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Imprisonment Inertia and Public Attitudes Toward "Truth in Sentencing"

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Despite more than a decade of effort by policymakers across the United States, America's imprisonment rate seems stuck at historically high levels. The nation's prison population exploded between 1972 and 2001, with the number of prisoners increasing sevenfold from 196,092 to more than 1.4 million—averaging a 400,000-prisoner jump each decade.[1] However, all of the associated prison-building and staffing put an enormous strain on many state budgets, with the total costs of incarceration increasing from $5 billion in 1978 to $40 billion in 2000.[2] The 2001 recession, in particular, served as a wakeup call for many policymakers, convincing them that imprisonment rates had reached unsustainable levels.[3]There followed a widespread flowering of state initiatives to divert more offenders from incarceration and to move out those who were already in prison more quickly.[4] Despite these realizations, a sort of inertia set in. Imprisonment numbers did not come down, but actually grew by about another 200,000 in the decade following 2001.[5] To be sure, this represented a marked deceleration from the prior rate of growth, but the failure of so many reform efforts to

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1. *Compare* PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUSTICE, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925–1986, NCJ 111098, 15 (1988) (1972 data), *with* E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011, NCJ 239808, 2 (2012).

2. Vincent Schiraldi & Judith Greene, *Reducing Correctional Costs in an Era of Tightening Budgets and Shifting Public Opinion*, 14 FED. SENT. REP. 332, 332 (2002).

3. *Id.*

4. *Id.* at 333–35; Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1248 (2011).

5. CARSON & SABOL, *supra* note 1, at 2.

accomplish real reductions in imprisonment has been both disappointing and puzzling—all the more so in light of a remarkably large and sustained drop in American crime rates that began in the early 1990s.[6]

In truth, despite budgetary pressures and relatively low crime rates, policymakers in many states have been quite cautious in the design and administration of new programs intended to move prisoners out of confinement more quickly.[7] In order to better understand the sources of this caution, as well as the potential for developing more robust early-release initiatives, we set out to study public opinion regarding sentencing and corrections in the state of Wisconsin, which had a prominent failed experiment with early-release reforms between 2009 and 2011.[8] Our research is based on public opinion surveys of hundreds of Wisconsin voters in 2012, 2013, and 2014. Their responses reflect the same conflicting beliefs about early release that are also revealed in the troubled history of the on-again off-again 2009 reforms.

More specifically, public opinion embraces two policy preferences that are in tension with one another. On the one hand, we find strong support for the ideal of "truth in sentencing," or TIS—that is, the ideal that an offender must serve the full term of imprisonment imposed at sentencing.[9] On the other hand, we also find strong support for moving prisoners into less costly forms of punishment when it is safe to do so.[10] Neither of these competing policy preferences can be fully implemented without detriment to the other.

Although our research identifies a dilemma for policymakers seeking to satisfy public opinion, it also suggests a path forward. First, our questions elicited not merely general attitudes, but also views about specific procedural and institutional aspects of early-release programs. The results allow us to make conclusions about what type of early-release programs would garner the greatest levels of public support. For instance, we find much greater support for an

6. FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE V (2007).

7. Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415, 416–17 (2012).

8. *See, e.g.*, *Id.*at 417, 435–39 (including Wisconsin as one of six profiles of state experiences with early-release reforms).

9. *Infra* Part III.

10. *Infra* Part IV.

early-release program administered by an expert commission than by trial court judges. Second, our results point to a distinctive population of swing voters who are drawn both to TIS and early release. A majority of our respondents did not display any ambivalence toward TIS and early release, but clearly favored one or the other. Approximately thirty percent of voters in the middle favored both positions, and thereby caused the overall poll results to appear inconsistent. A careful assessment of the survey responses provides insight into how reformers can most effectively appeal to this politically crucial group.

Our research offers a unique contribution to the scholarly literature in several respects. First, we provide the first systematic assessment of public attitudes toward TIS. Although TIS became a nationally important phenomenon in the 1990s, with forty-two states adopting TIS laws by the decade's end,[11] scholars have paid little attention to the extent and sources of public support for the laws, often assuming that they are simply an expression of general punitiveness[12]—an assumption that we show to be incorrect.[13] Second, we explore public attitudes toward several specific aspects of early-release reforms that have not previously been studied in any published research. Finally, we identify and describe, for the first time in the scholarly literature, the early-release swing voters, showing how they are differentiated from other components of the electorate.

Our analysis is based exclusively on the views of Wisconsin voters. Nonetheless, we believe that public opinion in the Badger State should be of much wider national interest. Indeed, there are reasons to think that these Wisconsin survey data might be reflective of broader national views toward crime and punishment. For instance, among the fifty states, Wisconsin's imprisonment rate stands not far from the nation's middle with its ranking as the thirty-third highest imprisonment rate.[14] Moreover, a recent series of

11. WILLIAM J. SABOL ET AL., URBAN INSTITUTE, THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS 7 (2002).

12. *See, e.g.*, DAVID GARLAND, THE CULTURE OF CONTROL 142 (2001) (discussing TIS laws as an indicator of popular punitiveness); Michael Tonry, *Sentencing in America, 1975–2025*, 42 CRIME & JUST. 141, 173 (2013) (grouping TIS laws together with mandatory minimum, three-strikes, and life without the possibility of parole laws as expressions of "tough on crime" values).

13. *Infra* Part III.

14. CARSON & SABOL, *supra* note 1, at 23.

closely fought, nationally prominent electoral campaigns underscores Wisconsin's position as a genuinely "purple" state that sits somewhere close to the nation's political center of gravity.[15] Thus, Wisconsin's divisions in the highly politicized field of criminal justice are not likely much different from what one might find in the nation as a whole.

The Article proceeds as follows. In Part I, we discuss Wisconsin's TIS law, including the short-lived reforms of 2009 through 2011, and highlight competing understandings of the reasons for the law. In Part II, we describe the survey methodology and our analytical strategy. In Part III, we delve into the sources that support TIS. In Part IV, we identify specific early-release reform ideas that have majority support and suggest what a credible reform proposal might include. In Part V, we describe swing-voter values and preferences and suggest how a reform proposal might be framed to better appeal to those voters. Finally, in Part VI we recapitulate our key findings and revisit the narrative of Part I in light of the survey results.

I. BACKGROUND: TRUTH IN SENTENCING IN WISCONSIN

Wisconsin adopted truth in sentencing in 1998 through a statute now often referred to as "TIS I." The state later modified its TIS regime in 2002 (TIS II), 2009 (TIS III), and 2011 (TIS IV). In this Part, we discuss each reform in turn. Through this discussion, we will highlight the values and policy considerations that have dominated the political rhetoric surrounding TIS and early release in

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

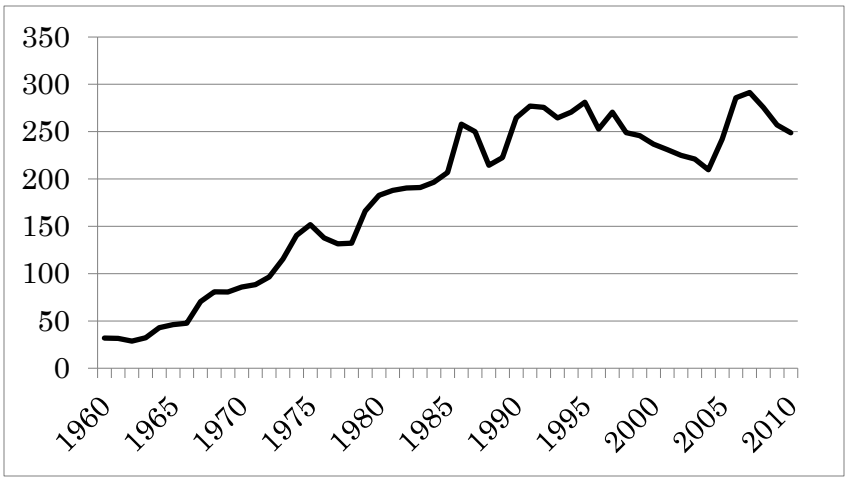
Wisconsin. This Part thus establishes a conceptual framework for assessing reforms in this area. This framework structures the polling research and analysis that are the subject of the rest of the Article.

A. Wisconsin's Path to Truth in Sentencing

1. Long-term crime and imprisonment trends

The adoption of TIS I and its subsequent modifications cannot be understood without reference to long-term crime and imprisonment trends. Although the focus is on Wisconsin, the state's trajectory generally mirrors that of the nation as a whole. Violent crime grew markedly from the early 1960s until the mid-1990s. As indicated in Figure 1, the 1995 peak was nearly ten times higher than the 1963 valley. Since 1995, violent crime has been up and down, but still remains far above the 1960s and 1970s levels.

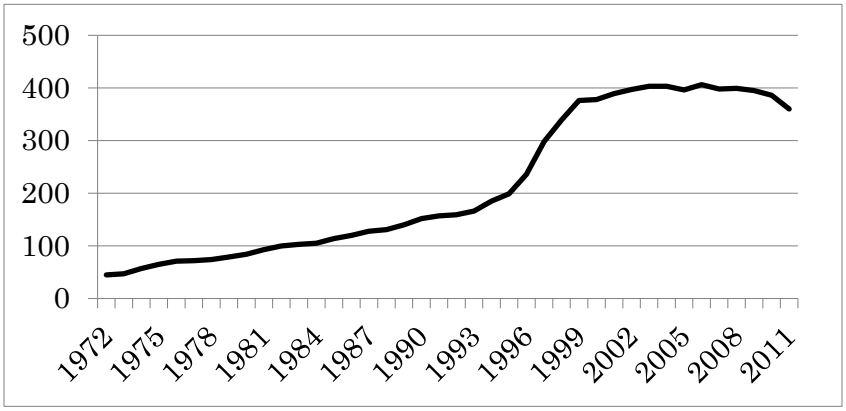
Figure 1. Wisconsin violent crime per 100,000 residents, 1960–2010[16]



16. "Violent crime" refers here to the four violent "index" crimes tracked by the Federal Bureau of Investigation: homicide, rape, robbery, and aggravated assault. The data come from the FBI's annual reports *Crime in the United States*, which are available back to 1995 at http://www.fbi.gov/about-us/cjis/ucr/ucr. Older reports are available online from LLMC Digital at http://www.llmcdigital.org/titleresults.aspx?searchtype=0&set=80524&volume=&part=&page.

Imprisonment went through its own, equally sustained surge. As indicated in Figure 2, Wisconsin's imprisonment rate grew every single year from 1972 through 2003, and then hit an all-time high in 2006, reaching a level more than nine times that of the early 1970s. Such explosive growth pushed Wisconsin's prison system into a position of chronic overcrowding, even notwithstanding an extraordinary prison-building boom.[17] Meanwhile, the state corrections budget more than quintupled between 1984 and 2000.[18]

Figure 2. Wisconsin imprisonment per 100,000, 1972–2011[19]



Fortunately for the Department of Corrections ("DOC"), a variety of safety valves were available to prevent a complete system meltdown. In the 1990s, the most important safeguard was

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

18. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2003 13 (2003).

19. "Imprisonment" here refers only to those incarcerated persons sentenced to prison, and does not include those incarcerated in local jails. Older data come from PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUSTICE, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925–1986 (1988). More recent data come from the Bureau of Justice Statistics' annual *Prisoners* reports, which are available at http://www.bjs.gov/index.cfm?ty=pbse&sid=40.

discretionary parole. Under Wisconsin's pre-TIS system, the term of imprisonment imposed on an offender at sentencing merely established parameters within which the Parole Commission would work to determine the actual release date. In general, the Commission had discretion to permit release after only twenty-five percent of the sentence had been served, and release was required by the time two-thirds of the sentence was complete.[20] The absence of objective criteria meant that the Commission, which was located organizationally within the DOC,[21] had considerable freedom to liberalize release in times of prison overcrowding.[22] And, sure enough, as prison admissions exploded in the 1990s, the parole safety valve was soon opened wide.[23] As a result of this liberalization, the average prison time served before release dropped by seven percent between 1990 and 1998, even though the average prison sentence increased by eight percent in the same time period.[24] This widening gap between nominal and actual sentence lengths served as an impetus for the adoption of TIS in 1998.

2. The politics of TIS I

Abolishing parole was not a new idea in Wisconsin in 1998. "Determinate sentencing," an earlier term for TIS, had been adopted by several states in the 1970s and debated extensively in Wisconsin during that time period.[25] However, legislative reform

20. JOE FONTAINE, WIS. SENT'ING COMM'N, SENTENCING POLICY IN WISCONSIN: 1975–2005 (2005).

21. WISCONSIN LEGISLATIVE FISCAL BUREAU, ADULT CORRECTIONS PROGRAM 24 (1995).

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

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

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

25. FONTAINE, *supra* note 20, at 6–9.

proposals proved unsuccessful,[26] and interest in determinate sentencing waned in the 1980s and early 1990s.

Republican Governor Tommy Thompson revived the attack on parole in his 1994 reelection campaign.[27] However, Thompson also understood the prison population pressures facing the state and the importance of parole's safety valve function, which may explain why he did not move swiftly to deliver on his TIS campaign promise. Perhaps sensing the difficulty of Thompson's position, Democrat Attorney General Jim Doyle decided to press the attack on parole, releasing a specific reform proposal in October 1996.[28] Doyle's proposal followed the lead of most TIS jurisdictions in retaining an opportunity for inmates to earn an earlier release date through good behavior in prison; as in the federal system, the good-behavior credits could amount to at most fifteen percent of the sentence.[29] The proposal also called for the creation of a commission to develop plans for implementing TIS.[30]

What followed was a classic bit of tough-on-crime one-upmanship. Letting prisoners out after serving just eighty-five percent of their sentences, sniffed Thompson's spokesman, is not truth in sentencing.[31] Consistent with this rebuff, Thompson proposed his own version of TIS in January 1997.[32] The governor's bill served notice that he would not permit Democrats to out-tough him on crime issues. Not only did the bill eliminate good-time credit, thereby requiring inmates to serve one hundred percent of their sentences, but it also increased maximum sentences for nearly all felonies by fifty percent or more in order to provide more time for a period of community supervision at the end of the prison term.[33]

26. *See* WIS. LEG. COUNCIL STAFF, INFORMATION MEMORANDUM 84-4: THE FELONY SENTENCING GUIDELINES LAW 5–6 (1984) (discussing 1979 Assembly Bill 1190).

27. FONTAINE, *supra* note 20, at 24.

28. *Id*. at 25.

29. *Id*.

30. *Id*.

31. *Doyle Urges Halt to Earlier Releases; Report Shows Felons Are Serving Shorter Sentences Than Six Years Ago*, WIS. ST. J., Oct. 15, 1996.

32. David Callender, *Trial Judges Endorse "Truth in Sentencing,"* CAPITAL TIMES, May 9, 1997, at 1A.

33. FONTAINE, *supra* note 20, at 25; Matt Pommer, *Gov Signs Truth in Sentencing Bill*, CAPITAL TIMES, June 15, 1998, at 1A.

Doyle and Thompson eventually negotiated a compromise bill in June 1997,[34] which the legislature enacted by large majorities a year later.[35] Key provisions included Thompson's "100 percent truth" (i.e., no good-time credits), across-the-board increase in maximum sentences, and an implementation committee to figure out how to make the system work. The new regime would govern all felonies committed on or after December 31, 1999.[36]

3. Making sense of TIS I

A review of the history leading to TIS I's adoption suggests at least three different interpretations of the law's overarching purpose: instrumental, legitimacy-enhancing, or symbolic. First, TIS I may be understood in *instrumental* terms as a measure intended to reduce crime by increasing the severity of actual prison terms in Wisconsin. As indicated in Figure 1, violent crime hit a peak in 1995, the year before Doyle advanced his TIS proposal, and remained very high relative to historical norms throughout the entire time period that TIS was debated. As crime rates headed toward their 1995 peak, parole simultaneously grew more generous.[37] It is understandable that observers might have associated these two trends causally and viewed the elimination of parole as a public-safety measure.

However, it is important to realize that TIS I did not *necessarily* increase penal severity. In theory, sentencing judges might have taken into account the elimination of parole and handed out more lenient sentences. For instance, if burglars were generally expected to be paroled halfway through their prison terms, a pre-TIS judge might have given ten years to burglars in the belief that five years in prison was the right punishment for the crime. After TIS I took effect, the same judge could achieve the same "right punishment" by imposing five-year terms on burglars. If all judges took this approach with all crimes, then TIS I would have no effect on severity. Strictly speaking, nothing in TIS I precluded this possibility—the law imposed no mandatory minimum sentences.

If TIS I were not intended to protect public safety by increasing real sentence lengths, then what else might be the law's purpose? In

34. FONTAINE, *supra*, note 20, at 26.
35. *Id.*
36. WIS. STAT. § 973.01(1) (2011–12).
37. *Supra* Part I.A.1.

lieu of the instrumental rationale, many TIS supporters actually tended to emphasize more prominently what we would call a *legitimacy* rationale, which was captured in the oft-repeated claim that TIS would "restor[e] faith in Wisconsin's criminal justice system."[38]

On the legitimacy rationale, the problem was not that prison stays were too short per se, but that the wrong people were making the decisions in a procedurally unacceptable manner. For instance, Doyle made the point this way:

> The current system has removed power [from the] elected judges of our state and placed it in the hands of the corrections bureaucracy. After all the facts in a case, we expect judges to issue fair sentences. Those sentences should not be overturned by corrections department employees who are looking for a few more beds.
>
> We elect judges to make sentencing decisions. They should be held accountable for their actions. If the public doesn't like the job they do, new judges should be elected. It is difficult to make mid-level corrections officials accountable in the same way.[39]

Similarly, Thompson declared, "elected judges, not unelected parole boards" should decide how much time criminals will serve behind bars.[40]

Along with democratic accountability, transparency also figured into the legitimacy critique. Doyle charged that, with parole lurking in the background, sentencing hearings had become "largely charades."[41] Likewise, a leading supporter in the senate argued, "[o]ur current system of penalizing and imprisoning people is a fraud perpetrated on the victims. . . . We've probably all heard . . . the stories from district attorneys that tell us that there's no way they can tell a victim how long somebody will be behind bars."[42]

Such legitimacy arguments were important, in part, because of the great uncertainty over what sentencing judges would do in the

38. *"Truth" . . . Or Consequences*, WIS. ST. J., June 12, 1997, at 11A (editorial endorsing TIS).

39. James E. Doyle, *Wisconsin Needs "Truth in Sentencing,"* 20 WIS. BAR CRIM. L. NEWS, Jan. 1997, at 17, 18.

40. Mike Flaherty, *One of State's Costliest Programs? Warning Issued as Senate OKs Sentencing Bill*, WIS. ST. J., May 2, 1998, at 1A.

41. Matt Pommer, *Doyle Pushes Sentencing Bill, Says Hearings Now "Charades,"* CAPITAL TIMES, Feb. 9, 1998, at 4A.

42. Richard P. Jones, *Senate Easily Passes Bill to End Parole; It Would Take Effect in '99*, MILWAUKEE. J. SENTINEL, May 2, 1998, at 1 (quoting Senator Joanne Huelsman).

new TIS regime, which rendered quite speculative any claims, pro or con, about the more tangible effects of the reform proposal. For instance, in response to arguments that TIS would cause a fiscally catastrophic increase in the prison population, Representative Scott Walker, the Assembly's leading TIS proponent, emphasized the transparency benefits and instrumental uncertainties: "While it's still very debatable whether truth in sentencing will require any additional money, how can you put a price tag on peace of mind for victims and their families? It's invaluable."[43]

Yet, while sometimes suggesting that overall severity (and hence cost) might not increase much under TIS, proponents argued at other times that eliminating parole would bring instrumental crime-reducing benefits. Doyle, for instance, asserted, "[t]oo many people, who are released from prison, commit new violent crimes while on parole," and claimed that "[t]ruth in sentencing also creates deterrence."[44] Thompson also invoked incapacitation and deterrence themes, even going so far at one point as to quantify the crime-reduction benefits of TIS as being worth nearly $400 million annually.[45] Moreover, any claimed expectation that TIS I would be severity-neutral seemed belied by the law's across-the-board fifty-percent increase in maximum sentence lengths.[46]

In short, the record provides substantial support for the importance of both the instrumental and the legitimacy rationales of TIS I. Of course, these different types of justification for the law are not mutually exclusive, and both likely played a role in building public and political support for the reform. Still, while the instrumental and legitimacy arguments dominated the public debate over TIS I, there is at least one additional way of understanding the law's adoption that merits consideration.

43. Matt Pommer, *Huge Savings Claimed for "Truth in Sentencing," but Prison Expert Dickey Calls Numbers "Fiction,"* CAPITAL TIMES, June 4, 1997, at 4A.

44. Doyle, *supra* note 39, at 18.

45. Mike Flaherty, *"Truth in Sentencing" Measure Gets Cost-Effective Designation; A Study From the Governor Says Money Would Be Saved Over Time in Crime Prevention*, WIS. ST. J., June 4, 1997, at 5C; *see also* Flaherty, *supra* note 40 ("When Gov. Tommy Thompson proposed [TIS] last year, he also said criminals 'no longer fear Wisconsin's prison system' because they know they won't serve their full sentence in prison.'").

46. Richard P. Jones, *Senate Panel Urges Truth-in-Sentencing Approval; Party-Line Vote Also Recommends Passage of "Cocaine-Mom" Legislation*, MILWAUKEE J. SENTINEL, April 30, 1998, at 3B.

Research suggests that public support for punitive laws may rest primarily on *symbolic* considerations. Tom Tyler and Robert Boeckmann describe the dynamics this way:

> [This] model is concerned with the moral meaning of rule-breaking behavior. This model suggests that rule breaking is an affront to social and moral values and norms, while punishment reasserts community commitment to those values. This approach focuses on the "symbolic" meaning of rule breaking. It links reactions to rule breaking to concerns about social conditions and to judgments about cohesiveness, that is, to public concerns about the nature and strength of social bonds within the family, the community, and society. In other words, it suggests that people want to punish rule breakers because rule-breaking behavior poses a threat to the moral cohesion of society and because punishment reasserts social values and the obligation to obey social rules.[47]

The symbolic understanding of TIS I seems implicit in Governor Thompson's statement on signing the law that it was "not a good day for the bad guys in Wisconsin."[48] Symbolic considerations may also help to explain why a "truth in sentencing" law was adopted in 1998 when a "determinate sentencing" law was rejected in 1980: a law bearing the "truth" label more readily tapped into public anxieties about trust and the need to reassert traditional moral values.

Again, symbolic interpretations of TIS I do not exclude the instrumental and legitimacy interpretations; the abolition of parole in Wisconsin likely resulted from a diverse set of considerations. However, developing a clearer sense of which considerations are most important in maintaining support for TIS may provide insight into how future reform proposals might be most effectively designed and framed. For instance, if instrumental considerations play a

47. Tom R. Tyler & Robert J. Boeckmann, *Three Strikes and You Are Out, but Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 LAW & SOC'Y REV. 237, 240 (1997). This symbolic view of punishment resonates with modern "communicative" theories of retribution. Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1254 (2011). In this context, however, we prefer the term "symbolic" over "retributive" both to relate our research to Tyler and Boeckmann's important work and because retributivism sometimes has quite different connotations, such as simple vengeance or "an eye for an eye." *Id.* We also think the term "symbolic" more clearly indicates the basic contrast we wish to draw with "instrumental" approaches to punishment. Whereas instrumentally motivated policies seek to achieve some concrete change in the world, symbolically motivated policies are adopted because the adoption in and of itself communicates approval of certain appealing social values.

48. FONTAINE, *supra* note 20, at 34.

relatively minor role, then reformers may make little headway with voters by arguing solely that TIS could be relaxed in one way or another without compromising public safety; reformers would also have to speak convincingly to legitimacy and/or symbolic concerns. We try to untangle the relative importance of these various considerations in Part III below.

B. TIS II: Reintroducing Early Release

If, based on the political rhetoric, there was some doubt about the primary purpose of TIS I, no such doubt exists as to TIS II. Adopted in 2002, TIS II was clearly framed in the media and in the legislative process as an effort to blunt the adverse budgetary consequences of TIS I. In this sense, TIS II was instrumental in its orientation, albeit not with the same crime-reduction ends in view as TIS I; the later statute aimed instead at achieving reductions in the rate of growth of Wisconsin's prison population.

TIS II grew out of the work of the implementation committee authorized by TIS I, which was supposed to make recommendations for statutory reforms to the legislature. Although TIS I did not specifically instruct the Criminal Penalties Study Committee to focus on cost concerns, Governor Thompson urged the committee to try to do something about the rising corrections budget when he appointed the committee's chair, Judge Thomas Barland.[49] Indeed, Barland later recalled that this objective "dominated our thoughts and discussion" in the committee.[50] The committee's proposal thus had the effect of reducing severity (and hence corrections costs) in several respects, including new limits on the period of initial confinement to prison.[51]

To this package, the Democrat-controlled senate added another severity-reducing measure: a sentence-modification provision that would permit judges to revisit, and potentially reduce, sentences after just twenty-five percent of the prison term had been served.[52] Although the Republican-controlled assembly had quickly passed the committee recommendations,[53] Representative Walker and his

49. *Id.* at 35.
50. *Id.* at 49.
51. CRIMINAL PENALTIES STUDY COMM., FINAL REPORT 22 (1999).
52. FONTAINE, *supra* note 20, at 55.
53. *Id.* at 50.

colleagues objected vociferously to the sentence-modification provision, characterizing it as contrary to the transparency goals of TIS I. "Truth-in-sentencing wasn't necessarily to make sentences longer," Walker declared, "it was to make them certain."[54]

Mounting cost concerns, however, pressured legislators to try to reach a compromise.[55] Governor Scott McCallum, Thomson's successor, made TIS II a priority, including it in a special budget bill.[56] Ultimately, legislators on both sides agreed to a middle-ground resolution, permitting early-release petitions for less serious felonies after either seventy-five or eighty-five percent of the prison term had been served, depending on the seriousness of the felony.[57] With that compromise achieved, TIS II—incorporating most of the proposals of the Criminal Penalties Study Committee and the new sentence-modification provision—quickly became law.[58]

TIS II thus reintroduced early release into Wisconsin law, and did so over legitimacy-oriented objections. However, movement away from the TIS ideal was modest. Moreover, by giving early-release authority to judges, TIS II remained fully consistent with at least one of the legitimacy-based critiques of parole: that elected judges, and not appointed bureaucrats, should have the final say on punishment.

C. TIS III: Expanding Early Release

Once again, instrumental, cost-saving concerns carried the day in 2009, when the legislature adopted several potentially important expansions to early release. TIS III differed from TIS II, though, in presenting a more direct challenge to the legitimacy rationales offered for truth in sentencing in Wisconsin.

The modest 2002 reforms hardly brought about an immediate end to growth in Wisconsin's prison population, which did not peak for another four years.[59] Even after that peak, projections pointed to

54. Sarah Wyatt, *Lawmakers at Odds Over Prison Time; Budget Bills Differ on Truth in Sentencing*, MILWAUKEE J. SENTINEL, April 7, 2002, at 2.

55. Sarah Wyatt, *Costs Push Sentencing Law Toward a Moment of Truth; Long Terms Mean Huge Price Tag*, CAPITAL TIMES, March 11, 2002, at 2A.

56. Scott Milfred, *"Truth-in-Sentencing" on Agenda; McCallum Wants Action on the Revisions*, WIS. STATE J., Jan. 13, 2002, at C1.

57. FONTAINE, *supra* note 20, at 55.

58. *Id.*

59. *Supra* Part I.A.1.

another twenty-five percent increase in the prison population by 2019.[60] In light of such projections, and facing a multibillion-dollar budgetary shortfall,[61] Jim Doyle, now serving as governor, included in his 2009 state budget proposal an ambitious, though confusing, array of new early-release initiatives. Some of the important features included (1) creation of new opportunities for early release based on good behavior in prison, amounting to as much as one-third reduction of the prison term;[62] (2) transfer of authority over the TIS II sentence-adjustment option from the judiciary to a new Earned Release Review Commission ("ERRC");[63] and (3) expansion of "compassionate release," which permitted release by the ERRC for inmates based on terminal illness or other qualifying medical conditions.[64] Public defenses of these reforms focused on their capacity to reduce the prison population and, consequently, corrections costs. To a lesser extent, proponents also argued that such programs would be instrumental in the rehabilitation of inmates.[65]

Republicans wasted no time in castigating Doyle's proposal as a "complete gutting of truth in sentencing."[66] Echoing the arguments originally made for TIS I, opponents of TIS III both invoked instrumental public-safety considerations and sounded legitimacy themes. "We're not talking about Boy Scouts here," said one Republican leader. "We're talking about some dangerous people that are going to be released."[67] Another observed, "[w]ith judges you

60. THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, JUSTICE REINVESTMENT IN WISCONSIN: ANALYSES & POLICY OPTIONS TO REDUCE SPENDING ON CORRECTIONS AND INCREASE PUBLIC SAFETY 3 (2009).

61. *See* Mark Pitsch, *Prisoner Proposal Defended; Critics Say Plan Guts Sentence Law*, WIS. ST. J., Feb. 19, 2009, at A1 (noting $5.9 billion budgetary shortfall).

62. *Id. See also* Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies,* 95 MARQ. L. REV. 1551, 1574–75 (2012) (describing new "positive adjustment time" program in more detail).

63. Pitsch, *supra* note 61. *See also* Norris, *supra* note 62, at 1573–74 (describing changes in more detail).

64. Pitsch, *supra* note 61. *See also* Norris, *supra* note 62, at 1568–70 (describing changes in more detail).

65. *See, e.g.,* Pitsch, *supra* note 61 ("The proposal, unveiled Tuesday as part of the state's 2009–11 budget, could save millions of dollars while also providing rehabilitation incentives to prisoners, Corrections Secretary Rick Raemisch said."); Steven Elbow, *Doyle's Vetoes Rankle Friends and Foes; Both Sides of the Aisle Irked as Governor Strips Budget of Key Prison Release Terms*, CAPITAL TIMES, July 8, 2009, at 17 ("Doyle's earned release plan was presented last spring as a way to chip away at a burgeoning prison population.").

66. Pitsch, *supra* note 61.

67. *Id.*

have accountability. . . . Judges are elected and they're re-elected by the people. The nameless faceless bureaucrats on this [ERRC] will be able to release whoever they want with no accountability."[68]

Despite such concerns, the Democrat-controlled legislature passed TIS III, and Governor Doyle signed it into law in July 2009.[69] These reforms, however, proved remarkably short-lived.

D. TIS IV: Contracting Early Release

Republicans swept to power after the 2010 elections, led by newly elected Governor Scott Walker.[70] Walker had been the chief legislative proponent of truth in sentencing in 1998. Not surprisingly, he campaigned against TIS III in his run for the governorship and repealed it when he was elected.[71]

Supporters of the repeal bill (TIS IV) reiterated the same sorts of criticisms of early release that they had articulated when opposing TIS III. Republican Representative Scott Suder, who was perhaps the most outspoken critic of TIS III, charged, "[e]arly release has allowed hundreds of high-risk inmates to get out of jail before serving their time . . . and Wisconsin will undoubtedly be a safer place to live, work and raise a family now that dangerous criminals will be kept behind bars where they belong."[72] To these criticisms, though, was added the charge that TIS III had not even proven much of a money saver.[73] In its first year, for instance, only 158 inmates were released early, which fell far short of the 500 to 1,000 projected by Doyle.[74] In light of persistently repeated charges that TIS III was a threat to public safety, it appears that the officials administering the highly discretionary early release programs grew increasingly restrictive.[75] This restrictiveness, however, did not seem to lessen the public-safety criticisms, but merely served to undermine the cost-saving rationale for TIS III.

68. *Id.*

69. Elbow, *supra* note 65.

70. Norris, *supra* note 62, at 1567.

71. *Id.*

72. Liam Marlaire, *Walker Signs Bill Ending Early Release Program*, LEADER-TELEGRAM, July 20, 2011.

73. *Id.*

74. Ben Poston, *Sentencing Reform Results Fall Short; Early Prison Releases, Cost Savings Are a Fraction of Year-Ago Estimate*, MILWAUKEE J. SENTINEL, July 11, 2010, at 1.

75. *Id.*

E. Lessons: A Preliminary Consideration

The adoption and survival of the TIS II sentence-adjustment reform suggests that Wisconsin's political system can accept modest reductions in penal severity in the name of cost savings, at least so long as the ultimate control over release is held by the judiciary. Support for the truth in sentencing ideal is not so unyielding as to preclude any flexibility at all on the back end of a prison term. However, the failure of TIS III—repeatedly attacked for "gutting" truth in sentencing—suggests there may be limits to how far the state can move from the original vision of TIS I without provoking a powerful political backlash.

It is unclear whether TIS III might have fared better if it had been designed or presented somewhat differently. What if, for instance, severity had been relaxed a little less? If elected judges had retained their decision-making role in lieu of the ERRC's "nameless faceless bureaucrats"? If certain components of TIS III had been omitted, such as the revival of good time or the expansion of compassionate release?

In her assessment of the disappointing experience with early release reforms in Wisconsin and a handful of other states, Professor Cecelia Klingele of Wisconsin Law School ultimately focuses less on such design considerations than on the way that reforms are publicly justified. She argues,

> [M]ost importantly, lawmakers who want to reduce prison populations must frame early release efforts as one small part of a larger and more important effort to combat the injustices that flow from mass imprisonment. . . . If policymakers want to promote lasting change, they must be willing to meet moral criticisms of early release with normative responses of their own.
>
> Politicians and policymakers have asserted that decreasing the prison population is a way to be "smart on crime" and to demonstrate fiscal stewardship over dwindling state resources. While these statements technically may be true, and while they may persuade the public to support such measures in the short term, they are unlikely to be satisfactory justifications for practices that are not also seen as fundamentally fair.[76]

76. Klingele, *supra* note 7, at 456–57.

Our polling research might be thought of as an effort to test Klingele's claim and to unpack what might make an early release program "fundamentally fair" in the eyes of the public. In light of the conceptual framework developed earlier in this Part, we might recast this project as an inquiry into the role of noninstrumental thinking (that is, of legitimacy and symbolic considerations) in shaping public attitudes toward TIS and early release.

More specifically, we focus on the importance of fear of crime (an instrumental consideration) and preference for elected judges over an unelected expert commission (a legitimacy consideration) as predictors for support of TIS. We also focus on the importance of community cohesion, which relates to symbolic theories of punishment. We hypothesize that individuals lacking confidence in the moral cohesion of their communities would be more likely to support TIS because of its symbolic value as a reassertion of moral order and accountability.

II. DATA AND ANALYTIC STRATEGY

To test the three possible explanations (instrumental, legitimacy-directed, symbolic) concerning public support for TIS in Wisconsin, we analyzed survey data collected from the Marquette University Law School Poll in July 2012, July 2013, and July 2014.[77] The findings we report here are based chiefly on the 2013 poll, which included the most extensive survey items regarding sentencing policy and concerns about crime more generally. However, there are select survey items unique to the 2012 and 2014 waves of data collection, so we will present some analysis of those data as well. To the extent that questions were repeated, similar questions elicited similar responses, which points to stability in the underlying public attitudes.

The 2013 poll was comprised of 713 Wisconsin registered voters.[78] Both landline (seventy-eight percent of the sample) and cell phone (twenty percent of the sample) numbers were included in the

77. Founded in 2012, the Marquette University Law School Poll conducts regular surveys of Wisconsin voters on state and national politics and public policy. More information about the poll is available through its website (https://law.marquette.edu/poll/). We are very grateful to our colleague Charles Franklin, the poll's director, for collaborating with us in the sentencing-focused surveys of 2012–2014.

78. Complete results and data from July 2013 and all of the Marquette University Law School Poll surveys can be found at https://law.marquette.edu/poll/results-data/.

random digit dialing (RDD) technique.[79] Recent survey data research suggests that including cell phone numbers is important for generalizability as more United States residents, especially individuals under thirty years old, rely on cell phones as their primary or only telephone number.[80] The margin of error for a single percentage in a sample of 713 respondents is +/- 3.7 percentage points.[81] Additional technical details are set forth in the footnotes.[82]

Administered in a similar manner, the 2012 poll was comprised of 697 registered voters and had a margin of error of +/- 3.8 percentage points.[83] Likewise, the 2014 poll was comprised of 804 registered voters and had a margin of error of +/- 3.5 percentage points.[84] Unless otherwise indicated in the text, readers should assume that all findings reported here are based on the 2013 poll.

We focus our analysis on a number of variables. The first are three measures of support for TIS. These questions ask respondents to agree or disagree with following statements: "Truth in sentencing sends a message that society will not tolerate crime"; "Truth in sentencing helps to reduce crime and make Wisconsin safer"; and "Truth in

79. LHK Partners Inc. managed all the actual data collection.

80. Carl Bialik, *Pollsters Go Mobile*, WALL ST. J. (Dec. 2, 2011), http://blogs.wsj.com/numbersguy/pollsters-go-mobile-1103/.

81. Marquette University Law School Poll, *Methodology*, Marquette Law School Poll (July 2013), https://law.marquette.edu/poll/wp-content/uploads/2013/07/MLSP17Methodology.pdf.

82. The survey itself utilizes a post-stratification approach: a weighting procedure that compensates for patterns of non-response that shift sample characteristics from known population values. In telephone survey research, it is common for certain groups to be over-represented in populations of individuals that do not participate and are consequently under-represented in survey samples. For example, individuals with fewer years of formal schooling than the general population and younger individuals are among the population of potential respondents that are less likely to participate in surveys. To adjust for this potential source of bias, responses from these respondents are weighted to align with general U.S. population values. (In this sample the population values of age groups, education levels, and sex were determined by combining the 2008 and 2012 Current Population Surveys conducted by the U.S. Census in Wisconsin to estimate the distribution of age, education and sex for registered voters in the state.) Finally, a "raking" procedure was used to simultaneously balance the weights so that the sample distribution closely approximates the known population distributions for age, education and sex.

83. Marquette University Law School Poll, *Methodology*, Marquette Law School Poll (July 5–8, 2012), https://law.marquette.edu/poll/wp-content/uploads/2012/09/MLSP8_Methdology.pdf.

84. Marquette University Law School Poll, *Methodology*, Marquette Law School Poll (July 2014), http://law.marquette.edu/poll/wp-content/uploads/2014/07/MLSP22Methodology.pdf.

sentencing should continue to be the law in Wisconsin."[85] In order to account for the possibility that survey respondents were not familiar with TIS laws in Wisconsin, we also provided a prompt explaining TIS laws, which read, "Laws that ban parole and require prisoners to serve the full term of their sentences, regardless of what they do in prison, are often called 'truth in sentencing' laws. Wisconsin adopted a truth in sentencing law in 1998."[86] This step in data collection addresses the potential critique that our results stem from public ignorance of TIS laws, instead of genuine views towards this policy. Responses were recoded so that higher values represent greater support for TIS laws. Unless otherwise indicated, our findings concerning TIS refer to an index created by combining all three TIS items into a single variable. Reliability analysis indicates that these three items measure a similar underlying concept (alpha = .833).

Another important variable in analysis of the data is a question about early release: "Once a prisoner has served at least half of his term, he should be released from prison and given a less costly form of punishment if he can demonstrate that he is no longer a threat to society."[87] Respondents were this time asked to strongly agree, agree, disagree, or strongly disagree with that statement. Again, responses were recoded so that higher values indicate greater support for this item. We also examined the impact of numerous demographic characteristics on both TIS and early release including gender (coded as Male = 1, Female = 0), political orientation,[88] race (white = 1, all other races = 0), education (college educated or higher = 1, all other = 0), age (measured in years), religiosity (more frequent church attendance = higher values), religious denomination (Catholic = 1, all else = 0), and resident of Milwaukee County (resident = 1, non-resident = 0). There are a number of additional measures we examine in this study that will be discussed in greater depth in the analyses sections below. Table 1 contains a full list of descriptive statistics of the demographic variables included in the analyses.

85. Marquette University Law School Poll, MARQUETTE LAW SCHOOL POLL, July 15-18, 2013, Q21-23 (2013) [hereinafter 2013 Toplines].

86. Marquette University Law School Poll, Instrument, Marquette Law School Poll July 15–18, 2013, at 8 (2013), https://law.marquette.edu/poll/wp-content/uploads/2013/07/MLSP17Instrument.pdf.

87. 2013 Toplines, *supra* note 85, Q19.

88. This variable asks respondents to describe their own political views as "very conservative"(5), "conservative"(4), "moderate"(3), "liberal"(2), or "very liberal"(1).

Table 1. Summary of Demographic Variables for Total Sample

Variable	N	%
Sex		
Male	340	47.7
Female	373	52.3
Age		
Mean years	695	49.9
Education		
Less than college	380	53.3
College or greater	327	46.3
Race		
White	632	88.7
Other	60	8.6
Ethnicity		
Hispanic	17	2.4
Non-Hispanic	689	97.6
Marital Status		
Married	417	58.4
Other	292	41.2
Political Orientation		
Very conservative	67	9.9
Conservative	204	30
Moderate	235	34.4
Liberal	124	18.2
Very liberal	51	7.6
Religion		
Catholic	214	30.1
Other	485	69.3
Church Attendance		
More than once a week	54	7.8
Once a week	206	29.4

A few times a month	130	18.6
A few times a year	102	14.6
Seldom	119	17
Never	89	12.7
Milwaukee County		
Live in Milwaukee County	116	16.4
Does not live in Milwaukee County	593	83.6

We used the following analytic strategy: First, we examined the level of support for TIS laws. Then we examined bivariate relationships between support for TIS and factors that would seem to explain its support. We used the conceptual framing set forth in Part I above to identify variables that might share a bivariate relationship with the TIS composite index. To examine the viability of the instrumental explanation, we examined the link between fear of crime and support for TIS.[89] To measure concerns about the legitimacy of the release decisions, we detected for a relationship between support for TIS and views toward which body should make release decisions, the original (elected) sentencing judges or a statewide commission of experts. Responses that replied "original sentencing judge" were coded as "1." To supplement these analyses, we also examined the link between TIS and an item in the 2012 data set that asked respondents to report whether they agreed or disagreed with the statement, "It would be better to have an expert commission set state sentencing policies, rather than elected politicians."[90] To account for the role of *symbolic* justifications for TIS support, we investigated potential links between support for TIS and three indicators of community cohesion.

89. We did not attempt to measure another instrumental consideration, cost sensitivity, because this consideration does not seem likely to explain support for TIS. However, cost sensitivity might explain support for early release. Exploring this relationship further would be a helpful focus for future research.

90. 2013 Toplines, *supra* note 85, at Q36. Our legitimacy measures focus on democratic accountability, which has been a particular issue in the recent political debates regarding TIS III and TIS IV. *Supra* Parts I.C. and I.D. In the original debate over TIS I, another legitimacy consideration, transparency, also figured prominently in the discussion. *Supra* Part I.A.3. Since transparency seems to have played a lesser role in more recent debates, we have not included it in our analysis.

Following the bivariate analysis, we then estimated a series of multivariate OLS regression models[91] where the TIS index was specified as the dependent variable. We then repeated these steps of analysis for the early release variable except the multivariate regression models. We recoded early release into a dummy variable (1 = strongly agree or agree, 0 = strongly disagree or disagree) and then estimated the coefficients for binary logistics regression models. Lastly, we conducted a series of bivariate analyses for different subsamples of the data paying specific attention to the group of respondents that both supports TIS laws and supports early release—two seemingly disparate and conflicting views toward sentencing policy.

III. SUPPORT FOR TRUTH IN SENTENCING

We found that most respondents support TIS. Specifically, 76.1% of respondents agreed that "truth in sentencing sends a message that society will not tolerate crime"; 62.5% agreed that "TIS helps reduce crime"; and 71.3% indicated that they felt TIS should continue to be the law in Wisconsin. Otherwise stated, there is strong and consistent support for TIS among sample respondents. The mean for the TIS index is 2.09 on a variable that ranges from zero to three, supporting the notion that those surveyed demonstrate strong support for these laws.[92]

In the bivariate analysis, we found little evidence that instrumental explanations fuel TIS support. The TIS index does not share a statistically significant relationship with the fear-of-crime measure.[93] Moreover, consistent with this conclusion, we found in

91. OLS regression, or Ordinary Least Squares, is a regression estimator well suited for normally distributed continuous data. Under these data conditions, OLS is an efficient and unbiased estimator. In a multivariate context, we can statistically isolate the effect of a given variable in the model.

92. Additional support for the strength of this conclusion comes from an ordering experiment we conducted in the 2012 poll. In that survey, we randomly varied whether respondents were asked first about TIS or about corrections costs and prisoner rehabilitation. We hypothesized that respondents would be less likely to support TIS if they were first prompted to think about its potential negative effects. However, we found no significant difference in support of TIS based on the order of the questions; TIS supporters apparently stuck to their position even with the costs in mind.

93. In general, statistical significance refers to the probability that the results are not due to random chance alone. There are varying null hypotheses for each test of significance (for example in this paper, we employ chi-square and t-tests) so the specific inferences also vary. P values represent the level of statistical certainty that the results are not due to random chance;

the 2012 poll that about seventy-eight percent of the respondents who favored TIS also agreed that "even if truth in sentencing does not reduce crime, it would still be the right thing to do."[94] Indeed, in 2013, fifteen percent of the TIS supporters expressly disclaimed any belief in instrumental public-safety benefits.[95]

By contrast, we did find evidence in the bivariate analysis that notions of legitimacy may explain some of the variation in support for TIS. Support for TIS shares a modest, yet positive and statistically significant bivariate relationship with respondents preferring sentencing judges to make release decisions ($r = .179$).[96] This finding also replicates for the 2012 data set. In these data, respondents who supported elected politicians setting state sentencing policies over a commission of experts were also significantly more likely to support TIS, although this relationship is fairly weak (.097). These results suggest that public support for TIS does, in part, result from a preference for democratically accountable decision makers over unaccountable experts or bureaucrats—a finding that is consistent with much of the rhetoric from the politicians who originally supported the adoption of TIS in Wisconsin.[97]

The bivariate analysis produced ambiguous results with respect to symbolic support for TIS. Again, we utilized three different questions relating to community cohesion. The first ("The people in my community really care about their neighbors") was not significantly correlated with TIS support. The third ("It would not bother me too much to move from here into some other community") was significantly correlated in the expected direction: individuals who felt no special attachment to their communities of residence were more likely to support TIS. The second ("Most people in my community share the same basic values that I do") was also significantly correlated, but in an unexpected direction:

$p < .1$ signifies less than a ten percent chance that the results are due to random chance; $p < .05$, less than a five percent chance; and $p < .01$, less than a one percent chance.

94. Marquette University Law School Poll, Marquette Law School Poll Toplines (July 5–8, 2012), https://law.marquette.edu/poll/results-data/ [hereinafter 2012 Toplines].

95. This number was calculated by comparing responses to questions 22 and 23.

96. Correlation coefficients of association, or R statistics, indicate the direction and strength of a relationship between two variables and ranges between 1 and -1. Estimates close to 0 indicate a weak relationship while coefficients close to either 1 or -1 suggest a strong one. In addition, a positive estimate indicates that the two variables co-vary in the same direction and a negative relationship indicates that as one variable increases the other decreases.

97. *Supra* Part I.A.3.

individuals who perceive themselves to be living in morally homogenous communities were *more*, not less, likely to support TIS.

One possible way of accounting for the latter surprising result is that individuals who live in morally homogenous communities generally do so by choice and probably at least in part due to their discomfort with the diversity found in society more generally. Although satisfied with conditions in their own suburban and rural enclaves, they may nonetheless favor symbolic assertions of moral order through law as a response to the perceived moral chaos emanating from more diverse communities elsewhere in the state. Our surveys were not designed to test this particular hypothesis, but it would be consistent with earlier research conducted on public support for punitive policies.[98]

Table 2. OLS Regression of the Truth in Sentencing Index[99]

Variable	Model 1		Model 2	
	B	Stand B	B	Stand B
Demographic measures				
Men	-.255**	-.107	-.246**	-.103
Age	-.002	-.024	-.002	-.026
White	-.489**	-.113	-.441**	-.102
Hispanic	.093	.013	.208	.029
College degree	-.231**	-.097	-.155	-.065
Married	-.088	.-036	-.126	-.052
Political orientation	.301***	.268	.278***	.248
Catholic	.168	.064	.155	.06
Church attendance	.047	.06	.044	.056

98. *See* Tyler & Boeckmann, *supra* note 47, at 253 (finding a statistically significant relationship between punitiveness and concerns about social diversity in state as a whole, but not between punitiveness and concerns about community cohesion).

99. In OLS regression, the coefficient for each independent variable ("B") can be interpreted as the amount changed in the dependent variable for a one unit increase in the independent variable. In Table 2, we also report standardized B ("Stand B"), which takes into account differing metrics of measurement so that B's can be compared directly to each other for relative effect magnitude on the dependent variable.

Milwaukee	-.495**	-.157	-.462**	-.146
Instrumental				
Fear of crime			-.001	-.001
Legitimacy				
Judges should decide sentence			.312**	.122
Symbolic				
Neighbors care			-.037	-.024
Neighbors share vales			.117*	.082
Not bothered by moving			.067	.046
R^2	.132		.157	
N	520		520	

*p< .1**, *p* < 0.05**, *p*< 0.01***

Turning to the multivariate regression, our results are divided into two separate models so that we can observe changes across the regression estimates after we introduce indicators of the instrumental, legitimacy, and symbolic explanations for TIS support. Results of the multivariate OLS Model 1 with only demographic variables indicate that five of these predictors are statistically significant predictors of TIS. The first measure, political orientation, indicates that as respondents become more politically conservative, they become more likely to support TIS (.301; p <.001). Otherwise stated, statistically controlling for the other covariates in the model, as respondents become more conservative, their support for TIS increases by .301. Keeping in mind that the TIS index ranges from 0 to 3, this is a sizeable impact for a single variable.

Living in Milwaukee County (home of Wisconsin's largest urban center) is also a statistically significant predictor of TIS support, but shares a statistically negative relationship with the dependent variables (-.495; p < .01). Thus, respondents who live in Milwaukee County are less likely to support TIS than respondents living elsewhere in the state. White respondents (-.489; p < .05), men (-.255; p < .05), and those with a college degree (-.231; p < .05) are also significantly less likely to support TIS. Standardized regression

coefficients indicate that political conservatism (.268) is the single most influential demographic predictor in shaping views towards TIS, with a strong positive correlation between conservatism and support for the policy.

Interestingly, we see early evidence that support for TIS stems from diverse sources and may be conceptually distinct from the broader notion of punitive attitudes and support for capital punishment. In a considerable body of scholarship on punitive attitudes and support for capital punishment, researchers have consistently found, holding political and other variables constant, that being male or white either has no impact on the desire to punish or is positively correlated with punitive attitudes when there is a statistically significant relationship.[100] Yet, our results indicate starkly different patterns. Central demographic predictors here have the opposite effect on support for TIS compared to more generalized desires to punish law violators. This empirical evidence lends support for the notion that support for TIS differs from the general desire to punish in key respects.

Model 2 in Table 2 includes both demographic measures and key indicators of the three potential explanations we discussed above. Results at this stage in the analysis indicate that, as in Model 1, political conservatism (.278; $p < .001$), living in Milwaukee County (-.462; $p < .01$), being male (-.202; $p < .05$), and being white (-.441; $p < .05$) are again statistically significant demographic predictors of support for TIS, either in a negative or a positive direction. However, the college-educated measure is no longer significant in Model 2, suggesting that its impact on TIS support has been absorbed by the key explanatory variables (a 32.9 percent coefficient reduction).[101]

100. *See, e.g.*, Darren Wheelock et al., *Perceived Group Threat and Punitive Attitudes in Russia and the United States*, 61 BRIT. J. CRIMINOLOGY 937 (2011); Ryan King & Darren Wheelock, *Group Threat and Social Control: Race, Perceptions of Minorities, and the Desire to Punish*, 85 SOC. FORCES 1255 (2007); S.E. Barkan & S.F. Cohn, *Contemporary Regional Differences in Support by Whites for the Death Penalty: A Research Note*, 27 JUST. Q. 458 (2010); E.P. Baumer et al., *Explaining Spatial Variation in Support for Capital Punishment: A Multilevel Analysis*, 108 AM. J. SOC. 844 (2003).

101. There are two factors that lead variables to become non-significant across models. Either the standard error increases or the coefficient itself decreases suggesting that the new covariates are taking up the variation previously explained by the now non-significant variable. The college variable drops from -.231 to -.155. To calculate the percent change, (-.155-(-.231))/-.231 = 32.9 percent reduction.

The results of Model 2 also indicate that the instrumental explanation as measured by fear of crime is not a salient factor to explain TIS support, which is consistent with the findings from the bivariate analysis.[102] By contrast, as in the bivariate analysis, our legitimacy variable (preference for judges over experts) did prove statistically significant in Model 2 (.312; $p < .01$). As to our symbolic measures—the three community cohesion variables—only one was statistically significant in Model 2: "most people in my community share the same basic values that I do." As in the bivariate analysis, the direction of correlation was the opposite of what the symbolic explanation would predict (.117; $p < .05$). Standardized coefficients again indicate that the political orientation measure (.248) continues to be the strongest predictor, but the "judge" measure (.122) is the strongest predictor among the central explanatory variables. In sum, net of demographic controls, the analysis of the data lends strongest evidentiary support for the legitimacy explanation of why Wisconsin residents support TIS.[103]

IV. CREDIBLE EARLY RELEASE REFORMS

Although we have found strong public support for TIS, we have also found significant support for providing early release from prison in certain circumstances. The latter results from Wisconsin are consistent with the results of a number of national polls. (However, we are not aware of any recent polls, other than ours, that have tested for support of TIS per se.) In this Part, we first describe the national polls. Then, we discuss our central finding on early release,

102. It is also consistent with our analysis of 2012 survey data, where there was a different question concerning crime and public safety. That survey asked respondents whether they agreed or disagreed with the claim that "[t]he crime problem has been getting worse in my community over the past few years." It is not significant in all 2012 multivariate regression models where support for TIS is the dependent variable. However, we are cautious in making direct comparisons between the 2012 and 2013 results because sample sizes and model specifications are considerably different.

103. Unfortunately, data are not available to answer the historical question of whether the same concerns predominated in public attitudes at the time that TIS I was originally adopted. We believe, however, that the public attitudes we are measuring do have some stability over time. To the extent we asked the same questions in 2012 and 2013, we had very similar responses. Moreover, our results were broadly consistent with a set of national polls conducted from 2006 to 2012, as discussed in Part IV below. We note, too, that multi-decade national research indicates more generally that "[p]unitive sentiment moves slowly over time with few periods of abrupt change." Mark D. Ramirez, *Punitive Sentiment*, 51 CRIMINOLOGY 329, 340 (2013).

that a majority of respondents would favor the release of prisoners who have served at least half of their sentences if they can demonstrate that they no longer pose a threat to public safety. Finally, we discuss additional findings from our survey that identify specific features that Wisconsin voters would like to see in an early release program.

A. National Polls

At least four national surveys conducted in recent years have found strong public support for reduced use of imprisonment in the United States for some offenders. These surveys were sponsored by the Pew Center on the States (2012 and 2010),[104] the National Council on Crime and Delinquency (2009),[105] and the National Center for State Courts (2006).[106] While the three organizations had different areas of focus and asked somewhat different questions, their results generally paint a consistent picture.

First, there is considerable interest in reducing the size of the U.S. prison population. The Pew Center found that forty-five percent of respondents believe that we lock up too many people today, as compared to only twenty-eight percent who believe that the prison population is "about right" and thirteen percent who think we lock up too few.[107] In part, these attitudes may reflect fiscal concerns. For instance, seventy-eight percent said that it would be acceptable to reduce prison time for low-risk, nonviolent offenders in order to close budget deficits.[108] However, there seems some ambivalence about the extent to which reducing the prison population or corrections spending should be ends in themselves. The National Center for State Courts found that only thirty-eight percent of respondents in 2006 said it was "very important" to reduce the prison population, and only twenty-two percent said that spending on prisons should be

104. PEW CENTER ON THE STATES, PUBLIC OPINION ON SENTENCING AND CORRECTIONS POLICY IN AMERICA (2012) [hereinafter PEW 2012];PEW CENTER ON THE STATES, NATIONAL RESEARCH OF PUBLIC ATTITUDES ON CRIME AND PUNISHMENT (2010) [hereinafter PEW 2010].

105. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, ATTITUDES OF U.S. VOTERS TOWARD NONSERIOUS OFFENDERS AND ALTERNATIVES TO INCARCERATION (2009).

106. PRINCETON SURVEY RESEARCH ASSOCIATES INTERNATIONAL, THE NCSC SENTENCING ATTITUDES SURVEY: A REPORT ON THE FINDINGS (2006).

107. PEW 2012, *supra* note 104, at 2.

108. *Id*. at 4.

decreased.[109] It is possible that these numbers would be higher today in the wake of the post-2006 economic downturn and resulting fiscal pressures on state governments.

However, even in more recent surveys, it appears that the public desires less to reduce corrections spending per se than to reallocate the dollars in ways that more cost effectively protect public safety. Here are some of the results:

- Eighty-four percent agree that "[s]ome of the money that we are spending on locking up low-risk, nonviolent inmates should be shifted to strengthening community corrections programs like probation and parole."[110]
- Eighty-five percent would accept reducing prison time for low-risk, nonviolent offenders in order to reinvest in alternatives.[111]
- Eighty-seven percent agree that "[p]risons are a government program, and just like any other government program they need to be put to the cost-benefit test to make sure taxpayers are getting the best bang for their buck."[112]
- Sixty percent say that sending fewer non-serious offenders to prison may be justified by the availability of alternatives that decrease reoffending.[113]

Implicit in these findings are beliefs that rehabilitation is a feasible goal for many offenders, but that prisons are not the best place to pursue rehabilitative objectives. These views are more explicit in a number of other findings:

- Only thirty-three percent say that prisons are at least somewhat successful at rehabilitating offenders.[114]

109. PRINCETON SURVEY RESEARCH ASSOCIATES INTERNATIONAL, *supra* note 106, at 38, 21.

110. PEW 2012, *supra* note 104, at 1.

111. *Id.* at 4.

112. *Id.* at 7.

113. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *supra* note 105, at 8.

114. PRINCETON SURVEY RESEARCH ASSOCIATES INTERNATIONAL, *supra* note 106, at 17.

- Fifty-eight percent say that prevention or rehabilitation should be the top priority for dealing with crime, as opposed to only nineteen percent who favor longer sentences and more prisons.[115]
- Seventy-nine percent agree that "under the right conditions, many offenders can turn their lives around."[116]
- Sixty-one percent said it was "very important" to put nonviolent offenders in treatment/job/education programs.[117]
- Eighty-seven percent agree that "[i]t does not matter whether a nonviolent offender is in prison for 18 or 24 [or] 30 months . . . . What really matters is that the system does a better job of making sure that when an offender does get out, he is less likely to commit another crime."[118]

Public opinion seems considerably more favorable to prison alternatives for nonviolent than violent offenders. Indeed, some of the support for reducing prison time for the former seems based precisely on the perceived need to preserve prison space for the latter. Thus, for instance, the Pew Center found that eighty-six percent would accept reduced prison time for nonviolent offenders in order "to keep violent offenders locked up."[119] Similarly, the National Center for State Courts found that seventy-two percent thought it was "very important" to keep violent offenders in prison longer.[120]

For the nonviolent offenders, though, the public seems open to early release in a number of circumstances. The Pew Center found that eighty-six percent would accept reduced prison time for completion of programs, eighty-three percent for good behavior in prison, and seventy-seven percent for age or illness.[121] Likewise, the National Center for Crime and Delinquency found that seventy-seven percent favored alternatives to prison for "nonviolent,

115. *Id.* at 20.
116. *Id.* at 22.
117. *Id.* at 38.
118. PEW 2012, *supra* note 104, at 5.
119. *Id.* at 4.
120. PRINCETON SURVEY RESEARCH ASSOCIATES INTERNATIONAL, *supra* note 106, at 38.
121. PEW 2012, *supra* note 104, at 4.

nonsexual" offenders whose crime "did not involve significant property loss."[122]

However, a few caveats are in order. The National Center for State Courts found that eighty-one percent of respondents believe that it is "very important" for criminal-justice systems to do more "to make sure the punishment fits the crime."[123] This retributive/symbolic view stands in tension with the more clearly instrumental, cost-benefit-balancing perspective evident in some of the other survey responses. Additionally, the Pew Center found substantial skepticism of the adequacy of community supervision as a punishment; fifty percent characterized probation and parole as a "slap on the wrist."[124] This may point to resistance to early release in cases of serious crime, even if the risk of re-offense is very low. Finally, there appears to be widespread public distrust of many of the officials who work in the system. In one survey, only thirty-seven percent said that judges were doing a good job of serving the public, and only twenty-five percent said as much of prison, probation, and parole authorities.[125]

B. Support for Early Release in Wisconsin

We found consistent support for early release among our Wisconsin sample of registered voters. In the 2012 data, fifty-five percent agreed that "[o]nce a prisoner has served at least half of his term, he should be released from prison and given a less costly form of punishment if he can demonstrate that he is no longer a threat to society."[126] Only thirty-five percent disagreed.[127] Similarly, in 2013, 54.5% agreed, while only 41.4% disagreed.[128]

This level of support for early release is especially remarkable because of the specification of a generous halfway release point. We hypothesized that more modest, or less specific, reductions in sentence length would draw even higher levels of support. For

122. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *supra* note 105, at 6.

123. PRINCETON SURVEY RESEARCH ASSOCIATES INTERNATIONAL, *supra* note 106, at 38.

124. PEW 2012, *supra* note 104, at 7.

125. PRINCETON SURVEY RESEARCH ASSOCIATES INTERNATIONAL, *supra* note 106, at 16.

126. 2012 Toplines, *supra* note 94, at Q26g.

127. *Id.*

128. Marquette University Law School Poll, MARQUETTE LAW SCHOOL POLL, July 15-18, 2013, Q19 (2013) [hereinafter 2013 Toplines], https://law.marquette.edu/poll/results-data/.

instance, in response to another early release question in the 2012 data, we had found that two-thirds agreed "Wisconsin should recognize prisoners' rehabilitative accomplishments by awarding credits toward early release."[129] We tested, and confirmed, our hypothesis in the 2014 poll, in which we found that 66.4% agreed that "[i]f a prisoner serves *two-thirds* of his term, he should be released and given a less costly form of punishment if he can demonstrate that he is no longer a threat to society."[130]

Notably, we found this support for early release even without distinguishing between violent and nonviolent offenders. The national polling results discussed above suggest that we may have found even higher levels of support if we had narrowed the focus of the question to nonviolent offenders.

We analyzed the survey data to identify predictors for early release support, that is, support for the specific halfway proposal described above. The results of the bivariate analysis[131] demonstrate little evidence of either fear of crime or community cohesion variables being significant correlates of early release support. There is, however, evidence that the legitimacy variable (judges versus experts) helps to account for variation in early release views. Chi-square tests indicate that these two variables share a statistically significant relationship ($p < .001$); respondents who agree that judges should determine sentences are more likely to disagree that prisoners should be considered for early release.[132] This finding conforms to our TIS regression analysis. Based on that analysis, one would expect, precisely as we find, that individuals who place a high value on the democratic accountability of judges and therefore support TIS would be especially skeptical of any early release proposal. Given the historical functioning of parole, they would likely assume early release to be administratively, rather than judicially, implemented.

129. 2012 Toplines, *supra* note 94, at Q26c.

130. Marquette University Law School Poll, MARQUETTE LAW SCHOOL POLL, July 17-20, 2014, Q30 (2014) [hereinafter 2014 Toplines], http://law.marquette.edu/poll/wp-content/uploads/2014/07/MLSP22Toplines.pdf.

131. Because this variable is categorical, we employed cross-tabulation chi-square tests instead of estimating correlation matrices and R coefficients as was the case with the TIS index.

132. *See infra* Table 3, at 33.

The results of the binary logistic regression models[133] are separated into two models, one comprising just the demographic covariates and the second consisting of the full selection of variables, including variables that capture the three explanations for TIS support that we explored above.

Table 3. **Binary Logistic Regression of Early Release Variable**

Variable	Model 1		Model 2	
	B	Exp(B)	B	Exp(B)
Demographic measures				
Men	.285	1.33	.327*	1.387
Age	-.002	.998	-.004	.996
White	-1.59	.853	-.248	.78
College degree	.107	1.113	.031	1.031
Hispanic	-.068	.934	-.063	.939
Married	-.618***	.539	-.589***	.555
Political orientation	-.622***	.537	-.6***	.549
Catholic	-.253	.776	-.228	.796
Church attendance	.102	1.107	.1	1.105
Milwaukee	.604**	1.83	.635**	1.887
Instrumental				
Fear of crime			-.039	.961
Legitimacy				
Judges should decide sentence			-.577***	.555
Symbolic				
Neighbors care			.104	1.11
Neighbors share vales			.061	1.063
Not bothered by			-.008	.992

133. The OLS estimator is not appropriate for categorical dependent variables because it generates biased and even regression coefficients that cannot be interpreted (for example, ones that would produce negative probabilities). Since we recoded the Early Release variable to have only two possible categories, we utilize binary logistic regression models and a Maximum Likelihood Estimation (MLE) estimator. The B then can be interpreted as the effect on the logistic probability unit, or the logit, of the dependent variable. Since the logit function is not intuitive when discussing results, exponentiating B coefficients (Exp B) yields the effect on the odds.

moving		
N	568	568

*p< .1**, *p* < 0.05**, *p*< 0.01***

The results of Model 1 demonstrate that married respondents are less likely to support early release. In fact, the odds that married respondents would agree with early release were forty-six percent less than the odds for non-married individuals. Being politically conservative is also a negative predictor of support for early release (a forty-six percent reduction in the odds). Finally, respondents residing in Milwaukee County are statistically more likely to support early release. Specifically, the odds that these respondents support early release are eighty-three percent higher than those of respondents living elsewhere in Wisconsin.

The full early release model with both demographic controls and key explanatory factors shows that the effects of being married (-.59; p < .01), political conservatism (-.60; p < .001), and residing in Milwaukee County (.64; p < .001) remain statistically significant in Model 2. However, in Model 2, being male is statistically significant net of the other covariates in the model (.33; p < .1). The exponentiated beta coefficient shows that being male increases the odds of supporting early release by thirty-nine percent. Of the three central explanations, only the indicator for the legitimacy explanation is statistically significant.[134] Respondents who feel that judges should handle sentencing are approximately forty-four percent less likely to support early release.

C. Program Specifics

Although a number of national-level polls have found substantial public support for early release as a general concept, they leave many

134. We note, though, that our instrumental variable, fear of crime, does not capture what is likely the most important instrumental consideration supporting early release: cost-savings. On the other hand, in the 2012 Poll, a clear majority (fifty-eight percent) of respondents agreed with the statement, "[e]ven if such an earned-release program, [providing credits based on rehabilitative accomplishments in prison], does not reduce crime, it would still be the right thing to do." 2012 Toplines, *supra* note 94, at Q26d. Similarly, in the 2014 Poll, we found no statistically significant relationship, in either a bivariate or a multivariate model, between support for early release and support for the proposition that "[r]educing the amount of money we spend on imprisoning criminals" is either "absolutely essential" or "very important." For the topline results, see 2014 Toplines, *supra* note 130, Q28e, 30.

unanswered questions as to the specifics of program design. Our research provides new insights into what sort of an early release program voters might see as more acceptable.

First, we found much higher public support for putting release decisions in the hands of a statewide commission of experts than in the hands of judges. Fifty-two percent of our respondents favored the expert commission, as against 31.3% preferring judges.[135] This result suggests that TIS III, which created the ERRC in Wisconsin, got it right from the standpoint of institutional design, while TIS IV, which eliminated the ERRC and restored judicial control over early release, got it wrong.[136] Indeed, in our research, respondents considered a commission to be superior to a judge along five of six different performance dimensions.[137] A judge was said to be slightly better at evaluating the seriousness of the prisoner's crime, but a commission was determined to be superior in a wide range of other tasks—most decisively, in using the latest scientific knowledge on rehabilitation and risk (58.7% to 12.5%) and in ensuring fair and equal treatment (44.7% to 20.6%).[138] It is notable that a judge's advantage in assessing the seriousness of an offense did not control the bottom-line judge-versus-commission decision; this underscores that making the punishment fit the crime was not seen as a singular, overriding objective of the penal system, but stands as only one of a number of purposes.[139]

These findings echo the distrust of judges evident in national polls.[140] However, polls also find similar or greater distrust of corrections officials.[141] We did not ask our respondents questions

135. 2013 Toplines, *supra* note 128, at Q36.

136. *See supra* Part I.C–D.

137. 2013 Toplines, *supra* note 128, at Q30–35.

138. *Id.*

139. We found more explicit confirmation of this point in the 2014 poll, in which only 41.2% said it was "absolutely essential" that the criminal justice system "ensur[e] that people who commit crimes receive the punishment they deserve." 2014 Toplines, *supra* note 130, at Q28a. Somewhat greater numbers said it was "absolutely essential" that the system "keep[] crime victims informed about their cases and help[] them to understand how the system works" (42.7%) and that the system "mak[e] Wisconsin a safer place to live" (46.8%). *Id.* at Q28b, 28d. Majorities said it was also at least "very important" that the system rehabilitate offenders and reduce imprisonment costs. *Id.*, at Q28c, 28e.

140. *See, e.g.*, *supra*, Part IV.A and text accompanying note 118.

141. *Id.*; *see also* Mike Hough & Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, *in* THE OXFORD HANDBOOK OF CRIMINOLOGY 279, 292 (Mike Maguire et al. eds., 5th ed. 2012) (reporting survey research in Britain showing that twenty-seven percent of

about how a commission of experts should be staffed and overseen, but concerns about the trustworthiness of corrections officials suggest that some institutional independence from the corrections department might be advisable. Neither Wisconsin's old Parole Commission nor the ERRC had such institutional independence,[142] which may account for some of the distrust both programs encountered.

Second, we found high levels of support for taking into account a diverse set of considerations in the release decision. Wisconsin voters do not seem to support reducing the release decision to any single criterion. All of the following considerations were ranked as "very important" or "somewhat important" by at least eighty percent of respondents:

- Prisoner's record of good behavior in prison.[143]
- Whether prisoner has accepted responsibility for his crime.[144]
- Whether victim opposes release.[145]
- Whether prisoner has obtained a GED or completed educational programs in prison.[146]
- Whether prisoner has completed treatment for any addiction or mental illness.[147]
- Whether prisoner has marketable skills and good employment prospects after release.[148]

Our findings partially replicate the Pew Center's national results, which indicate that eighty-six percent of respondents accept reducing prison time based on the completion of programs, while eighty-three

respondents rate the performance of judges as good or better, while twenty-five percent give that rating to prisons). Surprisingly, we found a slight advantage for corrections officials in the 2012 poll: thirty-six percent said that judges treat criminals too leniently, while only twenty-nine percent said as much of prison officials. 2012 Toplines, *supra* note 94, at Q27a–27b.

142. *Supra* Part I.A.1 (Parole Commission); Nicole Murphy, *Dying to Be Free: An Analysis of Wisconsin's Restructured Compassionate Release Statute*, 95 MARQ. L. REV. 1679, 1703–04 (2012) (Earned Release Review Commission).

143. 2013 Toplines, *supra* note 128, at Q24.

144. *Id*. at Q25.

145. *Id*. at Q26.

146. *Id*. at Q27.

147. *Id*. at Q28.

148. *Id*. at Q29.

percent accept reductions based on good behavior.[149] Our survey is unique, however, in asking about acceptance of responsibility, victim views, and employment prospects.

The finding on acceptance of responsibility, which had the second-highest support of the six criteria covered in the survey, may be especially noteworthy. As one of us has argued elsewhere, acceptance of responsibility has moral significance as a form of atonement for an offense.[150] Incorporating acceptance into the early release decision may help to reconcile early release with the moral-symbolic view of punishment; once an offender has atoned, he may be welcomed back into the community without representing a threat to its moral cohesion. Victim views may also gain some support from a similar set of instincts. Indeed, even good behavior in prison and the successful completion of treatment and educational programs may have an atoning character.[151]

Third, we expressly confirmed that Wisconsin voters do not wish to limit early release to those who are physically incapable of threatening others. Only 42.5% agreed, and 51.9% disagreed, that "[e]arly release should be restricted to prisoners who are elderly, terminally ill or severely physically disabled."[152]

Fourth, as noted in the previous Section, we found majority support for a release opportunity as early as halfway through a sentence.[153] This would actually be considerably more generous than any of the early release mechanisms included in TIS III.[154]

Finally, we found majority support for early release even without distinguishing between violent and nonviolent offenders. The national survey research suggests that such a distinction would increase support for early release. However, if it is not necessary to make such a distinction in order to have a credible program, there

149. PEW 2012, *supra* note 104, at 4.

150. 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, 210–18 (2012).

151. *Id.* at 218–22.

152. 2013 Toplines, *supra* note 85, at Q37.

153. *Id.* at Q19.

154. The ERRC was authorized to adjust sentences at the seventy-five percent mark. Norris, *supra* note 62, at 1573. Other components of TIS III included "positive adjustment time," which might give up to a one-third discount from the original sentence, and the risk reduction sentence, which offered the possibility of release at the seventy-five percent mark. *Id.* at 1574–75. Other aspects of TIS III are not readily measurable in this way. For instance, the "certain early release" program permitted release up to one year early. *Id.* at 1576.

may be good reasons to avoid the distinction. There are many ambiguities in implementing such a distinction. Questions would arise such as, should the distinction between violent and nonviolent be based solely on the offense of conviction, or may prior criminal history also come into play? Which offenses count as "violent"?[155] Does one conviction of a violent crime forever brand the offender "violent," no matter how aberrational the crime or how far in the past it occurred? If left with unfettered discretion to make such distinctions, risk-averse officials are apt to undermine the effectiveness of an early-release program by expanding the "violent" category so broadly as to encompass many offenders who are actually relatively safe bets.[156]

V. SWING-VOTER PREFERENCES

In this Part, we focus on differences among subsamples of the survey, most notably a group we call the "swing vote," or those respondents who reported either strongly agreeing or agreeing with early release *and* agreeing with the statement that "truth in sentencing should be the law in Wisconsin."[157] This group of respondents is the most intriguing in that they seemingly hold two competing notions of sentencing and criminal punishment. In our view, this group of respondents actually represents the duality of public attitudes toward criminal punishment more generally.[158] In the abstract, TIS laws capture sentiments of certainty, equity and fairness that most individuals support. Assuming sentences are fair and reasonable, a sensible criminal justice system should hold offenders to serve their full prison terms for everyone's benefit, including the offenders themselves, who will have the benefit of knowing exactly how much time they must serve. On the other hand, however, notions of second chances and rehabilitation still underlie common understandings of what a responsive criminal justice system should

155. In recent years, the federal courts have been tying themselves in interpretive knots trying to decide which offenses count as violent for purposes of the Armed Career Criminal Act. Michael M. O'Hear, *Mandatory Minimums: Don't Give Up on the Court*, 2011 CARDOZO L. REV. DE NOVO 67, 79–86.

156. Klingele, *supra* note 7, at 450–51.

157. 2013 Toplines, *supra* note 85, atQ23.

158. *See* MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 17 (2004) ("The general public holds complicated views about punishment that are neither monolithically nor single-mindedly punitive.").

accomplish. A system with post-sentencing flexibility allows officials to take expenditure considerations into account while also instilling programmatic components that allow for "second chances."

In our sample, we found 220 respondents in the "swing voter" group (that is, categorized as "1" for both the early release variable and our baseline support for TIS measure, which asked respondents wither they agreed with the statement that TIS should continue to be law in Wisconsin). This subsample constitutes 30.9% of the total sample.

We first compare the swing voter group to respondents who support TIS but oppose early release. We refer to this subsample as the "law and order" group (N = 238 or 37% of the total respondents), since people in this group answered questions in a way that reflects the position that law violators should be punished harshly, and the focus of the criminal justice system should be retribution, deterrence, and incapacitation rather than rehabilitation. We then compare the swing voters to respondents who oppose TIS and support early release, or the "rehabilitators" (N = 148 or twenty-three percent).[159] Individuals in this group embody the perspective that rehabilitation should be a primary goal for the criminal justice system, and providing offenders with employment and educational opportunities constitutes a vital part of these efforts.

In terms of demographic differences, the results of means difference t-tests[160] indicate that the law and order group differs from the swing voters in the following ways: the law and order group has significantly higher marriage rates, a higher percentage of whites, and higher levels of political conservatism. Significantly fewer members of the law and order subsample reside in Milwaukee County, Wisconsin's largest urban center, than in other areas of the state, which likely indicates that they tend to live in rural and suburban areas.

Moving beyond demographic differences, we also found many differences between the law-and-order group and the swing voters in

159. There is a fourth category of respondents who opposed both TIS and early release, but this group comprised too few individuals (N = 38 or 5.3%) to conduct comparative analysis.

160. Mean difference t-test is a statistical procedure to determine whether differences in means or averages between two groups are statistically significant. For this stage of analysis and in Table 4, the reference group is the swing voter group. We tested for whether means for the law and order group and the rehabilitator group differed from the swing voter group, not whether means for the law and order and rehabilitator groups differed from each other.

attitudes towards sentencing and early release.[161] For instance, we found statistically significant differences between the two groups in general punitiveness.[162] We also found statistically significant differences with regard to our legitimacy variable; the law-and-order group was more supportive of judges making release decisions than were the swing voters. In part, this reflects more positive views among the law-and-order group about judges' ability to use scientific evidence and to treat defendants in a fair and equal manner.

In response to the questions about which criteria are most important for release decisions, we found significant differences across the board on the importance of offenders' post-sentencing conduct and rehabilitative progress.[163] As expected, the swing voters tend to value these criteria more than the law-and-order voters. The single criterion on which both groups agreed was victim views, with both groups tending to favor this criterion significantly more often than the rehabilitators. The swing voters thus seem distinctive from the other two groups in their tendency to want to balance a concern for victims with a desire to encourage and recognize offenders' good conduct. Relative to the swing voters, the rehabilitators discount victim interests, while the law-and-order voters discount early release for good conduct.

The differences between the swing voters and the law-and-order voters are perhaps best captured in their responses to a question that asked respondents which of two statements came closest to their own point of view:

Statement A:

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

161. Since we divided the larger sample of respondents by the central TIS measure and the early release variable, we are unable to observe how these groups differ along the measures specified as dependent variables throughout the regression models.

162. Our "punishment index" was comprised of answers to three questions about whether courts are too lenient, whether tougher sentences should be imposed on repeat offenders, and whether murderers should receive the death penalty.

163. These variables were then recoded so that "very important" = 3, "somewhat important" = 2, and "not important" = 1.

Or

Statement B:

> People who commit crimes belong behind bars, end of story. It may cost a lot of money to run prisons, but it would cost society more in the long run if more criminals were on the street.[164]

As expected, swing voters were more likely to support Statement A than law-and-order voters. Again, we see in the swing voters a relatively nuanced attitude toward penal policy that requires a balancing of competing considerations, while the law-and-order voters are relatively more likely to express a simplified, "lock 'em up and throw away the key" viewpoint.[165]

Table 4: Mean Difference T-Tests for 3 Subgroups[166]

	Swing Voters Mean	Law and Order Mean	Rehabilitators Mean
Age	50.31	50.66	45.00***
Married	.49	.70***	.54
Race/Ethnicity	.88	.95**	.91
Frequency of Church Attendance	3.74	3.73	3.20**
Milwaukee County Resident	.18	.10**	.24
Political Views	3.13	3.53***	2.45***

164. *See* 2013 Toplines, *supra* note 85, at Q20.

165. We hypothesize that there may be a relationship between these differences and the residential differences between the two groups, with the swing voters more likely to live in or near Milwaukee, Wisconsin's main urban center. Although we did not ask questions directly on this topic, it is at least plausible that the swing voters, with their more urban orientation, are more likely to be personally acquainted with someone who has either committed a serious crime or been victimized by a serious crime. If so, then questions of penal policy could have an experiential dimension for the swing voters. The law-and-order voters, by contrast, may tend to view penal policy in more abstract and symbolic terms, which may lead to more absolutist policy preferences. We found some support for this view in the 2014 poll, in which there was a positive, bivariate relationship (albeit not at quite the .05 level) between support for early release and whether someone in the respondent's immediate family had ever been charged with a crime. For the topline results, see 2014 Toplines, *supra* note 129, at Q30, 31.

166. Due to space, we only included variables in table 4 with means for either the law-and-order group or the rehabilitators that differed significantly from swing voters.

College Educated	.43	.48	.54*
Which perspective comes closest to your views	1.32	1.67***	1.18**
Judges vs. Experts	.32	.44**	.22*
Judges better with science	.12	.21***	.023***
Judges better at fair and equal treatment	.19	.29***	.19
Judges better meeting community needs	.28	.3	.11***
Neighborhood Care	3.41	3.38	3.11***
Share Values	3.17	3.10	2.80***
Move to Another Community	2.70	2.65	2.30**
Punishment Index	8.84	9.60***	6.60***
Good Behavior	2.52	2.20***	2.62
Acceptance	2.67	2.50***	2.70
Victim Opposition	1.30	1.30	.98***
GED	2.31	2.00***	2.43*
Mental Health Treatment	2.70	2.50**	2.80
Skills	2.38	2.16**	2.33
Can't trust gov't to do right	2.87	2.92	2.66*
Gov't wastes tax money	3.5	3.63*	3.22**

$p = 0.05$, $p = 0.01$, $p = 0.001$

Turning to our third subsample, the rehabilitators tended on average to be significantly younger (over five years), have lower levels of church attendance, and have higher levels of education in comparison to the swing voters. While swing voters tended to be

significantly less politically conservative than the law-and-order group, rehabilitators were even significantly less politically conservative than swing voters. Similarly, while swing voters had significantly lower levels of support for judges making release decisions than the law-and-order group, the rehabilitators were even less likely to favor judges.

Another interesting finding is that the rehabilitators differed substantially from swing voters on the community-cohesion measures that we used to test the symbolic explanation for TIS support. Significantly fewer rehabilitators reported living around neighbors that care about their community and living in a community where people shared values. Significantly more rehabilitators reported that moving to another community would not bother them. These findings suggest that the rehabilitators, while no more statistically likely than the swing voters to live in Milwaukee County, nonetheless tend to live in less cohesive neighborhoods.[167] Lastly, rehabilitators were the least punitive subsample (significantly less punitive than swing voters, who were in turn less punitive than the law-and-order group) and the least likely to agree that "people who commit crimes belong behind bars, end of story."

In sum, disaggregating these data into three categories suggests that there are in fact three distinct positions on criminal justice and criminal punishment. The first group, or the law-and-order subsample, tends to be individuals who live either in rural sections of Wisconsin or the outer suburban regions. They are almost exclusively white, older, politically conservative, and possess high levels of punitiveness towards law violators. In our view, these voters support TIS largely because they understand these policies to be an extension of the tough-minded law and order position they favor.

In sharp contrast, the rehabilitators tend to be younger, more racially diverse, better-educated, political liberals. Rehabilitators have more confidence that offenders can turn their lives around and favor encouraging and recognizing rehabilitation through early release opportunities, even at the expense of victims' interests. In general,

167. We also analyzed whether those in the swing vote group were more or less likely to live in Milwaukee city limits instead of Milwaukee County. The results for Milwaukee and Milwaukee County were similar. The law and order group was less likely to live in the city of Milwaukee, and there was no significant difference between the swing vote and the rehabilitator group.

these voters oppose TIS because they perceive it as antithetical to their rehabilitation platform.

The swing voters are the most intriguing. In some respects, they resemble the law-and-order group in that they tend to be older, have relatively high church attendance, and have relatively high levels of support for TIS laws. As a whole, however, they tend to be less punitive and more supportive of flexibility in punishment than their law-and-order counterparts.[168]

How can early-release reformers appeal to the swing voters? Relative to other TIS supporters, this group seems to have many diverse objectives. Appeals to a single consideration (sending the right message, or doing the right thing for victims, or saving money, or making the punishment fit the crime) are not likely to be persuasive to this group. These voters seem interested in hearing about costs and benefits, about what victims want, and about making rehabilitation work. They are not especially fearful of crime. (There were no statistically significant differences among the three groups, in fact, with respect to our fear variable.) They do prefer for a commission of experts to make release decisions, and they seem particularly mindful of the commission's potential advantages in the areas of using science and in ensuring fair and consistent treatment of offenders. At the same time, the swing voters seem more attuned than the rehabilitators to ensuring accountability for criminal offenses. In general punitiveness, the swing voters are much closer to the law-and-order group than they are to the rehabilitators. Since the instrumental fear-of-crime concern does not distinguish the groups, we suspect that the punitiveness of swing voters is related, at least in part, to moral-symbolic considerations. Reformers who favor early release should thus consider how their reforms can be reconciled with, or made to incorporate, the value of individual accountability for wrongdoing, such as through the acceptance of responsibility and the atonement concept noted above.[169]

168. Empirically, this further demonstrates that support for TIS laws is decoupled from more general notions of public desires to punish offenders. Rather, it seemingly taps support for a distinct attitude or belief concerning the criminal justice system.

169. *Supra* Part IV.C.

VI. CONCLUSION

We began this article by observing the phenomenon of "imprisonment inertia"—the persistence of America's historically high imprisonment rate notwithstanding relatively low crime rates, fiscal pressures created by state corrections budgets, and the implementation of new programs in dozens of states intended to facilitate early release. Our finding of strong public support for "truth in sentencing"[170] suggests one reason why policymakers have not adopted more robust early-release programs and why some programs, including those in Wisconsin, have even been eliminated entirely. Policymakers are understandably reluctant to embrace early-release programs that may be seen as undermining the politically popular TIS ideal.

Our research also suggests one reason why states have retained their TIS laws even as crime rates have steadily declined. While politicians may have played on public fears of crime in their efforts to build support for TIS,[171] our research indicates that such fear does not play a central role in maintaining positive voter perceptions of TIS.[172] Rather, TIS support seems motivated by other considerations. Our research particularly highlights the importance of legitimacy considerations, as well as general political conservatism.[173] TIS support may also be based, in part, on its value as a symbolic reaffirmation of traditional morality in the face of perceived breakdowns in social responsibility, although our data do not permit firm conclusions in that regard. In any event, based on our analysis, we would certainly not expect support for TIS to move up or down with crime rates.

Although public support for TIS presents a significant challenge for reformers who would like to see stronger imprisonment-reduction policies, our research also indicates that TIS support is not absolute and inflexible. Indeed, we find majority support for release at the halfway mark in some cases, which would be a very significant deviation from the TIS ideal.[174]

170. *Supra* Part III.
171. *Supra* Part I.A.3.
172. *Supra* Part III.
173. *Id.*
174. *Supra* Part IV.B.

Our finding that support for TIS is not instrumental in nature complements Klingele's argument that reformers who wish to develop politically viable early-release initiatives must show that such initiatives are not merely cost-saving (instrumentally beneficial) but also "fundamentally fair."[175] Our findings on the importance of legitimacy, moreover, suggest that attention to "fundamental fairness" should include attention to decision-making processes.

For instance, our data indicate that voters prefer release decisions to be made by a "commission of experts."[176] Notably, we find that experts are seen as particularly good at making use of scientific knowledge and at ensuring fair and equal treatment of prisoners. Voters value these attributes, and a credible early release program should ensure that decisions take into account the best available science and avoid unwarranted disparities.

More generally, we find strong support for basing release decisions on a wide range of variables, including several related to what the offender has done since being sentenced to prison.[177] Among other things, these public preferences represent an implicit rejection of the traditional retributive view that penal severity should be based exclusively on offense severity; "making the punishment fit the crime" seems not to be an exclusive or overriding objective of voters. At the same time, this should not necessarily be seen as a rejection or as belittling moral considerations in release decisions. Voters see release in some cases as "the right thing to do" even in the absence of public safety (instrumental) benefits.[178] Moreover, voters overwhelmingly support "acceptance of responsibility" as a release criterion, which may also point to moral considerations (atonement).[179]

Our data also indicate that release need not be restricted to elderly or physically incapacitated prisoners.[180] Additionally, unlike other recent public-opinion research on early release,[181] we did not limit our questions to the subject of "nonviolent" offenders. Our

175. Klingele, *supra* note 7, at 457.
176. *Supra* Part IV.C.
177. *Id.*
178. 2012 Toplines, *supra* note 94, at Q26d.
179. *Supra* Part IV.C.
180. *Id.*
181. *Supra* Part IV.A.

findings suggest that it may not be necessary to structure early release programs around the elusive violent/nonviolent distinction.

Our findings point to the existence of three distinct groups of respondents based on their views of TIS and early release: the law-and-order voters, the rehabilitators, and the swing voters.[182]Reformers should consider the duality of swing voters in order to build majoritarian public support for more robust early-release mechanisms. In some respects, such as support for victims and general punitiveness, the swing voters look much more like the law-and-order voters than the rehabilitators. Yet, the swing voters are clearly distinguishable from the law-and-order voters in their greater interest in cost-benefit balancing, their stronger preference for expert decision-making, and their desire to encourage and recognize prisoners' good conduct and rehabilitative progress. Advocates for reform would do well to bear in mind the diverse set of considerations that swing voters seem to take into account when evaluating penal policy options.

Our findings illuminate the Wisconsin TIS story recounted in Part I. The pre-TIS parole system operated quite differently from the sort of early-release system that we find voters prefer. The old system was not seen as being based on principles of science or individual desert; rather, it was perceived to operate in an arbitrary and unpredictable way based largely on a desire to relieve prison overcrowding.[183] The problem was not with early release per se, but with the particular early-release program in use at the time.

It should not be a surprise, then, that the partial restoration of early release in TIS II[184] has proven a durable and largely uncontroversial reform. Early release came back, but not through the old processes. The judicially administered system of TIS II may not have been what voters would have most preferred, but judges were nonetheless broadly accepted, particularly in light of the very limited extent to which early release was authorized in the new law.

The bigger mystery is why TIS III failed. Our research indicates that the public would support a commission-administered early-release program that is considerably more generous than what TIS II

182. *Supra* Part V.

183. John Welsh, *Longer Sentences, Shorter Terms Average Prison Stay in Wisconsin Has Been Decreasing,* State Journal *Analysis Finds*, WIS. ST. J., Mar. 15, 1998, at 1A; *Supra* Part I.A.1.

184. *Supra* Part I.B.

established. Why, then, did the Legislature overturn TIS III so quickly after it was adopted? Of course, legislative majorities do not always reflect the majoritarian preferences of a broader public, and we did not find such overwhelming public support for early release as to suggest a high political cost for disregarding it. Perhaps more important, though, was the failure to "sell" it to the public on any basis besides its projected cost-savings.[185] Viewed this way, the new ERRC looked suspiciously like the old Parole Commission, which had also been focused on reducing the prison population as an end in itself.[186] Although the ERRC might have been an expert commission, the public had no reason to think it would pay attention to the sorts of considerations that the public wants to control release decisions. In short, we do not think that the political failure of TIS III casts doubt on our conclusion that the public would support a properly framed and focused reincarnation of an Earned Release Review Commission.

185. *Supra* Part I.C.

186. *Supra* Part I.A.1.