

---

---

# MEANINGS AND MEASURES OF RECIDIVISM

ROBERT WEISBERG\*

## I. INTRODUCTION

What causes crime and why crime rates vary over time and place—these are vast questions that dominate the careers of criminologists. The related question of what we can expect government agencies to do about crime—that is, what we can hold government responsible for—occupies much of our civic discourse. My subject here is deceptively more modest: how we identify and address one major problem that government agencies, most obviously criminal justice agencies are supposed to resolve: the elusive phenomenon called recidivism. In this Essay I will undertake some admittedly impressionist reflections on recidivism. I will suggest that because of the power and salience of the term in our discourse, we need to be more self-critical in deploying it. Turning to more pragmatic concerns of criminal justice, I will review how variable and contingent are the formal definitions of measures of recidivism, and I will address the need for sensibly self-critical stipulations of the meaning of the term in order to make the most of any pragmatic use of the term feasible. But first, to suggest what a multimeaning term recidivism is and what a complex phenomenon it may signify, I beg indulgence for a quick narrative of developments in California.

A decade ago California's prison system fell under federal court control because of its unconstitutional conditions and overcrowding.<sup>1</sup> The scrutiny given the state prison system was marked by the lament that California had the nation's "highest recidivism rate."<sup>2</sup> By what measure?

---

\* Professor of Law, Stanford Law School.

1. Years of litigation resulted in *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011), in which the Supreme Court upheld a lower-court order requiring a reduction in the state prison population aimed at addressing unconstitutional overcrowding. The overcrowding was associated with deficits in prison medical and mental health care systems, which were deemed to violate the Eighth Amendment. *Id.*

2. *Id.* at 1942 n.10.

Under the state's then-operative mandatory parole system, each year thousands of prisoners who had served terms in the one- to ten-year range were released on mandatory supervision for up to three years, and if they then violated the conditions of parole, they could be returned to prison for a year or more.<sup>3</sup> Sixty-six percent of released prisoners suffered this fate within three years of release.<sup>4</sup> In criminological terms, this measure could be viewed as a very conservative definition of recidivism. Only if the offender did something bad enough to send him back to prison was he counted. But it was also a loose definition, because a "technical violation," rather than a new crime, could send him back.<sup>5</sup>

At the same time, although the federal litigation was about certain specific Eighth Amendment issues, this allegedly highest recidivism rate was also invoked in public discourse as proof of dysfunctionality and failure in California's criminal justice system, a sign of political and cultural breakdown in our government and society.<sup>6</sup> The reincarcerations proved that even long imprisonment terms did not work, contributing not only to the sheer size of the prison population, but also to the administrative chaos of constant short term inflows and outflows through the prison gates. But were these problems really the result of some independently meaningful phenomenon called recidivism? While the underlying definition of recidivism at work here was perfectly rational, it was also very contestable. One could have limited the definition of a recidivist act to a new crime, or a new prison-eligible felony. One could have lengthened or shortened the 3-year "test" period. Thus, the definition of recidivism was a matter of both legal concept and criminological significance. One could have penetrated the cases where a technical violation was charged to see if the act was actually a new crime that the prosecutor just chose to treat as an administrative violation, for ease of proof and procedure. That approach would have raised difficult factfinding

---

3. For a complete discussion, see JOAN PETERSILIA, UNDERSTANDING CALIFORNIA CORRECTIONS 59–76 (2006) (discussing the parole system); Robert Weisberg, *How Sentencing Commissions Turned out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179, 222–29 (2007) ("There is still the special issue of 'mandatory parole' in California . . . which has led to the chaotic revolving door of relapse-and-catch that has foiled the hopes of an efficient planning scheme for the California prison system.").

4. Ryken Grattet, Joan Petersilia & Jeffrey Lin, PAROLE VIOLATIONS AND REVOCATIONS IN CALIFORNIA 5 (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/224521.pdf>.

5. *Id.* at 72–75.

6. See Letter from Michael E. Alpert, Chairman, Little Hoover Comm'n, to Arnold Schwarzenegger, Governor of Cal., and members of the California Legislature (Jan. 25, 2007), available at <http://www.lhc.ca.gov/lhc/185/Report185.pdf> (discussing large problems in the criminal justice system and possible solutions).

issues, so the definition of recidivism remained contingent on empirical uncertainty. Indeed, so contestable are the definition and consequent potential measures of recidivism that one would have forgiven a stylish critical-theory-post-modernist for claiming to have discovered that recidivism was “socially constructed” or, for a chic deconstructionist, a “floating signifier.”

Some more details about the California story may have general implications important for the story of recidivism in America. Largely in response to the federal court injunction, in the last two years California criminal justice has been overhauled by what is called Realignment.<sup>7</sup> This is a transfer of authority from state to counties, whereby certain categories of new felony convicts are being sent to county jails for their terms instead of state prison, and most offenders released from state prison are now immune from returning to prison for further violations (instead they are supervised by county probation officers and at worst face brief jail terms for violations).<sup>8</sup> Realignment has rebuilt California criminal justice in many controversial ways and has raised concerns that it may lead to increased crime rates, especially crime by former offenders.<sup>9</sup> Now that Realignment has mandated counties to experiment with new forms of supervision and control, new programs are being subjected to evaluation for their success in combating recidivism; officials are struggling to generate a uniform state-wide definition of recidivism to enable intercounty comparisons and the office of the State Attorney General, seeking to broaden its role in criminal justice, has announced a new Division of Recidivism Reduction and Re-Entry.<sup>10</sup> California criminal justice has come to focus on the form and venue and circumstances of incarceration, and the true test of its revised policies is recidivism.

## II. MEANINGS AND META-MEANINGS OF RECIDIVISM

Why do we worry about this thing called “recidivism”? Of course, for people vulnerable to crime victimization, recidivism might seem logically irrelevant. The injury from a crime is the same regardless of whether it

---

7. Barbara Owen & Alan Mobley, *Realignment in California: Policy and Research Implications*, 13 W. CRIMINOLOGY REV. 46, 46–47 (2012).

8. *Id.* at 46–48.

9. Don Thompson, *California Realignment of Inmates Blamed for Increase in Crime*, HUFFINGTON POST (May 12, 2013, 9:52 AM), [http://www.huffingtonpost.com/2013/05/12/california-realignment-inmates\\_n\\_3263078.html](http://www.huffingtonpost.com/2013/05/12/california-realignment-inmates_n_3263078.html).

10. *Attorney General Kamala D. Harris Launches Initiative to Reduce Recidivism in California*, OFF. ATT’Y GEN. (Nov. 20, 2013), available at <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-launches-initiative-reduce-recidivism>.

came from a first-time offender or a recidivist. But we often worry about recidivism independently of the crime rate. Perhaps one reason is that if we believe most criminals commit just one crime, we might think it just bad luck to be attacked again, but if we think most criminals reoffend we are more prone to fear revictimization. It is as if first-time offenses by large numbers of offenders represent a kind of ineradicable natural exogenous force in human nature, while only repeat offenses are subjects of policy control or are susceptible to prevention. Put differently, it is as if there is a society-wide first-free-bite principle. First crimes are caused by inherent character or social conditions that are too complex to control. But once someone is identified as an offender, the system is on notice that he is prone to offend, and if he enters the system the failure to control becomes an especially lamentable and, in theory, avoidable failure.

The very term “recidivism” provokes debates about the social and cultural conditions we associate with crime.<sup>11</sup> By one connotation, recidivism is viewed in terms of the recidivist individual, a character to be condemned and feared. He is the unrepentant sociopath, the most stubbornly resistant to whatever crime-preventing or evil-curing mechanisms that comprise our criminal justice system. By another reckoning, recidivism is a social condition reflecting a tragic or frightening illness in society. By another, recidivism is a policy outcome that provides one of the most specific tests to which we subject specific criminal justice system programs—the thing the program evaluators report on when they evaluate new correctional or reentry experiments. By this reckoning, it is the key subject of the contemporary emphasis on “evidence-based practices,” an important mantra of modern criminal justice reform.<sup>12</sup> From another perspective, recidivism is an existential test of the criminal justice system generally. Indeed, at a time when America’s anomalously high incarceration rate is decried as a social evil called mass incarceration,<sup>13</sup> recidivism becomes an exacerbating embarrassment. Even if the high imprisonment rate merits some credit for the lowering of the American crime rate in recent years,<sup>14</sup> the payback from mass incarceration looms as a possible source of increased crime if huge numbers of prisoners will return home to places that are unprepared to assist in their peaceful

---

11. See THE PEW CENTER ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS 6–7 (2011) [hereinafter PEW STUDY].

12. Roger K. Warren, *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism*, 82 IND. L.J. 1307, 1308 (2007).

13. Owen & Mobley, *supra* note 7, at 48.

14. See *infra* text accompanying note 50.

reentry.<sup>15</sup>

### III. SETTLED FACTS ABOUT RECIDIVISM

What do we know for sure about recidivism? Of course, merely trying to state the most basic facts involves stipulating or submitting to certain contestable predicates, addressed in more detail below, about the definitions of recidivism. But we probably can agree on certain things. By broad and loose measures, surely most criminals recidivate, in the sense of committing more than one crime, or even committing crimes after some degree of punishment or control or supervision.<sup>16</sup> One recent study suggests that at least 40 percent of all offenders released from prison in the United States were re-incarcerated for new crimes or violations within three years.<sup>17</sup> The rate of recidivism varies tremendously among the states. But if we had perfect information, the endogenous nature of the measure, given different policies for defining violations or punishments, might explain away many of the differences.<sup>18</sup> The overall national rate has probably not changed much in the last two decades.<sup>19</sup>

One apparently settled matter is that the recidivism rate varies by crime, often in somewhat counterintuitive ways. But this factor implicates a key aspect of recidivism to which I will return in more detail—the question of age. Robbers, car thieves, and burglars are very prone to recidivism, with rates measured in the 70 percent range.<sup>20</sup> At the other end of the spectrum, murderers often have very low recidivism rates,<sup>21</sup> perhaps because murder is a more situation-specific crime and there are relatively few prolific killers. The rate for people convicted of homicide getting rearrested for any crime is roughly 40 percent, but it drops dramatically as the offender gets older upon release, and in any event, the risk of another homicide is barely one percent.<sup>22</sup>

Several explanations for the difference are possible. Homicide is easy

---

15. See generally JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (2009) (discussing the difficulties of prisoners returning home and the lack of preparation for returning to society).

16. PETERSILIA, *supra* note 3, at 70.

17. PEW STUDY, *supra* note 11, at 9.

18. See *id.* at 9–15 (comparing recidivism rates across the states).

19. *Id.* at 12.

20. PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, NCJ 193427, *RECIDIVISM OF PRISONERS RELEASED IN 1994*, at 8 (2002), available at <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>.

21. *Id.*

22. *Id.* at 7–9.

to detect and is often victim or situation-specific in terms of motive. Robberies, car thefts, and burglaries are fairly victim-indifferent and easy to do frequently, and those who commit these crimes often have good reason to believe they will escape arrest. But if recidivism for these crimes is defined as recommitment after punishment, then it may simply be that certain categories of criminal specialists tend to be of more incorrigible characters. On the other hand, any comparison is somewhat hypothetical at best, because of the age factor. If robbers were given twenty-five-year prison sentences, their recidivism rate would likely be lower, and if murderers got two year sentences, their recidivism rate might be much higher. The simple fact is that for certain crimes or criminals, aging is the best suppressant, and that will be especially true for crimes requiring physical strength or speed, like robbery, and hence a bit less so for burglary (which may rely more on experience), and so on.<sup>23</sup> This sort of endogeneity in comparative recidivism rates among crimes may seem banally obvious. But it helps us uncover a wider set of issues, because it causes us to consider how the various rationales for or mechanisms of punishment bear on the issue of recidivism, and ponder what parts of the criminal justice system are arguably responsible for controlling recidivism.

#### IV. RECIDIVISM AND THE PURPOSE—AND AGENTS—OF PUNISHMENT

The standard litany is that the purposes (or justifications, or mechanisms) of punishment are retribution, general deterrence, specific deterrence, rehabilitation, and incapacitation. I will put retribution aside, except to say that one professed rationale for the extremely long sentences under some recidivist statutes, like Three Strikes, is that a career in crime deserves a longer sentence than the sum of its component crimes, because at a certain point the behavior confirms a disproportionately malevolent moral character.<sup>24</sup> My focus instead is on the other four, the consequentialist or instrumental purposes. And the one that needs to be

---

23. See generally Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 *CRIMINOLOGY* 555 (2003) (finding that the crime rate of offenders declines with age); Robert J. Sampson & John H. Laub, *Desistance from Crime over the Life Course*, in *HANDBOOK OF THE LIFE COURSE* 295 (Jeylan T. Mortimer & Michael J. Shanahan eds., 2003) (discussing various theories explaining desistance from crime).

24. Recidivist laws like Three Strikes may reflect a philosophical compromise: They isolate those who will persist in crime despite “warnings,” thus reflecting a tragic recognition of the incorrigibility of the worst malefactors. It also confesses a loss of faith in the effectiveness of earlier punishments, a kind of corrective to underpunishment. For a critical discussion of the jurisprudential rationales for Three Strikes laws, see Edward Rubin, *Just Say No to Retribution*, 7 *BUFF. CRIM. L. REV.* 17, 19–20, 54–61 (2003).

immediately disentangled is general deterrence. General deterrence is about reducing crime, not reducing recidivism, unless we assume that those who have already been punished are unusually sensitive to the general deterrent message. In that sense, general deterrence, and general crime prevention, are the concerns of the legislature when it defines crimes and when it devotes resources to police, prosecutors, and courts to enforce those laws. Those other agencies can serve or disserve general deterrence by better or worse implementation of those laws, but those responsibilities are different from the ones we would associate with reducing recidivism. By contrast, the executive branch agencies (and possibly the judiciary) that prosecute, punish, incarcerate, and supervise offenders are the most logical targets of blame if recidivism is too high. The legislature might only be a target if it is attacked for not having special recidivist statutes or for not allocating enough funding to the more logically responsible agencies. In addition, if the length of sentences and rate of incarceration in the United States are already anomalously high, then it may well be that general deterrence has “hit the wall” and is getting diminishing returns, so that all the focus should now be on recidivism.<sup>25</sup>

As for the other rationales, two fit the goal of reducing recidivism fairly straightforwardly, and one in a more problematic way. The straightforward ones, at least in theory, are specific deterrence and rehabilitation, both designed to deploy punishment in such a way as to discourage or prevent recidivism. The most problematic one is incapacitation, because of the temporal factor. If we put aside different degrees of harshness of conditions of confinement,<sup>26</sup> then the key measure of severity of punishment is length. Longer sentences can enhance specific deterrence if length is simply a measure of deterrent pain; they can also enhance rehabilitation if the environment of custody and the educational or therapeutic programs conducted in custody prove to be more effective when they are longer. But to isolate the effect of length as simply influencing specific deterrence or rehabilitation as a means of recidivism reduction, the incarceration must not extend so far into the offender’s life as to reach a significant downward point in the offender’s predicable or feasible crime capacity or propensity. If the incarceration lasts long enough, much or all of the recidivism reducing effect of a person’s

---

25. See PEW STUDY, *supra* note 11, at 1, 5 (“In 2008, the Pew Center on the States reported that incarceration levels had risen to a point where one in 100 American adults was behind bars.”).

26. For a discussion of how the experience of pain could be a basis for correlating punishment and desert, see generally Adam Kolber, Essay, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009).

sentence will lie in the purely incapacitative consequence of delaying the person's release into society until he is too old to be a recidivist anyway.

As for specific deterrence and rehabilitation, our legal system and standard jurisprudence do not define these or distinguish them very well. Specific deterrence gets very little attention in the jurisprudence of policy discussions, perhaps because its presumed definition and distinctive nature tend to limit the scope of useful discussion. At the very threshold, Zimring and Hawkins have argued that it has no distinctive character at all; they suggest that there is simply a species of general deterrence whose target population is the formerly punished.<sup>27</sup> But if we are to grant specific deterrence some independent identity, the main mechanism for it is probably simple and binary. If you are punished—let us say, if you are deprived of liberty for any amount of time—the fear of that deprivation happening again may scare you straight. As noted above, the longer is the deprivation perhaps, even in some nonlinear way the greater can be the pain. But then some of the recidivism reducing effect will come from aging out. We can increase or decrease the pain of the deprivation by changing the conditions of confinement, though we may then face Eighth Amendment problems if we experiment too much.<sup>28</sup> Finally, the most serious theoretical problem lies in distinguishing specific deterrence from rehabilitation. If the latter implies inward moral improvement, there are plenty of theological traditions we can find whereby pain can accomplish that goal. If the test of rehabilitation is simply greater compliance with law, we may not be able to tell how much of it is deontological in nature and how much of it is self-regardingly rational in nature.

Two recent examples come to mind that test both the difficulty and importance—or unimportance—of the distinction. One of the new components of California Realignment law is a split sentence—an ostensibly fixed incarceration term (for felonies that send the offender to county jail) where the judge can choose to allocate a fraction of the term to mandatory supervision, and can set such conditions for the supervised fraction as mandatory mental health or drug treatment.<sup>29</sup> This is a variant of

---

27. FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 72–74 (1973). See also Robert Weisberg, *Empirical Criminal Law Scholarship and the Shift to Institutions*, 65 STAN. L. REV. 1371, 1380 n.39 (2013) (elaborating this point).

28. This is an implication of Kolber, *supra* note 26, at 212.

29. For a discussion of this scheme, and of the reactions to it, described in the following text, see generally Robert Weisberg & Lisa T. Quan, *Assessing Judicial Sentencing Preferences After Public Safety Realignment: A Survey of California Judges* 19–26 (Stanford Criminal Justice Ctr. 2013), available at <http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Weisberg%20Judges%20Report%2012%2011%2013.pdf>.

traditional probation, in that it combines “jail with a tail.”<sup>30</sup> One would think that offenders would prefer a split, rather than a straight, sentence, with as much time as possible allocated to tail and not jail. But there are early indications that even holding length equal, many offenders prefer being in jail to the experience and possible consequences of being supervised.<sup>31</sup> Conversely, many judges choose split sentences and would prefer them even to a straight sentence that was longer than a sum of jail plus tail, because they have so much faith in the power of the tail to reduce recidivism for some offenders, especially if the condition is mandatory treatment.<sup>32</sup> Sorting out the specific deterrent and rehabilitative components of such a menu of dispositions is an interesting philosophical exercise, but of course the criminal justice system only cares about the recidivism-reducing effect.

Another example is one of the most highly touted of recent recidivism-reducing programs—the Operation Hope program in Hawaii.<sup>33</sup> The gist of this program is to subject offenders who are under probation supervision to regular drug testing and to make a day in jail the virtually automatic sanction for any positive test.<sup>34</sup> This is popularly known as “flash incarceration.” This scheme is legally and financially very efficient: virtually no procedure, and just a day in jail. Its proponents claim great success in reducing recidivism.<sup>35</sup> HOPE may be a rare example of a new (and constitutional) experiment in specific deterrence and one that can be easily distinguished from rehabilitation (except for those who see no distinction in theoretical terms). Of course it may also be an example of targeted general deterrence, since some of the recidivism-reducing effects may come from probationers’ awareness of the threat of this shock incarceration.

But, however we parse out the attribution of recidivism-reduction to specific deterrence, rehabilitation, or incapacitation, we must attend to another side of the equation—the possibility of punishment, especially

---

30. *Id.* at 23–24.

31. *Id.* at 41, 48.

32. *Id.* at 22.

33. Angela Hawken, *HOPE for Probation: How Hawaii Improved Behavior with High-Probability, Low-Severity Sanctions*, J. GLOBAL DRUG POL’Y & PRAC., Fall 2010, at 9.

34. *Id.* at 10.

35. The rate of positive drug tests for HOPE probationers during the first six months fell from 53 percent to 4 percent, compared with a drop for comparison probationers from 22 percent to 19 percent. *Id.* at 11. Arrests for the HOPE group were more than halved, and revocations and incarceration sharply reduced. *Id.* For further evidence of HOPE’s success, see Mark A. R. Kleiman, *Jail Break: How Smarter Parole and Probation Can Cut the Nation’s Incarceration Rate*, WASH. MONTHLY, July/August 2009, available at <http://www.washingtonmonthly.com/features/2009/0907.kleiman.html>.

incarceration, *increasing* recidivism. Whether it does so and how are complex criminological questions. But we can imagine, and find at least unsystematic evidence of, at least two mechanisms for this effect. One is the old idea of prison as a school for crime, perhaps traceable back to the early twentieth century notion of new inmates being tutored in the logistics of specific crimes by more experienced inmates.<sup>36</sup> There may truly be a modern manifestation of this with respect to drug crimes in the form of new inmates learning how to deal drugs more effectively, how to recognize informants, and so on. If so, it may be related to a somewhat more amorphous recidivism-increasing effect from simply becoming more fully recruited into or acculturated to gang organizational life in prison. The other mechanism is the degradation of social skills and other forms of human capital from the time spent in prison. For offenders who already lacked social skills, or who were prone to antisocial behavior, or who were disinclined or unable to undertake productive labor, or who were seriously mentally ill before incarceration, the time spent on the inside is as likely to exacerbate as to mitigate these deficits.<sup>37</sup> Thus, a harsh but perhaps not unduly cynical view would be that the realistic goal of any recidivism-reducing effort is this: so long as offenders are sent to prison for purposes of retribution or general deterrence, the goal of a correctional program must be to mitigate the criminogenic effects of the punishment. Such a view would have interesting implications for measuring recidivism-reduction efforts. It would call for comparison not between the punished and the unpunished but between sub-populations of prisoners subjected to criminogenic effects. And, of course, the fear of social payback from mass incarceration only underscores these concerns.

Examining how we can reduce recidivism thus leads us to some new and nuanced insights about the purposes and mechanisms of punishment, and about what agencies of government should be held responsible for recidivism. Of course, for pragmatists solely concerned with results, the jurisprudence does not matter much. But how satisfied should pragmatists be with evidence of the results?

## V. MEASURING RECIDIVISM

Any effort to credit a particular program with reducing recidivism

---

36. For a helpful overall review of the social science on the “school of crime” effect, see PAUL GENDREAU, CLAIRE GOGGIN & FRANCIS T. CULLEN, THE EFFECTS OF PRISON SENTENCES ON RECIDIVISM 4–5 (1999), available at <http://www.prisonpolicy.org/scans/e199912.htm>.

37. See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 83–163 (2006) (summarizing empirical evidence of various economic and social effects of having been incarcerated).

must be subject to the skepticism that is necessary in assessing *any* empirical causation in crime reduction studies. And there is reason for skepticism at every level.<sup>38</sup> At the very broadest, there is the admonitory message from the famous work by Zimring and Hawkins, *The Scale of Imprisonment*.<sup>39</sup> While their focus is on the difficulty of identifying any reliable determinants of a polity's prison population, they also review the difficulty of finding causation in any direction, including the effect of incarceration rates on crime rates.<sup>40</sup> They conclude that there often are simply too many variables to account for, too many actors with too much and too many kinds of discretion, for us to confidently credit a deliberate program for a measured outcome.<sup>41</sup>

A striking recent lesson in skepticism has come from the virtual academic industry that emerged to assess the dramatic drop in American crime rates at the end of the last century. Initially some criminologists pointed to changes in drug markets<sup>42</sup> or the national economy<sup>43</sup> or to lagged birthrate reductions in certain demographic groups.<sup>44</sup> Others focused on increased incarceration<sup>45</sup> and such new policing techniques as the "broken windows" approach.<sup>46</sup> Economist Steven Levitt then expressed doubt about the relevance of new policing procedures,<sup>47</sup> but found some causal link in

---

38. See Robert Weisberg, *Tragedy, Skepticism, Empirics, and the MPCS*, 61 FLA. L. REV. 797, 802–06 (2009) (discussing the empirical difficulty of comparing differential incarceration policies across states); *id.* at 806–11 (describing the multiplicity of causal factors associated with the crime drop of the 1990s).

39. FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 221 (1991).

40. *Id.* at 121–24.

41. And some links for which a modicum of statistical evidence has emerged seem random if not counterintuitive. Thus, even policies that may be motivated specifically to reduce reliance on prison may sometimes increase imprisonment. For example, regimes of alternative sanctions often end up simply widening the net of criminal supervision and feeding more people into prisons, and often serve not as replacements for prisons but as pressure-release valves to enable the state to retain large prison censuses. *Id.* at 185–86.

42. Jeff Grogger, *An Economic Model of Recent Trends in Violence*, in *THE CRIME DROP IN AMERICA* 266, 275–77 (Alfred Blumstein & Joel Wallman eds., 2000) (arguing that crack cocaine contributed to the rise in violent crime in the mid-1980s).

43. John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in *THE CRIME DROP IN AMERICA*, *supra* note 42, at 207, 241 (hypothesizing that "the booming national economy since the early 1990s may have increased the effectiveness of focused police efforts to address drug problems in specific places").

44. *But see* James Alan Fox, *Demographics and U.S. Homicide*, in *THE CRIME DROP IN AMERICA*, *supra* note 42, at 288, 301–04 (concluding that the abortion-crime-drop hypothesis is only partly supported by crime rate and demographic data from the 1990s).

45. William Spelman, *The Limited Importance of Prison Expansion*, in *THE CRIME DROP IN AMERICA*, *supra* note 42, at 97, 123–25 (estimating the extent to which an increase in incarceration was responsible for the drop in crime in the 1990s).

46. Eck & Maguire, *supra* note 43, at 224–28 (describing the "broken windows" approach).

47. Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain*

the simple increase in police personnel,<sup>48</sup> along with a decline in crack-cocaine use,<sup>49</sup> a higher incarceration rate,<sup>50</sup> and most controversially, the legalization of abortion.<sup>51</sup>

At the same time, some prominent criminologists studied very specific crime reduction programs, such as Boston's *Operation Ceasefire*, New York's *Compstat*, and Richmond's *Project Exile*.<sup>52</sup> Richard Rosenfeld and his group found that New York's homicide trend was not distinct enough from that of other cities for credit to be given to New York-specific policies,<sup>53</sup> and that the small number of incidents in Boston precluded any useful conclusions.<sup>54</sup> However, they found that the tough policies under *Project Exile* may have had some effect.<sup>55</sup> But the entire Rosenfeld study immediately met vigorous opposition from sociologist Richard Berk,<sup>56</sup> who argued that efforts to draw conclusions from nondesigned observational studies is futile. In Berk's view, even with a discrete variable like homicide, the multiple product variables and their components hopelessly confound the search for statistical insights or for any concept of a stringent causal model. He somberly concludes that only carefully predesigned true randomized experiments—virtually inconceivable in criminal justice—can yield reliable results.<sup>57</sup> And further inducement to skepticism comes from Zimring's own work on the recent crime drop.<sup>58</sup> He concedes—indeed declares—that the post-1990 decline was historically significant. And, he suggests, the decline tempts us to look for very specific governmental explanations, because, as he puts it, it took place without any change in the

---

*the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163, 172–73 (2004).

48. *Id.* at 176–77.

49. *Id.* at 179–81.

50. *Id.* at 177–79.

51. *Id.* at 181–83.

52. Richard Rosenfeld, Robert Fornango & Eric Baumer, *Did Ceasefire, Compstat, and Exile Reduce Homicide?*, 4 CRIMINOLOGY & PUB. POL'Y 419 (2005). *Ceasefire* was an antirearm initiative; *Compstat* refers to the use of computer technology for efficient allocation of police to high-crime neighborhoods; *Exile* involved the use of exceptionally high sentences for drugs and firearm crimes and increased federal law enforcement personnel assigned to urban crime. *Id.* at 422–25.

53. *Id.* at 435.

54. *Id.* at 434–35.

55. *Id.* at 437–38.

56. Richard A. Berk, *Knowing when to Fold 'Em: An Essay on Evaluating the Impact of Ceasefire, Compstat, and Exile*, 4 CRIMINOLOGY & PUB. POL'Y 451, 455–59 (2005).

57. *Id.* at 459–61.

58. See FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE 195–99* (2007) (“But the reason that police, imprisonment, employment, and population figures don't produce precision and certainty in estimates of their impact on the crime rate is that we really don't know very much about the unconditional impact of any of these factors on rates of crime.”).

“social fabric.”<sup>59</sup> For example, New York City did not evidence any describable change in social or cultural factors in the relevant years.<sup>60</sup> Nevertheless, Zimring worries that because of the multiplicity of potential causal factors, our statistical science cannot do a very good job of parsing out the meritorious explanatory ones.<sup>61</sup>

One might argue that this skepticism about the state of empirical measurement of crime may not fully apply to recidivism research. The macro issues studied by Zimring and Hawkins, and even the more historically circumscribed issues about the recent crime decline, deal with situations so large and complex as to challenge any search for causation. Even the more targeted studies like Rosenfeld’s, while working with specific policies, concern the effect of those policies on wide and diffuse populations. By contrast, recidivism studies start with relatively circumscribed populations of convicted and punished offenders and then, depending on the policy to be studied, delimit those populations even more. Thus, the problem of multiple causation is somewhat lessened.

Now the general state of empirical evaluation of recidivism studies is far beyond my scope here. I simply want to note that even under these somewhat more promising and narrowed parameters, teasing out the recidivism-reducing effect of any policy can be daunting. But in a brief stab at this exercise, I will focus on one much-discussed legal intervention that has won many adherents in terms of reducing recidivism, but has also been the subject of interesting scrutiny. This is the advent of drug courts and mental health courts.

Drug courts identify offenders with severe addiction problems and for whom a carefully formulated mixture of sanction, supervision, and therapy is thought to be very promising in reducing recidivism. Mental health courts promote a parallel approach for offenders who, while not insane enough to win acquittal, exhibit severe mental illness, and for whom a similar protocol should be effective. In both cases, promising candidates

---

59. *Id.* at 206–09.

60. *Id.* at 207.

61. For example, Zimring casts doubt on Levitt’s inference that the legalization of abortion played a great role. *Id.* at 99–100. Zimring argues that Levitt’s explanation does not account for the wider social factors manifesting the “wantedness” of children or how those factors might affect crime. *Id.* Zimring evinces more faith in the policing practices explanation because New York City, the main venue of police innovation at the time, enjoyed an even greater decline than other places, but Zimring remains agnostic about the degree of casual effect of this factor. *Id.* at 168. And then Zimring exhorts us to ponder the admonitory significance of Canada, a country socially and economically very similar to the United States, which experienced a similar crime decline, but which underwent none of the policy changes researchers have cited in the American story. *Id.* at 107–34.

are diverted during their adjudication and given the conditional opportunity to avoid prison altogether if they succeed in rehabilitation. Doubtless, these are often very effective programs because they identify some instances of addiction or mental illness strongly correlated with offending, and because enforced and targeted therapy is logically much more effective than the general rehabilitation opportunities afforded, if at all, in prison or under probation.<sup>62</sup>

One vociferous critic of drug courts is Josh Bowers, who argues that the incoherent theory underlying these courts produces results that are either misleading,<sup>63</sup> or where accurately measured, very worrisome.<sup>64</sup> Bowers complains that the premise of the selection of offenders for these courts is self-contradictory. The courts aim to break the cycle of irrational drug addiction and compulsive behavior, but expect the offenders to respond positively—and fairly promptly—to treatment plans based on rational self-control and diligent adherence to protocols.<sup>65</sup> Bowers marshals evidence showing that some offenders, the ones who are not so deeply addicted and for whom offending is less compulsive, are able to game their way into this system to avoid prison and will do well in drug court programs.<sup>66</sup> By contrast, the more seriously addicted offenders, the ones for whom offending is sometimes more compulsive, are likely to flunk drug court programs and to be penalized with a conventional long sentence.<sup>67</sup> In effect these offenders are punished for both the crime and the treatment failure.<sup>68</sup> Thus, a drug court that tilts heavily toward the first population will exhibit a strong but somewhat illusory effect in reducing recidivism because of a self-selection bias, while any apparent failure in a program tilted toward the latter population may have to do with an ill-conceived notion of how therapy can best help addicts avoid crime.

As with drug courts, proponents of mental health courts focus on reducing recidivism as the major goal.<sup>69</sup> But a critique that is somewhat

---

62. For a full description and positive evaluation of drug courts, see generally Peggy Fulton Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999).

63. Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 824–27 (2008).

64. *Id.* at 792–97.

65. *Id.* at 787–88.

66. *Id.* at 798–802.

67. *Id.* at 785–86.

68. *Id.* at 788.

69. *E.g.*, Sarah L. Miller & Abigail M. Perelman, *Mental Health Courts: An Overview and Redefinition of Tasks and Goals*, 33 LAW & PSYCHOL. REV. 113, 122 (2009) (suggesting that the primary purpose of mental health courts is reducing reoffending rates).

parallel to Bowers's on drug courts, comes from Lea Johnston's examination of mental health courts.<sup>70</sup> Johnston finds a theoretical incoherence in mental health courts that could distort any meaningful implications for their power to reduce recidivism.<sup>71</sup> After an exhaustive review of the psychological research, she argues that despite some apparent correlations between serious mental illness and crime, the nature and causal direction of the linkage are not established at all.<sup>72</sup> Even where the correlation appears strong, serious mental illness correlates with, or is "mediated" by, many social and economic disadvantages that are criminogenic or that increase the risk of arrest, including heightened susceptibility to police surveillance.<sup>73</sup> Thus, while using a court to direct seriously mental ill offenders to treatment may serve the salutary purpose of leading to mitigation of their mental illness, it may play little demonstrable role in reducing offending.

Standing in contrast is the condition known as antisocial personality disorder, which is farther down on the scale of mental illness, and which, along with other personality disorders, may not merit being classified as an illness at all, because its definition is often tautologically comprised of a description of its behavioral symptoms.<sup>74</sup> Unsurprisingly, this disorder is very closely correlated with the risk predictors of crime. Thus, mental health courts that produce promising outcomes in terms of reducing recidivism may not really be resolving serious mental illness at all. Rather, they may be succeeding with some form of self-control-focused behavior that might be better directed at a larger number of offenders who exhibit antisocial symptoms but are not mentally ill enough to qualify for mental health court diversion.

## VI. MODELING RECIDIVISM

So far, I have suggested that recidivism is a vexingly complicated criminological and social concept, while acknowledging that for some pragmatists a conceptual resolution of the meaning of recidivism at this level of generality is unnecessary to the operation of a criminal justice

---

70. E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 545 (2012).

71. *Id.* at 545–46.

72. *Id.* at 564–75.

73. *Id.* at 564–69.

74. *Id.* at 569–70. See also Robert Weisberg, *The Unlucky Psychopath as Death Penalty Prototype*, in WHO DESERVES TO DIE: CONSTRUCTING THE EXECUTABLE SUBJECT 40, 49 (Austin Sarat & Karl Shoemaker eds., 2011) ("As a matter of diagnosis and prognosis, [antisocial personality disorder] is famously resistant to cure, only marginally susceptible to alleviation, and impervious to anything psychoanalytic that requires moral self-consciousness.").

system. I have also suggested that even if we establish a sensible model of recidivism in terms of formal stages of criminality adjudication and correctional control, measuring the recidivism-reducing effect of any program is challenged by the complexity of interdependent variables that affect the measure. It takes a huge amount of data and some very powerful statistical resources to resolve the latter problem, but at the very least a criminal justice system concerned with recidivism needs to establish the predicate of a working model in the first place. Such a model should be relatively noncontroversial in identifying the key moments and events that help capture recidivism, and it should be concrete enough to be administrable, even if somewhat arbitrary, and that it be applicable across programs or jurisdictions or across time within programs or jurisdictions so as to enable comparisons. In narrowest terms, it should be useful in comparing, for example, the success of different counties' programs under a big scheme like Realignment; in broadest terms, it should offer us a reasonable measure of the existential success over time of a whole criminal justice system.

One recent—and eminently sensible example of a model comes from Los Angeles County, as part of its progress report on implementation of Realignment<sup>75</sup>:

PROPOSED DEFINITION OF RECIDIVISM: “A qualifying return to custody during a specified time period.”

- The “specified time period” proposed is the three-year period immediately following a subject’s custody release. This time period shall continue to run regardless of supervision status (i.e. probation, parole, post release community supervision, mandatory supervision, or no supervision).
- It is proposed that “custody” includes jail, prison, and other alternative sentencing options such as fire camp or electronic monitoring imposed in lieu of jail or prison following a qualifying return event.
- “Qualifying returns” would include:
  - misdemeanor arrests where there has been a new criminal filing or a violation in lieu of a new criminal filing;
  - felony arrests where there has been a finding of probable cause through a preliminary hearing or grand jury indictment;
  - convictions;
  - revocations of community supervision; and

---

75. L.A. CNTY. PUB. SAFETY REALIGNMENT TEAM, PUBLIC SAFETY REALIGNMENT, YEAR-TWO REPORT, Attachment E (2013), available at <http://ccjcc.lacounty.gov/PublicSafetyRealignment.aspx>.

· flash incarceration.<sup>76</sup>

To appreciate the decisions that went into creating this model, we can turn to a brief but foundational essay on recidivism by Joan Petersilia, where she lays out the basic modeling choices.<sup>77</sup> As she elaborates, the modeler must make choices in the following categories: study population; starting event; type of recidivism event; seriousness of recidivism event; follow-up time period; data sources; number of times an offender is counted; and policy variables.<sup>78</sup> Here, I will review some of the details in Petersilia's elaboration of her key categories,<sup>79</sup> and comment on some of the interesting implications of these categories.

—Study population: Do we focus on juveniles as well as adults? And if so, do we include recidivist acts before the age of maturity, or just “crossover” recidivism that starts the clock while the person is a juvenile and then looks for recidivist acts after? The choice may rest on assumptions about whether the normal human processes of maturation independently affect the arc of criminality for many individuals. It also implicates questions about whether the supposedly nonpunitive juvenile delinquency process has a greater—or lesser—deterrent or rehabilitative effect than early sanctions denominated as punitive.

—Starting event: Is it arrest, conviction, grant of probation or parole, entry into a program, release from a program, or release from incarceration? Note that the choices here can implicate many issues. We absolutely need a settled definition of starting event so we can establish a uniform time period. But is the starting event seen simply as the first official marker of criminality? Or do we think of it as the moment of the potentially deterrent or rehabilitative intervention, the action by the state that must be tested for its efficacy? If it is a release from control or incarceration, is that because we test the criminal justice system according to its own claim to have successfully intervened?

---

76. *Id.* In an explanatory comment, the report says:

These identified qualifying events [should] be viewed as multiple tiers of a comprehensive definition. This tiered approach would provide several advantages.

Accounting for all qualifying events ensures a comprehensive approach to measuring recidivism and provides a broader view of system impacts, such as demand on jail beds. However, the tiered approach also enables tailored reports on recidivism to be generated that better address specific comparison needs. For example, recidivism reports with specified qualifying events could be generated to maintain consistency with other reports, as needed.

*Id.*

77. Joan Petersilia, *Recidivism*, in *ENCYCLOPEDIA OF AMERICAN PRISONS* 382, 383 tbl.1 (Marilyn D. McShane & Frank P. Williams III eds., 1996).

78. *Id.* at 382–85.

79. *Id.*

---

---

—Type and seriousness of recidivism event: Perhaps these are the most crucial choices. Here, of course, the endogeneity problem discussed earlier is most evident.<sup>80</sup> But even if we assume some independent authority is identifying a recidivist event, what form must it take and how serious must it be to indicate failure? And whose failure is salient—the offender’s or the system’s? And how bad must failure be, and as compared to what? Might we compare the severity of the recidivist event to the severity of the original crime? The average or typical level of crime committed by the offender earlier? Is the best marker the formal designation of the event as a violation, misdemeanor, or felony? Or is return to jail or prison a more telling evaluative statement by the criminal justice system than the formal designation?

—Follow-up time period: Again, we need some settled and specific definition to make measurements of recidivism possible, but the choice is fraught with criminological and philosophical implications and assumptions. Do we have a notion of human psychology whereby the deterrent or rehabilitative effect of a starting event or sanction dissipates? By that reckoning, perhaps any later offense is caused by a new volitional act by the offender, one that breaks the proximate causal chain. If so, are we defining the time period as one in which the offender is wholly outside any control or threat of control? Or is the choice about the responsibility of government, which should be granted a kind of statute of limitations?

—Data sources: This is a general problem in criminological research, but an unusually serious one if the definition of recidivism is to include events that are not always fully adjudicated and documented. For example, official data can include police reports as well as agency and court conclusions. There are also self-reports and surveys.

—Number of times an offender will be counted: Do we look solely to the first recidivist event? Do we count multiple crimes committed in the relevant period as separate instances of recidivism? If so, we might be shifting public perception from the failure of an individual to an apparently wider social problem. If the individual engages in a criminal transaction that can lead to multiple charges under the statutory definitions of crimes, is each “separate” crime a separate recidivist event? If so, we are introducing a further problem of endogeneity into our measure, a problem often traceable to arbitrary and excessive legislative crime-definition.

Finally, let us return briefly to the larger endogeneity problem.

---

80. See *supra* text accompanying note 18.

Consider the most recent tally of recidivism by the Bureau of Justice Statistics (“BJS”). BJS offers its own numbers on recidivism rates. Sensibly relying on a simple common-denominator model for its national picture, it focuses on the number of events the states denominate as “parole violations” leading to re-imprisonment.<sup>81</sup> But the analytic benefit of such a parsimonious measure may be outweighed by its avoidance of the huge variety of ways in which states count the relevant events. A study by James A. Wilson demonstrates in just one jurisdiction how variable and contingent the definition of a parole violation is.<sup>82</sup> Even within the one jurisdiction he studied, the triggering criteria for revocation changed during the study period, as did the benefit of the doubt accorded parolees by parole agents and the rigor of parole supervision they exercise on parolees.<sup>83</sup> When Wilson examined changes in the parole release and revocation patterns, he found no clear correlations with any demographic criteria or severity of crime or conviction.<sup>84</sup> Rather, the main predictors of the number of parole revocations were the original number of parole releases<sup>85</sup> and population pressures on the jail. That is, in a certain sense, the parole decision, influenced by legal and economic constraints, determined how many violations there will be.<sup>86</sup>

And then consider one more layer of complexity. Since recidivism measures are all about ratios, what if we subanalyze the stages of adjudication and corrections to discover ratios for various combinations of events?<sup>87</sup> We could look to the ratio of new court commitments to parole violators. That ratio would enable us to compare the crime prevention success of the criminal justice or law enforcement system generally to the

---

81. HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, NCJ 224280, PRISONERS IN 2007, at 17 (2008), <http://www.bjs.gov/content/pub/pdf/p07.pdf>. Unsurprisingly, in the 2007 report California’s parole violation rate is the great outlier, *id.*, anomalously high no matter how one adjusts for general population or even prison population.

82. James A. Wilson, *Bad Behavior of Bad Policy? An Examination of Tennessee Release Cohorts, 1993-2001*, 4 CRIMINOLOGY & PUB. POL’Y 485, 490 (2005).

83. *Id.*

84. *Id.* at 507–11.

85. *Id.* at 508 (“Increases in the parole grant rate not only resulted in larger proportions of prisoners being released to parole supervision but ultimately were associated with increases in the proportion of the population that returned to incarceration.”).

86. *Id.* at 508–09. See also Shelia Royo Maxwell, *Rethinking the Broad Sweep of Recidivism: A Task for Evaluators*, 4 CRIMINOLOGY & PUB. POL’Y 519, 521–23 (2005) (arguing that more rigorous supervision sometimes increases revocations because it detects more violations, but sometimes relaxed supervision has the same effect if it reduces behavioral control of parolees); Joel Wallman, *Unpacking Recidivism*, 4 CRIMINOLOGY & PUB. POL’Y 479, 481–82 (2005) (observing that the recidivism-reducing effects of parole also depend on whether original release was mandatory or discretionary under state law).

87. For an elaboration of this approach, see Weisberg, *supra* note 38, at 820.

performance of the prisons: the higher the ratio, the better the performance. Or we could look to the ratio of prisoner releases to parole violators returned. This measure offers a more internally focused assessment of the recidivism-reducing powers of the prison, one at least worth observing over time. A third possible ratio is that of conditional releases to parole violators returned. It could help us evaluate the efficacy of the system in its selection of offenders for release and its supervision of those it chooses. Of course, these possible subratios are just examples of a large number of possibilities within a complex system especially if we look at the voluminous world of probation. The general point is that our choice of a recidivism measure largely depends on what questions we want to answer about whatever decision points in the system we focus on.

## VII. CONCLUSION

My goal in this Essay has not been to settle the meaning of recidivism. Perhaps quite opposite, it has been to urge us to be more self-critical in this exercise and to recognize how many questions and assumptions may underlie any deployment or invocation of this all-too-tempting concept and term when we evaluate our criminal justice systems. Thus, I close with one more point about modesty—modesty both about how well we can settle the meaning of recidivism and also about our criminal justice system generally. Recidivism should not be viewed in binary terms. Perhaps we should not be asking whether a criminal recidivates or not, or whether recidivist acts occur or not. Perhaps we should not even be focusing on the frequency of recidivism for a person or a society. Rather, we should accept that most offenders, regardless of the form of sanction or control or rehabilitation to which they are exposed, are likely to reoffend by some definition at some time, because of tragic facts about human nature and because of the inherent imperfection of human institutions. So, perhaps a better measure—or a rough guide to a better measure—is to ask whether as a result of a state intervention the offender reoffends less frequently or less harmfully than he otherwise might, especially by comparison to the likely downward arc of criminality due to aging. If so, and, of course taking account of the expense of this accomplishment to ensure cost-benefit analysis, we will have succeeded in reducing recidivism.