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Michael M. O'Hear

Marquette University Law School, michael.ohear@marquette.edu

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Let the Good Time Roll: Early Release for Good Behavior in Prison

BY MICHAEL M. O'HEAR



Reinstituting programs that allow prison inmates to be released early for good behavior is a cost-effective and safe way to reduce prison populations and decrease the likelihood that former inmates will commit more crimes once released.

For most of its history as a state, Wisconsin offered “good time” credits to encourage and recognize good behavior by prisoners, who might thereby shave months or even years off a long sentence.¹ A century ago, such good-time programs were ubiquitous in the United States.² However, as part of the national move toward more certain sentencing in the late 20th century, Wisconsin and many other states eliminated good time for prisoners.³

More recently, the national trend has been to reinstitute or expand good time.⁴ Properly designed good-time programs are thought to improve institutional discipline, reduce the recidivism risks posed by returning prisoners, and save taxpayers money.⁵ As Wisconsin continues to grapple with the fiscal, administrative, and ethical challenges created by a prison population that remains extraordinarily high relative to historical norms, the state would do well to consider reviving good time.

This article reviews some of the troubling aspects of “mass incarceration” in Wisconsin and indications of public support for new approaches. Next, it describes how good time works in Washington state, which has a middle-of-the-road program that might serve as a model for Wisconsin, and discusses the research identifying potential benefits from good time. Finally, the article addresses concerns that good time might conflict with Wisconsin’s “truth in sentencing” policy.

Wisconsin’s Incarceration Crisis and Support for Alternatives

Like the rest of the United States, Wisconsin experienced a boom in imprisonment in the final quarter of the 20th century. Indeed, after decades of stability, the state’s imprisonment

rate grew every year from 1972 through 2003, eventually reaching a level about nine times that of the early 1970s.⁶ Although the rate has since fallen a bit, it remains many times higher than Wisconsin’s historical norms and about twice as high as that of neighboring Minnesota.⁷

Moreover, the negative effects of the incarceration explosion have not been distributed evenly but have been borne disproportionately by traditionally disadvantaged groups. Wisconsin now leads the nation in its imprisonment rates of African American men and Native American men.⁸

The long-term growth in incarceration has caused chronic overcrowding in Wisconsin’s prisons.⁹ The Department of Corrections budget grew explosively right along with the prison population and has continued to rise even as the population stabilized over the past decade.¹⁰ Wisconsin now spends more on corrections than on the entire University of Wisconsin system.¹¹

The massive increase in the number of individuals *entering* prison in the late 20th century has, predictably, led to a similarly large increase in the number of individuals *exiting* prison in the early 21st century.¹² As policymakers increasingly grapple with the challenges of prisoner reentry, the reality seems to be sinking in that the number of people we send to prison today, and the conditions to which we subject them, may have profound consequences for the health of our most vulnerable communities many years down the road.

All these concerns have led to a national movement away from the tough-on-crime policies of the 1980s and 1990s. At least three dozen states, for instance, have adopted more flexible policies toward prisoner release since 2000.¹³ Wisconsin did the same in 2009 with Governor Doyle’s

SUMMARY

Wisconsin’s prison population remains near historical highs and the incarceration rates for African American men and Native American men are among the nation’s worst. This “mass incarceration” poses social and economic challenges for the state, and despite a strong political divide generally among Wisconsin voters, there are indications of public support for new approaches.

The author, a Marquette Law School professor and criminal-law scholar, proposes reviving good-time programs in Wisconsin prisons. He describes Washington state’s middle-of-the-road good-time program, which might serve as a model for Wisconsin, and discusses research from various states identifying good time’s potential benefits. He also addresses concerns that good time might conflict with Wisconsin’s “truth in sentencing” policy.

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VIDEO Prof. Michael M. O’Hear discusses a proposal to revive an early release program for good behavior in Wisconsin prisons.

complex package of “earned release” reforms, which included, among many other provisions, something of a revival of good time.¹⁴ The reforms, however, proved a political lightning rod and were swept away by new Republican majorities in the Wisconsin Legislature in 2011.¹⁵

More recently, though, the appointment of two new Legislative Council Special Committees to reexamine aspects of the criminal-justice system seems to indicate there is bipartisan interest in new approaches.¹⁶ Indeed, on the national level, many prominent conservatives, such as Newt Gingrich and Grover Norquist, have been leaders in calling for less punitive criminal-justice policies.¹⁷

Wisconsin voters share this interest in reform. Since 2012, the Marquette Law School Poll has annually asked Wisconsin voters about their views toward the accelerated release of prisoners. For instance, in 2012, two-thirds of respondents agreed that prisoners’ rehabilitative accomplishments should be rewarded with credits toward early release.¹⁸ Likewise, in 2013, 88 percent of respondents indicated that it was at least somewhat important to take into account a prisoner’s record in prison when considering him or her for early release.¹⁹

In 2014, two-thirds of respondents agreed that prisoners who are no longer a threat to society should be considered for release after serving two-thirds of their sentences.²⁰ Such overwhelming majorities — all of which suggest

support for good time — are remarkable in a state as politically divided as Wisconsin.

A Model Good-Time Program: Washington State

A little more than half the states, as well as the federal government, offer good time for prison inmates.²¹ (Some states, including Wisconsin, have good time for the inmates of county jails; such programs are beyond the scope of this article.) Good-time programs for prisoners vary significantly in their generosity and in many other respects.²² Washington state has a balanced,

of Corrections a viable release plan, including approved residence and other living arrangements.³¹ The state can deny release if the plan is unsatisfactory from the standpoint of recidivism risk or in other specified ways.³² In recent years, the releases of many inmates, amounting to between 16 and 23 percent of all releases, have been delayed under this provision, typically by two to three months.³³ This provision gives Washington a potentially valuable safeguard against the premature release of inmates who continue to pose unacceptable public-safety risks.

The number of people we send to prison today, and the conditions to which we subject them, may have profound consequences for the health of our most vulnerable communities many years down the road.

middle-of-the-road program that might offer an attractive model for Wisconsin. Washington’s basic good-time rule provides for a maximum one-third reduction in prison terms.²³ However, inmates convicted of a serious violent offense or a Class A felony sex offense can earn at most a 10 percent reduction.²⁴

Washington refers to good time as “earned release time,” or ERT.²⁵ A portion of ERT, referred to as “earned time,” is based on participation in approved programs, including work and school,²⁶ although inmates are not penalized if programs are not available.²⁷ ERT can be lost, however, for the commission of a “serious infraction,”²⁸ a category that is defined by regulation and encompasses a wide range of offenses from possession of an alcohol beverage to escape.²⁹ Lost ERT can later be restored if the inmate avoids any additional serious infractions over a 12-month period.³⁰

Inmates who have reached their “earned release date,” that is, the release date taking into account any ERT reductions, may be required to present to the Washington Department

What the Research Says About Good Time

Good-time programs such as Washington’s offer the potential of reducing prison overcrowding and taxpayer costs by accelerating the release dates of inmates whose good performance in prison indicates rehabilitative progress and diminished recidivism risk. Good time may also provide stronger incentives for inmates to take advantage of programming and employment opportunities in prison and may improve prison discipline and safety, thereby providing important benefits for inmates and corrections officers alike.

Although corrections officials had articulated such views for decades, very little systematic research tested the benefits of good time before the 1990s. Since then, at least five studies have explored the impact of changes in good-time laws in specific states, holding various key variables constant. None of the studies dealt with a state moving from no good time to a program like Washington’s — the change I suggest



Michael M. O'Hear, Yale 1996, is a professor at Marquette University Law School. Before joining the Marquette faculty, he practiced civil and criminal litigation with Sonnenschein Nath & Rosenthal in Chicago.

michael.ohear@marquette.edu

here – but they do provide support in a general way for some of the conventional, commonsense views about the potential benefits of good time.

For instance, in 1997, the New York Legislature established a new good-time program that allowed certain inmates to earn up to a one-sixth reduction in sentence length.³⁴ By 2006, the program had saved taxpayers an estimated \$387 million.³⁵ Additionally, the early-release inmates were found to have lower recidivism rates than nearly all other comparison groups.³⁶ Similarly, analysis conducted after Washington expanded its good-time program in 2003 revealed small, but statistically significant, reductions in the recidivism rates.³⁷ Overall, researchers calculated that the benefits of expanded good time far outweighed the costs, with about \$1.88 in benefits for each \$1 in cost.³⁸

The flipside of the experience of states such as New York and Washington that expanded good time was the experience of states that moved in the opposite direction. Research in such states also tends to support the value of good time. For instance, North Carolina substantially curtailed good time in 1994. Researchers there subsequently found a nearly 20 percent increase in rates of discipline among inmates sentenced under the new system compared with inmates sentenced under the old.³⁹ Similarly, Florida imposed new caps on good time in 1995.⁴⁰ Researchers later determined that the new-law prisoners had 91.1 percent greater odds of committing a prison infraction over a five-year period than did the old-law prisoners.⁴¹

On the other hand, a different researcher did find a reduction in post-release recidivism after Florida adopted its new policy.⁴² In other words, recidivism rates fell after good time was curtailed. The cause of this experience in Florida – which seems contrary to the experiences in New York and Washington – is not entirely clear, but it is important to appreciate that Florida's old good-time system was among the most generous in

the nation; on average, time served was only 39 percent of the sentence.⁴³ Public safety concerns with such a program should not necessarily tarnish more balanced programs, like Washington's.

Good Time and Truth-in-Sentencing

Good time might be seen as inconsistent with the truth-in-sentencing (TIS) policy Wisconsin adopted in 1998. Indeed, this was a central criticism voiced by opponents of Governor Doyle's 2009 reform package. Properly understood, however, TIS does not preclude good time.

TIS was intended to eliminate parole, not good time, which had been eliminated for prisoners more than a decade earlier.⁴⁴ Parole, administered by the Parole Commission, and good time, administered by the Wisconsin Department of Corrections, have quite distinct histories and structures. Indeed, Wisconsin had good time for decades before it implemented parole, and good time has been retained in many other jurisdictions, such as the federal system, that have eliminated parole.⁴⁵ There is no logical reason why a state cannot have one without the other.

To equate the elimination of parole with "truth" was always a bit

misleading; after all, there was nothing secret about the existence of the parole system and nothing intrinsically dishonest about having some variability in release dates. TIS would have been better labeled "certainty in sentencing," because it did provide somewhat greater certainty about punishment at a somewhat earlier stage in the process.

Certainty is good to a point, but almost no one would favor a system that pursued certainty in the criminal-justice system to the utter exclusion of other values; doing so would require eliminating not only the discretion of the Parole Commission, but also the discretion of police officers to arrest, prosecutors to charge, judges to sentence, and corrections officials to establish the conditions of confinement and community supervision. A fair, workable criminal-justice system requires certainty to be balanced against other important considerations. The Wisconsin Legislature itself recognized this by creating a judicial sentence-adjustment mechanism shortly after adopting TIS.⁴⁶

A good-time program like Washington's entails some loss in certainty, but much less so than existed in Wisconsin's old parole system, which

permitted release anytime from the one-quarter to the two-thirds mark of the sentence based on far more ambiguous criteria.⁴⁷ Indeed, the variability of release dates under a middle-of-the-road good-time program is well in line with what is done in most other states that adopted TIS programs in the 1980s and 1990s. In general, other TIS states permit

release at the 85 percent mark of the sentence or earlier, and many, unlike Wisconsin, limit TIS to violent offenses.⁴⁸

Conclusion

Across the country, blue states and red states alike are adopting reforms to address the fiscal and human costs of mass incarceration.⁴⁹ Good time is

certainly not the only potential reform in the mix, but it is a device with a long history of success in many states. As Wisconsin policymakers consider new approaches, good time should be part of the conversation. **WL**

ENDNOTES

¹Wisconsin adopted its first good-time law in 1860. Act Relating to the Discipline of Convicts in the State Prisons, ch. 324, 1860 Wis. Laws 321. Good time was repealed 124 years later. 1983 Wis. Act 528, § 2, 1983 Wis. Sess. Laws at 2105.

²By 1910, good time had been established in the 46 states then existing. Thomas G. Blomberg & Karol Lucken, *American Penology: A History of Control* 75 (2010).

³In 2012, slightly more than half the states had good time. Michael M. O'Hear, *Solving the Good-Time Puzzle: Why Following the Rules Should Get You Out of Prison Early*, 2012 Wis. L. Rev. 195, 197.

⁴Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 Am. Crim. L. Rev. 1247, 1288-92 (2011) (noting post-2000 expansions of good time in Colorado, Delaware, Louisiana, Maine, Nebraska, Nevada, Texas, Washington, and Wyoming).

⁵Relevant research is discussed below. See also Nora V. Demleitner, *Good Conduct Time: How Much and For Whom? The Unprincipled Approach of the Model Penal Code: Sentencing*, 61 Fla. L. Rev. 777 (2009).

⁶Michael M. O'Hear, *Mass Incarceration in Three Midwestern States: Origins and Trends*, 47 Val. U. L. Rev. 722 (2013).

⁷*Id.*

⁸John Pawasarat & Lois M. Quinn, University of Wisconsin-Milwaukee, *Wisconsin's Mass Incarceration of African American Males: Workforce Challenges for 2013*, at 2 (2013).

⁹See, e.g., Wis. Leg. Fiscal Bureau, Informational Paper 56: Adult Corrections Program 4 (2013) (indicating that the Wisconsin prison system was at 129 percent of capacity in December 2012).

¹⁰Compare *id.* at 37 (total corrections funding in 2012-13 was nearly \$1.3 billion), with Wis. Leg. Fiscal Bureau, Informational Paper 54: Adult Corrections Program 34 (2003) (total corrections funding in 2002-03 was about \$977 million).

¹¹Devon Waugh, *Mary Burke Says Wisconsin Spends More on Corrections Than on Higher Education*, PolitiFact Wisconsin, June 27, 2014, www.politifact.com/wisconsin/statements/2014/jun/27/mary-burke/citing-scott-walker-mary-burke-says-wisconsin-spen/.

¹²Compare Wis. Leg. Fiscal Bureau, *supra* note 9, at 11 (12,706 prisoners released in 2011-12), with Wis. Leg. Fiscal Bureau, Informational Paper 56: Adult Corrections Program 7 (1999) (6,548 releases in 1997-98).

¹³O'Hear, *supra* note 4, at 1248.

¹⁴For a complete description of key features of the 2009 reforms, see Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 Marq. L. Rev. 1551, 1570-77 (2012).

¹⁵*Id.* at 1567.

¹⁶One committee is considering problem-solving courts and other diversions (<http://docs.legis.wisconsin.gov/misc/lc/study/2014/1190>), while the other is reviewing criminal penalties (<http://docs.legis.wisconsin.gov/misc/lc/study/2014/1191>).

¹⁷One prominent platform for the conservative critique of mass incarceration is the "Right on Crime" initiative (www.rightoncrime.com).

¹⁸Marquette Univ. Law Sch. Poll, Marquette Law School Poll Toplines - July 5-8, 2012, at Q26c (2012), available at https://law.marquette.edu/poll/wp-content/uploads/2012/09/MLSP8_

Toplines.pdf.

¹⁹Marquette Univ. Law Sch. Poll, Marquette Law School Poll, July 15-18, 2013, at Q24 (2013), available at <https://law.marquette.edu/poll/wp-content/uploads/2013/07/MLSP17Toplines.pdf>.

²⁰Marquette Univ. Law Sch. Poll, Marquette Law School Poll, July 17-20, 2014, at Q30 (2014), available at <http://law.marquette.edu/poll/wp-content/uploads/2014/07/MLSP22Toplines.pdf>.

²¹O'Hear, *supra* note 3, at 197.

²²*Id.* at 200-02.

²³Wash. Rev. Code Ann. § 9.94A.729(3)(d) (West 2010 & Supp. 2014).

²⁴Wash. Admin. Code § 137-30-030(1)(b) (2011).

²⁵*Id.* § 137-25-020.

²⁶*Id.* § 137-30-030(3)(a).

²⁷E.K. Drake, R. Barnoski & S. Aos., Wash. State Inst. for Pub. Policy, *Increased Earned Release From Prison: Impacts of a 2003 Law on Recidivism and Crime Costs*, Revised 2 n.7 (2009).

²⁸Wash. Admin. Code § 137-30-030(2)(c) (2011).

²⁹*Id.* § 137-25-030.

³⁰*Id.* § 137-30-070(2)(b).

³¹Wash. Rev. Code § 9.94A.729(5)(b) (West 2010 & Supp. 2014).

³²*Id.* § 9.94A.729(5)(c).

³³Wash. Dep't of Corr., *Earned Prison Release* 2 (2013).

³⁴N.Y. Dep't of Corr. Servs., *Merit Time Program Summary: October 1997-December 2006*, at i (2007).

³⁵*Id.* at 15.

³⁶*Id.* at iii.

³⁷Drake et al., *supra* note 27, at 6.

³⁸*Id.* at 9.

³⁹John M. Memory, Guang Guo, Ken Parker & Tom Sutton, *Comparing Disciplinary Infraction Rates of North Carolina Fair Sentencing and Structured Sentencing Inmates: A Natural Experiment*, 79 Prison J. 45, 57, 65 (1999).

⁴⁰Kerensa N. Pate, *Florida's Truth in Sentencing Effectiveness on Recidivism Rates* 10 (Apr. 1, 2010) (unpublished Ph.D. dissertation, Florida State Univ.), available at <http://diginole.lib.fsu.edu/cgi/viewcontent.cgi?article=4099&context=etd>.

⁴¹William D. Bales & Courtenay H. Miller, *The Impact of Determinate Sentencing on Prisoner Misconduct*, 40 J. Crim. Just. 394, 400 (2012).

⁴²Pate, *supra* note 40, at 50.

⁴³Bales & Miller, *supra* note 41, at 395.

⁴⁴See *supra* note 1.

⁴⁵Michael M. O'Hear, *Good Conduct Time for Prisoners: Why (and How) Wisconsin Should Provide Credits Toward Early Release*, 98 Marq. L. Rev. ___, *140-42 (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2501986.

⁴⁶Norris, *supra* note 14, at 1572.

⁴⁷See Patrick J. Fiedler, *The Wisconsin Department of Corrections: An Expensive Proposition*, 76 Marq. L. Rev. 501, 513-15 (1993) (indicating timing parameters and discussing criteria).

⁴⁸William J. Sabol et al., Urban Institute, *The Influences of Truth-in-Sentencing Reforms on Changes in States' Sentencing Practices and Prison Populations* 9, 20-23 (2002).

⁴⁹See, e.g., Nancy LaVigne et al., *Justice Reinvestment Initiative State Assessment Report* (2014) (discussing reforms in Arkansas, Georgia, Kansas, Oklahoma, and other states). **WL**