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Dying to be Free: An Analysis of Wisconsin's Restructured Compassionate Release Statute

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DYING TO BE FREE: AN ANALYSIS OF WISCONSIN'S RESTRUCTURED COMPASSIONATE RELEASE STATUTE

In 2009, the Wisconsin Legislature enacted comprehensive criminal sentencing reforms under 2009 Wisconsin Act 28 in an effort to shrink the State's swollen corrections budget and reduce the impending multi-billion dollar deficit. However, the new early release procedures sparked bitter partisan debate among state leaders, culminating in the repeal of the early release amendments a mere two years later. This Comment focuses on one of the early release amendments reserved for ill and elderly inmates, termed "compassionate release." The Comment traces the history of compassionate release legislation in Wisconsin and outlines arguments in support and opposition of the program. The Comment urges that compassionate release is a safe, fiscally attractive method to reduce corrections spending and overcrowding in Wisconsin prisons, and it concludes by suggesting further reforms to encourage bipartisan support of the recently amended program.

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I. INTRODUCTION

Early release of inmates from the prison system recently catapulted into the forefront of political discourse in Wisconsin, and the topic became a divisive issue fueled by bipartisan unrest infecting state politics. The impact of one of the greatest economic crises in decades led both sides of the legislative aisle on a quest for economic solutions. In 2009, as the Democrat-led Wisconsin Legislature struggled to enact the state budget, it became clear that significant changes and sacrifices would be necessary to combat Wisconsin's $6.6 billion dollar deficit—the largest in state history.[1] In an effort to alleviate the budgetary strain, 2009 Wisconsin Act 28 enacted sweeping modifications to criminal sentencing procedures.[2]

These sentence modifications, which became effective on October 1, 2009,[3] substantially increased the availability of early release opportunities for inmates serving a bifurcated sentence imposed on or after December 31, 1999.[4] Within the new early release procedures, the legislature provided for important amendments to Wisconsin's so-called "compassionate release" statute.[5] Compassionate release refers to early release programs for inmates with serious medical conditions, typically labeled as terminally ill, as well as elderly inmates who may be eligible for release due exclusively to advanced age.

Compassionate release is not foreign to the correctional system in Wisconsin. In fact, statutory procedures for the early release of terminally ill and elderly inmates in the state were first promulgated in 2001,[6] but the 2009 legislative amendments made important adjustments to proliferate the pool of eligible inmates. Compassionate release, also identified as medical parole or medical furlough, became popular among state governments as a fiscally attractive alternative in the last

1. WIS. ASSEMB. J., 2009 Leg., 99th Reg. Sess., 296, 298 (Governor's Veto Message).

2. *See* 2009 Wis. Act 28 (relating to Wisconsin finances and appropriations, also known as the 2009–2011 Wisconsin state budget; in particular, sections 2729p, 2729t, 2729v, 2729x, 2729y, 2739d, 2739f, 2739h, & 2739j apply to the compassionate release program).

3. STATE OF WIS., DEP'T OF CORR., 2009 WISCONSIN ACT 28 SENTENCING REFORM FACTSHEET 1 (2009) [hereinafter FACTSHEET], *available at* http://www.wi-doc.com/PDF_Files/ Sentencing%20Reform%20Fact%20Sheet.pdf.

4. *Id.* at 1–3. *See infra* notes 144–45 and accompanying text (discussing bifurcated sentences in Wisconsin).

5. *See infra* Part IV.C.

6. 2001 Wis. Act 109, § 406 (correcting an imbalance in Wisconsin's finances and appropriations during the 2001–2003 fiscal biennium).

decade to reduce strain on state correction budgets.[7] In Wisconsin, legislators maintained that increasing early release eligibility for ill and elderly inmates would help alleviate a portion of the financial pressure on corrections institutions across the state and, thus, reduce the state budget.[8] Under 2009 Wisconsin Act 28, Wisconsin boasted one of the most expansive compassionate release laws in the country.[9]

However, opponents of the recent early release amendments, including the restructured compassionate release statute, were outspoken regarding concern with the program. Republican state representatives mounted a campaign against the amendments, calling for the repeal of the early release legislation almost immediately after its passage.[10] Nevertheless, while the Democrats controlled the Governor's office and the state legislature, concerns with the liberalized early release system were disregarded.[11] Everything changed on November 2, 2010, when a Republican majority swept the state Assembly, Senate, and Governor's office.[12] On April 7, 2011, Republican state representatives and senators introduced 2011 Assembly Bill 86 for consideration.[13] The purpose of the Bill was to eliminate certain criminal sentencing provisions provided under 2009

7. Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415, 419, 442 n.141 (2012) [hereinafter Klingele, *The Early Demise*] ("A growing awareness of the human and financial costs of mass incarceration has led many jurisdictions to a bipartisan reevaluation of the number of people in prison and kinds of offenses for which incarceration is being imposed.").

8. *See* WIS. ASSEMB. J., 2009 Leg., 99th Reg. Sess., 296, 302 (Governor's Veto Message) (summarizing how the budget included provisions that allowed inmates with extraordinary health concerns to be released to extended supervision).

9. *See* Bren Gorman, *With Soaring Prison Costs, States Turn to Early Release of Aged, Infirm Inmates*, STATE HEALTH NOTES (Sept. 2, 2008), http://www.ncsl.org/default.aspx ?tabid=14647 (last visited Apr. 11, 2012) (explaining that, unlike the Wisconsin program under 2009 Wisconsin Act 28, states like North Carolina and California do not allow for early release of ill or elderly inmates who had been convicted of violent or sexual offenses); Marty Roney, *36 States Offer Release to Ill or Dying Inmates: Programs Help Cut Costs of Heath Care, Officials Say*, USA TODAY, Aug. 14, 2008, at 4A (noting that, unlike the Wisconsin program under the 2009 amendments, the compassionate release programs in Ohio and Wyoming require the inmate to have a life expectancy of six months or less and twelve months or less, respectively).

10. *See infra* Part IV.D.

11. *See* Rep. Scott Suder, Op-Ed., *Raemisch 'Legacy' Statement Should Give Wisconsinites Pause*, CAP. TIMES (June 6, 2010), http://host.madison.com/ct/ news/opinion/column/article_cc74fd40-9406-55a1-be88-05f1f9677fb8.html (outlining his belief that the Democrats "run for cover every time the issue is mentioned").

12. *See* Patrick Marley & Lee Bergquist, *Walker Wins Governor's Race on Promise of Jobs*, MILWAUKEE J. SENTINEL, Nov. 3, 2010, at 1A.

13. Assemb. B. 86, 2011–2012 Leg., 100th sess., at 3–4 (Wis. 2011).

Wisconsin Act 28 and to restore other early release provisions to pre-Act law.[14] The amendments to compassionate release were not immune from the effects of the Bill, which became 2011 Wisconsin Act 38, and the result decreased the utility and flexibility of the program for the prison system in Wisconsin. Governor Scott Walker signed 2011 Wisconsin Act 38 into law on July 19, 2011.[15]

This Comment provides historical and financial context for the rising popularity of compassionate release and outlines the continuing debate over the program in Wisconsin. In addition, this Comment will clarify why the most recent amendments were largely unnecessary and counterproductive modifications to the program, and it will propose reforms that would allow compassionate release to regain its status as a beneficial corrections tool. Part II traces the history of the American criminal justice system as it contributes to the current state of corrections in both Wisconsin and the nation in an effort to understand the impetus for compassionate release legislation. Part III investigates the rationale behind compassionate release, including justifications for and against the early release program, with a special focus on the particular issues that ill and elderly inmates pose to the prison system. Part IV deconstructs compassionate release in Wisconsin, including a comparison between the original compassionate release statute, the 2009 statutory amendments, and the recent restructuring of the statute. Part V provides insight into how Wisconsin implemented the restructured compassionate release program by investigating who was released and who was denied release under the statute. Finally, Part VI dissects the opposition's concerns with the liberalized 2009 amendments, and advocates for continued reforms to compassionate release, focusing on the future success of the program.

II. CORRECTIONS CRISIS

The current state of the corrections system in America is a portrait of an institution in crisis. In the late 2000s, prison populations reached unprecedented levels compared to any other time in the nation's history.[16] Social scientists, attorneys, and scholars advance multiple

14. *Id.*

15. Patrick Marley, *Walker Signs Bill Repealing Early Release*, JSONLINE (July 19, 2011), http://www.jsonline.com/news/statepolitics/125814448.html.

16. Cara Buckley, *Law Has Little Impact on Compassionate Release for Ailing Inmates*, N.Y. TIMES, Jan. 30, 2010, at A17. *But see* LAUREN E. GLAZE, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS: CORRECTIONAL POPULATIONS IN THE UNITED

theories for the explosion in prison populations across the country; yet, these scholars are unable to reach a consensus to explain the historically high prison population levels as a response to any individual factor.[17] Scholars suggest that, beginning in the early 1970s, a drastic ideological shift took hold in the American corrections system, and support for the liberal, rehabilitation-based agenda was abruptly drained away by the dawn of a conservative era in crime response policy.[18] This Part describes how the development of new "tough on crime" policies, coupled with the consequences of increased incarceration, created the necessity for states like Wisconsin to seek alternative release programs.

A. Results of Tough on Crime Initiatives

Students of imprisonment theory suggest that the burgeoning prison population can be attributed to three distinct eras based on "tough on crime" initiatives and changing prison demographics.[19] From the 1970s to the mid-1980s, increases in incarceration rates can be traced to courts sending more "marginal" criminals to prison.[20] Then, from the mid-1980s to the early 1990s, the impetus for the prison growth was the war on drugs.[21] The increased incarceration of drug offenders during this period accounts for one-third of the total increase in prison populations.[22] As of the late 1990s, sixty percent of the federal prison population and twenty-three percent of those in state prison were drug offenders.[23] Finally, in the 1990s, the major cause of expanding

STATES, 2009, at 1 (2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus09.pdf (indicating a 0.7% decrease in the number of federal, state, and local prisoners nationwide); Press Release, Bureau of Justice Statistics (Dec. 21, 2010), http://bjs.ojp.usdoj.gov/content/pub/press/corrections09pr.cfm (explaining that the decrease in national prison populations was the first recorded decline since the Bureau of Justice started reporting these statistics in 1980).

17. *Cf.* MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 23–25 (2004) (explaining eight reasons why punishments for crimes in America yield harsher penalties than earlier in history).

18. *See, e.g.*, *id.* at 39–40 (explaining how, beginning in the 1970s, Republican strategists successfully seized on "wedge issues," like crime control, to differentiate the parties and that this success at the polls led to implementing stiffer policies in corrections systems); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 8 (2001).

19. HENRY RUTH & KEVIN R. REITZ, THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE 96 (2003) (describing the eras that result in the changing prison demographics).

20. *Id.*

21. *Id.*

22. *Id.*

23. Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 CRIME & JUST. 17, 53–54 (1999).

incarceration rates, specifically in state prisons, was longer sentences for offenders instead of new prison entrants.[24]

In state prisons, the growth in incarceration in recent years can be traced predominantly to state government policies that drastically increased time served due to mandatory-minimum laws, "three strikes" laws, and "truth-in-sentencing" laws.[25] These reforms either increased the prison term the convicted individual was required to serve or removed the possibility of early release or sentence modification.[26] The effect of the "tough on crime" sentencing reforms can be seen in statistics indicating that across the nation one in eleven prisoners is serving a life sentence, and in some states the figure is even higher with one in six inmates serving life without parole.[27]

Prior to truth-in-sentencing reforms initiated nationwide in the late 1990s, an inmate could expect to serve only a fraction of his or her original sentence. In Wisconsin, for example, inmates typically served only half of their prison term.[28] Prior to December 31, 1999, an inmate serving a prison term in a Wisconsin state prison was sentenced by the court, but after serving only one-fourth of that sentence the inmate was eligible for parole.[29] Furthermore, the inmate was released on parole after serving just two-thirds of his original sentence.[30] However, in 1998, Wisconsin passed its truth-in-sentencing reform establishing a bifurcated sentencing system that provided an inmate with a set term in state prison as well as a period of extended supervision in the community.[31] The purpose of the reform was to clarify how long the individual would be in prison, make prison terms more determinate, and

24. RUTH & REITZ, *supra* note 19, at 96.

25. Blumstein & Beck, *supra* note 23, at 55; 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, 468 (2010) [hereinafter Klingele, *Changing the Sentence*].

26. Blumstein & Beck, *supra* note 23, at 55.

27. Rebecca Vesely, *Another Aging Population: More States Considering Early-Release Programs for Older, Infirm Inmates*, MOD. HEALTHCARE, Mar. 29, 2010, at 32, 32 *available at* http://www.modernhealthcare.com/assets/pdf/CH69147327.PDF.

28. JESSICA MCBRIDE, BACK ON THE STREET: WISCONSIN IS STARTING TO LET CRIMINALS OUT OF PRISON EARLY—ARE THEY "NONVIOLENT?," WIS. POL'Y RES. INST. (2009), http://www.wpri.org/Special_Reports/Back_On_The_Street.html [hereinafter McBride, *Wisconsin Is Starting*].

29. Thomas J. Hammer, *The Long and Arduous Journey to Truth-in-Sentencing in Wisconsin*, 15 FED. SENT. REP. 15, 15 (2002).

30. *Id.*

31. *Id.*

remove early release decisions from the purview of the parole board.[32] However, an unintended effect of truth-in-sentencing is that felons are now being incarcerated in droves with no safety valve to reduce the pressure on the corrections system.

B. Consequences of Increasing Incarceration Rates

Statistics from the late-2000s indicate that the incarceration rate in the United States has soared to unprecedented levels. As of 2010, the United States had the highest rate of incarceration in the world—housing only five percent of the world population, while holding twenty-five percent of the world prison population.[33] Furthermore, as of 2009, 2.3 million individuals were behind bars in the United States, equating to roughly one in 135 adults.[34] An even more staggering statistic demonstrates that around 7.3 million people are under some form of corrections control—including probationers and parolees—which corresponds to one in thirty-one adults.[35] And yet, according to recent state and national data, we have reached the stage where each criminal we incarcerate will now manifest diminishing returns, resulting in the prevention of less and less crime.[36]

Furthermore, across the United States, corrections budgets are one of the fastest growing expenditures, expanding at a rate second only to Medicaid.[37] Fiscal data from 2008 estimates that states collectively spent

32. *See id.* ("The concept is that, at the time sentence is imposed, the court, the lawyers, the defendant, the victim, and anyone else who is interested in the case will know exactly how long the offender will be in prison.").

33. Press Release, Justice Policy Inst., How to Safely Reduce Prison Populations and Support People Returning to Their Communities 2 (June 2, 2010) [hereinafter Justice Policy Inst.], *available at* http://www.justicepolicy.org/images/upload/10-06_FAC_ForImmediateRelease_PS-AC.pdf.

34. THE PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 4–5 (2009), http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf; CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUST., THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 3 (2009), http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf.

35. THE PEW CTR. ON THE STATES, *supra* note 34, at 5.

36. *Id.* at 2. Furthermore, increasing the length of incarceration does not also increase public safety. Justice Policy Inst., *supra* note 33, at 2. Research from the Department of Justice indicates that there appears to be little difference between individuals who serve short sentences in prison and those who are held for longer periods of time in terms of recidivism rates. *Id.*

37. THE PEW CTR. ON THE STATES, *supra* note 34, at 1; SCOTT-HAYWARD, *supra* note 34, at 3.

$47 billion each year on corrections[38]—an increase of 303% since 1988[39]—subsidized by $900 million in funds from the federal government.[40] To exacerbate the growing crisis in the corrections system, federal and state governments are currently confronted with one of the worst financial emergencies in years,[41] and because budget deficits are expected only to grow, legislators must continue to find ways to cut corrections costs.[42] For example, some states are reducing available medical services or entering programs to purchase inmate pharmaceuticals at lower costs.[43] Many states have thinned corrections staff, begun hiring freezes, cut salaries and employment benefits, and closed or downsized facilities in an effort to alleviate the financial strain on state budgets.[44]

In Wisconsin, the corrections crisis is equally apparent. In fact, not only has the state prison population inflated, but the state is also spending more on prisons than on its university system.[45] The state prison population increased fourteen percent from 2000 to 2007, and experts estimate that between 2008 and 2019 the population will increase twenty-five percent.[46] The number of individuals under state

38. THE PEW CTR. ON THE STATES, *supra* note 34, at 11; SCOTT-HAYWARD, *supra* note 34, at 3.

39. SCOTT-HAYWARD, *supra* note 34, at 3.

40. THE PEW CTR. ON THE STATES, *supra* note 34, at 11.

41. ELIZABETH MCNICHOL ET AL., CTR. ON BUDGET AND POLICY PRIORITIES, STATES CONTINUE TO FEEL RECESSION'S IMPACT 2 (2012), http://www.cbpp.org/files/9-8-08sfp.pdf (indicating that for fiscal year 2012–2013, twenty-nine states "have projected or have addressed shortfalls totaling $47 billion"); SCOTT-HAYWARD, *supra* note 34, at 2 ("States across the United States are facing the worst fiscal crisis in years.").

42. SCOTT-HAYWARD, *supra* note 34, at 2 (noting that the individual states are responding to the corrections crisis in three main areas: operating efficiencies, recidivism reduction strategies, and release policies).

43. *Id.*; *cf. infra* Part III.A (describing the growing elderly and ill patient population and the need for states to cut costs by reducing medical services).

44. SCOTT-HAYWARD, *supra* note 34, at 2.

45. *See* Dee J. Hall & Mary Spicuzza, *Slow Start to Early Release*, WIS. ST. J., Mar. 21, 2010, at A1 ("The state now spends as much on prisons as it provides in support for the 26-campus University of Wisconsin system."); Jason Shepard, *Throwing Away the Key: Doyle's Parole Chief Defends Tough Tack on Releases*, ISTHMUS, Aug. 24, 2007, at 10, *available at* http://www.thedailypage.com/isthmus/article.php?article=8234.

46. JUSTICE CTR., THE COUNCIL OF STATE GOV'TS, JUSTICE REINVESTMENT IN WISCONSIN: ANALYSES & POLICY OPTIONS TO REDUCE SPENDING ON CORRECTIONS AND INCREASE PUBLIC SAFETY 3 (2009) [hereinafter JUSTICE CENTER, ANALYSES], *available at* http://www.pewcenteronthestates.org/uploadedFiles/Wisconsin%20Analyses%20and%20Policy%20Options.pdf. *Contra* Dee J. Hall, *Prison Population Drops 13.6%: 'This Is Historic,' Corrections Official Says of Turnaround*, WIS. ST. J., Jan. 13, 2011, at A1 (indicating that Wisconsin's prison population decreased in 2010).

corrections control follows national figures closely: one in thirty-nine adults are under some form of correctional control in Wisconsin.[47] This figure indicates a steep increase from 1982 data, which demonstrated that only one in 111 adults were maintained under the corrections system.[48] Furthermore, individuals are being incarcerated in facilities that were never meant to accommodate the number of prisoners currently detained.[49] The Department of Corrections (DOC) estimates that it will cost taxpayers around $2.5 billion to reduce overcrowding in the prison system, which corresponds to $1.4 billion in new facilities and $1.1 billion in operating expenditures.[50] With these figures in mind, supporters of expanded compassionate release legislation argued in favor of progressive amendments around the country.

III. THE CASE FOR COMPASSIONATE RELEASE

Supporters of compassionate release argue for the necessity of the program in light of the existing financial crisis and overcrowding in the prison system, but changing demographics in the prison population across the nation also provide additional incentives for compassionate release. This Part will detail these changing prison demographics, outline the compassionate release debate, and describe the steps jurisdictions across the nation have taken to bolster the successful release of elderly and ill inmates back into the community.

A. Issues Unique to Elderly and Ill Inmates

Statistics from recent decades indicate that geriatric inmates are quickly becoming a significant portion of prison populations.[51] In 1996,

47. THE PEW CTR. ON THE STATES, 1 IN 31: THE LONG REACH OF AMERICAN CORRECTIONS, WISCONSIN 1 (2009) [hereinafter THE PEW CTR. ON THE STATES, WISCONSIN], http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestates org/Fact_Sheets/PSPP_1in31_factsheet_WI.pdf.

48. *Id.*

49. *See* JUSTICE CENTER, ANALYSES, *supra* note 46, at 3. For example, the Green Bay Correctional Institution's prison population is 136% higher than the operating capacity. Steve Contorno, *Wisconsin's 20 Correctional Facilities Strain Finances*, GREEN BAY PRESS-GAZETTE (May 22, 2011), http://www.greenbaypressgazette.com/article/20110522/GPG0101/105220663/Wisconsin-s-20-correctional-facilities-strain-finances.

50. JUSTICE CENTER, ANALYSES, *supra* note 46, at 3.

51. TINA CHIU, VERA INST. OF JUST., IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 4 (2010), http://www.vera.org/download?file=2973/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf; Carrie Abner, *Graying Prisons: States Face Challenges of an Aging Inmate Population*, STATE NEWS, Nov./Dec. 2006, at 8, 9, *available at* http://www.csg.org/knowledgecenter/docs/sn0611 GrayingPrisons.pdf.

estimates indicated that prison inmates fifty-five and older constituted 3% of the population in state and federal prisons.[52] Between 1999 and 2007, the population of prison inmates fifty-five and older increased 76.9%, from 43,300 to 76,600 nationwide.[53] By 2008, out of the 1.4 million males incarcerated in state and federal prisons, almost 150,000 were over the age of fifty.[54] Overall, between 2007 and 2010, the number of prisoners age sixty-five and older increased 63%, and the number of prisoners age fifty-five and older increased 282% from 1995 to 2010.[55] In 2010, 8% of the inmate population was fifty-five or older.[56] From 1995 to 2005 the number of Wisconsin prison inmates over the age of 65 nearly tripled.[57] In 1995, only 165 state prisoners were over age sixty, and that figure increased to 492 by 2005.[58] According to Human Rights Watch, the elderly population in American prisons will continue to increase "unless there are changes to harsh 'tough on crime' policies, such as long mandatory minimum sentences, increasing life sentences, and reduced opportunities for parole."[59]

Furthermore, a comparison of elderly inmates and their younger counterparts indicates a significant increase in the rates of both mild and severe health conditions in the elder inmates.[60] These health concerns encompass not only major diseases, but also conditions such as mental illness, hearing loss, vision impairment, arthritis, and impaired movement that make prison life considerably more challenging for elderly inmates.[61] Additionally, inmates may actually appear older than their real age both physically and medically, especially compared to their non-incarcerated peers.[62] Studies suggest that elderly inmates demonstrate a physical age that is seven to ten years older than their

52. *See* Jason S. Ornduff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 ELDER L.J. 173, 181 (1996).

53. CHIU, *supra* note 51, at 4.

54. Vesely, *supra* note 27, at 32.

55. *US: Number of Aging Prisoners Soaring: Corrections Officials Ill-Prepared to Run Geriatric Facilities*, HUM. RTS. WATCH (Jan. 27, 2012) [hereinafter *Number of Aging Prisoners Soaring*], http://www.hrw.org/news/2012/01/26/us-number-aging-prisoners-soaring.

56. *Id*.

57. Bob Purvis, *Cheaper Prison Options Sought*, MILWAUKEE J. SENTINEL, Aug. 7, 2006, at 1A.

58. *Id.*

59. *Number of Aging Prisoners Soaring*, *supra* note 55.

60. CHIU, *supra* note 51, at 5.

61. *Id.*; Abner, *supra* note 51, at 9–10.

62. Abner, *supra* note 51, at 9.

actual chronological age.[63] Experts propose several explanations for this effect, including poor health care prior to incarceration, poor diet, lack of exercise, substance abuse, and especially the stress of prison life.[64] Thus, elderly inmates often develop medical issues earlier and more frequently than their counterparts in the community.[65]

The burgeoning population of aging and ill prisoners requires significant medical assistance—a service that the prison system is *required* to provide. In *Estelle v. Gamble*, the United States Supreme Court investigated the constitutional rights of inmates pertaining to medical treatment, including whether states are required to provide access to medical care.[66] The Court affirmatively found that the state has a duty to provide medical care to inmates because it maintains custody and control over the prisoner; thus, it controls access to necessary treatment.[67] Any bad faith in treatment or in meeting the medical needs of inmates may be deemed cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.[68] Thus, an inmate has basic rights to medical care, to the medical care that is ordered, and to a professional medical determination.[69] Due to the Court's holding in *Estelle v. Gamble*, the corrections system is required to provide costly medical treatments to prisoners at taxpayers' expense.[70]

However, these elderly and ill prisoners generate a significant strain on corrections systems through increased health concerns and resulting medical costs that corrections institutions are ill equipped to provide.[71] Not only do elderly, ill inmates require frequent visits to prison health facilities for medical treatment or physical therapy, but there is also an increased demand for medical devices including walkers, wheelchairs, and hearing aids.[72] Often, to accommodate these infirm inmates,

63. *Id.* at 9; *see also* CHIU, *supra* note 51, at 5.

64. CHIU, *supra* note 51, at 5 ("Specific stressors include separation from family and friends; the prospect of living a large portion of one's life in confinement; and the threat of victimization, which disproportionately affects older inmates."); Abner, *supra* note 51, at 9.

65. Abner, *supra* note 51, at 9–10.

66. 429 U.S. 97, 103–04 (1976); Ronald H. Aday & Jennifer J. Krabill, *Aging Offenders in the Criminal Justice System*, 7 MARQ. ELDER'S ADVISOR 237, 248 (2006).

67. *Estelle*, 429 U.S. at 103–04; Aday & Krabill, *supra* note 66, at 248.

68. *Estelle*, 429 U.S. at 104; Aday & Krabill, *supra* note 66, at 248.

69. Aday & Krabill, *supra* note 66, at 248.

70. *See Estelle*, 429 U.S. at 103–04.

71. Ornduff, *supra* note 52, at 182–83.

72. CHIU, *supra* note 51, at 5; Ornduff, *supra* note 52, at 185.

corrections systems must venture beyond the four walls of the prison to provide treatment.[73] Treating inmates offsite requires considerable transactional expenditures for transportation, security, and correctional staff time.[74] In fact, health care costs account for the majority of the additional funds spent on elderly inmates. For example, in 1990, statistics indicated that while a younger prisoner could be incarcerated for around $18,600 a year, an older or ill inmate would cost the state or federal government approximately $67,000 for that same period.[75] More recent studies indicate that this figure has increased to $70,000 a year.[76] However, while fiscal concerns related to ill and elderly inmates in the corrections system became popular rhetoric for supporters of the program, financial motivation is not the only argument advanced in support of compassionate release legislation.

B. The Compassionate Release Debate

In general, state legislatures base the decision to adopt compassionate release legislation on four considerations.[77] The first consideration is the cornerstone of all compassionate release statutes—humanitarian concern for dying or ill inmates. Despite widespread public revulsion of criminal conduct, there is also an overarching understanding that, except in certain severe cases, even those who have committed a crime should be allowed the opportunity to spend their last days on Earth with family or friends—not behind prison walls.[78] To accomplish this humanitarian purpose, the particular compassionate

73. CHIU, *supra* note 51, at 5; Ornduff, *supra* note 52, at 185.

74. CHIU, *supra* note 51, at 5; Ornduff, *supra* note 52, at 185.

75. Ornduff, *supra* note 52, at 185; *see also* Abner, *supra* note 51, at 10 (stating that younger inmates cost roughly $22,000 per year to house and elderly inmates cost $67,000 per year to house).

76. CHIU, *supra* note 51, at 5; Peter Maller & Richard P. Jones, *With Aging Inmates, Solutions Not Simple: Holding Them Is Costly, Feeding Them Erases Punishment*, MILWAUKEE J. SENTINEL, May 27, 1996, at 1A (questioning whether younger inmates should be paroled so that "older inmates in failing health imprisoned at a cost of $60,000 to $75,000 a year" can continue to receive medical treatment).

77. John A. Beck, *Compassionate Release from New York State Prisons: Why Are So Few Getting Out?*, 27 J.L. MED. & ETHICS 216, 223 (1999) ("There are four essential considerations for [compassionate release] programs. Three are factors favoring the release of dying inmates—humanitarians concerns, criminal justice-sentencing issues, and financial considerations. They must be balanced against the fourth concern—that such releases do not pose any significant risk to society.").

78. *Id.*; *see also* Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse than the Disease?*, 3 WIDENER J. PUB. L. 799, 803 (1994) (discussing the historic concern in American society about death with dignity).

release legislation must be narrowly tailored, yet flexible enough to afford an inmate the time to file a petition and allow the petition to filter through the system before the inmate dies behind bars.[79]

The second consideration focuses on the purpose of the criminal justice system as it relates to punishment. For instance, one of the main rationales for the incarceration of certain criminals is to protect others from the incarcerated individual.[80] Setting aside other factors, if an inmate is so ill or elderly that he or she is no longer a danger to society, then a portion of the justification for the inmate's sentence has been eradicated.[81] Obviously, other factors such as deterrence, retribution, respect for the legal system, and the gravity of the offense must be taken into account, but compassionate release statutes allow a reassessment of the inmate's original sentence based on new information, which is an opportunity that is not typically provided to inmates in other circumstances.[82] When an inmate becomes either terminally ill or physically incapable of functioning in his or her daily life due to a medical condition, achieving the goals of the corrections system becomes less critical.[83]

The third consideration is the financial constraints of the corrections system. Inmates who are either ill or elderly, or both, place severe financial burdens on state corrections systems that are already hemorrhaging financially.[84] By providing for the release of these inmates, states are attempting to avoid subsidizing those end-of-life medical costs at state taxpayer expense.[85] Opponents of compassionate release question whether the fiscal motivation for the early release program is actually being realized.[86] Some argue that the medical costs for prisoners who are released early are still being subsidized by the public through other state programs.[87] However, the cost saving is

79. *See* Beck, *supra* note 77, at 223.

80. *See id.* at 224.

81. *Id.*

82. *Id.*

83. Russell, *supra* note 78, at 805.

84. Beck, *supra* note 77, at 224; *see also supra* Part III.A.

85. *See* Klingele, *The Early Demise*, *supra* note 7, at 442 n.141 (noting that the "states cannot access federal funds to offset the cost of providing medical services to those confined in state institutions"); *see also* 42 U.S.C. § 1396d(a)(28)(A) (2006) (prohibiting Medicaid payments to inmates of public institutions).

86. CHIU, *supra* note 51, at 8.

87. *See id.*; Abner, *supra* note 51, at 11 ("With little savings and limited employment opportunities, elderly offenders may not be able to adequately care for themselves. As a

significant considering the expenses associated with providing additional security for inmates or providing transportation if treatment outside of the prison is required.[88] For example, consider the situation facing one female inmate in California:

> The shrunken 82-year-old wakes up every morning to change into her prison uniform. Then guards must outfit her with ankle chains, belly chains, and handcuffs. Next, she is transported 40 minutes for dialysis. She suffers from chronic renal failure, a condition that she figures costs the state $436,000 a year, not counting the two $24.75-an-hour armed corrections officers who guard her, all five feet and 90 pounds, for up to 8 hours a day three times a week.[89]

Additionally, if the elderly or ill inmates are released into the community, then the state can share the cost of medical care with the federal government instead of assuming responsibility for the entire financial burden.[90] Programs like Medicaid, Medicare, Social Security, and veterans benefits do not apply to incarcerated individuals.[91] Not to mention, releasing elderly and ill prisoners would help alleviate overcrowding issues facing most state corrections systems, which, in turn, would help to reduce the cost of maintaining prison facilities.[92]

Finally, the fourth consideration, or concern, is that the release of ill or elderly inmates should not pose any risk to society. In fact, this concern should not be seen as a consideration at all; instead, it should be viewed as a backdrop against which all other considerations must be measured.[93] Typically, compassionate release statutes may be considered a safer alternative because elderly or ill inmates are less

result . . . society may still be burdened by the costs for caring for an offender, even though he or she may no longer pose a threat to the community." (internal quotation marks omitted)).

88. *See* Beck, *supra* note 77, at 224; *cf.* Ron Hillerman, *Older Prisoners: Is There Life After "Life" Sentencing? A White Paper*, *in* POLICY AND PROGRAM PLANNING FOR OLDER ADULTS app. at 355 (Elaine Theresa Jurkowski ed., 2008) ("Current comparisons show the terminally ill could be treated in a nursing home for $41,000 a year as compared to $69,000 a year in prison.").

89. Hillerman, *supra* note 88, at 355.

90. *See, e.g.,* SCOTT-HAYWARD, *supra* note 34, at 11; Purvis, *supra* note 57.

91. Justice Policy Inst., *supra* note 33, at 4.

92. Ornduff, *supra* note 52, at 197.

93. Beck, *supra* note 77, at 223.

likely to re-offend.[94] However, in light of the recent national trend to limit or end parole,[95] it is apparent that politicians and corrections officials are unwilling to take responsibility for the release of inmates who may enter society only to re-offend.[96] Few events enrage the public more. Opposition to compassionate release is habitually fueled by both political motivations and negative public response.

Politically, advocating for the release of criminals can be a risky endeavor, no matter how low the recidivism rates or cost-saving estimates.[97] In fact, recidivism risk data from 2005 indicates that inmates who were over 60-years-old at the time they were released from prison had only a 17% chance of being incarcerated again within two years, which is significant considering that inmates between 17- and 21-years-old had a 55% chance of being back behind bars within two years.[98] More recent data suggest that inmates over fifty-five have recidivism rates of only 2% to 8%.[99] Regardless, public opinion is not classically swayed by studies touting how low the recidivism rates are for elderly and ill inmates. People are chronically fearful of criminals, and they seek to create as much distance between the criminals and their families for as long as possible. Nevertheless, despite a stringent opposition, the majority of jurisdictions in the United States currently have compassionate release provisions,[100] and each year more states are amending their statutes to broaden the number of inmates eligible for the early release program.[101]

94. *See* CHIU, *supra* note 51, at 5; *see also* Maller & Jones, *supra* note 76 ("Some people question whether most older inmates should remain in prison at all, considering state and federal studies showing that, except for sex offenders, aging convicts pose little risk to society.").

95. *See* TODD REIMERS, SENATE RESEARCH CTR., PAROLE: THEN & NOW 4 (1999), *available at* http://www.senate.state.tx.us/src/pdf/ib0599.pdf; Shepard, *supra* note 45, at 10 ("Wisconsin eliminated parole in 2000 as part of one of the nation's harshest overhauls in criminal-justice sentencing."); Michael M. O'Hear, *The Quiet Comeback of Early Release*, LIFE SENTENCES BLOG (Nov. 9, 2010, 3:51 PM), http://www.lifesentencesblog.com/?p=327. *But see generally* Michael M. O'Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT. REP. 1, 7 (2010) (indicating that life without parole may have entered a period of decline similar to the decline of the death penalty).

96. Beck, *supra* note 77, at 224.

97. CHIU, *supra* note 51, at 8; Buckley, *supra* note 16.

98. JUSTICE CENTER, ANALYSES, *supra* note 46, at 4 fig.3.

99. Gorman, *supra* note 9.

100. Roney, *supra* note 9.

101. Vesely, *supra* note 27, at 32 ("In recent years, states have revised these laws to allow more aged and infirm prisoners to qualify . . . . Fifteen to 20 states have amended their early release laws in the past two to three years.").

C. Compassionate Release in Other Jurisdictions

Both the federal government and the majority of states have compassionate release provisions operating within their respective jurisdictions. Federal law, although rarely used, allows for a modification of an imprisonment term under certain circumstances.[102] When Congress passed the Sentencing Reform Act of 1984, the Act eliminated parole for federal prisoners convicted after November 1, 1987, which would require these individuals to serve their full sentence in prison.[103] In response, Congress provided "'safety valve' provisions to allow for courts to avoid injustice in certain circumstances."[104] Under 18 U.S.C. section 3582(c), a term of imprisonment may be reduced upon a motion of the Director of the Bureau of Prisons if "extraordinary and compelling reasons warrant . . . a reduction."[105] The United States Sentencing Guidelines also broached the subject of compassionate release, adding that the defendant must also not be a danger to the community for the court to grant the sentence modification.[106]

Among the states, the number of jurisdictions providing early release to inmates due to health status or advanced age continues to grow. As of 2008, thirty-six states had statutory provisions for early release by virtue of a prisoner's age or health status.[107] Data collected in 2009 indicated that thirty-nine states had statutes providing for medical parole,[108] while current research reveals that forty-one jurisdictions allow for some sort of medical release.[109] Of those states with compassionate release provisions, fifteen jurisdictions and the District of Columbia

102. 18 U.S.C. § 3582(c)(1)(A) (2006).

103. William W. Berry III, *Extraordinary and Compelling: A Re-examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 858 (2009).

104. *Id.* at 859.

105. 18 U.S.C. § 3582(c)(1)(A)(i); Berry, *supra* note 103, at 859.

106. U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 (2011); Berry, *supra* note 103, at 859.

107. Roney, *supra* note 9. States with some form of compassionate release program for elderly inmates, ill inmates, or both include the following: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming. *Id.*

108. Nat'l Conference of State Legislatures, *Three Years of Conditional Release Laws*, THE BULLETIN: ONLINE SENTENCING AND CORRECTIONS POLICY UPDATES, June 2010, at 5, http://www.ncsl.org/portals/1/Documents/cj/bulletinJune-2010.pdf. Medical parole in this instance is defined as release only for inmates who are ill, not for inmates who are merely elderly.

109. Vesely, *supra* note 27, at 32.

include provisions for the early release of elderly inmates.[110] Furthermore, in the last few years between fifteen and twenty states enacted legislation to allow more elderly and ill prisoners to qualify.[111] For example, in 2009, Wisconsin joined with Maine and New York to expand the requirements for release based on medical concerns.[112] In Maine, the pool of eligible inmates was expanded to include not only terminally ill inmates, but also inmates with a "'severely incapacitating medical condition.'"[113] Similarly, New York expanded its medical parole eligibility in 2009, and it expects to save $2 million annually as a result.[114] Also in 2009, the Minnesota Legislature ordered the corrections commissioner to increase utilization of compassionate release within the state.[115]

However, despite widespread enactment of compassionate release statutes across the nation, jurisdictions experience widely disparate results with the program. Often, inmates and taxpayers alike rarely reap the benefits of the legislation. Traditionally, within jurisdictions that provide for compassionate release, the legislation is unreasonably restrictive and mired by the effects of political grandstanding.[116] In fact, few inmates apply for compassionate release programs, and those inmates that do apply rarely have their petition granted.[117] For example, in California, seventy inmates petitioned for early release in 2007 under the state's compassionate release statute, yet only ten inmates were released.[118] In the state of New York, the corrections department released only 364 inmates since the medical parole program became

110. Justice Policy Inst., *supra* note 33, at 5.

111. Vesely, *supra* note 27, at 32; Michael O'Hear, *The Early-Release Renaissance: Updated Chart*, LIFE SENTENCES BLOG (Feb. 25, 2011, 7:26 PM), http://www.lifesentencesblog.com/?p=1687#more-1687 (citing thirteen states that have introduced or amended their compassionate release legislation since 2001).

112. Vesely, *supra* note 27, at 32; O'Hear, *supra* note 111.

113. Vesely, *supra* note 27, at 32.

114. SCOTT-HAYWARD, *supra* note 34, at 11.

115. Nat'l Conference of State Legislatures, *supra* note 108, at 5.

116. Nina Quinn, *Medical Parole: Politics vs. Compassion*, NATIONAL PRISON HOSPICE ASSOCIATION, http://npha.org/npha-articles/interviews-news/medical-parole/ (last visited Apr. 12, 2012) ("Apart from negative political influence, there are other related obstacles. The eligibility criteria can be overly restrictive eliminating, [sic] people who are clearly terminally ill. The process can be convoluted and delayed resulting in many inmates dying in prison before their review is completed.").

117. Aday & Krabill, *supra* note 66, at 256.

118. Lynne Murray, *Corrections 101: Compassionate Release*, CORRECTIONS.COM (Feb. 2, 2009), http://www.corrections.com/articles/20580-corrections-101-compassionate-release.

effective in 1992.[119] This figure is inclusive of the number of inmates released under the 2009 amendments.[120] In fact, statistics indicate that 202 inmates filed petitions for early release in New York since the recent amendment went into effect, compared to the sixty-eight inmates who petitioned in 2008; yet, the state has seen no comparable rise in the number of inmates granted early release.[121]

Nevertheless, not all states encounter disappointing compassionate release statistics. A few states boast high-functioning early release programs for elderly and ill inmates. Texas, for example, releases approximately 170 inmates per year under its early release procedures.[122] Similarly, Michigan claims more than 100 elderly or ill inmates released under its compassionate release statute since mid-2008.[123] Proponents of Wisconsin's amended sentencing reforms hoped for a similar high-functioning compassionate release program under the 2009 amendments.

IV. COMPASSIONATE RELEASE IN WISCONSIN

In 2009, state leaders confronted a looming $6.6 billion shortfall.[124] In response, the Wisconsin Legislature began investigating multiple cost-saving initiatives, including a restructuring of the State's compassionate release statute. The restructured compassionate release statute was merely one attempt by state leaders to ease the economic strain imposed by a teeming prison system.[125] In 2001, compassionate release legislation was first introduced in Wisconsin as a budgetary reform measure,[126] and the 2009 amendments furthered fiscal reform efforts by introducing liberalized early release criteria.[127] However, opponents of the liberalized amendments mounted a successful campaign against expanded compassionate release, which led to the ultimate repeal of the 2009 modifications.[128] This Part will outline the

119. Buckley, *supra* note 16. *But see* SCOTT-HAYWARD, *supra* note 34, at 11 (discussing recent amendments to New York compassionate release statutes that will presumably increase the utilization of the statute).

120. Buckley, *supra* note 16.

121. *Id.*

122. Vesely, *supra* note 27, at 33.

123. *Id.*

124. WIS. ASSEMB. J., 2009 Leg., 99th Reg. Sess., 296, 298 (Governor's Veto Message).

125. *See id.* at 302 (describing additional sentencing reform measures).

126. *See* 2001 Wis. Act 109, § 406.

127. *See infra* Part IV.C.

128. *See infra* Part IV.D.

economic motivation behind the amendments and detail the original compassionate release legislation, the 2009 modifications, and the 2011 repeal.

A. Economic Impetus for Compassionate Release in Wisconsin

In Wisconsin, it costs taxpayers approximately $88 a day to incarcerate one individual—about the cost of a one-night stay in an average hotel.[129] Moreover, with the state prison population nearly tripling in the past two decades,[130] incarceration expenditures continued to exhaust the increasing state budget.[131] In 1989, corrections costs accounted for the state's seventh-largest general fund expenditure; twenty years later, it emerged as the third-largest expenditure.[132] The total cost of corrections during the 2008 fiscal year was $1.217 billion,[133] and by 2009 corrections expenditures rose to $1.265 billion.[134] Additionally, in 2008, the costs of the corrections system in Wisconsin monopolized 8% of the state's general purpose revenue, and it increased to 8.8% in the 2009 fiscal year.[135]

Unfortunately, there is little opportunity to enact cost-saving initiatives within the corrections system, especially when continued overcrowding in the prison system demands more state funds. For example, the Wisconsin DOC estimated that it would cost the state $2.5 billion dollars to alleviate overcrowding and manage the constant growth in prison populations.[136] Additionally, as the age of inmates incarcerated for long periods of time increases, so do the medical costs

129. Christina D. Carmichael, *Adult Corrections Program* 3 (Wis. Legis. Fiscal Bur., Informational Paper No. 57, 2011); Contorno, *supra* note 49.

130. *But see* Hall, *supra* note 46 (stating that the prison population declined in 2010).

131. Contorno, *supra* note 49.

132. *The Cost of Corrections: Wisconsin and Minnesota*, WIS. TAXPAYER, April 2010, at 1, 1.

133. NAT'L ASSOC. OF STATE BUDGET OFFICERS, 2009 STATE EXPENDITURES REPORT 56 tbl.32 (2010) [hereinafter NASBO 2009], http://www.nasbo.org/sites/default/files/2009-State-Expenditure-Report.pdf. According to the Pew Center on the States, for each dollar the state spent on the corrections system in 2008, a mere sixteen cents went to probation and parole. THE PEW CTR. ON THE STATES, WISCONSIN, *supra* note 47.

134. NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS, 2010 STATE EXPENDITURES REPORT 56 tbl.32 (2011), http://www.nasbo.org/sites/default/files/2010%20State%20Expenditure%20Report.pdf [hereinafter NASBO 2010].

135. NASBO 2009, *supra* note 133, at 58 tbl.34; NASBO 2010, *supra* note 134, at 58 tbl.34.

136. JUSTICE CENTER, ANALYSES, *supra* note 46, at 3. *But see* Hall, *supra* note 46 (citing a decrease in state prison population growth).

for prisoners in the Wisconsin system. Data indicates that the cost to provide medical care to inmates exploded from $28.5 million in 1998 to $87.6 million in 2005.[137] Conceivably, it was with these figures in mind that the Wisconsin Legislature proposed and passed 2009 Wisconsin Act 28.

The Act amending compassionate release in Wisconsin, which went into effect on October 1, 2009,[138] included several sentencing reforms intended to reduce strain on the overcrowded prison system and decrease corrections spending. Among these sentence modifications were the amendments to compassionate release, the ability to earn positive adjustment time, the availability of early release for inmates convicted of misdemeanors, the expansion of the Challenge Incarceration Program and Earned Release Program, the possibility of risk reduction sentences, and the opportunity for early discharge from extended supervision or probation.[139] The expansion of these early release procedures was aimed at reducing the state corrections budget, which in 2009 had reached historically high levels.[140] The 2009

137. Timothy Curtin, Note, *The Continuing Problem of America's Aging Prison Population and the Search for a Cost-Effective and Socially Acceptable Means of Addressing It*, 15 ELDER L.J. 473, 475 (2007). *But see* Purvis, *supra* note 57 (indicating that "[o]fficials can't say just how much of that boost in cost can be attributed to geriatric care, but older prisoners are more likely to have chronic illnesses and to require off-site medical treatment, organ transplants and other costly operations").

138. FACTSHEET, *supra* note 3, at 1.

139. *See* 2009 Wis. Act. 28; FACTSHEET, *supra* note 3, at 1–3. Inmates eligible for sentence modification earned positive adjustment time provided "they d[id] not violate the rules and regulations of the prison or refuse or neglect to perform required or assigned duties." FACTSHEET, *supra*, at 1. Inmates sentenced to "misdemeanor[s] or non-violent felon[ies] Class F–I" and deemed not to be a high risk for re-offending earned one day for every two days served. *Id.* Inmates sentenced to misdemeanors or Class F–I felonies and deemed to be a high risk for re-offending earned one day for every three days served. *Id.* at 1–2. Inmates sentenced to Class C–E felonies, or violent offenses, earned one day for every 5.7 days served. *Id.* at 2. The expansion of the Challenge Incarceration Program and Earned Release Program allows for expanded sentencing options in cases where an inmate convicted of a non-violent crime may have a substance abuse problem. *Id.* Risk Reduction sentences may be imposed by a judge if the inmate consents to participation in Department of Corrections programming or treatment. *Id.* at 3. Early discharge from extended supervision or probation would have been granted if the inmate has met all the requirements of extended supervision for a period of two years and "the reduction is in the interest of justice." *Id.*

140. *See* THE COUNCIL OF STATE GOV'TS, JUSTICE CTR., JUSTICE REINVESTMENT IN WISCONSIN: REDUCING SPENDING ON CORRECTIONS AND REINVESTING IN STRATEGIES TO INCREASE PUBLIC SAFETY 2 (2009), http://justicereinvestment.org/files/JR_Wisconsin.FINAL.pdf; NASBO 2010, *supra* note 134, at 54; WIS. BUDGET PROJECT, INCREASING SHARE OF SCARCE RESOURCES SPENT ON CORRECTIONS: NEIGHBORING STATES SPEND FAR LESS THAN WISCONSIN ON CORRECTIONS (2011),

amendments enacted progressive modifications to the original 2001 compassionate release legislation, and these amendments, in conjunction with the companion sentence modification reforms, were slated to save the state an estimated $27 million over two years.[141] However, 2009 Wisconsin Act 28 was not the first time in Wisconsin history that sentencing provisions aimed at reducing corrections expenditures were incorporated in a budget bill.

B. Wisconsin's Former Compassionate Release Legislation

Compassionate release was first introduced to the state under 2001 Wisconsin Act 109, a budget reform bill.[142] Under this Act, inmates could petition the sentencing court for early release due to age or medical condition under Wisconsin Statutes section 302.113.[143] Under Wisconsin law, frequently referred to as "truth-in-sentencing," individuals sentenced to prison are given a bifurcated sentence.[144] Within this two-part sentence, the sentencing judge designates an interval that the individual is to remain in prison, as well as a specified period that he or she will remain under extended supervision in the community.[145] Wisconsin's truth-in-sentencing legislation was enacted to clarify sentencing terms and make prison time more determinate.[146] Yet, under the 2001 statute, inmates were allowed to petition for compassionate release.[147] However, early release was reserved for

http://www.wisconsinbudgetproject.org/corrections_spending.pdf (indicating that state spending on corrections increased 9.1% from 2001 to 2010, peaking in 2009 at approximately 15%).

141. Paul Srubas, *Wisconsin Gov. Scott Walker's Budget Tightens Early Prison Release*, GREEN BAY PRESS-GAZETTE (Mar. 5, 2011), http://www.greenbaypressgazette.com/article/20110305/GPG0101/103050637/Wisconsin-Gov-Scott-Walker-s-budget-tightens-early-prison-release. By May 2010, however, the early release amendments saved $900,000 in prison-related expenditures—only a fraction of the initial multi-million dollar estimate. Klingele, *The Early Demise*, *supra* note 7, at 438.

142. 2001 Wis. Act 109, § 406.

143. WIS. STAT. § 302.113(9g)(b)–(c) (2007–2008).

144. CHRIS CARMICHAEL, WIS. LEG. FISCAL BUREAU, BIFURCATED SENTENCE MODIFICATION, J. FINANCE COMM. 99-277, 1ST SESS., at 1 (2009) [hereinafter FISCAL BUREAU], http://legis.wisconsin.gov/lfb/publications/budget/2009-11-Budget/Documents/Budget%20Papers/277.pdf. *See generally* Hammer, *supra* note 29 (detailing truth-in-sentencing in Wisconsin from historic roots to current legislation).

145. FISCAL BUREAU, *supra* note 144, at 1.

146. Hammer, *supra* note 29, at 15.

147. *See* WIS. STAT. § 302.113 (2007–2008).

inmates who had not committed a Class B felony or were not serving a life sentence.[148]

Eligible inmates could petition for release in three specific circumstances. The statute required that the inmate be at least sixty-five years old and have completed at least five years of his or her sentence.[149] Additionally, sixty-year-old inmates could petition for early release if they had served a minimum of ten years of the sentence.[150] Finally, the statute allowed inmates with a terminal condition, of any age and with any amount of time served, to petition for release.[151] "Terminal condition" was defined as "an incurable condition afflicting a person, caused by injury, disease, or illness, as a result of which the person has a medical prognosis that his or her life expectancy is 6 months or less."[152] If the petitioner met one or more of these requirements, his or her petition would first be reviewed by the program review committee (PRC) at his or her correctional institution.[153] The PRC would make one of two determinations: (1) it could outright deny the petition if it did not agree that the public interest would be served by early release of the inmate or (2) it could decide to forward the petition to the sentencing court, which was responsible for making compassionate release determinations.[154] If the petition was denied, the inmate had no right to appeal the decision of the PRC and had to wait one year to refile a subsequent petition.[155]

Provided the petition was referred to the sentencing court, the statute required that the court hold a hearing to determine, by the

148. *Id.* § 302.113(9g)(b); Memorandum from Chris Carmichael, Fiscal Analyst, Leg. Fiscal Bureau, to State Senator Lena Taylor at 5 (July 29, 2009) [hereinafter Carmichael Memorandum], http://www.wi-doc.com/PDF_Files/Budget/2009_07_29Taylor.pdf (explaining that 2009 Wis. Act 28 "modified the law to allow inmates serving life sentences or Class B felonies to be eligible for release"); *see also* WIS. STAT. §§ 302.114, 973.014 (2007–2008). Examples of the crimes that generally come under Class B felony are reckless homicide, conspiracy, kidnapping, and sexual assault. Carmichael Memorandum, *supra*, at 7.

149. WIS. STAT. § 302.113(9g)(b)(1).

150. *Id.* § 302.113(9g)(b)(2).

151. *Id.* § 302.113(9g)(b)(3).

152. *Id.* § 302.113(9g)(a)(2).

153. *Id.* § 302.113(9g)(c). The program review committee is the "committee at a correctional institution that reviews the security classifications, institution assignments, and correctional programming assignments of inmates confined in the institution." *Id.* § 302.113(9g)(a)(1).

154. Carmichael Memorandum, *supra* note 148, at 5; FISCAL BUREAU, *supra* note 144, at 2.

155. WIS. STAT. § 302.113(9g)(i).

"greater weight of the credible evidence," that early release of the inmate would serve the public interest.[156] If the sentencing court issued a positive finding and the petition for compassionate release was granted, the statute required that the inmate be released within thirty days into extended supervision within the community.[157] Regardless, the length of the inmate's sentence would remain unchanged because the term of extended supervision would simply increase, allowing the original term of the bifurcated sentence to remain intact.[158] However, the state could appeal the sentencing court's determination to the appellate court, and the appellate court had the power to reverse the sentencing court's decision only if it found that the court "erroneously exercised its discretion in granting or denying the petition."[159]

C. Wisconsin's Amended Compassionate Release Legislation Under 2009 Wisconsin Act 28

While the basic spirit of the former compassionate release statute was maintained under 2009 Wisconsin Act 28, several significant amendments were introduced to broaden the pool of eligible inmates. As a result, Wisconsin became a forerunner in the advancement of compassionate release legislation.[160] Under the 2009 amendments creating Wisconsin Statute section 302.1135, elderly and ill inmates serving a bifurcated sentence were permitted to petition for early release due to age or medical condition as the previous law provided, but the recent amendments considerably expanded inmate eligibility.[161] The age requirements remained the same, allowing inmates who are at least sixty years old, having served at least ten years of their sentence, as well as inmates who are at least sixty-five years old, having served at least five years of their sentence, to seek sentence modification.[162] However, under the amended statute elderly prisoners who were originally sentenced to life in prison or convicted of a Class B felony also became eligible to petition for early release.[163]

156. FISCAL BUREAU, *supra* note 144, at 2.
157. *Id.;* WIS. STAT. § 302.113(9g)(f)(1).
158. WIS. STAT. § 302.113(9g)(f)(2); FISCAL BUREAU, *supra* note 144, at 2.
159. WIS. STAT. § 302.113(9g)(h); FISCAL BUREAU, *supra* note 144, at 2–3.
160. *See supra* note 9 and accompanying text.
161. *See* WIS. STAT. § 302.1135(2)(a)–(c) (2009–2010).
162. *Id.* § 302.1135(2)(a)–(b).
163. *Id.* § 302.1135(2); *see also* Carmichael Memorandum, *supra* note 148, at 5.

Furthermore, the statute no longer limited petitions for sentence modification to the terminally ill; instead, inmates needed only demonstrate an extraordinary health condition.[164] "Extraordinary health condition" was defined as "a condition afflicting a person, such as advanced age, infirmity, or disability of the person or a need for medical treatment or services not available within a correctional institution."[165] Like elderly inmates, prisoners who were serving a life sentence or convicted of a Class B felony and were deemed to have an extraordinary health condition could still seek a sentence modification under the 2009 amendments.[166]

Additionally, under the amended 2009 statute, the inmate's petition for sentence modification was no longer reviewed by the PRC or determined by the sentencing court. Instead, the legislature created the Earned Release Review Commission (ERRC) as an administrative panel established to replace the parole commission and oversee all compassionate release petitions.[167] The ERRC continued to perform all of the residual duties of the parole board, but it also reviewed inmate petitions for early release under the new statutory provisions.[168] The ERRC was comprised of eight members, including a chairperson.[169] The chairperson was nominated by the governor for a two-year term, subject to the advice and consent of the senate.[170] The first, and only, ERRC chairperson was Alfonso Graham, a former Milwaukee police official,[171] who was responsible for appointing the remaining seven members who must "have knowledge of or experience in corrections or criminal

164. *Compare* WIS. STAT. §§ 302.1135(1)(b), .1135(2)(c) (defining "extraordinary health condition" and making it explicit that an inmate needs to exhibit an extraordinary health condition to apply for compassionate release), *with* WIS. STAT. §§ 302.113(9g)(a)(2), .113(9g)(b)(3) (defining "terminal condition" and making it explicit that an inmate needs to exhibit a terminal condition to apply for compassionate release).

165. WIS. STAT. § 302.1135(1)(b).

166. *Id.* § 302.1135(2)(c).

167. *See* WIS. STAT. § 15.145(1) (2009–2010); DANIEL RITSCHE, LEGISLATIVE REFERENCE BUREAU, BUDGET BRIEFS: EARLY RELEASE AND SENTENCING REFORMS 1 (2009) [hereinafter BUDGET BRIEFS], *available at* http://www.legis.wisconsin.gov/lrb/pubs/budbriefs/09bb1.pdf.

168. BUDGET BRIEFS, *supra* note 167, at 1.

169. WIS. STAT. § 15.145(1).

170. *Id.*

171. Janine Anderson, *State Official: Prison Is Not Always the Answer*, J. TIMES, Oct. 17, 2010, at 11A; Shepard, *supra* note 45.

justice."[172] During the period while the ERRC was in existence, all the members were DOC employees.[173]

If an inmate satisfied the specific criteria for age and health conditions, he or she could submit a petition to the ERRC requesting that his or her sentence be modified as provided by the statute. For a petition citing an extraordinary health condition, the inmate must include affidavits from two physicians substantiating his or her claim.[174] When the ERRC received the inmate's petition, a hearing was held to "determine whether the public interest would be served by a modification of the inmate's sentence."[175] When making early release eligibility determinations, the ERRC could "consider the inmate's conduct; efforts at and progress in rehabilitation; participation and progress in education, treatment, or other correctional programs; and whether sentence reduction is in the interests of justice."[176] In essence, the ERRC was responsible for making decisions previously in the hands of elected judges.

Prior to the hearing, the ERRC was required to provide notice of the hearing to the inmate, the inmate's attorney, the district attorney, and the victim of the crime, who all may be present at the proceeding.[177] The statute required that the district attorney provide the victim with a card requesting the victim's name and address; the victim could then forward that information to the ERRC so the victim could be contacted in the event of a hearing, but the mailing address of the victim would

172. WIS. STAT. § 15.145(1).

173. JESSICA MCBRIDE, WIS. POL'Y RES. INST., BACK ON THE STREET: UNDER A NEW LAW, BUREAUCRATS CAN DECIDE TO CUT LIFE SENTENCES SHORT (2009) [hereinafter MCBRIDE, UNDER A NEW LAW], http://www.wpri.org/Special_Reports/Back_On_The_Street.html. During the period from October 1, 2009 to July 19, 2011, the ERRC members were James Hart (09/08/02–12/30/09), David White (08/20/06–11/30/09), Lawrence Mahoney (03/01/10–11/07/10), Danielle LaCost (08/20/06–Present member of the parole commission at time of publication), Douglas Drankiewicz (07/06/10–Present), William Francis (09/27/10–Present), Heidi Schroeder (03/01/10–Present), and Emily Davidson (03/01/10–Present). E-mail from Holly Heggestad, Assistant to the Chair, Wisconsin Parole Commission, to author (Apr. 10, 2012, 10:36 CST). Many of these individuals retained their positions as commissioners when the ERRC was abolished and the Parole Commission was reestablished. *See Wisconsin Parole Commission*, WIS. DEP'T OF CORRECTIONS, http://www.wi-doc.com/ParoleCommission.htm (last visited June 21, 2012).

174. WIS. STAT. § 302.1135(3) (2009–2010).

175. *Id.* § 302.1135(4).

176. BUDGET BRIEFS, *supra* note 167, at 1.

177. WIS. STAT. § 302.1135(4). According to the statute, the term "victim" does not include the person charged with or alleged to have committed the crime. *Id.* § 950.02(4)(b).

remain confidential.[178] At the hearing, the prisoner had the burden to demonstrate "by the greater weight of the credible evidence that a modification of the sentence . . . would serve the public interest."[179] However, the victim also maintained the right to present a statement regarding potential changes to the inmate's sentence.[180] If the inmate failed to convince the ERRC that a sentence modification would serve the public interest, the ERRC would deny the petition, and another petition could not be filed with the ERRC within one year of the denial.[181]

If the ERRC considered sentence modification to be in the best interest of the public, the ERRC was empowered to alter an inmate's sentence. The ERRC accomplished this by reducing the incarceration time and discharging the inmate into extended supervision within the community or by increasing the period of time that the inmate is under extended supervision; so, the length of the original sentence was not altered.[182] If the inmate was sentenced to a term of life imprisonment, the ERRC could release the inmate to extended supervision; however, it imposed a term of supervision equal to the original sentence, leaving the total length of the original sentence intact.[183]

D. PUBLIC AND LEGISLATIVE RESPONSE TO 2009 WISCONSIN ACT 28

Despite the few, yet significant, changes made to the compassionate release law in Wisconsin under the 2009 amendments, the early release program garnered significant opposition. Critics of Wisconsin's early release program were vocal in their repeated requests for the program to be abolished.[184] Unfortunately, critics rarely separated the compassionate release legislation from the broader changes to early

178. *Id.* § 302.1135(7) ("The commission shall make a reasonable attempt to send the notice of hearing to the last-known address of the inmate's victim, postmarked at least 10 days before the date of the hearing.").

179. *Id.* § 302.1135(5).

180. *Id.* § 302.1135(4).

181. *Id.* § 302.1135(9).

182. *Id.* § 302.1135(6)(a)–(b).

183. *Id.* § 302.1135(6)(b).

184. *See, e.g.*, Press Release, State Representative Scott Suder, 44 State Legislators Join Suder in Calling for an End to Early Release (Jan. 13, 2010) [hereinafter Suder Press Release, Jan. 13, 2010].

release provisions, thereby villianizing the entire program.[185] Opponents coined it a "catch and release" social experiment that had the propensity to inundate the community with prison-hardened career criminals.[186] In support for their position, they cited evidence that violent offenders and those serving time for committing Class B felonies were eligible to petition under the 2009 amendments.[187] Critics also condemned the creation of the ERRC, arguing that it removed key sentencing decisions from the discretion of judges and placed the decisions in the hands of unelected bureaucrats.[188] Furthermore, Wisconsin Attorney General J.B. Van Hollen argued that the new "program is 'changing the rules in the middle of the game' and a 'huge slap in the face' to victims."[189]

As a result, in January 2010, forty-five Wisconsin state legislators, led by State Representative Scott Suder, collaborated to oppose early release and urged Governor Doyle to suspend the program.[190] Then, in February 2010, Suder authored a bill to repeal early release, calling it the Democrats' "Let Em' [sic] Loose Early" program.[191] According to Suder, the age or medical condition of a criminal should have no bearing on his ability to carry out his sentence behind bars.[192] He argued that "'[p]utting these criminals in residential nursing homes with an already vulnerable population . . . is just utterly dangerous,'"[193] and he urged that the "potential savings from the program were greatly exaggerated and now hardened criminals are on the street, committing

185. *See supra* note 139 and accompanying text (discussing additional prison-term modifications passed alongside the compassionate release legislation).

186. Hall & Spicuzza, *supra* note 45.

187. *Id.* ("While it's easier for nonviolent offenders to qualify, many other inmates—including murderers—may petition for early release."); *see also* WIS. STAT. § 302.1135(2) (indicating that there is no restriction on who can petition based on the crime committed).

188. *See* Hall & Spicuzza, *supra* note 45.

189. *Id.*

190. Suder Press Release, Jan. 13, 2010, *supra* note 184.

191. Assemb. B. 879, 2009 Leg., 99th Sess. (Wis. 2010); Press Release, State Representative Scott Suder, Rep. Suder Authors Bill to End Early Release (Feb. 24, 2010) [hereinafter Suder Press Release, Feb. 24, 2010], *available at* http://legis.wisconsin.gov/assembly/asm69/news/website/releases/02.24.2010.htm; Press Release, State Representative Scott Suder, Rep. Suder Calls for Repeal of Democrats' "Let Em' Loose Early" Program (Jan. 6, 2010), *available at* http://legis.wisconsin.gov/assembly/asm69/news/website/releases/01.06.2010.htm.

192. Purvis, *supra* note 57.

193. *Id.* (quoting Representative Suder).

crimes when they should be in jail."[194] Nevertheless, while Democrats remained in control of the state legislature, those opposed to compassionate and early release remained unable to repeal the legislation.

However, in November 2010, in the midst of the most devastating economic downturn in recent memory, the Republican Party, running on a platform of job creation and tax cuts for businesses, secured the governor's office and both houses of the Legislature, marking a complete reversal of state government control from one party to the other.[195] The effects of the 2010 election created a firestorm in the state, and Wisconsin came into the national spotlight as a hotbed for political upheaval shortly after the election of Governor Walker.[196] In April 2011, opponents of early release implemented measures to repeal the 2009 amendments. Assembly Bill 86 was introduced on April 7, 2011, by twenty-seven Republican State Representatives, an Independent,[197] and five Republican State Senators[198] to repeal or amend major portions of Wisconsin Act 28; many of the same legislators introduced the companion bill in the senate, Senate Bill 57, on April 8, 2011.[199] The senate version passed both houses of the legislature with bipartisan

194. Suder Press Release, Feb. 24, 2010, *supra* note 191. *But see* Record Request Response, Earned Release Review Commission (Sept. 12, 2011) (on file with author) (indicating that there is no data to support the assertion that inmates released under compassionate release have re-offended).

195. Marley & Bergquist, *supra* note 12.

196. *See* Bill Lueders, *Scott Walker Does It His Way*, HUFFINGTONPOST.COM (Jan. 9, 2012), http://www.huffingtonpost.com/2012/01/09/scott-walker-does-it-his-way_n_1193105.html (explaining how the Governor's actions led to "historic protests in 2011 and . . . an ongoing recall attempt").

197. Assemb. B. 86, 2011–2012 Leg., 100th Sess. (Wis. 2011). The twenty-seven Republican Representatives include Representatives Suder, Krug, Jacque, Petersen, Spanbauer, Steineke, Severson, T. Larson, Kestell, Mursau, Thiesfeldt, LeMahieu, Strachota, Kleefisch, Murtha, Endsley, Marklein, Rivard, Honadel, Bies, Kaufert, Stone, Brooks, Petryk, Ripp, Knodl, and Klenke. Wisconsin State Representatives Contact List, Wisconsin State Legislature, http://legis.wisconsin.gov/w3asp/contact/legislatorslist.aspx?house=assembly (last visited Apr. 12, 2012). One sponsor, Representative Ziegelbauer, is an independent. *Id.*

198. Assemb. B. 86. The five Republican Senators include Senators Wanggaard, Leibham, Moulton, Zipperer, and Galloway. Wisconsin State Senators Contact List, Wisconsin State Legislature, http://legis.wisconsin.gov/w3asp/contact/legislatorslist.aspx?house=senate (last visited Apr. 12, 2012).

199. S. B. 57, 2011–2012 Leg., 100th Sess. (Wis. 2011). The Senate companion bill was identical to the Assembly version except that State Representative Klenke was not a co-sponsor. *Compare id.*, *with* Assemb. B. 86.

support and became 2011 Wisconsin Act 38 on July 19, 2011, with Governor Walker's signature.[200]

Wisconsin Act 38 restores the sentencing provisions and most of the early release provisions to the law in effect prior to Wisconsin Act 28, including compassionate release.[201] Wisconsin Act 38 repealed Wisconsin Statutes section 302.1135, and reinstated Wisconsin Statutes section 302.113(9g), maintaining the vast majority of the language utilized in the former compassionate release legislation created in 2001.[202] In fact, the only language retained from the 2009 amendments was the "extraordinary health condition" criteria for release, which was preserved rather than reverted to the former "terminal condition" requirement.[203] Thus, the 2011 amendments abolished the ERRC entirely—restoring the Wisconsin Parole Commission—and reinstated the program review commission (PRC) and the sentencing court as the decision-making bodies for compassionate release decisions.[204] Furthermore, inmates serving a sentence for committing a Class B felony or serving life without parole were no longer eligible for consideration under the statute.[205] However, despite persistent rhetoric from compassionate release opponents that it was necessary to repeal the early release legislation, an analysis of the actual implementation of the 2009 amendments suggests disparate results.

V. IMPLEMENTATION OF RESTRUCTURED COMPASSIONATE RELEASE IN WISCONSIN

During the period between October 1, 2009, and July 19, 2011, fifty-five inmates submitted compassionate release petitions under the 2009 amendments; however, only eight inmates were ultimately released.[206] This Part will detail the inmates who submitted petitions under the 2009 amendments, focusing on those that were ultimately denied and approved, in order to highlight the types of inmates who were granted and denied release from the prison system.

200. Marley, *supra* note 15.
201. Assemb. B. 86, at 3–4.
202. *Compare* 2011 Wis. Act 38, § 45, *with* 2001 Wis. Act 109, § 406.
203. 2011 Wis. Act 38, § 45.
204. *Id.* § 1.
205. *Id.* § 45.
206. Record Request Response, *supra* note 194.

A. Petitions Filed Under the 2009 Wisconsin Act 28 Compassionate Release Amendments

Under the 2009 amendments to compassionate release, the procedure for processing petitions required significant time and energy on behalf of the ERRC. According to the ERRC, the Commission did not inform inmates directly of the availability of compassionate release.[207] Instead, if an inmate contacted the ERRC inquiring about early release, the Commission directed the inmate to the correct petition forms available in the correctional institution library.[208] Only one commissioner was responsible for compiling the petitions and scheduling hearing dates for all the compassionate release petitions submitted to the ERRC.[209] Unfortunately, a significant number of petitions were incomplete or incorrect upon submission, which delayed or stalled the hearing process for some inmates.[210] The petitions were submitted to the Commission through several avenues. Some petitions were filed on behalf of inmates by private attorneys or public defenders, but the majority of petitions came directly from the inmate or from an inmate's family member.[211] The only procedural requirement was that the inmate personally sign the petition.[212]

According to data obtained from the ERRC and the Parole Commission, fifty-five inmates petitioned for early release under the amended statute between October 1, 2009, and July 19, 2011.[213] Twelve petitions were filed subsequent to the statute taking effect in 2009, thirty-one were filed in 2010, and twelve were filed in 2011 before the 2009 amendments were repealed.[214] Of these petitions, thirty-six were received from inmates seeking early release due to an extraordinary health condition, while twenty-one inmates filed petitions under the age criteria.[215] Three inmates who filed petitions prior to 2011 Wisconsin Act 38 taking effect have since been denied a hearing based on

207. E-mail from Holly Heggestad to author, *supra* note 173.

208. Telephone Interview with Pam Waddell, Former Assistant to the Chair, Earned Release Review Commission (Jan. 10, 2012).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. Record Request Response, *supra* note 194.

214. *Id.*

215. *Id.*

ineligibility due to the 2011 amendments to the statute.[216] Four inmate petitions that were awaiting a hearing when the 2011 amendments went into effect have been forwarded on to the Bureau of Offender Classification and Movement and are no longer controlled by the parole commission.[217]

The remaining petitions, not officially denied by the Commission, were distributed into a number of categories. Seventeen inmates were denied early release because they did not meet the specific eligibility criteria required by the statute.[218] Nine inmates submitted incomplete or incorrect petitions, and although the inmates may refile to bring their petition into compliance, they rarely do.[219] One inmate, James Jesko, died before a hearing was held on his petition.[220] Another inmate, Russell Lesperance, was released under a different early release provision before the ERRC could schedule a hearing to review his petition.[221] Additionally, Raina Lewis was granted early release due to an extraordinary health condition, but the approval was subsequently rescinded by the Commission before she was released.[222]

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216. *Id.*

217. Telephone Interview with Holly Heggestad, Assistant to the Chair, Parole Commission (Jan. 10, 2012) (on file with the author); Record Request Response, *supra* note 194. The inmates are Martin Barreiro, George Boswell, Christopher Greve, and Larry Beerbohm. Telephone interview with Holly Heggestad, *supra* note 217.

218. Record Request Response, *supra* note 194. The inmate is not officially denied by the ERRC if he or she does not meet the criteria required in the statute. E-mail from Holly Heggestad to author, *supra* note 173. For an explanation of the required criteria see *supra* notes 159–163 and accompanying text.

219. Record Request Response, *supra* note 194; Telephone Interview with Pam Waddell, *supra* note 208.

220. Record Request Response, *supra* note 194.

221. Telephone interview with Holly Heggestad, *supra* note 217; JESSICA MCBRIDE, WIS. POL'Y RES. INST., BACK ON THE STREET: DOES THE STATE KNOW WHAT KIND OF CRIMINALS THEY ARE SENDING BACK INTO OUR NEIGHBORHOODS? (2009) [hereinafter MCBRIDE, DOES THE STATE KNOW], http://www.wpri.org/Special_Reports/Back_On_The_Street.html. Lesperance, an eighty-eight year old male, worked for a non-profit dedicated to providing assistance to low-income families in need of homes. MCBRIDE, DOES THE STATE KNOW, *supra* note 221. His non-profit would promise to repair properties if individual would first purchase them. *Id.* However, his company never completed the repairs for the victims. *Id.* Lesperance was "[a] veteran of WWII, he was treated for dementia, hearing loss, chronic kidney disease, obesity, and other ailments." *Id.*

222. Record Request Response, *supra* note 194. There was no explanation given in the ERRC records for why her release was denied. *See id.* Raina Lewis was convicted of identity theft and sentenced on June 10, 2009, to two years in state prison and two years extended supervision. Oral Decision of Hon. Thomas P. Donegan, State v. Lewis, No. 2009CF001238 (Wis. Cir. Ct. June 10, 2009) (Wis. Ct. Sys., Cir. Ct. Access).

B. Inmate Petitions Denied Under the 2009 Amendments to Compassionate Release

During the period while the 2009 amendments were in effect, ERRC records indicate that thirteen inmate petitions were officially denied.[223] The Commission cites several justifications for these denials: the inmate's failure to prove that a sentence modification would serve the public interest, the medical needs were met by the department, and the inmate required additional time to depreciate the possibility of re-offending.[224] Table 1[225] provides some insight into the inmates who were denied release under the compassionate release statute.

223. Record Request Response, *supra* note 194.

224. *Id.* However, the ERRC records do not indicate a reason for all the inmate petitions that were denied. *See id.*

225. Table 1 contains data compiled from the Wisconsin Court System: Circuit Court Access website, http://wcca.wicourts.gov/index.xsl, and Record Request Responses on file with the author. For more information please contact the author or the *Marquette Law Review*. The Inmate Age heading refers to the inmates age when filing the petition; the EHC Petition heading refers to an extraordinary health condition petition; the Sentence heading details the number of years the defendant was sentenced to incarceration and extended supervision; and the Years in Prison heading refers to the number of years the defendant served at the time of the petition.

Table 1. Inmates Denied Release Under the Compassionate Release Statute from 2009–2011

Inmate Name	Inmate Age	EHC Petition	Age Petition	Conviction	Sentence	Years in Prison	Reason for Denial	Date of Petition	Date of Release
Michael Stuber	72		X	First-Degree Sexual Assault of a Child, Exposing a Child to Harmful Materials	15 years/ 35 years, 4 years/ 6 years, concurrent	> 7 years	Time needed to depreciate seriousness of re-offending	Nov. 25, 2009	
Brandon Neumann	29	X		Manufacture, Distribution, or Delivery of THC, Possession with Intent to Deliver Non-Narcotics	1.5 years/ 2 years, 2.5 years/ 3 years, concurrent	> 1 year	Medical needs met by DOC	Dec. 11, 2009	Oct. 26, 2010, released to extended supervision
Fernald Cavert	72		X	First-Degree Sexual Assault of a Child in two counties	10 years/ 25 years, 1 year/ 14 years, consecutive	< 7 years	Unmet treatment needs Cavert had not completed the required treatment program for sex offenders prior to submitting his petition. At the time of Cavert's denial he was still on the waiting list to begin the sex offender treatment program.	Dec. 10, 2009	

Clair "Slick" Visgar	67		X	Substantial Battery to an Individual-habitual criminality modifier	10 years/ 5 years	> 5 years	Failed to meet the burden of proof	Dec. 23, 2009	Scheduled on or before May 3, 2012, released to extended supervision
Patricia Klein	61	X		OWI, 5+	2 years/ 3 years	< 2 years	Failed to meet the burden of proof	Jan. 25, 2010	Jan. 4, 2011, released to extended supervision
Gerald West	27	X		Possession of Heroin with Intent to Deliver, Manufacture, Distribution, or Delivery of Heroin	4 years/ 4 years, 2 years/ 3 years, concurrent	< 2 years	Failed to meet the burden of proof	Feb. 11, 2010	Scheduled on or before Sept. 4, 2012, released to extended supervision

Inmate Name	Inmate Age	EHC Petition	Age Petition	Conviction	Sentence	Years in Prison	Reason for Denial	Date of Petition	Date of Release
Juan Milanes	65		X	Arson, Criminal Damage to Property, Discharging Firearm into a Vehicle or Building	19 years/ 26 years	> 8 years	No reason indicated	Mar. 8, 2010	
Joseph Castro, Jr.	68		X	Possession of Cocaine and THC with Intent to Deliver	9 years/ 6 years	> 4 years	Failed to meet the burden of proof	Apr.12, 2010	
James Woller	69		X	First-degree Sexual Assault of a Child, Second-Degree Sexual Assault of a Child (Two counts)	20 years/ 20 years, 20 years/ 10 years, 20 years/ 20 years, concurrent	> 6 years	No reason indicated	Apr. 29, 2010	

Ronald Gable	64	X		Armed robbery, 4 counts	10 years/ 5 years, 5 years/ 1 years, consecutive	< 6 years	Medical needs met by DOC. According to prison records, Gable spent four days in a supervised living facility in August 2010	July 8, 2010	
Raymond Kallio	67		X	First-degree Sexual Assault of a Child	10 years/ 14 years	> 4 years	No reason indicated	July 12, 2010	
David Sell	60	X		Delivery of THC, Intent to Deliver THC, Bail Jumping	2 years/ 2 years, 3 years/ 2 years, 2 years/ 2 years. Sell is to serve his two year sentences concurrently and consecutive to his three year sentence	3 years	No reason indicated, but review of decision was to be conducted	July 18, 2010	June 3, 2011, reason for release is unknown. Records do not indicate if his release was due to a belated review by the ERRC or achieved through another DOC release method.

Inmate Name	Inmate Age	EHC Petition	Age Petition	Conviction	Sentence	Years in Prison	Reason for Denial	Date of Petition	Date of Release
Robert Lehman	61	X		OWI, 5+	2 years/ 2 years	< 2 months	No reason indicated. According to prison records, Lehman has been housed in a supervised living facility since July 21, 2001.	Nov. 15, 2010	
Levi Booth	63		X	First-degree Reckless Homicide, First-degree Recklessly Endangering Safety	21 years/ 16 years	> 9 years	No reason indicated	Nov. 19, 2010	

C. *Inmates Released Under the 2009 Amendments to Compassionate Release*

Between October 1, 2009 and July 19, 2011, the ERRC granted release to only eight inmates under the amended statute.[226] The subsequent table outlines the corrections history of the released inmates, followed by a more descriptive narrative regarding these individuals.

Table 2. Inmates Released Under the Compassionate Release Statute from 2009–2011

Inmate Name	EHC Petition	Conviction	Sentence	Time Served	Release Date	Deceased	Re-offend
Paula Harris	X	First-Degree Reckless Homicide	11 years	> 3 years	Dec. 15, 2009		No
Bruce Hokenson	X	OWI, 5+	2 years	> 2 years	Feb. 22, 2010		No
Herbert Skeens	X	Armed Robbery with Threat of Force	3 years	> 1 year	June 2, 2010	Aug. 14, 2010	No
Craig Nowak	X	Manufacture, Distribution, or Delivery of a Schedule IV Drug	3 years	< 1 year	July 16, 2010	Aug. 28, 2010	No
Robert Savoy	X	Injury by intoxicated use of a vehicle and OWI, 5+	7.5 years	> 6 years	Jan. 6, 2011		No
Robert Anderson	X	OWI	3 years	> 3 years	Apr. 6, 2011	Apr. 24, 2011	No
Keith Sims	X	Retail Theft	3 years	> 3 months	June 3, 2011	July 5, 2011	No
Richard McNew	X	Multiple Firearms Violations	2 years	> 1 year	June 23, 2011	Oct. 12, 2011	No

226. *See* tbl.2, *infra* p. 1717; Record Request Response, *supra* note 194.

The first, on December 15, 2009, was Paula Harris, a forty-five year old female, who was convicted of first-degree reckless homicide and sentenced to eleven years in prison with seven years extended supervision.[227] She reportedly stabbed Felicia Woodley, an acquaintance, with a steak knife after an argument in her apartment.[228] Her sentence began on December 12, 2006; thus, she served a little over three years of her eleven-year sentence.[229] ERRC records indicate that Harris was released under the extraordinary health condition provision of the statute,[230] but documents indicate no specific explanation for her release; however, court records from 2006 imply that she suffered from congestive heart failure and had difficulty walking.[231] This was her first criminal conviction. No further information is available regarding whether Harris has re-offended since her release because, according to information received from the department, the DOC does not keep records concerning offenses by released prisoners.[232] However, a search of the Wisconsin Circuit Court Access (CCAP) website revealed no recent infractions, criminal or otherwise, since her release.[233]

The second inmate released was Bruce Hokenson, a fifty-eight year old male, convicted of operating while under the influence (OWI); this was his fifth offense.[234] Hokenson filed a petition under the extraordinary health condition provision of the statute.[235] He was originally sentenced to two years and six months in state prison with an additional three years of extended supervision.[236] His sentence began on January 3, 2008, and he was released on February 22, 2010[237]—just five

227. *Id.*; State v. Harris, No. 2005CF005730 (Wis. Cir. Ct. Dec. 12, 2006) (Wis. Ct. Sys., Cir. Ct. Access). Ms. Harris was charged with first-degree reckless homicide under WIS. STAT. § 940.02(1) (2005–2006). *Id.*

228. McBride, *Wisconsin Is Starting*, *supra* note 28.

229. *Harris*, No. 2005CF005730.

230. Record Request Response, *supra* note 194.

231. MCBRIDE, DOES THE STATE KNOW, *supra* note 221.

232. Record Request Response, Division of Community Corrections (Jan. 6, 2011) (on file with author) ("Currently there is no record that exists for the information you have requested regarding inmates who have been released under Wis. Stat. 302.1135 (2010) and may have subsequently reoffended.").

233. Wis. Ct. Sys., Cir. Ct. Access, http://wcca.wicourts.gov/simpleCaseSearch.xsl;jsessionid=8AEE55E6E57A38EA33A29DE3A285A835.render6 (last visited Apr. 12, 2012). This data is based on running a "simple case search" for "Harris," "Paula." *Id.*

234. State v. Hokenson, No. 2007CF000465 (Wis. Cir. Ct. Jan. 3, 2008) (Wis. Ct. Sys., Cir. Ct. Access).

235. Record Request Response, *supra* note 194.

236. *Hokenson*, No. 2007CF000465.

237. *Id.*; Record Request Response, *supra* note 194.

months shy of his full sentence. Again, while the DOC does not keep a thorough accounting of inmates after their release,[238] there is no indication that Hokenson has re-offended.[239]

The third inmate released was Herbert Skeens, a fifty-one year old male, charged with armed robbery with threat of force.[240] He was sentenced on March 18, 2009, to three years in state prison and five years extended release.[241] Shortly after sentencing, Skeens was recommended for treatment in The Mental Illness-Chemical Abuse (MICA) Program.[242] He was subsequently released under the extraordinary health condition provision of the statute on June 2, 2010,[243] and he passed away on August 14, 2010.[244] He served just over one year of his sentence.

The fourth individual released was Craig Nowak, a forty-nine year old male, convicted of the manufacture, distribution, or delivery of a schedule IV drug.[245] He was sentenced on October 15, 2009, to three years in a state prison and three years extended supervision.[246] He filed a compassionate release petition under the extraordinary health condition requirement, and he was released on July 16, 2010, after

238. *See* Record Request Response, *supra* note 232 (indicating that there is currently no record for inmates who were released under the 2009 amendments and may have subsequently reoffended).

239. Wis. Ct. Sys., Cir. Ct. Access, http://wcca.wicourts.gov/simpleCaseSearch.xsl;jsessionid=8AEE55E6E57A38EA33A29DE3A285A835.render6 (last visited Apr. 12, 2012). This data is based on running a "simple case search" for "Hokenson," "Bruce." *Id.*

240. State v. Skeens, No. 2008CF005368 (Wis. Cir. Ct. Feb. 10, 2009) (Wis. Ct. Sys., Cir. Ct. Access).

241. *Id.*

242. *Id.* ("Court recommends that DOC find placement where defendant can receive dual diagnosis treatment, and DOC to also consider the MICA program if deemed appropriate. Court further orders that this matter be supervised by the mental health unit of DOC.").

243. Record Request Response, *supra* note 194.

244. *Herbert Skeens Obituary*, TRIBUTES.COM, http://www.tributes.com/show/Herbert-Skeens-89265572 (last visited Apr. 12, 2012).

245. State v. Nowak, No. 2009CF000300 (Wis. Cir. Ct. Aug. 14, 2009) (Wis. Ct. Sys., Cir. Ct. Access). A schedule IV drug is a drug that has "a low potential for abuse . . . has currently accepted medical use in treatment in the United States[,] and [a]buse of the substance may lead to limited physical dependence or psychological dependence." WIS. STAT. §§ 961.19–961.20 (2009–2010).

246. *Nowak*, No. 2009CF000300.

serving less than a year of his sentence.[247] Nowak passed away on August 28, 2010.[248]

The fifth individual released was Robert Savoy, a sixty-three year old male.[249] He was charged with injury by intoxicated use of a vehicle and operating while under the influence for the fifth time.[250] He was sentenced on October 4, 2004, to seven and a half years in state prison and seven and a half years extended supervision.[251] He was released under the extraordinary health condition provision of the statute on January 6, 2011.[252] He had served just over six years of his sentence. There is no record suggesting that Savoy has re-offended since his release in 2011.[253]

The sixth individual was Robert Anderson, a forty-five year old male, convicted of repeatedly operating while under the influence.[254] He was sentenced on January 31, 2007, to three years in a state prison and two years extended supervision.[255] Anderson filed a petition for release under the extraordinary health condition criteria,[256] and prison records reveal that he spent multiple months in a supervised living facility beginning in 2010.[257] After serving three years in state prison, he was released from custody on April 6, 2011,[258] and he passed away on April 24, 2011.[259]

247. Record Request Response, *supra* note 194.

248. *Craig E. Nowak Obituary*, TRIBUTES.COM, http://hosting-tributes-23619.tributes.com/show/Craig-Nowak-89243152 (last visited Apr. 12, 2012).

249. State v. Savoy, No. 2004CF002379 (Wis. Cir. Ct. July 30, 2004) (Wis. Ct. Sys., Cir. Ct. Access); Record Request Response, *supra* note 194.

250. *Savoy*, No. 2004CF002379.

251. *Id.*

252. Record Request Response, *supra* note 194.

253. Wis. Ct. Sys., Cir. Ct. Access, http://wcca.wicourts.gov/simpleCaseSearch.xsl;jsessionid=8AEE55E6E57A38EA33A29DE3A285A835.render6 (last visited Apr. 12, 2012). This data is based on running a "simple case search" for "Savoy," "Robert." *Id.*

254. State v. Anderson, No. 2007CF000001 (Wis. Cir. Ct. Jan. 31, 2007) (Wis. Ct. Sys., Cir. Ct. Access).

255. *Id.*

256. Record Request Response, *supra* note 194.

257. Record Request Response, Bureau of Adult Institutions, Robert Anderson (Jan. 10, 2012) (on file with author) [hereinafter Bureau of Adult Institutions] .

258. Record Request Response, *supra* note 194.

259. *Robert Anderson Obituary*, TRIBUTES.COM, http://www.tributes.com/show/Robert-D.-Anderson-91442221 (last visited Apr. 12, 2012).

The seventh individual released was Keith Sims, a thirty-nine year old male, who was a habitual offender charged in this instance with retail theft.[260] He was sentenced on February 10, 2011, to three years in state prison and three years extended supervision.[261] His petition, filed under the extraordinary health condition criteria, was approved and he was released on June 3, 2011, after only serving a few months of his sentence.[262] Sims passed away on July 5, 2011.[263]

The eighth individual released was Richard McNew, a fifty-four year old male, convicted of multiple felonies and misdemeanors, including possession of a short-barreled shotgun/rifle, carrying a concealed weapon, operating a firearm while intoxicated, possession of narcotics, and felon in possession of a firearm.[264] He was sentenced on March 23, 2010, to two years in state prison, one year in local jail, and seven years extended supervision.[265] He filed a petition citing an extraordinary health condition, and he was released on June 23, 2011, after serving one year and three months of his original sentence.[266] McNew passed away on October 12, 2011.[267]

As the ERRC data indicates, while a number of inmates petitioned under the 2009 amendments, very few were granted release from prison. Thus, the 2009 amendments failed to meet the expectations of both the supporters and opponents of compassionate release.

VI. OBSERVATIONS AND RECOMMENDATIONS

The 2009 statutory amendments to compassionate release were initiated with the promise that it would save the state significant funds—a promise that certainly was not realized when only eight inmates were released and when support for the early release program dwindled, leading to a repeal of the amendments a mere two years later. The 2009 modifications to the types of inmates who may petition for early release,

260. State v. Sims, No. 2010CM001818 (Wis. Cir. Ct. Feb. 10, 2011) (Wis. Ct. Sys., Cir. Ct. Access).

261. *Id.*

262. Record Request Response, *supra* note 194.

263. *Keith Sims Obituary*, TRIBUTES.COM, http://www.tributes.com/show/Keith-Sims-91823297 (last visited Apr. 12, 2012).

264. State v. McNew, No. 2009CF001219 (Wis. Cir. Ct. Feb. 8, 2010) (Wis. Ct. Sys., Cir. Ct. Access).

265. *Id.*

266. Record Request Response, *supra* note 194.

267. *Richard A. McNew Obituary*, TRIBUTES.COM, http://www.tributes.com/show/Richard-A.-Mcnew-92602830 (last visited Apr. 12, 2012).

as well as a more relaxed definition of what constitutes a sufficiently severe medical condition, aimed to increase eligibility among the prison population and provide a more expedited means for the release of inmates.[268] However, while the amendments made important advances to compassionate release policies in Wisconsin, data indicated that during the period that the amendments were in effect there was minimal utilization of the statute.[269] Yet, despite the inconsequential number of inmates released and nonexistent recidivism rate under the 2009 amendments, early release opponents continued to attack compassionate release as a dangerous policy.

Both public opinion and opposition from Republicans in the state legislature appear to be the most significant impediments to a comprehensive utilization of the program and ultimately led to the repeal of the 2009 amendments to compassionate release.[270] There will always be public concern surrounding the release of prisoners who committed crimes against the community, and, therefore, there will always be political motivation to capitalize on that fear.[271] Compassionate release is a double-edged sword for politicians. Reform-minded public officials, despite lofty goals to effect positive social change, often are vilified and labeled "soft on crime."[272] With the passage of the 2011 amendments to compassionate release, it is clear that the policy that once distinguished Wisconsin[273] has become little more than a pipedream for elderly and ill inmates hoping for release. This Part will outline the basic critiques of the 2009 amendments touted by opponents of the program as well as propose future changes to revitalize the statute as a viable release alternative in Wisconsin.

268. *See* Beck, *supra* note 77, at 223–25 (discussing the failures of the compassionate release statute in New York because it is overly restrictive and cumbersome); Quinn, *supra* note 116 (indicating that eligibility criteria for compassionate release statutes are often overly restrictive).

269. *See supra* Part V.A–.C.

270. *See* CHIU, *supra* note 51, at 8 ("Politics and public sentiment present obstacles to fully using statutes already on the books. Releasing older inmates can be viewed as politically unwise, fiscally questionable, or philosophically unpalatable.").

271. *See id.* at 8–9 (noting that decisions to grant compassionate release are "politically risky" and often "the desire to keep individuals confined may trump any other considerations").

272. Buckley, *supra* note 16.

273. *See supra* note 9 and accompanying text.

A. Critique of the Amendments to Compassionate Release Under 2009 Wisconsin Act 28

Opponents of the 2009 amendments to compassionate release latched onto four main concerns with the liberalized compassionate release policy. The first, most salient, concern is the legitimate fear that criminals who commit violent, abhorrent crimes will be released into the general population, or into nursing homes, where these inmates will once again create a danger to public safety.[274] The concern over public safety prompted opponents to repeal the 2009 modifications that allowed inmates serving a life sentence or convicted of a Class B felony to petition for compassionate release. As Dane County Executive Kathleen Falk explained, "[f]ears and phobias drive policies instead of facts."[275] It is safe to assume that few, if any, would condone the release of violent criminals who are at risk for re-offending, and supporters of compassionate release certainly do not advocate for the release of inmates who continue to pose a risk to society.[276]

In fact, the most important consideration made by the reviewing body, either the ERRC under the former law or the sentencing court, is whether the release of the inmate would serve the public interest,[277] presumably including public safety. Ostensibly, when considering what is in the public interest, the reviewing body should assess values such as the "specific deterrence of the inmate and protection of the public, retribution for past wrongs, and an inmate's efforts at rehabilitation while incarcerated."[278] However, the public interest may also be served

274. *See* Purvis, *supra* note 57; Suder, *supra* note 11; Video: Assembly Committee on Criminal Justice and Corrections (Wisconsin Eye May 12, 2011) [hereinafter Video], *available at* http://www.wiseye.org/Programming/VideoArchive/EventDetail.aspx?evhdid=4216.

275. Dee J. Hall, *Will it Hurt to Let Inmates Go Early?*, WIS. ST. J., Apr. 25, 2009, at A1, *available at* http://host.madison.com/mobile/article_3179a287-437a-5d59-8f36-6ac6746a9d44.html.

276. Paul Fanlund, *Prison Policy a Bonanza for GOP Demagogues*, CAP. TIMES, July 27–Aug. 2, 2011, at 5, *available at* http://host.madison.com/ct/news/local/madison_360/article_9d42ad70-b623-11e0-8a49-001cc4c002e0.html (quoting Rick Raemisch—former Secretary of the DOC and supporter of the 2009 amendments—stating, "'We all know some diseases that have no cure, and there are some inmates who should never be let out'" and adding that "'[w]e know that too and [these inmates] were not eligible for the program'").

277. 2011 Wis. Act 38, § 45(cm) (requiring the sentencing court to consider if release of the inmate would be in the "public interest").

278. Gregory J. O'Meara, *Compassion and the Public Interest: Wisconsin's New Compassionate Release Legislation*, 23 FED. SENT. REP. 33, 35 (2010); *see also* State v. Gallion, 2004 WI 42, ¶ 40, 270 Wis. 2d 535, 678 N.W.2d 197 (indicating that sentencing

by reducing the strain on the state corrections budget through the release of inmates with a low risk of recidivism.[279] And while concern for public safety is legitimate, the elderly and ill inmates petitioning for release under this particular program belong to a group who are unlikely and often incapable of re-offending.[280] Statistics indicate that compassionate release is one of the safest methods for reducing prison populations due to the extremely low recidivism rates among elderly and ill inmates.[281] Furthermore, under the 2009 amendments, an elderly inmate is precluded from filing a petition until he or she has served a substantial portion of the original sentence.[282] Thus, concerns regarding retribution for past wrongs as well as specific deterrence are considered in compassionate release evaluations.[283]

Additionally, while it is true that inmates on the highest echelon of criminality do have the opportunity to petition, that does not mean that these inmates will be released nor that they should be released. Consider, for example, James Woller, who was awaiting a hearing on his compassionate release petition filed under the age criteria last year.[284] Woller was an elementary school teacher who was accused of having sexual contact with two of his female students.[285] In 2004, He was ultimately convicted of one count of first-degree and two counts of second-degree sexual assault of a child.[286] He was sentenced to a total of sixty years in prison—three twenty-year sentences to be served concurrently.[287] At the time he filed his petition he had served only six

objectives "include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others").

279. O'Meara, *supra* note 278, at 35.

280. CHIU, *supra* note 51, at 5; Gorman, *supra* note 9 (citing the recidivism rate for elderly inmates at between two and eight percent).

281. *See* JUSTICE CENTER, ANALYSES, *supra* note 46, at 4 fig.3; Gorman, *supra* note 9; *see also* Maller & Jones, *supra* note 76 (pointing out that elderly inmates are "less agile").

282. *See* WIS. STAT. § 302.1135(2)(a)–(b) (2009–2010) (indicating that elderly inmates may petition for release after serving either five or ten years of their sentences).

283. O'Meara, *supra* note 278, at 35.

284. Record Request Response, *supra* note 194.

285. State v. Woller, No. 2004AP3149-CR, slip op. ¶ 2 (Wis. Ct. App. Nov. 15, 2005) (Wisconsin Bar), *available at* http://www.wisbar.org/res/capp/2005p/2004AP003149.pdf.

286. State v. Woller, No. 2003CF000313 (Wis. Cir. Ct. Nov. 26, 2003) (Wis. Ct. Sys., Cir. Ct. Access).

287. *Id.* It should be noted that while Woller was sentenced to a total of sixty years in prison because his sentence is to be served concurrently he will actually serve no more than twenty years behind bars.

years of his sentence,[288] but he petitioned for early release because he was sixty-eight years old and he met the age eligibility requirements. Woller's petition for early release was ultimately denied by the ERRC.[289]

While information regarding the reasons for approval or denial of petitions is not available to the public, one can speculate that Woller's petition was denied due to the sexual nature of his crime; the fact that his victims were young children; the fact that he was already elderly when the crime was committed, which speaks to a higher risk for re-offending than a typical elderly inmate;[290] and the fact that he has only served a minuscule portion of his original sentence. Many, if not all, citizens would agree that it was not in the interest of justice to release Woller, but the fact that he was eligible to file a petition under the 2009 amendments highlights a suggested failure of the liberalized program. What opponents failed to realize, however, was that the ERRC served as a safety valve. The members of the ERRC were not liberal extremists whose only interest was in releasing convicted criminals from prison; instead, they were all community members who were equally unwilling to see a sex offender or convicted murderer, with a high risk for re-offending, released into the community.[291] The benefit of the 2009 amendments was the inherent flexibility that it afforded for early release decisions. Inmates who committed serious felonies were able to petition for release, but the Commission's human component allowed for the narrowing of the statute in appropriate situations.

More importantly, an actual analysis of the individuals released under the 2009 amendments appears to challenge the opposition's claims and further support the assertion that inmates released under compassionate release in Wisconsin pose little to no risk to society. The

288. *See* tbl.1, *supra*, pp. 1712–16.

289. Telephone interview with Holly Heggestad, *supra* note 217.

290. *See* PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 1–2 (2003), http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf (finding that 38.6% of sex offenders were returned to prison within three years following their release and, further, "[r]ecidivism studies typically find that, the older the prisoner when released, the lower the rate of recidivism" and that "[r]esults reported here on released sex offenders did not follow the familiar pattern").

291. As former secretary of the DOC, Rick Raemisch, explained, "It was not like a bunch of left-wing, granola-eating, Kumbaya-singing people decided for whatever reason to let dangerous criminals out." Fanlund, *supra* note 298, at 5.

opposition routinely attracted attention to the one inmate released under the statute who was a "convicted murderer."[292] Paula Harris was convicted of first-degree reckless homicide for stabbing an acquaintance in her home.[293] When the former secretary of the DOC, Rick Raemisch, was questioned about Harris he explained, "'If I told you the reason (for the release) it was so obvious it just made sense.'"[294] Harris was the only inmate released through the liberalized program convicted of a Class B felony, and there is no indication that she continues to pose a significant risk to the community.[295] Furthermore, five of the eight offenders released under the statute since 2009 have since passed away,[296] presumably due to the ailment or illness that prompted a compassionate release petition. The remaining two inmates released into the community, both convicted of OWI offenses, also have not re-offended since their release.[297] Thus, a more thorough analysis of the compassionate release data indicates that the opposition's contention that dangerous criminals with a high recidivism risk are being released into the community through the compassionate release program is clearly unfounded.[298]

The second concern that prompted the repeal of the 2009 early release amendments was the fear that unelected individuals were making early release decisions instead of sentencing judges. For example, in 2009 Representative Suder stressed that the early release proposals were modifying sentences that were granted by a judge and a jury, and the 2009 amendments were "'letting unelected bureaucrats—not judges and juries—make those decisions.'"[299] Additionally, Representative Kestell, in an executive session of the Assembly Committee on Criminal Justice and Corrections, expressed that he

292. *Id.*

293. McBride, *Wisconsin Is Starting*, *supra* note 28.

294. Fanlund, *supra* note 276, at 5.

295. *See supra* notes 232–233 and accompanying text.

296. *See* tbl.2, *supra* p. 1717.

297. *See supra* notes 238–239, 253 and accompanying text.

298. Although the sample size of the compassionate release data for the 2009 amendments is, by necessity, not large, the statistical evidence that is available clearly does not support the assertion that dangerous, high-risk criminals were being released under the program.

299. Patrick Marley, *Early Inmate Release Debated: Supporters Say Plan Saves Money; Detractors Raise Public Safety Issues*, MILWAUKEE J. SENTINEL, Feb. 22, 2009, at 1B (quoting Representative Suder).

found it hard to believe that judges would be happy with someone else altering the sentence that the judge had given the offender.[300] These concerns led the critics to abolish the ERRC, reinstate the Parole Commission, and replace the sentencing court as the reviewing body for compassionate release decisions.[301]

However, perhaps who is making the decision is not as important as how carefully the decision is being made. Once again, while the members of the ERRC were not elected officials, they were still members of the community charged with an important gatekeeping function. Inserting the ERRC in a compassionate release review role allowed this one body of bureaucrats to focus on early release decisions. The members of the ERRC were able to concentrate on making a decision that incorporated all the necessary elements required to serve the public interest, thereby promoting and protecting the overarching interests of accuracy and efficiency in the criminal justice system. Specifically, DOC officials are in the position to acquire particular expertise pertaining to the unique health challenges faced by ill and elderly inmates in the prison system, including how these inmates' challenges impact the prison facility's day-to-day operation and financial bottom-line.[302] This information would be difficult if not impossible for a sentencing judge to obtain, and even if the DOC could impart this knowledge to the sentencing judge for each compassionate release petition the judge reviews, it is unlikely that the judge would assess the appropriate weight to this evidence when making a release determination. Conserving scarce DOC resources simply may not be a priority for judges habitually charged with reaching initial sentencing decisions.

Additionally, prior to the 2011 amendments, the sentencing court already had a full docket, and with the addition of compassionate release decisions to the agenda, it only serves to further strain the court and threaten judicial economy. Allowing a commission like the ERRC to manage compassionate release determinations removed pressure from the court system. In fact, Representative Kessler, a former

300. Video, *supra* note 274.

301. *See supra* text accompanying notes 292–300.

302. *See* Video, *supra* note 274 (noting Representative Kessler's opinion that prison authorities may be in the best position to make release decisions based on their opportunity to obtain knowledge about the inmate's correctional record).

Milwaukee County judge, expressed his concerns with being asked to reevaluate a sentencing decision that he or a colleague had made based on an inmate's conduct in prison.[303] He felt that the prison authorities had the "opportunity and had the knowledge on whether to make a decision to recommend early release, or probation, or parole."[304] He further felt that this was not the function of a judge, and during his tenure, he already had enough cases to manage just with hearings and initial sentencing.[305]

Furthermore, as elected officials, judges in Wisconsin have the propensity to be swayed by critical public opinion, especially in an election year. As previously discussed, early release is a politically divisive issue that is capable of inflaming public attitudes. Thus, granting judges responsibility for reaching compassionate release determinations is problematic considering the political accountability aspect of judicial elections. Sentencing judges may prove unwilling to make logical release decisions for fear of public backlash that could endanger their term on the court.[306] Despite the fact that judges are thought to be impartial, there is always the concern in states, like Wisconsin, that elected judges will not always remain unbiased. Instead of deliberating on the individual facts of the inmate's compassionate release petition based on what is in the best interest of the public, a judge up for reelection may be swayed more by what is in the best interest of his or her career.[307] Conversely, unelected bureaucrats may be less likely to consider public opinion when making release decisions because their accountability is not to the individuals who vote at the polls.[308]

The third concern touted by opponents of compassionate release is that the program degrades the purpose of truth-in-sentencing in Wisconsin and, thus, indirectly harms victims and the larger community. Truth-in-sentencing was passed in Wisconsin in 1998 as a response to

303. *Id.*

304. *Id.*

305. *Id.*

306. *See* Paul M. Walsh, *Justice for Sale in Wisconsin*, USA TODAY (Apr. 4, 2011), http://www.usatoday.com/news/opinion/editorials/2011-04-05-editorial05_ST2_N.htm (describing how legislative topics are "increasingly infecting judicial elections and threatening judicial independence").

307. *See id.*

308. *But see infra* notes 323–325 and accompanying text.

the former indeterminate model of sentencing, which allowed inmates to serve only a fraction of their original sentences.[309] Instead, truth-in-sentencing created finite sentence terms that inmates were required to fulfill, providing the victim and the community with peace of mind.[310] Opponents of compassionate release argue that the program is a loophole to determinate sentencing because it introduces uncertainty back into the sentencing equation and eliminates the finality of the judicial resolution for the victim.[311] Furthermore, as Representative Scott Suder explained, "decisions regarding which prisoners are released are made in secret, behind closed doors with zero public input. No community notification. No involvement from law enforcement or prosecutors. And zero accountability."[312]

While the compassionate release procedure would benefit from increased community notification,[313] it is an error of judgment to say that the liberalized 2009 amendments alone harm truth-in-sentencing. Truth-in-sentencing is important in Wisconsin because transparency of the criminal sentencing process is essential for society to have faith in the system. In essence, inmate sentences are more certain after truth-in-sentencing because the process was revealed and defined for victims and community members.[314] Unfortunately, current compassionate release legislation does obscure the purpose of truth-in-sentencing in that the process is obfuscated from the public view, but this failure of the program has little to do with the eligibility requirements under the 2009 amendments that opponents fought to repeal. Instead, compassionate release and truth-in-sentencing may be easily reconciled by allowing the compassionate release process to become more transparent. Thus, the flexibility of the eligibility requirements established by the liberalized

309. Hammer, *supra* note 29, at 15.

310. *See* Hammer, *supra* note 29, at 15.

311. *See* Video, *supra* note 274 (statement of Representative Kestell) ("[T]he average citizen, particularly a citizen that might have been a victim of a crime, believes that when someone is sentenced to a particular time behind bars that they're actually going to serve that time. . . . Otherwise, why would we actually have a sentence? I think for people to have faith in our entire criminal justice system, we have to at some point do what we say and mean what we say.").

312. Suder, *supra* note 11.

313. *See infra* Part VI.B.

314. *See infra* Part VI.B.1 (indicating that information regarding release of inmates under compassionate release procedures is not readily available to the public).

2009 amendments could be maintained if the release process was exposed to the public.

Additionally, compassionate release does not denigrate truth-in-sentencing in terms of the effect on the victim of the inmate's crime. Instead, the compassionate release procedure contemplates the continued involvement of the victim in the petition process. Not only is a statutory procedure in place to notify the victims of the hearing on the inmate's petition, but the victim is also able to attend the hearing and give a statement to be considered by the reviewing body.[315] While this additional step may threaten the sense of finality the victim welcomes after a conviction, perhaps the victim would rather continue to be involved in the offender's criminal process if given the option. Therefore, compassionate release does not degrade the interests of the victim while, at the same time, bolstering the interests of the offender.

The fourth, and final, concern expressed by opponents of the 2009 amendments to compassionate release relates to the failure of the amendments to demonstrate significant cost savings for the state. However, while the concern is valid, the blame should not rest solely on the actual amendments to the statute. Instead, opponents should recognize that it is difficult to fairly judge the 2009 amendments as a cost-saving initiative when the program was only in effect for two years. Furthermore, it is wise to consider that opponents of 2009 Wisconsin Act 28 may have prematurely halted the effects of the restructured program. By publicly admonishing the amendments and calling for the repeal of the sentence modifications, critics attracted significant attention to compassionate release, likely generating fear of public backlash within the ERRC.

Consequently, the Commission members were likely increasingly wary of the number and type of inmates released under the statute, especially considering the legislative call to repeal the early release amendments.[316] Given the unpredictability of the future of the statute, it

315. WIS. STAT. § 302.1135(4) (2009–2010).

316. Ben Poston, *Sentencing Reform Results Fall Short*, MILWAUKEE J. SENTINEL, July 10, 2010, at 1A (explaining that Representative Suder believes that the DOC is "releasing fewer inmates because the program has drawn scrutiny from media and lawmakers"); *see also* Klingele, *The Early Demise*, *supra* note 7, at 443 (discussing all of the 2009 early release amendments and suggesting that "[f]ear of public or political backlash can paralyze decisionmakers, rendering them so risk-adverse that they refuse to utilize the legal authority they have been afforded").

is foreseeable that the ERRC was unwilling to fully utilize compassionate release for low-risk inmates in Wisconsin, which consequently led to only eight inmates being released between 2009 and 2011.[317] For example, none of the inmates granted release under the 2009 amendments filed a petition under the age-related statutory requirements,[318] which may indicate that the ERRC was less willing to approve petitions by elderly inmates. Instead, conceivably due to fear of public backlash, the ERRC released only inmates who were terminally ill or had severe health concerns.[319]

Furthermore, David Sell, Gerald West, Patricia Klein, Clair Visgar, and Brandon Neumann were all released from state prison within a year or more after the ERRC denied their petitions for compassionate release.[320] Interestingly, DOC records indicate that Sell, West, and Klein all spent time in a supervised living facility at the time of or after the ERRC denied their petitions.[321] Considering that these individuals were released to extended supervision within such a short amount of time after their petition was denied, perhaps the ERRC denied the petitions because they were concerned politically with being linked to the release of these inmates.[322] However, had these individuals been released by the ERRC at the time of their petitions, it may have saved taxpayers thousands of dollars in health-care costs incurred in the supervised living facility.

317. Klingele, *The Early Demise*, *supra* note 7, at 443 ("Wisconsin's abundant new mechanisms for early release potentially applied to thousands of prisoners, yet fear of the political ramifications of a release-gone-bad prevented the Department of Corrections or the [ERRC] from granting relief to more than a fraction of those eligible." (footnotes omitted)); Record Request Response, *supra* note 194.

318. Record Request Response, *supra* note 194.

319. *See* tbl.2, *supra* p. 1717 (indicating that the five released inmates have died since their release and the three remaining inmates were released due to an extraordinary health concern).

320. *See* tbl.1, *supra* pp. 1712–16. Four of these individuals filed petitions under the extraordinary health condition criteria of the statute. Record Request Response, *supra* note 194.

321. Records Request Response, *supra* note 194; Bureau of Adult Institutions, *supra* note 257.

322. *See* Bureau of Adult Institutions, Brandon Neumann, *supra* note 257 (indicating that Brandon Neumann did commit another crime after being released on extended supervision). Since his release to extended supervision, Neumann was charged with petty theft and possession of THC in 2011; he pleaded no contest to both charges and received only a fine and probation, respectively. City of Appleton v. Neumann, No. 2011FO001419 (Wis. Cir. Ct. Aug. 10, 2011) (Wis. Ct. Sys., Cir. Ct. Access); State v. Neumann, No. 2011CF000141 (Wis. Cir. Ct. June 2, 2011) (Wis. Ct. Sys., Cir. Ct. Access).

Furthermore, the composition of the Commission likely impacted the utilization of the amended early release program. The ERRC was chaired by a former police official, and the remaining members of the Commission were all corrections employees.[323] These individuals, considering their backgrounds, may be especially leery of releasing inmates into the community regardless of their health status or statistically low recidivism rates.[324] Current data seems to indicate a certain level of trepidation with the petition process.[325] To affect real change, the ERRC should have been more willing to move compassionate release forward in Wisconsin and release more low-risk, non-violent inmates who satisfy the requirements of the statute.

B. Proposal for Change

Compassionate release in Wisconsin endured a difficult journey in the last decade—from its initial introduction in 2001 to the amendments in 2009 and 2011. The 2009 amendments to compassionate release brought a progressive version of the statute to the table that, if used effectively, could have affected real change in the corrections system of Wisconsin.[326] However, because the state witnessed only minor changes under the more flexible 2009 amendments, it is reasonable to assume that even fewer elderly and ill inmates will be released under the 2011 modifications. Thus, when Republican opposition to early release targeted the 2009 amendments for repeal, compassionate release should have remained largely intact. Despite the bitter debate surrounding the program, compassionate release, with substantial revisions, could still succeed as a viable early release alternative in Wisconsin.

1. Transparency and Accountability

First, the compassionate release procedure must become more transparent and incorporate increased community involvement to

323. MCBRIDE, UNDER A NEW LAW, *supra* note 173; Shepard, *supra* note 45.

324. *See* Shepard, *supra* note 45 ("When his commissioners recommend release for killers and pedophiles, Graham says, he scrutinizes the facts more thoroughly than other cases. As a cop, he says, 'we locked up these people up [sic] for life, and we didn't think we'd ever see them again. Now, I've had to modify that view a little bit based on what I've seen here.'").

325. *See* Record Request Response, *supra* note 194.

326. *See* Fanlund, *supra* note 276 (noting that, according to Raemisch, the early release repeal is just one incidence in a "pattern of GOP decisions taking the state from 'progressive to 'regressive'").

remove the veil of secrecy from the program and alleviate public concern.[327] Opponents of the program charged that the ERRC was obfuscating the truth regarding the release of inmates. While the data on compassionate release petitions, including denials and approvals, is available to the public, the information can only be obtained through a tedious open records request process.[328] Furthermore, if the public would like additional information pertaining to the conviction details for each inmate petitioning under the statute, an additional open records request must be submitted.[329] In order to provide these records, the DOC is within its rights to charge the open records requester the cost of copying and mailing these materials.[330] Thus, the data on compassionate release is hardly easily accessible for public knowledge.

In the interest of transparency, compassionate release decisions should be made more public, commencing with the initial petition filing and continuing to the resolution and the resulting approval or denial of the petition.[331] This information would be most easily accessible if it was included on the DOC website, as well as in local newspapers across the state.[332] Newspaper publication would protect against the disenfranchisement of community members without knowledge of or

327. *See* Klingele, *The Early Demise*, *supra* note 7, at 452 ("It has long been conventional wisdom that 'back door' release mechanisms are more politically palatable than front end changes in sentencing practice. . . . The reality, however, appears to be the inverse.").

328. *See* Record Request Response, *supra* note 194. The author submitted multiple open records requests to update release information during the course of writing this Comment, and while working with both the ERRC and the parole commission was always a pleasant experience, the process was time consuming.

329. *See* Bureau of Adult Institutions, *supra* note 257 (indicating that some information, such as the offender's birth date, may be withheld by the DOC due to confidentiality concerns, but the DOC will send offender "locators" that provide more detailed conviction information). It should be noted, however, that offender birthdates are already readily available on CCAP. *See, e.g.*, Wis. Ct. Sys., Cir. Ct. Access, http://wcca.wicourts.gov/simpleCaseSearch.xsl;jsessionid=8AEE55E6E57A38EA33A29DE3A285A835.render6 (last visited Apr. 12, 2012). The offender's birth date can be found by running a "simple case search" for a known individual. *Id.*

330. *See id.* (requesting reimbursement from the author for copying fees and postage pursuant to WIS. STAT. 19.35(3)(a) (2009–2010)).

331. *See* Klingele, *The Early Demise*, *supra* note 7, at 452 ("Unless laws operate transparently and rely on explicitly-stated criteria that the public deems fair, they are unlikely to persist.").

332. While providing information to the public through internet and newspaper media would have a small cost associated with it, that figure is minuscule compared to the cost of continued long-term incarceration of an elderly or ill inmate. *See supra* notes 75–76 and accompanying text.

access to computer technology. As for the privacy concerns of the inmates, arguably by submitting a petition for early release the inmate would be consenting to the release of his or her conviction information. In fact, detailed information is already available on the Wisconsin Circuit Court Access (CCAP) website for individuals across the state; therefore, the DOC would merely be releasing information that may already be publicly available.

In this same vein, the compassionate release procedure should acknowledge that community members may require more than information to feel sufficiently apprised of the release process. Thus, the petition procedure should be reformed to reflect the idea that victims are not the only members of the public who require a voice. At the very least, all interested parties, including victims, family members, and community members, should have the opportunity to submit a short statement for consideration by the compassionate release reviewing body. Perhaps if the community feels included in the process, then it may be generally more accepting of compassionate release and the decisions of the reviewing body. Furthermore, while this information may not be a dispositive element in the decision-making process, it may introduce an important component in petition deliberations. Consider, for example, that at sentencing hearings the victim or victims of a crime are typically not the only voice that the judge or jury will hear. Instead, family members and friends of the accused are also typically given the opportunity to speak.[333] Inmates seeking compassionate release should be granted equal treatment, and the reviewing body should have access to all information regarding the inmate instead of only a one-sided statement from the victim.

Similarly, not only should victims, family, friends, and community members have the opportunity to submit a statement to the court, but compassionate release hearings must also become events that are open to the public. Interested parties should have the ability to attend the hearing, as well as be privy to the reasoning of the reviewing body for the approval or denial of the inmate's petition. Furthermore, the

333. STATE BAR OF WIS., WISCONSIN NEWS REPORTERS' LEGAL HANDBOOK ch. 3A, *available at* http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_News_Reporters_Legal_Handbook&Template=/CM/ContentDisplay.cfm&ContentID=47173 ("At the time of sentencing the judge will hear from the prosecutor, victim (if there is a victim), defense lawyer, defendant, and others related to the parties.").

reviewing body's decision and analysis should also become public knowledge. Community publication is a necessary step to remove the shroud of secrecy surrounding these compassionate release deliberations. Secrecy breeds fear. By unveiling the process, opponents of compassionate release gain some insight into the reasoning behind inmate-release decisions and may no longer fear the unknown surrounding what convicted criminal is being released and why.[334]

Furthermore, in the interest of the continued dissemination of public knowledge, the DOC must maintain a more thorough accounting of the inmates released under the statute. Currently, the DOC does not keep a record of compassionate release inmates after they leave the prison walls.[335] Therefore, in order to find out if a released inmate has re-offended, an interested party would have to search the Wisconsin Circuit Court Access website for the offender's name. If the public was confident that the DOC was monitoring the inmates approved for compassionate release after they are no longer under the control of the DOC, then the public may be more willing to trust the DOC in its release decisions.

Some may argue, however, that increased community involvement in the process may lead to even stronger opposition to compassionate release. While that may be the case in some release situations, an argument can be made that if the public was more aware of the types of inmates seeking and being granted release it may be more accepting of the program. The ERRC was not releasing sex offenders and violent criminals back into the community to endanger the public, but that is the picture that was painted by the opposition.[336] Perhaps if the public had a clearer idea of the inmates who were actually released, as this Comment provides, it would have been more supportive of compassionate release under 2009 Wisconsin Act 28.

2. Flexibility

Second, the provisions of the compassionate release statute should include language that allows inmates convicted of a Class B felony to once again petition for release in order to bring more flexibility to the

334. *See supra* note 280–281 and accompanying text.

335. Record Request Response, *supra* note 194.

336. *Compare* tbl.2, *supra* p. 1717, *with* Suder Press Release, Feb. 24, 2010, *supra* note 191.

statute. However, in the interest of compromise, this provision would only be available for Class B felons petitioning under the extraordinary health condition criteria. Allowing inmates serving time for commission of a Class B felony to petition for compassionate release under the extraordinary health condition criteria does not guarantee their release, nor does it imply that the safety of the public is at risk.[337] Instead, expanding the definition to include serious offenders merely grants the program an element of flexibility to allow decision-makers to release an inmate who is incapable of committing another serious crime due to an advance medical condition. Thus, the state may shoulder the monetary burden of caring for that inmate with other government organizations.[338]

As previously discussed, compassionate release programs are widely regarded as one of the safest avenues for state governments to salvage a hemorrhaging corrections budget because the inmates who are eligible for release under the statute represent those who are least likely and least capable of re-offending.[339] For example, under the 2009 amendments, Paula Harris was the only Class B felon released under the extraordinary health condition, and there is no record suggesting that Harris has re-offended since her release over two years ago.[340] If the focus of compassionate release is truly to release eligible inmates in a manner that is most considerate of public safety concerns, then these concerns will still be acknowledged, and likely considered more carefully, if a Class B felon is submitting a petition.

3. Bureaucracy

Third, the state should also retain a commission, such as the parole commission, as the decision-making body for compassionate release

337. In fact, see Klingele, *The Early Demise*, *supra* note 7, at 451, where Professor Klingele suggests that "[i]f lawmakers were truly interested in releasing individuals who pose the lowest risk of re-offense, they would not categorically exclude individuals convicted of violent or sexual offenses, since in many cases such offenders pose a lesser risk of re-offense than do their counterparts convicted of less serious crimes."

338. *See supra* notes 90–91 and accompanying text.

339. CHIU, *supra* note 51, at 5 ("Viable alternatives to keeping older adults incarcerated are attractive because of potential cost savings. . . . Such alternatives also make sense from a public safety perspective."); JUSTICE CENTER, ANALYSES, *supra* note 46, at 4 fig.3; Maller & Jones, *supra* note 76 ("People getting toward the end of their life are different people than they were at the time they committed the crime, and some compassion and mercy may be what's called for here." (internal quotation omitted)).

340. *See supra* notes 227–233 and accompanying text.

decisions. Under the 2011 modifications, the sentencing court will once again determine the fate of compassionate release petitioners.[341] However, not only will sentencing judges be even less likely than the members of the former ERRC to favor the release of inmates,[342] but also the sentencing court will have a substantial docket that may not allow them the time to make an informed decision regarding the inmate's individual circumstances and the public interest.[343] Compassionate release determinations do not require any particular legal education or training; instead, these evaluations should be made by individuals who are versed in making *release* decisions as opposed to *incarceration* decisions.[344] As previously discussed, DOC officials are familiar with the unique health challenges faced by ill and elderly inmates in the prison system, including how these health concerns are being addressed based on the quality and accessibility of medical resources.[345] It would be difficult for a sentencing judge to obtain this information for each inmate petitioning for early release, and it is also unlikely that the judiciary would consider these issues of utmost concern. For example, DOC spokesperson, John Dipko, explained that "'[t]he courts are familiar with the offender and charges at the time of sentencing, but the Department of Corrections is with that offender 24/7 while incarcerated. DOC is in the best position to make a determination whether or not the offender has earned an early release.'"[346]

Furthermore, replacing the ERRC with the sentencing court as the reviewing body for compassionate release petitions may increase the period between an inmate's initial petition and the court's final decision. A delay in processing when dealing with ill and elderly inmates will have a substantial negative effect on the purported purpose of the statute—to release inmates to save state corrections funds before the compassionate

341. *See* 2011 Wis. Act 38, § 45.

342. *See supra* notes 306–308 and accompanying text.

343. *See* Klingele, *Changing the Sentence*, *supra* note 25, at 528 (noting that "American courts are busy places, and judges often struggle to keep pace with their expanding dockets" and also noting that "[w]e therefore need to question whether courts have the administrative capacity to reconsider large numbers of already-imposed sentences").

344. For a similar argument that was not used as a source by the author, see Jesse J. Norris, *The Early Release Revolution: Early Assessments and State-Level Strategies*, 95 MARQ. L. REV. 1551 (2012).

345. *See* Video, *supra* note 274 (noting Representative Kessler's opinion that prison authorities may be in the best position to make release decision based on their opportunity to obtain knowledge).

346. MCBRIDE, DOES THE STATE KNOW, *supra* note 221 (quoting John Dipko).

release of an inmate becomes a nullity.[347] Even when the ERRC was reaching compassionate release determinations, the terminally ill petitioners who were released did not survive for more than four months, and one lived only a number of days after being released.[348] Under the 2011 Amendments, the sentencing court regains control over the compassionate release review process. Unfortunately, this reversion may increase the time it takes to process the compassionate release petitions even further, which may lead to more terminally ill inmates passing away while in prison—a possibility that the program aims to avoid. Therefore, a bureaucratic commission should be retained as the reviewing body to facilitate speedy petition deliberation.

However, those opposed to compassionate release questioned the wisdom in granting unelected bureaucrats the authority to release convicted criminals from prison. On the other hand, it is feasible that the opposition confuses its own argument or feels unable to fully articulate their concerns. Perhaps compassionate release opponents were actually disturbed by a perceived underrepresentation of their interests on the Commission. The former ERRC was chaired by an individual appointed by Governor Doyle, a politically liberal politician, and the remaining members of the Commission were in turn selected by that chairperson[349]—the only requirement being that the members have a criminal justice background.[350] In the interest of compromise, I suggest less amorphous and more inclusive requirements for membership on the Commission executing compassionate release decisions. For example, the statute could require at least one former or current judge to hold a seat, as well as one prosecutor and one defense attorney. Furthermore, perhaps allowing the legislature to participate in the process would convince more moderate and conservative state leaders to support compassionate release policies; thus, at least one Democrat and one Republican state representative could also be invited to hold a seat on the Commission.

347. *See* Beck, *supra* note 77, at 231 (explaining that a delayed review process for compassionate release petitions in New York has led to more inmates dying in prison than being released).

348. *See supra* Part V.C.

349. MCBRIDE, UNDER A NEW LAW, *supra* note 173 (noting that the first, and only, chair of the ERRC, appointed by Governor Doyle, was Alfonso Graham, a former Milwaukee police commander).

350. WIS. STAT. § 15.145(1) (2009–2010).

In the alternative, the statute could grant both the Commission and the sentencing court power over compassionate release decisions. For instance, the Commission could maintain control of the petition process and have further authority to make an initial determination of the inmate's petition. The petition and Commission recommendation would then be forwarded to the sentencing court, which would have the final authorization to grant or deny the petition.[351] However, while this reconsidered procedure may well allow the inmate's petition to be deliberated more thoroughly, the concern remains that sentencing judges in general will be less willing to release inmates who they or their colleagues have previously sentenced to prison, regardless of a change in circumstances.[352] And, thus, if individuals charged with reaching these determinations are unwilling to embrace the program, then no conceivable statutory modification will have any effect on the utilization of compassionate release in Wisconsin.

4. Utility

Finally, if compassionate release is intended to succeed in the state as a viable alternative to continued long-term incarceration of elderly and ill inmates, then it must gain both bipartisan support from state leadership as well as support from the decision-making body charged with reaching the compassionate release determinations. Leadership in Wisconsin must end the vilification of compassionate release and commit to fully utilizing the advantages of the program. However, even under the liberalized 2009 amendments, evidence suggests that the ERRC remained unwilling to embrace the full potential of the statute.[353]

Perhaps some of the failure of the program rests on the lack of communication extended to inmates who may be unaware of the

351. It is important to note that under the 2009 early release amendments, "[m]ost of the proposed laws allowed the [ERRC] to decide whether to release a prisoner, but then authorized judicial veto of any release decision." Klingele, *The Early Demise*, *supra* note 7, at 437; *see also* WIS. STAT. § 302.113(7m)(c) (2009–2010). However, the amendments to compassionate release did not include a judicial veto; instead, the restructured statute contemplates judicial discretionary review "only if it determines that the commission erroneously exercised its discretion in granting or denying the petition." WIS. STAT. § 302.1135(8) (2009–2010).

352. *See supra* notes 303–305 and accompanying text (explaining that Representative Kessler felt that judges would be hesitant to alter a sentence imposed by a colleague and was concerned about charging judges with reevaluating sentences based on conduct in prison).

353. *See supra* notes 323–325 and accompanying text.

possibility of compassionate release. A whole host of inmates may be excellent candidates for release under the statute, yet these inmates may simply be unaware of the possibility of compassionate release.[354] For example, communication could be improved by requiring prison medical staff to inform patients with chronic conditions of the availability of compassionate release. Furthermore, inmates or family members could be provided with materials detailing the compassionate release process once the inmates meet the age-requirement criteria. However, an increase in the pool of compassionate release petitions will do little to increase the utilization of the statute if the decision-making body responsible for determining compassionate release eligibility is unwilling to support all aspects of the statute. Statistical evidence pertaining to compassionate release under 2009 Wisconsin Act 28 indicates that the opposition exaggerated the dangers of the program.[355] Despite the small sample size of the inmates released under the 2009 amendments, it is clear that violent offenders were not being released in large numbers and allowed to reoffend.[356] Thus, state leadership had no need to fear the effects of the liberalized program in Wisconsin, and if the purpose of the statute is ever to be realized then the opposition must acknowledge the program's potential for safe application and adopt comprehensive reforms to salvage the viability of compassionate release under the current law.

VII. CONCLUSION

As Wisconsin continues to grapple with the increasing costs of mass incarceration in the face of a debilitating fiscal crisis, the state took great strides in 2009 to alleviate substantial financial constraints by furthering the cause of compassionate release for elderly and ill inmates confined to state prisons. The 2009 legislative amendments could have marked a significant humanitarian change in the state's corrections system if leaders of the early release program were willing to utilize its untapped

354. *See* E-mail from Holly Heggestad to author, *supra* note 173 (indicating that the ERRC did not inform inmates of the possibility of compassionate release); Interview with Pam Waddell, *supra* note 208 (explaining that the ERRC did not counsel the inmates on the petition process).

355. Hall & Spicuzza, *supra* note 45 (suggesting that the small number of inmates released under the 2009 amendments "fulfill[] neither supporters' highest hopes nor opponents' worst fears").

356. *See* tbl.2, *supra* p. 1717.

potential. However, opponents of the amendments failed to embrace the benefits of the liberalized compassionate release policy and to trust in the Department of Corrections and the ERRC to protect the community. Without the reforms discussed in this Comment, compassionate release under the 2011 amendments will likely become another ineffective program providing little benefit to a state in crisis. In Wisconsin, the mutually exclusive nature of compassion and the prison system is a political reality today, but perhaps it may not always be an inevitable truth.

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