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# Compassion and the Public Interest: Wisconsin's New Compassionate Release Legislation



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Current sentencing and parole policies can be characterized by what John Pratt terms *penal populism*.<sup>1</sup> This approach to criminal justice includes widespread increase in police surveillance and arrests,<sup>2</sup> elimination of rehabilitation as a correctional goal,<sup>3</sup> and an unprecedented expansion of the prison population.<sup>4</sup> Although crime rates have been declining appreciably for some time (a decline that preceded the explosion in prison populations),<sup>5</sup> it has become politically expedient to ignore policy suggestions based on statistical analysis and focus rather on the uninformed beliefs of the populace.<sup>6</sup> Because the prison system is backed by a bureaucracy of its own, it continues to grow according to an internal rationality that favors constant expansion according to a decidedly retributive ethos.<sup>7</sup>

Because so much of prison life occurs far from the public's view, changes in policy and implications of long-held truisms are rarely noticed by those who are not directly affected by the penal system. Just as Victor Hugo's fictional Jean Valjean could be largely forgotten in the bowels of prison, women and men sentenced to correctional facilities largely fall from consciousness unless or until benign neglect is disturbed by other factors.

Today, that benign neglect in Wisconsin has been disturbed by the financial constraints of maintaining the current prison population. Between 2000 and 2007, Wisconsin's prison population increased by 14 percent.<sup>8</sup> The State Corrections budget increased by 71 percent from 1999 to 2009.<sup>9</sup> Wisconsin's health care costs for adult prisoners leapt from \$28.5 million in 1998 to \$87.6 million in 2005.<sup>10</sup> The Wisconsin Department of Corrections estimates that it will cost \$2.5 billion between 2009 and 2019 to reduce overcrowding and accommodate the expansion of the prison system.<sup>11</sup> As a result of looming costs, Wisconsin, like other states, has begun to reconsider implications of previously popular law-and-order policies.

One product of Wisconsin's reconsideration is a recent change in compassionate release standards for inmates in state correctional facilities.<sup>22</sup> This legislation both expands the category of those eligible for sentence modification and streamlines the procedure.<sup>13</sup> Although the law has much to recommend it, issues unaddressed may prove costly—notably the unintended consequences of placing financial burdens on the families or communities to

which these prisoners are released in a bleak economic climate.

The idea of compassionate release of elderly and ill inmates is not new.<sup>14</sup> In 1994, Professor Marjorie Russell published a consideration of the compassionate release and medical parole programs of the fifty states and the District of Columbia.<sup>15</sup> Only three jurisdictions, the District of Columbia, Kansas, and Maine, had no programs for the parole or release of terminally ill prisoners.<sup>16</sup> Russell noted that

[t]wenty-two states reported that they have no compassionate release program, but each has at least one method by which a terminally ill prisoner can seek release. These methods included: commutation of sentence through the administrative procedures of the DOC with no specific provision relating to the terminally ill; general claim for executive clemency; and normal parole application procedures, where the prisoner's medical condition is only one factor to be considered in the ordinary parole decision.<sup>17</sup>

Thus, almost twenty years ago, states recognized a need for this safety valve even without providing a specific statutory grounding for it. Professor Russell maintained that compassionate release statutes address the concerns of both inmates and the states far better than do more generalized administrative procedures or clemency petitions.<sup>18</sup>

After laying out the shifts in eligibility standards and procedure between Wisconsin's old and new compassionate release laws, I will turn to broader concerns that fall under the public-interest calculus called for in the statutes. In addition to usual criminological considerations, I suggest that the word *compassionate* will need to do heavy lifting if this law is to make a difference in the lives of inmates.

## I. Wisconsin's Old Compassionate Release Law

By way of background, Wisconsin's current sentencing structure is relatively new; it was overhauled between 1998 and 2003 under the provisions of the state's Truth in Sentencing legislation.<sup>19</sup> Under that law, parole was abolished; felons sentenced to prison are now given a bifurcated (two-part) sentence in which the sentencing judge specifies an amount of time a convicted felon will

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serve in prison and an amount of time the person will serve in the community on extended supervision.<sup>20</sup> Under the original provisions of Truth in Sentencing, most inmates, with approval of the program review committee at their respective institutions, could petition the sentencing court for release to extended supervision in certain extenuating circumstances.<sup>21</sup> However, inmates serving life sentences were not eligible to petition.<sup>22</sup>

Eligible inmates included both the elderly and the gravely ill. With regard to the elderly, the program review committee at the housing institution could consider petitions filed by prisoners either 60 or 65 years old who had served substantial portions of their sentences.<sup>23</sup> In addition to these petitions, those who had a “terminal condition” could file for modification.<sup>24</sup> The statute defined “terminal condition” 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, even with available life-sustaining treatment provided in accordance with the prevailing standard of medical care.<sup>25</sup>

Inmates who fit within either category could then petition the program review committee of their correctional institution, requesting modification of the bifurcated sentence.<sup>26</sup> Any request for modification based on a terminal condition required affidavits from two physicians.<sup>27</sup> The institution’s program review committee then reviewed each petition filed and decided if the “public interest” (a phrase undefined in the statute) would be served by modifying the inmate’s sentence.<sup>28</sup> Only if the program review committee found such interest could the inmate’s petition be referred to the sentencing court.<sup>29</sup> The statute provided no right to appeal the program review committee’s denial of a petition for modification.<sup>30</sup>

At the sentencing court hearing, the petitioner, the district attorney, and any victim of the crime for which the petitioner was sentenced were permitted to be heard.<sup>31</sup> The petitioner bore the burden of proving by the greater weight of the credible evidence that modification of his or her sentence would be in the public interest.<sup>32</sup> If the court so found, any reduction in the incarceration portion of the bifurcated sentence was balanced by a like increase in the extended supervision portion so that the total length of the original sentence did not change.<sup>33</sup> The court’s decision could be appealed by either the petitioner or the state.<sup>34</sup> Inmate petitioners had the right to be represented by counsel, including appointment of a state public defender.<sup>35</sup> In its study of the new legislation, the Legislative Fiscal Bureau of Wisconsin provided no evidence describing whether or how often this law resulted in the release of inmates from confinement.<sup>36</sup>

## II. Wisconsin’s New Compassionate Release Law

Wisconsin’s new compassionate release law simplifies earlier procedures and expands the class of inmates who can petition for sentence modification. The statute retains

the distinction between those petitioning for compassionate release because of age and those who petition for reasons of ill health. The age qualifications track the previous legislation<sup>37</sup>; however, the new provision no longer bars petitions by elderly inmates sentenced to life imprisonment.<sup>38</sup> The second category of “extraordinary health condition” may signal greater eligibility to petition under the law.<sup>39</sup> Anyone claiming “advanced age, infirmity, or disability of the person or a need for medical treatment or services not available within a correctional institution” may now petition for compassionate release.<sup>40</sup>

In terms of procedural differences, the law shifts the locus of decision making from the sentencing court to a newly created administrative panel, the Earned Release Review Commission, which replaces the parole board.<sup>41</sup> The Commission, part of the executive branch of state government, consists of eight members who have “knowledge of or experience in corrections or criminal justice.”<sup>42</sup> The chair is nominated by the governor and subject to state senate approval; other members are appointed by the chair.<sup>43</sup>

Inmates meeting eligibility criteria may submit petitions to the Commission.<sup>44</sup> Upon receipt of a petition, the Commission sets a hearing to determine whether the public interest would be served by modifying the sentence as requested.<sup>45</sup> The District Attorney from the sentencing jurisdiction and any victim of the inmate’s crime must be notified and can be present for any such hearing.<sup>46</sup>

Again, inmates must prove that granting their petition would serve the public interest by the greater weight of the credible evidence.<sup>47</sup> For inmates who meet that burden, the Commission must modify their sentence in the manner requested.<sup>48</sup> As was the case under the previous legislation, if the petitioner prevails and is granted a modification, the state may appeal that decision to a reviewing court (which may overturn the determination using an abuse of discretion standard).<sup>49</sup> By contrast, inmates can only appeal from the denial of their petition under the common law right of certiorari.<sup>50</sup> Again, those petitioning for modification are afforded the right to counsel, including appointment of a state public defender.<sup>51</sup> Echoing previous law, reduction in an inmate’s term of confinement must be balanced with a like increase in the period of extended supervision so that the total length of the sentence imposed remains the same.<sup>52</sup>

Initially, one must applaud Wisconsin’s willingness to revisit parts of a recent sentencing overhaul to address difficulties in the current system. Although the proposed changes are hardly sweeping in scope, they do offer real possibilities of change. By removing a level of bureaucracy and shifting decision making from elected judges to a politically appointed commission, Wisconsin may speed up the petitioning process and improve results. In an era when judicial elections are marred by often unsupported allegations that opponents are soft on crime, the decision to release an elderly or infirm prisoner seems best shielded from obvious political posturing. That said, the Commission must still be responsive to the citizens of the state.

### III. Public Interest Considerations

To determine the public-interest standard that governs decisions to grant or deny release, it is helpful to return to standard sentencing goals. Presumably public interest includes consideration of specific deterrence of the inmate and protection of the public, retribution for past wrongs, and an inmate's efforts at rehabilitation while incarcerated. The literature also indicates that public interest includes saving the criminal justice system money while not imposing an undue burden on the communities to which the inmates will be released. Finally, it seems that consideration of the public interest must also include some reflection on the odd word *compassionate* in the title of the statute.

No one doubts that specific deterrence and protection of the public are paramount in considering the release of prisoners into society. To underscore this idea, Wisconsin State Representative Scott Suder recently organized forty-four GOP lawmakers to protest all of the prisoner release provisions passed as part of the budget bill in 2009.<sup>53</sup> Commenting on similar legislation in the past, Suder decried compassionate release of elderly inmates: "I don't think age should be a factor . . . for letting people loose early or giving them things like house arrest . . . Putting these criminals in residential nursing homes with an already vulnerable population . . . I think is just utterly dangerous."<sup>54</sup>

Although concern with public safety is an important factor, statistical analysis undermines claims that those eligible for compassionate release pose a substantial threat to society.<sup>55</sup> Research in this area indicates that elderly prisoners are the least likely to, and the least capable of, committing crimes.<sup>56</sup> For one thing, elders in prison appear to be more physically impaired than the general elderly population.<sup>57</sup> They frequently have lives marked by poverty and addiction;<sup>58</sup> therefore, they tend to be less healthy than society at large. Aside from these ex ante considerations, the major factor contributing to growth in Wisconsin's prison population is revocation of earlier sentences.<sup>59</sup> Inmates know that they will always be subject to revocation if they step out of line while on extended supervision. This awareness may well discourage further unlawful behavior.

Second, internal evidence from the statute demonstrates that retribution is taken into account in compassionate release determinations. Elderly prisoners are not eligible to file petitions until they have served a substantial period of their sentences behind bars.<sup>60</sup> Furthermore, Wisconsin prison sentences and periods of extended supervision have increased markedly under Truth in Sentencing, which in part underscores the necessity of this law.<sup>61</sup> Retribution concerns are thus met. In addition, Wisconsin statutes specifically provide that courts must consider inmates' efforts at rehabilitation while incarcerated as a factor in any motion to modify a sentence.<sup>62</sup> Insofar as correctional institutions still accept the idea that prisoners strive to reform their lives, inmates' efforts at self-improvement are rewarded by current Wisconsin law.<sup>63</sup>

Although necessary, it is fair to concede that the foregoing would not constitute sufficient grounds for changing the release standards barring an expected dividend of cost savings. Thus, it is noteworthy that such savings remain undefined. For example, no one has been able to estimate what, if any, net savings may accrue because of Wisconsin's sentence modification legislation.<sup>64</sup> Indeed, rather than careful analysis of projected savings and possible costs that may be shifted to other state, county, or municipal programs by releasing inmates under compassionate release, the legislative history assumes without proof that it is more economical to house some people outside of state prisons. Moving prisoners out of the state corrections system will surely save money for corrections.<sup>65</sup> The National Center on Institutions and Alternatives concluded that release of non-violent elderly prisoners to communities would result in "astronomical" savings.<sup>66</sup> Later studies are more guarded and suggest that it is at best unclear whether this strategy will garner any net savings across government and private entities.<sup>67</sup>

One key concern is that costs may be shifted to those particularly unable to take on added financial burdens given the precarious state of Wisconsin's current economic situation. In particular, Milwaukee has been recognized as a metropolitan area suffering concentrated poverty.<sup>68</sup> For instance, one recent study of the past forty years of economic data in the largest U.S. cities revealed that "none of their urban centers fell as far, as fast, as hard," as Milwaukee's.<sup>69</sup> The study concluded that "Milwaukee falls to the bottom of nearly every index of social distress."<sup>70</sup> Another recent study revealed that Milwaukee has one of the highest rates of Black male joblessness among U.S. cities.<sup>71</sup>

If one accepts as a reasonable assumption that many who are released will return to their families for end-of-life or extended care, it would also seem reasonable that any bill providing for compassionate release would provide for increased community reentry funding to support families facing the financial burdens associated with caring for these family members. Before the new bill, the State Department of Corrections spent more than \$27 million annually for the purchase of goods, care, and services, including community-based residential care, for inmates, probationers, parolees, and individuals on extended supervision.<sup>72</sup> Although the governor requested additional positions and funding in the bill of more than \$5 million, that request was vetoed by the Wisconsin Legislature's Joint Finance Committee and adopted by the Conference Committee.<sup>73</sup> This denial of additional funding may end up costing the state more in the long run, because it may either make compassionate release a practical impossibility in a great number of inmates' cases or lead families already in precarious financial circumstances into even greater economic distress.

Despite these very real cost concerns, on balance, the public interest may well be upheld by Wisconsin's new compassionate release programs—but this interest requires a different sort of analysis from that which usually occupies

lawyers. The values at stake are well expressed by considering the Latin root of the word *compassion*: “I suffer with.” Rather than the Kantian broad-based rules that characterize most public interests, the interest spoken of here is more in line with a Heideggerian “Dasein,” the “being there” that roots more personal considerations.<sup>74</sup> The word *compassion* evokes a relationship at a level of personal directness that the penal apparatus rarely considers. Rather than determining results that could be seen as distributed equitably by a blindfolded figure holding scales, those deciding compassionate release petitions must consider the suffering and extremity of a particular inmate with particular physical, emotional, and mental needs and limitations.

In determining the public interest involved in compassionate release of convicts, the Commission will need to ask not only what sort of society we are but also what sort of society we aspire to be. For compassionate release, the public interest must be focused on a very particular private interest. If the Commission is not willing so to act, Wisconsin’s new compassionate release law will not engender much change.

#### Notes

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<sup>1</sup> JOHN PRATT, *PENAL POPULISM* 12 (2007). Pratt characterizes penal populism this way:

[P]enal populism speaks to the way in which criminals and prisoners are thought to have been favoured at the expense of crime victims in particular and the law-abiding public in general. It feeds on expressions of anger, disenchantment and disillusionment with the criminal justice establishment. It holds this responsible for what seems to have been the insidious inversion of commonsensical priorities: protecting the well-being and security of the law-abiding ‘ordinary people’. Punishing those whose crimes jeopardize this. *Id.* (emphasis omitted).

<sup>2</sup> See BERNARD HARCOURT, *ILLUSIONS OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 2 (2001) (“In New York City, the quality of life initiative produced between 40,000 and 85,000 additional adult misdemeanor arrests per year during the period of 1994–1998, and an even greater number of stops and frisks during a period of sharply declining crime rates.” (citations omitted)).

<sup>3</sup> See DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 6 (1990) (“This all-inclusive sign provided a sense of purpose and justification for penal practice and made punishment appear meaningful for its various audiences. Today, however, this unifying and uplifting term is no longer the talismanic reference point it once was. Following a sustained critique, the notion of rehabilitation has come to seem problematic at best, dangerous and unworkable at worst.”).

<sup>4</sup> See HENRY RUTH & KEVIN REITZ, *THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE* 18–22 (2003). Ruth and Reitz provide a first-rate analysis of incarceration trends that highlights not only the increase in the overall prison population but also the increase in average sentence lengths in the United States. The U.S. incarceration rate is now roughly five to ten times

the rate of most other industrialized nations. Public Safety Performance project, Pew Center on the States, *Public Safety, Public Spending: Forecasting America’s Prison Population 2007–2011*, at 1 (2007).

<sup>5</sup> *Id.* at 98–102. For a discussion of the debate regarding the cause of drop in crime, see Robert Weisberg, *Tragedy, Skepticism, Empirics and the MCS*, 61 *FLA. L. REV.* 797, 806–11 (2009). Relying on the research of Professor Frank Zimring, Weisberg suggests that although the crime drop was real, it is owed to a multiplicity of factors that “cannot be disentangled with our current statistical tools.” *Id.* at 811.

<sup>6</sup> See, e.g., PRATT, *supra* note 1, at 17–18 (“Crime levels were to be judged on the basis of ‘what we all know’ rather than any such abstract quantifications. It was this that determined its reality, not statistical detail.”).

<sup>7</sup> See, e.g., GARLAND, *supra* note 3, at 3 (“Like all habitual patterns of social action, the structures of modern punishment have created a sense of their own inevitability and of the necessary rightness of the status quo. Our taken for granted ways of punishing have relieved us of the need for thinking deeply about punishment and what little thinking we are left to do is guided along certain narrowly formatted channels.” (citation omitted)).

<sup>8</sup> See COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, *JUSTICE REINVESTMENT IN WISCONSIN: ANALYSES AND POLICY OPTIONS TO REDUCE SPENDING ON CORRECTIONS AND INCREASE PUBLIC SAFETY* 3 N.5 (2009) (CITING WISCONSIN DEPARTMENT OF CORRECTIONS, *Depot Update through 2007* (2008)).

<sup>9</sup> *Time to Break Prison-Spending Cycle*, THE NORTHWESTERN, Oshkosh, Wis., May 13, 2009, available at [http://www.legis.state.wi.us/I&/committees/study/2008/JRIO/files/editorial\\_break.pdf](http://www.legis.state.wi.us/I&/committees/study/2008/JRIO/files/editorial_break.pdf).

<sup>10</sup> Bob Purvis, *Cheaper Prison Options Sought; As Number of Older Prisoners Rises, So Do Costs for Care*, MILWAUKEE J. SENTINEL, Aug. 7, 2006, at A1.

<sup>11</sup> COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, *supra* note 8, at 3.

<sup>12</sup> WIS. STAT. § 302.1135 (2010).

<sup>13</sup> The new law took effect on January 4, 2010. It was passed and signed by the governor as part of the 2009 omnibus budget bill, Act 28.

<sup>14</sup> Indeed, the topic has been the subject of scholarly research for some time. Representative articles include 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 (1994); Jason S. Ornduff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 *ELDER L.J.* 173, (1996); William B. Aldenberg, *Bursting at the Seams: An Analysis of Compassionate-Release Statutes and the Current Problem of HIV and AIDS in U.S. Prisons and Jails*, 24 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 541 (1998); John A. Beck, *Compassionate Release from New York State Prisons: Why Are So Few Getting Out?*, 27 *J.L. MED. & ETHICS* 216 (1999); Nadine Curran, *Blue Hairs in the Bighouse: The Rise in Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It*, 26 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 225 (2000); Ronald H. Aday & Jennifer J. Krabill, *Aging Offenders in the Criminal Justice System*, 7 *MARQ. ELDER’S ADVISOR* 237 (2006); Timothy Curtin, *The Continuing Problem of America’s Aging Prison Population and the Search for a Cost-Effective and Socially Acceptable Means of Addressing It*, 15 *ELDER L.J.* 473 (2007).

<sup>15</sup> Russell, *supra* note 14.

<sup>16</sup> *Id.* at 181–19.

<sup>17</sup> *Id.* at 819 (citations omitted).

<sup>18</sup> *Id.*

<sup>19</sup> The history and provisions of that law are nicely laid out in Thomas Hammer, *The Long and Arduous Journey to Truth-in-Sentencing in Wisconsin*, 15 *FED. SENT. REP.* 15 (2002).

<sup>20</sup> WIS. STAT. § 973.01 (2009).

- 21 Wis. STAT. §§ 302.113(9g)(a)(1), (b)(3)(cm) (2007).
- 22 See Wis. STAT. §§ 973.014, 302.114 (2007).
- 23 Wis. STAT. § 302.11(9g)(b) (2007). The statute provides as follows:
- An inmate who is serving a bifurcated sentence for a crime other than a Class B felony may seek modification of the bifurcated sentence in the manner specified in par. (f) if he or she meets one of the following criteria:
1. The inmate is 65 years of age or older and has served at least 5 years of the term of confinement in prison portion of the bifurcated sentence.
  2. The inmate is 60 years of age or older and has served at least 10 years of the term of confinement in prison portion of the bifurcated sentence. *Id.*
- 24 Wis. STAT. § 302.113(9g)(c) (2007).
- 25 Wis. STAT. § 302.113(9g)(a)(2) (2007).
- 26 Wis. STAT. § 302.113(9g)(c) (2007).
- 27 *Id.*
- 28 Wis. STAT. § 302.113(9g)(cm) (2007).
- 29 *Id.*
- 30 Wis. STAT. §§ 302.113(9g)(h)-(i) (2007).
- 31 Wis. STAT. § 302.113(9g)(d) (2007).
- 32 Wis. STAT. § 302.113(9g)(e) (2007).
- 33 Wis. STAT. § 302.113(9g)(f) (2007).
- 34 Wis. STAT. § 302.113(9g)(h) (2007). The appellate court could overturn the sentencing court under an abuse of discretion standard. *Id.*
- 35 Wis. STAT. § 302.113(9g)(j) (2007).
- 36 See WISCONSIN LEGISLATIVE FISCAL BUREAU, BIFURCATED SENTENCE MODIFICATION (CORRECTIONS-SENTENCING MODIFICATION) (2009), available at <http://www.legis.state.wi.us/lfb/2009-11Budget/Budget%20Papers/277.pdf>.
- 37 The statute provides as follows:
- An inmate who is serving a bifurcated sentence imposed under s. 973.01 or, notwithstanding s. 973.014 (1g) (a) or (2), an inmate who is serving a life sentence imposed under s. 973.014 may seek modification of the sentence in the manner specified in sub. (6) if he or she meets one of the following criteria: (a) The inmate is 65 years of age or older and has served at least 5 years of the term of confinement in prison portion of the bifurcated sentence for a sentence imposed under s. 973.01 or has served at least 5 years in prison for a life sentence imposed under s. 973.014. (b) The inmate is 60 years of age or older and has served at least 10 years of the term of confinement in prison portion of the bifurcated sentence for a sentence imposed under s. 973.01 or has served at least 10 years in prison for a life sentence imposed under s. 973.014. Wis. STAT. § 302.1135(2) (2010).
- 38 *Id.*
- 39 Wis. STAT. § 302.1135(1)(b) (2010).
- 40 *Id.*
- 41 Wis. STAT. § 15.145(1) (2010).
- 42 *Id.*
- 43 *Id.*
- 44 Wis. STAT. § 302.1135(3) (2010). As was the case previously, the claim of an “extraordinary health condition” must be supported by affidavits from two physicians. *Id.*
- 45 Wis. STAT. § 302.1135(4) (2010).
- 46 *Id.*
- 47 Wis. STAT. § 302.1135(5) (2010).
- 48 *Id.*
- 49 Wis. STAT. § 302.1135(8) (2010).
- 50 *Id.*
- 51 Wis. STAT. § 302.1135(10) (2010).
- 52 Wis. STAT. § 302.1135(6)(a) (2010).
- 53 Press Release, Wisconsin State Rep. Scott Suder, Rep. Suder Calls for Repeal of Democrats’ “Let ‘Em Loose Early” Program (Jan. 6, 2010), available at <http://www.thewheelerreport.com/releases/jan10/jan6/0106suderearlyrelease.pdf> (“Letting convicted felons out of jail early on a hope and prayer that they won’t strike again is not only bad public policy, it’s downright dangerous.”).
- 54 Bob Purvis, *Cheaper Prison Options Sought; As Number of Older Prisoners Rises, So Do Costs for Care*, MILWAUKEE J. SENTINEL, Aug. 7, 2006, at A1.
- 55 According to older studies, elders are less likely to be recidivists; indeed, age is the only reliable factor on which recidivism may be predicted. Within one year of release, nearly 22 percent of those between the ages of 18 and 24 will return to prison, but only about 2 percent of those 45 and older will return. After seven years, nearly 50 percent of those between the ages of 18 and 24 at release will have returned, but only about 12 percent of those 45 or older at release will return. Statement of Professor Jonathan Turley, Assistant Professor of Law and Director of the Project for Older Prisoners, Tulane Law School, to Special Budget Task Force of the Louisiana State Senate (Oct. 23, 1989). See also ALLEN J. BECK, U.S. DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983, at 1 (1989); RUSSELL, *supra* note 14, at 805 (citing LAWRENCE A. GREENFIELD, U.S. DEP’T OF JUSTICE, EXAMINING RECIDIVISM, at 1(1985)).
- 56 See, e.g., Ginny Carroll, *Growing Old Behind Bars: Some Cells Are More Nursing Home Than Jail*, NEWSWEEK, Nov. 20, 1989, at 70 (drawing on the research of Jonathan Turley).
- 57 Cynthia Massie Mara, *Chronic Illness, Disability and Long-Term Care in the Prison Setting*, in VULNERABLE POPULATIONS IN THE LONG TERM CARE CONTINUUM 39, 43–44 (Paul R. Katz et al. eds., 2004) (“Although 23.8% of inmates under age [twenty-five] reported having at least one (chronic) condition, 47.6% of prisoners over [forty-four] years of age said they had a similar level of impairment.”), cited in Curtin, *supra* note 14, at 481.
- 58 One study found that 8.5 percent of the elderly individuals studied were arrested for driving under the influence and 12.4 percent were arrested or ticketed for public intoxication. Peter C. Kratcoski & George A. Pownall, *Federal Bureau of Prisons Programming for Older Inmates*, FED. PROBATION, June 1989, at 28. Alcohol is also a major factor in violent crimes committed by elders. Curtin, *supra* note 14, at 482 (citing Karen M. Jennison, *The Violent Older Offender: A Research Note*, FED. PROBATION, Sept. 1986, at 60).
- 59 See COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, *supra* note 8, at 4 (“Between 2000 and 2007, the number of people admitted to prison who did not comply with the conditions of their community supervision increased 40 percent. The number of people admitted to prison who committed new offenses, however, decreased 11 percent.”).
- 60 Wis. STAT. § 302.1135(2) (2010).
- 61 See COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, *supra* note 8, at 5 (“Between 2000 and 2007, the average period of post-release community supervision to be served for individuals receiving a new prison sentence more than doubled, increasing from 23 to 54 months. The average confinement period also increased, albeit by a smaller margin, from 31 to 40 months.”).
- 62 Wis. STAT. § 973.195(1r)(b) (“Any of the following is a ground for a petition [for sentence modification]: 1. The inmate’s conduct, efforts at and progress in rehabilitation, or participation and progress in education, treatment, or other correctional programs since he or she was sentenced.”).
- 63 See, e.g., DAVID ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 79–108 (2d ed. 1990).

<sup>64</sup> See, e.g., WISCONSIN LEGISLATIVE FISCAL BUREAU, SENTENCE ADJUSTMENT FOR CLASS C THROUGH CLASS I FELONIES (CORRECTIONS—SENTENCING MODIFICATIONS) 8–9 (2009), available at <http://www.legis.state.wi.us/lfb/2009-11Budget/Budget%20Papers/275.pdf>.

Of the above totals, it is unknown how many offenders' sentences would be adjusted under the bill and how many prison beds savings may occur as a result of the provisions. Factors that would affect how many offenders are eligible and how much time may be earned include how many offenders with non-violent Class F to I felonies might be assessed as high-risk, and how many regulation violations offenders might receive in prison and in the community. According to the Department, there is "no way to determine the actual number of inmates who would have their sentences modified for release to supervision. . . ." Although this statement on cost estimates applies most clearly to legislation addressing good time adjustments, it applies with equal force to the compassionate release legislation. *Id.*

<sup>65</sup> CARRIE ABNER, THE COUNCIL OF STATE GOVERNMENTS, GRAYING PRISONS: STATES FACE CHALLENGES OF AN AGING INMATE POPULATION 8, 10 (2006) ("The financial burden for states in providing adequate health care for older prisoners is staggering. In 1997, the Texas Criminal Justice Policy Council reported that health care for elderly inmates ran \$14.80 per day, nearly three times the health care costs for younger prisoners.").

<sup>66</sup> NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES, IMPRISONING ELDERLY OFFENDERS: PUBLIC SAFETY OR MAXIMUM SECURITY NURSING HOMES? 2 (1998), available at <http://www.igc.org/sent/exec.pdf>. The NCIA calculates \$69,000 a year being spent on elderly inmates as opposed to \$22,000 a year for younger inmates. *Id.*

<sup>67</sup> ABNER, *supra* note 65, at 11.

"Although corrections may reduce costs through early release the cost to taxpayers doesn't necessarily go away," said Carl Wicklund, executive director of the American Probation and Parole Association. With little savings and limited employment opportunities, elderly offenders may not be able to adequately care for themselves. As a result, said Wicklund, "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." Others

agree, and advocate that some cost savings associated with early release programs be used to assist with the community re-entry transition. Testifying before the California Senate in 2003, [Professor Jonathan] Turley warned that "some of that money (from early release) has to be put back into the post-release plan. . . . It's not that expensive to do that. But it can be the difference between zero recidivism and greater recidivism. It's called a soft landing." *Id.*

<sup>68</sup> See generally, Jeremiah Boyle, *Milwaukee, Wisconsin: The Northwest Neighborhood*, in THE ENDURING CHALLENGE OF CONCENTRATED POVERTY IN AMERICA: CASE STUDIES FROM COMMUNITIES ACROSS THE U.S. (D. Erickson et al. eds., 2008), available at [http://www.frbsf.org/cpreport/docs/milwaukee\\_wi.pdf](http://www.frbsf.org/cpreport/docs/milwaukee_wi.pdf). This study was commissioned by the Federal Reserve Bank and the Brookings Institution.

<sup>69</sup> John Schmid, *A Dream Derailed*, MILWAUKEE J. SENTINEL, Dec. 5, 2004.

<sup>70</sup> *Id.*

<sup>71</sup> MARC V. LEVINE, THE CRISIS OF BLACK MALE JOBLESSNESS IN MILWAUKEE: TRENDS, EXPLANATIONS, AND POLICY OPTIONS (2007), available at <http://www4.uwm.edu/ced/publications/blackcrisis307.pdf>. In a research update to his previous work, Levine indicates that Milwaukee's Black male unemployment in 2008 held at 47.1 percent of the population; White male unemployment was at 18.1 percent. MARC V. LEVINE, RESEARCH UPDATE: RACE AND MALE JOBLESSNESS IN MILWAUKEE: 2008, at 5 (2009), available at [http://www4.uwm.edu/ced/publications/race\\_joblessness08.pdf](http://www4.uwm.edu/ced/publications/race_joblessness08.pdf).

<sup>72</sup> WISCONSIN LEGISLATIVE FISCAL BUREAU, COMMUNITY REENTRY FUNDING (CORRECTIONS—ADULT COMMUNITY CORRECTIONS) (2009), available at <http://www.legis.state.wi.us/lfb/2009-11Budget/Budget%20Papers/296.pdf>.

<sup>73</sup> WISCONSIN LEGISLATIVE FISCAL BUREAU, COMPARATIVE SUMMARY OF 2009–2011 BUDGET, CORRECTIONS—ADULT COMMUNITY CORRECTIONS, COMMUNITY REENTRY FUNDING 306 (2009).

<sup>74</sup> Professor Linda Ross Meyer masterfully lays out this distinction in *The Merciful State*, in FORGIVENESS, MERCY AND CLEMENCY 64, 79–85 (Austin Sarat & Nasser Hussain eds., 2007). Although Professor Meyer refers primarily to questions of clemency in this chapter, I believe her insights can be easily transferred to the interests raised in compassionate release.