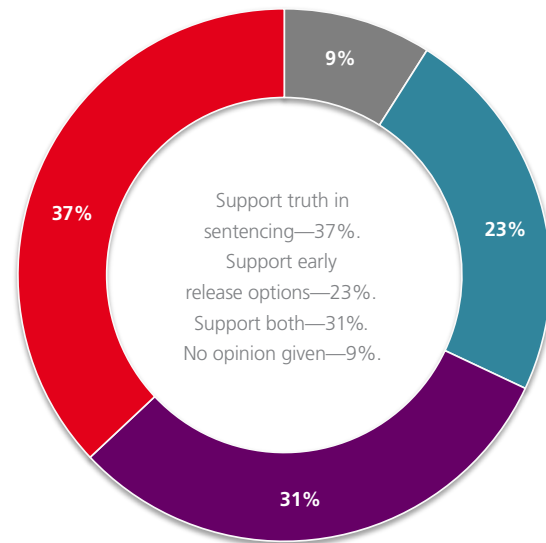


# Yes, No, and It Depends

## Flexible Middle Ground on Inflexible Sentences Could Indicate Paths for New Policies

By Alan J. Borsuk



Yes or no—are you in favor of Wisconsin’s truth in sentencing? Or is there an important answer that lies somewhere in between?

“Tough on crime” politics often makes issues such as fixed sentences and early release of convicts from prison seem like they come with clear-cut dividing lines, with the preponderance of public opinion favoring the harder line.

But a groundbreaking examination of public opinion in Wisconsin, using results from the Marquette Law School Poll, finds that *three* substantial camps exist

when it comes to questions such as whether there should be ways to release people from prison before they have served their full terms: Yes, no, and it depends on some specific factors.

That third group’s views are shaped in important ways by moral perspectives on what is the right thing to do, as much as or more than they are by factors such as saving money through reducing the prison population, said Michael O’Hear, Marquette Law School professor of law and associate dean for research.

O’Hear and Darren Wheelock, an associate professor in Marquette’s Department of Social and Cultural Sciences, analyzed responses to questions related to “truth in sentencing” that were asked during the Marquette Law School Poll conducted in July 2012 and July 2013. The poll results showed

strong support for the truth-in-sentencing law: for example, 66 percent of those in the July 2013 sample agreed that “truth in sentencing should continue to be the law in Wisconsin,” while 27 percent disagreed.

But O’Hear and Wheelock also found more than 50 percent of those polled in support of policies that, in practice, would allow some inmates to be released before serving their full sentences—contrary to the core notion of truth in sentencing.

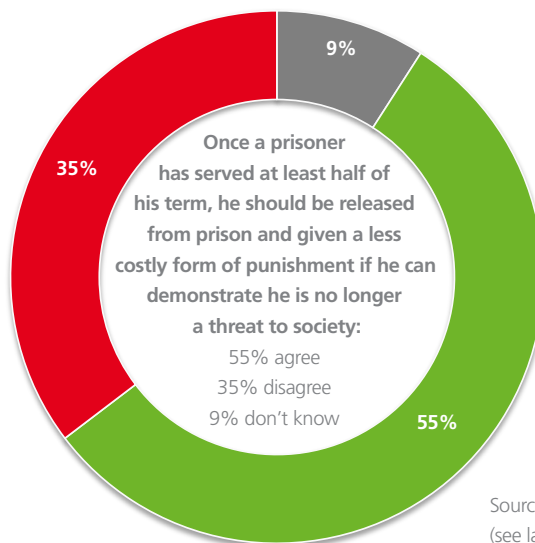
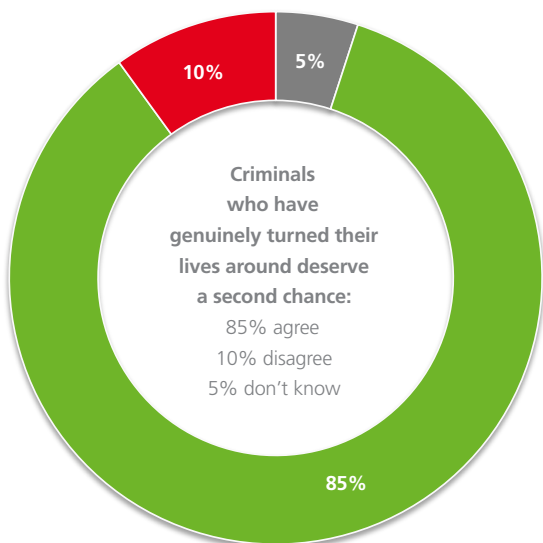
How to explain this? Detailed analysis of the responses led O’Hear and Wheelock to identify three groupings of opinions, not just the two (“Yes” or “No”) groups that might be expected. Overall, 37 percent of people supported truth in sentencing and opposed early-release programs. Another 23 percent opposed truth in sentencing and supported early-release programs. That left what O’Hear and Wheelock called “the swing vote”—the 31 percent of those polled who said that they supported both truth in sentencing and at least some ways to provide early release. (The remainder consisted of people who did not have or did not give an opinion.)

Describing the swing group, the two researchers have written, in a paper scheduled for publication in the *Brigham Young University Law Review*, “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. In the abstract, TIS [truth in sentencing] laws



Michael M. O’Hear



Source: Marquette Law School Poll (see [law.marquette.edu/poll](http://law.marquette.edu/poll))

capture sentiments of certainty, equity, and fairness that most individuals support. Assuming sentences are fair and reasonable, then 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 be able to accomplish in practice.”

In an “On the Issues with Mike Gousha” program in Eckstein Hall in November, O’Hear outlined the incarceration trends in Wisconsin and nationwide since the early 1970s, along with the rise of opposition to parole and early release.

In Wisconsin the prison population was about 2,000 in 1973, but, beginning in 1974, “we have three decades of literally unbroken increases in the size of our state’s prison population,” O’Hear said. The count reached a peak of almost 23,000 in 2004, the end of that period. Since then, the number has generally stayed around that level or dropped a bit. As of the end of March 2014, the state Department of Corrections reported that the inmate count was 21,799. Over the same period, the state corrections budget rose from tens of millions of dollars a year in the 1970s to more than \$1 billion a year now.

Between 1970 and 2000, O’Hear said, 15 states abolished parole and 20 more restricted it, reducing or eliminating the opportunity for those serving time to be released before serving their full sentences—and in

many cases, including in Wisconsin, before serving even half of their sentences. But, with prison populations and budgets rising, 36 states reestablished or expanded early-release options from 2000 to 2010, O’Hear said.

Wisconsin took part in both trends. It adopted a truth-in-sentencing law that abolished parole for those convicted of crimes occurring on or after December 31, 1999. (One of the primary advocates for the law was then-State Rep. Scott Walker.) In 2002, the legislature modified the law so that prisoners could apply to the sentencing judge for release after serving either 75 or 85 percent of their sentences, depending on the severity of their offenses. In 2009, the law was amended again, this time to create an Earned Release Review Commission, which had the power to allow some convicts out of prison early. The justification for that change largely relied on a goal of holding down spending on the corrections system, O’Hear said. A relatively small number of prisoners were actually released by the commission. But in 2011, with Scott Walker newly sworn-in as governor, the 2009 changes were overturned by the legislature.

O’Hear suggested that it may have been the wrong strategy for advocates of the 2009 changes to defend them as a fiscally wise step. The recent Marquette Law School Poll results, he said, indicate that support for at least some early-release policies is strongest in cases where the argument is not one of saving money but one of doing the right thing, especially when convicts have taken responsibility for their crimes or taken steps to show they want to do better in life, such as getting treatment for addictions or pursuing educational goals. ►►

Doing what people see as morally right could provide a path for reviving some forms of early release and reducing Wisconsin's prison population, O'Hear suggested in the "On the Issues" session. "Wisconsin voters do not see truth in sentencing as an absolute overriding imperative," he said, and a well-designed early-release plan has potential to gain public support and success in the Wisconsin Legislature, he told Gousha and an audience of about 200. O'Hear was joined by Charles Franklin, director of the Marquette Law School Poll and professor of law and public policy, to discuss the poll results.

Truth in sentencing certainly had strong support in the polling done in 2012 and 2013. Among the results from 2013:

- 73 percent agreed that "truth in sentencing sends a message that society will not tolerate crime," while 23 percent disagreed.
- 57 percent agreed that "truth in sentencing helps to reduce crime and make Wisconsin safer," while 34 percent disagreed.
- 30 percent strongly agreed with the statement, "The courts are too lenient with criminals," while 32 percent said they somewhat agreed, a total of 62 percent. Saying that they somewhat disagreed with that were 25 percent of those polled, with 9 percent strongly disagreeing, totaling 34 percent.

But O'Hear noted other results that can be seen as offering contrasting majority sentiment:

- 55 percent agreed that "if a prisoner serves half of his term, he should be released and given a less costly form of punishment if he can demonstrate that he is longer a threat to society," with 35 percent disagreeing.
- 50 percent said a "prisoner's record of good behavior in prison" is very important in determining whether a prisoner should be released, while

39 percent said it was "somewhat important." This totals 89 percent. Only 11 percent said a record of good behavior was not important. O'Hear pointed out that Wisconsin is one of very few states that in their truth-in-sentencing laws eliminated "good time"—that is, a record of good behavior in prison—as a factor in earning early release.

- 68 percent said it was "very important" in making a decision on releasing a prisoner whether the prisoner "has accepted responsibility for his crime." Another 24 percent said it was "somewhat important," and 8 percent said it was "not important."
- 41 percent said it was "very important" in decisions on release whether a prisoner had obtained a GED, generally regarded as equivalent to a high school diploma, or completed other educational programs while in prison. Another 41 percent said it was "somewhat important," and 18 percent said it was "not important."

Completing treatment for addiction or mental illness was valued by those polled. Responses from 72 percent said it was "very important" to the determination whether a prisoner should be released, 21 percent said it was "somewhat important," and 7 percent said it was "not important."

O'Hear said, "We punish people for doing antisocial things because it is morally appropriate to do that. . . . But the flip side is that when people engage in pro-social behavior, it is morally appropriate to recognize that by mitigating punishment." He pointed out that 58 percent of those polled agreed that even if earned release does not reduce crime, it is the right thing to do.

Is the climate actually going to change in ways that would bring forms of early release back into practice? Don't look for anything dramatic, in part because almost no politician wants to look soft on crime. Even some of



Respondents weighed in on whether a prisoner's having accepted responsibility for his or her crime should be a deciding factor in his or her release: **68 percent** said it was "very important," **24 percent** said it was "somewhat important," and **8 percent** said it was "not important."

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—Professor Michael O’Hear

the avenues in place now are not being used very much. For example, parole remains an option for inmates in prison for earlier crimes (basically, those occurring before 2000), and a state parole board for such inmates continues to exist. In reality, there have been few grants of parole in recent years.

Yet some people who are involved in advocacy around incarceration issues are encouraged by what they see as small but significant steps recently by the Republican-controlled legislature in funding treatment and diversion programs for some people charged with crimes, with some legislative leaders supporting further increases. Among the latter is Rep. John Nygren (R-Marinette), co-chair of the legislature’s Joint Finance Committee, who has called for new efforts to help prevent and treat addiction to heroin and other opiates, in light of his own daughter’s history of addiction, overdosing, and incarceration.

In the state budget passed in 2013, the allocation to programs offering “treatment, alternatives, and diversions” for those who would most likely otherwise be imprisoned was increased from \$1 million to \$2.5 million. That may seem minuscule compared to the full budget, and it was far less than advocates of such programs wanted, but it was a 150 percent increase.

A citizen-action group known as WISDOM has undertaken what it calls an “11 X 15” campaign, calling for reducing the state’s prison population to about 11,000, roughly half the current total, by 2015. David Liners, the director, said that such a decrease would put Wisconsin more in line with Minnesota in terms of incarceration rates and, in WISDOM’s view, could be accomplished without compromising public safety.

Liners called truth in sentencing “really misguided” and said that restoring early-release options would give inmates incentives to take part in rehabilitation efforts. Is this politically saleable? “It’s getting there,” he said.

State Rep. Evan Goyke, a Milwaukee Democrat who is on the Assembly Judiciary Committee, said there was debate within the ranks of both Republicans and Democrats over how to deal with issues such as alternatives to imprisonment and early release. There is, he said, “a bipartisan movement to really examine

corrections and criminal justice policies in Wisconsin,” with eyes on both state spending and doing what is right.

No one is advocating to shorten sentences or provide early release to those convicted of violent crimes. Goyke said the focus is on those involved in drug-related offenses and nonviolent crimes.

If a goal is to reduce spending on corrections, Goyke said, drug courts and diversion programs aren’t enough to have an impact. How to navigate the competing interests related to truth in sentencing and early release has to be considered.

In what may well be a sign of the continuing political sensitivities on the subject, several Republican legislative leaders declined to be interviewed for this story.

Developments at the federal level nonetheless suggest that some cross-party common cause may be possible. In January, Sen. Dick Durbin, a liberal Democrat from Illinois, and Utah Sen. Mike Lee, who has strong ties to the tea party faction of the Republican Party, cosponsored legislation that would give federal judges more discretion in setting sentences, particularly in drug-related cases. The two were reported as sharing concerns about both the fairness of sentences and the rising budget for federal prisons, and they have drawn support from others on both sides of the political aisle. More than 200,000 people are currently in federal prisons, about half for drug offenses. Almost all of the drug-law violators were sentenced under mandatory minimum sentencing laws. But while alliances between politicians such as Durbin and Lee are eye-catching, such proposals face major hurdles to becoming law.

Back in Wisconsin, O’Hear said one interesting result in the Marquette Law School Poll surveys was the support that was shown for having decision on early release made by something that might resemble a parole board. Asked who should decide on early release, 52 percent of those polled supported “a commission of experts,” while 31 percent said it should be the judge who sentenced the person.

O’Hear said an early-release plan that is seen by the majority of the public as protecting safety, operating on the basis of well-grounded decisions, and doing the right thing has potential to gain strong public support. ■