

# SOLVING THE GOOD-TIME PUZZLE: WHY FOLLOWING THE RULES SHOULD GET YOU OUT OF PRISON EARLY

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Good-time programs have long been an important part of the American penal landscape. At least twenty-nine states and the federal government currently offer prison inmates early release, sometimes by many years, in return for good behavior. Written a generation ago, the leading law review article on good time presented a strong case against such programs. Although good time is traditionally justified by reference to its usefulness in deterring inmate misconduct—credits can be denied or withdrawn as a penalty for violations of prison rules—the article questioned how it could possibly be just to impose additional incarceration based on mere violations of administrative regulations.

In response to this important challenge, the present Essay proposes a new way to conceptualize good-time credits, specifically, as a way to recognize atonement. Drawing on communicative theories of punishment, the Essay argues that good time can be seen as congruent with (and not, as is commonly supposed, in opposition to) the basic purposes of sentencing. The Essay then proposes reforms that would help good-time programs more fully to embody the atonement model.

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#### INTRODUCTION

In 1982, Professor James Jacobs provided the first extended treatment in the scholarly literature of good-time programs, which offer prison inmates early release in return for good behavior.<sup>1</sup> Although good time was nearly ubiquitous in the United States—Jacobs found programs in all but four states<sup>2</sup>—it was administered entirely behind prison walls and hence was “nearly invisible” to the public.<sup>3</sup> Given the lack of public (and scholarly) attention, Jacobs worried that good time would be left untouched by the sentencing reform movement then sweeping the nation.<sup>4</sup> As he observed, good time seemed fundamentally inconsistent with the basic thrust of the sentencing reform agenda, which reflected a deep skepticism of both the rehabilitative capacity of prisons and the trustworthiness of officials given broad discretionary power over criminal offenders.<sup>5</sup> In light of these concerns, Jacobs canvassed a range of potential justifications for good time, and found them all inadequate.<sup>6</sup> Good time, he concluded, “should be phased out.”<sup>7</sup>

Jacobs’ analysis points to a puzzle. When it comes to the judge’s decision in selecting a sentence, scholars have given us a superabundance of elaborate normative frameworks,<sup>8</sup> which are

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1. James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 219–20 (1982).

2. *Id.* at 226.

3. *Id.* at 218–19.

4. *Id.* at 220.

5. *Id.* For a more detailed account of the concerns of sentencing reformers in the 1970s and early 1980s, see Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 757–77 (2006).

6. Jacobs, *supra* note 1, at 258–69.

7. *Id.* at 221.

8. For an overview, see Andrew von Hirsch, *Penal Theories*, in THE HANDBOOK OF CRIME AND PUNISHMENT 659 (Michael Tonry ed., 1998).

reflected to varying degrees in the directives of sentencing law.<sup>9</sup> In most jurisdictions, however, when a judge imposes a prison term, that term is only a theoretical maximum; the actual time served will be determined to a significant extent through post-sentencing decisions made by corrections and parole officials, including those related to good time. Yet, scholars have devoted hardly any additional attention to good time since Jacobs' landmark article,<sup>10</sup> and the traditional justifications for good time are no more impressive today than they were in 1982.

One potential response to this state of affairs is that of Jacobs himself: if no persuasive justification has been offered for a common and highly consequential practice, then that practice ought to be abolished. But the durability of a practice in the face of both stiff academic criticism and strong political headwinds ought to give us pause. Although not quite so ubiquitous today as it was in 1982, good time remains available in twenty-nine states.<sup>11</sup> That programs framed in terms of "early release" have survived the sentencing severity revolution of the past generation seems quite remarkable.<sup>12</sup> Indeed,

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9. See, e.g., 18 U.S.C. § 3553(a) (2006) (identifying considerations for judges to take into account in federal system); O'Hear, *supra* note 5, at 773 (discussing purposes of sentencing embraced by § 3553(a)).

10. The most thorough and insightful recent contribution to the good-time literature is probably Nora V. Demleitner, *Good Conduct Time: How Much and for Whom? The Unprincipled Approach of the Model Penal Code: Sentencing*, 61 FLA. L. REV. 777 (2009). Demleitner helpfully updates aspects of Jacobs' paper and offers a much more positive view of good time. See, e.g., *id.* at 796 (arguing that "good time can become a valuable tool"). However, the aims of her paper are different than mine in at least two important respects. First, she takes as a given the current high level of severity of American punishment, and finds justification for good time, in part, in the need to mitigate that severity. *Id.* By contrast, my aim is to develop a justification that is not dependent on the harshness of sentencing practices at any particular moment in time. (I think Jacobs rightly questioned, moreover, whether good time actually helps to reduce sentence length. See *infra* text accompanying notes 52-53.) Second, Demleitner folds together both good time and what is sometimes called "earned time," that is, providing credits toward early release based on participation in rehabilitative programming. Demleitner, *supra*, at 781. My aim, however, is to address pure good time (credits for following the rules). Earned-time programs are attractive in principle for the reasons that Demleitner identifies, but their viability and practical appeal depend on the uncertain willingness of legislatures to allocate sufficient funds for programming to be made widely available to inmates. *Id.* at 782-83. As Jacobs pointed out, where programs have long waiting lists, earned time may raise substantial equity concerns. Jacobs, *supra* note 1, at 265-66.

11. For a complete list of these states, see *infra* Appendix. I do not count states with only "earned time." See *supra* note 10. I also do not count states that offer good time only to jail inmates, but not to those incarcerated in prisons (which typically house larger numbers and longer-term inmates than jails).

12. See, e.g., MICHAEL TONRY, SENTENCING MATTERS 3 (1996) ("Every state since 1980 has enacted laws mandating minimum prison sentences based on the

good time has persisted even in the federal system,<sup>13</sup> which has at least arguably become the harshest jurisdiction in the United States.<sup>14</sup> Surely, good time's durability warrants a renewed effort to identify a principled reason for its existence. There must be *something* about good time that resonates with our intuitions about society's proper response to criminal wrongdoing. Identifying that "something" is the puzzle I address in this Essay.

More specifically, I will show how good-time programs can be thought of as an effort to recognize *atonement*. Although there is a vast and ancient literature on atonement as a theological concept,<sup>15</sup> philosophers and legal scholars have more recently begun to develop secular theories of atonement and to consider their implications for criminal punishment.<sup>16</sup> These authors have identified certain widely

premises that harsher penalties will reduce crime rates and that judges cannot otherwise be trusted to impose them."); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 3, 55 (2003) (noting near quintupling of U.S. incarcerated population between mid-1970s and 2000).

13. 18 U.S.C. § 3624(b) (2006).

14. See LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009*, at 7 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus09.pdf> (noting that average annual increase in number of federal prisoners from 2000 to 2008 was 4.4%, as compared to only 1.5% for state prisoners); Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 730-33 (2002) (discussing incentive for law-enforcement officers to choose federal prosecution over state in order to obtain longer sentences).

15. For a discussion of some of the leading theological views, see LINDA RADZIK, *MAKING AMENDS: ATONEMENT IN MORALITY, LAW, AND POLITICS* 9-10, 27-30, 61, 69-72 (2009).

16. The seminal article in the law review literature is Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999). The most thorough philosophical treatment of atonement is supplied by RADZIK, *supra* note 15, at 3-5. For an earlier effort to apply the atonement model to an important problem in sentencing law (that is, discounts for "substantial assistance" to the authorities), see Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 12, 33-44 (2003) (quoting U.S. SENTENCING GUIDELINES MANUAL, § 5K1.1 (2002)). There has been a particularly large outpouring of attention in the legal scholarship in recent years to remorse and apology, which are both aspects of atonement. See, e.g., Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 87-91 (2004); Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2107-09 (2003); Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, in *CRIMINAL LAW CONVERSATIONS* 185, 185-95 (Paul H. Robinson et al. eds., 2009). In addition to the apology literature, at least two other burgeoning bodies of literature help to illuminate aspects of atonement and how atonement might be made a more central part of society's response to crime. The first is the restorative justice literature. For an introduction to restorative justice and its relationship to atonement, see RADZIK, *supra* note 15, at 153-74. The second is the

held, if often inchoate, moral intuitions regarding the value and content of successful atonement. Although none of these scholars address good time per se, their work shows how good conduct in prison can be regarded as an aspect of an offender's broader efforts to atone for wrongdoing.

To be clear, I do not claim that good conduct, without more, constitutes complete atonement for an offense. Rather, the claim is more modest: that good conduct, in the right circumstances, carries at least some of the social meaning that we associate with atonement. Good conduct, in other words, can have a positive communicative character—a character that may serve to mitigate the harmful and threatening message conveyed by the underlying criminal offense.

In order to develop these ideas, I will take a detour into the realm of another longstanding puzzle in punishment theory: why do we give a “discount” at sentencing to offenders who accept responsibility for their offenses? The criteria for acceptance, as articulated in the federal sentencing guidelines,<sup>17</sup> point to atonement as an important animating consideration. Our detour into the acceptance puzzle will thus prove helpful in demonstrating a systemic willingness to adjust penal severity in light of an offender's efforts to make amends. But our detour will also be useful in another respect, for it will underscore the shortcomings of the sentencing hearing as the moment at which to make a final decision regarding the offender's atonement. By taking a broader view of when atonement can occur and how it is recognized—as I think we do not only through good time, but also through parole, clemency, and other post-sentencing proceedings—we provide offenders with greater opportunities and encouragement to make amends. In so doing, we help to create the conditions in which offenders can be welcomed back into full membership in the community without devaluing the social norms they violated or the worth of the victims they wronged.

The Essay proceeds as follows. Part I elaborates on the nature of the good-time puzzle. Part II describes the acceptance puzzle. Part III offers atonement as the solution to both puzzles. Part IV considers implications of the analysis for the framing and design of good-time programs. I conclude with some more general thoughts regarding atonement and imprisonment.

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literature on communicative theories of punishment, which are discussed below in Part III.A.

17. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2011).

## I. THE GOOD-TIME PUZZLE

The following sections briefly survey the varied landscape of good-time law and then explore in more detail Professor Jacobs' important challenge to the justifiability of good time.

*A. Good Time in Practice: Amount, Eligibility, Forfeiture*

The amount of good time available varies considerably by jurisdiction, and within some jurisdictions based on offense type and other considerations. Seven states offer day-for-day credit or better to at least some classes of inmates; in these states, a sentence might effectively be cut in half based on good conduct.<sup>18</sup> Other states are much stingier, awarding only three or four days of credit per month.<sup>19</sup> Still other states have quite elaborate systems that defy easy characterization.<sup>20</sup> The norm, however, seems to be in the range of ten to twenty days per month, or a reduction in sentence length of twenty-five to forty percent.<sup>21</sup>

In general, good time is awarded automatically to eligible inmates, although the statutes of two states expressly contemplate an inmate-by-inmate monthly review as a condition of granting credit.<sup>22</sup> Most states with good-time programs make credit available to all or nearly all of their prison inmates, but other states have adopted a wide range of categorical exclusions. For instance, some exclude inmates who have committed serious violent or sexual offenses,<sup>23</sup> or who have killed a law enforcement officer.<sup>24</sup> Others require that an inmate work or participate

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18. These states are Alabama, Illinois, Louisiana, North Carolina (for impaired driving offenses only), Oklahoma, Texas, and West Virginia. For further details and statutory citations, see *infra* Appendix to this Essay.

19. Delaware inmates cap out at three days per month, as do South Carolina inmates serving time on no-parole offenses, while Maine limits good time to four days per month. See *infra* Appendix.

20. Examples include Oklahoma and New Jersey. See *infra* Appendix.

21. Different states express this idea differently. Alaska and New York offer one-third off the sentence. Nevada offers a credit of twenty days per month, as does South Carolina for paroleable offenses. Colorado and Wyoming offer a credit of fifteen days per month. New Hampshire offers a credit of 12.5 days per month. Kentucky, Maryland, and Rhode Island offer a credit of ten days per month. South Dakota offers a credit of either four or six months per year, depending on the length of the sentence. See *infra* Appendix.

22. N.H. REV. STAT. ANN. § 651-A:22(I) (2007 & Supp. 2011); TENN. CODE ANN. § 41-21-236(a)(3) (2010).

23. Louisiana and Maine are examples. See *infra* Appendix.

24. OKLA. STAT. tit. 57, § 138(A) (2004).

in an education or rehabilitative program in order to be eligible for good time.<sup>25</sup>

Once awarded, credits may be forfeited for misconduct. Normally, any fresh criminal offense committed in prison or any violation of prison rules will suffice. A few states limit forfeiture by statute to more serious violations.<sup>26</sup> Other states, however, are even more expansive than the norm in what can lead to forfeiture. New York, for instance, authorizes forfeiture for “bad behavior” and “failure to perform properly . . . [assigned] duties.”<sup>27</sup> Once forfeiture is ordered, corrections officials have broad discretion in determining how much good time to take away.<sup>28</sup> In some states, officials may even order the

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25. States falling into this category include Massachusetts, Missouri, Oklahoma, and Texas. *See infra* Appendix. These states blur the distinction between “good time” and “earned time.” I have classified them as good-time states because the additional requirements beyond following the rules do not seem especially rigorous, for instance, requiring only “participation” in one of a range of different activities (as opposed to requiring successful completion of a program). The Missouri and Texas statutes also include some notable hedging language. In Missouri, inmates must “take[] advantage of the programs . . . available to him,” MO. REV. STAT. § 558.041(3) (2000), while Texas corrections officials may excuse inmates from the participation requirement if “the inmate is not capable of participating,” TEX. GOV’T CODE ANN. § 498.003(a) (West 2004).

26. For instance, New Jersey’s statute speaks in terms of “flagrant misconduct,” and Michigan’s of “major misconduct.” *See infra* Appendix. Such terms, however, may be considerably more expansive in their reach than might first appear to be the case. For instance, in Michigan, “major misconduct” includes such potentially low-level offenses as “[d]isobeying a direct order,” “[i]nterference with the administration of rules,” “[i]nsolence,” “[f]ailure to maintain employment,” being “[o]ut of place,” and “possession of gambling paraphernalia.” MICH. ADMIN. CODE R. 791.5513(1)(c) (1999).

27. N.Y. CORRECT. LAW § 803(1)(a) (McKinney 2003 & Supp. 2012). In South Dakota, inmates may lose good time “for conduct evincing an intent to reoffend,” and sex offenders for “fail[ing] to fully cooperate with all treatment offered.” S.D. CODIFIED LAWS § 24-2-18 (2004 & Supp. 2011). In Texas, forfeiture is required for inmates who contact minor victims or their family members. TEX. GOV’T CODE ANN. § 498.0042 (West 2004 & Supp. 2011). In twelve states (Delaware, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Nevada, New Jersey, Tennessee, Texas, and West Virginia), good time may be forfeited for filing a “frivolous lawsuit.” *See infra* Appendix.

28. This discretion is limited by statute in some states in a variety of ways. For instance, Delaware specifies that *all* good time is lost when certain inmates are convicted of a fresh crime. DEL. CODE ANN. tit. 11, § 4382(a) (2007). Rhode Island has a simple day-for-day rule: “[f]or every day [that] a prisoner [is] shut up or otherwise disciplined for bad conduct . . . there shall be deducted one day” from the prisoner’s good-conduct time. R.I. GEN. LAWS § 42-56-24(c) (Supp. 2011). Illinois caps forfeiture at one year per infraction, 730 ILL. COMP. STAT. 5/3-6-3(c) (West 2007 & Supp. 2011), and Louisiana at 180 days, LA. REV. STAT. ANN. § 15:571.4(B) (2005 & Supp. 2011).

loss of good time that has not yet been earned.<sup>29</sup> In many states, they also have discretion either to restore lost good time<sup>30</sup> or to suspend forfeitures.<sup>31</sup> In any event, the decision-making procedures are internal, administrative procedures, without the protections normally associated with criminal trials.<sup>32</sup>

### *B. The Challenge to Good Time*

Jacobs' critique of good time advanced two distinct types of argument. The less important, at least for present purposes, challenged the amount of discretionary authority given to largely unaccountable prison officials, particularly at the level of the individual institution.<sup>33</sup>

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29. COLO. REV. STAT. § 17-22.5-301(4) (2006); CONN. GEN. STAT. § 18-7a(c) (2006); KY. REV. STAT. ANN. § 197.045(2) (LexisNexis Supp. 2011); ME. REV. STAT. tit. 17-A, § 1253(9)(B) (2006 & Supp. 2011).

30. ALA. CODE § 14-9-41(f)(2) (2011); 730 ILL. COMP. STAT. 5/3-6-3(5)(c) (2007 & Supp. 2011); MD. CODE ANN., CORR. SERVS. § 3-709(c) (LexisNexis 2008); MICH. COMP. LAWS § 800.33(5) (1998 & Supp. 2011); N.H. REV. STAT. ANN. § 651-A:22(IV)(c) (2007 & Supp. 2011); OKLA. STAT. tit. 57, § 138(A) (2004 & Supp. 2012); OR. REV. STAT. § 421.121(4) (2009); R.I. GEN. LAWS § 42-56-24(d) (2006); W. VA. CODE § 28-5-27(f) (2008); DIV. OF PRISONS, N. C. DEP'T OF CORR., POLICY & PROCEDURE, ch. B, § .0111(c) (May 31, 2011), *available at* [http://www.doc.state.nc.us/dop/policy\\_procedure\\_manual/b0100.pdf](http://www.doc.state.nc.us/dop/policy_procedure_manual/b0100.pdf).

31. DEL. CODE ANN. tit. 11, § 4382(b) (2007); TEX. GOV'T CODE ANN. § 498.004(a) (West 2004 & Supp. 2011).

32. *See, e.g.*, ALA. CODE § 14-9-41(f)(2) (2011) (Commissioner of the Department of Corrections decides based on evidence submitted by the warden in charge); COLO. REV. STAT. § 17-22.5-301(3) (2006) (“[G]ood time authorized . . . shall not vest and may be withheld or deducted by the department.”); ME. REV. STAT. tit. 17-A, § 1253(9)(B) (2006) (“Any portion of the time deducted from the sentence . . . may be withdrawn by the chief administrative officer of the state facility . . . .”); MD. CODE ANN., CORR. SERVS. § 3-709 (LexisNexis 2008) (“If an inmate violates the applicable rules of discipline, the Division [of Correction] may revoke a portion or all of the diminution credits . . . .”); NEV. REV. STAT. § 209.451(3) (2011) (“The decision of the director regarding a forfeiture is final.”); N.J. STAT. ANN. § 30:4-140 (West 2008) (“In case of any flagrant misconduct the board of managers may declare a forfeiture . . . as to them shall seem just.”); *see also Wolff v. McDonnell*, 418 U.S. 539, 560–62, 568–70 (1974) (holding that Due Process Clause requires fewer procedural protections in connection with loss of good time than in connection with revocation of parole; inmates do not have right to confront and cross-examine adverse witnesses or right to counsel in prison disciplinary proceedings).

33. Jacobs, *supra* note 1, at 218–20. Professor Klingele has recently echoed these same criticisms in arguing that *judicial* sentence modification is preferable to good time and other mechanisms that put release authority in the hands of corrections or parole officials. Cecelia Klingele, *Changing the Sentence without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 515 (2010).

Jacobs worried about abuse of power<sup>34</sup> and unwarranted disparities in the treatment of different inmates.<sup>35</sup> Although his concerns seem well justified for many good-time programs as they are currently structured, they do not speak to good time *as a concept*—the basic idea that time served ought to be reduced based on good conduct. There is nothing in this concept that requires the sort of wide, decentralized discretion that Jacobs described. There is no reason, for instance, why vague legal standards cannot be replaced with the sort of specific guidelines that have replaced unlimited judicial sentencing discretion in many jurisdictions.<sup>36</sup> Likewise, greater formality could be required at disciplinary hearings and more searching external review authorized, either in the court system or by a centralized authority in the corrections system that would be independent from the institution-level power structure.<sup>37</sup>

Jacobs' second major theme, however, strikes closer to the heart of the good-time concept. His argument was premised on the view that good-time denials and forfeitures are *de facto* sentencing decisions—they result in longer periods of incarceration based on findings of misconduct. Even assuming this sentencing power was not used vindictively, Jacobs argued that there was still a fundamental problem: the good-time system resulted in incremental criminal punishment being imposed for violations of administrative regulations.<sup>38</sup> He observed, “It is important to emphasize that prison regulations cover the totality of human conduct—e.g., personal grooming, possessions, smoking, talking, reading materials, working, sex practices, and inmate-staff and inmate-inmate relations.”<sup>39</sup> With the extraordinary reach of prison regulations in mind, Jacobs criticized the imposition of extra prison time on an inmate for conduct that would not count as criminal if committed outside prison walls:

One tends to think of prison officials using good time to deter and punish serious misbehaviors like stabbing, rape, and arson—all of which are, of course, also felony offenses under

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34. See, e.g., Jacobs, *supra* note 1, at 261 (expressing concern about prison officials denying credits to “[n]onconformists and those who for any reason antagonized the officials”).

35. *Id.* at 256.

36. See TONRY, *supra* note 12, at 25–30 (describing implementation of guidelines in about half the states).

37. If this level of due process is impractical in routine matters, then it could at least be made available in cases involving the largest losses of good time (say, more than sixty days), where the abuse concerns are greatest.

38. Jacobs, *supra* note 1, at 261.

39. *Id.* at 234.

state law. But using good time to deter and punish lesser, nonfelonious behavior—cursing at a guard, refusing to work, being in the wrong cell, engaging in consensual homosexual behavior—should trouble us. The most disturbing fact is that prison officials are vested with the authority to impose six-month, one-year, or longer prison terms for this kind of misbehavior.<sup>40</sup>

Given its impact on time served, Jacobs properly demanded some justification for good time—precisely as we should demand justification for any program that imposes the “very severe sanction” of imprisonment.<sup>41</sup> So what was the justification for good time? Jacobs considered three traditionally important candidates.<sup>42</sup>

First, as Jacobs observed, prison officials frequently defended good time as a way to maintain order and discipline.<sup>43</sup> The underlying assumption is that the threatened loss of good time deters prison misconduct. Although this assumption is at least facially plausible, Jacobs argued that “the use of good time to enforce discipline and maintain control is unnecessary and, even if necessary, illegitimate.”<sup>44</sup> Jacobs questioned, “Does the threat of good time forfeiture deter any behavior not already deterred by threats of loss of privileges, segregation, parole denial, and prosecution?”<sup>45</sup> And, even if there were

40. *Id.* at 260–61. Moreover, even when criminal misconduct was at issue, Jacobs still saw a problem:

If [prison officials] suspect a crime has been committed, why should they not be required to have the accusation tested in court? The response usually given is that such cases are hard to prosecute and often end in acquittal. This puts the matter nicely. Good time revocation is considered a legitimate punishment because it is a way, in effect, to impose a criminal sentence which otherwise could not be imposed.

*Id.* at 260.

41. *Id.* at 259.

42. Jacobs considered five possible justifications in all. *Id.* at 258–69. However, two of these candidates (mitigating sentence severity and providing a safety valve for prison overcrowding) seem so similar that I will group them together here. The fifth possibility, that good conduct reveals a “good character” that deserves reduced punishment, has not been a commonly articulated justification for good time and, as Jacobs observed, seems quite out of step with modern desert theory. *Id.* at 266. Because it is so obviously weaker than the other candidates, I’ll not discuss it further here.

43. *Id.* at 258.

44. *Id.*

45. *Id.* at 259. He seemed particularly dubious that forfeiture threats add anything to segregation threats:

My impression, from years of prison research, is that disciplinary segregation is perceived by prisoners to be the most important intra-prison

some marginal deterrence, Jacobs doubted that the benefits of avoided rule violations could justify the harsh consequences of loss of good time. He observed, “Capital punishment might deter prison rule violations, but most of us would rule out its use for administrative infractions.”<sup>46</sup>

Second, there was the incapacitation justification: “It is argued that failures to conform to rules and to participate effectively in prison programs should be punished by lengthening prison sentences because such failures indicate that the prisoner is unwilling to live a crime-free life outside prison.”<sup>47</sup> As Jacobs pointed out, however, behavior in the “quintessentially abnormal environment” of prison might actually have little value when one is trying to predict post-prison behavior:

Those individuals incapable of coping with the extraordinary pressures of prison life may cope well enough with the stresses of everyday life on the streets. On the other hand, there are many individuals who have learned to survive and even “prosper” in prison who cannot or will not adhere to the rules imposed by our larger society.<sup>48</sup>

Finally, there was the argument that good time accomplishes a necessary bit of political sleight-of-hand—a reconciliation of “conflicting impulses.”<sup>49</sup> On the one hand, the public seems to demand long prison sentences, but, on the other, seems equally unwilling to spend adequate sums to build and properly maintain enough prisons to house everyone who is sent away. Against this backdrop, good time serves as a “[l]ow-visibility release mechanism[]” that “allow[s]

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punishment . . . . [T]he imposition of segregative confinement has an immediate and negative effect on the rule violator. By comparison, revoking good time is a kind of paper punishment.

*Id.* at 258–59.

46. *Id.* at 259.

47. *Id.* at 264. This viewpoint helped to fuel the adoption of good-time laws in many states during the Progressive Era. CRAIG HANEY, REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT 41 (2006).

48. Jacobs, *supra* note 1, at 264. In terms of addressing recidivism risk, there may be a distinction to be made between “good time” (my subject and Jacobs’) and “earned time.” (For a comparison of these terms, see *supra* note 10.) There is a growing body of evidence indicating that successful participation in *some* types of prison-based programming does reduce recidivism risk. Dora Schriro, *Is Good Time a Good Idea? A Practitioner’s Perspective*, 21 FED. SENT’G REP. 179, 179–80 (2009). For this reason, the case for earned time may be stronger than the case for good time. On the other hand, earned-time programs will likely always be hampered by the scarcity of resources for high-quality prison programs and the objection that criminal offenders should not be first in line to receive any of our limited social-service dollars.

49. Jacobs, *supra* note 1, at 262.

politicians to promise stiff sentences while shielding the public from the social and economic costs of more imprisonment.”<sup>50</sup>

Yet, as Jacobs argued, the implicit deception was hardly ethically attractive,<sup>51</sup> and, in any event, seemed unlikely to fool a public bent on harsher punishment over the long run. Indeed, concerns over public perceptions might lead to decisions by legislators, sentencing judges, and corrections officials that could effectively undermine the goal of using good time to mitigate severity.<sup>52</sup> Judges, for instance, might inflate nominal sentence lengths so as to offset anticipated good-time reductions.<sup>53</sup>

In sum, Jacobs raised important, and still not effectively addressed, objections to each of the traditional justifications for good time. His arguments suggest a need either to abandon good time (as many, but not most, good-time states did in the wake of his article) or to identify a fresh justification.

## II. THE ACCEPTANCE PUZZLE

Although Jacobs and others who have written about good time have not previously made the connection, there is a remarkably similar puzzle with respect to the sentence discount for acceptance of responsibility. Sentencing judges routinely reduce sentence length based on acceptance.<sup>54</sup> For instance, the federal sentencing guidelines (which will be my focus here)<sup>55</sup> call for reducing sentence length by more than one-quarter if the defendant is found to have accepted responsibility (an amount that is notably close to the typical good-time discount).<sup>56</sup>

50. *Id.*

51. *Id.*

52. *Id.* at 263.

53. Jacobs might have gone a step further and questioned whether good time might not lead to *longer* amounts of time served overall, which could result if multiple institutional players (legislature, judiciary, corrections) independently tried to “correct for” good time without taking into account the actions of others.

54. *See, e.g.*, U.S. SENTENCING COMM’N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (indicating that 94.9% of federal defendants had their sentences reduced on this basis in fiscal year 2010).

55. Although the federal system has the most clearly and precisely structured standards for acceptance, the discount is also recognized in state systems. *See, e.g.*, *State v. Strupp*, No. 2010AP1806-CR, slip op. at 6 (Wis. Ct. App. Aug. 4, 2011), available at <http://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=69082> (approving sentencing judge’s consideration of fact that defendant showed “a lack of remorse or sense of responsibility for his actions”).

56. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2010). The guideline offers a two- or three-level reduction for acceptance. The effect of this reduction on minimum sentence length varies depending on where a defendant is on the guidelines

The acceptance discount is often thought of as a guilty-plea discount, and there can be no doubt that a guilty plea is normally an essential component of acceptance. The federal guideline expresses the close relationship between the guilty plea and the acceptance discount as follows: “This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse.”<sup>57</sup>

Data on actual federal sentencing practices bear out the closeness of the relationship with the vast majority of defendants who plead guilty receiving the discount.<sup>58</sup>

In light of the plea-acceptance relationship, I have suggested elsewhere that the acceptance discount might best be thought of in the “cooperation paradigm,” providing incentives for defendants to act in a manner that facilitates the efficient administration of the criminal justice system.<sup>59</sup> Indeed, the current federal acceptance provision had its origin in a proposal to provide an automatic discount for guilty pleas, reflecting Sentencing Commission research indicating that defendants who pled guilty received sentence reductions that averaged between thirty and forty percent.<sup>60</sup> Many commentators viewed this discount as a practical necessity for a system that required high rates of guilty pleas in order to process burgeoning case loads.<sup>61</sup>

Yet, the Commission did *not* adopt the automatic plea discount. In itself, a guilty plea is neither necessary nor sufficient for the acceptance discount.<sup>62</sup> The Commission’s reasoning, although a bit obtuse, provides insight into the true nature of acceptance. In the words of the Commission’s then-Chair, the automatic discount would have resulted

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“grid,” but typically results in a reduction between one-quarter and one-third. *See id.* at ch. 5, pt. A, sentencing tbl. (setting forth the grid).

57. *Id.* § 3E1.1 cmt. n.2.

58. Michael M. O’Hear, *Remorse, Cooperation, and “Acceptance of Responsibility”: The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1539 (1997) (discussing study showing that eighty-eight percent of defendants pleading guilty received the discount, while only twenty percent of those going to trial did).

59. *Id.* at 1511.

60. *Id.* at 1512–13.

61. *Id.* at 1513.

62. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n.2 (“Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction.”); *id.* § 3E1.1 cmt. n.3 (“A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.”).

in “unjustified windfalls” to some defendants and “would not be in keeping with the public’s perception of justice.”<sup>63</sup>

This reasoning echoes Jacobs’ critique of good time. No one would question the practical value to the criminal justice system of defendants pleading guilty and inmates obeying prison rules, but the reward held out to incentivize the desired behavior seems inappropriate, particularly if one thinks in terms of the relative position of the person who does not get the reward. Additional incarceration—measured in many months or even years—hardly seems on its face a just and proportionate response either to the inconvenience of a trial or to the disruption created by a minor rule violation in prison. Incarceration is punishment, and, as the Commission recognized, we intuitively feel that punishment should be imposed by reference to a criminal offense, not merely by what serves the convenience of the State. In both contexts—good time and acceptance—there must be something else going on besides mere convenience.

### III. ATONEMENT AS THE SOLUTION

In this Part, I draw a connection between good time and acceptance, on the one hand, and the dynamics of wrongdoing and reconciliation, on the other. Atonement, I argue, might be that “something else” that provides a morally satisfactory justification for our good-time and acceptance practices.

#### *A. The Communicative Theory of Atonement*

Although the term “atonement” has a wide range of different connotations in theology and philosophy, I will draw primarily on the philosopher Linda Radzik’s reconciliation theory of atonement.<sup>64</sup> Her work, in turn, relies on communicative theories of wrongdoing and punishment, which have become increasingly influential in recent years among scholars of criminal law.<sup>65</sup> On the communicative view,

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63. William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181, 191 (1988). The automatic discount was also rejected based on concerns regarding the constitutionality of what might be regarded as a nondiscretionary penalty to be imposed on a defendant for exercising his right to a trial. O’Hear, *supra* note 58, at 1513.

64. RADZIK, *supra* note 15, at 75–109.

65. For a description of these theories and a consideration of how they relate to other theories of punishment, see Michael M. O’Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1253–59 (2011).

wrongdoing constitutes an insult to the victim, an implicit statement that the victim has a lesser value than the offender.<sup>66</sup> This insult, moreover, may carry something of the character of a threat:

The wrongful act functions as a kind of testimony that this sort of treatment of the victim is acceptable. If the victims believe that testimony, if any observers of the wrong believe it, or if the wrongdoers themselves are encouraged by the apparent acceptance of their claim to superiority, then further wrongs and further harms become more likely.<sup>67</sup>

If we focus specifically on *criminal* wrongdoing, we can think of the insult and the threat as being made not only to an individual victim, but also more broadly to a community. To the extent that a community's most fundamental social norms are embodied in its criminal law, the commission of a crime communicates something negative about and to the community. The criminal offender acts as if he is above the community's norms, thus threatening the community's ability to rely on compliance with its norms and ultimately its sense of security, cohesion, and trust.

The goal of atonement is reconciliation—a restoration of relationships that is accomplished by addressing the communicative harms of crime in morally suitable ways. As Radzik puts it, “When a wrongdoer atones, he gives his victim good reason to stop structuring their relationship to one another in terms of the roles of wrongdoer and victim . . . . The victim will have good reason to give up her resentment, fear, and distrust of the wrongdoer.”<sup>68</sup>

Apology is a familiar form or aspect of atonement:

To apologize is to correct the false claim about the victim's value and to withdraw the insult and the threat. When the offender properly apologizes for wrongdoing, he acknowledges that the victim deserves to have been treated better. He offers the injured party a gesture of respect. In showing his remorse, he lets the victim know that he does not take his mistake lightly but is instead emotionally moved by it.<sup>69</sup>

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66. RADZIK, *supra* note 15, at 76.

67. *Id.* at 77.

68. *Id.* at 82 (footnotes omitted).

69. *Id.* at 94. For a similar communicative account of apology's value, see Murphy, *supra* note 16, at 188.

To be sure, not all apologies succeed equally well as atonement, and something more than an apology may be necessary to atone for some offenses. There may even be some offenses that are so serious that full atonement is not possible. However, even partial atonement may have communicative value; there seems no reason why the worth of apologies and other efforts to make amends must be assessed in all-or-nothing terms.<sup>70</sup>

### *B. Atonement and the Acceptance Puzzle*

This Section considers the acceptance discount from the perspective of the atonement model. I first highlight the apologetic (and hence atoning) character of acceptance and then explain why we might want to reward apology at sentencing.

#### 1. ACCEPTANCE AS APOLOGY

The acceptance discount, as described in the federal guidelines, contemplates that sentencing judges will evaluate the apologetic quality of defendants' words and deeds prior to and during the sentencing hearing—this is that “something extra” beyond just the fact of a guilty plea that must be considered. To be sure, I do not mean to claim that acceptance (as understood in federal practice) implies a perfect or morally ideal apology. What the philosopher Nick Smith calls a “categorical apology” is rare in our social lives,<sup>71</sup> and we do not demand one for the acceptance discount any more than we normally demand one in other circumstances of wrongdoing.<sup>72</sup> But we do require a set of words and deeds that are at least not inconsistent with much of the social meaning associated with the term “apology.” If satisfied, this requirement permits us to see the entry of a guilty plea and related statements by the defendant as a form of partial atonement.

Consider, for instance, what Smith identifies as the elements of a categorical apology<sup>73</sup>—most of these find expression in federal law and practice relating to guilty pleas and the acceptance discount.

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70. RADZIK, *supra* note 15, at 84.

71. NICK SMITH, *I WAS WRONG: THE MEANINGS OF APOLOGIES* 17 (2008).

72. *Cf. id.* at 24 (“Approximations of categorical apologies—gestures that do not provide certain of the available kinds of apologetic meaning—can prove meaningful in their own right.”).

73. *Id.* at 140–42.

*a. Wrongdoer's personal performance of the apology*

Consistent with Smith's model,<sup>74</sup> the guilty plea is entered by the defendant in person, rather than through an attorney or other proxy.<sup>75</sup> Likewise, the defendant has a right to address the court personally at sentencing,<sup>76</sup> which is often used as an occasion for expressing remorse.<sup>77</sup>

*b. Corroborated factual record*

The guideline states, "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility."<sup>78</sup> Moreover, the defendant's truthful admission of the offense and relevant conduct is listed as an appropriate consideration in the acceptance determination.<sup>79</sup>

*c. Identification of harm and acceptance of blame (moral responsibility)*

In some cases, the relevant harm will be an element of the crime, as in a homicide case. Likewise, the key blame-related considerations (proximate causation of harm and culpable mental state) may also be offense elements. To the extent that harm, proximate causation, and culpability are elements, the defendant's guilty plea will constitute an identification of harm and acceptance of blame. In cases in which the guilty plea does not provide a full identification of harm or acceptance of blame, some or all of the missing considerations may be encompassed by the guidelines' concept of relevant conduct,<sup>80</sup> which, as

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74. I combine here two of Smith's elements, possession of appropriate standing and performance of the apology. *Id.* at 74, 141–42, 207.

75. See FED. R. CRIM. P. 11(b)(1) (requiring court to address the defendant "personally" before accepting guilty plea).

76. See FED. R. CRIM. P. 32(i)(4)(A)(ii) (requiring sentencing judge to "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence").

77. Mark W. Bennett, *Heartstrings or Heartburn: A Federal Judge's Musings on Defendants' Right and Rite of Allocution*, CHAMPION, Mar. 2011, at 26, 26–29.

78. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n.1(A) (2010).

79. *Id.* Of course, even before sentencing, the defendant will normally specifically agree to a factual basis when entering a guilty plea. See FED. R. CRIM. P. 11(b)(3) (requiring factual basis before judge accepts guilty plea).

80. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(3) (2010) (defining relevant conduct to include "all harm that resulted from the acts and omissions [for which the defendant was responsible] . . . and all harm that was the object of such acts and omissions").

noted above, must normally be truthfully admitted, or at least not falsely denied, in order for a defendant to get acceptance.<sup>81</sup>

*d. Reform and redress*

As considerations in determining whether there has been acceptance, the guideline includes “voluntary termination or withdrawal from criminal conduct or associations;”<sup>82</sup> “voluntary payment of restitution prior to the adjudication of guilt;”<sup>83</sup> and “post-offense rehabilitative efforts.”<sup>84</sup>

*e. Proper intentions and emotions*

Although the guideline does not directly address these considerations, they seem implicit in two provisions. First, the guideline specifies that acceptance is not to be awarded to the defendant who is convicted at trial “and only then admits guilt and expresses remorse.”<sup>85</sup> Although the guideline does not explain this restriction, it likely reflects an understanding that the already-convicted defendant has nothing to lose in admitting guilt and expressing remorse, which means that the admissions are probably self-interested and the expressions insincere. Second, the guideline states that “[t]he sentencing judge is in a unique position to evaluate a defendant’s acceptance of responsibility.”<sup>86</sup> While this assertion also remains unexplained, it is likely premised on the standard explanation for the superiority of trial judges in fact-finding, that is, the trial judge’s access to demeanor evidence, which is thought to permit more reliable credibility determinations.<sup>87</sup> The guideline’s particular emphasis on the sentencing judge’s “unique position” thus seems to reflect an assumption that the judge’s assessment of the defendant’s sincerity will play an important role in the acceptance calculus. This, in any event, has been the widely accepted view of the federal appellate courts.<sup>88</sup>

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81. See *supra* text accompanying notes 78-79.

82. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n.1(B) (2010).

83. *Id.* § 3E1.1 cmt. n.1(C).

84. *Id.* § 3E1.1 cmt. n.1(G).

85. *Id.* § 3E1.1 cmt. n.2.

86. *Id.* § 3E1.1 cmt. n.5.

87. See Michael M. O’Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123, 2141 (2010) (discussing link between access to demeanor evidence and appellate deference).

88. See O’Hear, *supra* note 58, at 1524 (“Virtually all appellate case law on the subject equates acceptance of responsibility with remorse . . .”).

This is not to say, of course, that all of these apologetic considerations are routinely a matter of rigorous inquiry; that would probably be too much to expect of busy district judges.<sup>89</sup> Particularly against a backdrop of quite severe sentencing guidelines, as well as the judge's self-interest in facilitating plea deals to reduce docket pressures, the temptation must be great indeed to award the acceptance discount to just about anyone who pleads guilty as a matter of course, and there's not much to prevent district judges from doing so.<sup>90</sup> But the doctrinal elaboration of the acceptance discount, in both the guidelines and the appellate jurisprudence, does point to an ideal form of acceptance that seems distinctly apologetic in character.

## 2. WHY APOLOGY MATTERS

Why should an apology get an offender a reduced sentence? An early draft of the guidelines suggested one possibility, asserting that acceptance of responsibility "is a sound indicator of rehabilitative potential."<sup>91</sup> However, there is little evidence that apologies actually help to predict recidivism,<sup>92</sup> and the Commission dropped express mention of rehabilitative potential in the final version of the guidelines.<sup>93</sup>

Another possible explanation for apology's appeal is that we associate apology with painful emotions, like remorse and shame. Perhaps the apologetic defendant requires less incarceration because he has already suffered in some significant way prior to the term of imprisonment; this suffering diminishes the need for additional hard treatment to achieve retributive or deterrent ends. There may be some merit to this line of thinking, but it is not clear that the apologetic emotions are on balance any more negative than the defiant emotions, such as anger and resentment. Indeed, we often speak of apology as an

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89. See *United States v. Knight*, 905 F.2d 189, 192 (8th Cir. 1990) (expressing doubt, in light of high number of acceptance discounts granted, whether district courts are normally looking for anything more than guilty plea).

90. See O'Hear, *supra* note 58, at 1538–39 (discussing use of acceptance in District of Connecticut as a way to soften perceived harshness of guidelines, and institutional dynamics that reinforce tendency to make acceptance nearly automatic when the defendant pleads guilty).

91. *Id.* at 1514–15 (quoting U.S. SENTENCING COMM'N, PRELIMINARY DRAFT OF SENTENCING GUIDELINES § B321 commentary (Sept. 1986)).

92. Bibas & Bierschbach, *supra* note 16, at 106; see also David Eagleman, *The Brain on Trial*, ATLANTIC, July/Aug. 2011, at 112, 121 (discussing study showing that recidivism risk of sex offenders does not correlate with low remorse or denial of the crime).

93. O'Hear, *supra* note 58, at 1521.

“unburdening,” suggesting that apology may be less a cause of negative emotional states than an opportunity for release.<sup>94</sup>

A more persuasive account of apology’s appeal comes from atonement theory. An apology functions as at least a partial withdrawal of the insult and the threat to the victim and the community, and thereby mitigates some of the harm and anxiety created by a criminal offense. By contrast, we may imagine an overtly defiant offender as compounding the original wrong by reaffirming the insult and the threat.<sup>95</sup> Viewed this way, it is easier to see why the acceptance discount is justified: the offender who accepts responsibility is treated differently than the otherwise similar offender who remains defiant, not merely because the former offers a convenience to those who administer the criminal justice system, but because he *deserves* a less severe sentence.

### 3. RECONCILING THE ACCEPTANCE DISCOUNT AND THE COMMUNICATIVE THEORY OF PUNISHMENT

Although I think there is some intuitive appeal to this desert claim, it may help to unpack the view of punishment that underlies it. Under communicative theories, a criminal is punished because “to mean what we say in condemning some conduct as wrong is to be committed to censuring those who engage in it”; “such a response is owed both to the victims of such wrongs and to their perpetrators.”<sup>96</sup> If criminal wrongdoing communicates an insult and a threat to the immediate victim and to the community more broadly, punishment is necessary to communicate a countervailing message of reassurance, reaffirming the moral worth of both the victim and the social norms of the community and offering a greater sense of security to those who feel threatened by criminal wrongdoing. Punishment also communicates to the offender the wrongfulness of his conduct and the need for atonement, in the hope that the offender will eventually be reconciled with the victim and the wider community.<sup>97</sup>

The difficulty lies in the need for proportionality between the offense and the punishment. “To punish [an offender] with disproportionate severity, or leniency, is to communicate to her more,

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94. See, e.g., Allison D. Redlich et al., *Comparing True and False Confessions among Persons with Serious Mental Illness*, 17 PSYCHOL. PUB. POL’Y & L. 394, 407, 410 (2011) (reporting results of study of defendants who confessed; when asked about experiencing sense of relief, subjects’ average response was 4.19, with “1” meaning “not at all” and “7” meaning “very much so”).

95. RADZIK, *supra* note 15, at 77.

96. R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 72 (2001).

97. *Id.* at 107, 109.

or less, censure than she deserves.”<sup>98</sup> Antony Duff, a leading communicative theorist, contends that this understanding of punishment precludes sentence reductions based on anything the offender does after the commission of the crime; such reductions arguably undermine the message that punishment is supposed to communicate regarding the severity of the offense.<sup>99</sup> However, as Duff concedes, current practices commonly do recognize repentance as a basis for earlier release from prison.<sup>100</sup> These practices, I think, reflect an intuitive sense that adjusting penal severity based on atonement has a compelling communicative justification in its own right.

This justification has two dimensions. First, atonement—even partial atonement—helps to address the needs that are served by punishment. If the offender has already performed acts with an atoning character, then the threat and the insult should be seen as at least partially withdrawn. The victim and the community do not require as strong a message of reassurance from the state. Nor does the offender require quite so forceful a reminder of his need to atone. Lenience thus seems less likely to amplify the offender’s underlying insult and threat to the victim and the community, as it might if offered to a thoroughly unrepentant offender, or to undermine the message that the offender ought to make amends.

Second, a failure to recognize atonement would itself communicate unsuitable messages about the offender and the community. Communicative punishment is premised on the moral agency of the offender—the offender’s capacity to listen to and be swayed by the community’s censure. But to discount at sentencing any indications that the offender has already recognized the need for atonement seems contrary to this premise. As Radzik puts it, “[n]ot to recognize and nurture moral progress is to deny moral agency.”<sup>101</sup> She discusses, moreover, the idea that an inability to respond favorably to atonement reflects a view about the indestructibility of wrongdoing that is corrosive of social trust and cooperation.<sup>102</sup> Carried to an extreme, an unrelenting severity in punishment may produce even more anxiety and prove even more socially immobilizing than a persistent and unwarranted lenience in punishment. By contrast, recognizing atonement at sentencing may help to communicate a message that

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98. *Id.* at 132.

99. *Id.* at 120. Duff makes an exception for “immediate repentance” after commission of the crime, insofar as such repentance mitigates the severity of the crime itself. *Id.* at 120–21.

100. *Id.* at 120.

101. RADZIK, *supra* note 15, at 131.

102. *Id.* at 129–31.

forgiveness is possible and desirable—a message that may be a necessary lubricant for constructive social relationships.<sup>103</sup>

These, then, are the concerns and beliefs that I think underlie our sense that acceptance of responsibility (seen as an apology or a form of partial atonement) merits a reduced sentence. But this solution to the acceptance puzzle raises another question, the consideration of which is necessary before we can move on to the good-time puzzle.

### C. *Why Only a Discount for Acceptance?*

If acceptance of responsibility is a form of atonement, then why doesn't acceptance obviate the need for any state-imposed condemnation at all? We could imagine not merely an acceptance discount, but acceptance as an alternative to conviction and punishment. Indeed, something of this character does seem to happen in our nation's increasingly ubiquitous drug treatment courts and restorative justice programs, as offenders who admit wrongdoing and engage in various apologetic and reparative activities are given a path out of conventional criminal case-processing.<sup>104</sup> Although harder to document systematically, it also surely happens in informal ways through the exercise of police and prosecutorial discretion, with no-charge decisions influenced by perceptions of remorse and efforts to make amends. But when charges are pursued through conviction, the expectation is that acceptance will serve at most as a discount, and not as a basis for eliminating punishment entirely.<sup>105</sup>

Case severity likely provides a partial explanation. When a case does proceed to conviction and then to a conventional sentencing, that fact is a good indication that the case is one in which full atonement would be quite demanding of the offender. For instance, drug treatment courts and restorative justice programs typically screen out the most

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103. *See id.* at 129 (“[I]f we consider moral trust to be the sort of thing that cannot be deserved and cannot be re-earned after wrongdoing, we will all be the worse off for it.”); *see also* Janet Ainsworth, *The Social Meaning of Apology*, in *CRIMINAL LAW CONVERSATIONS*, *supra* note 16, at 201, 203 (“[W]e need apologies and expressions of remorse to matter at sentencing because they are as necessary for us as for the defendant.”).

104. For a description of drug treatment courts, see Michael M. O’Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 *STAN. L. & POL’Y REV.* 463, 478–79 (2009). For a description of restorative justice programs, see *id.* at 488–89.

105. *Cf. United States v. Pulley*, 601 F.3d 660, 667–68 (7th Cir. 2010) (affirming district court’s decision not to grant further sentence reduction based on “extraordinary acceptance of responsibility”); *United States v. Masek*, 588 F.3d 1283, 1290–91 (10th Cir. 2009).

serious cases.<sup>106</sup> And what may seem “good enough” to justify withholding conventional punishment in minor cases may seem far less satisfactory as atonement for severe wrongdoing.

It is important, moreover, to bear in mind the many procedural constraints of the criminal justice system that make it highly unlikely that an offender in a serious case will be able to offer anything approaching full atonement before sentence is imposed. Consider the difficulties.<sup>107</sup>

For instance, reparations are an important aspect of atonement in cases of significant victimization.<sup>108</sup> In some cases, symbolic reparations, as through an apology, may be sufficient, but, in others, something of a more material character may be important. However, the material circumstances of many offenders will put monetary reparations out of reach during the relatively brief time between offense and sentencing, particularly taking into account periods of pre-trial and pre-sentencing confinement, when income-earning will be impossible; the costs of making bail; the costs of retaining legal assistance if it is not provided by the state; and the imposition of fines, forfeitures, and court costs.<sup>109</sup>

To be sure, the guilty plea may have something of a reparative character that goes beyond the merely symbolic. The plea saves the community the expense of a trial and individual victims the stress and inconvenience of participating in a trial. Additionally, the offender may also be able to do something of a reparative character by assisting with the apprehension and/or conviction of another offender.<sup>110</sup> In some cases, a guilty plea, especially if coupled with other forms of cooperation with the authorities, may go a long way toward satisfying reparations obligations. But in other cases, especially those involving more seriously victimizing offenses, these sorts of reparations may seem rather meager.

Then, too, there is the need for the atoning offender to demonstrate a commitment to reform. Again, a lack of time and

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106. O’Hear, *supra* note 104, at 478 (drug treatment courts); Paul H. Robinson, *Restorative Processes & Doing Justice*, 3 U. ST. THOMAS L.J. 421, 428 (2006) (restorative justice programs).

107. In a similar vein, Bibas and Bierschbach argue, “[b]y the time of sentencing, criminal procedures have done little to encourage repentance, apology to victims, or coming to terms with one’s guilt.” Bibas & Bierschbach, *supra* note 16, at 98.

108. RADZIK, *supra* note 15, at 85.

109. Such considerations, as well as the burdens of preparing for trial and sentencing, may also rule out reparations in the form of community or other service.

110. *See* Simons, *supra* note 16, at 50 (discussing such cooperation as a form of reparation).

resources may present prohibitive obstacles. In order to initiate a period of self-conscious reform, some offenders may require considerable time to move beyond the feelings of shame, resentment, and anxiety triggered by the offense, arrest, and criminal proceedings. Likewise, some offenders may need social services, such as treatment for drug dependency, to support their efforts at self-reform—services that require time or resources that may not be available pre-sentencing. Compliance with jail rules and/or conditions of pretrial release may help to establish a commitment to reform, but the meaningfulness of this good conduct will be diminished both by its short duration and by the close supervision of corrections officials and immediate threat of sanctions if rules are broken.

These practical challenges in providing reparations and achieving and demonstrating reform make it difficult for many offenders to accomplish atonement in a communicatively powerful way by the time of sentencing. The challenges are compounded by the great paradox of the acceptance discount: the greater the discount, the harder it is to credit the offender's sincerity.<sup>111</sup> Thus, if we were to recognize atonement much more generously than we do at sentencing, we might make it prohibitively difficult for many offenders to convince us of their sincerity and qualify for the benefit.

Indeed, the structure of the federal discount may conceivably strike some sort of optimal balance: we offer a limited, but meaningful, discount in recognition of a form of partial atonement whose depth and sincerity we do not probe with great rigor; if we offered a greater discount, we might find ourselves in the Catch-22 of needing greater reassurances of sincerity while simultaneously disabling offenders from providing such reassurance.

#### *D. Atonement and the Good-Time Puzzle*

One response to this line of thinking would be to say “the acceptance discount recognizes the communicative significance of atonement as well as can be done within the practical constraints of the

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111. See, e.g., Murphy, *supra* note 16, at 189 (“To the degree we give rewards for goodness of character, then to that same degree do we give wrongdoers incentives to fake goodness of character.”). Murphy argues against giving a sentence discount based on remorse or apology because crediting dubious apologies may “cheapen the currency of the real thing and add to the cynicism about our system of criminal law.” *Id.* at 194. In rejoinder, though, Susan Bandes observes that Murphy’s argument may prove too much: “[t]he legal system is irrevocably in the business of determining sincerity and credibility.” Susan A. Bandes, *Evaluation of Remorse Is Here to Stay: We Should Focus on Improving Its Dynamics*, in *CRIMINAL LAW CONVERSATIONS*, *supra* note 16, at 198, 198.

criminal justice system,” and leave it at that. But this response would ignore the communicative possibilities of what happens in the system *after* sentence is imposed. To be sure, there is something uniquely compelling and communicatively rich about the direct, personal encounter between the offender and the judge at sentencing. Nothing that happens afterwards is likely to command as much attention and to “speak” with as much clarity to the offender’s wrongdoing and his efforts to make amends. Yet, to say that the opportunities for communication are in some respects more limited is not to say that they are absent altogether. In particular, the way that the offender conducts himself while serving his sentence can be seen as a response—either positive or negative—to the message communicated by the sentence that the offender has done wrong and ought to make amends.

If the offender’s in-prison conduct is seen in this light, then we can see good-time decisions as a continuation of the dialogue regarding the offender’s atonement that has begun at sentencing. And there are good reasons to favor continuing the dialogue: doing so helps to address some of the deficiencies of the acceptance discount as a way to recognize atonement. The basic advantage offered by good time is that it permits consideration of atonement over a much longer time scale, providing the offender with opportunities to develop a deeper appreciation of his wrongdoing and to make additional efforts to make amends.

Most importantly, good time can help to communicate a commitment to reform. True, the prison environment is quite different in many respects from the outside world, and many of the prison rules that must be complied with reflect idiosyncratic institutional needs and preferences, rather than general principles of good social conduct. But other rules, particularly the more important ones whose violation is most likely to result in significant losses of good time, either embody general criminal prohibitions (e.g., bans on physical violence or possession of controlled substances) or have an obvious, direct relationship to basic concerns of physical safety (e.g., bans on the possession of weapons or unhygienic activities that are likely to spread disease). Compliance with such rules can be understood as the expression of a commitment to show more regard in the future for the well-being of others. More generally, compliance with prison rules over time—even those that seem arbitrary—can be understood as the expression of a commitment to heed lawful authority. Such expressions help, to borrow Radzick’s characterizations of atonement, to “disarm”

the threats made by the offender through the offense<sup>112</sup> and to “create the conditions in which . . . reconciliation can take place.”<sup>113</sup>

Although similar, this is not quite the same thing as the argument about incapacitation and rehabilitation that Jacobs rejected. The point is not that the inmate who behaves himself inside prison is necessarily a safe bet on the outside. Rather, the point is that good conduct signals that the offender is not consumed by feelings of resentment and defiance toward his punishment and has a capacity and a desire to do better. We understand that the offender will face a very different set of temptations, pressures, and opportunities outside prison, and that positive attitudes in prison may not translate into positive actions on the outside.<sup>114</sup> The expression of the positive attitude in prison nonetheless warrants recognition—for much the same reasons as the apology at sentencing warrants recognition, even though we well understand that it is no guarantee of better conduct in the future. The message conveyed by the offender’s conduct permits us to moderate or discontinue our punishment of the offender without thereby communicating a message of disrespect for our social and legal norms. Relative to the offender whose in-prison behavior reflects a continued attitude of norm-defiance, we can more fully permit ourselves to view the offender who performs well in prison as addressing the communicative harms of his wrongdoing.

Indeed, the offender who performs well in prison has indicated a desire and a capacity to reform in what is apt to be the most meaningful way available to him. We owe it to him and to ourselves to respond in some positive fashion, in the same way that we ought to respond positively to acceptance of responsibility at sentencing.<sup>115</sup> A reduction in sentence length seems an appropriate way to make such a positive response to good conduct, inasmuch as the severity of the sentence is

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112. RADZIK, *supra* note 15, at 94–95.

113. *Id.* at 82–83. I’ve focused particularly on the communicative value of good time, but it may also be possible to think of good time as a more material form of reparations insofar as it contributes to efficient prison administration. We might conceive of this as a form of compensation to the community for the resources that the community was required to expend in order to address the underlying wrongdoing (e.g., the time of law-enforcement and court personnel, or the costs of social services provided to victims at public expense), and perhaps more broadly for the costs of increased perceptions of crime risk (e.g., the costs of alarm systems and property insurance).

114. It may help to appreciate that, even if an apologizing offender recidivates, this does not necessarily mean that the apology was dishonest. *See* Murphy, *supra* note 16, at 188 (“The wrongdoer can be self-deceptive or just honestly mistaken about the sincerity of his own repentance, and even the sincerely repentant wrongdoer can suffer from weak will.”).

115. *See supra* text accompanying note 104.

intended to communicate a message of condemnation that no longer need be made so forcefully.

Atonement theory thus provides a potential justification for good time and helps us to understand why good time has proven such a durable part of the American penal landscape. I do not claim that this justification has been a fully worked out part of the thought process of our policymakers, but I am suggesting that there may be a widely shared, if largely inchoate, intuition that offenders who conform to the difficult regimen of prison life deserve reduced sentences—that offering such sentence reductions “sends the right message,” a message that we hope and expect that offenders will reform themselves and be reconciled to the community. Something of this same intuition can perhaps also be seen in the popularity of drug treatment courts and restorative justice programs.<sup>116</sup>

This intuition also has interesting echoes in two quite recent Supreme Court decisions. First, in *Graham v. Florida*,<sup>117</sup> the Court overturned on Eighth Amendment grounds a defendant’s sentence of life without parole.<sup>118</sup> In so doing, the Court specifically invoked atonement as something the state should encourage and recognize:

Terrance Graham’s sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.<sup>119</sup>

Second, in *Pepper v. United States*,<sup>120</sup> the Court again emphasized the importance of taking into account what the defendant does after sentencing, ruling that a defendant’s positive post-sentencing conduct may be considered when the defendant’s sentence is overturned on

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116. For a communicative account of drug treatment courts, see Michael M. O’Hear, *Drug Treatment Courts as Communicative Punishment*, in *RETRIBUTIVISM HAS A PAST, HAS IT A FUTURE?* 234 (Michael Tonry ed., 2011). For a communicative account of restorative justice processes, see DUFF, *supra* note 96, at 96–99.

117. 130 S. Ct. 2011 (2010).

118. *Id.* at 2033–34.

119. *Id.* at 2033.

120. 131 S. Ct. 1229 (2011).

appeal and the case is remanded for a resentencing.<sup>121</sup> The Court observed, “Pepper’s exemplary postsentencing conduct may be taken as the most accurate indicator of ‘his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him.’”<sup>122</sup>

Neither *Graham* nor *Pepper* offers a fully worked-out theory of atonement, of course, but both decisions resonate in many ways with the justification I have proposed for good time.

### *E. Responding to Objections*

Viewing good time in terms of atonement offers a solution to the good-time puzzle. But is it really appropriate to view good time in this way? In this Section, I will address a few potential objections.

First, the positive message of reform conveyed by good conduct is admittedly qualified by the particular institutional realities of prison life, especially the system of close surveillance and swift discipline. Still, it is easy to overstate the extent to which prisons are institutions of total external control,<sup>123</sup> and high rates of some forms of criminality in prison (such as sexual assault) provide good evidence of the contrary.<sup>124</sup> Moreover, even outside prison our lives are subject to surveillance and threats of penal sanctions. We do not limit membership in our political communities to saints or angels whose internal motivations to do the right thing are so unflinchingly strong that external controls are wholly unnecessary. Thus, even against a backdrop of external controls, we can still regard rule-abiding behavior in prison as saying *something* positive about the offender’s capacity and desire to be restored to regular membership in the community.

Second, good conduct in prison and acceptance of responsibility at sentencing are potentially distinguishable from one another based on the public nature of the latter; it might be argued that good conduct cannot effectively communicate a commitment to reform to the community because the conduct occurs out of sight of the community. But the distinction may not be as important as first appears. Although sentencings are in principle open to the community, few attract widespread attention; we are normally content to allow the judge to

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121. *Id.* at 1241.

122. *Id.* at 1242–43 (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937)).

123. Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 434–35 (2008).

124. *See, e.g.*, Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 2 (2011) (discussing high sexual assault rates on sexual minorities in prison).

serve as the community's representative. The prison officials monitoring behavior in prison, who belong to a politically accountable branch of government, might likewise be thought of as community representatives. Moreover, good-conduct decisions, like sentencing decisions, become matters of public record.<sup>125</sup> As a practical matter, prison conduct may be hardly less available to the wider community than sentencing-related conduct.

Finally, and most importantly, there is a broad philosophical objection to the whole notion that the state should take atonement considerations into account when setting (or revising) levels of penal severity: atonement, it might be argued, is a matter of private conscience and private relationships, and lies beyond the permissible regard of the liberal state. Plainly, it would indeed be improper for the state to use brainwashing or unrestrained brute force to impose on offenders a change of heart or reconciliation with victims. Yet, as communicative theorists have argued, it is not necessarily unacceptably illiberal to punish in the hope of sending a message that the offender has done wrong and is expected to undertake reform; such punishment, although necessarily coercive in some respects, may nonetheless instantiate a respect for the core liberal values of freedom and equality.<sup>126</sup> Indeed, *not* punishing might be more illiberal than punishing, insofar as such a failure might be understood as an implicit rejection of the offender's moral agency or an implicit endorsement of the denigration of the victim's equal moral status.

If we are to reconcile the liberal ideals of freedom and equality with the use of punishment that seeks reform and reconciliation, Duff argues that punishment must aim to persuade offenders in a way that leaves them the "freedom to remain unpersuaded."<sup>127</sup> Thus, as he puts it, we may force offenders to *hear* the message that punishment aims to communicate, but we may not force them to *listen* to it.<sup>128</sup> In more practical terms, sentences should not be extended *indefinitely* for offenders who remain unrepentant,<sup>129</sup> but *some* additional punishment may be imposed on offenders who willfully fail to comply with the

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125. See, e.g., 730 ILL. COMP. STAT. 5/3-6-3(a)(5) (Supp. 2011) (requiring prior notice to local State's Attorney prior to early release of inmate based on good time and posting of information about such inmates on the Internet).

126. RADZIK, *supra* note 15, at 163–64. There are, to be sure, different varieties of liberalism, and some are easier to reconcile with the atonement model than others. See Garvey, *supra* note 16, at 1856–58 ("Perfectionist liberalism can therefore embrace atonement; neutralist liberalism can't.").

127. DUFF, *supra* note 96, at 135.

128. *Id.* at 126.

129. *Id.* at 122.

terms of their punishment<sup>130</sup>—this does not necessarily take away from offenders the freedom to choose how to respond to the message that punishment aims to communicate.

To be sure, it is far from certain how much additional punishment can be imposed without violating the offender's freedom to remain unpersuaded—without crossing the line from merely forcing the offender to *hear* our message into the forbidden zone of forcing the offender actually to *listen*. For instance, in the good-time setting, by how much can incarceration be extended based on prison rule violations in the hope of focusing the offender's attention on his need to atone? No mathematically precise answer seems possible.

Whatever the outer limits of permissible incremental incarceration, we may take some reassurance in the limitations routinely imposed in practice. Because the amount of possible good time is normally less than half of the total sentence length, even a loss of all of an inmate's good time would do no worse than effectively double the length of incarceration, and in most states would do much less than that. And this, of course, assumes a loss of *all* good time; however, prison officials have considerable discretion to impose lesser sanctions, and in many states are even able to restore lost good time.<sup>131</sup>

Moreover, if the basic concern here is that atonement-based approaches threaten freedom of conscience, we should also bear in mind that, while we might be willing to regard good conduct as indicative of a genuine change of heart, the process of awarding and taking away good time is generally a routinized, bureaucratic process that does not imply a searching inquiry into the state of an inmate's soul. We can regard both good time and acceptance as efforts to strike a balance—both communicating a message about our hopes for reform and reconciliation, but also leaving a certain zone of privacy intact by not inquiring too rigorously (that is, illiberally) into those aspects of atonement that are most internal.

#### IV. IMPLICATIONS FOR GOOD-TIME LAW AND PRACTICE

If I am correct, then certain widely shared intuitions about atonement help to account for the durability of good time. Yet, although good time can in theory be seen as a way to recognize atonement, current good time laws hardly implement this ideal in an optimally coherent or transparent manner. In this Part, I will suggest four ways that good-time programs might be reframed or redesigned so as to better embody the atonement model.

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130. *Id.* at 152.

131. *See supra* Part I.A.

First, the rhetoric surrounding incarceration and good time might more clearly highlight atonement considerations. Although there are many moments at which such a change might be implemented, a particular point of focus might be the judge's words at the time a sentence of imprisonment is imposed, for this is a moment at which the attention of the offender, the victim, their supporters, and sometimes the wider community is likely to be drawn in especially powerful ways to the offender's punishment. Imagine, for instance, if the judge said something to this effect immediately after announcing a lengthy prison term:

In our society, prison is often thought to be a place where nothing constructive happens, where inmates simply, passively wait out the expiration of their terms and have no meaningful choices to make. But, in reality, prison is a place where important choices are made every single day. I don't want to suggest it is easy, but inmates can indeed use their prison time constructively. I and your other fellow citizens hope that you will use your time well.

For instance, while you are in prison, you are likely to have opportunities at some point for education, employment, and counseling. You will have to choose whether to take advantage of such opportunities, and then choose many times thereafter whether to work hard and make the most of those opportunities. If you make the right choices, though, you will send a powerful message to your fellow citizens that you genuinely wish to return as a productive member of the community and to avoid future criminal activity.

I understand, though, that the opportunities for education, employment, and counseling in prison may not be as good as you and I might wish. But I would like for you to appreciate that these are not the only ways for you to make positive choices while you are in prison. Whether you are in a program or not, you will have to make choices every day that will either contribute to or detract from the safety and order of the prison community. If you make the right choices and follow the rules while you are inside, you will send a message that you are taking greater responsibility for your actions and that you are trying to prepare for a successful return to the community.

A few minutes ago, as I was explaining why I selected the sentence I did, I told you that I took into account your efforts so far to demonstrate acceptance of responsibility for your offense. But for a serious offense, like yours, true

acceptance of responsibility requires more than words; it must be demonstrated through positive conduct over a long period of time. I invite you to think of your time in prison as an opportunity for you to give life to the words of apology you have spoken in this courtroom. This may be an important step in your efforts to make amends for the wrong you have done.

Again, using your incarceration time constructively in this way will not be easy. But, by doing so over a period of time, you will show that you deserve to return to the community. In fact, as you may know, your efforts to make the right choices in prison will be recognized through the award of good-time credits, which may reduce your term of imprisonment by as much as years. If you do the hard work that is necessary to truly earn those credits, then you will indeed deserve an early return.

Analogous messages might be delivered at the reception center when new inmates enter prison and periodically thereafter through the term of imprisonment. A public announcement along these lines might also be made when an offender is released early due to good-time credits.

Second, the link between good time and the acceptance of responsibility discount might be formalized, even beyond the rhetorical connection suggested above. This would probably require changes to sentencing law. For instance, the sentencing judge might be instructed to announce the prison term in two ways, both with and without whatever acceptance discount the judge concludes is appropriate. The difference would constitute a contingent sentence credit that could be partially or fully withdrawn by prison officials as a sanction for serious, willful rule violations, on the theory that prison misconduct constitutes something of a repudiation of acceptance. Folded into the acceptance discount this way, a good-time program would in effect become a “bad-time” program. Acceptance discounts might then be increased a bit to offset the lost opportunity for additional sentence reductions based on good time.<sup>132</sup>

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132. One potential drawback is that there would not be much of an opportunity to recognize the in-prison conduct of offenders who do not receive a large acceptance discount; they would have no contingent benefit that would vest based on good conduct. There is, to be sure, a justification for treating differently those who demonstrate acceptance by the time of sentencing from those who do not. *See supra* Part III.B. Still, there are legitimate concerns about making large swings in sentence length so dependent on performance at the sentencing hearing. *See O’Hear, supra* note 58, at 1548–53 (discussing risk that acceptance discount may be lost based on mental illness and other factors that should not directly affect sentence severity). For that reason, it

Third, the atonement model should cause us to question the categorical exclusion of certain inmates from good-time credit in many states. Most importantly, there are the exclusions for certain inmates who have committed violent or sexual offenses.<sup>133</sup> To be sure, the most serious victimizing offenses demand the most by way of atonement, and in some cases full atonement may not even be possible.<sup>134</sup> Yet, there seems to be nothing in the atonement model that would categorically rule out *any* meaningful degree of atonement for particular types of offenses. For that reason, the federal acceptance of responsibility guideline is correct not to make any distinctions based on offense type.<sup>135</sup> Good-time programs would do well to follow the guideline's lead in this respect.

One imagines that the categorical exclusions have arisen from a fear that good-time credits will drop sentence lengths for serious crimes below what is minimally acceptable from the standpoint of either the proportionality ideal or the desire to incapacitate the most truly dangerous. A better way to address such concerns would be through greater transparency and predictability in sentencing and good-time decisions. In particular, sentencing guidelines could be designed around good-time programs to ensure that minimal length requirements are respected in the most serious cases. Additionally, as to incapacitation needs specifically, policymakers and the public should bear in mind the widespread availability of indefinite civil commitment for the most dangerous sex offenders at the expiration of their prison terms.<sup>136</sup>

Fourth, and finally, the grounds for denial or loss of good time should be tightened up. The focus ought to be on serious, persistent, willful misconduct that seems fundamentally inconsistent with acceptance of responsibility and a willingness to engage with imprisonment in a constructive, atoning way. In this vein, Jacobs' criticism of good-time laws in 1982 remains equally valid as to most or all of the current statutes; the laws give too much discretion to prison officials and do not sufficiently narrow the grounds for denial or

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might be helpful to give offenders who received little or no acceptance discount the first time around an opportunity to petition the sentencing court for an acceptance redetermination after there has been a significant period of good conduct in prison.

133. States with such exclusions include Alabama, Louisiana, Maine, Nevada, New York, and Rhode Island. See *infra* Appendix. Several other states, including Illinois, Maryland, and Washington, permit good time for such inmates, but at a much reduced rate. See *infra* Appendix.

134. RADZIK, *supra* note 15, at 84.

135. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2010).

136. See Eric S. Janus & Robert A. Prentky, *Sexual Predator Laws: A Two-Decade Retrospective*, 21 FED. SENT'G REP. 90, 91 (2008) (noting that twenty states and the federal government adopted civil commitment laws for sexually violent predators beginning in 1990).

forfeiture of credits.<sup>137</sup> Although none of the statutes seem fully satisfactory in this regard, a few seem to have something of the right idea, such as New Hampshire's ("serious act of misconduct or insubordination, or persistent refusal to conform to prison regulations")<sup>138</sup> and South Dakota's ("conduct evincing an intent to reoffend or commit further offenses when discharged");<sup>139</sup> these provide hope for more widespread reform. Also hopeful is the fact that some state departments of corrections have already substantially cabined official discretion through the adoption of detailed administrative regulations governing the denial or loss of good time.<sup>140</sup>

Of particular concern, though, are the states that deny or take away good time on the basis of the filing of a frivolous claim in a prisoner rights lawsuit.<sup>141</sup> A frivolous claim need not be willful; indeed, given the lack of legal representation for prisoners,<sup>142</sup> the risk of inadvertent errors seems high. Moreover, a frivolous claim, by its nature, should be easy to defend and adjudicate; there seems little harm to warrant such a harsh response as a loss of good time. Finally, we ought to be concerned about the potential chilling of meritorious claims of abuse or unlawful prison conditions; it hardly seems consistent to diminish the accountability of prison officials at the same time that we are trying to instill a greater sense of accountability among inmates.

#### CONCLUSION

Three decades ago, Professor Jacobs posed an important challenge not merely to the design of good-time laws, but to the fairness of the basic concept. He invited us to consider the perspective of the offender who is denied or loses good time due to a rule violation that would not result in a sentence of imprisonment if committed by someone on the outside. In these circumstances, Jacobs asked, how can we justify a good-time decision that has the effect of increasing the inmate's term of imprisonment?

The answer, from the perspective of the atonement model, is that the inmate and the civilian are quite differently situated. The inmate's

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137. *See, e.g.*, N.Y. CORRECT. LAW § 803(1)(a) (Supp. 2012) ("bad behavior"); R.I. GEN. LAWS § 42-56-24(c) (Supp. 2011) ("bad conduct").

138. N.H. REV. STAT. ANN. § 651-A:22(IV)(b) (2007 & Supp. 2011).

139. S.D. CODIFIED LAW § 24-2-18 (2004 & Supp. 2011).

140. *See, e.g.*, WYO. DEP'T OF CORR., POLICY AND PROCEDURE #1.500: INMATE GOOD TIME 9-13 (2010), *available at* <http://corrections.wy.gov/Media.aspx?mediaId=50>.

141. *See supra* note 27.

142. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1654-57 (2003).

underlying offense has delivered an insult and a threat to the community, and the negative messages remain in place as long as the inmate fails to atone for his wrongdoing. Against this backdrop, rule-breaking in prison reinforces the negative messages of the original offense and thus warrants a reinforcement of the community's penal response to the original offense. Perpetrated by a civilian, the same conduct would either not carry any particular message regarding the civilian's views of the community and its norms, or, at worst, would carry a negative message of less resonance because it is not joined with some other earlier, still-unaddressed wrongdoing. The communicative character of the conduct varies depending on the circumstances, which justifies different penal treatment.<sup>143</sup>

The line of thinking here suggests a broader point for punishment theory. It is easy to recognize the sentencing hearing as a dialogue of sorts between the offender and the judge, speaking as the voice of the community. Many commentators have seen the offender-judge confrontation at sentencing as a crucial source of moral meaning and justification for the punishment that follows.<sup>144</sup> Yet, important though it may be, this dialogue is also deeply unsatisfactory in some respects. The offender speaks, but it is difficult under the circumstances to fully credit what he says. Then, the judge pronounces the sentence. Her word is the last word, and we are left to speculate as to what meaning the sentence carries for the offender and how the offender will engage with his punishment.

However, if we look beyond the sentencing hearing itself, we may see additional opportunities to continue the dialogue. To be sure, those opportunities are much constrained by our society's almost reflexive tendency to imprison its offenders. Yet, even when the offender is incarcerated, the dialogue may continue. I have tried to show how this

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143. The analysis is more complicated if we imagine a civilian with a criminal record; in such a case, the fresh misconduct by the civilian will carry some of the negative resonance of the inmate's misconduct, which might cast doubt on the appropriateness of different treatment. On the other hand, if the ex-con is still on parole, there may not be much of a functional difference in the treatment: the parolee's misconduct can lead to the revocation of parole and hence what is in effect an extension of imprisonment without the benefit of normal trial procedures. If the ex-con is no longer on parole, we must assume that a relatively long time has elapsed since the original offense, which suggests that the insult and threat of the original offense may be considerably attenuated; if so, this attenuation might justify different treatment for the ex-con than for the inmate. At the same time, the operation of recidivism-based sentence enhancements may make the practical differences in treatment less dramatic than might first appear to be the case.

144. KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 81–82 (1998).

might happen through a good-time program. Similar points might be made about parole and clemency.<sup>145</sup>

What I suggest here cuts against a view of the prison as a place of exile and utter apartness—a place where neither dialogue nor any other kind of meaningful engagement can occur with the wider community. Although common, this view does not exhaust the possibilities. For instance, I have elsewhere described at length Justice John Paul Stevens' vision of the prison as a place where inmates retain their connectedness to the outside world—a connectedness that helps to support and inspire their efforts at self-reform.<sup>146</sup>

It is important, I think, to hold onto this more connected, constructive vision of the prison experience. If we see prisoners as wholly removed from the community, on what basis do we permit their return? How is the exile—a person who is definitionally cut off from his erstwhile fellow citizens—ever to make amends? Absent atonement, there might eventually be release from prison, but not reconciliation. And release without reconciliation seems a fearful prospect for both offenders and the communities to which they return.<sup>147</sup>

It is, of course, no good merely to say that the prison experience should be viewed in more connected, constructive ways if the reality of the situation is moving sharply in the opposite direction. I have argued elsewhere that punishment theorists who decry the increasing harshness of American sentences—and that would be the vast majority of punishment theorists—ought to devote more attention to the conceptualization and structuring of the prison experience, rather than simply bemoaning the fact that we have so many prisoners.<sup>148</sup> Rethinking and reforming good time (and, for that matter, parole and clemency) along atonement lines might be a good first step.

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145. See O'Hear, *supra* note 65 (proposing theory of parole along these lines); cf. Murphy, *supra* note 16, at 191 (arguing that remorse and repentance should be recognized through clemency). Although a less familiar device than parole and clemency, judicial sentence modification would also provide another opportunity to continue the dialogue. For a description of this device, see Klingele, *supra* note 33, at 498–512.

146. O'Hear, *supra* note 65, at 1272–76.

147. Indeed, it is possible that the elimination or scaling back in many jurisdictions over the past generation of programs like parole and good time that encourage and recognize atonement has contributed to the adoption of a host of new laws that seem to reflect deep anxieties about returning prisoners, from three-strikes laws and other harsh mandatory minimums for recidivists to civil commitment statutes to sex-offender registration requirements to mandatory deportation and so forth. Such laws have, of course, proven immensely costly in both fiscal and human terms. Klingele, *supra* note 33, at 469–70.

148. O'Hear, *supra* note 65, at 1286–87.

APPENDIX: STATES WITH GOOD-TIME PROGRAMS FOR PRISON  
INMATES<sup>149</sup>

	Maximum Reduction in Term	Statutory Exclusions	Grounds for Denial or Loss of Credit
AL	75 days per 30 days served <sup>150</sup>	Class A felons Inmates sentenced to death, life, or more than 15 years Sex offenders with child victim <sup>151</sup>	Offense or rule violation <sup>152</sup>
AK	One-third of term <sup>153</sup>	Inmates sentenced to mandatory 99-year term; repeat sex offenders <sup>154</sup>	Offense or rule violation <sup>155</sup>
CO	15 days per month <sup>156</sup>		Credit "shall not vest and may be withheld or deducted." <sup>157</sup>
CT	12 days per month <sup>158</sup>		"Misconduct or refusal to obey the rules . . . ." <sup>159</sup>
DE	3 days per month <sup>160</sup>	Inmates sentenced to life or as habitual criminals Certain others at judge's discretion <sup>161</sup>	Offense or rule violation Assault on correctional personnel Frivolous lawsuit <sup>162</sup>

149. This list excludes good-time programs designed for jail inmates and parolees. The list also excludes earned-time programs, in which credit toward early release is obtained by virtue of successful participation in specified programs or activities. Finally, the list excludes states that have recently eliminated good time for new inmates, even though a number of current inmates may still be eligible for good time under the old system.

150. ALA. CODE § 14-9-41(a) (2011). This credit is available to Class I prisoners. Lesser credits are available to other classes of prisoners, with no credit at all for Class IV prisoners. § 14-9-41(a)(1)-(4).

151. § 14-9-41(e).

152. § 14-9-41(f)(1).

153. ALASKA STAT. § 33.20.010(a) (2010).

154. § 33.20.010(a)(1)-(3).

155. § 33.20.050.

156. COLO. REV. STAT. § 17-22.5-301(1) (2006).

157. § 17-22.5-301(3).

158. CONN. GEN. STAT. § 18-7a(c) (2006). In the first five years, only ten days per month can be earned. *Id.*

159. *Id.*

160. DEL. CODE ANN. tit. 11, § 4381(c)(2) (Supp. 2010). In the first year, only two days per month can be earned. § 4381(c)(1).

161. § 4381(b).

162. § 4382(a)-(c), (e).

	Maximum Reduction in Term	Statutory Exclusions	Grounds for Denial or Loss of Credit
IL	1 day per day <sup>163</sup>	Inmates convicted of first-degree murder or terrorism <sup>164</sup> Inmates sentenced to death or life <sup>165</sup>	Rule violation <sup>166</sup> Frivolous lawsuit <sup>167</sup>
KS	20 percent of term <sup>168</sup>	Inmates convicted of capital or premeditated first-degree murder <sup>169</sup>	Maladjustment, failure to cooperate in development of release plan, offense, or rule violation <sup>170</sup> Frivolous lawsuit or other abusive litigation practices <sup>171</sup>
KY	10 days per month <sup>172</sup>		An offense or a rule violation <sup>173</sup> Frivolous lawsuit <sup>174</sup>
LA	35 days per 30 days <sup>175</sup>	Inmates convicted of listed violent or sex offense <sup>176</sup> Inmates sentenced as habitual offenders, or (at trial court discretion) convicted of stalking <sup>177</sup>	Escape, battery of a corrections employee or police officer, or rule violation <sup>178</sup> Frivolous lawsuit or other abusive litigation practices <sup>179</sup>

163. 730 ILL. COMP. STAT. 5/3-6-3(a)(2.1) (2010). This is the general rule, but there are a number of specific offenses for which good time is more limited, most commonly to 4.5 days per month. 730 ILL. COMP. STAT. 5/3-6-3(a)(2).

164. 730 ILL. COMP. STAT. 5/3-6-3(a)(2)(i).

165. 730 ILL. COMP. STAT. 5/3-6-3(a)(2.2).

166. 730 ILL. COMP. STAT. 5/3-6-3(5)(c).

167. 730 ILL. COMP. STAT. 5/3-6-3(5)(d).

168. KAN. ADMIN. REGS. § 44-6-114e(a) (2009). For some classes of offenses, the maximum credit is fifteen percent of the prison term. § 44-6-114e(b).

169. KAN. STAT. ANN. § 22-3717(b)(1) (2007 & Supp. 2010).

170. § 44-6-115a(d)-(g).

171. KAN. STAT. ANN. § 21-6821(d)(1)-(5) (Supp. 2011).

172. KY. REV. STAT. ANN. § 197.045(1)(b)1. (West Supp. 2011).

173. § 197.045(2).

174. § 197.045(5)(a).

175. LA. REV. STAT. ANN. § 15:571.3(B)(1)(a) (Supp. 2011). Certain prisoners convicted of a crime of violence earn credit at the rate of three days for every seventeen days in actual custody. § 15:571.3(B)(2)(a).

176. § 15:571.3(C)(1), (4).

177. § 15:571.3(C)(2)-(3), (5).

178. § 15:571.4(B)-(C).

179. LA. REV. STAT. ANN. § 15:1190 (2005).

	Maximum Reduction in Term	Statutory Exclusions	Grounds for Denial or Loss of Credit
ME	4 days per month <sup>180</sup>	Inmates convicted of a listed crime of violence or sex offense, or of a domestic offense <sup>181</sup>	Offense or rule violation <sup>182</sup>
MD	10 days per month <sup>183</sup>		Rule violation <sup>184</sup>
MA	7.5 days per month <sup>185</sup>		Infraction <sup>186</sup> Frivolous lawsuit or other abusive litigation practices <sup>187</sup>
MI	5 days per month <sup>188</sup>		“Major misconduct” <sup>189</sup> Frivolous lawsuit <sup>190</sup>
MO	2 months per year <sup>191</sup>	Inmates sentenced as persistent sexual offenders and certain other recidivists <sup>192</sup>	Offense or rule violation <sup>193</sup>
NV	20 days per month <sup>194</sup>	Class A and B felons Inmates convicted of a listed crime of violence or sex offense <sup>195</sup>	Offense Assault “Flagrant disregard” of rules or of “terms and conditions of confinement” Frivolous lawsuit or other abusive litigation practices <sup>196</sup>

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180. ME. REV. STAT. tit. 17-A, § 1253(9)(A) (2006 & Supp. 2011).

181. *Id.*

182. ME. REV. STAT. tit. 17-A, § 1253(9)(B).

183. MD. CODE ANN., CORR. SERVS. § 3-704(b)(1)(ii) (LexisNexis 2008). The credit is limited to five days per month for inmates convicted of a crime of violence or a drug trafficking offense. § 3-704(b)(2).

184. § 3-709(a).

185. MASS. GEN. LAWS ch. 127, § 129D (2003). The amount of possible credits is related to the number of programs or activities in which the inmate participates. *Id.*

186. 103 MASS. CODE REGS. § 410.14 (2011).

187. MASS. GEN. LAWS ch. 127, § 129D.

188. MICH. COMP. LAWS § 800.33(5) (1998 & Supp. 2011).

189. *Id.*

190. § 800.33(15).

191. MO. CODE REGS. ANN. tit. 14, § 10-5.010(2)(A) (Supp. 2011).

192. MO. REV. STAT. § 558.041(1) (2011).

193. § 558.041(3).

194. NEV. REV. STAT § 209.4465(1) (2011).

195. § 209.4465(8).

196. § 209.451(1).

	Maximum Reduction in Term	Statutory Exclusions	Grounds for Denial or Loss of Credit
NH	12.5 days per month <sup>197</sup>		Escape “[S]erious act of misconduct or insubordination, or persistent refusal to conform to prison regulations” <sup>198</sup>
NJ	16 days per month <sup>199</sup>		“Flagrant misconduct” <sup>200</sup> Frivolous lawsuit <sup>201</sup>
NY	One-third of term <sup>202</sup>	Inmates sentenced to life <sup>203</sup> Certain A-I felons and other inmates convicted of listed crime of violence or sex offense <sup>204</sup>	“[B]ad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned” <sup>205</sup>
NC	1 day per day <sup>206</sup>	Only available for inmates convicted of impaired driving <sup>207</sup>	Rule violation <sup>208</sup>
OK	60 days per month <sup>209</sup>	Inmates whose offense resulted in death of a law-enforcement or corrections officer <sup>210</sup>	“[M]isconduct, nonperformance or disciplinary action” <sup>211</sup>
OR	20 percent of term <sup>212</sup>		Major rule violation <sup>213</sup>

197. N.H. REV. STAT. ANN. § 651-A:22(III) (2007 & Supp. 2011).

198. § 651-A:22(IV).

199. N.J. STAT. ANN. § 30:4-140 (West 2008). This rate applies only to the very longest sentences. New Jersey has an unusually complicated system in which many fine-grained distinctions are made based on sentence length. On the opposite end of the spectrum, inmates with the shortest sentences receive a credit of only seven days per month. *See id.*

200. *Id.*

201. § 30:4-16.2(b).

202. N.Y. CORRECT. LAW § 803(1)(a) (McKinney 2003 & Supp. 2012).

203. *Id.*

204. § 803(1)(d)(ii).

205. § 803(1)(a).

206. DIV. OF PRISONS, *supra* note 30, § .0110(b).

207. *Id.*

208. *Id.* § .0111(b).

209. OKLA. STAT. tit. 57, § 138(A), (D)(2)(c) (2004 & Supp. 2012). Oklahoma has a complicated system in which the maximum available credit varies considerably depending on criminal history and inmate classification, which in turn depends in part on evaluations received in work, education, and program assignments. § 138(D).

210. § 138(A).

211. § 138(C).

212. OR. REV. STAT. § 421.121(2)(b) (2009).

213. OR. ADMIN. R. 291-097-0025(1) (2011).

	Maximum Reduction in Term	Statutory Exclusions	Grounds for Denial or Loss of Credit
RI	10 days per month <sup>214</sup>	Inmates sentenced to life or for various sex offenses <sup>215</sup>	“[B]ad conduct, as determined by the assistant director . . . .” <sup>216</sup>
SC	20 days per month <sup>217</sup>	Inmates sentenced to life or under a 30-year mandatory minimum statute <sup>218</sup>	Offense or rule violation <sup>219</sup>
SD	6 months per year <sup>220</sup>	Inmates sentenced to life <sup>221</sup>	Recommendation of disciplinary committee Conduct “evinced an intent to reoffend or commit further offenses when discharged” Failure of sex offender “to fully cooperate with all treatment offered” <sup>222</sup>
TN	8 days per month <sup>223</sup>		Commission of “disciplinary offense” <sup>224</sup> Multiple frivolous lawsuits <sup>225</sup>
TX	30 days per 30 days <sup>226</sup>		Offense or rule violation <sup>227</sup> Contacting a victim of the crime or a victim’s family member if the victim was younger than 17 <sup>228</sup> Frivolous lawsuit <sup>229</sup>

214. R.I. GEN. LAWS § 42-56-24(b) (Supp. 2011).

215. § 42-56-24(a).

216. R.I. GEN. LAWS § 42-56-24(c) (2006 & Supp. 2011).

217. S.C. CODE ANN. § 24-13-210(A) (2007 & Supp. 2011). Inmates serving time for “no parole offense[s]” earn good time at the lower rate of three days per month. § 24-13-210(B).

218. § 24-13-210(B).

219. § 24-13-210(D).

220. S.D. CODIFIED LAW § 24-5-1 (2004). The rate begins in the tenth year; prior to that, up to four months per year may be earned. *Id.*

221. *Id.*

222. S.D. CODIFIED LAW § 24-2-18 (2004 & Supp. 2011).

223. TENN. CODE ANN. § 41-21-236(a)(2)(A) (2010).

224. § 41-21-236(a)(4).

225. § 41-21-816.

226. TEX. GOV’T CODE ANN. § 498.003(b) (West 2004). This is the rate for a trusty; other classes of inmates accrue good time at lesser rates. *Id.* “Regardless of the classification of an inmate, the department may grant good conduct time to the inmate only if the department finds that the inmate is actively engaged in an agricultural, vocational, or educational endeavor, in an industrial program or other work program, or in a treatment program, unless the department finds that the inmate is not capable of participating in such a program or endeavor.” § 498.003(a).

227. TEX. GOV’T CODE ANN. § 498.004(a) (West 2004 & Supp. 2011).

228. § 498.0042.

	Maximum Reduction in Term	Statutory Exclusions	Grounds for Denial or Loss of Credit
WA	50 percent of term <sup>230</sup>		“Serious infraction” <sup>231</sup>
WV	1 day per day <sup>232</sup>	Inmates sentenced to life <sup>233</sup>	Rule violation <sup>234</sup> Frivolous lawsuit or other abusive litigation practices <sup>235</sup>
WY	15 days per month <sup>236</sup>		Inmate’s “attitude, conduct or behavior has not been good, proper or helpful” or inmate “has not adhered to the rules of the facility” <sup>237</sup>

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229. § 498.0045.

230. WASH. REV. CODE § 9.94A.729(c) (2011). Inmates convicted of certain serious crimes of violence or sex offenses are limited to ten percent of the sentence. § 9.94A.729(b).

231. WASH. ADMIN. CODE § 137-28-350(1)(l) (2011).

232. W. VA. CODE § 28-5-27(c) (2011).

233. § 28-5-27(d).

234. § 28-5-27(f).

235. § 25-1A-6.

236. WYO. DEP’T OF CORR., *supra* note 140, at 4.

237. *Id.* at 9.