking, as is mandated in Illinois for that state's supplemental GCT program.³³⁶

8. Effective Date and Retroactivity

Implementing the proposed system will require a certain amount of administrative rulemaking, as well as education for judges, lawyers, and corrections personnel. In order to allow adequate time for these activities, the system should apply only to offenders convicted of crimes committed on or after its effective date, and the effective date should be set at least twelve months after GCT is adopted by the Legislature.

Once the system is operational, there would be benefits to extending it to prisoners who were convicted of crimes committed prior to the effective date. However, doing so would raise serious fair notice objections on behalf of victims and might also undercut assumptions about release that were material to some charging, plea-bargaining, and sentencing decisions. It would thus seem better to adopt a presumption against retroactivity. There might, however, be some flexibility in

334. See *supra* note 143.

335. See *supra* note 143.

336. ILL. DEP'T OF CORR., *supra* note 261.

permitting some “pre-GCT” inmates to petition to be able to receive credits. These petitions could be handled under the existing judicial sentence-adjustment provision, which includes notification requirements for prosecutors and victims.³³⁷ In order to prevent a flood of petitions and to focus judicial attention on those cases in which retroactivity would most likely be appropriate and meaningful, petitions might be limited to nonviolent, non-sexual offenders who have served at least half of their initial term of confinement and who have at least two years left on this term.³³⁸ The grant of a petition would allow the inmate to begin accruing GCT credits the next month.

C. Differences From 2009 Reforms

A proposal to adopt GCT in Wisconsin might seem on its face an effort to revive the rejected 2009 Doyle reforms. However, any similarities to the 2009 reforms should not lead to rejection of the present proposal.

First, and most fundamentally, it is important to recall that the 2009 reforms were not rejected on the basis of any persuasively demonstrated operational problems, but rather for political reasons.³³⁹ Moreover, while the 2009 reforms included what was in effect a GCT component (“positive adjustment time”), the critique of these reforms did not focus in any specific way on this component, and had considerably more force as to the more discretionary components.³⁴⁰

Second, the 2009 reforms contained no limitations on retroactivity, but made GCT available on all equal basis to TIS inmates, without regard to date of offense or sentencing.³⁴¹ Such an approach not only raises important fair notice concerns,³⁴² but also exacerbates public-safety concerns in light of the potential (or at least perceived potential) for a near-term surge in returning inmates before local authorities and the community supervision system have time to prepare. My proposal

337. WIS. STAT. § 973.195 (2011–2012).

338. Pre-TIS inmates might be excluded from this process on the ground that they have an alternative early release opportunity available to them in the form of parole review.

339. *See supra* Part II.E.

340. *See supra* Part III.

341. *See, e.g.*, WIS. STAT. § 302.113(2)(b) (2009–2010) (making positive adjustment time available to certain classes of offenders sentenced under § 973.01 without regard to date); WIS. STAT. § 304.06(1)(bg)(1)–(2) (2009–2010) (same).

342. *See supra* Part VII.B.8.

contemplates a much slower unfolding and a reduced likelihood that release-date expectations at sentencing will be badly disappointed.

Third, my proposal, unlike the 2009 reforms, requires participation in approved programming in order to receive maximum credit.

Finally, my proposal includes fair-notice provisions that were not part of the 2009 reforms.³⁴³

In sum, although my proposal in overall effect might be fairly characterized as one that would reestablish a system of moderate determinacy in Wisconsin, this system would differ in several important respects from the moderate-determinacy regime that was in place between 2009 and 2011.

VIII. CONCLUSION

Wisconsin's present regime of hyper-determinacy cuts against the grain of national norms, public opinion in the state, and the state's own longstanding traditions of release-date flexibility. The arguments for hyper-determinacy reflect overly simplistic views of democratic accountability, victim rights, and public safety. It is time for Wisconsin to provide more meaningful recognition of the positive things offenders can do while they are behind bars. While the nation as a whole has been moving away from the prison-as-warehouse model, Wisconsin policy still seems stuck in the cynical and harshly punitive attitudes of the 1990s.

There are a variety of mechanisms by which greater flexibility may be returned to the corrections system, and a reasonable case may be made for a number of different approaches. However, since the 1970s, in Wisconsin and nationally, there has been greater emphasis on transparency, predictability, objectivity, and uniformity in punishment. A system of good conduct time modeled on Washington's would respect these important values,³⁴⁴ while also providing appropriate

343. See, e.g., WIS. STAT. § 973.01(8) (2009–2010) (indicating various aspects of sentence that must be explained, but not including positive adjustment time); WIS. STAT. § 973.01(8) (2010–2011) (same).

344. Discretionary parole, by contrast, may be harder to square with these values. Cf. GOODSTEIN, *supra* note 170, at 46 (noting that Illinois prisoners sentenced under new determinate system with large GCT component expressed more positive views about equity of system than did prisoners sentenced under old parole system). For a more extended discussion of the advantages of GCT over parole, see Larkin, *supra* note 238, at 40–41. Professor Cecelia Klingele proposes a third approach to back-end flexibility, judicial sentence modification. 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,

encouragement and recognition for positive behavior in prison. “[G]ood time is crucial,” as Dean Demleitner observes, “as a symbol of hope and rehabilitative potential in an overly harsh penal regime.”³⁴⁵

465–66 (2010). Based in part on the controversy over Illinois’s abortive expansion of GCT in 2009, Klingele argues that judicial sentence modification may be preferable to GCT from the standpoint of transparency, accountability, and political sustainability. *Id.* at 496–98, 515–21. In this Essay, I have attempted to address transparency and accountability concerns with GCT. *See supra* Parts III.A, III.B, VII. Additionally, as Part V demonstrates, GCT has proven itself remarkably durable over many decades; the 2009 Illinois controversy was the exception, not the rule. *See also* Larkin, *supra* note 238, at 41 (“[G]ood-time laws significantly predate the birth of parole and never have been the subject of the type of intensive, sustained criticism that ultimately withered parole. In the eyes of the public, good-time laws have earned a presumption of respectability that parole lacks today.”). In any event, there is nothing operationally or philosophically incompatible between GCT and judicial sentence modification, which may function in a complementary manner. Indeed, in light of all of the limitations on GCT in my proposal, there would still undoubtedly be a need for a reexamination of the sentences of many individuals still serving time in prison long after there is any demonstrable need for them to do so.

345. Demleitner, *supra* note 170, at 796.