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### Good Conduct Time: How Much and For Whom? The Unprincipled Approach of the Model Penal Code

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#### Recommended Citation

Nora V. Demleitner, *Good Conduct Time: How Much and For Whom? The Unprincipled Approach of the Model Penal Code*, 61 Fla. L. Re. 777 (2009).

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# GOOD CONDUCT TIME: HOW MUCH AND FOR WHOM? THE UNPRINCIPLED APPROACH OF THE MODEL PENAL CODE: SENTENCING

Nora V. Demleitner\*

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## I. INTRODUCTION

Up until the 1970s, indeterminate sentencing dominated sentencing in the United States.<sup>1</sup> This model implied a focus on offender rehabilitation, with the concomitant need for individualized treatment.<sup>2</sup> The American Law Institute’s (ALI) *Model Penal Code (MPC)*, published in 1962, incorporated these assumptions, though in contrast to its General Part, the *MPC*’s sentencing provisions failed to attract adherents during the substantial revisions of state and federal sentencing laws, which started in the mid-1970s.<sup>3</sup> As rehabilitation has fallen into disrepute and prison populations have skyrocketed,<sup>4</sup> other sentencing goals have taken center

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1. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895–97 (1990).

2. *Id.*

3. MODEL PENAL CODE: SENTENCING, *Reporter’s Introductory Memorandum* xxviii (Tentative Draft No. 1, 2007).

4. Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population*

stage. The federal sentencing system, with its ill-regarded guideline regime, appears largely built on retribution and incapacitation,<sup>5</sup> which, together with the politicization of crime, have contributed to a dramatic build-up in the federal prison population. Most states have also witnessed a substantial increase in their prison populations<sup>6</sup> while struggling to control the resulting expenditures and overcrowding. Between the state and federal prison populations, the United States has an unprecedentedly large prison system, maintaining the highest number of prisoners in the world.<sup>7</sup>

The current approaches to sentencing *and* corrections are based on four different models: indeterminate sentencing, comprehensive structured sentencing, community/restorative justice, and comprehensive risk-based systems.<sup>8</sup> Any systemic classification should not only include the sentencing process—including the existence of guideline regimes and mandatory minimums—but also the back-end process, such as the scope of good time and parole release.<sup>9</sup> In many state sentencing systems, much back-end discretion continues to be exercised through corrections administrators.<sup>10</sup>

One of the ways in which prison administrators exercise discretion is through the award of “good conduct time,” or “good time.”<sup>11</sup> The

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*Trends*, in 26 CRIME AND JUSTICE: A REVIEW OF RESEARCH—PRISONS 63, 73–76 (Michael Tonry & Joan Petersilia eds., 1999).

5. Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 23–24 (2003) (stating that use of “rational reconstruction” indicates a “modified just desert” philosophy of punishment, which blends punishment proportionate to the seriousness of the crime and incapacitation, dominates the federal sentencing guidelines). *But see* Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission’s Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043–46 (2003) (asking that the U.S. Sentencing Commission develop a coherent sentencing philosophy).

6. *See generally* HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2007, at 1 (2008) (analyzing data from the National Prisoner Statistics program for state and federal prison populations from 2006 to 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p.07.pdf>. For more dramatic comparisons of incarceration growth over the last twenty-five years, see U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, INCARCERATION RATE, 1980–2007, chart at 1, available at <http://www.ojp.usdoj.gov/bjs/glance/incrt.htm> (last visited July 14, 2009).

7. THE PEW CENTER ON THE STATES, PUBLIC SAFETY PERFORMANCE PROJECT, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA’S PRISON POPULATION 2007–2011, at 1 (2007), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/State-based\\_policy/PSPP\\_prison\\_projections\\_0207.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/State-based_policy/PSPP_prison_projections_0207.pdf).

8. MICHAEL TONRY, THE FRAGMENTATION OF SENTENCING AND CORRECTIONS IN AMERICA 3 (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/175721.pdf>.

9. MICHAEL TONRY, RECONSIDERING INDETERMINATE AND STRUCTURED SENTENCING 2 (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/175722.pdf>.

10. Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679, 681–82 (1993).

11. *Id.* at 682.

availability of such time varies widely between sentencing systems.<sup>12</sup> In the course of different drafts, the ALI's proposed *Model Penal Code: Sentencing* has also suggested a widely varying percentage discount for good conduct and program participation. While increased good time carries the risk of administrative discretion, it is of crucial importance in a regime in which long sentences appear to continue unabated because good time will assure appropriate prison conduct and guarantee a limited form of relief and hope to inmates. Equally important, the enhanced focus on community re-entry upon release mandates that rehabilitation begin upon entry into the prison system.<sup>13</sup> Program participation, including drug abuse and educational programs, and the adoption of work-related values through participation in correctional employment suggest the appropriateness of a reward in the form of decreased sentence length. Undoubtedly, good time could and should be re-thought if the length of United States prison sentences and the rate of imprisonment were to fall.

This Article explains the changing assumptions behind sentencing since the initial issuance of the *MPC*, the purposes of good time in sentencing and post-sentencing, and addresses good time in light of existing sentencing regimes at federal and state levels. As well, this Article discusses the *Model Penal Code: Sentencing*'s approach to good time and proposes the adoption of a more extensive and differently structured good time regime than currently proposed in the ALI's Sentencing Draft.

## II. HOW ASSUMPTIONS ABOUT SENTENCING HAVE CHANGED: FROM THE *MPC* TO THE *MPC: SENTENCING*

Drafted in the 1950s and ultimately adopted in 1962, the *MPC* subscribed to indeterminate sentencing, with its focus on rehabilitation and individualization of treatment.<sup>14</sup> The *MPC*'s eight purposes of sentencing included "the correction and rehabilitation of offenders."<sup>15</sup> Rehabilitative goals assured at least the promise of enhanced governmental funding of programs that allowed offenders to improve and advance themselves.<sup>16</sup> The *MPC*'s sentencing provisions and back-end measures, including parole and good time, reflected its focus on rehabilitative efforts and offenders' perceived treatment needs. Good time was suggested at six days per month for "good behavior and faithful performance of duties," with another six

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12. *Id.* at 685–86.

13. See, e.g., MODEL PENAL CODE: SENTENCING, *Reporter's Note* 25–26 (Tentative Draft No. 1, 2007); MODEL PENAL CODE: SENTENCING 25–26 (Discussion Draft, 2006).

14. MODEL PENAL CODE AND COMMENTARIES: PART I, §§ 6.01 to 7.09, at 2–3 (1985); see also MODEL PENAL CODE: SENTENCING, *Reporter's Introductory Memorandum* xxviii–xxix (Tentative Draft No. 1, 2007).

15. MODEL PENAL CODE AND COMMENTARIES § 1.02(2)(b) (Official Draft and Revised Comments 1985); see also MODEL PENAL CODE: SENTENCING § 1.02(2), at 2 (Tentative Draft No. 1, 2007).

16. TONRY, *supra* note 9, at 5.

days to be awarded for “meritorious behavior or exceptional performance of his [or her] duties.”<sup>17</sup> Most prisoners would have received 20% good time under the *MPC*’s original good time provision. The credits would have applied to the minimum term, advancing parole eligibility, and would have applied to the maximum term, advancing mandatory release.<sup>18</sup>

Subsequent sentencing reform has focused on shifting sentencing discretion from the back-end, where it rested with parole officials and prison administrators, to the front-end, where it rests with the judiciary.<sup>19</sup> In addition, such reforms have focused on “truth in sentencing.”<sup>20</sup> While “truth in sentencing” has multiple meanings, one of its usages emphasizes the “close correspondence between the pronounced sentence and time served,”<sup>21</sup> which also leads to greater predictability for the inmate and the public. Admittedly, predictability can also be achieved while disparity between the sentence imposed and the time served occurs.<sup>22</sup>

The ALI’s *Model Penal Code: Sentencing* builds on these newer sentencing approaches. Its purposes “overlay[] limits of proportionality upon the pursuit of utilitarian goals.” It recommends the creation of permanent state sentencing commissions and provides for sufficient judicial discretion to individualize sentences.<sup>23</sup> In its current version, the *Model Penal Code: Sentencing* limits good time to 15% to prevent increased back-end discretion.<sup>24</sup>

### III. “GOOD TIME”

“Good time” reduces the actual time a defendant sentenced to prison serves—usually because he has complied with prison rules and regulations.<sup>25</sup> Because good time may amount to a substantial sentence reduction, it is valuable to inmates.<sup>26</sup> The value of good time is also reflected in the ex post facto protection against a decrease in good time through legislation enacted after the date of the offender’s sentencing.<sup>27</sup> Another indication of its value includes the due process protections that accompany the loss of good time.<sup>28</sup>

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17. MODEL PENAL CODE § 305.1 (1962).

18. TONRY, *supra* note 9, at 4.

19. Knapp, *supra* note 10, at 684.

20. *Id.*

21. *Id.* at 685.

22. *Id.*

23. MODEL PENAL CODE: SENTENCING, *Reporter’s Introductory Memorandum* xxx-xxxi (Tentative Draft No. 1, 2007).

24. *Id.*

25. BLACK’S LAW DICTIONARY 1521 (8th ed. 2004).

26. *See* Wolff v. McDonnell, 418 U.S. 539, 561 (1974) (“The deprivation of good time is unquestionably a matter of considerable importance.”).

27. *Weaver v. Graham*, 450 U.S. 24, 25, 36 (1981).

28. *See infra* note 114 and accompanying text.

Good time has frequently been classified in four different ways. First and most traditionally, it can be awarded for good prison conduct, which usually implies mere compliance with prison rules and regulations and avoidance of disciplinary infractions. Frequently, correctional systems “assume [such] good time credit will automatically accrue to eligible inmates.”<sup>29</sup> Therefore, it is often referred to as statutory good time.<sup>30</sup> Second, there may be a separate award of good time for successful participation in prison programs.<sup>31</sup> In this case “good time” is often referred to as “earned time.”<sup>32</sup> Third, good time may be granted for extraordinary achievements or service, which may include participation in drug experiments, donation of blood, or saving a corrections official during a riot.<sup>33</sup> Only occasionally do states provide for such meritorious good time.<sup>34</sup>

Fourth and finally, some state prison systems have used good time largely as a population management tool, designed to alleviate the pressure emanating from overcrowding.<sup>35</sup> In that case, “[e]mergency release credit is [] available . . . as a contingency to manage overcrowding.”<sup>36</sup> Good conduct deductions are awarded to the inmate in such situations solely for “staying out of trouble.”<sup>37</sup> In the early 1980s Michigan and Iowa both authorized early releases once their prison populations had reached a certain level. In some states, prisoners served increasingly less time because of a combination of generous good-time and emergency releases.<sup>38</sup> In the early 1990s, using this approach, Texas released offenders after having served on average only 13% of the sentence imposed.<sup>39</sup> During the same time, North Carolina offenders served less than 20% of their

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29. Dora Schriro, *Is Good Time a Good Idea? A Practitioner's Perspective*, 21 FED. SENT'G REP. 179–81 (2009).

30. *Id.*

31. *Id.*

32. *Id.*

33. James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 221 (1982).

34. Schriro, *supra* note 29, at 179.

35. STATE OF CAL. LITTLE HOOVER COMM'N, SOLVING CALIFORNIA'S CORRECTIONS CRISIS: TIME IS RUNNING OUT 25 (Jan. 25, 2007), available at <http://www.lhc.ca.gov/lhcdir/185/Report185.pdf> [hereinafter SOLVING CALIFORNIA'S CORRECTIONS CRISIS].

36. Schriro, *supra* note 29, at 179.

37. SOLVING CALIFORNIA'S CORRECTIONS CRISIS, *supra* note 35, at 25. Other administrative ways to control prison overcrowding include work release and pre-release. Knapp, *supra* note 10, at 682.

38. Judith Greene, *Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act*, in *Sentencing and Society: International Perspectives* 43, 51 (Cyrus Tata & Neil Hutton, eds., 1998).

39. Knapp, *supra* note 10, at 681 n.9; see also Carl Reynolds, *Sentencing and Corrections: From Crowding to Equilibrium (and Back Again?)*, 69 TEX. B.J. 232, 233 (2006) (stating that in its pursuit of a (partial) solution to overcrowding, the State of Texas engaged in substantial prison building throughout the 1990s).

sentences.<sup>40</sup> Not surprisingly, attendant headlines resulted in widespread public frustration with sentencing.<sup>41</sup> As a consequence, many states dramatically curtailed the discretion of prison officials to award sentence reductions or to move prisoners early into less restrictive confinement for program participation or work.<sup>42</sup>

Ideally, good conduct should connote rehabilitation on the part of the prisoner and at the same time improve safety in prisons as an incentive for lawful behavior. In addition, an increasing number of those focused on public safety view good time as a way to “match[] pre-release requirements to an individual inmate’s future propensity for crime.”<sup>43</sup> The *Preliminary Draft to the Model Penal Code: Sentencing* indicates that all inmates should have access to good time, based on any of the first three categories.<sup>44</sup>

### A. *Purposes of Good Time*

Key policy issues in determining the award of good time include the amount of good time, the types of offenders eligible for such deductions, and the requirements attached to good time.<sup>45</sup>

Good time may serve a host of purposes. First, good time can provide an incentive for participation in educational, work, drug, or other types of programs.<sup>46</sup> Correction officials have stated that “prisons are safer, more orderly, and more productive when inmates participate in programs.”<sup>47</sup> Programming may enhance rehabilitation. Successful participation in the federal government’s Residential Drug Abuse Program (RDAP), for example, reduces recidivism.<sup>48</sup> Second, “productive work programs permit inmates . . . to begin to repay their debt to society.”<sup>49</sup> Finally, good time can incentivize compliance with prison rules or perhaps even exemplary behavior. Such compliance makes it possible for the institution to function

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40. Knapp, *supra* note 10, at 681 n.9.

41. PIERCE O’DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 70 (1977).

42. DEAN J. CHAMPION, MEASURING OFFENDER RISK: A CRIMINAL JUSTICE SOURCEBOOK 58 (1993).

43. Schriro, *supra* note 29, at 179.

44. MODEL PENAL CODE: SENTENCING § 305.1 (1962).

45. BERT USEEM ET AL., INST. FOR SOCIAL RESEARCH UNIV. OF N.M., SENTENCING MATTERS, BUT DOES GOOD TIME MATTER MORE? 3 (1996).

46. *Id.*

47. *Id.*

48. See, e.g., U.S. DEP’T OF JUSTICE, FED. BUREAU OF PRISONS, DRUG TREATMENT PROJECTS: TRIAD DRUG TREATMENT EVALUATION PROJECT, available at [http://www.bop.gov/news/research\\_projects/published\\_reports/drug\\_treat/oretriad.jsp](http://www.bop.gov/news/research_projects/published_reports/drug_treat/oretriad.jsp) (last visited July 20, 2009) (demonstrating that RDAP participants’ recidivism rates were lower than those of comparable former inmates); NEIL P. LANGAN & BERNADETTE M.M. PELISSIER, THE EFFECT OF DRUG TREATMENT ON INMATE MISCONDUCT IN FEDERAL PRISONS 11 (2002).

49. USEEM ET AL., *supra* note 45, at 3.



more smoothly. For that reason, most states allow for good time, at least for most offenders. However, “[n]o one knows whether, or in what measure, a reduction in good time will produce greater disorder behind bars.”<sup>50</sup> States without good time do not appear to experience more frequent prison riots than those with good time.<sup>51</sup>

Good time may be used selectively. It may, for example, be restricted to non-violent offenders. While such a rule may enhance public safety by keeping violent offenders in prison longer, it could also create less compliance with prison rules and a perception of unfairness and inequality. In addition, this type of binary distinction may be too blunt to achieve its purpose.<sup>52</sup> Some argue that instead of using such a crude distinction, good time should be awarded based on custody level.<sup>53</sup> In turn, improvements in confinement or in custody level, rather than a time deduction, may result from enhanced compliance.<sup>54</sup>

Good time may also decrease sentence severity, assuming judges and juries do not increase the sentence to account for the good time reduction.<sup>55</sup> Finally, good time undermines the goals of “truth-in-sentencing,” as the sentence served will not be close to the sentence imposed.<sup>56</sup> This may only be a minor problem if the amount of good time is relatively limited, but may be quite dramatic in day-for-day systems, especially if those systems also have a generous parole regime.

In both federal and state systems, most inmates are awarded the entire available amount of good time. One may draw one of two conclusions: Either the good time system is effective in assuring compliance with prison rules, or good time is ineffective because prison policies are either too lax or insufficiently enforced.<sup>57</sup> For practical reasons, in large prison systems, there is “an inexorable tendency for statutory and meritorious good time to be awarded automatically.”<sup>58</sup> Some have suggested that good time should not be awarded for mere failure to run afoul of rules or solely for participation in work programs, but instead should assess actual rehabilitation. If such awards were to be based on rehabilitative progress,

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50. *Id.* at 4.

51. Jacobs, *supra* note 33, at 259.

52. USEEM ET AL., *supra* note 45, at 4–5.

53. *Id.* at 5–6.

54. Schriro, *supra* note 29, at 181 (describing Arizona’s program which uses “[e]ach inmate’s successful completion of individualized pre-release plans [as] the basis for earning improved conditions of confinement”).

55. USEEM ET AL., *supra* note 45, at 6. Cf. O’DONNELL ET AL., *supra* note 41, at 56 (suggesting need for decreased sentence length when limiting good time to a one-time maximum ten percent sentence reduction); Jacobs, *supra* note 33, at 221.

56. See USEEM ET AL., *supra* note 45, at 6.

57. *Id.* at 7. At least for New Mexico’s prison system, correction officials claimed to strictly enforce good time policies and considered them “a key management tool.” *Id.* at 10.

58. Jacobs, *supra* note 33, at 225.



however, the assessment would require an effective measure of such progress, which appears virtually impossible. In addition, substantially more personnel would be needed for these assessments.<sup>59</sup>

Others argue for evidence-based rehabilitative programs which bring about necessary cognitive changes.<sup>60</sup> While some such programs are available, they also need to target the appropriate offender.<sup>61</sup> Despite increasing knowledge about appropriate programming, state and federal good time rules often operate on outdated assumptions or seem to be driven by political concerns.

### B. Federal "Good Time"

In the federal system "good time" is earned for "satisfactory behavior," which is defined as "exemplary compliance with institutional disciplinary regulations."<sup>62</sup> Good time is available to any prisoner sentenced to a non-life term longer than one year.<sup>63</sup> The prisoner may receive credit of up to fifty-four days, which is awarded at the end of each year of imprisonment.<sup>64</sup> Good time available to prisoners sentenced after 1996 depends on whether they have "earned, or [are] making satisfactory progress toward earning, a high school diploma or an equivalent degree."<sup>65</sup> If that is not the case, the statutorily available maximum good time per year served is capped at forty-two days.<sup>66</sup>

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59. See USEEM ET AL., *supra* note 45, at 11–12.

60. While research on the success of prison treatment remains sparse, the literature supports the claim that carefully targeted programs will decrease recidivism. Further detailed studies and meta-analysis remain necessary. See Gerald G. Gaes et al., *Adult Correctional Treatment*, in 26 CRIME AND JUSTICE: A REVIEW OF RESEARCH—PRISONS 361, 415 (Michael Tonry & Joan Petersilia eds., 1999).

61. See generally Schriro, *supra* note 29, at 180 (providing examples of various states' policies).

62. 18 U.S.C. § 3624(b) (2006).

63. MODEL PENAL CODE: SENTENCING § 305:1 (1962). Inmates with a sentence of 365 days or less do not earn any good time. *Id.*

64. *Id.* The military system also allows for good time credit, with a maximum good time allowance of 10 days per month. In addition, extra good time credit is available for work assignments, with a maximum of seven days per month. Jeff Walker, *The Practical Consequences of a Court-Martial Conviction*, ARMY LAW., Dec. 2001, 1, 4–5.

65. MODEL PENAL CODE: SENTENCING § 305:1 (1962). If the offense was committed prior to November 1, 1987, 18 U.S.C. §§ 4161–66 (repealed 1987) governs good time. See U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 2008, at 14 (2008), available at <http://ndqq-defender.org/static/resources/BOP%20Legal%20Resource%220Guide%202008.pdf>. Inmates are eligible for both statutory and extra good time. *Id.* at 15. The former can be forfeited either in its entirety or partially "if the prisoner violates institution rules or commits any offense." *Id.*

66. The change in maximum good time per year resulted from the Prison Litigation Reform Act (PLRA), which went into effect April 26, 1996. 42 U.S.C. § 1997(e) (2006); see also Families Against Mandatory Minimums (FAMM), Frequently Asked Questions About Federal Good Time Credit (2008), available at [http://www.famm.org/Repository/Files/Final\\_Good\\_Time\\_FAQs\\_10.2](http://www.famm.org/Repository/Files/Final_Good_Time_FAQs_10.2)

The Bureau of Prisons' (BOP) Designation and Sentence Computation Center is responsible for all good time calculations of federal inmates held in BOP facilities; those held in private prisons have their good time computed by the individual facilities.<sup>67</sup> There should, however, be no difference in result.

One of the most disputed issues pertaining to federal good time is the way in which the BOP calculates it.<sup>68</sup> Since the BOP deducts good time from the days actually served by the prisoner rather than the sentence imposed by the judge, the maximum amount of good time per year is effectively forty-seven days.<sup>69</sup> Courts have deferred to the BOP's calculation of good time as agency interpretation of an ambiguous statute.<sup>70</sup>

The fifty-four day rule arose from the construction of the United States Sentencing Guidelines in 1987.<sup>71</sup> The guideline ranges are 15% longer than the time Congress intended for prisoners to stay incarcerated.<sup>72</sup> This meant that prisoners should serve only 85% of the sentences imposed.<sup>73</sup> The fifty-four days amount to almost exactly 15%.<sup>74</sup>

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1.08%581%50.pdf [hereinafter FAMM, FAQs]. The PLRA good time rule covers all inmates convicted after that date. 42 U.S.C. §1997(e) (2006); FAMM, FAQs, *supra*; see also U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT: GOOD CONDUCT TIME UNDER THE PRISON LITIGATION REFORM ACT, P 5884.03 (2006), available at [http://www.bop.gov/policy/progstat/5884\\_003.pdf](http://www.bop.gov/policy/progstat/5884_003.pdf).

67. See FAMM, FAQs, *supra* note 66, at 2.

68. Stephen R. Sady & Lynn Deffenbach, *The Sentencing Commission, The Bureau of Prisons, and the Need for Full Implementation of Existing Ameliorative Statutes to Address Unwarranted and Unauthorized Over-Incarceration* 2–9 (2008), available at [http://www.rashkind.com/alternatives/dir\\_04/Sady\\_Over-Incarceration.pdf](http://www.rashkind.com/alternatives/dir_04/Sady_Over-Incarceration.pdf). Stephen R. Sady, *Misinterpretation of the Federal Good Time Statute Costs Prisoners Seven Days Every Year*, CHAMPION 12 (Sept./Oct. 2002). Other concerns include the calculation of good time credit for concurrent sentences. See Stephen R. Sady & Lynn Deffenbach, *Grid & Bear It*, 31 CHAMPION 56 (May 2007).

69. See FAMM, FAQs, *supra* note 66, at 3–6.

70. See, e.g., *Tablada v. Thomas*, 533 F.3d 800, 809 (9th Cir. 2008) (finding that BOP violated Administrative Procedure Act by failing to articulate a rational basis for its interpretation of good time, but upholding the interpretation as reasonable nonetheless); *Bernitt v. Martinez*, 432 F.3d 868, 869 (8th Cir. 2005); *Sash v. Zenk*, 428 F.3d 132, 136–37 (2d Cir. 2005); *Petty v. Stine*, 424 F.3d 509, 510 (6th Cir. 2005); *Brown v. McFadden*, 416 F.3d 1271, 1272–73 (11th Cir. 2005); *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 534 (4th Cir. 2005); *O'Donald v. Johns*, 402 F.3d 172, 174 (3d Cir. 2005); *Perez-Olivo v. Chavez*, 394 F.3d 45, 52–53 n.6 (1st Cir. 2005); *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1270–71 (9th Cir. 2001) (holding that BOP's calculation of good time was reasonable). Cf. *Moreland v. Fed. Bureau of Prisons*, 431 F.3d 180, 186 (5th Cir. 2005), *cert. denied*, 547 U.S. 1106 (2006) (finding statute to be unambiguously referencing "time served"). In *Moreland*, Justice Stevens wrote a concurrence to the denial of the grant of certiorari, suggesting that Congress clarify the statute as it had done once before in 1959 when the same issue arose and Congress "und[id] a judicial determination that credit should be based on time served rather than on the sentence imposed." *Id.* at 1907 (Stevens, J., concurring).

71. FAMM, FAQs, *supra* note 66, at 7.

72. *Id.*

73. *Id.*

74. *Id.*

Congress replicated the 85% rule in the 1994 Violent Crime Control and Law Enforcement Act, which created a “Truth in Sentencing” (TIS) grant program for states.<sup>75</sup> The TIS legislation provides funding to states to increase their capacity to house violent offenders if those states either require violent offenders to serve at least 85% of the sentence imposed, or increase the percentage of violent felons sentenced to prison, increase their average time served, increase the percentage of the sentence served by incarcerated violent offenders, and have laws in effect that require those with one or more prior federal or state convictions of a violent crime or serious drug offense to serve at least 85% of the sentence imposed.<sup>76</sup> The consequence of TIS legislation has been that an offender serves a much longer period of time than before.<sup>77</sup>

In the federal system, previously proposed legislation would have increased good time up to sixty days per year for federal inmates if they satisfactorily earned a high school diploma, a GED, or “certification through an accredited vocational training program, college, or university.”<sup>78</sup> Inmates would also have earned the maximum good time if they had completed “interventional rehabilitation programs, including mental health and drug abuse programs.”<sup>79</sup> Sole responsibility for awarding the good time would have rested with the BOP.<sup>80</sup>

The bill was designed in part to increase the BOP’s accountability for programming that leads to better re-entry. As some have written, the proposed legislation pursued three goals: “to promote public safety by offering constructive incentives for exemplary institutional adjustment,” to “increas[e] educational standards” and to “decreas[e] the overall cost of corrections.”<sup>81</sup> Some research, however, indicates that institutional adjustment and recidivism are relatively unrelated because prisons are an artificial environment.<sup>82</sup> Therefore, compliance with prison rules may in fact be counterproductive to successful re-entry. When an inmate

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75. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20101(a), 108 Stat. 1796, 1816 (1994); 42 U.S.C.A. §§ 13701–02 (West 2007). For a detailed background on the legislation, see Greene, *supra* note 38, at 55–62.

76. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20102(a)(2)(D), 108 Stat. 1796, 1816 (1994). For allocation of funding, see 42 U.S.C. § 13708 (2006).

77. PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, TRUTH IN SENTENCING IN STATE PRISONS 1, 14 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tssp.pdf>.

78. Literacy, Education, and Rehabilitation Act (LERA), H.R. 4283, 110th Cong. § 2(a) (1st Sess. 2007) [hereinafter LERA]. The bill was originally introduced by Congressman Scott in 2005. See H.R. 3602, 109th Cong. (1st Sess. 2005).

79. LERA § 2(a).

80. *Id.*

81. Posting of Jeralyn Merritt to Talk Left: the Politics of Crime, <http://www.talkleft.com> (Oct. 21, 2003, 05:39 EST).

82. Jacobs, *supra* note 33, at 264–65.

participates in a program to gain release, such a decision does not necessarily reflect moral growth or rehabilitation. More disturbingly, it may be solely indicative of successful functioning in an artificially controlled environment, rather than be predictive of success in a less structured setting. While all prisons require a certain structure and control, rehabilitative programs and especially work programs also need to allow for increasing choices to replicate life on the outside more accurately.

Increased education standards will only be meaningful to inmates upon release if the standards lead to (better) employment. For that reason, institutional educational opportunities should be constructed carefully. Any shorter imprisonment, even with enhanced programming, will be cost-effective, assuming that more inmates are not returned to prison for violations committed during supervised release or for more offenses committed over their lifetime.

Recidivism studies indicate that certain good time programs can both enhance public safety and save costs.<sup>83</sup> Through the transmission of skills and application of such skills, successful programs bring about cognitive transformation. However, not all program options are created equal as static factors may play a crucial role in an individual's chances for program success. Static factors include the type of crime committed, prior criminal history, prior employment history, and a history of substance abuse.<sup>84</sup>

In 1989, the BOP introduced its first residential drug and alcohol abuse treatment program as a pilot.<sup>85</sup> Today, the Residential Drug Abuse Program (RDAP)<sup>86</sup> awards up to one year of sentence reduction for participating non-violent offenders.<sup>87</sup> The number of inmates who volunteered originally

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83. See, e.g., Schriro, *supra* note 29, at 179–81.

84. *Id.* at 180.

85. See BERNADETTE PELISSIER ET AL., FEDERAL PRISON RESIDENTIAL DRUG TREATMENT REDUCES SUBSTANCE USE AND ABUSE AFTER RELEASE 3–4, available at [http://www.bop.gov/news/research\\_projects/published\\_reports/recidivism/orepramjalcd.pdf](http://www.bop.gov/news/research_projects/published_reports/recidivism/orepramjalcd.pdf) (last visited July 14, 2009) (noting that development of residential substance abuse programs occurred following a conference held in 1988). Alan Ellis, J. Michael Henderson & James H. Feldman, Jr., *Reducing Recidivism: The Bureau of Prisons Comprehensive Residential Drug Abuse Program*, CHAMPION, July 2006, at 36, 36.

86. 18 U.S.C. § 3621(e) (2006).

87. *Id.* Those convicted of a “crime of violence,” which the BOP interprets as including the possession of a weapon, may participate in RDAP, but are excluded from early release. See THE 2009 CRIM. JUSTICE TRANSITION COAL., SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS 55 (2008), available at [http://www.2009transition.org/criminal\\_justice/](http://www.2009transition.org/criminal_justice/) (last visited July 20, 2009) [hereinafter SMART ON CRIME]. INS detainees, pre-trial inmates, and contractual boarders, which includes prisoners housed by the BOP but sentenced under the authority of any state or the United States military, are statutorily precluded from program participation. Alan Ellis & J. Michael Henderson, *Reducing Recidivism: The Bureau of Prisons Comprehensive Residential Drug Abuse Program* 1, 3, available at <http://www.alanellis.com/CM/Publications/reducing-recidivism.pdf>. 28 C.F.R. Parts 545–550 (Jan. 14, 2009) (D.C. non-violent Code offenders eligible for RDAP and its sentence reduction). The BOP also excludes from participation all those with a detainer. U.S. DEP’T OF JUSTICE, FED. BUREAU OF PRISONS, SUBSTANCE ABUSE TREATMENT FAQs, available at

was small, in part because the rigorous program did not provide any incentives for participation.<sup>88</sup> Even when the BOP began to offer some rewards in the form of goods and performance pay awards,<sup>89</sup> the number of participants remained small.<sup>90</sup>

The number increased dramatically after passage of the 1994 Violent Crime Control and Law Enforcement Act which provided up to one year sentence reduction for non-violent inmates who successfully completed the residential drug abuse treatment program.<sup>91</sup> Because a large number of inmates fulfill the program prerequisites, an ever higher number of inmates have been able to benefit from the program.<sup>92</sup> At any point in time, about six thousand inmates are now enrolled in the RDAP, with an even longer waiting list.<sup>93</sup> The long waitlist combined with the way in which the BOP administers the program, however, has decreased the resulting sentence reduction for program participants. As of summer 2008, the average sentence reduction amounted to only 7.7 months.<sup>94</sup>

The positive response to the program results from the RDAP being the only program in the federal prison system that allows for early release based on program participation. Upon early release, all program participants will be transferred to a community correctional center (CCC) for up to six months to participate in a transitional pre-release program, ideally immediately prior to their release.<sup>95</sup>

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[http://www.bop.gov/inmate\\_programs/substanceabuse\\_faqs.jsp](http://www.bop.gov/inmate_programs/substanceabuse_faqs.jsp) (last visited July 15, 2009).

88. Ellis, Henderson & Feldman, *supra* note 85, at 36.

89. See 28 C.F.R. § 550.57 (2009) (outlining current incentives other than early release).

90. BUREAU OF PRISONS, 1997 SUBSTANCE ABUSE TREATMENT PROGRAM IN THE FEDERAL BUREAU OF PRISONS, REPORT TO CONGRESS, AS REQUIRED BY THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994, at 12 (stating that as of 1993, approximately 1,100 inmates had participated).

91. 18 U.S.C. § 3621(e)(2)(B) (2006). The legislation also required the BOP to provide such treatment for all “eligible” inmates, which the BOP subsequently defined as all those with a verifiable and documented drug, alcohol, or prescription abuse problem. *Id.* § 3621(e)(5)(B). See also BOP Program Statement 533.02 (changes in eligibility for some offenders).

92. FED. BUREAU OF PRISONS, THE FEDERAL BUREAU OF PRISONS ANNUAL REPORT ON SUBSTANCE ABUSE TREATMENT PROGRAMS FISCAL YEAR 2007, REPORT TO CONGRESS 11 (2008) [hereinafter FED. BUREAU OF PRISONS, ANNUAL SUBSTANCE ABUSE TREATMENT PROGRAMS REPORT 2007] (stating that in fiscal year 2007, almost five thousand inmates received the sentence reduction; a total of almost twenty-eight thousand inmates have received the sentence reduction in the last dozen years). Pre-sentence data from fiscal years 2002 and 2003 indicate that approximately forty percent of federal inmates meet the substance abuse disorder criteria. See U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS ON THE FEASIBILITY OF FEDERAL DRUG COURTS 6 (2006), available at [http://www.usdoj.gov/olp/pdf/drug\\_court\\_study.pdf](http://www.usdoj.gov/olp/pdf/drug_court_study.pdf) [hereinafter FEASIBILITY OF FEDERAL DRUG COURTS REPORT].

93. Ellis, Henderson & Feldman, *supra* note 85, at 38–39. The Bureau of Prisons, however, reported a substantially higher participation number of inmates in 2007, without any indication of the existence of a waitlist. FED. BUREAU OF PRISONS, ANNUAL SUBSTANCE ABUSE TREATMENT PROGRAMS REPORT 2007, *supra* note 92, at 11.

94. SMART ON CRIME, *supra* note 87, at 55.

95. Ellis, Henderson & Feldman, *supra* note 85, at 36.

The RDAP is based on the assumption that drug and alcohol addiction are intimately connected to offending, even if the precise correlation remains contested. In any event, it is generally accepted that “drug dependence can amplify the offending rates of people whose circumstances may already predispose them to crime.”<sup>96</sup> Once the addiction has been broken, reform and rehabilitation of the offender proceed more smoothly, so as to decrease future offending and ultimately enhance public safety.<sup>97</sup> The goal is to turn the offender into a productive member of society by providing a cognitive transformation.

### C. “Good Time” in the States

Not unlike the patchwork in our state and federal sentencing regimes generally, good time awards continue to vary dramatically between states. In some states, good time is tied to the length of time served, with longer sentences meriting larger amounts of good time.<sup>98</sup> In others, good time may be linked to prior record and current offense.<sup>99</sup> New Mexico’s good time policy, for example, continues to be strikingly different from the federal policy. Up until 1999, offenders served on average only about half the time imposed, with variations between offenders based on the offense of conviction.<sup>100</sup> Today’s Earned Meritorious Deductions statutory policy assesses the allowable deduction based on solely the offense of conviction. For example, serious violent offenders receive only up to four days of credit for every thirty days served, which means they will serve at least 85% of the sentence imposed.<sup>101</sup> Most other offenders, excluding parole violators, receive up to thirty days for thirty days served.<sup>102</sup> Credits may be forfeited but may also be restored.<sup>103</sup> In addition, offenders may earn a “bonus” award for successful completion of select types of programming.<sup>104</sup>

Illinois subscribes to a similar regime. Violent offenders are eligible for up to only 4.5 days of good conduct credit for each month of an

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96. Tim McSweeney et al., *Twisting Arms or a Helping Hand? Assessing the Impact of “Coerced” and Comparable “Voluntary” Drug Treatment Options*, 47 BRIT. J. CRIMINOLOGY 470, 470 (2007).

97. While debate continues as to whether coerced drug treatment is as effective as voluntary treatment, a substantial number of studies indicate that even coerced treatment results in “considerable and sustained reductions in reported substance use, injecting risk and offending behaviours.” *Id.* at 485.

98. Jacobs, *supra* note 33, at 229–30.

99. *Id.*

100. USEEM ET AL., *supra* note 45, at 6.

101. NEW MEXICO SENTENCING COMM’N, TIME SERVED IN NEW MEXICO PRISONS, FY 2008: ANALYSIS OF THE IMPACT OF EARNED MERITORIOUS DEDUCTIONS 2 (Oct. 2008).

102. *Id.*

103. *Id.*

104. *Id.*



imprisonment sentence.<sup>105</sup> Most prisoners, however, receive one day of good conduct credit for each day of their sentence.<sup>106</sup> In addition, successful completion of an educational or substance abuse program or prison industry work assignment may lead to further reduction of the length of a prison sentence.<sup>107</sup>

New York created an extensive Merit Time Program in 1997. Inmates who are serving prison time for non-violent offenses can earn up to a one-sixth reduction of their sentence. To be eligible, inmates must not have run afoul of disciplinary rules and must either have obtained a GED or a vocational training certificate, participated in alcohol or drug counseling, or performed community service as member of a community work crew.<sup>108</sup> Drug offenders are eligible for an additional one-sixth decrease in their time if they fulfill two of these requirements or work release.<sup>109</sup> The program has led to substantial savings in corrections costs in New York State.<sup>110</sup>

Good time may be credited as a whole at the beginning of a prison term—making its revocation a punishment rather than a reward for good behavior—or may be credited as it is earned, yearly, quarterly, or monthly.<sup>111</sup> The award of good time, as well as its revocation, rests largely with prison officials, and may vary substantially.<sup>112</sup> Under BOP and state regulations, inmates who have been sanctioned for violating prison disciplinary rules may lose all or part of their good time credits.<sup>113</sup> The United States Supreme Court has held some minimal due process protections to apply to proceedings based on which offenders lose good time.<sup>114</sup> Such a holding indicates the importance of good time to prisoners

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105. 730 ILL. COMP. STAT. 5/3-6-3(a)(1)–(2) (2008).

106. *Id.*

107. 730 ILL. COMP. STAT. 5/3-6-3(a)(4) (2008).

108. STATE OF NEW YORK—DEPARTMENT OF CORRECTIONAL SERVICES, MERIT TIME PROGRAM SUMMARY—OCTOBER 1997–DECEMBER 2006 1 (Aug. 2007).

109. *Id.* at 2.

110. *Id.* at ii. For a further update on release data, see STATE OF NEW YORK—DEPARTMENT OF CORRECTIONAL SERVICES, MERIT TIME PROGRAM SUMMARY—APRIL 2007–SEPTEMBER 2007 (Apr. 2008).

111. Jacobs, *supra* note 33, at 224–25.

112. See USEEM ET AL., *supra* note 45, at 10.

113. Some state systems revoke good time also for other reasons: Thirteen states allow for forfeiture of good time if inmates file frivolous lawsuits. In Missouri, that forfeiture provision explicitly includes situations in which inmates had asked for DNA testing which confirmed their guilt. Tonja Jacobi & Gwendolyn Carroll, *Acknowledging Guilt: Forcing Self-Identification in Post-Conviction DNA Testing*, 102 NW. U. L. REV. 263, 292 (2008). FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 2008, at 14 (2008).

114. For a detailed account on the due process analysis in one state, see Jeremy J. Overbey, *Comment: The Texas Department of Criminal Justice—Institutional Division: Controlling and Disciplining Society's Inmate Population*, 4 TEX. TECH J. ADMIN. L. 257 (2003). See Wolff v. McDonnell, 418 U.S. 539, 563–66 (1974) (stating that evolving and flexible due process protections require in this context “advance written notice of the claimed violation and a written



and their reliance on its existence. Nevertheless, opposition to good time continues. Some has come from academics, some from politicians who object to the “leniency” created by good time, and some from practitioners.

#### D. Rejecting Good Time

Good time is open to the same criticism as indeterminate sentencing, and some sentencing reformers have rejected it for similar reasons.<sup>115</sup> Nevertheless, many of the early sentencing reformers in the state systems included generous good time provisions in their proposals and reforms.<sup>116</sup> Good time injects a certain level of uncertainty into the length of the sentence to be served, thereby undermining the initial judicial sentencing decision. The uncertainty created “deprives a prisoner of the incentive to prepare seriously for release and fosters self-defeating despair.”<sup>117</sup>

Typically, back-end discretion is virtually invisible and prison officials are substantially less accountable than judges.<sup>118</sup> Moreover, earned good time poses particular issues if work assignments or program spaces are insufficient.<sup>119</sup> It may also be problematic if correction rules preclude certain offenders from participating in rehabilitative programs even though they would be statutorily eligible.<sup>120</sup> Revocation of good time appears particularly subject to abuse unless it vests at some point or can only be revoked in part.<sup>121</sup>

Because good time laws serve at least one specific purpose (independent of any finding of rehabilitation), Pierce O’Donnell and his co-authors suggest replacing good time with a modified early release program. Early release would depend on the BOP’s evaluation of the inmate’s “institutional conduct and performance,” but would be limited to one-tenth of the sentence.<sup>122</sup> Should the BOP find the inmate unsuitable for early release, it would be required to hold a hearing to provide the inmate

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statement of the fact-finders as to the evidence relied upon and the reasons for the disciplinary action taken”); *id.* at 566 (stating inmate is also “allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals”); *id.* at 570–71 (stating the inmate is entitled to the right to assistance in preparing and presenting a defense at least under some circumstances; the decision-maker must be “sufficiently impartial”). In a later case, *Superintendent, Mass. Corr. Inst. Walpole v. Hill*, 472 U.S. 445 (1985), the Court required that “there be some evidence to support the findings made in the disciplinary hearing.” *Id.* at 457.

115. See O’DONNELL ET AL., *supra* note 41, at 56, 68; Jacobs, *supra* note 33, at 243.

116. Greene, *supra* note 38, at 47–48.

117. O’DONNELL ET AL., *supra* note 41, at 68.

118. Jacobs, *supra* note 33, at 218–19.

119. *Id.* at 235.

120. See, e.g., Nora V. Demleitner, *Terms of Imprisonment: Tracking the Noncitizen Offender Equality*, 21 FED. SENT’G REP. 174 (2009) (critiquing exclusion of offenders with immigration detainer from RDAP program).

121. Jacobs, *supra* note 33, at 238–39.

122. O’DONNELL ET AL., *supra* note 41, at 70.

with an opportunity to present his case for early release once the inmate has completed three-fourths of his sentence.<sup>123</sup>

Such limited good time would allow for the existence of some disciplinary mechanism while maintaining the focus on the sentence's retributive character.<sup>124</sup> However, no evidence exists that prison officials could not use other discretionary programs to reward good conduct or penalize violations of prison rules.<sup>125</sup> And, in fact, some already do.<sup>126</sup> Others argue that good time is inappropriate if viewed as an indicator of rehabilitation because compliance with prison rules does not predict recidivism.<sup>127</sup> Moreover, incentive-based program participation fails to indicate moral improvement, or necessarily lead to it. In addition, some have criticized the use of good time to encourage participation in rehabilitative programs.<sup>128</sup>

Much of the criticism of good time has been based on the assumption that sentences are too long and need to be shortened as part of a sentence reform movement. Since the publication of such criticism thirty years ago, sentences have lengthened further rather than shortened, and the number of people incarcerated has sky-rocketed. The political pressure to increase sentence length has been almost relentless, and the number of prisoners as well as the amount of time they serve has increased dramatically since those pre-reform days. This reality, however, seems to have been only insufficiently considered in the current version of the *Model Penal Code: Sentencing*. To be considered a true "model," designed to revolutionize sentencing, it should start from much lower sentence lengths which would allow for a theoretically and practically based re-thinking of good time. If it is, on the other hand, to some extent grounded in present reality, it should also focus on the most recent—albeit limited—work on the success of rehabilitative and work programs, so as to inform good time decisions.

#### E. *Good Time in the Model Penal Code: Sentencing Drafts*

An early draft of the *Model Penal Code: Sentencing* indicated generous amounts of good time, up to 20% each for good conduct, program

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123. *Id.*

124. ANDREW VON HIRSCH, COMM. FOR THE STUDY OF INCARCERATION, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 101–02 (1976) (indicating that 10% to 15% of good time would be acceptable).

125. Jacobs, *supra* note 33, at 258–59.

126. Rewards other than good time may include furloughs, transfers to lower-security units or prison facilities, or monetary awards. Jacobs, *supra* note 33, at 242. The experience in the early years of RDAP, however, may contradict this claim as only substantial good time credits increased the number of applicants dramatically. Demleitner, *supra* note 120, at 175. Rather than sanctioning an individual with the loss of good time, placement in solitary confinement or a special control unit may have a more specific and general deterrent effect. *See* Jacobs, *supra* note 33, at 258.

127. Jacobs, *supra* note 33, at 264.

128. NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 18, 49 (1974).

participation, and extraordinary service.<sup>129</sup> However, such large sentence reductions would have dramatically enhanced the discretion of prison officials, who are largely unaccountable to the public. A later draft seemed to settle on 15% of good time for good conduct, with another 15% being awarded for “extraordinary service, such as saving a life or assisting in recapturing an escaped inmate.”<sup>130</sup>

The latest draft now provides for good time for good conduct at a minimum amount of 15%. Since the 15% reduction would be presumed, prisoners could lose such good time only if they commit a criminal offense or “a serious violation of the rules of the institution,” or if they “failed to participate satisfactorily in work, education, or other rehabilitation programs.”<sup>131</sup> A presumption of a good time reduction may not only be easier to administer but may also carry a symbolic effect on the prisoner who is presumed to be able to follow rules and regulations, which may indicate a societal belief in his rehabilitation. The reason for the relatively limited amount of good time now available is again to avoid back-end discretion.

Good time that continues to be provided allows prison authorities to exercise some “authority over prison durations as a tool to manage the in-prison behavior of inmates.”<sup>132</sup> However, there is only limited explanation for the choice of 15% as the minimum amount of good time states should award. While federal law and some states have adopted a 15% rule, the commentary notes that “no data exist for derivation of an optimum formula.”<sup>133</sup> The *Model Penal Code: Sentencing* in its current form does not adopt a vesting rule; however, in the commentary, it provides language for one. Currently, good time does not vest in any state.

#### IV. FRAMING GOOD TIME IN THE CURRENT SENTENCING CONTEXT

The United States prison system has grown dramatically in the last twenty years. Today, state and federal authorities hold over two million people. The BOP incarcerates over two hundred thousand prisoners<sup>134</sup> which makes it the largest jailer in the United States. The federal prison system has grown at least three times as fast as state systems within the last decade, and costs about five billion dollars a year.<sup>135</sup> It has particularly long

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129. MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 5, 2007).

130. MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 6, 2008).

131. MODEL PENAL CODE: SENTENCING §§ 305.1(2)(a), (b) (Council Draft No. 2, 2008).

132. *Id.* § 305.1 cmt. a.

133. *Id.* § 305.1 cmt. b.

134. SCOTT D. CAMP & GERALD G. GAES, U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, GROWTH AND QUALITY OF U.S. PRIVATE PRISONS: EVIDENCE FROM A NATIONAL SURVEY 2 & n.3 (2001), available at [http://www.bop.gov/news/research\\_projects/published\\_reports/pub\\_vs\\_priv/orepres\\_note.pdf](http://www.bop.gov/news/research_projects/published_reports/pub_vs_priv/orepres_note.pdf).

135. THE SENTENCING PROJECT, THE FEDERAL PRISON POPULATION: A STATISTICAL ANALYSIS 1,

sentences for non-violent offenders. For drug offenses committed between the early nineties and the following decade, the average time to be served has increased by almost one-third, from 32.7 months to 42.9 months.<sup>136</sup>

Starting in the 1960s, as crime became a salient political issue, legislators increasingly clamored for longer sentences and increased harshness toward offenders. The tide, however, appears to have turned, especially in light of tight state budgets and enhanced emphasis on public safety which mandates long prison terms only for those who constitute an active threat or are believed to do so—a determination usually based on a combination of the offense of conviction and the offender's prior criminal record. Public opinion polls indicate that people support education and job training programs for inmates to prepare them for release. According to polls, three-quarters of the public also favor early release for prisoners who have participated in such programs, largely because they view such prisoners as unlikely to recidivate.<sup>137</sup> Thus, the public will support programs that rehabilitate offenders and therefore enhance public safety, and is willing to reward those who participate in such programming.

All sentencing and corrections regimes exist to protect numerous goals and values, which include equal treatment, autonomy, participation, transparency, and legitimacy.<sup>138</sup> Good time can assist in achieving these goals when constructed carefully and when designed to provide a sufficient incentive.

Good time should fall into two categories. One category should be tied to satisfactory behavior, with a relatively small amount of good time sufficient to incentivize such behavior. While some criticize this requirement as minimal,<sup>139</sup> prison inmates are convicted for running afoul of societal rules. Therefore, they deserve some credit, albeit limited, for complying with rules.

The second category should be tied to whether they have achieved a goal that is crucial to their future rehabilitation and social reintegration, such as drug treatment, or an educational or vocational achievement.<sup>140</sup> This is especially the case if program success indicates a substantial cognitive change from earlier thinking. If good time is tied to program

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3, available at [http://www.sentencingproject.org/doc/publications/sl\\_fedprisonpopulation.pdf](http://www.sentencingproject.org/doc/publications/sl_fedprisonpopulation.pdf); U.S. COURTS, COSTS OF INCARCERATION AND SUPERVISED RELEASE, available at <http://www.uscourts.gov/newsroom/2008/costs.cfm> (last visited July 14, 2009).

136. THE 2009 CRIMINAL JUSTICE TRANSITION COAL., PRISON INCENTIVES AND MANAGEMENT: IMPROVE PRISON MANAGEMENT BY EXPANDING PRISONERS' GOOD CONDUCT CREDITS (2008), available at [http://2009transition.org/criminaljustice/index.php?view=article&catid=20%3Achapter-fourteen-sentencing-reform-&id=51%3Aincentives-and-sentencing-management&format=pdf&option=com\\_content&Itemid=104](http://2009transition.org/criminaljustice/index.php?view=article&catid=20%3Achapter-fourteen-sentencing-reform-&id=51%3Aincentives-and-sentencing-management&format=pdf&option=com_content&Itemid=104).

137. PETER D. HART RESEARCH ASSOCS., OPEN SOCIETY INSTITUTE, CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM: SUMMARY OF FINDINGS 13 (2002).

138. TONRY, *supra* note 8, at 5–7.

139. SOLVING CALIFORNIA'S CORRECTIONS CRISIS, *supra* note 35, at 25.

140. *See id.* at 25–26.

participation, sufficient seats must be available in such programs, so as not to randomly exclude otherwise eligible offenders. Such exclusions would necessarily lead to inequities and resulting difficulties in managing an institution.

If opportunities to earn good time are equally available, correctional goals will be fulfilled. Autonomy aims at “leaving people alone” but at the same time holding them responsible for their decisions. While imprisonment has often been charged with infantilizing offenders, the ability to earn good time through personal choices and behavior restores some autonomy to inmates. It restores the inmates’ opportunity to believe in their ability to operate as independent actors. This is especially true if the programming decisions become part of the offender’s pre-release plan, so that every step on the way toward release either shortens the time to release or improves the conditions of the inmate’s confinement.

Despite the fact that participation rights in sentencing and release decisions have begun to include victims and their focus on the offender has diminished to some extent, imprisonment should be addressed differently. Imprisonment deals solely with the offender and his punishment. During that time, offenders should play an active part in their rehabilitation and participate in shaping their future. Efforts that resemble those of a law-abiding person—following rules—should be rewarded; any action beyond that—employment and especially efforts at education and treatment—should merit even greater reward, with the goal of testing the depth of the attitudinal change as soon as feasible.

Transparency of this good time regime could be assured to some extent through clear-cut but sufficiently flexible guideline-like rules that determine what merits a discount and how much of a discount to award. The construction of such a regime should rely less on currently existing rules, which do not appear scientifically founded but rather use pedagogical literature to assess how time discounts effect rule compliance, goal setting, and achievement in other educational settings. Whether 12% to 15% is the appropriate discount for good conduct and for program success may be more easily answerable in light of the pedagogical literature. While different states provide us with distinct models, their experiences may be less important as neither selective programming nor thoughtful use of good time are likely to have occurred in most states. It may be precisely this laboratory of states, however, that may allow us to determine discount rates more likely to achieve our societal goals of offender rehabilitation and crime prevention.

Such transparency is also crucial because extensive use of good time will be challenged by victims and the public alike. After all, the time imposed in court may appear irrelevant if it will subsequently be cut in half by prison officials. Such decrease in the time served should be defensible on grounds other than merely “good behavior.” The extensive type of

programming envisioned here would make it more defensible.

In light of the long prison sentences many inmates currently serve, good time should become irrevocable at a point to avoid the ongoing threat of loss of good time credits. Surely prison systems have other, more immediate and harsher sanctions available should serious misconduct occur.

Fair procedures in awarding and taking away good time will be crucial in establishing the legitimacy of the system to inmates and the public. The procedures should be transparent to the extent possible. Extraordinary behavior in the form of saving a prison guard or preventing an effort at escape or rioting should not be rewarded within this good time regime. Because of its rare nature, it might be appropriate to allow for judicial action at that point, giving the court an opportunity to re-assess a sentence in light of such unique conduct.

#### V. THE FUTURE: A PROPOSAL FOR CHANGE

The proposed expansion of good time and its re-thinking is justified, at least in part, by the current length of prison sentences in the United States. The entire good time regime should be reviewed if our sentence lengths begin to decrease.<sup>141</sup> Until that point, however, good time is crucial for prison management and as a symbol of hope and rehabilitative potential in an overly harsh penal regime. A discount of up to one-third of the sentence judicially imposed may capture these goals appropriately. Good time, after all, encompasses the power of the law to “create, alter, distort, or even destroy time itself, not simply our experience of it.”<sup>142</sup> My proposal allows inmates to regain some control over time, control that usually escapes any prisoner. It puts them in charge of their own fate by choosing compliance, and especially by preparing themselves for release. With re-entry becoming a mantra in recent years, which is crucial for the reintegration of the thousands of inmates who will be released annually, good time incentives, combined with enhanced prison programming, could help facilitate adjustment to life on the outside and help decrease recidivism. Thus, good time can become a valuable tool not only for prison administrators in keeping control, but also for the inmate and society in achieving our goals of cutting prison time, saving costs associated with imprisonment, and decreasing the number of future crimes.

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141. For an analysis of the increase in the time served by federal inmates, see WILLIAM J. SABOL & JOHN MCGREADY, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *TIME SERVED IN PRISON BY FEDERAL OFFENDERS 1986-97* (1999).

142. Rebecca R. French, *Time in the Law*, 72 U. COLO. L. REV. 663, 693 (2001) (citing Jonathan D. Kramer).