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Early Release for Prisoners Convicted of Violent Crimes: Can Anyone Escape the Incapacitation-Retribution Catch-22?

MICHAEL O'HEAR

Two decades of criminal-justice reform in the United States have achieved only a modest reduction in the nation's historically high imprisonment rate. Returning to the much lower imprisonment rate of a generation ago will almost certainly require shorter prison terms for individuals who have been convicted of violent crimes. Such a change, however, would draw at least two important objections: (1) people who have been convicted of violent crimes are an especially dangerous offender group who ought to be incapacitated behind bars for as long as possible, and (2) violent crimes are so serious that long prison terms are required as a matter of justice. In order to evaluate the strength of these claims, it is necessary to develop a more nuanced understanding of who is serving time for violent offenses and what exactly they have done.

In the hope of advancing this understanding, this Article undertakes a unique empirical analysis of the nearly 14,000 violence-convicted individuals who are currently in prison in one state, Wisconsin. Focusing first on the incapacitation objection, the Article identifies indicators of recidivism risk and quantifies their prevalence among violence-convicted prisoners. Next, the Article identifies a set of aggravating and mitigating circumstances that bear on just punishment and quantifies their prevalence. Additionally, the Article synthesizes national benchmarks for prison length of stay (LOS) for the major categories of violent crime. Taking into account risk factors, desert factors, and LOS norms, the Article suggests a rough estimate of the proportion of violence-convicted prisoners who seem to be viable candidates for early release. The analysis underscores the practical and political challenges of achieving large reductions in this component of the prison population, but also highlights the wide variation that is masked by the stigmatizing "violent criminal" label.

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Early Release for Prisoners Convicted of Violent Crimes: Can Anyone Escape the Incapacitation-Retribution Catch-22?

MICHAEL O'HEAR *

INTRODUCTION

Although a national consensus seems to be emerging that the United States imprisons far too many people,¹ few states have adopted decarceration initiatives that can be characterized as truly bold.² Indeed, over the past decade, twenty-five states actually experienced a net *increase* in the size of their prison populations.³ Among the states who did achieve reductions, only eight did so by even 20%⁴—a rather modest benchmark

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¹ See, e.g., Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1580–81 (2019) (“For the first time in decades, there is a still-evolving view that longer sentences and more criminalization is not always better and that favoring a more lenient justice system does not automatically lead to the politically-fatal ‘soft on crime’ label.”); Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html> (discussing bipartisan passage in U.S. Senate of First Step Act, which softens federal sentencing laws and provides expanded opportunities for federal prisoners to obtain early release).

² See, e.g., MICHAEL O'HEAR, *THE FAILED PROMISE OF SENTENCING REFORM*, at xiv–xvii (2017) (describing modest scale of decarceration achieved after two decades of reform and summarizing common weaknesses of reform legislation).

³ Compare JENNIFER BRONSON & E. ANN CARSON, U.S. DEP'T OF JUSTICE, *PRISONERS IN 2017*, at 4 tbl.2 (2019) (listing the total number of prisoners under state or federal jurisdiction in each state in 2017), with HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, *PRISONERS IN 2007*, at 2 tbl.2 (2009) (listing the total number of prisoners under state or federal jurisdiction in each state in 2007).

⁴ From greatest to least, the percent reductions of the nation's “biggest losers” were: Connecticut (33), Vermont (29), Rhode Island (28), New Jersey (27), California (25), Michigan (21), New York (21), and Massachusetts (20). Compare BRONSON & CARSON, *supra* note 3, at 4 tbl.2, with WEST & SABOL, *supra* note 3, at 2 tbl.2.

when set against the backdrop of an *eightfold* increase in the size of the national prison population between the early 1970s and the early 2000s.⁵

One of the key political impediments to more effective reform was on vivid display in the 2018 Wisconsin gubernatorial race. During the campaign, Democratic challenger Tony Evers indicated that he would like to cut the Badger State's record-high prison population in half if elected.⁶ The incumbent, Republican Scott Walker, responded with an attack ad that charged Evers with "a dangerous plan that today would mean releasing thousands of violent criminals back into our communities."⁷ Evers reacted by disavowing any particular timetable for reducing the prison population and promising, "[w]e will not release violent criminals."⁸ Although Evers eventually scored a narrow electoral victory over Walker,⁹ the thrust and parry underscored that the release of "violent criminals" from prison remains a politically dicey proposition.

Walker's attack was not, in one sense, entirely unfair. Most of the individuals held in state prisons in the United States today are serving time for violent crimes.¹⁰ Indeed, depending on how broadly one defines the term "violent criminals," their share of the national prison population might reach two-thirds or higher.¹¹ Thus, Walker was not wrong to suggest that a dramatic reduction in the size of the prison population, such as that embraced by Evers, would require, at some level of the criminal-justice system, more lenient treatment of a substantial number of individuals who have been convicted of violent crimes.

However, Walker may have been on shakier ground insofar as he was characterizing such reforms as necessarily "dangerous." Walker's charge seems premised on the assumption that individuals who have once committed a violent crime are likely to do so again in the future. In actuality, though, prisoners who are serving time for violent offenses are,

⁵ The national prison population increased from 196,092 in 1972, PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUSTICE, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925-86, at 11 (1988), to 1,598,316 in 2007, WEST & SABOL, *supra* note 3, at 1 tbl.1. This increase in the absolute size of the prison population was associated with a quintupling of the nation's rate of imprisonment, that is, prisoners per 100,000 United States residents. O'HEAR, *supra* note 2, at xiii.

⁶ Tom Kertscher, *Tony Evers Supports Cutting Prison Population 50%, but Releasing Thousands of Violent Criminals?*, POLITIFACT WIS. (Sept. 21, 2018, 6:00 AM), <https://www.politifact.com/wisconsin/statements/2018/sep/21/scott-walker/tony-evers-supports-cutting-prison-population-50-/>.

⁷ *Id.*

⁸ *Id.*

⁹ Patrick Marley & Molly Beck, *Gov. Scott Walker Concedes to Democrat Tony Evers*, MILWAUKEE J. SENTINEL (Nov. 8, 2018, 4:54 PM), <https://www.jsonline.com/story/news/politics/elections/2018/11/07/wisconsin-elections-gov-scott-walker-concedes-democrat-tony-evers/1921045002/>.

¹⁰ O'HEAR, *supra* note 2, at 198.

¹¹ *Id.*

on the whole, *less* likely to reoffend than other prisoners.¹² Moreover, increasingly sophisticated risk-assessment tools now permit corrections officials to make more accurate, individualized judgments about dangerousness.¹³ If decisions are appropriately based on valid risk-assessment tools, there seems no greater reason categorically to fear the release of a group of violence-convicted (VC) prisoners than groups of property- or drug-convicted prisoners.

At the same time, a quite different set of concerns may still weigh heavily against more lenient treatment of the violence-convicted. The Walker attack ad implicitly invoked one well-recognized purpose of imprisonment, that is, *incapacitation* of the dangerous. However, another purpose that may appropriately play an important role in legal responses to violent crime is *retribution*—giving the offender his or her just deserts.¹⁴

¹² For instance, the United States Department of Justice's Bureau of Justice Statistics (BJS) tracked the performance of prisoners released in thirty states in 2005. MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010* (2014) [hereinafter DUROSE, COOPER & SNYDER, *RECIDIVISM PATTERNS*]. Dividing the prisoners into four categories (violent, property, drug, and public order), the BJS found that those who had been convicted of violent crimes actually had the *lowest* rates of reconviction for a new offense. *See id.* at 15 (indicating that the five-year reconviction rate for violent offenders was 48.0%; for property offenders, 61.2%; for drug offenders, 56.3%; and for public order offenders, 54.2%). In addition to reconviction, the BJS study also reported results for five other measures of recidivism. *Id.* at 8, 15. Violent offenders had the lowest repeat-offending rate using each of these measures.

To be sure, not all new offenses are equally concerning. If offenders tend to specialize in certain types of crime, then we might still want to undertake special measures in order to address the recidivism risks of those who have been convicted of violent crimes. Yet, the BJS data reveal little evidence of specialization. For instance, among the prisoners convicted of violent crimes who recidivated, public order offenses were far more common than fresh violent offenses. MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010—SUPPLEMENTAL TABLES: MOST SERIOUS COMMITMENT OFFENSE AND TYPES OF POST-RELEASE ARREST CHARGES OF PRISONERS RELEASED IN 30 STATES IN 2005* tbl.2 (2016) [hereinafter DUROSE, COOPER & SNYDER, *SUPPLEMENTAL TABLES*]. Indeed, violent recidivism was almost as common among the prisoners convicted of property and public order offenses as it was among those convicted of violence. *See id.* (indicating that 33.1% of those who had served time for a violent offense were rearrested for a new violent offense, as compared to 29.2% of those who served time for a public order offense and 28.5% of those who served time for a property offense).

¹³ Michael M. O'Hear, *Managing the Risk of Violent Recidivism: Lessons from Legal Responses to Sexual Offenses*, 100 B.U. L. REV. 133, 179–80 (2020).

¹⁴ *See* Leipold, *supra* note 1, at 1586–87 (“Focusing exclusively on deterring future crime and incapacitating those who are not deterred misses the vital role that retribution plays in our sentencing policy and decisions. No matter how confident the prediction that an inmate can be returned safely to society, release will not (and should not) happen if the inmate has not been adequately punished for his behavior.”). Retribution is frequently and mistakenly conflated with vengeance or a desire simply to maximize the severity of punishment. Jeffrie G. Murphy, *Retribution*, in 4 *REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE* 7, 10–11 (Erik Luna ed., 2017). Rather, at its core, retribution involves punishment that is based on, and apportioned to, the wrongfulness of the offender's conduct—giving the offender, in other words, what he or she *deserves*. *See id.* at 10; Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM.

Because violent crimes include some extremely serious offenses like murder and rape, more lenient treatment for the violence-convicted may offend widely shared views of just punishment—even if there were little or no direct cost to public safety. Indeed, it is possible to imagine a sort of catch-22. The prisoners who are least likely to require further incapacitation may be those who have already served many years in prison and who are now well past the peak age for committing crimes.¹⁵ Yet, individuals are not likely to have such long sentences unless they have been convicted of an especially disturbing offense that cries out for harsh punishment.¹⁶ In short, the prisoners who can respond most effectively to public-safety objections to their release may tend to be more-or-less the same prisoners who evoke the most compelling just-punishment objections.¹⁷

In recent years, the national criminal-justice reform conversation has centered on the goal of diverting or removing low-risk nonviolent

L. REV. 1247, 1255 (2011). Imposing punishment consistently with retributive principles of desert and proportionality is sometimes framed as a matter of moral duty. Murphy, *supra*, at 11–13. Alternatively, or additionally, retributive approaches may be favored on more pragmatic grounds. For instance, Paul Robinson and John Darley have developed what they characterize as a utilitarian theory of desert. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997). They argue that public views of the legal system’s legitimacy depend on the system’s conformity with lay intuitions about desert, and that, in turn, public cooperation with law and legal officials depends on the system’s perceived legitimacy. *Id.* at 457–58.

Although retributive and incapacitative approaches to punishment are sometimes seen as fundamentally at odds with one another, they may be reconciled through Norval Morris’s influential theory of “limiting retributivism,” in which desert establishes a range of permissible punishment, while utilitarian considerations, like incapacitation, provide appropriate grounds for selecting a specific punishment within the range. NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 75 (1974). As will become apparent in Part II, my analytical approach in this Article is informed by Morris’s range-based conception of desert.

¹⁵ See *infra* Part I (discussing the relationship between age and recidivism).

¹⁶ Although this catch-22 dynamic has not figured prominently in policy discussions thus far, it is already an all-too-real phenomenon to many individuals who are seeking parole. See, e.g., WISDOM, Reform Now: A Call for Accountability in the Department of Corrections—Brief One: A Broken Parole System, <https://www.rocwisconsin.org/wp-content/uploads/2015/10/A-Broken-Parole-System.pdf> (last visited Oct. 23, 2019) (describing a case of one Wisconsin prisoner who was convicted of armed robbery and, despite a strong record of good institutional behavior and rehabilitative effort, was repeatedly and summarily denied parole on the basis of “insufficient time served”).

¹⁷ In this Article, I focus on two of the conventionally recognized justifications for imprisonment—incapacitation and retribution—but disregard another, deterrence. Arguably, an early release from prison might undercut the deterrent threat of punishment for either the prisoner (specific deterrence) or the public at large (general deterrence). However, the available research suggests that the deterrent effects of marginal differences in sentence length are modest at best. COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS. PRESS, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 5 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014). Rather, the research points to certainty of apprehension, rather than severity of punishment, as the most effective deterrent. Daniel S. Nagin, *Deterrence*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 19, 34–35 (Erik Luna ed., 2017).

offenders—especially those convicted of drug offenses—from the prison system.¹⁸ In this context, it is easy to understand why considerations of risk and amenability to treatment have been the primary focus. However, reformers are now starting to turn their attention to those who have been convicted of violent offenses,¹⁹ which would be a necessary pivot if the ultimate goal really were to end mass incarceration. With this shift of attention, though, retributive considerations are likely to play a more prominent role in the conversation. Reformers may be able to offer sound, research-based arguments that not all VC prisoners require continued incapacitation, but they must also be prepared to address retributive objections.

With this political and policy context in mind, the present article seeks to answer a deceptively simple empirical question: are there enough VC prisoners who may plausibly avoid the incapacitation-retribution catch-22 such that their release might be a sensible reform priority? If, say, only 1% or 2% of VC prisoners are plausibly releasable, then reformers may do better to focus their attention on other components of the offender population—even if that means accepting the persistence of a historically high national incarceration rate for many more years to come.²⁰

¹⁸ O’HEAR, *supra* note 2, at xv–xvi.

¹⁹ For instance, James Forman Jr.’s recent Pulitzer Prize-winning book on race and mass incarceration closes with a call to focus more attention on violent offenders. JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 228–31 (2017).

²⁰ At first blush, it may seem that if the United States managed to get by with an incarceration rate only one-quarter of the current level in the early 1970s—a time well within the memory of many now living—then there simply *must* be a tolerable way to return to that rate within a relatively short timeframe. See MICHAEL O’HEAR, *PRISONS AND PUNISHMENT IN AMERICA: EXAMINING THE FACTS* 166–67 (2018) [hereinafter O’HEAR, *PRISONS AND PUNISHMENT*] (describing long-term U.S. incarceration trends). Yet, rewinding the incarceration clock may be impeded by the many other profound changes that have occurred in American society over the past half-century—deindustrialization and the emergence of historically high levels of economic inequality, changing patterns of drug use and dependence, new norms in family structure and parenting arrangements, the pendulum swing of white flight from cities to the gentrification of previously low-income urban neighborhoods, and the erosion of churches and other traditional institutions of informal social control, to name just a few familiar aspects of our nation’s recent social and economic history. See, e.g., MICHAEL O’HEAR, *WISCONSIN SENTENCING IN THE TOUGH-ON-CRIME ERA: HOW JUDGES RETAINED POWER AND WHY MASS INCARCERATION HAPPENED ANYWAY* 33 (2017) [hereinafter O’HEAR, *WISCONSIN SENTENCING*] (deindustrialization); *id.* at 167–68, 170, 183–84, 191 (drug trends); CHAD STONE ET AL., *CTR. ON BUDGET & POLICY PRIORITIES, A GUIDE TO STATISTICS ON HISTORICAL TRENDS IN INCOME INEQUALITY I* (2019) (inequality); PEW RESEARCH CTR., *PARENTING IN AMERICA: OUTLOOK, WORRIES, ASPIRATIONS ARE STRONGLY LINKED TO FINANCIAL SITUATION* 15 (2015) (family structure); Erika K. Wilson, *Gentrification and Urban Public School Reforms: The Interest Divergence Dilemma*, 118 W. VA. L. REV. 677, 678 (2015) (white flight and gentrification); PEW RESEARCH CTR., “NONES” ON THE RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION 14 (2012) (church affiliation). Such broad social changes have subtle and uncertain connections to rates of crime and imprisonment. However, given the many ways that the United States of the late 2010s differs from the United States of the early 1970s, we cannot dismiss the possibility that an incarceration rate that made sense in the earlier time period no longer makes sense today, at least in the absence of a

Although there may be considerable value to answering the empirical question I have posed, a precisely quantified answer cannot be attained. Most fundamentally, neither theory nor research supplies any generally accepted, workably specific way of answering how much prison time is required for incapacitation and retribution purposes in any given case. Reasonable minds may differ on such key underlying questions as “how safe is ‘safe’” and what makes a punishment “fit” a crime. Moreover, even if agreement could somehow be reached on a formula for calculating who should be imprisoned for how long, it cannot be assumed that all of the necessary data for applying the formula have actually been collected and made available to the public by a trustworthy agency. Although criminal-justice agencies are becoming more data-oriented, researchers still commonly find that key information is either not tracked at all or not readily available to outsiders.²¹

In short, I can offer only a very rough ballpark estimate of the proportion of VC prisoners who seem capable of avoiding the incapacitation-retribution catch-22. Nonetheless, this project may still have value for at least three reasons. First, even just having some sense of the *order of magnitude* of the potentially releasable may prove helpful. Although 1% may not be enough to justify the investment of much reform effort in this area, 10% might be—and a figure substantially higher than 10% would almost certainly warrant some close attention.²² Second, the analysis may highlight certain specific subsets of the group that seem especially rich in potentially releasable inmates. This information may facilitate the most effective targeting of reform efforts. Finally, the basic methodological approach developed here may serve as a starting point for future researchers who have more fine-grained data available to them.

My own data come from the Wisconsin Department of Corrections (DOC).²³ Out of 23,218 individuals held under the DOC’s jurisdiction in

much broader restructuring of our national socioeconomic arrangements. Indeed, even in the earlier period, the emergence of a new brand of law-and-order politics—symbolized by the election of President Richard Nixon in 1968 and his re-election in 1972—suggests that the then-prevailing approach to incarceration was felt to be inadequate by many Americans. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 234 (2011) (noting Nixon’s successful appeal to “law and order” in the wake of rising crime in the 1960s).

²¹ See, e.g., Jason Tashea, *Liberating Criminal Justice Data: How a Florida Law Provides a Blueprint for the Nation*, A.B.A. J. (June 18, 2019, 6:30 AM), <http://www.abajournal.com/web/article/liberating-criminal-justice-data-how-a-florida-law-offers-a-blueprint-for-the-nation> (discussing efforts to improve collection and dissemination of criminal-justice data).

²² Assuming that violence-convicted individuals constitute half or more of the overall prison population, release of 10% should result in a reduction of the prison population of about 5% or more. By way of comparison, the national prison population dropped 1.2% in 2017, the most recent year for which data are available, and 6.7% over a ten-year period. BRONSON & CARSON, *supra* note 3, at 3 tbl.1.

²³ See *infra* note 31.

August 2018, I find that 13,649 had been convicted of a violent crime, employing a somewhat conservative definition of what counts as “violent.”²⁴

In considering who is potentially releasable among this group, I have tried to imagine the problem from a particular institutional perspective—that of a parole board possessing broad release authority. More specifically, I have approached the problem with these assumptions:

- The board is authorized and sincerely motivated to release all inmates who are on the low end of the prisoner risk spectrum and who have served an amount of time that can be plausibly defended as sufficient for just punishment, and
- All prisoners have completed basic reentry planning and preparations by the time they are considered for release.

To be sure, these assumptions may be quite far from actual on-the-ground realities—indeed, Wisconsin itself does not make parole available to *any* individuals who are currently entering prison²⁵—but, in a sense, that is precisely the point: if such a state of affairs as I assume holds genuine promise for large-scale decarceration, then reformers might want to try to make these hypothetical conditions a reality, or to achieve other policy changes that would produce similar outcomes.²⁶

To preview my conclusions, I find that 4388 of Wisconsin’s VC prisoners have at least one indicator of a potentially low recidivism risk.²⁷ Then, applying an algorithm that takes into account offense of conviction, date of conviction, and several case-specific aggravating and mitigating factors, I find that up to about 1700 (or 12% of the VC group) present significant indications of having served enough time for just punishment.²⁸ However, I also find that a more conservative approach yields an estimate of the “potentially releasable” that is only about half that size.²⁹

²⁴ See *infra* note 33.

²⁵ Michael M. O’Hear, *Wisconsin Sentencing in the Walker Era: Mass Incarceration as the New Normal*, 30 FED. SENT’G REP. 125, 126 (2017).

²⁶ These might include, for instance, mandatory or presumptive guidelines for parole authorities or sentencing judges. See O’HEAR, WISCONSIN SENTENCING, *supra* note 20, at 63, 213 (describing sentencing and parole guidelines).

²⁷ See *infra* Part I (discussing who are potentially low-risk violent-crime prisoners).

²⁸ See *infra* Table 27 (summarizing the viable release candidates from among all potentially low-risk violent-crime inmates).

²⁹ *Id.* These estimates are somewhat higher than another recent estimate that 3.1% of the prisoners serving time nationally for violent crime are “unnecessarily incarcerated.” JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUSTICE AT N.Y. UNIV. SCH. OF LAW, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 26 (2016). This estimate was reached using a quite different methodology applied to the prison populations of forty-eight states and the federal government. *Id.* at

To be sure, these conclusions only pertain to one state. However, there are reasons to think that Wisconsin's situation may be similar to what is found in many other states. After all, Wisconsin—a mid-sized jurisdiction in the American heartland—is a notable “swing” state whose political dynamics parallel those of the United States as a whole.³⁰ In the criminal-justice realm more specifically, Wisconsin's rate of imprisonment is almost exactly equal to the national average.³¹

This Article proceeds as follows. Part I summarizes the relevant research literature on risk, identifies three markers of possible low risk, and quantifies their prevalence among Wisconsin's VC prisoners. Part II considers how many of the potentially low-risk inmates may have served enough time already for retributive purposes. An analytical algorithm is developed and applied to the potentially low-risk VC population, ultimately producing both aggressive and conservative estimates of the number of inmates who may avoid the incapacitation-retribution catch-22. Part III discusses the implications of the Wisconsin data for reform priorities and the prospects for rolling back mass incarceration in the United States. Part III also highlights various limitations in my data and analytical approach, underscoring the need for additional research in this area. The fourth part concludes.

I. WHO ARE THE POTENTIALLY LOW-RISK VC PRISONERS?

As of late August 2018, the Wisconsin DOC incarcerated 23,218 individuals.³² Of these, 13,649 are identified as having at least one

47. For instance, the researchers utilized a different definition of “violent crime,” which they noted may be “overly broad.” *Id.* at 48. They based their judgment of “unnecessary incarceration” on the four factors of crime seriousness, victim impact, state of mind, and recidivism risk, as applied to 370 crime categories, both violent and nonviolent. *Id.* at 49. Their use of crime category as the basic unit of analysis differed from my focus on the specific circumstances of individual prisoners. In any event, the researchers did not claim a high level of precision or definitiveness to their estimates. *See id.* at 53 (“The authors recognize that this methodology can be viewed as somewhat arbitrary. The purpose of this analysis is not to put forth absolute sentence lengths. Instead, it is to put forth options for policymakers to consider, starting with one that the authors believe is moderate and effective.”).

³⁰ *See, e.g.*, Michael O'Hear & Darren Wheelock, *Imprisonment Inertia and Public Attitudes Toward “Truth in Sentencing”*, 2015 BYU L. REV. 257, 260 n.15 (reviewing close elections in Wisconsin since 2000). In 2016, Republican presidential candidate Donald J. Trump eked out a narrow victory in Wisconsin, which helped to seal his national victory. John Nichols, *The States That Elected Trump Have Turned Against Him*, NATION (Nov. 8, 2018), <https://www.thenation.com/article/wisconsin-michigan-pennsylvania-ohio-midterms-trump-democrats/>. But, just two years later, Wisconsin elected a Democrat as Governor and returned an incumbent Democrat to the United States Senate. *Id.*

³¹ BRONSON & CARSON, *supra* note 3, at 11–12 (indicating that Wisconsin holds 391 individuals in prison for every 100,000 state residents, in comparison to the national average of 390 state prisoners per 100,000 residents).

³² The data reported here were obtained from the DOC's offender locator website, *Locator*, WIS. DEP'T CORRECTIONS, <https://appsdoc.wi.gov/lop/> (last visited Apr. 1, 2020), between August 17 and

violent-crime conviction, utilizing a relatively narrow definition of “violent crime.”³³ Some basic demographic information about the overall and the VC prisoner populations is supplied in Table 1.

21, 2018. The full dataset is available from the author on request. The data do not include individuals who were adjudicated delinquent and committed to a DOC juvenile detention facility, but they do include some juveniles who were prosecuted and sentenced as adults. The data do include individuals who are being held under DOC authority in jails and correctional centers (in effect, halfway houses). I have chosen to exclude individuals who are being held by the DOC in the Milwaukee Secure Detention Facility (MSDF). MSDF is a specialized facility designed to hold individuals on community supervision who are accused of violating the terms of their release, or who are serving a short-term sanction in lieu of revocation. *Milwaukee Secure Detention Facility*, WIS. DEP’T CORRECTIONS, <https://doc.wi.gov/Pages/OffenderInformation/AdultInstitutions/MilwaukeeSecureDetentionFacility.aspx> (last visited Oct. 8, 2019). The individuals detained at MSDF constitute a transient population as to whom it would be difficult to apply the concept of early release. Arguably, the same could be said of those housed in Wisconsin’s correctional centers, which often function as a transitional place of confinement for individuals who are nearing the end of a prison term. *Wisconsin Correctional Center System*, WIS. DEP’T CORRECTIONS, <https://doc.wi.gov/Pages/OffenderInformation/AdultInstitutions/WisconsinCorrectionalCenterSystem.aspx> (last visited Oct. 8, 2019). However, the great majority of these inmates still have at least one year left to serve. See *Wisconsin Correctional Center System Minimum*, WIS. DEP’T CORRECTIONS, <https://doc.wi.gov/DataResearch/DataAndReports/WCCSInstitutionalFactSheet.pdf> (indicating that only 20% of these inmates have less than one year left to serve) (last visited Oct. 8, 2019). In any event, the number of VC inmates held in correctional centers is sufficiently small that it does not have much of an impact on the overall picture drawn in this Article. The same could be said for inmates in other unusual placements, such as those held in county jails pursuant to contracts with the State.

³³ For present purposes, I define “violent crime” to mean a violation of any part of Chapter 940 of the Wisconsin statutes, which codifies “crimes against the person,” or the offense of robbery. Nearly all of the major offenses that are widely and traditionally recognized as violent are included in Chapter 940, including the Wisconsin analogs of murder and manslaughter (first- and second-degree intentional homicide, first- and second-degree reckless homicide), sexual assault, battery, reckless endangerment, reckless injury, kidnapping, and false imprisonment. WIS. STAT. § 940 (West, Westlaw through 2019 Act 21). Robbery is the only offense outside of Chapter 940, WIS. STAT. § 943.32 (West, Westlaw through 2019 Act 21), that is almost always classified as violent. Notable exclusions include burglary, illegal possession of a firearm, driving while intoxicated, and sexual assault of a child, all of which are sometimes classified as violent. For an overview of the diverse legal definitions of “violent crime,” see Michael O’Hear, *Third-Class Citizenship: The Escalating Legal Consequences of Committing a “Violent” Crime*, 109 J. CRIM. L. & CRIMINOLOGY 165, 170–85 (2019).

Note that the 13,649 with a violence conviction may or may not have been serving a sentence for a violent offense at the time of our census. For instance, a person might have had a robbery conviction in 2000, completed the resulting sentence, and then been imprisoned on a new theft charge in 2017. If still behind bars at the time of our census, such a person would be included in my count as a VC prisoner.

Note also that there are likely some past violent-crime convictions that are not listed in the DOC data. It appears that the DOC’s conviction information includes only convictions resulting in commitments to DOC custody or supervision. Thus, for instance, out-of-state convictions would generally not be included.

Table 1. Demographics of Wisconsin Prisoners

	All Prisoners	VC Prisoners	Potentially Low-Risk VC Prisoners
Number	23,218	13,649	4388
Male	93%	95%	95%
White ³⁴	54%	46%	46%
Age (25 th -50 th -75 th percentile)	29-36-47	33-41-51	32-43-55
Conviction in past 5 years ³⁵	61%	57%	27%

It is not possible with the available data to provide a precise estimate of the number of VC prisoners who would present a low risk of recidivism if assessed with one of the commonly utilized multifactor actuarial risk-assessment instruments.³⁶ Indeed, given different views on what constitutes a risk level that is “low,” a clear, consensus answer might be elusive even if unlimited data were available. However, based on the large and growing body of research on recidivism risk, it is possible to identify several characteristics that would mark a VC prisoner as potentially low risk, at least relative to prison norms. I focus on three variables in particular.

First, *age* has been consistently found to be a useful consideration in predicting recidivism.³⁷ Indeed, the age-crime relationship has been

³⁴ The denominator includes a small number of inmates whose race is listed as “unknown” (for example, twenty-three in the “all prisoners” column). Note that the DOC data do not include information about ethnicity or national original. Although Hispanic/Latinx identity is sometimes treated as a separate category in racial classification systems, the DOC data do not provide any such breakdown.

³⁵ The numerator is a count of individuals whose most recent conviction year is 2014 or later. The denominator includes a small number of individuals (for example, nine in the “all prisoners” column) who do not have a usable conviction date in the DOC records.

³⁶ For an example of the data collected in one influential instrument, the Violence Risk Appraisal Guide, see GRANT T. HARRIS ET AL., *VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK* 285–86 (3d ed. 2015).

³⁷ To be sure, the recidivism figures discussed in this Part are, in a sense, misleading. As a perusal of the following footnotes makes clear, in almost all the research on recidivism risk factors, recidivism is defined as a rearrest, reconviction, or return to prison. However, a great deal of crime escapes such formal sanctioning because victims choose not to report it, because police are unable to identify and apprehend the perpetrator, or because police or other officials choose not to seek formal sanctions. As two commentators have observed, “pathways and trajectories plotted using administrative data on arrests and convictions only allow for the estimation of *criminal justice careers* rather than criminal careers.” Shawn D. Bushway & Sarah Tahamont, *Modeling Long-Term Career Criminal Careers: What Happened to the Variability?*, 53 J. RES. ON CRIME & DELINQ. 372, 375 (2016). Thus, when it is reported based on official statistics that X percent of a given group of offenders recidivated over a certain time period, the actual rate of reoffending will almost always be some unknown figure (Y) that is greater than X. Given this gap between X and Y, recidivism rates are offered here more for purposes

characterized as “one of the most robust and stable empirical findings of criminological research.”³⁸ Rates of violent offending, in particular, tend to peak in the teen years and then drop with age.³⁹ Thus, “eventual desistance from crime is the norm, even among those characterized as high-rate, chronic offenders.”⁴⁰ It is to be expected, then, that older prisoners will generally be safer to release than younger.⁴¹ This expectation is borne out by the recidivism data. For instance, in one national study, researchers found that prisoners who were forty-five or older at release were sent back to prison for a new crime only 17% of the time, as compared with a 30% recidivism rate for those who were aged eighteen to twenty-four.⁴² In other

of *relative* comparison than as *absolute* indicators of dangerousness. My premise is that if X is relatively low for one group of offenders in comparison with other groups, then Y is also likely relatively low for that group.

Concerns about the gap between X and Y may also be tempered by two additional considerations. First, because the VC prisoners who constitute our population of interest likely attract especially close supervision and police attention after release, it is plausible that they are less likely to get away with new offending than are most other individuals who have a criminal record. In other words, the X-Y gap is apt to be smaller for VC prisoners than for many other groups who have been studied in the recidivism research. Second, the stigma associated with a violence conviction may significantly increase the risk that a released VC prisoner will be falsely arrested, convicted, and reimprisoned. *See, e.g.,* Megan Denver, Justin T. Pickett & Shawn D. Bushway, *The Language of Stigmatization and the Mark of Violence: Experimental Evidence on the Social Construction and Use of Criminal Record Stigma*, 55 CRIMINOLOGY 664, 675–76 (2017) (in a national survey, finding that respondents perceived a higher recidivism risk among offenders convicted of violent than nonviolent offenses). False recidivism events recorded in the official statistics may, at least partially, offset missed recidivism events.

³⁸ Patrick Lussier & Jay Healey, *Rediscovering Quetelet, Again: The “Aging” Offender and the Prediction of Reoffending in a Sample of Adult Sex Offenders*, 26 JUST. Q. 827, 828 (2009) (citations omitted).

³⁹ Robert Prentky et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL’Y & L. 357, 375–76 (2006).

⁴⁰ Bianca E. Bersani & Elaine Eggleston Doherty, *Desistance from Offending in the Twenty-First Century*, 2018 ANN. REV. CRIMINOLOGY 311, 313. For instance, in one study, researchers tracked arrest records for 500 serious juvenile offenders until age seventy. Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to the Age of 70*, 41 CRIMINOLOGY 301, 302 (2003). They found an arrest rate of 84% before the age of twenty-five, but only 12% between the ages of sixty and sixty-nine—and only 3% for violent offenses. *Id.* at 314. These arrest rates were corrected for mortality (i.e., subjects who died before the age of seventy), but not incarceration. However, annual days of incarceration were tracked to the age of thirty-two and showed a steady decline after age sixteen. *Id.* at 325 fig.9. This pattern suggests that the decline in arrest rates that occurred for subjects between their teens and sixties was not simply a result of more time being spent behind bars.

A variety of different theories have been developed to account for the phenomenon of desistance. For a recent survey of the theoretical literature, see Bersani & Doherty, *supra*, at 315–18.

⁴¹ For instance, in one study of individuals imprisoned for sexual offenses, researchers concluded that age at release, by itself, was about as accurate a predictor of recidivism as was a score on the Static-99, a leading risk-assessment instrument. Lussier & Healey, *supra* note 38, at 850.

⁴² O’HEAR, PRISONS AND PUNISHMENT, *supra* note 20, at 160. Moreover, the predictive power of age at release seems to hold up even when other variables are held constant. For instance, in one study of individuals sentenced for felony offenses in Minnesota, each one-year increase in age was associated with a 2% reduction in recidivism risk after controlling for race, sex, urban residence, offense severity,

studies, older inmates show even lower recidivism rates.⁴³ In Wisconsin, for instance, out of 140 inmates aged sixty or older who were released in 2011, only ten—or about 7%—were convicted of a new crime over the following three years.⁴⁴

Although any specific age cutoff is necessarily somewhat arbitrary—after all, one could always set it a bit higher and likely find even lower recidivism rates—I will use sixty for present purposes as an indicator of relatively low risk.⁴⁵ Out of the 13,649 VC prisoners in Wisconsin, 806 satisfy this age criterion.

Second, *criminal history* has also proven useful as a risk-predictor.⁴⁶ While most individuals do tend to reduce their offending with age, an extensive criminal history may indicate that desistance will be slower or less complete.⁴⁷ By comparison, a person who is a first-timer in the

and type of offense. JULIA A. LASKORUNSKY, UNIV. OF MINN., MINNESOTA CRIMINAL HISTORY SCORE RECIDIVISM PROJECT 11 (2018). *See also* OFFICE OF STRATEGIC INITIATIVES, FLA. DEP'T OF CORR., FLORIDA PRISON RECIDIVISM REPORT: RELEASES FROM 2010 TO 2016, at 14 tbl.2 (2018) (showing for released male Florida prisoners, each additional year of age at release associated with 2.9% reduction in recidivism rate, holding numerous variables constant).

Interestingly, though, a more fine-grained analysis of the Minnesota data showed that age was associated with lower recidivism risk for those individuals with low and mid-range criminal history, but not for those with the highest criminal history scores. LASKORUNSKY, *supra*, at 12 fig.2. This suggests that desistance occurs more slowly and less completely with a relatively small number of “life-course persistent” offenders. *Id.* at 13. However, since they tend to be property offenders, *id.*, concerns about these individuals who continue to recidivate into old age do not necessarily negate the premise that elderly VC inmates generally present relatively low risk.

⁴³ In a New York study, for instance, only 4% of the inmates released at sixty-five or older were returned to prison for a new crime, while the rate in a Virginia study of those released at age fifty-five or older was only 1.3%. O'HEAR, PRISONS AND PUNISHMENT, *supra* note 20, at 160–61. Meanwhile, in Florida, 12% of inmates aged sixty-five or older were returned to prison within three years of release, as compared to 31% for those under twenty-five. OFFICE OF STRATEGIC INITIATIVES, *supra* note 42, at 11. (Note that the Florida definition of recidivism includes *any* return to prison, not just conviction of a new crime. *Id.* at 2. Thus, some share of the recidivism figures likely includes individuals returned to prison for merely technical violations of the terms of their release.) Finally, in a study of federal inmates, there were no arrests of any of the ten septuagenarians within three years of their release from prison. John Monahan, Jennifer Skeem & Christopher Lowenkamp, *Age, Risk Assessment, and Sanctioning: Overestimating the Old, Underestimating the Young*, 41 LAW & HUM. BEHAV. 191, 192 (2017).

⁴⁴ JOSEPH R. TATAR II & MEGAN JONES, WIS. DEP'T OF CORR., RECIDIVISM AFTER RELEASE FROM PRISON 8 (2016).

⁴⁵ Notably, public opinion research indicates that laypeople are receptive to the possibility of using advanced age as a criterion in setting prison terms. *See* Monahan, Skeem & Lowenkamp, *supra* note 43, at 193 (“In a recent survey of American adults, [the researchers] found that more than three-quarters of the respondents were open to the possibility of using advanced age as a [mitigating] factor at sentencing” (citation omitted)).

⁴⁶ Studies consistently find that criminal history is among the strongest predictors of recidivism. *See* RICHARD S. FRASE & JULIAN V. ROBERTS, PAYING FOR THE PAST: THE CASE AGAINST PRIOR RECORD SENTENCING ENHANCEMENTS ch. 2 (summarizing research).

⁴⁷ *See supra* note 42 (discussing the Minnesota study). *See also* Bersani & Doherty, *supra* note 40, at 313 (“Whereas the classic age-crime curve describes the modal pattern of offending, a nontrivial

criminal-justice system is more likely to have done something aberrational that does not indicate a propensity to commit more crimes in the future.⁴⁸ Such tendencies are apparent, for instance, in data from the federal criminal-justice system: among a sample of federal defendants with no criminal history points, only about 17% were convicted of a new offense within eight years of release, as opposed to about 29% among those with one point and 35% among those with two points.⁴⁹ In light of such data, I use an absence of any prior conviction as an indicator of possible low risk among VC prisoners.⁵⁰ Out of the 13,649 in Wisconsin, 2608 satisfy this criminal-history criterion.⁵¹

number of individuals deviate from this trend, engaging more frequently in crime, initiating offending at younger ages, and/or continuing to offend into later adulthood.”).

⁴⁸ See, e.g., Megan Kurlychek, Robert Brame & Shawn Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending*, 5 CRIMINOLOGY & PUB. POL’Y 483, 487 fig.1 (2006) (indicating, in a 1958 birth cohort sample from Philadelphia, that frequency of subsequent arrests was about 50% higher among individuals who had one, as opposed to zero, prior arrests).

⁴⁹ TRACEY KYCKELHAHN & TRISHIA COOPER, U.S. SENTENCING COMM’N, *THE PAST PREDICTS THE FUTURE: CRIMINAL HISTORY AND RECIDIVISM OF FEDERAL OFFENDERS* app. at A-7 (2017). State-level studies reach similar conclusions. For instance, in Minnesota, a sample of sentenced felony offenders with a criminal-history score of zero had a three-year recidivism rate of 15.6% after being placed on probation or released from prison. LASKORUNSKY, *supra* note 42, at 9 fig.1. By contrast, those with a score of one reoffended at a 22.5% rate, and those with a score of two at a 27.0% rate. *Id.* Similarly, a Pennsylvania study found that sentenced offenders with a prior record score of one were 40% more likely to recidivate than offenders with a score of zero. Rhys Hester, *Prior Record and Recidivism Risk*, 44 AM. J. CRIM. JUST. 353, 366 tbl.3 (2018). Indeed, the negative predictive power of a zero score was so great that if Pennsylvania’s entire complex scheme for calculating prior record scores were scrapped in favor of a simple distinction between zero and more than zero, the simplified system would do almost as good a job at predicting recidivism. See *id.* (noting that predictive accuracy would fall by only 1%).

The predictive power of criminal history seems to hold up even when other variables are held constant. For instance, in the Minnesota study, each one-point increase in criminal history score was associated with a 29% increase in the risk of recidivism after controlling for race, sex, age at release, urban residence, offense severity, and type of offense. LASKORUNSKY, *supra* note 42, at 11. Similarly, a study of released male prisoners in Florida found that each prior prison commitment was associated with a 26.7% increase in the likelihood of a return to prison, holding constant age, disciplinary problems in prison, education level, substance abuse, and several other variables. OFFICE OF STRATEGIC INITIATIVES, *supra* note 42, at 14. The Florida researchers found that among nineteen variables that affected recidivism rates, number of prior commitments was the second-most important, and age at release the third-most. *Id.* at 17.

⁵⁰ My criminal-history data, it should be conceded, are imperfect. I base criminal history on convictions noted in the DOC database, which is not a comprehensive repository of this information. For instance, out-of-state convictions are omitted. One study of prisoners released in thirty states in 2005 found that 23% of the VC prisoners did have prior out-of-state arrests. MATTHEW R. DUROSE, HOWARD N. SNYDER & ALEXIA D. COOPER, U.S. DEP’T OF JUSTICE, *MULTISTATE CRIMINAL HISTORY PATTERNS OF PRISONERS RELEASED IN 30 STATES* 3 tbl.2 (2015). Of course, an arrest is not the same thing as a conviction. Still, my no-prior-conviction population clearly constitutes something of an overcount. Again, the nature of this project is not to quantify precisely the number of low-risk prisoners, but to develop a rough sense of the magnitude of this population and of the retributive considerations that might affect the appropriateness of their release.

⁵¹ See *supra* notes 31–33 and accompanying text.

Third, there are also good reasons to view *time since last offense* as useful in assessing risk.⁵² In general, the older an offense, the less reliable it is as an indicator of future criminality. This commonsensical expectation has found empirical support in an important set of long-term longitudinal studies of offender careers that have been published over the past two decades. While the precise results vary from study to study, they do consistently point to a “redemption” period of about six to ten years; that is, an offender who manages to go crime-free for six to ten years is not much more likely to commit an offense in the next year than a person of the same age who does not have a record.⁵³

Admittedly, there are at least two important objections to using the redemption literature for present purposes. First, I propose to use the time since last conviction as an indicator of relatively low risk *among a population of prison inmates*. However, the key redemption studies track individuals who may or may not have spent any time at all in prison. Typically, these studies focus on time after *arrest*.⁵⁴ Yet, an arrest need not necessarily lead to a conviction, let alone a prison sentence.⁵⁵ It can be

⁵² See Megan C. Kurlycheck, Shawn D. Bushway & Robert Brame, *Long-Term Crime Desistance and Recidivism Patterns—Evidence from the Essex County Convicted Felon Study*, 50 CRIMINOLOGY 71, 96 (2012) (“Our starting point is the widespread understanding—based on decades of recidivism studies—that the risk of offending tends to decline with the passage of time since the last offense.”). Some research indicates that time-from-offense can even be used to improve the predictive power of commonly used actuarial risk-assessment instruments. Anthony W. Flores et al., *Time-Free Effects in Predicting Recidivism Using Both Fixed and Variable Follow-Up Periods*, 44 CRIM. JUST. & BEHAV. 121, 122 (2017).

⁵³ See Samuel E. DeWitt et al., *Redeemed Compared to Whom? Comparing the Distributional Properties of Arrest Risk Across Populations of Provisional Employees with and Without a Criminal Record*, 16 CRIMINOLOGY & PUB. POL’Y 963, 982 (2017) (summarizing research). For instance, one study followed 670 males in Racine, Wisconsin, from age eighteen to thirty-two. Megan C. Kurlycheck, Robert Brame & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQ. 64, 70 (2007). The researchers found that if a person was arrested and then went seven years without being rearrested, the likelihood that the person would ever have another arrest fell to about the same level as that of the other young men who had never been arrested. *Id.* at 80.

Another study tracked a large group of Philadelphia-born males to age twenty-six. Among the 1009 who were arrested at age eighteen, the researchers found sharply reduced rates of rearrest for each year that a person managed to go without a second arrest. Kurlycheck, Brame & Bushway, *supra* note 48, at 493–94. At age twenty-six, those who had been previously arrested only at age eighteen (eight years earlier) had a rearrest rate of only 2%—just a single percentage point higher than the arrest rate for those who had never been arrested at all. *Id.* at 499.

Yet another study followed a group of repeat-offenders from a working-class area of London from childhood to the age of fifty-six. Lila Kazemian & David P. Farrington, *Advancing Knowledge About Residual Criminal Careers: A Follow-Up to Age 56 from the Cambridge Study in Delinquent Development*, 57 J. CRIM. JUST. 1, 3 (2018). The researchers found a sharp drop in the average number of subsequent convictions of individuals who managed to go five years without a conviction. *Id.* at 6.

⁵⁴ For examples, see *supra* note 53 and accompanying text.

⁵⁵ See, e.g., BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 24 tbl.21, 29 tbl.24 (2013) (in study of court outcomes in seventy-five large urban counties, finding that only 66% of those arrested on felony charges were

inferred that many—perhaps even a great majority—of the subjects who achieved “redemption” in the typical six- to ten-year time frame did so while remaining free in the community. By contrast, our VC prisoners are, by definition, people who are currently behind bars, with many likely to have been continuously incarcerated since their last conviction. Offense-free time in *prison* may be less indicative of reduced risk than offense-free time in the *community*. After all, the tightly controlled social environment of the prison seems to offer fewer opportunities to commit new crimes.⁵⁶

Second, I propose to use time since last conviction to supplement the age and criminal-history criteria, identifying some inmates as potentially low risk even though they are below the age of sixty and have multiple convictions. However, some of the redemption studies suggest that redemption periods are quickest for those who have little or no criminal history.⁵⁷

Nonetheless, while redemption periods may vary with criminal history, the research does indicate that redemption remains a valid concept across different offender groups.⁵⁸ For instance, one notable study documented redemption across divergent risk categories, as determined by the Post Conviction Risk Assessment (PCRA) tool, which takes criminal history into account.⁵⁹ The researchers tracked 27,156 federal offenders for about ten years after entry into community supervision.⁶⁰ These offenders were divided based on their PCRA scores into low-, low-moderate-, moderate-, and high-risk categories.⁶¹ The researchers found that rearrest rates dropped for all four categories as offense-free time increased, with

convicted, and only 73% of those who were convicted were sentenced to incarceration). Notably, one of the most frequently cited redemption studies was intentionally limited to individuals who were arrested for crimes that rarely lead to incarceration on the first offense. Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *CRIMINOLOGY* 327, 335 (2009). Moreover, it should be noted that even studies focusing on convictions instead of arrests are not necessarily tracking many individuals with lengthy incarceration. *See, e.g.*, Kazemian & Farrington, *supra* note 53, at 4 (noting that only 39 of the 118 convicted subjects had been incarcerated, mostly just for short periods of time).

⁵⁶ At the same time, it should be recognized that the prison environment can be highly stressful and rife with interpersonal or intergroup conflict. O’HEAR, *PRISONS AND PUNISHMENT*, *supra* note 20, at 75–76. Inmate-on-inmate violence is hardly unknown, with some research suggesting that about 15% of inmates sustain violence-related injuries. *Id.* at 89. When an inmate does commit a new offense, he or she may be prosecuted criminally and sustain a fresh conviction, or the incident may be handled exclusively through prison disciplinary processes.

⁵⁷ Flores et al., *supra* note 52, at 122.

⁵⁸ Indeed, the first study to quantify redemption variability found that even the group with the longest redemption period (individuals arrested at age sixteen for robbery) saw its rearrest rate fall to the general arrest rate for individuals of the same age after about 8.5 years arrest-free—a figure that is within the standard six- to ten-year redemption period. Blumstein & Nakamura, *supra* note 55, at 338.

⁵⁹ *See* Flores et al., *supra* note 52, at 124–25 (describing PCRA).

⁶⁰ *Id.* at 124.

⁶¹ *Id.* at 124–25.

especially sharp reductions for the offenders who were initially evaluated as higher risk.⁶² Indeed, consistent with the redemption literature, the researchers found that the rearrest rates across all four risk groups had grown similar by the seven-year mark.⁶³ On the other hand, it should be noted that other studies of different offender groups with multiple convictions have found redemption periods two or three times longer than what was suggested by the federal study.⁶⁴

However, if there are reasons to think that the standard six- to ten-year redemption period is too *short* to serve as a benchmark for our VC prisoners, there are also reasons to think that it may be too *long*. In particular, it should be appreciated that the concept of the redemption period was developed as a tool for employers and for policymakers who regulate employers' use of criminal records.⁶⁵ The point was to identify a time period beyond which an employer should disregard (or perhaps should be *required* to disregard) a job applicant's prior arrests or convictions. From this perspective, it may make sense to use, as the point of reference, individuals who have no arrests or convictions—after all, in order to fill a job, employers will often be in a position to choose among multiple applicants, including some who have no criminal history. It seems unlikely that many employers would be willing and able to provide special supervision to manage the risk that a new employee will commit a crime, so it seems reasonable for employers to want to avoid hiring applicants who present any greater crime risk than necessary. Release from prison, however, requires a fundamentally different sort of decision. A former inmate is not set loose on an unprepared workplace but is instead subject to supervision in the community by corrections professionals. With such a structure in place, and in view of the high public costs of prolonged imprisonment,⁶⁶ the state might well choose to be more tolerant of risk than

⁶² *Id.* at 129 fig.1.

⁶³ *Id.* at 131.

⁶⁴ See Shawn D. Bushway, Paul Nieuwbeerta & Arjan Blokland, *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 CRIMINOLOGY 27, 36, 52 (2011) (based on a sample of 3243 Dutch males convicted in 1977 and followed for twenty-five years, finding “offenders with four or more offenses either never resemble nonoffenders or only begin to do so after a minimum of 23 years”); Keith Soothill & Brian Francis, *When Do Ex-Offenders Become Like Non-Offenders?*, 48 HOW. J. CRIM. JUST. 373, 381 (2009) (illustrating an analysis of conviction information from England and Wales for samples of individuals born in 1953 and 1958, finding that individuals who had a conviction prior to age seventeen and another conviction between the ages of seventeen and twenty did not reach the redemption point until about age thirty-five—that is, after about twelve to fifteen years conviction-free).

⁶⁵ See Soothill & Francis, *supra* note 64, at 375 (“[T]he [two seminal] studies were concerned about the length of prior criminal history which is reasonable to look at when carrying out background checks for employment.”).

⁶⁶ See CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUSTICE, *THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010–2015*, at 7 (2017) (estimating the average cost per inmate at \$33,274 per year).

a private employer—which would imply a more generous notion of “redemption.”⁶⁷

In the end, we must again draw a somewhat arbitrary line in determining how much time offense-free is sufficient to mark an inmate as potentially low-risk. I will use fifteen years since last conviction as the cutoff—a figure that is roughly twice the middle of the commonly invoked six- to ten-year redemption period. A lower cutoff might also be defensible, but fifteen years seems appropriately conservative given the differences noted above between the VC prisoners and the populations that have been studied in the leading redemption research. Out of the 13,649 VC prisoners in Wisconsin, 2220 satisfy the fifteen-year conviction-free criterion.⁶⁸

One final point should be noted with respect to recidivism risk. Although the thought of a VC prisoner reoffending may conjure images of Willie Horton,⁶⁹ most recidivism is of a far less lethal character—even the recidivism of individuals who have been convicted of violent crimes in the past. For instance, in one study of prisoners released in thirty states in 2005, the researchers found that many more of the recidivating VC

⁶⁷ The redemption concept would also grow more generous if an arbitrary constraint of many of the redemption studies was dropped: the use of same-age individuals as the benchmark. *See, e.g.*, Kurlychek, Brame & Bushway, *supra* note 52, at 70–71 (outlining the age-cohort study from Racine); Kurlychek, Brame & Bushway, *supra* note 48, at 490–91 (recounting the age-cohort study from Philadelphia). Because crime risk drops with age—even for those with no criminal history—the use of same-age peers as the benchmark for redemption effectively creates a moving target for individuals with criminal history to hit in order to be considered “redeemed.” *See* Soothill & Francis, *supra* note 64, at 381 (“[A]mong the non-offending group, there continues to be a decline in the likelihood of any offending. In other words, the other offending groups are chasing an increasingly difficult target for, as they get older, the chance of being similar to the non-offending groups becomes harder.”).

Another factor cutting in favor of a shorter redemption period for our VC prisoners is age at the time of most recent offense. The classic redemption studies focused on individuals who had been arrested or convicted most recently at quite young ages. *See, e.g.*, Soothill & Francis, *supra* note 64, at 380 (offenders convicted before the age of twenty-one); Blumstein & Nakamura, *supra* note 55, at 336 (offenders arrested at age sixteen, eighteen, or twenty); Kurlychek, Brame & Bushway, *supra* note 52, at 73–74 (offenders with police contacts at age twenty or younger); Kurlychek, Brame & Bushway, *supra* note 48, at 494 (offenders arrested at age eighteen). With a median age of thirty-seven and a large majority (57%) having their most recent conviction in the past five years, our VC prisoners generally began their offense-free time at a more advanced age than the offenders in the leading redemption studies. This matters insofar as the redemption research indicates that redemption periods are shorter for older offenders—that is, offense-free time for older individuals is more reliably indicative of desistance. Flores et al., *supra* note 52, at 122.

⁶⁸ More specifically, the fifteen-year criterion is operationalized by identifying VC inmates whose most recent conviction was in 2003 or earlier. Those who are counted as satisfying the criterion include three with unusable dates of conviction, which is assumed to be an indicator of an old conviction.

⁶⁹ While serving time for murder in Massachusetts, Willie Horton was granted a short-term furlough from prison, absconded, and later stabbed a man and sexually assaulted his wife. O’HEAR, *supra* note 2, at 13–14. When Massachusetts Governor Michael Dukakis ran as the Democratic nominee for President in 1988, his early lead over Republican George H.W. Bush evaporated in the wake of a controversial television attack ad that sought to tie Dukakis to Horton. *Id.*

offenders committed public-order offenses rather than new violent offenses.⁷⁰ Indeed, about as many committed drug (28.2%) or property (29.7%) as violent offenses (33.1%).⁷¹ And, among those who were arrested for a new violent offense, assaults far outnumbered the more serious violent crimes of homicide and rape.⁷² Keeping in mind a clearer picture of what recidivism typically means in practice might lead to greater tolerance of recidivism risk.

II. HOW MANY HAVE SERVED ENOUGH TIME FOR JUST PUNISHMENT?

Of the Wisconsin VC prisoners, 4388 have at least one of the three markers of potential low risk (age, criminal history, or time since last offense). Table 1 above included some general information about this potentially low-risk group. The proportions—32% of the VC prisoner population, 19% of the overall prisoner population—are quite substantial and undoubtedly large enough for early release of this group to make a real difference for corrections budgets, prison overcrowding, and the broader social costs associated with mass incarceration. But to what extent would early release for these individuals raise serious retributive concerns?

A. *How Much Imprisonment Is Enough?*

There is, of course, no precise, objective measure of how much imprisonment makes for “just punishment” in any given case. However, there is widespread agreement as to the basic considerations that make a crime relatively more or less blameworthy.⁷³ Although different theorists use varying terminology, the essential points have been captured in a four-dimensional model of culpability.⁷⁴ The key principles are as follows:

- The greater the harm caused by a person’s conduct, the more culpable he or she is.

⁷⁰ Out of the VC prisoners, 55.3% were arrested post-release for a public-order offense, as compared to 33.1% for a new violent offense. DUROSE, COOPER & SNYDER, SUPPLEMENTAL TABLES, *supra* note 12, at 2 tbl.2.

⁷¹ *Id.*

⁷² Of the VC prisoners, 26.5% were arrested post-release for assault, as compared to only 1.1% for homicide and 2.6% for rape. *Id.*

⁷³ See Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284, 285 (2002) (“A growing body of research demonstrates the considerable consensus regarding the rank ordered severity of various offenses.” (citing studies)).

⁷⁴ This model is developed in more detail in Michael M. O’Hear, *Sentencing the Green-Collar Offender: Punishment, Culpability, and Environmental Crime*, 95 J. CRIM. L. & CRIMINOLOGY 133, 156–59 (2004). It is loosely based on the four-factor model set forth in HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 77–82 (Oxford Univ. Press 1979).

- The more dangerous a person's conduct—measured by the likelihood that a harm would occur and the severity of that harm—the more culpable he or she is.
- The greater the intentionality of the person with respect to the harm or danger, the more culpable he or she is.
- The greater the justification for the person's conduct, the less culpable he or she is.

These principles can help to distinguish the *relative* severity of different offenses.

But this still leaves uncertainty about the *absolute* length of the prison terms that desert demands. It might be clear that an intentional injury demands more punishment than an accidental injury, all else being equal, but if we have no sense of the appropriate prison term for either type of assault, then simply knowing that the one should result in a longer term than the other has little practical utility for present purposes.

A helpful, but admittedly imperfect, benchmark is the actual severity of punishments that are imposed in practice. The average period of imprisonment that is served by those people who have been convicted of, say, robbery reflects a set of judgments that have been made by many prosecutors, sentencing judges, parole officials, and others about the seriousness of the crime of robbery. To be sure, these judgments are not purely decisions about just punishment. They also reflect decisions about incapacitation, deterrence, rehabilitation, availability of prison beds, the need to incentivize guilty pleas, and a host of other factors that may have little relationship to individual culpability and desert-based proportionality. Still, it should be appreciated that discretionary criminal-justice actors who operate within systems of political accountability face powerful incentives not to deviate too far or too often from popular intuitions about just punishment.⁷⁵ The much-discussed Brock Turner case, in which a California judge was electorally recalled after imposing only a short jail term and probation as the sentence for a sexual assault, vividly illustrates

⁷⁵ Legislators obviously face direct political accountability, which is also the norm for state-level judges and head prosecutors. See Justin T. Pickett, *Public Opinion and Criminal Justice Policy: Theory and Research*, 2 ANN. REV. CRIMINOLOGY 405, 418 (2019) ("Most states hold judicial elections Chief prosecutors . . . are elected in all states, excepting Alaska, Connecticut, and New Jersey, but even in these states they are still appointed by an elected attorney general." (citations omitted)). Other discretionary actors, such as line prosecutors and parole board members, may not themselves be elected, but they still work within governmental agencies that are subject to various forms of political oversight and accountability, in which a lack of sensitivity to public attitudes may prove quite damaging to one's career prospects. O'HEAR, *supra* note 2, at 13.

the political peril for the official who badly undershoots community views of just punishment.⁷⁶

While average length of stay in prison (LOS) may seem a helpful benchmark for desert, the calculation of this figure presents some practical challenges. There are two points at which LOS might be measured: at sentencing and at release from prison. The difficulty with using the sentence as a proxy for LOS is that most inmates in most states are able to take advantage of a variety of early release mechanisms, such as parole and good time.⁷⁷ As a result, average sentence length will tend to be higher than actual LOS before first release, but by amounts that vary from jurisdiction to jurisdiction and within a jurisdiction over time.⁷⁸ By contrast, at the time of release, actual LOS can be reliably measured for each exiting prisoner. However, simply averaging the LOS of exiting prisoners also has some weaknesses as an indicator of penal severity: (1) this approach excludes those convicted defendants who are never sent to prison at all (i.e., those who are sentenced to probation or a short jail term); (2) this approach also misses time spent in jail while defendants' cases were pending; and (3) if sentences become tougher, it may take many years before that trend is fully reflected in the release data.⁷⁹

Determining practice norms thus requires a sort of triangulation involving multiple data sets. I will rely on four in particular. First, the National Corrections Reporting Program (NCRP) of the United States Department of Justice (DOJ) collects and periodically disseminates data about LOS at release of prisoners in dozens of states. Most recently, the DOJ published LOS data on prisoners released in forty-four states in 2016.⁸⁰ Additionally, the Brennan Center for Justice at New York University Law School has published its own analysis of NCRP data on released prisoners in forty-two states in 2012,⁸¹ which contains a somewhat more fine-grained offense breakdown.⁸² Second, the DOJ's State Court

⁷⁶ Hannah Fry, *Judge Who Was Recalled After Stanford Sexual Assault Case Seeks Donations to Pay \$135,000 in Attorney Fees*, L.A. TIMES (Dec. 12, 2018), <https://www.latimes.com/local/lanow/la-me-ln-persky-20181212-story.html>.

⁷⁷ O'HEAR, PRISONS AND PUNISHMENT, *supra* note 20, at 106–10.

⁷⁸ Parole rates, for instance, may change over time based on political considerations and prison management needs. *See, e.g.*, O'HEAR, WISCONSIN SENTENCING, *supra* note 20, at 110–11, 116–17 (describing increase and decrease of parole rates in Wisconsin in the 1990s in response to overcrowding and political pressures).

⁷⁹ Such a toughening has indeed occurred with respect to violent crime over the past generation. *See* AUSTIN ET AL., *supra* note 29, at 17 (reporting a 39% increase in LOS between 1993 and 2009 for state prisoners convicted of violent crimes).

⁸⁰ *See* DANIELLE KAEBLE, U.S. DEP'T OF JUSTICE, TIME SERVED IN STATE PRISON, 2016, at 2 tbl.2 (2018), <https://www.bjs.gov/content/pub/pdf/tssp16.pdf> (describing data sets that show prisoner time spent in state prison before release in forty-four states).

⁸¹ *See* AUSTIN ET AL., *supra* note 29, at 53 (reporting prisoners' average length of stays in prison).

⁸² *Id.* at 31–34.

Processing Statistics Program periodically collects sentencing data on felony cases filed in the nation's seventy-five most populous counties.⁸³ The DOJ has most recently published the seventy-five-county data from 2009.⁸⁴ Third, the DOJ's National Judicial Reporting Program periodically collects sentencing data from a nationally representative sample of 300 counties. Unfortunately, the 300-county data have not been reported as recently as the seventy-five-county data, leaving us to rely on statistics from 2006.⁸⁵ Fourth, and finally, the United States Sentencing Commission annually collects and publishes detailed information about the sentences imposed in federal court.⁸⁶

B. *Analysis of Offense-Based Groups*

1. *Offense Breakdown*

Table 2 provides a breakdown of the potentially low-risk VC prisoners based on their most recent violence conviction. A relatively small number of offenses account for the overwhelming majority of these prisoners. The most common offenses can be grouped into the following categories: (1) murder and non-negligent manslaughter (1833 prisoners);⁸⁷ (2) robbery (706 prisoners); (3) sexual assault (632 prisoners); (4) other non-fatal assault (290 prisoners),⁸⁸ and (5) accidental killings (286 prisoners).⁸⁹ These offenses account for 95% of the potentially low-risk VC prisoners who had a violent offense in their most recent case. The sections that follow will analyze each of these five major offense groups in more detail, saving for last murder, non-negligent manslaughter, and sexual assault, which present some special challenges for the culpability analysis.

⁸³ REAVES, *supra* note 55, at 1–2.

⁸⁴ *Id.* at 23.

⁸⁵ SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006–STATISTICAL TABLES (2010), <https://www.bjs.gov/content/pub/pdf/fssc06st.pdf>.

⁸⁶ U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2017), <https://www.ussc.gov/research/sourcebook-2017>.

⁸⁷ This includes first- and second-degree intentional homicide, felony murder, and first-degree reckless homicide.

⁸⁸ This includes battery, battery with special circumstances, and reckless injury.

⁸⁹ This includes second-degree reckless homicide, homicide by intoxicated use of a vehicle or firearm, homicide by negligent operation of a vehicle, and homicide by negligent use of a weapon, explosive, or fire.

Table 2. Most Recent Violent Offense, Potentially Low-Risk VC Prisoners⁹⁰

Offense	Number
Intentional homicide (1st degree) ⁹¹	1159
Robbery ⁹²	706
Sexual assault ⁹³	632
Reckless homicide (1st degree)	419
Felony murder	168
Battery	137
Reckless homicide (2nd degree)	135
Homicide by intoxicated use of vehicle or firearm	123
Reckless injury	104
Intentional homicide (2nd degree) ⁹⁴	87
False imprisonment	69
Battery, special circumstances	49
Kidnapping	26
Homicide by negligent operation of vehicle	20
Strangulation/suffocation	19

⁹⁰ Some cases listed in the DOC records did not have usable dates of conviction. These appear to be older cases. For purposes of identifying the most recent case, the most recent usable date in the DOC records was utilized.

If a person's most recent case resulted in multiple violent-crime convictions, the default rule was to categorize based on the first-listed conviction, which is not necessarily the most serious. The DOC organizes the statutes of conviction in numerical order. Because homicide offenses appear first in Chapter 940, and hence have the lowest statutory numbers, a homicide offense will always be controlling if present. In nonhomicide cases, there is more of a risk that a person will be under-classified in Table 2. It appears that the most common under-classification problem is that individuals who have been convicted of the very serious felonies of first- or second-degree sexual assault or armed robbery would be placed in the less serious battery or reckless injury category if also convicted of either of those offenses in the same case. For purposes of Table 2 and the rest of the analysis that follows, I have reclassified such individuals based on their most serious violent offense, either sexual assault or robbery.

⁹¹ Because this is the most serious possible offense of conviction and triggers a mandatory life sentence, I count prisoners in this category even if they have a more recent violent or nonviolent offense. Given the life sentence, it can be assumed regardless of subsequent crimes that they continue to serve time, at least in part, for the first-degree intentional homicide.

⁹² See *supra* note 88 and accompanying text (including forty individuals reclassified from battery or reckless injury).

⁹³ See *supra* note 88 and accompanying text (including forty-nine individuals reclassified from battery or reckless injury).

⁹⁴ See WIS. STAT. § 940.05 (West, Westlaw through 2019 Act 21) (stating that this is a provoked or otherwise mitigated intentional killing—roughly equivalent to what is called voluntary manslaughter in other states).

Intimidation of victim ⁹⁵	18
Injury by intoxicated use of vehicle	14
Battery/threat to court or law enforcement officer	14
Intimidation of witness ⁹⁶	11
Negligent homicide (weapon, explosive, or fire)	8
Mutilating/hiding corpse	7
Mayhem	6
Negligent injury (weapon, explosive, or fire)	5
Taking hostages	5
Stalking	3
Human trafficking	2
Abuse of at-risk person	1
None ⁹⁷	441

2. Analytical Plan

For each offense group, the analysis will focus on a handful of variables. First, making use of the available information on current LOS norms, I will suggest a range of prison time that might reasonably be considered typical for the pertinent offenses.

Second, turning to the Wisconsin corrections data, a key variable will be what I call “implicit confinement time.” This figure is equal to the amount of time between the prisoner’s most recent conviction and 2018, when my data were collected—a proxy for how much time has already been served.⁹⁸ Using this variable and the LOS data, the Wisconsin prisoners will be divided into five categories:

⁹⁵ See §§ 940.42, 940.43 (West, Westlaw through 2019 Act 21) (combining here felony and misdemeanor versions of the offense).

⁹⁶ See §§ 940.44, 940.45 (West, Westlaw through 2019 Act 21) (combining here felony and misdemeanor versions of the offense).

⁹⁷ The violence conviction or convictions of these individuals predate their most recent conviction case.

⁹⁸ To be clear, “implicit confinement time” is an imperfect proxy. It is both over- and under-inclusive of time. It is over-inclusive because some prisoners will have already been released on the current sentence, spent some unknown amount of time on supervision in the community, and then been returned to prison as a result of a violation of the conditions of release (“revocation”). In general, though, such periods of time in the community before revocation tend not to be lengthy, especially when considered relative to a long prison sentence. Indeed, in Wisconsin, it is estimated that about half of those who will be reincarcerated are returned to prison within just the first year after release. Office of the Sec’y, Research & Policy Unit, *WI DOC Reincarceration Rates*, WIS. DEP’T CORRECTIONS (2015), <https://doc.wi.gov/DataResearch/InteractiveDashboards/ReincarcerationRates.pdf>. Additionally, it should be appreciated that “street time” cannot be wholly discounted when evaluating

- 1) Those whose implicit confinement is at least twice as long as the top of the normal LOS range—these individuals will be strongly presumed to have served enough time for just punishment;
- 2) Those whose implicit confinement time is at least as long as the top of the range, but less than twice the top—these individuals will be (less strongly) presumed to have served enough time;
- 3) Those whose implicit confinement time is at least as long as the bottom of the normal range, but less than the top;
- 4) Those whose implicit confinement time is at least half as long as the bottom of the range, but less than the bottom—these individuals will be presumed not to have served enough time; and
- 5) Those whose implicit confinement time is not even half the bottom of the normal range—these individuals will be strongly presumed not to have served enough time.

In this way, implicit confinement time establishes a framework within which each individual's set of aggravating and mitigating considerations can be weighed.

Third, certain generic culpability factors will be considered for all of the offense groups. One generic offense-severity factor is the presence of "collateral" convictions in the same case as the violence conviction of interest. Some cases do not involve any collateral convictions, but others

the penal bite that a prisoner has already experienced. To the contrary, street time for many individuals can prove to be extraordinarily stressful and challenging in a number of respects. *See* O'HEAR, PRISONS AND PUNISHMENT, *supra* note 20, at 42–47 (discussing difficulties of probation); *id.* at 116–23 (discussing difficulties facing those on post-prison supervision—at the outset, potentially even more unpleasant than the hardships of incarceration). Indeed, many offenders indicate that they would *prefer* a short sentence of incarceration over a longer term of community supervision. *See, e.g., id.* at 46 (“[O]ne study found that nearly one-third of offenders would choose one year of prison over three years of probation.”).

In any event, time since conviction can also be *under-inclusive* as a measure of incarceration insofar as some individuals facing charges are held in jail pending the resolution of their cases, which can take many weeks or even months. One national study of large urban counties found a median time from arrest to adjudication in violent felony cases of 145 days. REAVES, *supra* note 55, at 23. In 45% of these cases, the defendant was detained continuously while the charges were pending. *Id.* at 17. Even for those who were released, 32% had to wait a week or more, while 16% were held for at least one month. *Id.* at 18.

While time since conviction may be a flawed measure of the penal bite experienced by many individual prisoners, the over- and under-inclusiveness will to some extent offset one another when considered over a group of hundreds of prisoners.

indicate that additional offenses were committed. This should normally result in additional punishment, especially if any of the additional offenses were themselves violent. “Prior” convictions—that is, convictions prior to the violent conviction of immediate interest—will also be noted. Although criminal history is usually regarded as more pertinent to incapacitative than retributive purposes,⁹⁹ some theorists argue that a first-timer discount may be appropriate even in a retributive framework.¹⁰⁰

Another generic offense-severity factor—whether the individual was young at the time of the offense—may warrant a bit more explanation. As a growing body of psychological and neurological research makes clear, important aspects of brain development continue throughout the teen years and even into the twenties.¹⁰¹ The associated forms of cognitive and behavioral immaturity have important implications for the intentionality and deliberateness of the actions of youthful offenders. Such immaturity should affect judgments about culpability. As the Supreme Court has observed, “[a] juvenile is not absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult.”¹⁰² Moreover, the Court has also noted that the same tendencies that tend to diminish young people’s blameworthiness can also undercut the effectiveness of their legal representation and thereby increase the risk of mistakenly inflated conclusions about their culpability.¹⁰³ In short, there

⁹⁹ Michael M. O’Hear, *Not Just Kid Stuff? Extending Graham and Miller to Adults*, 78 MO. L. REV. 1087, 1135 (2013).

¹⁰⁰ See FRASE & ROBERTS, *supra* note 46, at 30 (“The justifications for regarding first offenders as being less blameworthy therefore invoke considerations such as the absence of formal censure and warnings, the greater possibility of innocent explanations for the offense, and incomplete awareness of the consequences of the crime.”). It has also been argued that mercy should be shown to first-time offenders in recognition of our shared human fallibilities; it seems all too evident that even the most conscientious individuals will have the occasional lapse in judgment. *Id.*

¹⁰¹ Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 PSYCHOL. PUB. POL’Y & L. 410, 413–15 (2017). One scholar summarizes the key research findings this way:

Youths differ from adults in risk perception, appreciation of consequences, impulsivity and self-control, sensation-seeking, and compliance with peers. The regions of the brain that control reward-seeking and emotional arousal develop earlier than do those that regulate executive functions and impulse control. Adolescents underestimate the amount and likelihood of risks, emphasize immediate outcomes, focus on anticipated gains rather than possible losses to a greater extent than adults, and consider fewer options.

Barry C. Feld, *Juvenile Justice*, in 1 REFORMING CRIMINAL JUSTICE: INTRODUCTION AND CRIMINALIZATION 329, 385 (Erik Luna ed., 2017) (citations omitted).

¹⁰² *Graham v. Florida*, 560 U.S. 48, 68 (2010) (citation and internal quotation marks omitted). While the Court’s observation focused on individuals under the age of eighteen, *id.* at 61, immaturity does not dissolve overnight on one’s eighteenth birthday, but persists into one’s twenties. See Steinberg, *supra* note 101, at 413–15 (discussing juvenile brain development and neuroscience in relation to Supreme Court decisions).

¹⁰³ *Graham*, 560 U.S. at 78. More specifically, the Court observed,

seem good reasons to regard youth as a mitigating factor when weighing whether enough time has been served for just punishment.

Fourth, additional severity factors that are more specific to each offense group will also be considered. These factors follow from the culpability model noted above and relate to harm, danger, or intent.

Finally, putting all of these considerations together, an estimate of the potentially releasable inmates can be calculated for each offense group.

3. *Detailed Analysis of Offense Groups*

i. Robbery

Table 3 presents various indicators of incarceration norms for the crime of robbery. These range from a low of 4.2 years to a high of 6.2 years.¹⁰⁴ Rounding the numbers and recognizing that each has its own limitations, a “just punishment” range of about four to seven years for typical robberies seems reasonable. Based on this range, certain propositions can be advanced:

- A person in the robbery group who has served at least fourteen years (twice the top of the range) is strongly presumed to have served enough time;
- A person who has served at least seven years, but fewer than fourteen years, is presumed to have served enough time;
- A person who has served at least two years, but fewer than four years, is presumed not to have served enough time; and
- A person who has not served even two years is strongly presumed not to have served enough time.

[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. These factors are likely to impair the quality of a juvenile defendant's representation.

Id. (citations omitted).

¹⁰⁴ See *infra* Table 3 (outlining mean incarceration lengths for robbery).

Table 3. Incarceration Norms for Robbery in the United States

Source	Years (mean)
LOS of released state prisoners (2016) ¹⁰⁵	4.7
LOS of released state prisoners (2012) ¹⁰⁶	4.2
Sentences in 75 largest counties (2009) ¹⁰⁷	5.5
Sentences in 300 representative counties (2006) ¹⁰⁸	6.1
Federal sentences (2017) ¹⁰⁹	6.2

Turning to the Wisconsin data, Table 4 sets forth information regarding the potentially low-risk VC prisoners whose most recent violence conviction was for robbery. The typical individual within this robbery group was convicted of armed robbery, had no collateral or prior convictions, and was only twenty-one years old at the time of conviction.

¹⁰⁵ KAEBLE, *supra* note 80, at 2. This figure represents time to first release (thus excluding revocations) and does not include time spent in jail prior to conviction and sentencing.

¹⁰⁶ AUSTIN ET AL., *supra* note 29, at 31.

¹⁰⁷ The mean sentence for those who received prison terms was 7.5 years. REAVES, *supra* note 55, at 30. However, if jail and probation sentences are factored in—and non-jail, non-prison sentences treated as zero-incarceration terms—then the average term of incarceration drops to 5.5 years. *See id.* at 29 (showing breakdown of prison, jail, probation, and other sentences for robbery offenses); *id.* at 31 (showing average lengths of jail sentences for robbery offenses).

¹⁰⁸ ROSENMERKEL, DUROSE & FAROLE, *supra* note 85, at 5–6. I have calculated the mean incarcerative sentence in the same manner as I did with the seventy-five-county data. *See supra* note 107 and accompanying table. If non-prison sentences are excluded, the mean sentence is 8.4 years. *Id.* at 6.

¹⁰⁹ U.S. SENTENCING COMM'N, *supra* note 86, at S-32 tbl.13.

Table 4. Potentially Low-Risk VC Prisoners, With Robbery as Most Recent Violent Conviction

Number	706
Armed ¹¹⁰	569 (81%)
Collateral convictions ¹¹¹	237 (34%)
Violent collateral convictions	94 (13%)
Prior convictions ¹¹²	185 (26%)
Age at most recent conviction (median)	21

This breakdown of culpability-related factors can help to structure the analysis of what should be considered aggravating or mitigating. Three “aggravators” are straightforward enough. Since most of the individuals in the robbery group lack collateral convictions, it seems appropriate to treat the presence of a collateral conviction as an aggravating factor, and doubly so if the collateral conviction is for a violent crime. Similarly, the individuals who have prior convictions are also atypical in a negative way and potentially merit punishment beyond the norm. Conversely, since most members of the group have been convicted of *armed* robbery, a conviction of simple robbery may be regarded as mitigating. Consistent with the culpability model described above,¹¹³ simple robbery involves less culpability than armed because of the reduced dangerousness and fear associated with an unarmed offense.¹¹⁴ The final factor is age. If the

¹¹⁰ This is the number of individuals who had a conviction for armed robbery under WIS. STAT. § 943.32(2) (West, Westlaw through 2019 Act 21) noted in their most recent case. (“Simple” (i.e., nonarmed) robbery is covered in WIS. STAT. § 943.32(1) (West, Westlaw through 2019 Act 21).) If the first listed robbery count was simple robbery, I manually checked to see if there was also an armed robbery conviction in the case and made corrections as necessary. Several individuals had a nonexistent statutory reference that combined aspects of the simple and the armed statutes (“943.32(1)(2),” “943.32(1)(A)2,” or “943.32(1)(B)2”). These cases were looked up in the Wisconsin Consolidated Court Automation Programs (CCAP) website (*Access to the Public Records of the Wisconsin Circuit Courts*, WIS. CIR. CT. ACCESS, <https://wcca.wicourts.gov/> (last visited Apr. 2, 2020)) to determine whether or not there was an armed robbery conviction.

¹¹¹ This includes individuals who are noted in the DOC database as having been found in violation of more than one statute in their most recent case, including a second robbery count.

¹¹² This is the number of individuals who are noted as having more than one case with a conviction in the DOC database.

¹¹³ *Supra* Part II.A.

¹¹⁴ The greater seriousness of armed robbery is reflected in much higher statutory sentencing ranges. In Wisconsin, for instance, the statutory maximum for armed robbery is nearly three times longer than the maximum for simple robbery. *See* WIS. STAT. § 939.50(3) (West, Westlaw through 2019 Act 21) (establishing forty-year maximum for Class C felony, a category that includes armed robbery, and fifteen-year maximum for Class E felony, including simple robbery).

inmate's age at conviction was under twenty-one, this was treated as a mitigator.¹¹⁵

Table 5 subdivides the robbery group on the basis of implicit confinement time and the LOS norms suggested by Table 3.

Table 5. Robbery Group Subdivided Based on Implicit Confinement Time (“A” denotes aggravating; “M” denotes mitigating)

	Half Desert Range ¹¹⁶	Below Desert Range ¹¹⁷	Within Desert Range ¹¹⁸	Above Desert Range ¹¹⁹	Twice Desert Range ¹²⁰
Number	233	130	77	55	211
Not armed (M)	51 (22%)	18 (14%)	20 (26%)	9 (16%)	39 (18%)
Collateral conviction (A)	82 (35%)	33 (25%)	16 (21%)	23 (42%)	83 (39%)
Violent collateral conviction (A)	31 (13%)	11 (8%)	8 (10%)	9 (16%)	48 (23%)
Under 21 at time of conviction (A)	137 (59%)	84 (65%)	47 (61%)	26 (47%)	56 (27%)
Prior conviction (A)	6 (3%)	5 (4%)	3 (4%)	10 (18%)	161 (76%)
Culpability scores (mean)	-0.3	-0.4	-0.5	0.1	0.9

Employing the various aggravators and mitigators summarized in Table 5, it is possible to develop at least a rough sense of the relative culpability of each person in the robbery group. For instance, an unarmed, teenage robber with no prior or collateral convictions seems, on the face of

¹¹⁵ It should be noted that age at conviction is not quite the same as age at offense, which would be the more pertinent variable for assessing desert. National research suggests that the time between arrest and conviction in robbery cases averages about five months. REAVES, *supra* note 55, at 23.

¹¹⁶ This includes individuals whose most recent conviction occurred after 2015.

¹¹⁷ This includes individuals whose most recent conviction occurred in 2014 or 2015.

¹¹⁸ This includes individuals whose most recent conviction occurred between 2011 and 2013, inclusive.

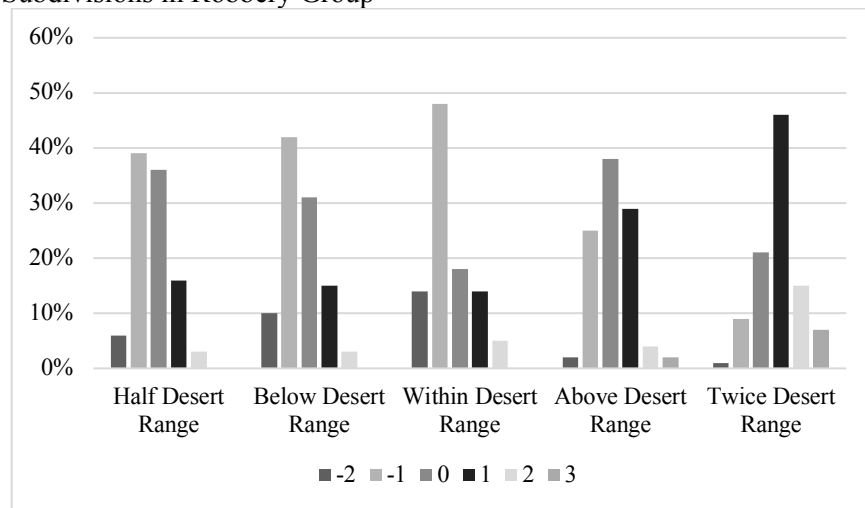
¹¹⁹ This includes individuals whose most recent conviction occurred between 2004 and 2010, inclusive.

¹²⁰ This includes individuals whose most recent conviction was before 2004.

things, far less culpable than an armed, thirty-year-old robber who does have prior and collateral convictions. To be sure, there may be some additional mitigating or aggravating circumstances that are not reflected in our data that might cause *some* unarmed teenage robbers to be more culpable than *some* armed thirty-year-old robbers. Still, there is no reason to think that we will *systematically* err if we adopt a general presumption that, say, unarmed teenagers present reduced culpability relative to the robbery norm, while armed thirty-year-olds with collaterals and priors present enhanced culpability.

Such intuitions must be operationalized for purposes of quantitative analysis. I have done so through a culpability formula that simply adds one point for each aggravator that is present, and subtracts one point for each mitigator. Figure 1 indicates the distribution of culpability scores for each confinement-time subgroup. In general, the people who have been in prison the longest are more likely to have high culpability scores, which suggests that sentencing judges are generally responsive to the same aggravators and mitigators that I utilize. However, within this general pattern, there are some deviations—note, for instance, that nearly one-third of those who have already served twice the LOS norm for robbery have a culpability score that is less than one. The bottom row of Table 5 includes the average culpability score for each subgroup.

Figure 1. Distribution of Culpability Scores Within Confinement-Time Subdivisions in Robbery Group



By putting together culpability scores, confinement time, and LOS norms, it is possible to calculate a rough estimate, or range, of the number of individuals in the robbery group who might plausibly have served enough time for desert purposes. Consider, for instance, the seventy-seven

individuals whose confinement time is within the normal desert range of four to seven years. Of these seventy-seven, forty-eight have negative culpability scores, indicating that mitigators outnumber aggravators in their cases. Facially, these individuals—who have relatively low net culpability, but who have already served an amount of time that is roughly in the range of what most other robbers serve—seem to have a good basis for claiming that they have already “paid their debt to society.” Indeed, if we were a little more aggressive, we might also be able to make an argument in favor of the fourteen individuals with a score of zero. They do not present particularly mitigated cases, but nor do they present particularly aggravated cases. Their culpability seems about typical for robbers—so we might fairly question whether desert truly *requires* them to serve any more time than the low end of what is typical for others who have committed the same crime. Putting together the more conservative and more aggressive approaches, the number of potentially releasable individuals from the within-range subgroup would be forty-eight to sixty-two.

Similar logic can be applied to the other subgroups. For instance, as to an individual who has served more than the top of the desert range, but who does not have net aggravated culpability (i.e., who does not have a culpability score of one or greater), there seems a strong case that enough time has already been served. And, if we were more aggressive in our approach, we might even conclude that such a person had served enough time if there were only *some* net aggravation (i.e., a score of no more than one). Similarly, for the person who has already spent more than twice the LOS norm behind bars, we might argue that a culpability score of two or even three should be necessary to justify further incarceration. Extending this logic, Table 6 estimates the number of potentially releasable individuals within each subgroup.

Table 6. Potentially Viable Release Candidates from Robbery Subgroups

Half Desert Range ¹²¹	Below Desert Range ¹²²	Within Desert Range ¹²³	Above Desert Range ¹²⁴	Twice Desert Range ¹²⁵	Total
0-14 (0-6%)	13-67 (10-52%)	48-62 (62-81%)	36-52 (65-95%)	164-196 (78-93%)	261-391 (37-55%)

ii. Assault

Table 7 sets forth incarceration norms for assault. The high (3.0 years) and low (1.4 years) reflect a disaggregation of simple and aggravated versions of the offense. When simple and aggravated assaults are considered together, the mean incarceration lengths are remarkably consistent across the sources, ranging from 2.4 to 2.6 years. This suggests that a range of two to three years would be appropriate to utilize as an overall norm.

Table 7. Incarceration Norms for Assault (means)

Source	Years
LOS of released state prisoners (2016) ¹²⁶	2.5
LOS of released state prisoners (2012) ¹²⁷	3.0 (aggravated) 1.4 (simple)
Sentences in 75 largest counties (2009) ¹²⁸	2.6
Sentences in 300 representative counties (2006) ¹²⁹	2.4 (aggravated)
Federal sentences (2017) ¹³⁰	2.4

¹²¹ The potentially releasable in this subgroup have a culpability score of less than -2 (conservative) or less than -1 (aggressive).

¹²² The potentially releasable in this subgroup have a culpability score of less than -1 (conservative) or less than 0 (aggressive).

¹²³ The potentially releasable in this subgroup have a culpability score of less than 0 (conservative) or less than 1 (aggressive).

¹²⁴ The potentially releasable in this subgroup have a culpability score of less than 1 (conservative) or less than 2 (aggressive).

¹²⁵ The potentially releasable in this subgroup have a culpability score of less than 2 (conservative) or less than 3 (aggressive).

¹²⁶ KAEBLE, *supra* note 80, at 2.

¹²⁷ AUSTIN ET AL., *supra* note 29, at 31.

¹²⁸ See REAVES, *supra* note 55, at 29–31 (noting that the mean prison sentence was 5.2 years, but a majority of assault defendants were sentenced to probation or jail, which reduced the overall mean to 2.6 years).

¹²⁹ See ROSENMERKEL, DUROSE & FAROLE, *supra* note 85, at 5–6 (noting that the mean prison sentence was 5.2 years, but a majority of assault defendants were sentenced to probation or jail, which reduced the overall mean to 2.4 years).

¹³⁰ U.S. SENTENCING COMM'N, *supra* note 86, at S-32 tbl.13.

The assault group in Wisconsin is comprised of individuals who have been convicted of the following offenses: battery (including substantial and aggravated battery),¹³¹ special circumstances battery,¹³² and reckless injury.¹³³ Complicating matters a bit, each of these offenses includes multiple degrees, resulting in many different conviction options. Thus, individuals in the assault group have been convicted of assault offenses that may be classified anywhere from a Class A misdemeanor to a Class D felony.

As indicated in Table 8, the typical or middle-of-the-road individual in the assault group was convicted at age twenty-eight of a low-level (Class H felony) version of the offense, with at least one nonviolent collateral conviction and no prior convictions.

¹³¹ WIS. STAT. § 940.19 (West, Westlaw through 2019 Act 21).

¹³² § 940.20.

¹³³ § 940.23.

Table 8. Potentially Low-Risk VC Prisoners, With Assaultive Offense as Most Recent Violent Conviction

Number	290
Misdemeanor ¹³⁴	56 (19%)
Class I felony ¹³⁵	29 (10%)
Class H felony ¹³⁶	78 (27%)
Class F felony ¹³⁷	25 (9%)
Class E felony ¹³⁸	23 (8%)
Class D felony ¹³⁹	79 (27%)
Collateral convictions	162 (56%)
Violent collateral convictions	95 (33%)
Prior convictions	103 (36%)
Age at most recent conviction (median)	28

Table 9 summarizes the various aggravators and mitigators for the assault group, subdivided based on implicit confinement time and following the logic suggested above in the analysis of the robbery group. The bottom row also indicates the average culpability score for each subgroup. Once again, as expected, there is a general trend toward higher culpability scores for those who have served more time.

¹³⁴ These individuals were convicted of violating WIS. STAT. § 940.19(1) (West, Westlaw through 2019 Act 21). Where an individual has been convicted of multiple assault offenses in the most recent case, I have classified him or her based on the most serious assault offense.

¹³⁵ These individuals were convicted of violating one of the following sections: WIS. STAT. §§ 940.19(2), 940.20(1m), 940.20(4), 940.20(5), or 940.20(6) (West, Westlaw through 2019 Act 21).

¹³⁶ These individuals were convicted of violating one of the following sections: WIS. STAT. §§ 940.19(4), 940.19(6), 940.20(1), 940.20(1g), 940.20(2), 940.20(2m), 940.20(3), or 940.20(7) (West, Westlaw through 2019 Act 21). This figure includes individuals who are listed in the DOC data as convicted under section 940.19(3), which is a statutory subsection that no longer exists. When it did exist, this offense was graded as the same level felony as section 940.19(4). WIS. STAT. § 940.19(3)–(4) (West, Westlaw through 2019 Act 21). Since subsection (4) still exists and is categorized as a Class H felony, I also count the subsection (3) violations as Class H felonies.

¹³⁷ These individuals were convicted of violating WIS. STAT. § 940.23(2) (West, Westlaw through 2019 Act 21).

¹³⁸ These individuals were convicted of violating WIS. STAT. § 940.19(5) (West, Westlaw through 2019 Act 21).

¹³⁹ The only Class D felony in the assault group is first-degree reckless injury in violation of WIS. STAT. § 940.23(1) (West, Westlaw through 2019 Act 21). Second-degree reckless injury is a Class F felony. It creates a problem for the counting of one offense in the assault group that is identified only as a violation of WIS. STAT. § 940.23 (West, Westlaw through 2019 Act 21), without a subsection identified. Since first-degree offenses are far more prevalent in the assault group than second-degree, I count this offense for present purposes as a first-degree violation.

Table 9. Assault Group Subdivided Based on Implicit Confinement Time (“A” denotes aggravating; “M” denotes mitigating)

	Half Desert Range¹⁴⁰	Below Desert Range¹⁴¹	Within Desert Range¹⁴²	Above Desert Range¹⁴³	Twice Desert Range¹⁴⁴
Number	64	36	26	39	125
Less than Class H felony (M)	27 (42%)	11 (31%)	8 (31%)	7 (18%)	32 (26%)
More than Class H felony (A)	23 (36%)	21 (58%)	11 (42%)	24 (62%)	48 (38%)
Class D felony (A)	10 (16%)	14 (39%)	8 (31%)	13 (33%)	34 (27%)
No collateral conviction (M)	25 (39%)	23 (64%)	9 (35%)	16 (41%)	55 (44%)
Violent collateral conviction (A)	22 (34%)	6 (17%)	12 (46%)	14 (36%)	33 (26%)
Prior convictions (A)	7 (11%)	3 (8%)	2 (8%)	8 (21%)	83 (66%)
Under 21 at time of conviction (M)	15 (23%)	11 (31%)	4 (15%)	8 (21%)	21 (17%)
Culpability score (mean)	-0.1	0.0	0.5	0.7	0.5

Using the same approach that was employed with the robbery group, Table 10 provides an estimate of the number of potentially low-risk assault-convicted inmates who might escape the incapacitation-retribution catch-22.

¹⁴⁰ This includes people who were convicted in 2017 or 2018.

¹⁴¹ This includes people who were convicted in 2016.

¹⁴² This includes people who were convicted in 2015.

¹⁴³ This includes people who were convicted between 2012 and 2014.

¹⁴⁴ This includes people who were convicted in 2011 or earlier.

Table 10. Potentially Viable Release Candidates from Assault Subgroups

Half Desert Range	Below Desert Range	Within Desert Range	Above Desert Range	Twice Desert Range	Total
1-7 (0-11%)	6-9 (17-25%)	5-15 (19-60%)	18-28 (46-72%)	90-113 (72-90%)	120-172 (41-59%)

iii. Accidental Killings

Table 11 sets forth incarceration norms for manslaughter. Where these are broken down between negligent and nonnegligent forms, I have supplied only the negligent form since our focus now is on *accidental* killings.¹⁴⁵ The sources suggest an overall norm of five to six years.¹⁴⁶

Table 11. Incarceration Norms for Manslaughter

Source	Years
LOS of released state prisoners (2016) ¹⁴⁷	5.2 (negligent manslaughter)
LOS of released state prisoners (2012) ¹⁴⁸	5.6 (manslaughter)
Federal sentences (2017) ¹⁴⁹	5.7 (manslaughter)

The accidental killing group in Wisconsin is comprised of individuals who have been convicted of the following offenses: second-degree reckless homicide (a Class D felony),¹⁵⁰ homicide by intoxicated use of a vehicle or firearm (Class D or C),¹⁵¹ homicide by negligent operation of a vehicle (Class G),¹⁵² and homicide by negligent use of a weapon, explosive, or fire (Class G).¹⁵³ As indicated in Table 12, the typical or middle-of-the-road individual in the accidental killing group was convicted at age twenty-five of a Class D felony homicide, with no collateral or prior convictions.

¹⁴⁵ Nonnegligent, or voluntary, manslaughter is an intentional, but mitigated, criminal homicide. WAYNE R. LAFAYE, CRIMINAL LAW § 15.2 (5th ed. 2010).

¹⁴⁶ AUSTIN ET AL., *supra* note 29, at 31; KAEBLE, *supra* note 80, at 2; U.S. SENTENCING COMM'N, *supra* note 86, at S-32 tbl.13.

¹⁴⁷ KAEBLE, *supra* note 80, at 2.

¹⁴⁸ AUSTIN ET AL., *supra* note 29, at 31.

¹⁴⁹ U.S. SENTENCING COMM'N, *supra* note 86, at S-32 tbl.13.

¹⁵⁰ WIS. STAT. § 940.06 (West, Westlaw through 2019 Act 21). Although first-degree reckless homicide could also be thought of as an accidental killing, the extreme severity of the culpability for this offense is such that it is traditionally classified as a form of murder, and it has thus been included below in the murder and nonnegligent manslaughter offense group.

¹⁵¹ § 940.09.

¹⁵² § 940.10.

¹⁵³ § 940.08.

Table 12. Potentially Low-Risk VC Prisoners, With Accidental Killing as Most Recent Violent Conviction

Number	286
Class C or D felony	258 (90%)
Collateral convictions	123 (43%)
Violent collateral convictions	51 (18%)
Prior convictions	38 (13%)
Age at most recent conviction (median)	25

Table 13 summarizes the various aggravators and mitigators for the group, subdivided based on implicit confinement time, along with estimates of the potentially viable release candidates. The total across all of the subgroups is 78 to 126 (27% to 44%).

Table 13. Accidental Killing Group Subdivided Based on Implicit Confinement Time (“A” denotes aggravating; “M” denotes mitigating)

	Half Desert Range ¹⁵⁴	Below Desert Range ¹⁵⁵	Within Desert Range ¹⁵⁶	Above Desert Range ¹⁵⁷	Twice Desert Range ¹⁵⁸
Number	87	66	11	75	47
Class G felony (M)	18 (21%)	7 (11%)	0 (0%)	3 (4%)	0 (0%)
Collateral conviction (A)	30 (34%)	26 (39%)	3 (27%)	37 (49%)	27 (57%)
Violent collateral conviction (A)	8 (9%)	14 (21%)	1 (9%)	14 (19%)	14 (30%)
Prior convictions (A)	4 (5%)	1 (2%)	0 (0%)	8 (11%)	25 (53%)
Under 21 at time of conviction (M)	14 (16%)	13 (20%)	6 (55%)	16 (21%)	19 (40%)
Culpability scores (mean)	0.1	0.3	-0.2	0.5	0.8
Potentially releasable	0-1 (0-1%)	1-11 (2-17%)	3-10 (27-91%)	41-61 (55-81%)	33-43 (70-91%)

iv. Murder and Nonnegligent Manslaughter

Table 14 sets forth incarceration norms for the murder and nonnegligent manslaughter (MNM) group of offenses. These figures present a challenge insofar as they reflect such a wide range: from 11.7 years on the low end to 31.1 on the high. In order to reach a more workable range that recognizes the very real differences between spending twelve years and thirty years in prison, it seems appropriate to divide the range, associating the lower portion with the relatively less serious crimes within the MNM group and the higher portion with the most serious. In Wisconsin law, the most serious type of MNM offense is readily

¹⁵⁴ This includes people who were convicted from 2016 to 2018, inclusive.

¹⁵⁵ This includes people who were convicted from 2013 to 2015, inclusive.

¹⁵⁶ This includes people who were convicted in 2012.

¹⁵⁷ This includes people who were convicted from 2006 to 2011, inclusive.

¹⁵⁸ This encompasses people who were convicted in 2005 or earlier.

distinguished: first-degree intentional homicide.¹⁵⁹ Out of the core group of homicide offenses, this is the only one that is treated as a Class A felony—the most aggravated classification in Wisconsin law. In order to conduct my desert analysis, I will assume an imprisonment norm for first-degree intentional homicide of twenty-two to thirty-one years. For the remaining MNM offenses, I will assume an imprisonment norm of twelve to twenty-one years.

Table 14. Incarceration Norms for Murder and Nonnegligent Manslaughter

Source	Years
LOS of released state prisoners (2016) ¹⁶⁰	15.0 (murder & nonnegligent manslaughter)
LOS of released state prisoners (2012) ¹⁶¹	11.7 (murder)
Sentences in 75 largest counties (2009) ¹⁶²	31.1 (murder & nonnegligent manslaughter)
Sentences in 300 representative counties (2006) ¹⁶³	19.4 (murder & nonnegligent manslaughter)
Federal sentences (2017) ¹⁶⁴	18.7 (murder)

a. First-Degree Intentional Homicide

As indicated in Table 15, the typical individual in the intentional-1 group was convicted at age twenty-five and had no prior or collateral convictions. Table 16 summarizes the aggravators and mitigators for this group, subdivided based on implicit confinement time, along with estimates of the potentially viable release candidates. The total across all of the subgroups is 113 to 263 (10% to 23%). Note that there is no twice-range subgroup because no one has served enough time to qualify—a minimum of sixty-two years.

¹⁵⁹ See WIS. STAT. § 940.01(1)(a) (West, Westlaw through 2019 Act 21) (defining crime of first-degree intentional homicide).

¹⁶⁰ KAEBLE, *supra* note 80, at 2.

¹⁶¹ AUSTIN ET AL., *supra* note 29, at 31. Murder is defined as “intentional killing of another, or killing a person during a felony.” *Id.*

¹⁶² REAVES, *supra* note 55, at 30. There were no probation sentences for this offense category, *id.* at 29, and so few jail sentences that no average jail term was reported. *Id.* at 31. Although the tables report data for “murder,” the definition of this term does include nonnegligent manslaughter. *Id.* at 34.

¹⁶³ ROSENMERKEL, DUROSE & FAROLE, *supra* note 85, at 5–6. This figure adjusts for the 5% of cases resulting in a nonincarcerative sentence and the 2% of cases with jail sentences, which had a mean length of ten months. *Id.* at 4, 6.

¹⁶⁴ U.S. SENTENCING COMM’N, *supra* note 86, at S-32 tbl.13. Murder is specifically defined to include felony murder and second-degree murder. *Id.* at S-167 app. A.

Table 15. Potentially Low-Risk VC Prisoners With Conviction for First-Degree Intentional Homicide

Number ¹⁶⁵	1159
Collateral conviction ¹⁶⁶	567 (49%)
Violent collateral conviction	421 (36%)
Collateral conviction for Class A or B felony ¹⁶⁷	122 (11%)
Prior conviction ¹⁶⁸	444 (38%)
Age at time of intentional-1 conviction (median) ¹⁶⁹	25

¹⁶⁵ This includes all individuals in the potentially low-risk group with a conviction under section 940.01, regardless of whether it is the most recent. There are eighty-four inmates in this group whose DOC record identifies a conviction subsequent to the section 940.01 conviction. There are also five individuals whose section 940.01 conviction is not associated with a usable date in the DOC records. Nor could a date be found for these convictions in CCAP, which presumably indicates that the cases were quite old.

Because section 940.01 includes a mandatory life term, it is assumed that all prisoners with such a conviction are, in some meaningful way, still serving time for that conviction even if there is also a subsequent conviction. In this way, the intentional-1 group is defined differently and somewhat more expansively than any of the other offense groups considered above.

¹⁶⁶ This includes individuals who have a conviction that post-dates their section 940.01 conviction. These subsequent convictions are analogized to collateral convictions insofar as they necessarily occur while the defendant is still serving the mandatory life term for a section 940.01 conviction and, in principle, bear upon the determination of how long the defendant should serve in prison. For instance, if an inmate with a parole-eligible section 940.01 conviction is found guilty of attempting to escape from prison, that new conviction is likely to be taken into account when the inmate is next considered for parole.

¹⁶⁷ With most other groups, I have not attempted to distinguish among different severity levels in cases involving a collateral conviction, but the intentional-1 group includes a substantial number of inmates with extremely serious collateral convictions, which seem appropriate to recognize as super-aggravating. More specifically, these super-aggravated cases include collateral convictions for first-degree sexual assault, first-degree reckless homicide, second-degree intentional homicide, or a second first-degree intentional homicide.

¹⁶⁸ This includes individuals who have a second conviction with no usable date of conviction in the DOC record. It is assumed that these convictions are exceptionally old and thus likely predate the section 940.01 conviction. This prior-conviction figure also includes individuals who have a conviction in a second case in the same year as the section 940.01 conviction.

¹⁶⁹ This figure is calculated without including the five individuals whose section 940.01 conviction has no usable date of conviction.

Table 16. Intentional-1 Group Subdivided Based on Implicit Confinement Time¹⁷⁰ (“A” denotes aggravating; “M” denotes mitigating)

	Half Desert Range ¹⁷¹	Below Desert Range ¹⁷²	Within Desert Range ¹⁷³	Above Desert Range ¹⁷⁴
Number	203	410	405	141
Collateral conviction (A)	85 (42%)	206 (50%)	193 (48%)	83 (59%)
Violent collateral conviction (A)	54 (27%)	154 (38%)	147 (36%)	66 (47%)
Collateral conviction for Class A or B felony (A)	10 (5%)	48 (12%)	47 (12%)	17 (12%)
Prior conviction (A)	15 (7%)	222 (54%)	169 (42%)	38 (6%)
Under 21 at time of conviction (M)	40 (20%)	103 (25%)	123 (30%)	36 (26%)
Culpability scores (mean)	0.6	1.3	1.1	1.2
Potentially releasable	0-0 (0-0%)	0-24 (0-6%)	63-160 (16-40%)	50-79 (35-56%)

b. Remainder of Murder and Nonnegligent Murder Group

The MNM-remainder group in Wisconsin is comprised of individuals who have been convicted of the following offenses: felony murder,¹⁷⁵ first-degree reckless homicide (more familiarly known as second-degree or

¹⁷⁰ Implicit confinement time is calculated based on time since the section 940.01 conviction.

¹⁷¹ This includes individuals who were convicted in 2007 or later.

¹⁷² This includes individuals who were convicted between 1996 and 2006, inclusive.

¹⁷³ This includes individuals who were convicted between 1987 and 1995, inclusive. I also include in this subgroup the five individuals who do not have a usable date of conviction. This is a conservative assumption, as the absence of a usable date (or a CCAP record) likely indicates a very old conviction.

¹⁷⁴ This includes individuals who were convicted in 1986 or earlier.

¹⁷⁵ Wis. STAT. § 940.03 (West, Westlaw through 2019 Act 21).

depraved-heart murder in other states),¹⁷⁶ and second-degree intentional homicide (more familiarly known as voluntary or nonnegligent manslaughter in other states).¹⁷⁷ Table 17 summarizes data relating to the MNM group. One variable merits brief explanation. Like many other states, Wisconsin has a “Len Bias” law that extends criminal homicide liability to people who supply drugs to an individual who then dies as a result of consuming the drugs.¹⁷⁸ Although the Len Bias law is contained within the first-degree reckless homicide statute, Len Bias convictions are classified as somewhat lower-level felonies than other first-degree reckless homicides, which seems appropriate since the Len Bias law has no mens rea element.¹⁷⁹ In other words, the Len Bias law creates a sort of strict liability as to death, which indicates a lower level of culpability than is generally required for other MNM convictions. For this reason, Len Bias convictions are treated as mitigated relative to others in the MNM group.¹⁸⁰

¹⁷⁶ § 940.02.

¹⁷⁷ § 940.05.

¹⁷⁸ § 940.02(2). For background on Len Bias laws and their use in other jurisdictions, see Rosa Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/us/drug-overdose-prosecution-crime.html>.

¹⁷⁹ WIS. STAT. § 940.02 (West, Westlaw through 2019 Act 21).

¹⁸⁰ Arguably, felony murder should also be treated as mitigated on similar reasoning. As long as death resulted from one of the relatively short list of aggravated felonies set forth in Wisconsin law, a conviction for felony murder can be obtained even if there is no proof of mens rea as to the death. WIS. STAT. § 940.03 (West, Westlaw through 2019 Act 21). However, the predicate drug offense under the Len Bias law may be a relatively low-level offense in comparison to what is required for felony murder. See § 940.02(2)(a) (indicating that predicate may be any violation of section 961.41 involving a Schedule I or II controlled substance); § 961.41(1)(b) (indicating that certain Schedule I and II offenses are only Class H felonies). Additionally, there is a long tradition in the law of treating felony murder as just that—*murder*. Indeed, in many states, felony murder is sometimes, or even always, classified as first-degree murder. LAFAVE, *supra* note 145, § 14.4(b). In light of these considerations, I do not distinguish felony murder from the core MNM convictions for the analysis that follows.

Table 17. Potentially Low-Risk VC Prisoners, With MNM-Remainder Offense as Most Recent Violent Conviction

Number	674
Len Bias conviction as only MNM	35 (5%)
Collateral convictions ¹⁸¹	209 (31%)
Violent collateral convictions	109 (16%)
Collateral conviction for second major homicide or first-degree sexual assault ¹⁸²	13 (2%)
Prior convictions	185 (27%)
Age at most recent conviction (median)	23

Table 17 indicates that the typical individual in the MNM-remainder group was convicted at age twenty-three and has no collateral or prior convictions. Table 18 summarizes the various aggravators and mitigators for the group, subdivided based on implicit confinement time,¹⁸³ along with estimates of the potentially viable release candidates. The total across all of the subgroups is 76 to 234 (11% to 35%).

¹⁸¹ Felony murder might present a difficulty in the analysis of collateral convictions insofar as the offense requires, by definition, conviction of a predicate felony. However, it appears that the DOC data only rarely, if ever, list the predicate felony as a separate conviction from the felony murder. This approach seems best for present purposes; it would not seem appropriate to treat a collateral conviction as aggravating if such a conviction were inherently part of the MNM offense.

A similar problem is presented in the Len Bias cases. If a person has both a Len Bias conviction and a drug distribution conviction, it is not possible to tell whether the latter was the predicate offense to the former, in which case the latter should probably not be counted as a collateral conviction. However, this problem only arises in five cases, so its bottom-line impact is minimal. I have treated the drug convictions in these cases as collateral, which may very slightly reduce my number of potentially viable release candidates.

¹⁸² “Major homicide” convictions are for first-degree reckless homicide or second-degree intentional homicide, which are Class B felonies.

¹⁸³ Note that a “twice above range” subgroup does not appear here because there are no individuals who have served enough time to qualify.

Table 18. MNM-Remainder Group Subdivided Based on Implicit Confinement Time (“A” denotes aggravating; “M” denotes mitigating)

	Half Desert Range ¹⁸⁴	Below Desert Range ¹⁸⁵	Within Desert Range ¹⁸⁶	Above Desert Range ¹⁸⁷
Number	184	115	285	90
Len Bias is only MNM conviction (M)	32 (17%)	3 (3%)	0 (0%)	0 (0%)
Collateral conviction (A)	52 (28%)	21 (18%)	87 (31%)	49 (54%)
Violent collateral conviction (A)	25 (14%)	4 (3%)	51 (18%)	29 (32%)
Collateral conviction for second major homicide or first-degree sexual assault (A)	4 (2%)	0 (0%)	3 (1%)	6 (7%)
Prior convictions (A)	4 (2%)	2 (2%)	125 (44%)	54 (60%)
Under 21 at time of conviction (M)	55 (30%)	48 (42%)	102 (36%)	36 (40%)
Culpability scores (mean)	0.0	-0.2	0.6	1.1
Potentially releasable	0-2 (0-1%)	0-42 (0-37%)	48-134 (17-47%)	28-56 (31-62%)

¹⁸⁴ This includes individuals who were convicted in 2012 or later.

¹⁸⁵ This includes individuals who were convicted between 2006 and 2011, inclusive.

¹⁸⁶ This includes individuals who were convicted between 1997 and 2005, inclusive.

¹⁸⁷ This includes individuals who were convicted in 1996 or earlier.

v. Sexual Assault

Table 19 sets forth various indicators of incarceration norms for the sexual assault group of offenses. Notably, some sources report punishment levels for “rape,” while others cover the broader category of “sexual assault.” The former term normally refers to assaults involving penetration and a use or threatened use of force,¹⁸⁸ while the latter term also sweeps in other types of nonconsensual sexual contact.¹⁸⁹ The sources suggest, not surprisingly, that incarceration norms are longer for rape than for non-rape sexual assaults. Indeed, the 300-county data indicate that norms for rape may be about twice as long as the norms for other forms of sexual assault.¹⁹⁰ More generally, distinguishing between these categories, I will provisionally assume a norm for rape of seven to ten years and a norm for other sexual assaults of four to six years.

¹⁸⁸ See David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 320–21 (2000) (noting that traditional elements of rape include “sexual intercourse” and “force or a threat of severe bodily harm”).

¹⁸⁹ See, e.g., WIS. STAT. § 940.225 (West, Westlaw through 2019 Act 69) (defining various forms of sexual assault to include “*sexual contact* or sexual intercourse” and including many forms of the offense without a force or violence element (emphasis added)).

¹⁹⁰ Further support for this view may come from the Brennan Center LOS study, which did not include a category for non-rape sexual assault, but which did track statutory rape—a type of offense that is analogous to other types of sexual assault in which force is not an element, but in which the victim was legally or physically unable to provide consent. The average LOS for statutory rape (both “serious” and “other,” to use the Brennan Center’s categories) was 3.3 years, a little less than half of what the Brennan Center found for rape. AUSTIN ET AL., *supra* note 29, at 25–26.

Table 19. Incarceration Norms for Sexual Assault¹⁹¹

Source	Years
LOS of released state prisoners (2016)	6.2 (all sexual assault) ¹⁹²
LOS of released state prisoners (2012)	7.4 (rape) ¹⁹³
Sentences in 75 largest counties (2009)	10.0 (rape) ¹⁹⁴
Sentences in 300 representative counties (2006)	9.8 (rape) ¹⁹⁵ 4.9 years (other sexual assault) ¹⁹⁶

Unfortunately, the Wisconsin definitions of “sexual assault” do not map neatly onto the rape/other sexual assault dichotomy. Sexual assault is divided into four degrees, none of which requires penetration.¹⁹⁷ Many other factors serve to distinguish the degrees, and the use or non-use of force is not necessarily dispositive in determining which form of sexual assault has been perpetrated. However, upon closer inspection of the statute, it seems reasonable to associate rape with first- and second-degree sexual assault. First-degree requires great bodily harm or pregnancy, threat or use of a dangerous weapon, or threat or use of force or violence by

¹⁹¹ I have omitted federal data because the federal sexual offense docket is so idiosyncratic in its extreme orientation to offenses involving children. See U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES FOR SEX OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 19 (2019) (showing that 73% of federal sexual abuse offenses in FY2016 fell into the categories of transportation of a minor to commit a commercial sex act or production of child pornography).

¹⁹² KAEBLE, *supra* note 80, at 2.

¹⁹³ AUSTIN ET AL., *supra* note 29, at 26. “Rape” is defined as “[s]exual intercourse forced on a non-consenting victim.” *Id.*

¹⁹⁴ The mean sentence for the 115 individuals who received prison terms was 11.8 years. REAVES, *supra* note 55, at 30. However, 5% of the individuals convicted of rape were sentenced to jail, while 11% received non-incarcerative sentences. *Id.* at 29. The DOJ report does not provide an average jail sentence for rape defendants, but indicates that the overall average jail sentence for violent offenses was six months. *Id.* at 31. If the average rape jail sentence is assumed to be six months, then the overall average rape sentence (including prison, jail, probation, and other non-incarcerative sentences) amounts to 9.8 years. “Rape” is defined as “forcible intercourse, sodomy, or penetration with a foreign object.” *Id.* at 34.

¹⁹⁵ The mean sentence for the estimated 10,540 individuals who received prison terms for rape was 13.5 years. ROSENMERKEL, DUROSE & FAROLE, *supra* note 85, at 5–6. However, an estimated 2180 received jail terms and 2010 non-incarcerative sentences. *Id.* at 5. The mean jail term was eight months. *Id.* at 6. This results in an overall average rape sentence (including prison, jail, probation, and other non-incarcerative sentences) of 9.8 years. “Rape” is defined as “forcible intercourse (vaginal, anal, or oral)” and includes “penetration with a foreign object.” *Id.* at 33.

¹⁹⁶ The mean sentence for the estimated 10,840 individuals who received prison terms for non-rape sexual assault was 8.2 years. *Id.* at 5–6. However, an estimated 3680 received jail terms and 4230 non-incarcerative sentences. *Id.* at 5. The mean jail term was eight months. *Id.* at 6. This results in an overall average sentence of 4.9 years for non-rape sexual assault (including prison, jail, probation, and other non-incarcerative sentences).

¹⁹⁷ WIS. STAT. § 940.225 (West, Westlaw through 2019 Act 69).

multiple perpetrators.¹⁹⁸ Second-degree covers a wider variety of circumstances, but easily the most common form of the offense, at least in the prisoner group, does have a force/violence element that dovetails with conventional definitions of rape.¹⁹⁹ Thus, for purposes of the analysis that follows, I will distinguish between first- and second-degree sexual assault, on the one hand, and third- and fourth-degree sexual assault, on the other. I will apply the rape punishment norms to the 1-2 group and the “other sexual assault” norms to the 3-4 group. The Wisconsin DOC data pertaining to these two groups are presented in Table 20. In light of heightened concerns surrounding the sexual victimization of children, I have noted where there are indications in the DOC record of a child victim.²⁰⁰

¹⁹⁸ § 940.225(1). Seventeen inmates were convicted under a long-since repealed fourth prong of the first-degree statute, which covered “sexual contact or sexual intercourse with a person 12 years of age or younger.” § 940.225(1)(d).

¹⁹⁹ § 940.225(2)(a). To be clear, because neither this provision nor the first-degree definition requires intercourse or penetration, my approach may result in some individuals being placed into the 1-2 subgroup whose offenses would not necessarily be classified as rape in other systems. *See* § 940.225(5)(b)(1) (defining “[s]exual contact” in Wisconsin to include “intentional touching, whether direct or through clothing”).

²⁰⁰ More specifically, I used the child victim classification where there was a collateral conviction from Chapter 948 of the Wisconsin Code, which covers crimes against children.

Table 20. Potentially Low-Risk VC Prisoners, With Sexual Assault as Most Recent Violent Conviction

	First- and Second-Degree²⁰¹	Third- and Fourth-Degree
Number	486	146
Degree ²⁰²	First—247 (51%) Second—239 (49%)	Third—115 (79%) Fourth—31 (21%)
Collateral conviction ²⁰³	331 (68%)	65 (45%)
Violent collateral conviction	265 (55%)	15 (10%)
Multiple first- or second-degree sexual assaults in most recent case	35 (7%)	-- ²⁰⁴
Indication of child victim	51 (10%)	42 (29%)
Prior convictions	253 (52%)	23 (16%)
Age at most recent conviction (median)	30	27

a. Third- and Fourth-Degree Sexual Assault

The typical individual in the third- and fourth-degree (3-4) sexual assault group was convicted at age twenty-seven of third-degree sexual assault and has no prior or collateral convictions indicated in the DOC data.²⁰⁵ Table 21 summarizes the various aggravators and mitigators for this group, subdivided based on implicit confinement time, along with estimates of the potentially viable release candidates. The total across all of the subgroups is 20 to 43 (14% to 29%).

²⁰¹ These are individuals whose most recent case includes a conviction for either first- or second-degree sexual assault.

²⁰² This is based on the highest-degree sexual assault offense in the person's most recent case. Two individuals do not have a degree specified. Based on a review of the CCAP records, the convictions were classified for present purposes as first-degree.

²⁰³ This includes individuals who are noted in the DOC database as having been found in violation of more than one statute in their most recent case, including a second sexual assault count.

²⁰⁴ By definition, there are no 1-2 collateral convictions since a 1-2 conviction in the most recent case would cause the individual to be placed into the 1-2 category.

²⁰⁵ See *supra* notes 32–33.

Table 21. 3-4 Sexual Assault Group Subdivided Based on Implicit Confinement Time (“A” denotes aggravating; “M” denotes mitigating)

	Half Desert Range²⁰⁶	Below Desert Range²⁰⁷	Within Desert Range²⁰⁸	Above Desert Range²⁰⁹	Twice Desert Range²¹⁰
Number	63	33	11	23	16
Fourth-degree (M)	14 (22%)	4 (12%)	4 (36%)	4 (17%)	5 (31%)
Collateral conviction (A)	22 (35%)	15 (45%)	6 (55%)	10 (43%)	12 (76%)
Violent collateral conviction (A)	5 (8%)	7 (21%)	1 (9%)	1 (4%)	1 (6%)
Indication of child victim (A)	13 (21%)	8 (24%)	5 (45%)	8 (35%)	8 (50%)
Prior convictions (A)	5 (9%)	1 (3%)	0 (0%)	5 (22%)	13 (81%)
Under 21 at time of conviction (M)	18 (29%)	8 (24%)	5 (45%)	5 (22%)	4 (25%)
Culpability scores (mean)	0.2	0.6	0.3	0.7	1.6
Potentially releasable	0-0 (0-0%)	0-5 (0-15%)	4-6 (36-55%)	10-19 (43-83%)	6-13 (38-81%)

b. First- and Second-Degree Sexual Assault

The typical individual in the first- and second-degree (1-2) sexual assault group was convicted at age thirty of first-degree sexual assault and has at least one collateral and one prior conviction.²¹¹ Table 22 summarizes

²⁰⁶ This includes individuals who were convicted in 2016 or later.

²⁰⁷ This includes individuals who were convicted in 2014 or 2015.

²⁰⁸ This includes individuals who were convicted in 2012 or 2013.

²⁰⁹ This includes individuals who were convicted between 2006 and 2011, inclusive.

²¹⁰ This includes individuals who were convicted in 2005 or earlier.

²¹¹ See *supra* notes 32–33.

the various aggravators and mitigators for the 1-2 group, subdivided based on implicit confinement time,²¹² along with estimates of the potentially viable release candidates. The provisional total across all of the subgroups is 329 to 429 (68% to 88%).

Table 22. 1-2 Sexual Assault Group Subdivided Based on Implicit Confinement Time (“A” denotes aggravating; “M” denotes mitigating)

	Half Desert Range²¹³	Below Desert Range²¹⁴	Within Desert Range²¹⁵	Above Desert Range²¹⁶	Twice Desert Range²¹⁷
Number	59	32	42	186	167
First-degree (A)	9 (15%)	10 (31%)	15 (36%)	94 (51%)	119 (71%)
No collateral conviction (M)	27 (46%)	13 (41%)	18 (43%)	62 (33%)	35 (21%)
Collateral conviction for first- or second-degree sexual assault (A)	4 (7%)	2 (6%)	2 (5%)	8 (4%)	19 (11%)

²¹² The aggravator-mitigator distinctions were made slightly differently for this group than for the previous groups. Here, there are two characteristics (first degree and prior conviction) that are shared by only slightly more than half of the group. Rigidly applying the rule that a majority establishes the norm would result in viewing both characteristics through a mitigation lens (i.e., second degree and no priors would be mitigators). However, this would leave the overall culpability scoring quite unbalanced, with many more mitigators than aggravators and two of the mitigators benefiting very close to half of the group. In order to achieve greater balance in the culpability scoring, I do not treat either of these essentially 50-50 characteristics as purely aggravating or purely mitigating. More specifically, I associate a half-point increase in culpability with a first-degree conviction, and a half-point decrease with a second-degree conviction. Criminal history is handled analogously.

One other aspect of the scoring may bear clarification. Since collateral convictions are so common, it seems appropriate to treat the absence of a collateral conviction as mitigating. Conversely, it seems appropriate to treat as aggravating the fact that some of the group have an especially serious collateral conviction, that is, a second conviction for first- or second-degree sexual assault in the same case. This leaves those who have a less serious violent collateral conviction in a middle ground where neither aggravation or mitigation seems satisfactory. Notably, this factor is also close to 50-50. All things considered, it seems best to drop the factor from the scoring analysis.

²¹³ This includes individuals who were convicted in 2014 or later.

²¹⁴ This includes individuals who were convicted between 2011 and 2013, inclusive.

²¹⁵ This includes individuals who were convicted between 2008 and 2010, inclusive.

²¹⁶ This includes individuals who were convicted between 1998 and 2007, inclusive.

²¹⁷ This includes individuals who were convicted in 1997 or earlier.

Indication of child victim (A)	6 (10%)	2 (6%)	4 (10%)	22 (12%)	17 (10%)
Prior conviction (A)	3 (5%)	4 (13%)	5 (12%)	123 (66%)	118 (71%)
Under 21 at time of conviction (M)	10 (17%)	9 (28%)	6 (14%)	31 (17%)	13 (8%)
Culpability scores (mean)	-1.3	-1.1	-1.0	-0.2	0.3
Potentially releasable	2-29 (3-49%)	13-23 (41-72%)	29-38 (69-90%)	139-74 (75-94%)	146-65 (87-99%)

The releasable proportions indicated above are exceptionally high for this group, as quantified in Table 23. This is especially surprising in light of the uniquely widespread prevalence of culpability-enhancing factors for the group, as indicated in Table 24. Upon closer inspection, it is evident that a major driver of the high releasability estimate for the 1-2 sexual assault group is simply that so many of them have served a very long time already by national norms. Table 25 provides a telling comparison.

Table 23. Percentage Potentially Releasable VC Prisoners in Each Offense Group

	Conservative	Aggressive	Midpoint
Sexual assault 1-2	68%	88%	78%
Robbery	37%	55%	46%
Assault	41%	59%	50%
Accidental killings	27%	44%	36%
First-degree intentional homicide	10%	23%	17%
MNM-remainder	11%	35%	23%
Sexual assault 3-4	14%	29%	22%

Table 24. Culpability Factors for Each Offense Group

	Collateral Conviction	Violent Collateral Conviction	Prior Convictions	Age 21 or Older at Conviction
Sexual assault 1-2	68%	55%	52%	86%
Robbery	34%	15%	26%	50%
Assault	56%	33%	36%	80%
Accidental killings	43%	18%	13%	76%
First-degree intentional homicide	49%	36%	38%	74%
MNM-remainder	31%	16%	27%	64%
Sexual assault 3-4	45%	10%	16%	73%

Table 25. Proportion of Inmates Who Have Served Above Normal Desert Range²¹⁸

Sexual assault 1-2	73%
Robbery	38%
Assault	57%
Accidental killings	43%
First-degree intentional homicide	47%
MNM-remainder	56%
Sexual assault 3-4	25%

It is not entirely clear why there are so many inmates in Wisconsin who have served long sentences relative to the national norms for rape. At least two possibilities suggest themselves. First, sentences may be longer because culpability-enhancing factors may be unusually common among Wisconsin's first- and second-degree sexual assault defendants. Certainly,

²¹⁸ This includes those who, in an earlier analysis, were categorized as "above desert range" and "twice desert range."

Table 24 does suggest that aggravating circumstances such as a violent collateral conviction or a prior conviction are quite common among this group, although data are not available to make comparisons with rape defendants in other states. It is at least possible, though, that unusually long confinement times in Wisconsin may be justified based on unusually high culpability among the Wisconsin defendants in comparison to what is found elsewhere.²¹⁹

Second, sentences may be longer because Wisconsin judges (perhaps reflecting Wisconsin public opinion) may tend to see sexual assaults as more serious offenses than do sentencing judges in other states. Attitudes about the seriousness of different kinds of sexual assaults seem inextricably intertwined with broader attitudes about gender roles and relations in American society—attitudes that seem to vary significantly across communities. Given the breadth and intensity of contemporary divides over gender norms, it does not seem implausible that sexual assaults might be viewed differently by the judges in some states than in others, resulting in a range of different sentencing patterns.²²⁰ In short, tougher-than-average sexual assault sentences in Wisconsin may conceivably be justified by tougher-than-average social attitudes regarding sexual assault in the state.

On the other hand, there is nothing in the 3-4 sexual assault group confinement times that suggests unusual toughness. Rather, the indications of exceptional toughness are limited to the 1-2 group. If Wisconsin really does have tougher norms against sexual assault, it is not clear why those norms would be manifest only in certain kinds of sexual assault cases, but not others. Rather, a comparison between the 3-4 and 1-2 groups seems to point back to that unique prevalence of culpability-enhancing factors within the 1-2 group, as indicated in Table 24. Indeed, the data suggest that Wisconsin prosecutors may be inclined to use their charging and plea-bargaining discretion to channel cases without these factors into 3-4 convictions, while insisting on 1-2 convictions in cases with these factors. We may note that Wisconsin's sexual assault statute, which divides the crime into four degrees that lack bright-line distinctions from one another, provides unusual flexibility for prosecutors and may facilitate an especially high concentration of elevated-culpability cases in the 1-2 group.²²¹

²¹⁹ See *supra* Table 25.

²²⁰ I focus here on judges, but prosecutors, parole boards, and corrections officials may be subject to similar dynamics, which could also contribute to different LOS tendencies for sexual assault in different states.

²²¹ Perhaps most notably, Wisconsin is one of only three states that provides prosecutors with standard sexual assault charging options that are based on an absence of *affirmative* consent on the part of the victim, and do not require proof of any use or threat of force or violence. Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 451 (2016).

Yet another consideration may also confound my use of national sentencing and LOS norms in the sexual assault area. My norms are derived from sentences imposed in 2006 and 2009, and from prison releases in 2012—releases that in many cases were governed by sentences that were handed down even earlier than 2006. Since that time period, however, we seem to have entered an era of significant change in social attitudes toward sexual assault. These changes are broadly associated with the #MeToo movement, and, in relation to criminal punishment, are perhaps most vividly illustrated by the intense public backlash against the sentence imposed on Brock Turner.²²² In this dynamic cultural context, past punishment norms may no longer provide an appropriate set of just-punishment benchmarks in sexual assault cases.

Given the apparent toughening of punishment expectations in this area, as well as the possibility that Wisconsin's 1-2 group has an unusually high level of culpability relative to the national comparison groups, it seems prudent to adopt a somewhat more conservative approach to estimating the number of potentially releasable individuals in the group. There is no entirely satisfactory way to do this, but the intuition of lengthening punishment norms can be captured by treating each subgroup (twice above range, above range, etc.) as if it were in the next-lowest confinement range. Thus, for instance, the individuals who are within what I have characterized as the normal range (seven to ten years) would be assessed as if they had not yet served seven years. Table 26 provides a revised estimate of the potentially releasable using this modified approach. The midpoint between conservative and aggressive estimates remains higher than for any other offense group (53%), but is now only slightly above the next-highest group, non-sexual assault (50%).²²³

Table 26. Potentially Viable Release Candidates from 1-2 Sexual Assault Subgroups—More Restrictive Approach

Half Desert Range	Below Desert Range	Within Desert Range	Above Desert Range	Twice Desert Range	Total
0-2 (0-3%)	4-13 (13-41%)	11-29 (26-69%)	70-139 (38-75%)	96-146 (57-87%)	181-329 (37-68%)

²²² See *supra* text accompanying note 76 (providing an example of how social norms have adversely affected officials that make decisions not in line with what society considers to be just punishment).

²²³ See *supra* Table 25.

vi. Other Potentially Low-Risk VC Prisoners

The foregoing analysis of the major offense groups accounts for 3747 of the 4388 potentially low-risk VC inmates. The remainder fall into one of two categories.

First, there are 200 inmates whose most recent violent conviction was for a low-volume offense that does not fit into one of the major offense groups.²²⁴ These encompass a wide variety of offenses from the extremely serious (kidnapping, mayhem) to the relatively minor (injury by negligent handling of dangerous weapon, explosive, or fire).²²⁵ National LOS benchmarks are not readily available for many of these offenses, so it is not practicable to employ the same methodology that I have used with the major offense groups. Given the wide range of offense types within the “miscellaneous” group—mirroring the variety of offenses within the major categories—it seems reasonable for present purposes to assume that the releasable percent for this group would be roughly in line with the overall releasable percent for the major offenses, which is 23% (conservative) to 42% (aggressive). This range would translate to between forty-six and eighty-four potentially releasable from the miscellaneous group.

Second, there are 441 VC inmates whose most recent case did not include a violent crime.²²⁶ Put differently, these individuals were convicted of a violent offense and then subsequently convicted in a separate case of a nonviolent offense.²²⁷ The situations of these inmates vary widely with respect to the severity of the violent offense and the timing and nature of the nonviolent case.²²⁸ There seems no straightforward, fully satisfactory way of integrating these inmates into the analysis used earlier. In general, though, a subsequent conviction can be conceptualized as roughly analogous to a collateral conviction; both types of conviction warrant some incremental punishment beyond what would be called for by the violent offense standing alone. Thus, if a collateral conviction results in one additional culpability point, it does not seem unreasonable to think about subsequent convictions in the same light. And, using the basic algorithm employed with the major offenses, adding one point to all inmates in a group effectively converts the conservative estimate of releasability into the aggressive. As noted above, the overall conservative estimate for all of the major offenses is 23%. For those with subsequent nonviolent convictions, then, an aggressive estimate of the releasable might be 23% of

²²⁴ See *supra* notes 32–33.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ In some instances, the convictions in both cases were entered on the same date. When there were two cases resolved at the same time, the sorting algorithm I used classified the most recent case as violent or nonviolent based on which case was first listed in the DOC record.

²²⁸ See *supra* notes 32–33.

441, or 101. Carrying over the general nineteen-percentage-point difference between conservative and aggressive estimates, the conservative releasability estimate for the subsequent-conviction group would be 4% of 441, or 18.

vii. Recapitulation

Table 27 summarizes the releasability estimates for the entire set of 4388 potentially low-risk VC inmates.

Table 27. Potentially Viable Release Candidates from Among All Potentially Low-Risk VC Inmates.

	Conservative	Aggressive
Robbery	261	391
Assault	120	172
Accidental killings	78	126
First-degree intentional homicide	113	263
MNM-remainder	76	234
Sexual assault 3-4	20	43
Sexual assault 1-2	181	329
Miscellaneous	23	84
Subsequent conviction	18	101
Total	890	1743

III. IMPLICATIONS AND LIMITATIONS

Is the glass half-empty or half-full? The foregoing analysis can be seen in either a pessimistic or an optimistic light. On the negative side, an analysis of the Wisconsin data confirms that a large majority—about 59%—of prisoners have been convicted of a violent crime, even using a fairly narrow definition of what counts as violent.²²⁹ Ambitious decarceration goals, such as the stated hope of Wisconsin's new Governor to cut the prison population in half, cannot be met any time soon without more lenient treatment at some point in the process of violence-convicted individuals. Moreover, the VC inmates currently in prison do not, on the whole, fit the profile of seemingly harmless old-timers who are waiting out clearly excessive prison sentences. Most are in their early forties or younger.²³⁰ Likewise, most have a conviction within the past five years.²³¹

²²⁹ The figure would doubtlessly be even higher if out-of-state convictions were included, or in-state convictions that did not result in earlier commitment to DOC custody or supervision.

²³⁰ See *supra* Table 1.

²³¹ *Id.*

Fewer than one-third of the VC prisoners have even one of the three markers of *potential* low risk that I have utilized. And among most of those who do have one of the markers, there are reasons to expect substantial *retributive* objections to early release. About half have been convicted of homicide offenses, and another 15% of sexual assault. While the remainder, constituting about one-third, have mostly been convicted of less serious violent crimes, a majority of these have served only a handful of years on their current sentences, which means that they may still face “insufficient punishment” objections to early release. In the end, even a fairly aggressive approach to estimating releasability suggests that only 1743 VC prisoners might avoid the incapacitation-retribution catch-22—about one in every eight.

On the more positive side of the ledger, there are *so many* VC prisoners that even releasing one in eight would be a nontrivial accomplishment. In Wisconsin, this would translate into a 7% reduction in the overall prison population. By way of comparison, this is a little larger than the reduction in the size of the federal prison population that was achieved over the two terms of President Barack Obama,²³² whose administration undertook several notable decarceration initiatives.²³³ A 7% reduction in the prison population may seem a rather uninspiring payoff for criminal-justice reforms that would be quite politically challenging to enact, but reductions on even this modest scale have proven elusive for many states.²³⁴

Yet, is releasing even one in eight VC prisoners a realistic goal? I have characterized this as an aggressive estimate, and my methodology suggests that more conservative approaches might result in a figure that is closer to one in sixteen, or even lower. At this level, it becomes more questionable whether the VC prisoners ought to be a reform priority. From the standpoint of decarceration potential, more inviting targets might include, for instance, the elimination of “crimeless” revocations²³⁵ or mandatory use of alternatives to incarceration for low-level nonviolent offenses.²³⁶

²³² See BRONSON & CARSON, *supra* note 3, at 3 tbl.1 (indicating that federal prison population dropped from 201,280 at year-end 2008 to 189,192 at year-end 2016, or about 6%).

²³³ For a summary of these initiatives and their impact, see O’HEAR, *supra* note 2, at 122–38 (providing an overview of the Obama Administration’s sentencing reform actions).

²³⁴ For instance, over the decade from 2007 to 2017, only eighteen states managed a reduction that was at least this large. This information was compiled from the Bureau of Justice Statistics, available at *Correction Statistical Analysis Tool*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=nps> (last visited June 17, 2020). The fully compiled dataset is available from the author on request.

²³⁵ See O’HEAR, PRISONS AND PUNISHMENT, *supra* note 20, at 123–27 (discussing frequency of crimeless, or “technical,” revocations).

²³⁶ See AUSTIN ET AL., *supra* note 29, at 41 tbl.4 (estimating there are 364,000 prisoners, or about one-quarter of the national prison population, who are serving time for “lower-level crimes” that would be better handled through alternatives to prison).

In weighing the significance of the numbers, it is important to bear in mind several important limitations in my methodology, some of which suggest that I have overestimated the potentially releasable, some of which suggest the contrary, and some of which do not point clearly in either direction.

First, the analysis here was conducted solely on one state. However, every state's criminal justice system is unique, which undoubtedly affects how many people are serving what length of time for which crimes. Vast state-to-state differences can be seen quite clearly even in a simple comparison of the overall imprisonment rates of states like Massachusetts (120 prisoners per 100,000 residents) and Maine (134) with states like Louisiana (719) and Oklahoma (704).²³⁷ Given such differences, there are also likely wide state-to-state differences in the number of potentially releasable VC prisoners, and estimates from any one state cannot be assumed to be a reliable indicator for other states. Still, Wisconsin tends to lie near the nation's center of gravity in many respects,²³⁸ including its imprisonment rate (391 per 100,000, in comparison to the overall national average of 390 per 100,000).²³⁹ It is doubtful that Wisconsin is an extreme outlier when considering the releasability of VC prisoners, although the state's unusually long sexual assault sentences²⁴⁰ should serve as a reminder that even a generally middle-of-the-road state is apt to have some distinctive policies and practices.

Second, I am using relatively crude proxies for risk. Of particular concern is missing criminal history. I am undoubtedly failing to account for a substantial number of out-of-state convictions, in-state convictions that did not result in a commitment to DOC custody or supervision, arrests that did not result in any conviction, pending cases, and criminal conduct while in custody or under supervision that was handled through administrative sanctioning rather than a fresh criminal prosecution. These gaps suggest that my estimate of the number of potentially low-risk VC prisoners is too high. On the other hand, there are other gaps in my data that might, to some extent, counterbalance the criminal history gaps. Most notably, I lack any psychosocial information about the VC prisoners. Some of these prisoners who may appear risky on the basis of their criminal history alone may seem far less threatening with more complete information, such as information about mental health, family support, or treatment for substance abuse. Additionally, it should be noted that I have adopted a conservative approach to age in using sixty as a low-risk marker.

²³⁷ BRONSON & CARSON, *supra* note 3, at 11 tbl.6.

²³⁸ See *supra* notes 30–31 and accompanying text.

²³⁹ BRONSON & CARSON, *supra* note 3, at 11 tbl.6. The national figure represents those held under the jurisdiction of *state* authorities across the United States.

²⁴⁰ See *supra* Table 25.

In truth, prisoners in their fifties also tend to have relatively low recidivism rates and might also reasonably be included in the potentially low-risk category.²⁴¹

Third, as the retributive benchmark, I have used national LOS norms. There is an argument to be made, however, that retribution is really about the expression and vindication of *community*—not necessarily national—moral norms,²⁴² and that, accordingly, desert benchmarks are better calculated based on state- or even local-level practices and preferences.²⁴³ Additionally, there are good reasons to think that LOS norms may be on the high side relative to desert. The national norms reflect a combination of desert and other judgments, and the non-desert side of the equation may tend to inflate severity beyond what desert minimally requires, especially when it comes to people with violent-crime convictions, who tend to provoke higher levels of fear than other offenders.²⁴⁴ Judges and other criminal-justice officials may err on the harsh side when dealing with VC individuals, either as a result of their own excessive risk assumptions or as a matter of political self-interest in light of the public’s exaggerated beliefs about the inherent dangerousness of “violent criminals.”

Fourth, I have only quite limited data on case severity—essentially, just a list of the statutes that the prisoner was found to have violated.²⁴⁵ Except to the extent that these considerations are reflected in the elements of the statutes, I have no way to know if the defendant, say, targeted a vulnerable victim, abused a position of trust, left the victim physically or emotionally damaged for life, or acted with cold-blooded deliberation. On

²⁴¹ See, e.g., AM. CIVIL LIBERTIES UNION, AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY 24–25 (2012) (noting study showing that only 9% of Virginia prisoners released between ages of forty-five and fifty-four were returned to prison within three years on new conviction, and only 1.3% of prisoners over the age of fifty-four; also noting another study showing that 9.2% of Arizona prisoners released between ages of fifty and fifty-four were returned to prison within three years on new felony conviction, and 8.5% between ages of fifty-five and fifty-nine).

²⁴² See, e.g., O’HEAR, WISCONSIN SENTENCING, *supra* note 20, at 24 (“For instance, a burglary is hardly a shocking event in a large city but may have a much more profound impact in a rural community whose residents are accustomed to leaving their homes unlocked. How, we might wonder, can the severity of a burglary be judged the same in these two different settings?”).

²⁴³ This would also help to deal with one of the practical problems in using national norms to study releasability in one state: national data categories do not necessarily map neatly onto a particular state’s criminal code. For instance, as we saw, Wisconsin’s definitions of homicide and sexual assault offenses do not precisely correspond with the categories used for national data-tracking. See *supra* note 33 and accompanying text (describing the method used for determining what is defined as homicide or sexual assault in Wisconsin, as opposed to national definitions).

²⁴⁴ For instance, in one recent study using a nationally representative sample, respondents perceived a higher recidivism risk among offenders convicted of violent than nonviolent offenses. Denver, Pickett & Bushway, *supra* note 37, at 675–76.

²⁴⁵ Even these data are not necessarily accurate and complete. Although I have not systematically cross-checked DOC records against CCAP (court) records, I have consulted several dozen CCAP records for this project in order to clarify ambiguities in the DOC information and uncovered numerous discrepancies along the way.

the other hand, such missing aggravators may be counterbalanced by missing mitigators, such as the defendant's diminished capacity, the victim's provoking behavior, or the minor role of the defendant in an offense that was orchestrated by another.²⁴⁶ Given the possibility of such countervailing considerations, it is far from clear that fuller case information would substantially change the overall estimate of the potentially releasable. Additionally, there are important objections to giving much weight in desert calculations to aggravating considerations that do not fall within the elements of the conviction offense. In particular, it would seem inconsistent with the presumption of innocence and all of the procedural rights that must be observed in relation to an adjudication of guilt if we were to prolong imprisonment on the basis of aggravating factors that were not elements of the crime of conviction.

Fifth, I have dealt rather crudely with collateral convictions, making few distinctions based on the number or severity of such convictions beyond whether one of them was for a second violent crime. There is no simple, satisfactory way to deal with collateral convictions. When one act or a course of conduct constitutes multiple crimes, we normally see greater culpability on the part of the perpetrator and expect a more severe punishment, but subject to a sort of discount rate. For instance, as Justice Breyer has observed, we would expect a longer sentence for the person who commits six bank robberies than the person who commits one, but not six times longer.²⁴⁷ But where exactly the punishment should fall between one and six times the standard bank robbery sentence remains a mystery. Breyer characterizes this as the "intractable sentencing problem."²⁴⁸ Still, even though it is far from clear how much weight ought to be given to which sorts of collateral convictions in which circumstances, there are probably somewhat more fine-grained distinctions among collateral convictions that could be made.

Sixth, I have essentially reduced the releasability question to two considerations: risk (narrowly assessed by reference to age and criminal history) and desert. However, in designing and implementing any early release initiative for VC prisoners, a variety of other practical and political concerns would have to be addressed. For instance, immediate release of any inmate is probably inadvisable if there has not been some prior effort

²⁴⁶ One particularly notable gap in the DOC records is whether the inmate was convicted of a mere attempt. Thus, for instance, the DOC conviction record does not permit separate identification of those who have been convicted of an attempted, as opposed to a completed, homicide—a distinction that may bear heavily on retributive judgments given the profound difference in the harm caused.

²⁴⁷ Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 25–26 (1988).

²⁴⁸ *Id.* at 25.

put into reentry planning and preparations.²⁴⁹ Similarly, there is apt to be a strong political pushback from victims if the state abruptly starts to release a large number of VC prisoners. It will be important to share with victims the research and reasoning that supports release, both on a global policy basis and as to individual prisoners; to provide victims with an opportunity to be heard on individual releases; and to impose release conditions that reasonably accommodate victim concerns, such as no-contact orders.²⁵⁰ Additionally, it is also important to ensure that there are adequate community supervision resources to accommodate any spike in the number of returning prisoners.

Seventh, and finally, my analysis here makes no assumptions about the availability or utility of rehabilitative interventions for VC offenders, or about the capacity of “technological incarceration” to protect the public from even relatively high-risk individuals.²⁵¹ However, a growing body of research suggests that some interventions and supervision technologies may effectively reduce the risk of many violence-prone offenders.²⁵² States that invest in these areas may be able not only to provide greater reassurance to victims and other members of the public who are wary of early release for VC offenders, but also significantly to expand the pool of prisoners who can avoid the incapacitation side of the incapacitation-retribution catch-22.

CONCLUSION

I began this Article by asking whether there are enough potentially releasable VC prisoners—that is, enough who avoid the incapacitation-retribution catch-22—to warrant making their release a reform priority. My answer is a resounding “maybe.” At least based on the

²⁴⁹ For some inmates, if time were required to complete reentry preparations, there would be little or no practically meaningful acceleration of the release date. However, this number may be small. Out of the total potentially low-risk VC population in August 2018, only about 0.7% were scheduled for mandatory release or extended supervision later in 2018. These data were obtained through the Wisconsin DOC offender locator website, *Locator*, WIS. DEP’T CORRECTIONS, <https://appsdoc.wi.gov/lop/> (last visited Apr. 1, 2020), between August 17 and 21, 2018. The full dataset is available from the author on request.

²⁵⁰ Although it is often assumed that victims are highly punitive in their views, recent survey research suggests that most victims would prefer for the criminal-justice system to emphasize rehabilitation over punishment. ALL FOR SAFETY & JUSTICE, CRIME SURVIVORS SPEAK 5 (2016).

²⁵¹ See, e.g., Mirko Bagaric et al., *Technological Incarceration and the End of the Prison Crisis*, 108 J. CRIM. L. & CRIMINOLOGY 73, 78–79 (2018) (proposing system of “technological incarceration” in the community that combines GPS tracking, remote real-time monitoring through video and other sensors, and remote-controlled Taser-type electronic immobilization devices).

²⁵² See, e.g., O’HEAR, PRISONS AND PUNISHMENT, *supra* note 20, at 51 (discussing research on effectiveness of electronic monitoring); D.A. (Don) Andrews, *The Risk-Need-Responsivity (RNR) Model of Correctional Assessment and Treatment*, in USING SOCIAL SCIENCE TO REDUCE VIOLENT OFFENDING 127, 136 (Joel A. Dvoskin et al. eds., 2012) (discussing research on use of RNR treatment model to control violent recidivism).

data from one middle-of-the-road state, the numbers of potentially releasable prisoners seem neither so large as to make this a clear and compelling reform priority, nor so small as to make efforts in this area seem obviously misguided. More nuanced, state-specific studies seem in order, particularly with respect to the risk-assessment/incapacitation side of the analysis.

For those who wish to see a sharp reduction in U.S. imprisonment, this is a bad news/good news article. To the extent that the Wisconsin story is generalizable, the bad news is that a large majority of prisoners have been convicted of violent crimes, and there does not appear to be a lot of “low-hanging fruit” in this VC population—that is, individuals who have already spent a long time in prison for relatively minor violent offenses. Homicide and sexual assault predominate, and most of the VC prisoners have at least one conviction in the past five years. In the absence of new thinking about—and funding for—rehabilitative interventions and supervision technology, most VC prisoners seem poor candidates for early release on grounds of public safety and/or just punishment.

The good news, broadly speaking, is that there is tremendous variation within the VC prisoner population. Although it has become commonplace to speak of “violent criminals” as a monolithic category—representing the inherently depraved and dangerous—the data instead highlight the potential to make important distinctions within this category as to both incapacitative and retributive needs. More specifically, there are small, but substantial, components of the VC population who:

- Are elderly and most likely past the serious crime-committing phase of their lives;
- Have little or no criminal history other than the case for which they are currently serving time;
- Have gone many years with no new criminal conviction;
- Have been convicted only of non-homicide, non-sexual offenses;
- Even though convicted of a homicide offense, have not been convicted of *intentional* or other aggravated-culpability forms of homicide;
- Even though convicted of a sexual offense, have not been convicted of the most serious forms of sexual assault;
- Have never been convicted of a high- or even mid-grade felony;

- Have already served a decade or more in prison—often in excess of national norms for their offenses; or
- Were twenty or younger at the time of their most recent conviction.

These segments of the VC population likely include the most promising targets for decarceration efforts.

The prevalence of significantly mitigating factors within the VC population raises hope that debates over mass incarceration and sentencing and corrections policy can eventually transcend the current, unrelentingly negative stereotypes of the “violent criminal.” Although large-scale releases of VC prisoners are unlikely and probably inadvisable in the short run, a more complete and nuanced understanding of who these prisoners are, what they have done, and what risks they pose should support new policies and practices that may lead to slow, steady reductions in the size of the VC inmate population over the long run.