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Articles

THE ADVERSE IMPACT OF TRUTH-IN-SENTENCING ON WISCONSIN'S EFFORTS TO DEAL WITH LOW-LEVEL DRUG OFFENDERS

Lynn Adelman*

I. INTRODUCTION

I thank the Valparaiso University Law School for the opportunity to participate in an important discussion about how we can most effectively address the problem of low-level drug offenders. This issue is timely because of the harmful consequences that many jurisdictions' sentencing practices have brought about, particularly in the African-American community.¹ I will attempt to contribute to the discussion by exploring Wisconsin's experience with a type of determinate sentencing that many states have adopted in recent decades known as truth in sentencing ("TIS"). My interest in Wisconsin's TIS law stems both from my experience as a federal district judge (1997–present) and as a Wisconsin state senator (1977–1997). As a district judge, I have had to deal with the federal version of determinate sentencing embodied in the Sentencing Reform Act ("SRA"), the federal sentencing guidelines, and statutes establishing mandatory minimum sentences in drug cases.² I have long been convinced that the federal sentencing laws and guidelines result in an enormous amount of over-punishment, particularly in drug cases.

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¹ See generally Donna K. Axel & David M. Rosen, *Putting Two Drug Courts to the Top Ten Test: Comparing Essex and Denver Drug Courts with "The Carey Team's" Best Practices*, 47 VAL. U. L. REV. 839 (2013) (evaluating the effectiveness of various drug courts to reduce recidivism); Jeanne Bishop, *Where the Rubber Meets the Road: Injecting Mercy into a System of Justice*, 47 VAL. U. L. REV. 819 (2013) (discussing her experiences as a public defender in Cook County, Illinois, and how devastating the effects of the drug war have been on the African-American community); Brian G. Gilmore & Reginald Dwayne Betts, *Deconstructing Carmona: The U.S. War on Drugs and Black Men as Non-Citizens*, 47 VAL. U. L. REV. 777 (2013) (exploring how the war on drugs has affected the African-American community).

² Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3661–3672 (2006)). See generally Mark Osler, *Amoral Numbers and Narcotics Sentencing*, 47 VAL. U. L. REV. 755, 755 (2013) ("[T]he arbitrary mandatory minimums and sentencing guidelines . . . have too often created broad and often tragic outcomes in our society.").

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Wisconsin enacted its TIS law in 1998.³ I thought that it might be useful to explore how TIS came to be enacted in Wisconsin and to consider whether the law has had negative consequences similar to those resulting from the SRA. Unfortunately, as discussed below, I conclude that it has.

Like many states, when Wisconsin enacted TIS, it abandoned an indeterminate sentencing system that had been in effect for many years. Under the indeterminate system, most offenders became eligible for parole after serving 25% of their sentence and had to be paroled after serving two-thirds of it.⁴ When it enacted TIS, however, Wisconsin abolished parole.⁵ It also abolished the right of an offender to earn credit for good behavior (“good time”) while in prison.⁶ Under TIS, when a judge sentences an offender to prison, the judge imposes a bifurcated sentence consisting of a term of confinement of at least one year followed by a term of extended supervision (“ES”) in the community.⁷ In addition to requiring offenders to serve their entire term of confinement, TIS established harsh rules regarding ES. The ES portion of the bifurcated sentence has to be at least 25% as long as the term of confinement.⁸ Further, offenders who violate ES and are returned to prison receive no sentence credit for time successfully served on ES prior to the violation.⁹

Wisconsin’s TIS law is as harsh as any in the country. By abolishing parole and good time, the law has led to a substantial increase in Wisconsin’s prison population and to skyrocketing corrections costs.¹⁰ TIS has especially harmed efforts to deal constructively with low-level drug offenders. The absence of readily available opportunities for early release deprives many offenders of an incentive to address substance abuse problems. Also, the increased incarceration caused by TIS absorbs funds that could otherwise be used for drug treatment both for offenders in the prison system and on ES. Further, the long periods of ES and the lapses that drug offenders frequently suffer ensnare many offenders in a

³ WIS. STAT. ANN. §§ 973.01 *et. seq.* (West 2007); Thomas J. Hammer, *The Long and Arduous Journey to Truth-in-Sentencing in Wisconsin*, 15 FED. SENT’G REP. 15, 15 (2002). See generally Jessica M. Eaglin, *Neorehabilitation and Indiana’s Sentencing Reform Dilemma*, 47 VAL. U. L. REV. 867 (2013) (discussing Indiana’s struggle to reform its sentencing practices).

⁴ Hammer, *supra* note 3, at 15 & 18 n.4.

⁵ WIS. STAT. § 973.01(6); Hammer, *supra* note 3, at 15.

⁶ Michael B. Brennan & Donald V. Latorraca, *Truth-in-Sentencing Comes to Wisconsin*, WIS. LAW., May 2000, at 14, 17.

⁷ *Id.* at 16.

⁸ *Id.* at 17.

⁹ *Id.* at 56.

¹⁰ Mary Zahn & Gina Barton, *Locked in: The Price of Truth in Sentencing* (Pt. 1), MILWAUKEE J. SENTINEL, Nov. 21, 2004, at 1.

vicious cycle of incarceration and reincarceration. The system might fairly be described as prison on the installment plan.

In the first section of this Article, I discuss how TIS came to be enacted in Wisconsin, and, in the second, I assess in more detail the impact that it has had.

II. THE ENACTMENT OF TIS

In 1994, Congress enacted the Violent Crime Control & Law Enforcement Act.¹¹ The Act included a provision known as the Violent Offender Incarceration and Truth-in-Sentencing Incentive Program (“VOI/TIS”).¹² VOI/TIS was part of an ongoing federal effort to ensure that sentences in criminal cases were both determinate and harsh. Ten years earlier, Congress had enacted the SRA, which abolished parole and substantially restricted the availability of good time at the federal level.¹³ The VOI/TIS program provided incentives for states to adopt similar laws, offering funding to any state that required offenders who committed violent crimes to serve at least 85% of the sentence specified by the sentencing judge.¹⁴ The law did not require states to establish determinate sentences for non-violent offenses, including drug crimes. Some states enacted TIS laws before the federal program took effect, but the program encouraged more to do so. By 2002, forty states had enacted TIS laws.¹⁵

In Wisconsin, federal funding was only a small part of the TIS story. Individual political ambition played a bigger role. As stated, before Wisconsin enacted a TIS law, it had an indeterminate sentencing system in which parole played an important part. An agency known as the Wisconsin Parole Commission administered the parole system. The Commission was chaired by an appointee of the governor, who served at

¹¹ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 42 U.S.C. §§ 2, 15, 16, 18, 21, 28, 31); Joseph P. Tartaro, *The Great Assault Weapon Hoax*, 20 DAYTON L. REV. 619, 619 (1995).

¹² Violent Crime Control and Law Enforcement Act of 1994 §§ 20101 *et seq.*; Environmental Impact Review Procedures for the VOI/TIS Grant Program, 65 Fed. Reg. 48,592 (Aug. 8, 2000) (to be codified at 28 C.F.R. pt. 91).

¹³ *See generally* WILLIAM W. WILKINS, JR., ET AL., U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991) (providing the origins of mandatory minimum penalties and then evaluating their effectiveness).

¹⁴ Paula M. Ditton & Doris James Wilson, *Special Report: Truth in Sentencing in State Prisons*, BUREAU OF JUST. STATS. 3 (Jan. 1999), <http://bjsdata.ojp.usdoj.gov/content/pub/pdf/tssp.pdf>.

¹⁵ Joe Fontaine, *A History of Wisconsin Sentencing – Part XVI*, CORRECTIONS SENT’G (Mar. 27, 2007, 12:00 PM), http://correctionssentencing.blogspot.com/2007/03/history-of-wisconsin-sentencing-part_27.html.

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the governor's pleasure.¹⁶ The other members of the Commission, however, were state employees with civil service protection.¹⁷ The fact that the governor appointed the chair of the Commission ensured that the Commission was accountable to the electorate. The fact that the commissioners had civil service protection was also important, because it meant that commissioners did not have to fear losing their job if they made a parole decision that didn't work out well. Thus, the system blended political accountability and professionalism. The underlying idea was to de-politicize parole decisions and, insofar as possible, ensure that they were made on the merits.

The commissioners traveled throughout Wisconsin interviewing prisoners who were coming up for consideration for parole and making recommendations to the Chair. The Commission's procedures and the manner in which it could exercise discretion were governed by written policies.¹⁸ In addition, the Commission was able to use its release authority to attempt to ensure that offenders with comparable records, offenses, and institutional conduct would serve approximately the same amount of time. The system generally worked well. Interested persons were aware of the policies and criteria that governed parole decisions or could easily discover them. Anybody who cared could find out when a prisoner was coming up for parole. In addition, victims were notified of parole hearings and could provide input.¹⁹ Thus, to characterize the system as something other than truth-in-sentencing, as TIS proponents did, was highly misleading.

Nevertheless, in the United States, criminal justice issues are very politicized. And the fact that tough-on-crime politics had been in vogue for several decades and that other states were adopting TIS laws made Wisconsin's indeterminate sentencing system an attractive target for candidates for statewide office looking for issues to run on in 1994. This was so despite statistics showing that in 1993 crime rates had dropped in almost every category of violent crime.²⁰ Thus, in 1994, candidates challenging incumbents in campaigns for governor and attorney general came out strongly for enacting a TIS law. Democratic State Senate Majority Leader Chuck Chvala, the challenger to Republican Governor

¹⁶ WIS. STAT. ANN. § 15.145(l) (West 2012) (allowing for the governor to appoint the chairperson); WIS. STAT. ANN. § 17.07(3m) (West 2003) (providing the governor with the power to remove the chairperson).

¹⁷ WIS. STAT. ANN. § 15.145(l) (explaining that the other members who were appointed by the chairperson will serve a two-year term).

¹⁸ WIS. ADMIN. CODE PAC §§ 1.01 *et seq.* (1995).

¹⁹ WIS. ADMIN. CODE PAC § 1.05(2).

²⁰ Dennis McCann, *Election-year Rhetoric Takes the Bite out of Upbeat Statistics on Crime*, MILWAUKEE J. SENTINEL, Aug. 3, 1994.

Tommy Thompson, reinvented himself as a tough-on-crime politician and advocated eliminating parole for twenty-seven violent felonies.²¹ Ironically, Chvala himself later went to jail after being charged with various kinds of official misconduct.²² Chvala's assembly counterpart, Republican Assembly Speaker Scott Jensen, another vocal TIS supporter, was also convicted of a crime involving misconduct in office.²³ In any case, Tommy Thompson, although an overwhelming favorite in the race against Chvala, had no intention of allowing himself to be outdone in the tough-on-crime department. Thus, he responded to Chvala's TIS proposal by proclaiming that he supported abolishing parole, not just for certain specified offenses, but for all offenses.²⁴

And even though the attorney general in Wisconsin has almost nothing to do with prosecuting street crime, the Republican challenger to Democratic Attorney General Jim Doyle, Jeff Wagner, a former Assistant U.S. Attorney and now a right wing talk radio host, ran a tough-on-crime campaign calling for the elimination of parole. Wagner characterized parole as a "cruel joke" on the public and opined that dangerous people were being released "way too soon."²⁵ Doyle responded that parole should be subject to strict standards.²⁶ The *Milwaukee Journal Sentinel* called the theme of the 1994 election "A Salute to Crime Busting" and lamented that the candidates would not let statistics get in the way of their tough-on-crime rhetoric.²⁷

Incumbents Thompson and Doyle were both re-elected, and, for a while after the 1994 election, neither said much about TIS. Thompson appointed a task force to explore sentencing and corrections issues but expressed little interest in promoting TIS.²⁸ However, in late 1996, Doyle, who by this time was contemplating a run for governor, released

²¹ Steve Schultze, *Thompson Wants Parole to Halt for All State Crimes*, MILWAUKEE J., Sept. 26, 1994.

²² *Chuck Chvala Timeline*, CHANNEL3000 (last updated Dec. 15, 2005, 12:24 PM), <http://www.channel3000.com/news/Chuck-Chvala-Timeline/-/1648/8290248/-/hlxqeez/-/index.html>.

²³ Ann Babe, *Jensen Officially Leaves Post*, THE BADGER HERALD (Mar. 22, 2006, 12:00 AM), http://badgerherald.com/news/2006/03/22/jensen_officially_le.php.

²⁴ Schultze, *supra* note 21 ("When a police officer captures a criminal and a judge sends him to prison, he should stay there until his full sentence is served—period,' [Gov.] Thompson said in his speech to the Wisconsin Professional Police Association.").

²⁵ Craig Gilbert, *Doyle Faces Republican Challenger*, MILWAUKEE J., Mar. 1, 1994; Eldon Knoche, *Wagner Due to Announce Candidacy for Attorney General*, MILWAUKEE SENTINEL, Mar. 1, 1994, at 5A.

²⁶ Gilbert, *supra* note 25 ("Doyle does not favor total abolition of parole, but has said it should be subject to tight standards.").

²⁷ McCann, *supra* note 20.

²⁸ Fontaine, *supra* note 15.

a fully developed TIS proposal.²⁹ Doyle's plan contemplated that only model inmates could be considered for parole and only after they had served 85% of their sentences.³⁰ He argued that TIS would "build public confidence in the corrections system."³¹ Doyle also proposed creating a sentencing commission to gather data and assist judges in modifying their sentencing practices to reflect the changes that a TIS law would bring about.³² He also advocated allocating 1% of the corrections budget to child abuse prevention.³³

Thompson, who perceived Doyle as a threat, responded with what he characterized as an "absolute" TIS proposal and included it in his 1997-98 budget bill.³⁴ Thompson dismissed Doyle's proposal as "not real truth-in-sentencing" and supported abolishing parole entirely and requiring all offenders to serve 100% of their sentence.³⁵ Other political actors also weighed in. Judge Patrick Crooks, campaigning for a seat on the Wisconsin Supreme Court, called for certainty in sentencing.³⁶ Milwaukee Mayor John Norquist suggested that parole be eliminated and unveiled a "Parole Stop" program calling for the City to oppose the early release of many inmates.³⁷ Victims' rights groups also initiated a petition drive supporting Doyle's TIS proposal.

Thus, the political momentum in support of TIS grew, even though Wisconsin's crime rate continued to fall. Between 1993 and 1998, the crime rate fell by almost 15%.³⁸ However, partisan differences remained. Besides Thompson, the principal Republican proponent of TIS was State Representative and future Governor, Scott Walker. Walker argued that TIS would provide the public with certainty about how much time an offender would serve in prison and would allow elected judges to make decisions about the length of incarceration rather than the unaccountable

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*; see also Alan J. Borsuk, *Thompson, Doyle Differ on Sentencing Overhaul*, MILWAUKEE J. SENTINEL, May 25, 1997, at 14A ("[Doyle] added, 'What we clearly need is a commission that has a very direct and limited charge to revamp the penalties in our criminal code to put in effect truth in sentencing.'").

³³ Fontaine, *supra* note 15.

³⁴ A.B. 100, 1997-98 Leg. (Wis. 1997).

³⁵ Fontaine, *supra* note 15.

³⁶ Richard P. Jones, *Crooks Campaigning for Tough Crime Laws*, MILWAUKEE J. SENTINEL, Jan. 26, 1996.

³⁷ Richard P. Jones, *State Tab for Norquist Plan to End Parole Is Put at \$35.7 Million*, MILWAUKEE J. SENTINEL, Apr. 9, 1996, at 5B.

³⁸ *Wisconsin Crime Rates 1960-2011*, THE DISASTER CTR., <http://www.disastercenter.com/crime/wicrime.htm> (last visited Mar. 13, 2013). In 1993, 204,244 total crimes were recorded in Wisconsin, and, in 1998, 185,093 total crimes were recorded. *Id.*

Wisconsin Parole Commission.³⁹ Walker denied that TIS was intended to make sentences longer.⁴⁰ However, unlike Doyle's proposal, Thompson's proposal did not include a sentencing commission to assist judges in modifying their sentencing practices to take the abolition of parole into account.⁴¹ Walker argued that the elimination of parole would automatically cause judges to impose lower sentences.⁴²

Although Democrats declined to debate the ideas underlying the TIS proposal—that the parole system failed to provide the public with sufficient certainty about sentences and that judges, rather than the Parole Commission, should decide when prisoners should be released—they criticized features of the Republican plan. They disputed Republican claims that offenders would not serve longer sentences under TIS and argued that the state prison population and state corrections costs would increase substantially.⁴³ The partisan disagreement led to the removal of TIS from the budget bill.⁴⁴ In May 1997, however, Walker and others introduced the Republican TIS proposal as a separate bill, Assembly Bill 351, which ultimately became the vehicle by which TIS was enacted in Wisconsin.

The American Legislative Exchange Council ("ALEC") also played an important role in bringing TIS to Wisconsin. ALEC is an organization that brings together fee-paying corporations and conservative state legislators to develop "model" legislative proposals.⁴⁵ Its primary purpose is to develop bills that benefit its corporate members and further conservative causes.⁴⁶ For example, ALEC has promoted "stand your ground" self-defense laws of the type at issue in the case involving the

³⁹ Joe Fontaine, *A History of Wisconsin – Part XVII*, CORRECTIONS SENT'G (Mar. 30, 2007, 2:48 PM), <http://correctionssentencing.blogspot.com/2007/03/history-of-wisconsin-part-xvii.html>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* ("Republicans repeatedly claimed that judges would control sentences on their own. Rep. Mark Green . . . argued that judges 'who have been giving out longer sentences in order to make sure inmates serve a specific time behind bars would probably give shorter sentences' if offenders were guaranteed to serve their full terms.").

⁴³ Joe Fontaine, *A History of Wisconsin Sentencing – Part XVIII*, CORRECTIONS SENT'G (Apr. 2, 2007, 9:14 AM), <http://correctionssentencing.blogspot.com/2007/04/history-of-wisconsin-sentencing-part.html>.

⁴⁴ Joe Fontaine, *A History of Wisconsin Sentencing – Part XIX*, CORRECTIONS SENT'G (Apr. 9, 2007, 2:41 PM), http://correctionssentencing.blogspot.com/2007/04/history-of-wisconsin-sentencing-part_09.html.

⁴⁵ Rachel Weiner, *How ALEC Became a Political Liability*, WASH. POST (Apr. 24, 2012), http://www.washingtonpost.com/blogs/the-fix/post/how-alec-became-a-political-liability/2012/04/24/g1QA3QnyeT_blog.html

⁴⁶ *Frequently Asked Questions*, ALEC.ORG, <http://www.alec.org/about-alec/frequently-asked-questions/> (last visited Mar. 3, 2012).

death of Trayvon Martin, and “show me your papers” laws, such as Arizona adopted as part of its effort to deal with illegal immigration.⁴⁷ For decades, the National Rifle Association has “helped bankroll ALEC operations and even co-chaired ALEC’s ‘Public Safety and Elections Task Force[.]’”⁴⁸

During the 1990s, the Corrections Corporation of America (“CCA”), the country’s largest operator of private prisons, was an active member of ALEC and pushed for the development of legislation that would increase the number of people incarcerated.⁴⁹ Among the bills that ALEC developed was a model TIS law. In 1995 alone, ALEC’s TIS proposal was signed into law in twenty-five states.⁵⁰ Scott Walker was a member of ALEC, and the TIS bill that he introduced was based on ALEC’s model law.⁵¹ Walker also used statistics and talking points developed by ALEC to argue in support of his proposal.⁵²

Walker’s TIS bill passed the Assembly, but ran into trouble in the Democratic-controlled Senate.⁵³ As discussed, the Senate was not opposed to TIS, but only to the harsh Republican version of it. The Senate passed a TIS bill which required offenders to serve 75% rather than 100% of their sentence in custody.⁵⁴ The Assembly killed the Senate version of TIS, characterizing it as a proposal that would “put criminals back on the street faster,” a curious statement in view of the assertion that TIS was about certainty rather than severity.⁵⁵ Ultimately, Thompson and Doyle sat down and negotiated a TIS bill, and Thompson clearly got the better of Doyle in the negotiations. Doyle agreed to accept Thompson’s proposal that offenders be required to serve 100% of their sentence. In return, Thompson agreed to very little—a committee to address implementation issues and an increase in child abuse prevention funding.⁵⁶ The legislature proceeded to pass the Thompson-Doyle

⁴⁷ Weiner, *supra* note 45; John M. Gillionna, *Arizona Immigration: ‘Show Me Your Papers’ Enforcement to Begin*, L.A. TIMES, Sept. 18, 2012, <http://articles.latimes.com/2012/sep/18/nation/la-na-nn-arizona-immigration-20120918>.

⁴⁸ Lisa Graves, *Backgrounder: The History of the NRA/ALEC Gun Agenda*, PR WATCH (Dec. 15, 2012, 12:32 PM), <http://www.prwatch.org/news/2012/12/11908/nraalec-reactionary-gun-agenda>.

⁴⁹ Mike Elk & Bob Sloan, *The Hidden History of ALEC and Prison Labor*, THE NATION (Aug. 1, 2011), <http://www.thenation.com/article/162478/hidden-history-alec-and-prison-labor#>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Fontaine, *supra* note 44.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Fontaine, *supra* note 15.

“compromise,” and, in June 1998, Thompson signed it into law “proclaiming that it was ‘not a good day for the bad guys in Wisconsin,’” another odd statement given the stated purpose of the law.⁵⁷

Several points about the emergence and enactment of TIS legislation in Wisconsin are worth further mention. First, few, if any, legislators made an effort to defend indeterminate sentencing, notwithstanding that the indeterminate sentencing system had served Wisconsin well for many years. One argument against TIS laws is that it does not make sense to impose a punishment on an offender who is say 18, and never modify it no matter how much the offender may change in subsequent years. Put differently, the argument is that a system that imposes the identical punishment on prisoners, without regard to their performance in prison, creates less prisoner accountability than a system that rewards prisoners who attempt to rehabilitate themselves. Undoubtedly, this was a difficult argument to make, particularly when a Republican governor and a Democratic attorney general both supported the abolition of parole and good time. But legislators were clearly reluctant even to suggest that some prisoners actually change for the better and that one of the responsibilities of an effective corrections system is to encourage such change.

Second, during roughly the same period in which TIS was enacted, police in Milwaukee County began to arrest a large number of low-level crack offenders.⁵⁸ At the same time, the Milwaukee County District Attorney adopted a policy of seeking prison sentences in almost all drug cases.⁵⁹ Further, judges in Milwaukee County began to express a lack of confidence in the probation system.⁶⁰ The result of these occurrences was that very few low-level drug offenders in Milwaukee County received sentences of probation.⁶¹ Wisconsin judges generally sentenced low-level “possession with intent to sell” drug offenders to about two years.⁶² But in counties other than Milwaukee, judges generally placed the offenders on probation first.⁶³ Thus, the prison sentence took effect only if probation was revoked. Milwaukee County judges, however,

⁵⁷ Joe Fontaine, *A History of Wisconsin Sentencing—Part XX*, CORRECTIONS SENT’G (Apr. 13, 2007, 9:04 AM), <http://correctionssentencing.blogspot.com/2007/04/history-of-wisconsin-sentencing-part-xx.html>.

⁵⁸ JUDITH GREENE & KEVIN PRANIS, JUST. STRATEGIES, TREATMENT INSTEAD OF PRISONS: A ROADMAP FOR SENTENCING AND CORRECTIONAL POLICY REFORM IN WISCONSIN 31 (2006).

⁵⁹ *Id.* at 33.

⁶⁰ *Id.* at 22.

⁶¹ *Id.*

⁶² *Id.* at 46.

⁶³ *Id.* at 22.

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sent most of these drug offenders directly to prison.⁶⁴ Thus, Milwaukee County put more offenders in prison than all other counties put together.⁶⁵ Further, some 80% to 90% of those Milwaukee County imprisoned were African-Americans.⁶⁶ Unfortunately, neither the governor, the attorney general, nor the legislature made any effort to address the perceived problems with probation in Milwaukee County or the disproportionate imprisonment of low-level drug offenders who were African-American. Instead, they chose to focus on enacting TIS.

Third, there is an interesting parallel in the way that Wisconsin supporters of TIS promoted their bill and the way proponents of the SRA operated. In both cases, proponents attempted to avoid placing primary emphasis on the fact that their proposals would result in much harsher sentences. In the case of TIS, supporters like Walker emphasized that the bill would create certainty about how much time offenders would serve in prison and that this would be an important public benefit. Proponents of the SRA also downplayed the punitive nature of their bill, stressing instead that it would reduce sentencing disparity and that this too would constitute an important public benefit.⁶⁷ Both the certainty argument and the reducing disparity argument sounded relatively neutral and made the bills in question seem almost like good government bills, rather than legislation that would imprison a vast number of people—mostly African-Americans—for a very long time. Although clearly aware that the principal appeal of their bills was to the public's punitive impulses, proponents seemed to want to avoid making the appeal embarrassingly blatant. Thus, they came up with catchy but misleading labels like “truth-in-sentencing” and “sentencing reform.”

In some states, like New York, policymakers have considerably reduced prison populations by establishing effective alternatives to prison for many drug offenders.⁶⁸ In the late 1990s and early 2000s, however, Wisconsin was not among them. Wisconsin has a history of progressivism in addressing criminal justice issues. For example, it

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 MARQ. L. REV. 1551, 1588 n.171 (2012).

⁶⁷ S. REP. NO. 98-1030, at 41-50 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3224-33.

⁶⁸ Mary Beth Pfeiffer, *Analysis: NY Prison Population's Dramatic Drop*, NBC N.Y. (Oct. 16, 2011, 12:58 PM), <http://www.nbcnewyork.com/news/local/Rockefeller-Drug-Laws-40-Years-Later-Prison-Population-Drug-Law-Reform-Act-131946193.html> (following a change of course in New York state drug policies, there was a sixty percent decline in inmates serving for drug crimes between 2000 and 2011).

abolished the death penalty in 1853 and has never reinstated it.⁶⁹ But in recent years, Wisconsin has been far from progressive.

III. THE IMPACT OF TIS

In the decade after it took effect, TIS created so many problems that the legislature had to revise it at least three times.⁷⁰ It is not an exaggeration to say that the legislature's work on TIS provides an excellent case study in how not to legislate. First, when it enacted TIS, the legislature delayed the law's effective date until the end of 1999 to allow time to develop supplemental legislation that presumably had to be passed before TIS took effect.⁷¹ The legislature also created a Criminal Penalties Study Committee ("CPSC") to draft such legislation. The CPSC was intended to identify and propose changes made necessary by TIS and to provide sentencing guidance to judges in a world in which offenders could no longer be paroled.

The expectation was that post-TIS sentences would be structured so that confinement periods would approximate the time offenders served in prison under the parole system. In August 1999, the CPSC recommended numerous changes, including: (1) the establishment of a new crime classification system with nine classes of offenses; (2) advisory sentencing guidelines; and (3) a sentencing commission to collect data about judicial sentencing practices.⁷² The CPSC based the new maximum periods of confinement on the time that offenders served before reaching their mandatory parole date under the old law.⁷³ Of course, the CPSC could not ensure that judges would modify their sentencing practices to reflect that prisoners would no longer be paroled.

Notwithstanding that the CPSC bill was supposed to be essential to TIS, it was not enacted until two and a half years after TIS took effect.⁷⁴ The CPSC legislation stalled because the Senate Judiciary Committee Chair, Gary George, who represented an African-American district in Milwaukee's inner city, sought changes in the bill. George correctly perceived that under TIS offenders would serve much more time in prison than they had under indeterminate sentencing and wanted to use

⁶⁹ Alexander T. Pendleton & Blaine R. Renfert, *A Brief History of Wisconsin's Death Penalty*, WIS. LAW., 2003, <http://www.wisbar.org/AM/Template.cfm?Section=Search&template=/cm/htmldisplay.cfm&contentid=50092>.

⁷⁰ 2001 Wis. Act 109 §§ 1114-31; 2003 Wis. Act 33 §§ 2749-51; 2005 Wis. Act 277 §§ 88-89.

⁷¹ WIS. STAT. ANN. § 973.01(1) (West 2007); Fontaine, *supra* note 57.

⁷² Hammer, *supra* note 3, at 16-17.

⁷³ *Id.* at 16.

⁷⁴ 2001 Wis. Act 109.

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the CPSC bill to soften TIS.⁷⁵ Among other changes, George wanted to add provisions allowing judges to modify inmates' sentences based on new information and to adjust the sentences of elderly inmates who were not a threat to public safety.⁷⁶ George's efforts mostly failed, but he did obtain a revision allowing certain offenders to petition the sentencing judge for early release after having served 75% or 85% of their sentence, depending on the seriousness of their offense.⁷⁷

In practice, however, George's early release provision had little effect. This was so because the pro-punishment forces insisted on a provision authorizing the prosecutor and, in some cases, the victim to veto any sentence adjustment.⁷⁸ Prosecutorial vetoes became routine and few inmates obtained early release. The prosecutor's veto was ultimately held to violate the separation of powers and is now void, although the statute has not changed.⁷⁹ The victim's veto has never been litigated, although it too would likely be found unconstitutional.

George's holding up of the CPSC bill, however, caused serious harm to the thousands of offenders who had the misfortune to be sentenced in the two and a half years that elapsed between TIS's taking effect and the enactment of the CPSC bill. These offenders were sentenced under a penalty structure that had not been modified to reflect the abolition of parole. As the reporter for the committee that drafted the CPSC bill wrote, "[I]t is difficult to imagine a more dreadful way to transition" from indeterminate sentencing to determinate sentencing.⁸⁰

At this point, at least for a short period of time, the legislature stepped away from TIS. However, the law had created numerous problems that cried out to be addressed. In 2004, the *Milwaukee Journal Sentinel* published a series of articles entitled *Locked in: The Price of Truth in Sentencing*, which focused on the costs of the new law.⁸¹ The series projected that TIS's cost would be enormous and pointed out that before enacting TIS, the legislature had not bothered to obtain an estimate of the fiscal impact that the law would have.⁸² The series prompted lawmakers to promise reforms, but none immediately materialized.

⁷⁵ Hammer, *supra* note 3, at 17; Joe Fontaine, *A History of Wisconsin Sentencing – Part XXXI, CORRECTIONS SENT'G* (June 18, 2007, 4:33 PM), http://correctionssentencing.blogspot.com/2007/06/history-of-wisconsin-sentencing-part_18.html.

⁷⁶ Fontaine, *supra* note 75.

⁷⁷ Hammer, *supra* note 3, at 17.

⁷⁸ WIS. STAT. ANN. § 973.195(c)-(d) (West 2007); 2001 Wis. Act 109 § 1143m.

⁷⁹ State v. Stenklyft, 697 N.W.2d 769 (Wis. 2005).

⁸⁰ Hammer, *supra* note 3, at 17.

⁸¹ Zahn & Barton, *supra* note 10.

⁸² *Id.*

In 2008, however, Doyle, who had been elected governor after Thompson, became a member of President George W. Bush's administration, and a number of concerned legislators asked the Council of State Governments' Justice Center ("Justice Center") to study TIS.⁸³ As governor, Doyle was responsible for paying for TIS, and his attitude toward the law changed considerably. Unsurprisingly, Doyle became far less enthusiastic about TIS than he had been when he was attorney general and a soon to be candidate for governor. Although the Justice Center did not expressly recommend that parole be reinstated, it might as well have in that it proposed that the legislature create a number of new vehicles by which inmates could obtain early release from prison. It also recommended limiting ES to 75% of confinement time for most offenders and limiting reconfinement time to six months for offenders whose ES was revoked for reasons other than having committed a new offense.⁸⁴

Based largely on the Justice Center's recommendations, the legislature proceeded to enact a TIS reform package.⁸⁵ The package included a number of avenues by which inmates could earn early release, and it authorized the Department of Corrections to release non-violent offenders to ES up to a year prior to their scheduled release date and to release elderly prisoners and those with extraordinary health conditions.⁸⁶ It also allowed offenders who successfully completed two years of ES to terminate supervision.⁸⁷

Unfortunately, each of the various early release programs involved different procedures and was governed by different standards. In addition, the programs overlapped. Thus, prisoners seeking to obtain early release, almost all of whom were without counsel, found the application process extremely complicated and confusing. Further, the Department of Corrections took several years to come up with administrative rules to govern each of the early release programs. And by the time the administrative rules were ready, the effort to reform TIS was destroyed entirely. This was so because, in 2010, Scott Walker succeeded Doyle as governor, and the Republicans took control of both

⁸³ JUSTICE CTR., JUSTICE REINVESTMENT IN WISCONSIN: ANALYSES & POLICY OPTIONS TO REDUCE SPENDING ON CORRECTIONS AND INCREASE PUBLIC SAFETY 1 (2009), available at <http://justicereinvestment.org/states/wisconsin/pubmaps-wi>.

⁸⁴ *Id.* at 5.

⁸⁵ 2009 Wis. Act 28 §§ 3378-81.

⁸⁶ Michael B. Brennan, *The Pendulum Swings: No More Early Release*, WIS. LAW., Sept. 2011, at 4, 7, available at http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/CM/ContentDisplay.cfm&contentid=105392.

⁸⁷ *Id.*

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houses of the legislature.⁸⁸ With Walker's encouragement, the new legislature promptly enacted a law repealing almost all of the provisions in the Justice Center's reform package.⁸⁹

Thus, after more than a decade of legislating, the TIS law today is pretty much the law that Thompson and Walker proposed in the late 1990s and that the legislature enacted with Doyle's approval. As the law stands, felons receive a bifurcated sentence consisting of a term of confinement and a term of ES. In determining the length of the confinement period, the judge is constrained by the statutory maximum. Prisoners typically serve 100% of their term of confinement and offenders who violate ES are often re-confined.⁹⁰ Although there are some limits on the length of the initial ES term, many offenders serve very long periods of ES. Obtaining early release is extremely difficult. Prisoners with substance abuse problems may obtain early release by participating in a boot camp program that pre-dated TIS, but spots in the program are hard to come by. Prisoners can apply for early release after serving 75% or 85% of their sentence, depending on their offense, but very few succeed.⁹¹ Many judges are reluctant to grant early release, and offenders can only apply once. The Department of Corrections may release elderly or sick prisoners but rarely does so.⁹²

As mentioned, Wisconsin's TIS law is very harsh. First, unlike many jurisdictions which require offenders to serve 75% or 85% of their confinement time, Wisconsin requires inmates to serve 100%.⁹³ Second, Wisconsin's law applies not only to offenders who commit violent crimes, but to all offenders, including those who commit drug offenses.⁹⁴ Third, Wisconsin permits no credit for good time, while at the same time it punishes for bad time. It does so by adding confinement time to the

⁸⁸ Jennifer C. Kerr, *State Elections: Republicans Gain Control of Key State Legislatures*, HUFFINGTON POST (Nov. 3, 2010, 4:37 PM), http://www.huffingtonpost.com/2010/11/03/state-elections-legislatures_n_778103.html?; *Wisconsin: GOP Wins Senate, House, Gov. Seats, Ousting Feingold*, USA TODAY (Nov. 3, 2010, 3:03 AM), http://usatoday30.usatoday.com/news/politics/2010-11-02-wi-full-election-results_N.htm (discussing the significant swing of power in Wisconsin politics during the 2010 elections).

⁸⁹ 2011 Wis. Act. 38 §§ 88-91.

⁹⁰ David Doege, *Sentencing Law Fills Cells: Slip-ups on Extended Supervision Can Add to Truth-in-Sentencing Terms*, MILWAUKEE J. SENTINEL, Oct. 31, 2007, <http://www.jsonline.com/news/wisconsin/29391614.html>.

⁹¹ Brennan, *supra* note 86, at 6.

⁹² Norris, *supra* note 66, at 1591 ("[O]ver the last two years, only six inmates achieved compassionate release, a small fraction of the thirty to fifty inmates who die in prison each year.") (footnote omitted). Since the 2011 legislation, a DOC compassionate release must be judicially reviewed. *Id.* at 1590.

⁹³ Brennan, *supra* note 86, at 7.

⁹⁴ WIS. STAT. ANN. § 973.01(1) (West 2007).

confinement period of an offender who misbehaves.⁹⁵ Fourth, Wisconsin bars offenders whose ES is revoked from receiving sentence credit for time they previously served successfully on ES.⁹⁶ These features set Wisconsin's law apart.

The law has led to a large increase in Wisconsin's prison population and dramatically affected the state's budget. In 2004, the *Milwaukee Journal Sentinel* estimated that, as the result of TIS, the biennial cost of corrections in Wisconsin would rise from \$700 million in 1999 to \$1.8 billion by 2025.⁹⁷ As it turned out, the *Journal Sentinel's* estimate was far too low. Walker's 2011–2013 budget allocated \$2.25 billion dollars to the Department of Corrections.⁹⁸ For the first time in history, Wisconsin budgeted more money for prisons than for the University of Wisconsin System.⁹⁹ As recently as 1992, the University's budget was three times as large as the state's corrections budget.¹⁰⁰ At present, the only state programs that involve larger expenditures than corrections are aid to schools and local governments and medical assistance.¹⁰¹

The *Journal Sentinel's* analysis concluded that, aside from cost, TIS had other negative effects. Because of the increased number of prisoners and the shortage of prison programming, "thousands of inmates are on waiting lists for prison jobs, education and treatment programs."¹⁰² Wardens reported that TIS led to increases in bad conduct by inmates and feelings of hopelessness precipitated by the lack of an opportunity to earn good time credit and obtain early release.¹⁰³ The wardens also noted that it was difficult to motivate inmates to participate in substance abuse treatment programs while in prison because of the absence of an incentive.¹⁰⁴ At one prison, 168 offenders refused to take part in a treatment program and 131 of these were TIS inmates.¹⁰⁵ Of course,

⁹⁵ WIS. STAT. ANN. § 302.11(2) (West 2010).

⁹⁶ WIS. STAT. ANN. § 302.113(9)(am) (West 2010).

⁹⁷ Zahn & Barton, *supra* note 10.

⁹⁸ Alison Bauter, *As Priorities Shift, Corrections Budget Passes UW System*, MILWAUKEE J. SENTINEL, Aug. 16, 2012, <http://www.jsonline.com/news/statepolitics/wisconsin-corrections-spending-passes-that-of-uw-system-ua62t4k-166039926.html>.

⁹⁹ *Id.*

¹⁰⁰ See Zahn & Barton, *supra* note 10 (explaining that in a dozen years prior to the 2004 article, the university system was budgeted for three times as much as correctional facilities).

¹⁰¹ Bauter, *supra* note 98.

¹⁰² Zahn & Barton, *supra* note 10.

¹⁰³ *Id.*

¹⁰⁴ Mary Zahn, *Inmates Less Motivated, Wardens Find*, MILWAUKEE J. SENTINEL, Nov. 22, 2004, at 14A ("They know they are not going to get out any earlier, so they simply don't want to take the time to do the programming and don't want to invest in it . . .") (internal quotations omitted).

¹⁰⁵ *Id.*

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prisoners who do not participate in treatment programs are at greater risk of substance abuse when released.

The *Journal Sentinel* also found that, as a result of TIS, offenders served more time in prison both as a result of their original sentence and for violations of ES.¹⁰⁶ This finding indicated that if judges were reducing sentences in response to TIS, they were not reducing them enough to offset the effect of TIS's elimination of parole. This was predictable, notwithstanding that Walker and other TIS proponents denied an interest in lengthening offender sentences. Judges also imposed lengthy periods of ES, often substantially more than the TIS minimum of 25% of confinement time.¹⁰⁷ This, of course, made it more likely that offenders would at some point violate the ES portion of their sentence. It is ironic that Milwaukee County judges, who not long before had expressed little or no faith in the probation system, frequently imposed lengthy periods of ES, thus placing offenders under the supervision of the probation system that they so mistrusted.

The *Journal Sentinel* also found that, for most inmates, the early release provisions had little value. Ordinary inmates rarely obtained early release, and elderly prisoners, even those near death, fared only slightly better.¹⁰⁸ Inmates over sixty-five can petition for early release if they have served five years or more, and prisoners over sixty may do so if they have served ten years or more.¹⁰⁹ By 2003, the number of elderly prisoners exceeded 6,500.¹¹⁰ This led to an enormous increase in prisoners' medical expenses with the cost exceeding \$30 million annually.¹¹¹

The 2009 *Justice Center Report* reached conclusions similar to the *Milwaukee Journal Sentinel's*. The Justice Center found that between 2000 and 2007, Wisconsin's prison population increased by 14% and that the average length of confinement increased by 29%.¹¹² The study projected an additional increase in the prison population of 25% by 2019.¹¹³ It also noted that prisons were overcrowded and that the state would have to build additional facilities.¹¹⁴ One cause of the increased prison

¹⁰⁶ *Id.*

¹⁰⁷ Zahn & Barton, *supra* note 10.

¹⁰⁸ Mary Zahn & Gina Barton, *Door on Early Release Closes Tightly*, MILWAUKEE J. SENTINEL, Nov. 22, 2004, at 1A, 15A.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 15A.

¹¹¹ *Id.*

¹¹² See JUSTICE CTR., *supra* note 83, at 3, 5 (providing a fourteen percent population increase and an extension of the confinement period from thirty-one months to forty).

¹¹³ *Id.* at 3.

¹¹⁴ *Id.* (anticipating a \$2.5 billion cost to the state of Wisconsin in order to reduce and accommodate prison overcrowding).

population was the repeated re-incarceration of offenders on supervision. Under TIS, the average length of post-release supervision increased by 135%.¹¹⁵ And, by the end of 2007, more than half the prison population consisted of inmates who had violated supervision, a 40% increase over pre-TIS numbers.¹¹⁶ In the years since the Justice Center's report, prison admissions have declined, but the prison population has continued to increase.

TIS has particularly undermined Wisconsin's opportunity to deal constructively with low-level drug offenders. Most drug offenders have a substance abuse problem, and many can benefit from effective treatment. Offenders who complete treatment programs are much less likely to re-offend than those who do not.¹¹⁷ Thus, good treatment programs, both within and outside of prisons, are essential if a state is to deal effectively with drug offenders. As discussed, TIS made it less likely that such treatment would be available and that, if it was, offenders would take advantage of it.

The longer incarceration periods brought about by TIS has greatly harmed the African-American community in Milwaukee. Many young African-American males experience incarceration, and it has a highly negative effect on their life prospects. Their employment possibilities are reduced, they suffer a 30–40% loss of income, their domestic partnerships are often ruptured, and their marriage prospects undermined. They also suffer a profound social exclusion, making it more likely that they will become recidivists and return to prison. In addition, incarceration divides minority communities, as the experience of pervasive imprisonment is generally confined to those who are less educated.¹¹⁸

Thus, TIS has greatly harmed Wisconsin. In recent years, some public officials have begun to understand this and have taken steps to mitigate the harm. For example, policymakers have attempted to develop more effective substance abuse treatment programs that can serve as alternatives to incarceration. In the 2005–2007 budget, the legislature created a program known as the Treatment Alternatives and Diversion ("TAD") program.¹¹⁹ The legislation authorized "grants to

¹¹⁵ *Id.* at 5.

¹¹⁶ *Id.* at 4.

¹¹⁷ BETH M. HUEBNER, DRUG ABUSE, TREATMENT, AND PROBATIONER RECIDIVISM 9, <http://www.icjia.state.il.us/public/pdf/ResearchReports/Drug%20Abuse%20Treatment%20and%20Probationer%20Recidivism.pdf> (last visited Aug. 22, 2013).

¹¹⁸ BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 18 (2006).

¹¹⁹ WIS. STAT. ANN. § 16.964(12) (West 2012); *Treatment Courts and Diversion Programs*, OFF. OF JUST. ASSISTANCE, <http://oja.state.wi.us/programs/criminal-justice/treatment-courts-and-diversion-programs> (last visited Apr. 3, 2013, 9:04 PM).

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counties to enable them to establish and operate programs, including suspended and deferred prosecution programs and programs based on principles of restorative justice, that provide alternatives to prosecution and incarceration for criminal offenders who abuse alcohol or other drugs.”¹²⁰ The TAD program currently provides funding to seven counties, four of which use the money to fund adult drug treatment courts.¹²¹ The other three, including Milwaukee County, utilize diversion models, in which specialists screen non-violent offenders with substance abuse problems to determine whether they can be diverted into community-based substance abuse treatment programs rather than being sent to prison.¹²²

The program has been quite successful. Offenders who participate in it are much less likely to be convicted of a new offense within three years; offenders who complete the program are even less likely to be convicted.¹²³ The program is also cost effective. One analysis concluded that every dollar spent on the TAD program brought almost two dollars in savings as the result of averted incarceration and reduced crime.¹²⁴ The benefits resulting from offenders obtaining employment are probably even greater. Wisconsin could benefit greatly by expanding the TAD program and by creating other substance abuse treatment programs for offenders. The *2009 Justice Center Report* called for expanding drug and alcohol treatment programs for offenders on ES as a critical ingredient in a TIS reform package.¹²⁵ It projected that a comprehensive program would save the state some \$2.3 billion.¹²⁶

Nevertheless, the problem of effectively addressing the problem of low-level drug offenders in the context of the TIS law remains. Wisconsin policymakers have been aware of this problem since TIS went into effect. Ironically, in its final report, the CPSC noted the “enormous consumption of prison resources by those convicted of drug offenses, the

¹²⁰ KIT R. VAN STELLE, JANA E. GOODRICH & JASON PALTZER, UNIV. OF WIS. POPULATION HEALTH INST., TREATMENT ALTERNATIVES AND DIVERSION (TAD) PROGRAM: ADVANCING EFFECTIVE DIVERSION IN WISCONSIN 1 (2011), <http://uwphi.pophealth.wisc.edu/about/staff/van-stelle-kit/tad-2011-evaluation-report-exec-summary.pdf> (quoting WIS. STAT. ANN § 16.964(12)(b) (West 2012)).

¹²¹ *Id.*

¹²² Felicia Thomas-Lynn, *400 Diverted into Treatment, Freeing Courts, Jail Space*, MILWAUKEE J. SENTINEL, Apr. 28, 2008, <http://www.jsonline.com/news/milwaukee/29594564.html>.

¹²³ VAN STELLE ET AL., *supra* note 120, at 3.

¹²⁴ *Id.* at 5.

¹²⁵ JUSTICE CTR., *supra* note 83, at 11.

¹²⁶ *See id.* at 10-11 (“Averted costs are based on the Wisconsin Department of Corrections’ estimates of cumulative construction and operating costs to accommodate the projected growth in the prison population [between 2010-2019].”).

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inadequacy of treatment programs for those who are both convicted and addicted, and the insufficiency of innovative responses to the drug problem"¹²⁷ The CPSC called for a comprehensive review of the state's drug policies regarding treatment, punishment, and enforcement. State policymakers, unfortunately, have never conducted such a review, and, after the various revisions of TIS discussed above, the TIS law remains much as it was when originally enacted and the issues noted by the CPSC remain largely unaddressed.

¹²⁷ THOMAS H. BARLAND ET AL., CRIMINAL PENALTIES STUDY COMMITTEE: FINAL REPORT 158 (1999), http://www.doa.state.wi.us/docs_view2.asp?docid=42.