



ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

STATE REPORT: WISCONSIN

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Prison-Release Discretion and Prison Population Size

State Report: Wisconsin

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Definitions and Concepts

“Indeterminacy” means “unpredictability of time served.” Once we know the terms of a particular judicial sentence, can we say with confidence how much time the defendant will actually serve before the sentence’s expiration? If actual time-that-will-be-served is highly unpredictable based on the pronounced judicial sentence, then the sentence is highly indeterminate. If actual time-to-be-served is knowable within a relatively small range of possibility, then the sentence has a low degree of indeterminacy—or, we might say—it has a high degree of determinacy. “Determinacy” means “predictability of time served” at the time of judicial sentencing.

Scaling up to the systemwide level, the project explores the degree to which prison population size in each state is placed under the jurisdiction of decision makers who exercise time-served discretion after judicial sentences have been finalized. Higher degrees of indeterminacy across individual sentences add up to greater control over prison population size by “back-end” agencies such as parole boards and departments of correction. These structural features vary greatly across U.S. jurisdictions. One goal is to inform state governments how they may deliberately adjust their laws and practices of prison-release authority to achieve desired policy goals, such as reductions of prison populations in a manner consistent with public safety

Note on the project’s rankings of “degrees of indeterminacy”

To compare the degrees of indeterminacy in individual prison sentences or across the prison-sentencing systems of different jurisdictions, we use a qualitative ranking framework based on our cumulative learning while preparing the project’s 52 jurisdiction-specific reports. To avoid false precision, we place all systems within one of five categories (see table below).

Each of the five categories can be expressed in alternative terms: either the *degree of indeterminacy* or *degree of determinacy* thought to be present. Our five tiers are based on the variations we observe in current American sentencing systems, not any absolute or theoretical conceptions of degrees of indeterminacy that could be imagined in hypothetical systems.

The ranking scale is subjective, although the reasoning that supports our judgments is laid out in each report. Ultimately, the rankings indicate only the rough position of specific prison-sentencing systems vis-à-vis each other. No two American prison-release systems are alike and all are highly complex, so nuanced comparative analysis requires closer inspection.

Rankings of “Degrees of Indeterminacy”

Ranking	Alternative terminology	
1	Extremely-high indeterminacy	Extremely-low determinacy
2	High indeterminacy	Low determinacy
3	Moderate indeterminacy	Moderate determinacy
4	Low indeterminacy	High determinacy
5	Extremely-low indeterminacy	Extremely-high determinacy

For individual classes of sentences, we use the following benchmarks for our classifications of higher versus lower degrees of indeterminacy:

Benchmarks for rankings of “degrees of indeterminacy”

Rankings of “Degrees of Indeterminacy”

- *Extremely high indeterminacy*: >80-100 percent indeterminacy (first prospect of release at 0-19.99 percent of judicial maximum)
- *High indeterminacy*: >60-80 percent indeterminacy (first prospect of release at 20-39.99 percent of judicial maximum)
- *Moderate indeterminacy*: >40-60 percent indeterminacy (first prospect of release at 40-59.99 percent of judicial maximum)
- *Low indeterminacy*: >20-40 percent indeterminacy (first prospect of release at 60-79.99 percent of judicial maximum)
- *Extremely low indeterminacy*: 0-20 percent indeterminacy (first prospect of release at 80-100 percent of judicial maximum)

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We classify Wisconsin's prison-sentencing system as one with a *low degree of indeterminacy* on the subjective ranking scale developed for this project. It may be more natural to say that it is a *highly determinate* system. The state abolished parole release discretion for all prisoners starting in 2000. It has also abolished good time as a technical matter, although the state maintains a bad-time system that links time actually served to prisoners' conduct.

For general-rules prisoners, judges have broad powers to vary the level of indeterminacy in their individual sentences. We expect that, on average, Wisconsin sentencing judges impose sentences with a low degree of indeterminacy even though they have statutory authority to inject greater indeterminacy—but this is only an educated guess. Wisconsin law also includes a number of unusual prison-release mechanisms that marginally increase the amount of indeterminacy in the system as a whole, but we see no evidence that these mechanisms play a large enough role to affect the general classification of the system.

As with other parole-release-abolition jurisdictions, the main player with back-end release discretion is the department of corrections, exercised in Wisconsin at the prison level through administration of the state's bad-time system. To an intriguing extent, however, Wisconsin has created prison-release avenues that place trial judges in the position of back-end decisionmakers. Sentencing courts have unusual powers to vary the degrees of indeterminacy in their sentences. They also have sentence “modification” and “adjustment” powers that can be exercised long into the life of a prison sentence. Finally, in the realm of life sentences with possibility of release, trial courts act as discretionary release authorities (a substitution for the role played by parole boards in most other states). Perhaps more than in any other American jurisdiction, trial courts in Wisconsin straddle institutional borderlines across the “front” and “back” ends of the prison-sentencing system.

Terminology note

This report will refer to the Wisconsin Parole Commission as the “parole board.” The Wisconsin Department of Corrections will be referred to as the “department of corrections.”

¹ This report was prepared with support from Arnold Ventures. The views expressed are the authors' and do not necessarily reflect the views of Arnold Ventures. We thank Michael O'Hear for his review of an early draft and Kate Finley for her review of a later draft.

Introduction

Wisconsin's prison-rate history, 1972 to 2020

In 2020, Wisconsin's prison rate was 320 per 100,000 general population, with a yearend prison population of 18,674.² Wisconsin's prison rate was 23rd largest among all states.

Figure 1. Prison Rate Change in Wisconsin and (Unweighted) Average Among All States, 1972 to 2020

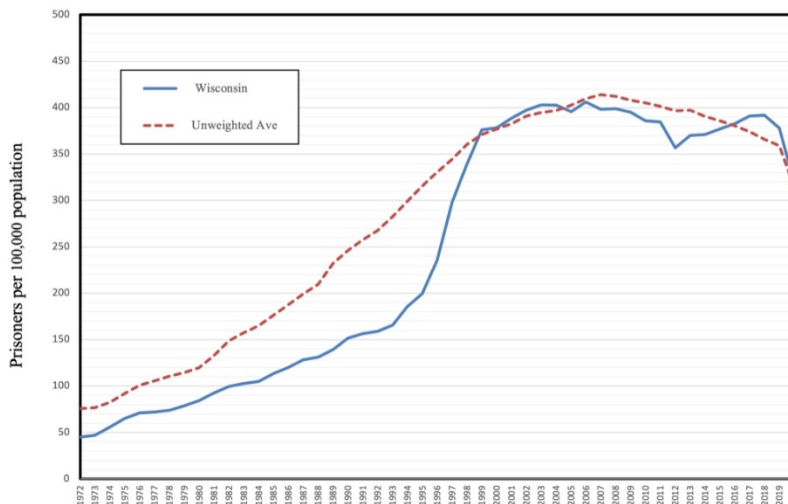
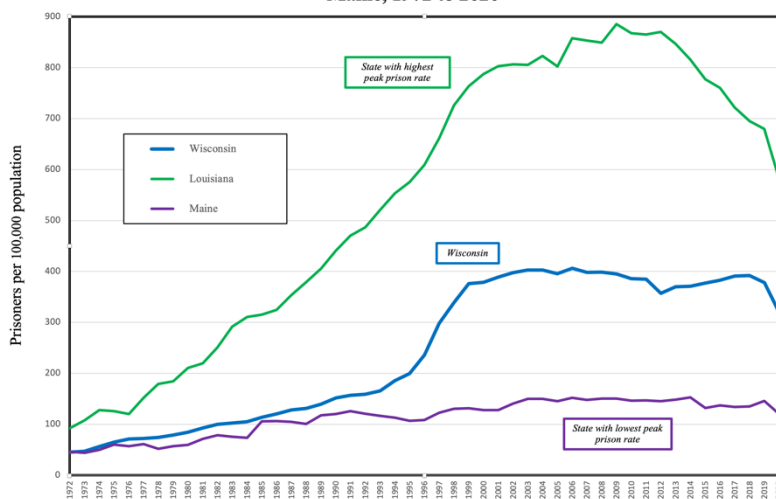


Figure 2. Prison Rate Change in Wisconsin, Louisiana, and Maine, 1972 to 2020



Sources: Timothy J. Flanagan, Kathleen Maguire & Michael J. Hindelang, *Sourcebook of Criminal Justice Statistics, 1990*, at 605 table 6.56, Rate (per 100,000 resident population) of

² E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 12 table 4, 16 table 7. Preliminary information about changes in Wisconsin's imprisonment rates after 2020 is presented below in the section on "The COVID period in Wisconsin."

sentenced prisoners under jurisdiction of State and Federal correctional authorities on December 31: By region and jurisdiction, 1971-1989 (Hindelang Criminal Justice Research Center, 1991) (for 1972-1977); E. Ann Carson, *Imprisonment rate of sentenced prisoners under the jurisdiction of state or federal correctional authorities per 100,000 U.S. residents, December 31, 1978-2016* (Bureau of Justice Statistics, Corrections Statistical Analysis Tool) (for 1978-2016), at <https://www.bjs.gov/index.cfm?ty=nps>; E. Ann Carson, *Prisoners in 2018* (Bureau of Justice Statistics, 2020), at 11 table 7 (for 2017); E. Ann Carson, *Prisoners in 2019* (Bureau of Justice Statistics, 2020), at 11 table 7 (for 2018); E. Ann Carson, *Prisoners in 2020--Statistical Tables* (Bureau of Justice Statistics, 2021), at 15-16 table 7 (for 2019-2020).

Wisconsin reached its peak prison rate during the national buildup period in 2006 at 406 per 100,000, which dropped to 320 per 100,000 in 2020. This is a net difference of -86 per 100,000, which was the 35th largest prison-rate drop of all states from their peak rates (in various years) through 2020.

Figures 1 and 2 span two important periods in American criminal-justice history. From 1972-2007, the United States saw 35 years of uninterrupted growth in the nationwide aggregated prison rate. This might be called the Great Prison Buildup. Since 2007, national prison rates have been falling. From 2007 through yearend 2019 (prior to the COVID pandemic), the average drop in states' prison rates was about 1.2 percent per year, with much variation across individual states.

The COVID period

We view American prison rates following the arrival of the COVID pandemic in March 2020 as discontinuous with earlier rates and trends. Whatever factors were at work to determine state prison rates in the “before times,” the pandemic introduced a major new causal force that, at least temporarily, diverted the course of prison-rate change nationwide.³

In calendar year 2020, most states saw unusually large drops in their prison rates. Prison rates fell in 49 states, the District of Columbia, and the federal system. The aggregate 50-state prison rate for the U.S. dropped by about 15 percent in a single year. From yearend 2019 to yearend 2020, the (unweighted) average state prison rate fell from 359 to 308 prisoners per 100,000

³ In Figures 1 and 2 above, the COVID period arrives in the very last year of data that has been reported by the Bureau of Justice Statistics (BJS) as of this writing—from yearend 2019 to yearend 2020. Figures 1 and 2 rely exclusively on BJS data covering the years 1972-2020. For a tentative update, the Vera Institute of Justice has collected state imprisonment counts reaching into December 2021, which are not fully compatible with BJS reports. See Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022).

general population, for an average incremental downturn of -51 per 100,000.⁴ We believe this was the largest one-year decline in state prison rates in American history.⁵

In calendar year 2021, U.S. prison rates did not continue to descend at the same dramatic pace. Preliminary data from the Vera Institute indicate that the aggregate 50-state prison population fell by about 1.8 percent from January to December 2021. Prison populations actually rose in 19 states.⁶

Given the focus of this project and the unprecedented size of prison-rate change during COVID's first year, it is relevant to ask whether indeterminacy in American prison sentences played a consequential role in events. An adequate history cannot yet be written, but considerable data have already been assembled.

Nationwide, COVID-driven changes in prison-release practices were not the main driving force of prison population shrinkage from early 2020 through the end of 2021. This is not to say that there was no expansion of prison release during the pandemic. Thirty-six states and the federal government did at least *something* to expedite releases, each jurisdiction choosing from a grab bag of different strategies—e.g., expedited parole release, loosened release criteria, increased or restored credit awards, early release of prisoners already close to their mandatory release dates, expanded compassionate release for the elderly or medically infirm, increases in clemency grants, invocation of overcrowding emergency provisions, and court orders. Such steps did not yield large numbers of “COVID releases” in most states, however, and many COVID releases were not much earlier than they would have been in the pandemic's absence.⁷

⁴ E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 1, 7 table 2. Across 2020, prison rates fell in every state except Alaska, where the rate increased by 1.2 percent.

⁵ Historical sources show no one-year decline in average state prison rates that approaches -51 per 100,000. See Margaret Werner Cahalan, *United States Historical Correctional Statistics, 1850-1984* (Bureau of Justice Statistics, 1986); Margaret Cahalan, *Trends in Incarceration in the United States since 1880: A Summary of Reported Rates and the Distribution of Offenses*, 25 *Crime & Delinq.* 9 (1979).

⁶ Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2 (reporting a decrease of 15.8 percent in the state prison population overall in 2020 followed by a decrease of 1.8 percent in 2021). The states reported to have had increases in prison populations in 2021 were: Alaska (up 7.7 percent), Arkansas (up 5.8 percent), California (up 3.9 percent), Connecticut (up 3.4 percent), Delaware (up 2.0 percent), Idaho (up 8.8 percent), Iowa (up 9.1 percent), Kentucky (up 0.2 percent), Missouri (up 1.5 percent), Montana (up 9.8 percent), Nebraska (up 5.9 percent), North Carolina (up 0.9 percent), North Dakota (up 20.6 percent), Ohio (up 0.04 percent), Rhode Island (up 2.1 percent), South Dakota (up 2.4 percent), Utah (up 8.4 percent), West Virginia (up 12.9 percent), and Wyoming (up 3.7 percent). *Id.* at 3-4 table 2.

⁷ For a survey of state releasing practices in response to COVID, see Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, forthcoming 2022) (finding that 24 states released 0 to 150 prisoners in response to the pandemic from March 2020 through December 2021, while only five states and the federal system released more than 3,000 prisoners). The effects on annual imprisonment rates were even less than the absolute numbers of releases would suggest. Mitchell et al. found that one of the most common criteria applied by states for COVID release decisions

The available data suggest that the 2020 plunge in state prison rates was primarily due to reduced *admissions* caused by a number of factors, including fewer arrests, fewer new court commitments, fewer revocations from community supervision, and some prisons' embargoes on receiving prisoners from local jails. The number of all state prison admissions in the U.S. dropped by an astonishing 40 percent in a single year from 2019 to 2020.⁸

The COVID period in Wisconsin

The state-specific experience of Wisconsin indicates some special mobilization of prison-release processes in the early COVID period.

In calendar year 2020, Wisconsin's prison rate fell from 378 to 320 per 100,000—a one-year decline of -58 per 100,000. This was the 18th largest one-year drop reported among all 50 states for that year.⁹ Measured in percentage terms, it was a 15.3 percent reduction in the state's prison rate. The state's total prison population fell by 3,365 people, from 22,039 to 18,574.¹⁰

COVID releases made up only a fraction of this drop. In a separate study, the Robina Institute found a total of 1,572 COVID-influenced releases in Wisconsin from March 2020 through December 2021. This number was the equivalent of about seven percent of Wisconsin's pre-COVID prison population (at yearend 2019).¹¹ Nearly all of these releases were of persons

was “short time left on sentence.” Thus, some of the accelerated COVID releases in 2020 and 2021 were of prisoners who would have been released in the same year anyway, albeit somewhat later.

⁸ See E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 17, 17 table 8 (admissions fell from 530,905 to 319,346). There was no comparable upswing in prison releases. Total releases from state prisons actually fell in 2020, dropping 9.8 percent from the previous year. *Id.* at 19 table 9 (nationwide releases fell from 557,309 to 502,723). Only five states released five percent or more of prisoners in 2020 than they had released in 2019: Arizona (6.9 percent), Maine (30.9 percent), Nebraska (5.9 percent), New Jersey (19.7 percent), and Wyoming (8.0 percent). For a focus on patterns of parole release in 2020, see Tiana Herring, *Parole boards approved fewer releases in 2020 than in 2019, despite the raging pandemic* (Prison Policy Initiative, February 3, 2021), at <https://www.prisonpolicy.org/blog/2021/02/03/parolegrants/> (surveying data from 13 states; finding that total numbers of parole releases fell in nine states; among all 13 states, the average drop in numbers of parole releases from yearend 2019 to yearend 2020 was 11.3 percent). See also Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, forthcoming 2022) (concluding that “the greatest impact on prison population overall occurred on the admissions side of the equation.”). From March 2020 through December 2021, Mitchell et al. estimate a total of 47,967 “non-routine COVID releases” from state prisons nationwide. Over a similar period (January 2020 to December 2021), Vera Institute of Justice (Vera) reported a drop in the aggregate state prison population of 217,989 people, from 1,259,977 to 1,041,988. Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2.

⁹ The largest single-state drop from yearend 2019 to yearend 2020 was in Kentucky, from 515 to 414 per 100,000. E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 16 table 7.

¹⁰ *Id.*, at 12 table 4.

¹¹ Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina

incarcerated for violations of parole or other community supervision, however.¹² Chances are that many of these releases did not come significantly earlier than they would have in the absence of the pandemic.

Falling admissions appear to have been the dominant factor in Wisconsin's reduction of prison population in 2020. The number of prison admissions in the state dropped by 45 percent in 2020 compared with the previous year (from 5,252 to 2,895).¹³ Total numbers of releases in 2020 grew by only 2.8 percent (from 5,859 to 6,023).¹⁴ Mathematically, the drop in admissions (by 2,357) was a larger force than boost in annual releases (by 164).

From yearend 2020 to December 2021, the Vera Institute reported that Wisconsin saw a small decrease in its prison population, from 20,720 to 20,677—or 0.2 percent.¹⁵ As of June 24, 2022, the Wisconsin Department of Corrections reported a total prison population of 20,063, which was a slight rise from the total population of 19,931 the department of corrections had reported on January 7, 2022.¹⁶

Institute of Criminal Law and Criminal Justice, forthcoming 2022), Appendix A. Mitchell et al. do not estimate the drop in states' prison rates attributable to COVID releases. Instead, their report counts total COVID releases from March 2020 through December 2021 as a fraction of each state's prison population at the end of 2019. The resulting impact on prison rates is impossible to estimate because many or most of the COVID releasees in 2020-21 would have been released during the two-year period anyway, albeit somewhat later.

¹² *Id.*, Appendix E (“Between March 2, 2020, and May 4, 2020, 1,447 individuals who had been detained because they violated terms of their parole, probation, or extended supervision were released by the Wisconsin Department of Corrections (DOC).”).

¹³ E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 18 table 8.

¹⁴ *Id.* at 20 table 9.

¹⁵ Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 4 table 2. As a general matter, Vera's *People in Prison* reports should not be treated uncritically as “updates” of BJS's annual *Prisoners* series. Vera does not always gather prisoner counts from the same dates as BJS, nor does it calculate state prison rates in the same way. For example, BJS calculates yearend prison rates using yearend population estimates for each state from the Census Bureau, while Vera uses the Census Bureau's July 1 estimates (six months earlier). Occasionally, the absolute numbers of state prisoners reported by Vera are dramatically different from those in BJS reports, suggesting basic differences in counting rules. Because of such incompatibilities, we do not attempt to integrate data from the two sources in any of our state reports for this project.

¹⁶ Wisconsin Department of Corrections, *Persons in Our Care on 06_24_2022*, at <https://doc.wi.gov/DataResearch/WeeklyPopulationReports/06242022.pdf>; Wisconsin Department of Corrections, *Persons in Our Care on 01_07_2022*, at <https://doc.wi.gov/DataResearch/WeeklyPopulationReports/01072022.pdf>.

1. General rules of prison release in Wisconsin

In 1998, the Wisconsin legislature enacted a “Truth-in-Sentencing” law to replace the state’s previous sentencing scheme, to take effect December 31, 1999. Parole-release discretion was abolished for all prisoners (except people sentenced under former law).¹⁷

As a formal matter, prison sentences in Wisconsin are neither reducible by discretionary parole release nor by good-time credits.¹⁸ While this may sound like a formula for absolute determinacy, the system is not really so extreme. Judicial prison sentences must include two components: an initial “term of confinement” and a separate term of postrelease supervision called the “extended supervision term.” Together, these are called the “bifurcated sentence.” By statute, the “total length of a bifurcated sentence” is defined as the combined lengths of the confinement term and the extended supervision term.¹⁹ The total bifurcated sentence must fall within the allowable statutory maximum prison sentence for a given offense.²⁰

The lengths of Wisconsin’s “total bifurcated sentences” function as “judicial maximum sentences” in the standardized terminology of this project. The “term of confinement” is the equivalent of a minimum judicial sentence. As in other states, most prisoners in Wisconsin are released to supervision after they have served a substantial fraction of their judicial maximum terms (their “total bifurcated sentences”). Completion of minimum terms yields mandatory release dates (MRDs) unless release is delayed by disciplinary penalties.²¹

Wisconsin maintains a bad-time system (our terminology) in which prisoners’ minimum terms may be extended by the department of corrections for rule infractions or neglect of assigned

¹⁷ See Michael O’Hear, *Good Conduct Time for Prisoners: Why (and How) Wisconsin Should Provide Credits Toward Early Release*, 98 Marquette L. Rev. 487, 490 (2014); Thomas J. Hammer & Michael B. Brennan, *Truth-In-Sentencing Part II: 2001 Wisconsin Act 109 Crimes and Their Penalties* (2003) (paper prepared to accompany presentation at “TRUTH-IN-SENTENCING II – A Program for the Criminal Defense Lawyer” sponsored by the Wisconsin State Public Defender).

¹⁸ Wis. Stat. § 973.01(4),(6). From 2009 to 2011, certain eligible prisoners were permitted to earn positive adjustment time as a result of good behavior. The scheme was abolished on August 3, 2011, but prisoners who had accrued positive adjustment time can still achieve reductions in their sentences by petitioning to the sentencing court. Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 Marq. L. Rev. 1574-1575 (2011-2012).

¹⁹ Wis. Stat. § 973.01(2).

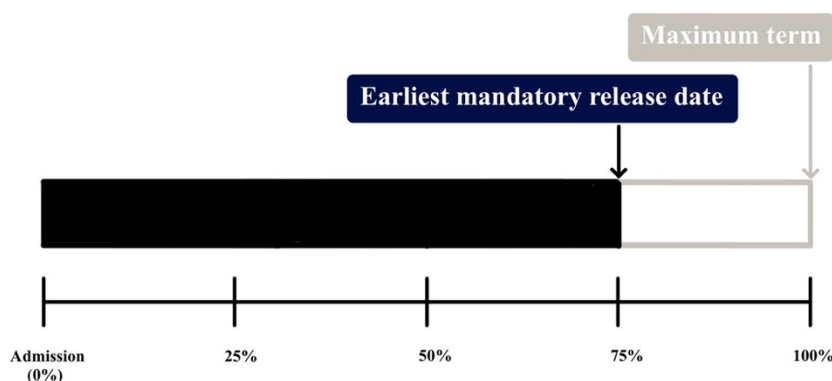
²⁰ Wis. Stat. § 973.01(2)(a). Total statutory maximum prison terms for each felony class are found in Wis. Stat. § 939.50(3). For each grade of felony, the maximum authorized prison term equals the sum of the lengths of the maximum prison and extended supervision terms in Table 1 above. For example, the statutory maximum prison term for a Class B felony is “imprisonment not to exceed 60 years.” Wis. Stat. § 939.50(3)(b). It is Wis. Stat. § 973.01(2)(b), under the ambit of “bifurcated sentences,” that subdivides the statutory maximum into separate caps on prison time and supervision time. Thus, for Class B felonies, those respective limits are 40 years and 20 years. Wis. Stat. § 973.01(b)(1),(d)(1) (fitted within the statutory maximum prison sentence of 60 years).

²¹ Wis. Stat. § 302.113(2).

duties. There is an unusually strict statutory schedule for bad-time penalties: Ten days may be added for the first offense, 20 days for the second offense, and 40 days for the third and each subsequent offense.²² Cumulatively, these penalties may push time served as far as the expiration of the total bifurcated sentence. As in many other systems, MRDs in Wisconsin are movable based on prisoners' conduct while incarcerated, but may not be pushed beyond the expiration of the judicial maximum sentence.

As a matter of system design, it is hard to pinpoint the degree of indeterminacy that is intended for general-rules sentences in Wisconsin.²³ Sentencing judges have substantial authority to vary the relative durations of “terms of confinement” and “extended supervision” in individual cases. Some rules apply: For all felony grades, terms of imprisonment must always be at least one year.²⁴ In most cases, the timespan of the confinement term may never exceed 75 percent of the judicial maximum term (“total bifurcated sentence”), and the extended supervision term may not be less than 25 percent of the total.²⁵ This sentence configuration is illustrated in Figure 3. Such sentences are 75 percent determinate and 25 percent indeterminate. On the subjective scale developed for this project (see p. iii), we rank such sentences as *low in indeterminacy* (or *high in determinacy*).

Wisconsin Figure 3. Prison-Release Timeline for General-Rules Sentences With Longest Possible Confinement Term



Note: The “confinement term” in Wisconsin functions as a mandatory release date unless it is extended as a penalty for one or more disciplinary violations

Judges are free to impose postrelease supervision terms longer than 25 percent of the total bifurcated sentence, however, within statutory restrictions that are staggered by felony class.

²² Wis. Stat. § 302.113(3)(a).

²³ The analysis in this section applies to general-rules prisoners convicted of felonies, excluding life sentences. Our models of indeterminacy do not apply to defendants who receive mandatory minimum sentences or specialized penalty enhancements under Wisconsin law.

²⁴ Wis. Stat. § 973.01(2)(b).

²⁵ Wis. Stat. § 973.01(2)(c)(10),(d).

For each class of felony, there are varying statutory maximum terms of extended supervision, which often limit the options available to the judge. See Table 1 below.

Table 1. Authorized lengths of prison terms and extended supervision terms by felony grade

Class of Felony	Length of Prison Term ²⁶	Length of Extended Supervision Term
Class B	<i>Maximum of 40 years</i>	<i>Maximum of 20 years</i>
Class C	<i>Maximum of 25 years</i>	<i>Maximum of 15 years</i>
Class D	<i>Maximum of 15 years</i>	<i>Maximum of 10 years</i>
Class E	<i>Maximum of 10 years</i>	<i>Maximum of 5 years</i>
Class F	<i>Maximum of 7 years and 6 months</i>	<i>Maximum of 5 years</i>
Class G	<i>Maximum of 5 years</i>	<i>Maximum of 5 years</i>
Class H	<i>Maximum of 3 years</i>	<i>Maximum of 3 years</i>
Class I	<i>Maximum of one year and 6 months</i>	<i>Maximum of 2 years</i>

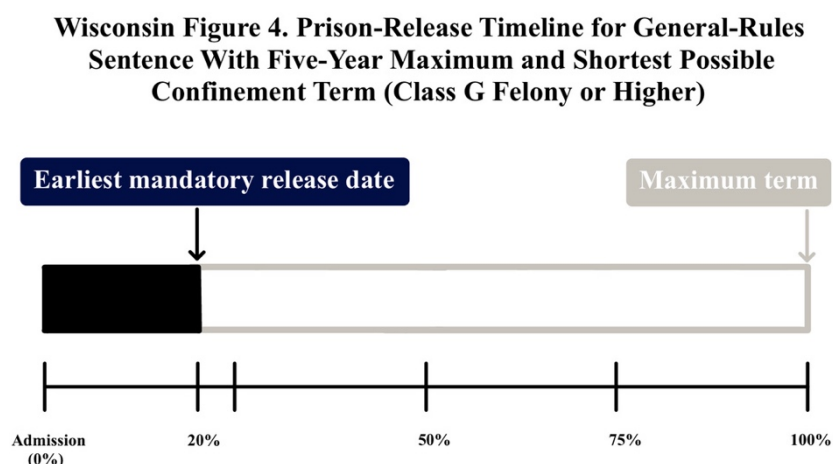
Source: Wis. Stat. § 973.01(2)(b)(1)-(9),(d)(1)-(6).

Putting the above rules together, judicial sentences can reflect widely varying degrees of indeterminacy, within statutory boundaries that vary by offense class. Figures 4 through 7 illustrate several of the possibilities.

²⁶ Maximum confinement terms might be increased by applicable penalty enhancement statutes in individual cases. See Wis. Stat. § 973.01(2)(c).

Figure 4 models a judicial maximum (or “total”) five-year sentence in which the judge has imposed the minimum required one year of confinement to be followed by four years of supervision. The Figure 4 sentence is 20 percent determinate and 80 percent indeterminate. On our ranking scale, such sentences carry an *extremely low degree of indeterminacy* (albeit just on the borderline of *low indeterminacy*).

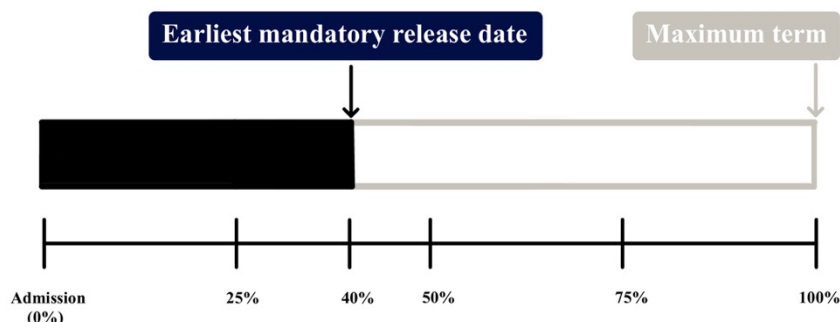
The Figure 4 sentence configuration is statutorily permissible for most defendants convicted of felonies at the Class G level or higher—as is the configuration shown in Figure 3. For this group, any ratio of minimum to maximum term between those in Figures 3 and 4 are possible. Among prisoners given five-year maximum terms, judges therefore have broad power to alter the amount of indeterminacy in their sentences.



Judges’ abilities to assign different degrees of indeterminacy to their prison sentences vary significantly by felony class. For example, the Figure 4 configuration is not available for defendants convicted of Class H felonies who are given total sentences of five years. This is because the mathematical cutoffs are different for Class H felons: periods of extended supervision are capped at three years. Thus, if a judge were to impose a total sentence of five years, the confinement term would have to be at least two years. Figure 5 charts sentences of this kind in which the judge has chosen the shortest allowable prison term. These sentences are 40 percent determinate and 60 percent indeterminate. A comparison of Figures 4 and 5 raises questions. Strangely, for defendants convicted of Class H felonies (Figure 5), five-year total sentences are required to be more severe than for defendants convicted of more serious crimes (Figure 4).²⁷

²⁷ One way to compare Figures 4 and 5 is to calculate the number of disciplinary violations needed to extend the minimum confinement term in Figure 4 to that of Figure 5, holding all else constant. For prisoners with Figure 4 sentences of five years, their original MRDs of one year would not be pushed back to the two-year mark shown in Figure 5 unless they had been found guilty of at least nine separate rules or violations.

Wisconsin Figure 5. Prison-Release Timeline for General-Rules Sentence With Five-Year Maximum and Shortest Possible Confinement Term (Class H Felony)

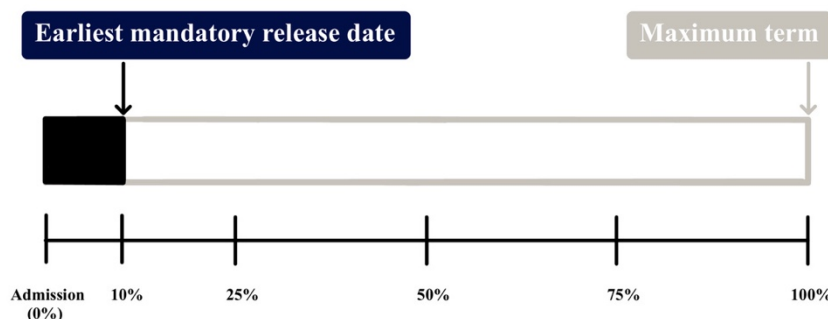


For longer maximum sentences, *extremely high degrees of indeterminacy* are sometimes available to Wisconsin sentencing judges. Once again, the potential ranges of indeterminacy vary by offense class. For instance, Figure 6 posits a 10-year total sentence with the shortest allowable confinement term of one year—a sentence that would be 10 percent determinate and 90 percent indeterminate. Such sentences are legally authorized for defendants convicted of Class B, C, and D felonies.

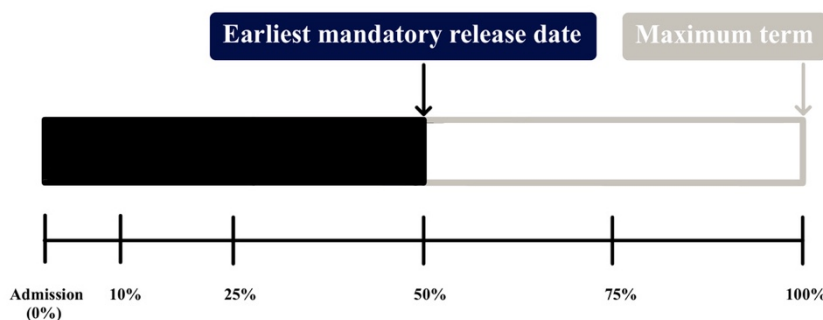
However, some 10-year sentences do not allow courts to build in such high degrees of indeterminacy. For defendants convicted of Class E, F, and G felonies who receive judicial maximum sentences of ten years, the prison portion of the sentence can be no shorter than five years (because extended supervision terms are statutorily limited to five years). Such sentences may at most be 50 percent indeterminate, as depicted in Figure 7. On our ranking scale, Figure 6 sentences are *extremely high in indeterminacy* while Figure 7 sentences reflect only a *moderate degree of indeterminacy*. Once again, this pattern is a little puzzling. For ten-year total prison sentences, required sentence severity is significantly greater for lower level felonies than for more serious offenses.²⁸

²⁸ Measured by the bad-time penalty schedule, prisoners with Figure 6 sentences would need to amass about 45 separate rules violations in order to have their MRDs pushed back to the five-year mark. Yet lower level offenders who receive Figure 7 sentences—with identical 10-year maximum terms—start out with MRDs at the five-year milestone even if they avoid all disciplinary sanctions.

Wisconsin Figure 6. Prison-Release Timeline for General-Rules Sentence With Ten-Year Maximum and Shortest Possible Confinement Term (Class B, C, and D Felonies)



Wisconsin Figure 7. Prison-Release Timeline for General-Rules Sentence With Ten-Year Maximum and Shortest Possible Confinement Term (Class E, F, and G Felonies)



Because of the asymmetric rules in force across felony classes, it is difficult to place a number on the degrees of indeterminacy Wisconsin law instantiates for general-rules prisoners. One point is clear: At all felony levels, judges are free to construct individual sentences that are 75 percent determinate and 25 percent indeterminate, as shown in Figure 3. This is the upper boundary on judges' power to impose highly-determinate prison sentences.

Also at all felony levels, depending on the total (maximum) sentence the judge wishes to impose, the judge has substantial freedom to craft sentences with higher degrees of indeterminacy than shown in Figure 3. We describe this arrangement as allowing judges to act as “gatekeepers” of the degree of indeterminacy that is embedded into their sentences. In Wisconsin, the breadth of the judicial gatekeeping power shifts depending on felony grade and the maximum sentences particular judges want to impose in a given case.²⁹

²⁹ As we read Wisconsin's statutes summarized in Table 1, the highest possible indeterminacy value across all general-rules cases occurs for Class B felonies: in one allowable configuration, a judge could impose a 21-year total

2. Life sentences in Wisconsin

Based on a 2020 survey of state departments of corrections, the Sentencing Project reported that nearly five percent of all prisoners in Wisconsin were serving life sentences. Out of a total of 23,929 prisoners in that year, 944 or four percent were serving life sentences with the possibility of release and 265 or one percent were serving LWOP sentences.³⁰

a. Adults

For most prisoners sentenced to life imprisonment, sentencing courts have the option to deny eligibility for release to extended supervision, which results in the equivalent of sentences of life without possibility of parole (LWOP).³¹ Alternatively, sentencing courts have discretion to order a minimum term of 20 years or longer.³² For a narrow class of offenses, all life sentences must be LWOP.³³

There are no parolable life sentences as such under Wisconsin law. Instead, for life prisoners with release eligibility, discretionary release decisions are routed back to sentencing courts. In our view, these should be classified as life sentences “with the possibility of release” rather than “with the possibility of “parole.” The statutory minimum term of 20 years makes Wisconsin’s life sentences somewhat more indeterminate than in most other states, where minimum terms of at least 30 or 40 years are the norm. **Cite Final Report**

The use of judicial prison release in Wisconsin is noteworthy. In comparative studies of European parole-release systems, scholars have nominated judicial-decisionmaker frameworks

sentence to a defendant with a confinement term of only one year—a sentence that would be roughly 5 percent determinate and 95 percent indeterminate. For Class C offenders, the statutes allow 16-year maximum terms with release eligibility after one year (94-percent indeterminate). For Class D offenders, the most indeterminate allowable sentence is a 11-year maximum term with first release eligibility at one year (91 percent indeterminate). For Classes E, F, and G, the most indeterminate sentences would carry six-year maximums and one-year minimums (83 percent indeterminate). For Class H, peak indeterminacy is available for four-year maximum and one-year minimum terms (75-percent indeterminate). For Class I, peak indeterminacy accompanies sentences with three-year maximums and one-year minimums (67 percent indeterminate).

In all of the above examples, if the judge wanted to select a higher or lower maximum term, then the resulting degrees of indeterminacy would decrease according to the idiosyncratic mathematical formulas for each felony class. Of course, in all lawful permutations, the degree of indeterminacy could never drop below the lowest statutory boundary of 25-percent.

³⁰ Ashley Nellis, *No End in Sight: America’s Enduring Reliance on Life Imprisonment* (The Sentencing Project, 2021), at 10 table 1.

³¹ Wis. Stat. § 973.014(1g)(a)(3).

³² Wis. Stat. § 973.014(1g)(a)(1),(2).

³³ Wis. Stat. § 973.014(2).

(judges or panels including a judge) as models of best practices.³⁴ There are few examples of judicial prison-release processes at work in the United States.

When life prisoners approach their first date of release eligibility, they must petition the sentencing court to decide whether to grant release.³⁵ The court has discretion to render decision without a hearing or to order a nonjury hearing.³⁶ Ultimately under the statute, the release decision is supposed to turn on recidivism risk. The court “may not grant an inmate’s petition for release to extended supervision unless the inmate proves, by clear and convincing evidence, that he or she is not a danger to the public.”³⁷ If release is granted, conditions of postrelease supervision are set by the releasing court.³⁸

If release is denied, the court has discretion to set the period of time before the prisoner may submit a new petition. There is no statutory limit on the length of such waiting periods.³⁹

Notably, prisoners have the right to appeal release denials to an “appellate court.” On review, the appellate court may reverse a release denial “only if it determines that the sentencing court erroneously exercised its discretion in denying the petition for release.”⁴⁰

b. Juvenile life sentences

Wisconsin is not among the states that have abolished LWOP sentences for defendants who were under age 18 at the time of their offenses.⁴¹ Consistent with federal law, the Wisconsin Court of Appeals has ruled that, in order for juvenile LWOP sentences to be constitutionally imposed, sentencing courts must adequately consider factors relating to defendants’ youth.⁴²

³⁴ Frieder Dünkel, Dirk van Zyl Smit, & Nicola Padfield, *Concluding thoughts*, in Nicola Padfield, Dirk van Zyl Smit, & Frieder Dünkel, eds., *Release from Prison: European Policy and Practice* (Willan Publishing 2010).

³⁵ Wis. Stat. § 302.114(5)(a) (“An inmate subject to this section who is seeking release to extended supervision shall file a petition for release to extended supervision with the court that sentenced him or her.”).

³⁶ Wis. Stat. § 302.114(5)(b) (“After reviewing a petition for release to extended supervision and the district attorney’s response to the petition, the court shall decide whether to hold a hearing on the petition or, if it does not hold a hearing, whether to grant or deny the petition without a hearing.”). Victims have the right to make or submit a statement to the court before a release decision is rendered. *Id.* § 302.114(5)(c).

³⁷ Wis. Stat. § 302.114(5)(cm).

³⁸ Wis. Stat. § 302.114(5)(d) (“If the court grants the inmate’s petition for release to extended supervision, the court may impose conditions on the term of extended supervision.”).

³⁹ Wis. Stat. § 302.114(5)(e).

⁴⁰ Wis. Stat. § 302.114(5)(f). A Westlaw search conducted on July 6, 2022 found no reported decisions in which an appellate court reversed a trial judge’s denial of release under this provision.

⁴¹ See Josh Rovner, *Juvenile Life Without Parole: An Overview* (The Sentencing Project, 2021).

⁴² See *Miller v. Alabama*, 567 U.S. 460, 480 (2012) (holding mandatory sentences of life without parole unconstitutional when applied to defendants who were under age 18 at the time of their crimes; stating further that, “[a]lthough we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it

The Court of Appeals has held that Wisconsin's general process for judicial discretionary release of life prisoners satisfied federal constitutional requirements that a "meaningful opportunity for release" be afforded to juvenile lifers who are not serving LWOP sentences.⁴³

3. Infrequently used forms of prison release in Wisconsin

a. Compassionate release

Offenders sentenced for felonies prior to December 31, 1999 may be considered for early parole release due to "extraordinary circumstances," so long as the sentencing court, district attorney, and victim are notified and permitted to comment on the offender's proposed release date.⁴⁴

Prisoners sentenced for felonies on or after December 31, 1999 may petition the parole board for modification of their sentences in order to be released to extended supervision. Prisoners must meet one of the following criteria: (1) the prisoner is 65 years of age or older and has served at least 5 years of the term of confinement for the prison portion of the bifurcated sentence or has served at least 5 years of a release-eligible life sentence; (2) the prisoner is 60 years of age or older and has served at least 10 years of the term of confinement of the prison portion of the bifurcated sentence or has served at least 5 years of a release-eligible life sentence; or (3) the prisoner has an extraordinary health condition.⁴⁵ Examples of "extraordinary" health conditions include advanced age and problems with activities of daily living, significant cognitive problems due to Alzheimer's or other diseases that cause impairment in mental capacity, significant/end of life medical conditions such that there is a strong likelihood the person will only live another 6-12 months, and quadriplegics with underlying medical problems.⁴⁶

to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."'). *See also* *Montgomery v. Louisiana*, 136 S.Ct. 718, 735 (2016) (stating that *Miller* required "a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence."); *Jones v. Mississippi*, No. 18-1259 (U.S. 2021) (holding that sentencing courts are not required to make a factual finding of "permanent incorrigibility" before imposing LWOP sentences on defendants who were under age 18 at the time of his offense).

⁴³ *State v. Barbeau*, 883 N.W.2d 520, 531, 535 (Wis. Ct. App. 2016), *cert. denied*, *Barbeau v. Wisconsin*, 137 S.Ct. 821 (2017). This decision later survived constitutional review in federal habeas corpus proceedings. *See Barbeau v. Foster*, 2018 WL 6831143 (E.D. Wis. 2018).

⁴⁴ Wis. Admin. Code, PAC 1.05(2)(a).

⁴⁵ Wis. Stat. § 302.113 (9)(g); Wis. Admin. Code, PAC 1.08(1).

⁴⁶ Wis. Dept. of Corr. Petition to Modify Bifurcated Sentence: Geriatric/Extraordinary Health Condition, Form DOC-3612 (2011) <https://ffupstuff.files.wordpress.com/2015/02/compassionate-release-formsall.pdf>.

Prisoners applying for modification of their sentence have a right to be represented by counsel, and may apply to the state public defender for determination of indigency and appointment of counsel before or after filing the petition.⁴⁷

From August 2, 2011 to June 2017, only 25 prisoners obtained released from the parole board after petitioning for compassionate or geriatric release. Only one prisoner was approved due to old age alone.⁴⁸

b. Clemency

The governor has the power to grant reprieves, commutations, and pardons after conviction for all offenses except treason and impeachment. The governor must annually communicate to the legislature each case of reprieve, commutation, or pardon granted, stating the reasons for each.⁴⁹

c. Substance abuse program

When Wisconsin sentencing courts impose bifurcated prison sentences, they have discretion to place defendants into the “substance abuse program” (SAP).⁵⁰ The SAP, also called the “earned release” program, requires prisoners to complete a substance abuse treatment program. When the department of corrections notifies the sentencing court that the prisoner has successfully completed the required program, the court “shall modify” the prisoner’s bifurcated sentence to provide for release to extended supervision within 30 days. The court must also lengthen the term of extended supervision so that the total length of the bifurcated sentence remains unchanged.⁵¹

We have not found any publicly-available statistics on the number of prisoners enrolled in the SAP. While we cannot directly determine the importance of the SAP within the state’s prison-sentencing system as a whole, the absence of regular reporting of statistics suggests that the numbers of participating prisoners are small.

⁴⁷ Wis. Admin. Code, PAC 1.08(2).

⁴⁸ Gina Barton, *Release programs for sick and elderly prisoners could save millions. But states rarely use them*, Milwaukee Journal Sentinel, April 18, 2018.

⁴⁹ Wis. Const. Art. V § 6.

⁵⁰ See Wis. Stat. §§ 302.05(3)(a)(2); 973.01(3g). See also *State v. Owens*, 713 N.W.2d 187, 189 (Wis. Ct. App. 2006) (emphasizing the discretionary nature of courts’ decisions whether to place defendants into SAP). Prisoners convicted of numerous sexual crimes with child victims are ineligible to participate in the SAP. Wis. Stat. §§ 302.05(3)(a)(1); 973.01(3g). In addition, early release under the SAP may be unavailable to prisoners serving mandatory minimum terms of imprisonment. *State v. Gramza*, 952 N.W.2d 836, 842 (holding that “the mandatory minimum term of initial confinement ... must be served in full by Gramza, regardless of his successful completion of the SAP.”).

⁵¹ Wis. Stat. § 302.05(3)(c)(1)–(2).

d. Judicial sentence modification

There are two separate statutory powers of judicial sentence modification under Wisconsin law (one called “modification” and the other called “adjustment”). The most general power arises under Wis. Stat. § 973.19, which provides that defendants may move the sentencing court to modify their sentences “within 90 days after the sentence or order is entered.”⁵² Motions for sentence modification under § 973.19 can be based on the ground that a sentence is “unduly harsh or unconscionable” or that a “new factor” justifies alteration of the original sentence.⁵³

The short time limit in § 973.19 is misleading. As recounted by Professor Cecelia Klingele, the Wisconsin courts have held that the § 973.19 sentence modification power extends throughout prisoners’ terms of incarceration:

Although Wisconsin statutes provide that defendants must move for sentence modification within ninety days of sentencing when contending that their sentences are “unduly harsh,” Wisconsin courts have held that their statutory time limits govern only the defendant’s *right* to be heard by the court—not the court’s discretionary power to hear the defendant’s claims and to modify the sentence. In Wisconsin, therefore, a defendant may move for sentence modification at any time following the commencement of his sentence. When the defendant’s motion is filed within the ninety-day time limit prescribed by statute, the court is obliged to entertain the motion. After those ninety days have passed, it is within the trial court’s discretion to deny or hear the motion for modification.⁵⁴

There has been substantial litigation dating back to the 1970s on the question of what counts as a “new factor” sufficient to support sentence modification under § 973.19.⁵⁵

⁵² Wis. Stat. § 973.19(1)(a).

⁵³ *State v. Noll*, 653 N.W.2d 895, 897–98 (Wis. Ct. App. 2002).

⁵⁴ Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 Wm. & Mary L. Rev. 466, 506 (2010) (footnotes omitted). For relevant caselaw, see *State v. Wuensch*, 230 N.W.2d 665, 672 (Wis. 1975); *State v. Noll*, 653 N.W.2d 895, 897–98 (Wis. Ct. App. 2002).

⁵⁵ Klingele, 52 Wm. & Mary L. Rev. at 506–08. Professor Klingele cites a number of cases including the following:

[*State v.*] *Hegwood*, 335 N.W.2d 399, 402 (Wis. 1983) (holding that a reduction in the maximum penalty for an offense does not constitute a new factor); *State v. Torres*, 670 N.W.2d 400, 403 (Wis. Ct. App. 2003) (holding that a reclassification of a criminal offense that “would result in a shorter sentence if the defendant were convicted under the new classification” did not qualify as a new factor); *State v. Champion*, 654 N.W.2d 242, 243–44, 248 (Wis. Ct. App. 2002) (holding that participation in rehabilitative programming is not a new factor); *State v. Toliver*, 523 N.W.2d 113, 119 (Wis. Ct. App. 1994) (holding that disparity in sentencing between codefendants not a new factor) ... *State v. Doe*, 697 N.W.2d 101, 105–06 (Wis. Ct. App. 2005) (postsentencing cooperation with law enforcement may qualify as a new factor)

Id. at 507 n. 188, 508 n. 189.

In a published study, Professor Klingele found no state or local data on the numbers of sentence modifications ordered by judges under § 973.19. She noted anecdotal evidence, however, indicating that as many as half of all petitions for sentence modification filed on behalf of prisoners by a legal clinic at the University of Wisconsin Law School has been successful.⁵⁶

A much narrower sentence “adjustment” power was created in the early 2000s under Wis. Stat. § 973.195. Any prisoner serving a sentence for a crime other than a Class B felony may petition the sentencing court to adjust the length of their sentence if they have served 85 percent of the prison term for a Class C to Class E felony or 75 percent of the prison term for a Class F to Class I felony. Any of the following supply grounds for a petition: (1) the prisoner’s conduct, efforts at and progress in rehabilitation, education, treatment, or other correctional programs since he or she was sentenced; (2) a change in law or procedure related to sentencing or revocation of extended supervision effective after the prisoner was sentenced that would have resulted in a shorter term of confinement; (3) the prisoner is subject to a sentence of confinement in another state or the prisoner is in the United States illegally and may be deported; or (4) sentence adjustment is otherwise in the interests of justice. If the court grants the petition and makes a sentence adjustment, the reduction in the prison term will result in a corresponding increase in the term of extended supervision, unless the sentence adjustment is based on a change of law or procedure.⁵⁷

Professor Michael O’Hear has written that the sentence adjustment power under § 973.195 was “modest in design”⁵⁸ and has seen little use by judges:

Although the 2002 law created new opportunities for judges to modify sentences, there was no reason to think that this would become a routine feature of penal practice, as parole and good conduct time had once been. Indeed, one study found an almost laughably low success rate of 0.8% for sentence modification petitions in three of the state’s largest counties (Milwaukee, Racine, and Kenosha).⁵⁹

⁵⁶ Klingele, 52 Wm. & Mary L. Rev. at 508–09, *citing* Telephone Interview with Meredith Ross, Clinical Dir. of the Univ. of Wis. Frank J. Remington Ctr. (Mar. 9, 2010). *See also* Wisconsin Policy Research Institute, *Report: Black Robes and Blue Collars*, (2017) at 11 (“Judges’ decisions [on sentence adjustment petitions] varied widely by county. ... Last year, for example, La Crosse County’s five circuit judges granted petitions in 45 percent of all the cases filed in their courts, 20 out of 44. The same year, Milwaukee County, with 47 circuit judges, granted only 10 of 463 petitions, and in 2014, they granted only two of 536 petitions.”).

⁵⁷ Wis. Stat. § 973.195(1g),(1r)(b),(1r)(g)–(h).

⁵⁸ Michael O’Hear, *Good Conduct Time for Prisoners: Why (and How) Wisconsin Should Provide Credits Toward Early Release*, 98 Marq. L. Rev. 487, 490 (2014).

⁵⁹ *Id.* at 504, *citing* Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 Marq. L. Rev. 1551, 1583 n.189 (2012).

e. Release during overcrowding emergencies

There is no statutory emergency release mechanism for prisoners in instances of prison overcrowding. To relieve medium security overcrowding, the department of corrections may, with approval of the joint committee on finance, allow temporary placement of medium security prisoners at existing minimum security institutions.⁶⁰

4. Overall assessment of Wisconsin's prison-sentencing system

Overall, we classify Wisconsin's prison-sentencing system as one with a *low degree of indeterminacy* on the ranking scale developed for this project (see p. iii). It may be more natural to say that it is a *highly determinate* system. We base our assessment on a certain amount of guesswork about how Wisconsin judges exercise their sentencing discretion. For general-rules prisoners, judges have broad powers to vary the level of indeterminacy built into their individual sentences. In essence, they are important "gatekeepers" of the levels of determinacy in the prison sentences they impose. In our illustrations of general-rules sentences in Figures 3 through 7, we found examples of prison sentences that are low in indeterminacy, with at least 75 percent of time served controlled by the judicial sentence. On the other hand, we found examples that were extremely high in indeterminacy, such as Figure 6, with a sentence that was 10 percent determinate (fixed by the judicial sentence) and 90 percent indeterminate (controlled by actions and decisions made during the prison term).

What are we to make of such a system? For purposes of our ranking system, we are forced to make certain suppositions. To the extent those guesses are wrong, our analysis will be off the mark. Here are our premises:

First, we expect that, on average, Wisconsin sentencing judges impose sentences that feature a low degree of indeterminacy even though they have statutory authority to inject greater indeterminacy into particular sentences. In order to exert their "pro-indeterminacy" powers, judges must be willing to structure sentences with relatively short minimum prison terms followed by significantly longer postrelease supervision terms. In many instances, we think judges would consider such sentences to be "lopsided" and a self-inflicted dilution of their own sentencing discretion. Highly indeterminate sentences surrender some of the court's authority to fix sentence length in favor of unknowable decisions to be made later. We also hypothesize that the statutory benchmark of bifurcated sentences (at 75-percent determinate) exerts psychological pull on judicial decisions. Thus, we imagine that the bulk of judicial sentences probably fall in the 60-percent to 75-percent range of determinacy (40 to 25-percent

⁶⁰ Wis. Stat. § 301.17.

indeterminate). In our evaluations of other American jurisdictions, that is the sweet spot of low in determinacy.⁶¹

Second, we think the bad-time system in Wisconsin makes it relatively difficult for prison officials to lengthen prisoners' minimum terms—after which prisoners are entitled to mandatory release. Wisconsin's sanctions scale for prison disciplinary violations limits punitive increments of time served to 40 days per violation. This is different from the rules in force in most states, where a single violation can legally support a loss of all of prisoners' accumulated credits, solely in the discretion of corrections officials. In contrast, to extend a prisoner's minimum term by a single year in Wisconsin, prison officials must find 11 separate violations.⁶² To extend for more than one year, the department of corrections' release denial discretion requires findings of about nine violations for every year added to a prison sentence. For prison officials acting in good faith, discretion to lengthen time served is not a matter of pure discretion, but exists only for prisoners who repeatedly violate the rules.

In our view, this makes minimum prison terms in Wisconsin more determinate than suggested by the mathematical ratios in our timeline diagrams. Fundamentally, we conceive of indeterminacy as unpredictability of actual time-to-be-served (see p. ii). In Wisconsin, we are guessing that it is relatively uncommon for actual time served to stray dramatically from the minimum term chosen by the sentencing judge. If so, then minimum confinement terms will bear a reasonably predictable relationship to time actually served. Even when timeline models such as those in Figures 4, 5, and 6 make Wisconsin prison sentences appear to be highly indeterminate, we think that, in practice, back-end discretion to elongate time served is weighted down and held back by the state's bad-time framework.

⁶¹ We often refer to the Minnesota and Washington systems as exemplars of high (but not extremely high) determinacy. In both states, sentences for general-rules prisoners are 67 percent determinate and 33 percent indeterminate.

⁶² The first year of bad-time extension requires 11 violations because the first violation may be punished by only 10 days and the second by only 20 days; subsequent violations are each punishable by 40 days.

In this project, we use the term “population-multiplier potential” (or PMP) to express the amount of influence over prison population size that is ceded by law to back-end decision makers such as parole boards and prison officials. To give a simplified example, if all prisoners in a hypothetical jurisdiction were eligible for parole release after serving 25 percent of their maximum sentences, then the PMP attached to the parole board’s release decisions is 4:1. That is, if the parole board were to deny release to all prisoners for as long as legally possible (a *longest-time-served scenario*), the resulting prison population would be four times as large as it would be if the board were to release all prisoners at their earliest allowable release dates (a *shortest-time-served scenario*).

With caveats reflecting the guesswork in our analysis, we calculate the population multiplier potential for general-rules prisoners in Wisconsin as roughly 1.67:1, reflecting our estimate above that judicial sentences in Wisconsin average out to be about 60 percent determinate and 40 percent indeterminate. By that calculation, if prison officials in Wisconsin assessed sufficient bad-time sanctions to hold all general-rules prisoners for their full maximum terms, the resulting population (of general-rules prisoners) would eventually stabilize at a number 67 percent larger than if prison officials were to release all such prisoners at their earliest minimum terms, never handing out any bad time at all. In the American context, this amounts to a relatively low level of power at the back end of the prison-sentencing system to affect prison population size.

If we are wrong in the assumptions laid out above, then Wisconsin’s prison-sentencing system is more indeterminate than we have estimated. In theory, based on the large amount of gatekeeping authority placed by statute in the hands of sentencing judges, it could be a system that operates with a moderate or even high degree of indeterminacy. Indeed, beyond the standard framework for general-rules prisoners, Wisconsin law includes a number of unusual prison-release mechanisms that incrementally increase the amount of indeterminacy in the system as a whole. These include the judicial “modification” and “adjustment” powers and judges’ discretion to place defendants into the substance abuse program (SAP) as part of their sentences. The open-ended sentence modification power and SAP in particular have the potential to greatly enlarge the degree of indeterminacy in the Wisconsin prison-sentencing system—if used with regularity by judges. However, we see no evidence that any of the above mechanisms play a large enough role to affect the character of the entire system.

We must also take special note of Wisconsin’s unique system for discretionary release of life prisoners. We know of no other state that wholly substitutes trial courts for parole boards in the domain of life sentences with possibility of release. In addition, Wisconsin statutes allow for the imposition of minimum terms that are shorter than the lowest statutory options in

most states. In the context of the state's entire prison-sentencing system, these arrangements may produce a tilt toward greater indeterminacy, but we doubt the systemwide effect is large. For one thing, prisoners serving life sentences with the prospect of release make up only about four percent of the state's total prison population. Also, as with most life sentences in most American states, we would anticipate that release rates are low and few prisoners are released immediately at the end of their minimum terms. For future researchers, it would be enlightening to study how judicial discretionary release of life prisoners compares with the parole-release approach used in other states.⁶³

Similar to other states, we find no evidence that small-numbers releasing mechanisms such as medical parole and clemency are important drivers of prison population size in Wisconsin.

Considering that Wisconsin abolished parole-release discretion in 1999, and has ostensibly abolished good time as well, it is a remarkably complex system. Many parole-release-abolition systems created in the late 20th century are far less convoluted. As with other parole-release-abolition jurisdictions, the main player with back-end release discretion in Wisconsin is the department of corrections, exercised at the prison level through administration of the state's bad-time system. To an intriguing extent, however, Wisconsin has created prison-release avenues that place trial judges in the position of back-end decisionmakers, with the scope of those powers largely dependent on judges' inclinations to use them. Sentencing judges also have striking powers to vary the degrees of indeterminacy built into their individual sentences. In short, trial courts in Wisconsin straddle institutional borderlines across the "front" and "back" ends of the prison-sentencing system. This raises philosophical questions we do not know how to answer: Why has Wisconsin made these idiosyncratic institutional choices? Or, turning the question on its head, why have other states *not* experimented with such arrangements?

⁶³ The most procedurally sophisticated U.S. system of parole release for life prisoners is California's. See Kevin R. Reitz, Allegra Lukac & Edward E. Rhine, *Prison Release Discretion and Prison Population Size, State Report: California* (Robina Institute of Criminal Law and Criminal Justice, 2021). We would suggest a California-Wisconsin comparative study as one possible starting point for future research.