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What The Numbers Say About How To Reduce Imprisonment: Offenses, Returns, and Turnover

Pamela Oliver

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WHAT THE NUMBERS SAY ABOUT HOW TO REDUCE IMPRISONMENT: OFFENSES, RETURNS, AND TURNOVER

PAMELA OLIVER*

Reformers across the political spectrum are calling for a rollback of mass incarceration. The U.S. rate of incarceration in state prisons would have to decline by 75% to return to its 1970s level. How might this be accomplished? This Article provides descriptive statistics about the mix of offenses, sentence lengths, and admission types and shows that no single approach can undo mass incarceration. Those classified as violent offenders are a majority of those in prison, but nonviolent offenders are a majority of those entering, leaving, or having been in prison. A majority of those in prison are scheduled to be released within five years, meaning that steep reductions in prison admissions can have a large impact on imprisonment rates. Revisiting the sentences and parole options for those who have already been in prison ten years or more could have some impact. An examination of the rate of returns to prison after a first release from prison suggests that the rate of committing a new crime is low and that reductions in revocations for violations of the conditions of supervision are an important avenue for reducing incarceration. The U.S. states vary greatly in their mixes of prisoners by offense, sentence length, and returns to prison for parole violations with no new crime as well as in their histories of trends over time. States will vary markedly in which reforms will affect their prison populations, and assumptions based on old data may not hold true as conditions change.

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I. INTRODUCTION

It is now widely recognized that the United States has a higher incarceration rate than any other nation.¹ The U.S. incarceration rate rose steeply after 1970 and by the 2000s had surpassed even Russia.² The rate of sentenced prisoners incarcerated in state and federal facilities in the United States peaked in 2007 at 506 per 100,000 population of all ages, more than five times the rate of 93 in 1972 at the beginning of the prison boom.³ Incarceration has been declining since the late 2000s but in 2017 was 440, still more than four times higher than

1. *Highest to Lowest – Prison Population Rate*, WORLD PRISON BRIEF, https://prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All [<https://perma.cc/U2BB-Z977>].

2. *United States of America*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/united-states-america> [<https://perma.cc/P55R-P8GN>]; *Russian Federation*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/russian-federation> [<https://perma.cc/DW5D-4LWT>].

3. UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE: NUMBER AND RATE (PER 100,000 RESIDENT POPULATION IN EACH GROUP) OF SENTENCED PRISONERS UNDER JURISDICTION OF STATE AND FEDERAL CORRECTIONAL AUTHORITIES ON DECEMBER 31 tbl.6.28.2012 (2012), <https://www.albany.edu/sourcebook/pdf/t6282012.pdf> [<https://perma.cc/Y9CM-AKTJ>].

it was in the early 1970s.⁴ Policy analysts across the political spectrum have become increasingly critical of the extremely high incarceration rate and of the racial disparities in the system, and there have already been some significant reforms in some states.⁵ However, the dynamics of incarceration and the larger criminal justice system are constantly changing, and assumptions about incarceration based on the past are not necessarily appropriate guides for current policy. This Article provides descriptive information on current imprisonment patterns and their possible implications for reform policies. Although there is growing concern with the whole carceral system,⁶ this Article will focus on state prisons only.

There would need to be a 75% reduction in the number incarcerated to bring the U.S. incarceration back to its early 1970s level. That would involve reducing by about 986,600 the roughly 1,314,500 who were in prison in 2016.⁷ The average reduction in the prison population between 2010 and 2016 (when the decline began) was 12,600 a year, about 1.3%, and the total reduction in seven years was about 9%.⁸ As I will show in more detail below, the largest share of this reduction was in California, and most of the decline is due to reductions in the imprisonment of drug offenders.⁹ Further reductions of a scale needed to roll back mass incarceration will need to occur across the offense spectrum, including violent offenders.

Mass incarceration happened not because there were more people committing crimes but because the people who were accused of crimes spent more time in prison. These people were more likely to be convicted of felonies

4. JENNIFER BRONSON & E. ANN CARSON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2017, at 1 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [<https://perma.cc/9WYA-267H>]; UNIV. AT ALBANY, *supra* note 3, at tbl.6.28.2012. The rate of sentenced prisoners under state and federal jurisdiction was 137 in 1939, went down to about 100 and then up to about 119 in 1961, went down and to a low of 93 in 1972, then started to rise, peaking at 506 in 2007 and down to 480 in 2012, UNIV. AT ALBANY, *supra* note 3, at tbl.6.28.2012, and 440 in 2017, BRONSON & CARSON, *supra*, at 1.

5. See David Dagan & Steven M. Teles, *Locked In? Conservative Reform and the Future of Mass Incarceration*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 266, 266–76 (2014).

6. Katherine Beckett, *The Politics, Promise, and Peril of Criminal Justice Reform in the Context of Mass Incarceration*, 1 ANN. REV. OF CRIMINOLOGY 235, 237–38 (2018).

7. The source of the number of prisoners and change in number of prisoners is my calculations from the National Prisoner Statistics. Rates are adjusted for population. The peak of the number in prison in the NPS data is 2009, when 1,403,803 were in state and federal prisons. See generally, U.S. DEP'T OF JUSTICE, NATIONAL PRISONER STATISTICS, 1978–2016 (2018) [hereinafter NATIONAL PRISONER STATISTICS], <https://doi.org/10.3886/ICPSR37003.v1> [<https://perma.cc/UEW7-ERAF>].

8. See generally *id.*

9. See *infra* Section F. Nonviolent Offenses

than misdemeanors for what they did.¹⁰ When convicted, they were more likely to be sentenced to prison rather than not.¹¹ When sentenced to prison, their sentences were longer, and they stayed in prison for a higher proportion of their sentences as early release for parole declined.¹² When released from prison, they were more likely to return to prison.¹³ The report of the National Research Council (NRC) showed that rising arrests and prison sentences for drug charges were major sources of growth in incarceration in the late 1980s and early 1990s, especially for blacks and Latinos, but drug charges ceased to be an overall source of growth after 2000.¹⁴ The NRC's decomposition shows that arrests per crime played some role in the rise of incarceration from 1980 to 1990, but none thereafter; they find that imprisonments per arrest were the largest contributors to prison growth from 1980 to 1990.¹⁵ For changes between 1990 and 2000, changes in time served were the most important sources of growth, with imprisonments per arrest in second place and arrests per crime unimportant.¹⁶

10. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 6 (2017) [hereinafter LOCKED IN]; John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program on Sentencing Practices*, 13 AM. L. & ECON. REV. 491, 504 (2011) [hereinafter *Myths and Realities*]; John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* 10 (Jan. 23, 2012) [hereinafter *Causes of Growth*], <https://ssrn.com/abstract=1990508> [<https://perma.cc/D3YW-RFJY>].

11. LOCKED IN, *supra* note 10, at 72.

12. NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 34 (2014).

13. See PEW CENTER ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 9, 12 (2011), https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2011/pewstateofrecidivismpdf.pdf [<https://perma.cc/ZCA8-GV5H>].

14. NATIONAL RESEARCH COUNCIL, *supra* note 12, at 33–69. However, my own analysis shows that while drug sentences for blacks and Latinos declined markedly in major urban areas, this masked the fact that sentences to prison for whites were still going up, especially in smaller cities and rural areas with small black populations. See Pamela E. Oliver, *Racial Patterns in State Trends in Prison Admissions 1983–2003: Drug and Non-Drug Sentences and Revocations*, U. WIS.-MADISON 1–2, 7 [hereinafter *State Prison Admission Trends*], <https://www.ssc.wisc.edu/~oliver/racial-disparities/state-prison-admission-trends/> [<https://perma.cc/ZJD7-FZ5Z>]; Pamela E. Oliver, *Prison Sentence Trends by Area Type: 1985–2001*, at 6 (June 2012) [hereinafter *Prison Sentence Trends*], osf.io/preprints/socarxiv/3nw8q [<https://perma.cc/Y84N-KWAZ>]; Pamela Oliver, *Education and Poverty as Factors in White and Black Rural and Urban Prison Admission Rates* 9 (Jan. 16, 2018) [hereinafter *Education and Poverty*], <https://osf.io/preprints/socarxiv/xzq7w/> [<https://perma.cc/RR6L-2RUU>].

15. NATIONAL RESEARCH COUNCIL, *supra* note 12, at 54.

16. *Id.*

As mass incarceration boomed, one source of this increase was the reincarceration of released prisoners. Those released from prison were more often returned to prison on revocations from the community supervision system.¹⁷ The time spent on supervision after prison increased in many jurisdictions, and the community supervision system shifted from an orientation focused on helping people reintegrate into society grounded primarily in social work to a supervisory orientation focused on preventing future crime and treating violations of the conditions of supervision as evidence of crime risk.¹⁸

Although the spectacular rise in black and Latino drug convictions in the late 1980s and early 1990s fueled a huge rise in the racial disparity in imprisonment, most of those offenders were sentenced to relatively short periods in prison.¹⁹ As prison admissions for drug crimes declined in the big cities after the mid-1990s and even more after 2007, drug offenders became a smaller share of the prison population.²⁰ The 1994 Omnibus Crime Bill incentivized prison building, increased sentences for violent crime, and increased truth in sentencing and three strikes laws that increased time in prison.²¹

As the reform movement against mass incarceration gained steam, the mass incarceration of black people, especially for drug offenses, was an early reform

17. *Id.* at 41.

18. See James Bonta, Tanya Rugge, Terri-Lynee Scott, Guy Bourgon, & Annie K. Yessine, *Exploring the Black Box of Community Supervision*, 47 J. OFFENDER REHABILITATION 248, 248–49, 261, 264, 267 (2008); Ryken Grattet & Jeffrey Lin, *Supervision Intensity and Parole Outcomes: A Competing Risks Approach to Criminal and Technical Parole Violations*, 33 JUST. Q. 565, 567 (2016); PEW CENTER ON THE STATES, *supra* note 13, at 27, 30–31; Joel M. Caplan, *Parole System Anomie: Conflicting Models of Casework and Surveillance*, FED. PROB., Dec. 2006, at 32, 33; Cecelia Klingele, *Rethinking the Use of the Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1027–29 (2013).

19. *State Prison Admission Trends*, *supra* note 14, at 1; *Myths and Realities*, *supra* note 10, at 494.

20. See generally NATIONAL PRISONER STATISTICS, *supra* note 7. Among the twenty states with complete data from 2000–2016 in the NCRP, the proportion in prison for drug offenses declined from 21% to 14%. The largest change was in California, but even excluding California, the decline for the other nineteen states was from 20% to 16%. I have examined the time plots for individual states, and black drug sentences declined in the majority of states in this period, while the pattern for white drug sentences was more variable.

21. Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §§ 13701–14223 (2012); *Prison Sentence Trends*, *supra* note 14, at 5; DENNIS SCHRANTZ, STEPHEN T. DEBOR, & MARC MAUER, *DECARCERATION STRATEGIES: HOW 5 STATES ACHIEVED SUBSTANTIAL PRISON POPULATION REDUCTIONS* 44 (2018), <https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions> [<https://perma.cc/J7RG-L9TD>]; Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INT., Spring 1974, at 22, 23.

target. State imprisonment rates fell in major metropolitan areas with large black populations while they continued to rise in predominantly-white smaller cities and rural areas.²² These initial reforms focused on low-level drug offenders and other “nonviolent” offenders without challenging discourses that treat “violent” offenders as a homogenously irredeemable threat to social welfare.²³ As incarceration has fallen in some states, especially California,²⁴ through releasing large numbers of nonviolent offenders, attention has shifted to violent offenders, especially those serving very long sentences, as an ongoing source of mass incarceration.²⁵ This Symposium is one example of the return of former attention to violent offenders.²⁶

In addition to attending to changes over time in the mix of prisoners, it is important to recognize that states are different from each other in their policies, offender mix, and trajectories over time. Between 1972 and 2000, all states experienced growth in imprisonment, although they varied in its extent.²⁷ States were much more variable after 2000, with some states experiencing decline and others growth, although less growth than before 2000.²⁸

Recent attention has turned toward asking whether some violent offenders can be released from prison—or never sent to prison in the first place—without sacrificing public safety. However, even these discussions of “violent offenders” are often based either on blurry images of “typical” offenders, or highly sympathetic extreme cases, such as youths who never killed anyone who are sentenced to life imprisonment under felony homicide laws.²⁹ Additionally, many policy prescriptions are based either on outdated information or on national averages or case studies of particular states.³⁰ These fail to recognize the great variation between states in their current policies and practices regarding incarceration. The recent decline has been concentrated in a few states that reduced incarceration markedly, with California alone accounting for

22. *Education and Poverty*, *supra* note 14, at 9.

23. LOCKED IN, *supra* note 10, at 185–86.

24. SCHRANTZ, DEBOR, & MAUER, *supra* note 21, at 5.

25. LOCKED IN, *supra* note 10, at 186–87.

26. This point is stressed by *id.* at 185. See also NAZGOL GHANDNOOSH, THE NEXT STEP: ENDING EXCESSIVE PUNISHMENT FOR VIOLENT CRIMES 5 (2019), <https://www.sentencingproject.org/publications/the-next-step-ending-excessive-punishment-for-violent-crimes/> [<https://perma.cc/VAU4-HCCS>].

27. See generally NATIONAL PRISONER STATISTICS, *supra* note 7.

28. NATIONAL RESEARCH COUNCIL, *supra* note 12, at 42; *State Prison Admission Trends*, *supra* note 14, at 1–2.

29. See, e.g., GHANDNOOSH, *supra* note 26, at 34.

30. See David S. Kirk & Sara Wakefield, *Collateral Consequences of Punishment: A Critical Review and Path Forward*, 1 ANN. REV. OF CRIMINOLOGY 171, 177 (2018).

most of the recent national decline.³¹ Meanwhile, many other states were still increasing incarceration.³²

A return to 1970s incarceration rates would require a 75% cut in the number in state prisons. How could this 75% cut be possible? This Article cannot answer that question but can shed some light on where to look for such reductions by analyzing data on prisoners released from and currently in prison. The analysis shows that there is no magic bullet. The only way to undo mass incarceration is to undo a wide variety of policies to reduce the use of prison sentences at all for lesser offenses and dramatically shorten prison sentences for worse offenses. These include reducing the use of prison as punishment in the first place, reducing effective sentence lengths and time served for any given offense, and reducing the reincarceration people for noncrime violations of the conditions of supervision or for crimes that would not ordinarily draw prison sentences. The analysis also shows that states vary greatly in their mix of prisoners and that different policies are needed to reduce incarceration in different places.

II. INTERROGATING INCARCERATION

The very question of whether there are alternatives to incarceration for violent offenders presupposes that incarceration is a reasonable default option. The ideological underpinnings of mass incarceration was the “nothing works” movement of the 1980s that argued that criminals needed to be incarcerated to incapacitate them from future crimes because treatment and rehabilitation did not work to promote desistance.³³ Ironically, Robert Martinson’s original 1974 “nothing works” article, an evaluation of 231 studies of correctional treatments, actually argued *against* incarceration, saying that most offenders were responding to the conditions in their society, that a period of incarceration made these conditions worse, and that it was mistaken to defend incarceration as an opportunity for treatment and rehabilitation.³⁴ Martinson’s original arguments were consistent with a long tradition of research linking crime rates to economic conditions and employment options.³⁵

31. SCHRANTZ, DEBOR, & MAUER, *supra* note 21, at 5.

32. *Id.*

33. See Francis T. Cullen & Paul Gendreau, *From Nothing Works to What Works: Changing Professional Ideology in the 21st Century*, 81 PRISON J. 313, 321 (2001).

34. See Martinson, *supra* note 21, at 24, 29–30, 42, 48–50.

35. See Lance Hannon & Robert DeFina, *The State of the Economy and the Relationship between Prisoner Reentry and Crime*. 57 SOC. PROBS. 611, 612 (2010).

An incapacitation model assumes the counterfactual that a person arrested for a crime will go on to commit other crimes if not incarcerated, but this depends on the assumption that it is possible to predict potential future crime from the circumstances of an arrest. A 1994 study that analyzed the twenty-five-year histories of 6,000 offenders found that there was little ability to predict future criminal careers from past behavior.³⁶ The mass incarceration movement also lengthened sentences and increased the crimes drawing life sentences, even though it is widely acknowledged that most people's likelihood of committing a crime declines with age.³⁷ Thus, mass incarceration involves high rates of treating people as incorrigible serial offenders when, in fact, they are not.

A. *Effects of Imprisonment on Future Crime*

There is little consistent evidence that a period of imprisonment reduces the likelihood of committing a crime after the period of confinement, and some arguments that going to prison is criminogenic, that is, increases the risk of future crime. The posited criminogenic effects include associations with criminals in prison, the psychological stresses of prison, weakened ties to family and community, and diminished employment and educational opportunities after leaving prison.³⁸ Reviews of multiple studies find mixed results on the effect of custody.³⁹ A systematic review of the effects of punitive and rehabilitative approaches finds at best modest effects of supervision and sanctions—and sometimes criminogenic effects—while rehabilitative programs generally have positive effects, although these vary depending on the type of treatment, how well it is implemented, and the type of offenders.⁴⁰ One study of the arrest histories of people released from state prisons in 1994 concluded that 56% were merely incapacitated, 40% deterred from future

36. Stephen D. Gottfredson & Don M. Gottfredson, *Behavioral Prediction and the Problem of Incapacitation*, 32 CRIMINOLOGY 441, 441, 466, 468 (1994).

37. See Marie Gottschalk, *Extraordinary Sentences and the Proposed Police Surge*, 10 CRIMINOLOGY & PUB. POL'Y 123, 124 (2011). Gottschalk criticizes the move to life sentences, saying that about one in eleven people in prison is serving a life sentence despite evidence that they would have lower recidivism rates than others. *Id.* at 125.

38. Kirk & Wakefield, *supra* note 30, at 175.

39. Amy E. Lerman, *The People Prisons Make: Effects of Incarceration on Criminal Psychology*, in DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM 151, 152–53 (Steven Raphael & Michael A. Stoll eds., 2009).

40. Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297, 302, 307–311 (2007).

crime, and only 4% had a criminogenic effect.⁴¹ Another study conducted in the 1990s found that a period of confinement increased the risk of future arrest for first-time arrestees but reduced the risk for experienced offenders.⁴² A study of people convicted of drug felonies in Kansas City, Missouri, in 1993 found that those sent to prison recidivated more quickly and at higher rates than those placed on probation.⁴³ A study of California prison inmates randomly assigned to higher-security custody in prison in 1998–1999 had a higher rate of reoffending than those randomly assigned to a less-secure facility, suggesting the importance of peer influence and environmental strain effects.⁴⁴

There are also spillover effects on communities.⁴⁵ An examination of the effect of rates of prison admission and release in Florida found criminogenic effects of imprisonment after five years due to the increased prevalence of former prisoners in a community.⁴⁶ A substantial and growing sociological literature examines the negative consequences for children of having an incarcerated parent, including effects that increase the likelihood of crime in the next generation.⁴⁷

41. Avinash Singh Bhati & Alex R. Piquero, *Estimating the Impact of Incarceration on Subsequent Offending Trajectories: Deterrent, Criminogenic, or Null Effect?*, 98 J. CRIM. L. & CRIMINOLOGY 207, 247 (2007).

42. Christina DeJong, *Survival Analysis and Specific Deterrence: Integrating Theoretical and Empirical Models of Recidivism*, 35 CRIMINOLOGY 561, 571 (1997).

43. See Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 329, 352 (2002).

44. Gerald G. Gaes & Scott D. Camp, *Unintended Consequences: Experimental Evidence for the Criminogenic Effect of Prison Security Level Placement on Post-Release Recidivism*, 5 J. EXPERIMENTAL CRIMINOLOGY 139, 142 (2009).

45. Todd R. Clear, Elin Waring, & Kristen Scully, *Communities and Reentry: Concentrated Reentry Cycling*, in PRISONER REENTRY AND CRIME IN AMERICA 179, 187–88 (Jeremy Travis & Christy Visser eds., 2005); Robert DeFina & Lance Hannon, *For Incapacitation, There Is No Time Like the Present: The Lagged Effects of Prisoner Reentry on Property and Violent Crime Rates*, 39 SOC. SCI. RES. 1004, 1012 (2010).

46. DeFina & Hannon, *supra* note 45, at 1012.

47. See, e.g., John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, in 26 PRISONS 121, 123–29 (Michael Tonry & Joan Petersilia eds., 1999); Harry J. Holzer, *Collateral Costs: Effects of Incarceration on Employment and Earnings Among Young Workers*, in DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM 239, 242 (Steven Raphael & Michael A. Stoll eds., 2009); Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 110–11 (2008); Robert H. DeFina & Lance Hannon, *The Impact of Adult Incarceration on Child Poverty: A County-Level Analysis, 1995–2007*, 90 PRISON J. 377, 391 (2010); Holly Foster & John Hagan, *The Mass Incarceration of Parents in America: Issues of Race/Ethnicity, Collateral Damage to Children, and Prisoner Reentry*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 179, 190 (2009); Lance Hannon & Robert DeFina, *Sowing the Seeds: How Adult Incarceration Promotes Juvenile Delinquency*, 57 CRIME, L. & SOC. CHANGE 475, 487 (2012); Kirk & Wakefield, *supra* note 30, at 176; David F. Weiman, *Barriers to Prisoners' Reentry*

B. *Supervision After Prison*

There is an extensive debate and discussion about the matter of people coming and going from prison and about how much and what kind of supervision people should receive when they leave prison.⁴⁸ Many more people have gone through prison than are in prison at any one time. In the National Corrections Reporting Program (NCRP) term records, for example, there were 1,212,756 people in prison in the last year for which there was data, but there were 4,992,554 people who were in prison one or more times between 2000 and 2016, or 4.12 times as many.⁴⁹ The large majority of people who entered prison got out again.⁵⁰ The people going and coming from prison in high numbers are the lower-level offenders who received shorter sentences.⁵¹ What happens with them after they leave prison is an important part of the prison story.

An older 1977 study by Martinson and Wilks reviewed a wide collection of data on arrests, convictions and returns to prison for people released from prison, and concluded that recidivism was lower for those released to parole than for those released unconditionally.⁵² There is a current debate about whether parole supervision is helping or hurting reentry and desistance. There are concerns that parole supervisors have become more focused on enforcement of rules than on providing reentry services to released prisoners or meeting their treatment needs.⁵³ There is specifically a debate about whether incarcerating supervisees for rule violations prevents recidivism. A study of released prisoners in Washington found that, after controls for offender characteristics, social supports and needs, those returned to prison on technical violations had an increased likelihood of committing a crime.⁵⁴ Recent scholars are arguing for a return to rehabilitative models.⁵⁵ A study of drug offenders found that

into the Labor Market and the Social Costs of Recidivism, 74 SOC. RES. 575, 576 (2007); Christopher Wildeman, Jason Schnittker & Kristin Turney, *Despair by Association? The Mental Health of Mothers with Children by Recently Incarcerated Fathers*, 77 AM. SOC. REV. 216, 218–19 (2012).

48. See COMMUNITY CORRECTIONS: PROBATION, PAROLE, AND INTERMEDIATE SANCTIONS 49–51 (Joan Petersilia ed., 1998).

49. NATIONAL PRISONER STATISTICS, *supra* note 7, at 6.

50. See Christopher Michael Campbell, *Dooming Failure: Understanding the Impact, Utility, and Practice of Returns on Technical Violations 2* (May 2015) (unpublished Ph.D. dissertation, Washington State University).

51. Beckett, *supra* note 6, at 245.

52. Robert Martinson & Judith Wilks, *Save Parole Supervision*, 41 FED. PROB. 23, 23–27 (1977).

53. See Bonta, Ruge, Scott, Bourgon, & Yessine, *supra* note 18, at 248.

54. See Campbell, *supra* note 50, at 132–33.

55. See, e.g., Cullen & Gendreau, *supra* note 33, at 334; Francis T. Cullen, *The Twelve People Who Saved Rehabilitation: How the Science of Criminology Made a Difference*, 43 CRIMINOLOGY 1,

only residential drug treatment, not incarceration, reduced recidivism.⁵⁶ One review of research suggests that more emphasis should be placed on programs in prison to reduce their criminogenic effects and on community programs to aid reentry.⁵⁷ Policies suggested by the Pew study of recidivism include rewarding workers for recidivism reduction, preparing inmates prior to release and improving support at the time of release, avoiding intensive programming for low-risk offenders for whom it can be counterproductive and instead concentrating programming resources on high-risk offenders, imposing swift and certain alternate sanctions, and creating incentives for offenders to succeed.⁵⁸

III. DATA⁵⁹

Most of this report uses numbers calculated from the National Corrections Reporting Program.⁶⁰ State departments of correction voluntarily submit individual-level records about prison admissions and releases to the Bureau of Justice Statistics (BJS).⁶¹ For the submissions since 2000, Abt Associates has processed these submissions and turned them into “term” records that match records and assign person IDs to make it possible to track the admission and release and readmission of the same prisoner over time.⁶² There are errors in these data. First, the data originally submitted by the states often are missing information for many data fields or include errors. Second, each state has its own rules for classifying offenders across variables, and the BJS process for

26 (2005); Francis T. Cullen, Paula Smith, Christopher T. Lowenkamp, & Edward J. Latessa, *Nothing Works Revisited: Deconstructing Farabee’s Rethinking Rehabilitation*, 4 VICTIMS & OFFENDERS 101, 116 (2009).

56. Hung-En Sung, *Differential Impact of Deterrence vs. Rehabilitation as Drug Interventions on Recidivism After 36 Months*, 37 J. OF OFFENDER REHABILITATION 95, 105 (2003).

57. Susan Turner, Randy Myers, Lori Sexton & Sarah Smith, *What Crime Rates Tell Us About Where to Focus Programs and Services for Prisoners*, 6 CRIMINOLOGY & PUB. POL’Y 623, 625, 627–28 (2007).

58. PEW CENTER ON THE STATES, *supra* note 13, at 27–31.

59. The Stata files that created the analytic data files from the official data sources and all figures and tables in this Article, along with supplementary tables to further document the analysis, are deposited with the Open Science Framework at <https://osf.io/gbprw/>.

60. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NATIONAL CORRECTIONS REPORTING PROGRAM, 2000–2016 (2019), <https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/37007> [<https://perma.cc/AGG8-CKGC>].

61. *Data Collection: National Corrections Reporting Program (NCRP)*, BUREAU JUST. STATISTICS, <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=268> [<https://perma.cc/WNY8-BUH6>].

62. *National Corrections Reporting Program Resource Guide*, NAT’L ARCHIVE CRIM. JUST. DATA, <https://www.icpsr.umich.edu/icpsrweb/content/NACJD/guides/ncrp.html> [<https://perma.cc/2ZBE-GAWK>].

creating common codes across states can introduce errors or inconsistencies.⁶³ Except for cases of obvious errors or internal inconsistencies, I use the data codes as they exist in the NCRP. Comparisons between states therefore include a mixture of “real” differences and administrative or coding differences.

Third, the process of matching people up between years sometimes contains errors, which matters for analyses tracking returns to prison. There are obvious errors in the data, including releases for death followed by readmission to prison and people whose gender, race, date of birth, and offense mix bounces back and forth across records. In the analysis of returns to prison, I dropped people whose sex and either date of birth or race did not match between records. Many of the “race” changes are plausible, as mixed-race people are often classified differently at different times, and most of the date of birth changes involved either the same month or same year of birth, suggesting a data coding error. However, this does mean that the analysis of new offenses in returns to prison probably includes a small number of cases of “new offenses” that were really different people. Conversely, some readmissions have been missed due to match failures.

I also use the National Prisoner Statistics dataset⁶⁴ to construct some of the introductory figures. This dataset gives the counts of people in state prisons each year from 1978 to 2016 but has no information about offenses or admission types.

A. *Sampling*

I have constructed several sub-samples from the NCRP data for different analyses. The “last valid” data is the subset of people who were in prison or admitted to or released from prison at the end of data collection. Including the District of Columbia, there are fifty-one states, of which six provided no data to the NCRP between 2000 and 2016. Different subsets of states are used for different analyses. There are forty-five states in the “last valid” analyses. For

63. For example, I realized during analysis that the 2014 release of the NCRP mistakenly reversed the race codes for Asians and whites for the state of Ohio, a mistake confirmed in a private email correspondence with a BJS statistician and corrected in later releases. As an example of an inconsistency, Wisconsin’s prison admissions for “alternative to revocation,” where an offender is sent to prison for up to ninety days but is not officially revoked, are coded as type “other” in the prison admission type field in the restricted data and as a type of parole revocation in the public data, which can be confirmed in the documentation file *Other_Crosswalk.xlsx* and was corroborated by Wisconsin Department of Corrections when I made an official inquiry. Some states classify probation revocations as new commitments, and some states classify all prison admissions as new commitments, as detailed perusal of the documentation reveals. Detailed documentation files are available at *National Corrections Reporting Program Resource Guide*, *supra* note 62.

64. NATIONAL PRISONER STATISTICS, *supra* note 7.

thirty-nine states, the last valid year is 2016; for six states this is a year between 2012 and 2015.⁶⁵ This sample of states is further restricted in some analyses for states that had too-high proportions of missing data for sentence lengths or offense categorizations or admission categories.

For the analysis of returns to prison after release, I selected a subsample of states that had at least five years of records between 2007–2016 and people whose first release from prison occurred between 2006 and 2016. If there was no second record, I counted those people as not having returned to prison. If there was a second record, I compared the first and second records to classify the type of return to prison. Second or subsequent releases from prison were excluded entirely from the analysis of returns to prison. There are thirty-six states in the continuous analysis of returns to prison by month, and thirty-three states in the five-year outcome analysis.⁶⁶

IV. STATE DIFFERENCES

National trends in incarceration over time mask the fact states vary greatly both in their overall rates of incarceration and that different things happened in different places at different times. Michael Campbell stresses the importance of examining specific state histories of penal policies, which show how multi-layered and messy penal politics are, how they are products of competing political and ideological forces, and how these politics are always racialized but follow different dynamics in different places.⁶⁷

Figure 1 shows the scatterplot of the number in prison in the last valid NCRP data by the imprisonment rate, using state postal codes as markers. As Figure 1 shows, the states vary tremendously both in the number of prisoners they contribute to the national prison statistics (and thus their impact on national statistics) and on the proportion of their residents who are imprisoned. Larger states and states with higher incarceration rates contribute more to the national

65. For Maryland this is 2012, for Alaska and Oregon 2013, for North Dakota 2014, for D.C. and New Mexico 2015.

66. However, New Hampshire has only 64 cases that qualify and New Mexico only 257, so analyses that control for state effects drop these two states. Further inspection revealed that there were less than twenty cases of unconditional release in Illinois and Oregon, so the unconditional releases from those states are dropped from analysis of outcomes. Also, less than 1% of Nebraska releases are followed by returns, so that is most likely a problem with record matching, and thus, Nebraska is dropped from analysis of returns as well. Spells were dropped if the admission and release dates are the same in a record or if the return to prison in the following record has the same date as the release date in the preceding record; admission and release dates are all rounded to the 15th of the month.

67. Michael C. Campbell, *Varieties of Mass Incarceration: What We Learn from State Histories*, 1 ANN. REV. OF CRIMINOLOGY 219, 220, 222–23 (2018).

trends than smaller states with lower incarceration rates. Using the NPS data, I calculated that in 2016, three states (Texas, California, and Florida) accounted for about 30% of all prisoners in state prisons in the US, and seven states (adding Georgia, Ohio, Pennsylvania and New York) accounted for almost half, 46%. If we consider the rate of imprisonment,⁶⁸ these large population states with lots of prisoners are not exceptionally high in their imprisonment rates and vary substantially among themselves.

FIGURE 1: NUMBER IN PRISON BY IMPRISONMENT RATE (NPS)



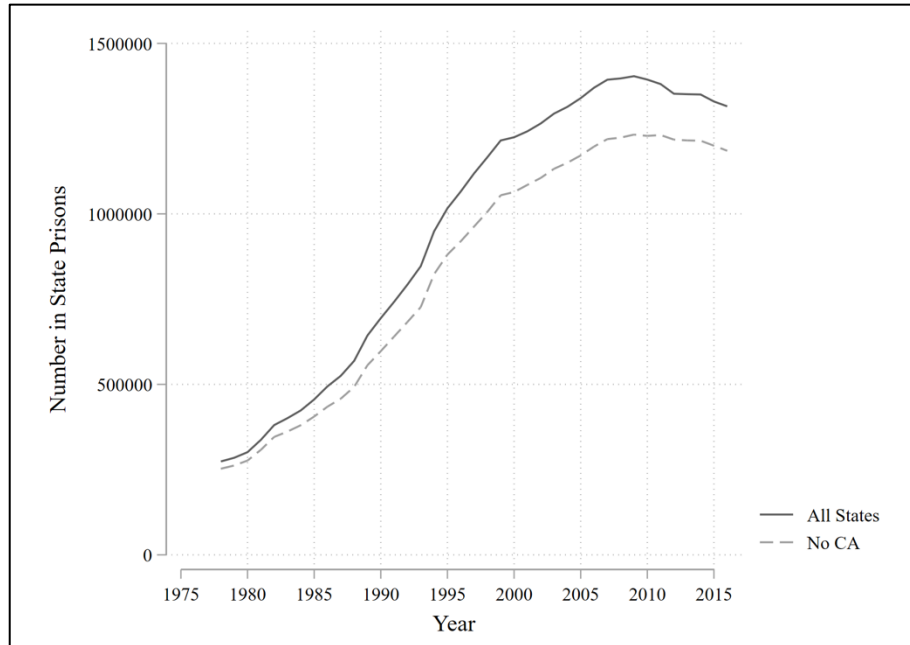
As Figure 1 shows, Texas has a much higher imprisonment rate and has about 20% more prisoners than California even though California is the largest state with a population of nearly 40 million that is about 41% larger than the Texas's second largest population of 28 million. The third most populous state, Florida, has fewer prisoners than California but a substantially higher rate. The fourth most populous state, New York, has about the same number of prisoners as the less populated states of Georgia, Pennsylvania, and Ohio because its imprisonment rate is relatively low.

The highest state imprisonment rate of 762 in Louisiana is 5.5 times higher than the lowest rate of 130 in Massachusetts. Massachusetts is the 15th largest state by population with about seven million residents and Louisiana is ranked

68. The number of prisoners divided by the population size and then multiplied by 100,000.

25th in population with about 4.6 million residents, but Louisiana has nearly four times as many prisoners as Massachusetts. As will be shown below, in addition to varying in their overall incarceration rates, the states differ markedly in their mix of inmates by offense, sentence length, and admission category.

FIGURE 2: NATIONAL NUMBER OF PEOPLE IN STATE PRISONS BY YEAR, WITH AND WITHOUT CALIFORNIA (NPS)



As Figure 2 shows, nationally, the number of people in state prisons increased steadily between 1978 and 2010, when it started to decline. However, most of the decline in incarceration between 2010 and 2012 came from California, which had a net decline of over 6,000 prisoners in 2010 and then over 15,000 prisoners in 2011 and again in 2012. The U.S. Supreme Court ordered in 2011 that 40,000 prisoners be released due to overcrowded conditions in the prisons, and California voters passed Proposition 47 in 2014 that reduced many nonviolent crimes from felonies to misdemeanors and Proposition 57 in 2016 that expanded the eligibility for parole.⁶⁹

69. Beckett, *supra* note 6, at 251, 251 n.13.

FIGURE 3: CHANGE IN NUMBER IN STATE PRISON BETWEEN 1990 AND 2000 BY CHANGE BETWEEN 2000 AND 2016 (NPS)

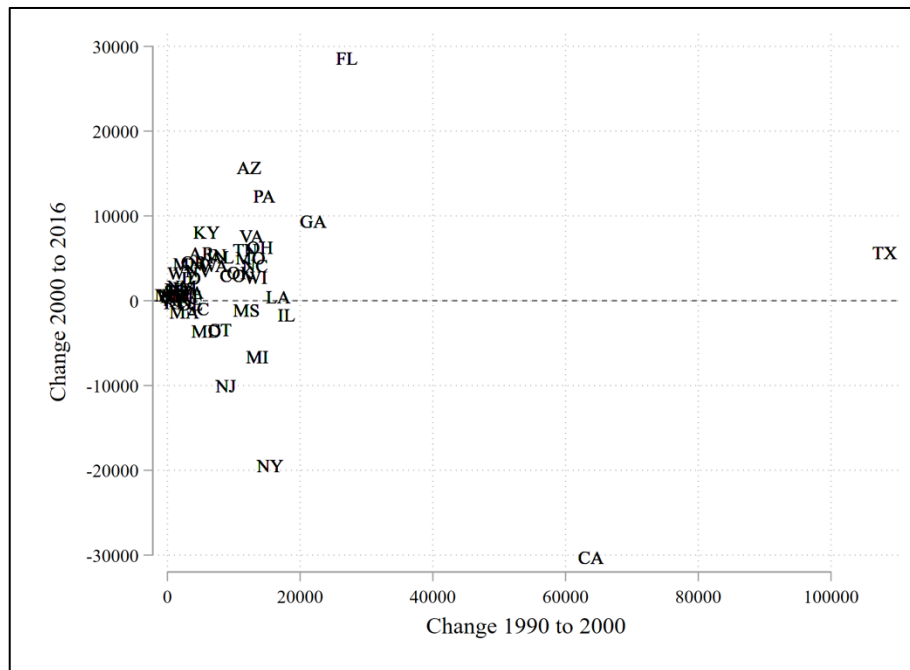


Figure 3 shows the scatterplot of the change in the number of prisoners in two decades: between 1991 and 2000, and between 2000 and 2016. All states increased in the first era (horizontal axis has no negative values), with Texas adding over 100,000 prisoners in this period, and California adding more than 60,000. After 2000, the patterns become more mixed. Twelve states reduced the number of prisoners: California declined by 30,000, New York by nearly 20,000, New Jersey by 10,000, and Michigan by 6,000. Other states showed smaller declines. Most states increased, with thirteen states increasing by more than 5,000. The largest increases were Florida at over 28,000, Arizona at nearly 16,000, Pennsylvania at 12,000, Georgia at over 9,000, and Kentucky at over 8,000.

FIGURE 4: NUMBER IN STATE PRISON BY YEAR FOR SEVEN LARGE STATES (NPS)

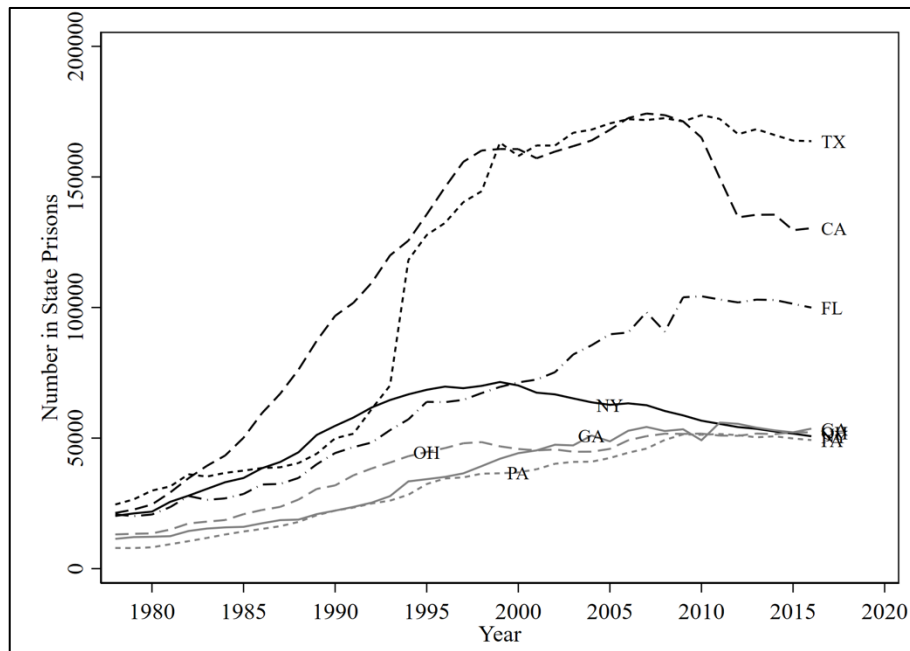


Figure 4 shows the trend in total numbers in prison for the seven large states, showing how different states had different trajectories. California had an early steep growth through the late 1990s, then grew more slowly through 2008 before rapidly declining. Texas started growing more slowly but then grew steeply in the late 1990s before leveling off to a slower growth rate. Florida grew steeply throughout the period, leveling off after 2010. New York, by contrast grew through 1995 and began declining after 1999, the only one of these large states to show steady long-term decline. Ohio, Georgia, and Pennsylvania all showed steady increase through most of the period, with Ohio leveling out more after the late 1990s.

Although the big states matter disproportionately, over half of the national prison population is in the smaller states which, themselves, vary tremendously in their propensity to imprison people (their imprisonment rates) and in their contribution to total national imprisonment.

V. OFFENSES

The NCRP dataset lists up to three offenses, each of which can have multiple counts. The first offense field is supposed to be the one with the longest sentence, and the sentence length for the first offense is given, along with the total sentence. There are also two “additional offense” fields for offenses added after prison admission.⁷⁰ The Bureau of Justice Statistics (BJS) recodes states’ offense categories into standard BJS categories, sometimes with an ill fit, especially for the less common offense types.⁷¹ After examining the frequencies and sentence length distributions, I regrouped the offenses into the broader categories shown in Figure 5, which also shows both the national percent of prisoners in each category with a red vertical mark and a numeric label and the scatter plot distribution of state percentages. As with the total incarceration rate, there is great between-state variability in the proportion of their prisoners in each of these categories.

70. When reporting median sentence lengths for offenses, I use the offense that was listed first and associated with the sentence length. When matching up offenses between records to determine whether there was a new offense, I sort the records by BJS offense number ensure sure the matching is correct. This sorting also ensures that violent offenses are listed before nonviolent offenses.

71. See *National Corrections Reporting Program Resource Guide*, *supra* note 62 for details on offense codes, especially the spreadsheet Offense Code Crosswalk that is accessible from this site.

FIGURE 5: PERCENTAGE OF STATE PRISONERS IN EACH OFFENSE GROUP FOR EACH STATE AND NATIONAL TOTAL

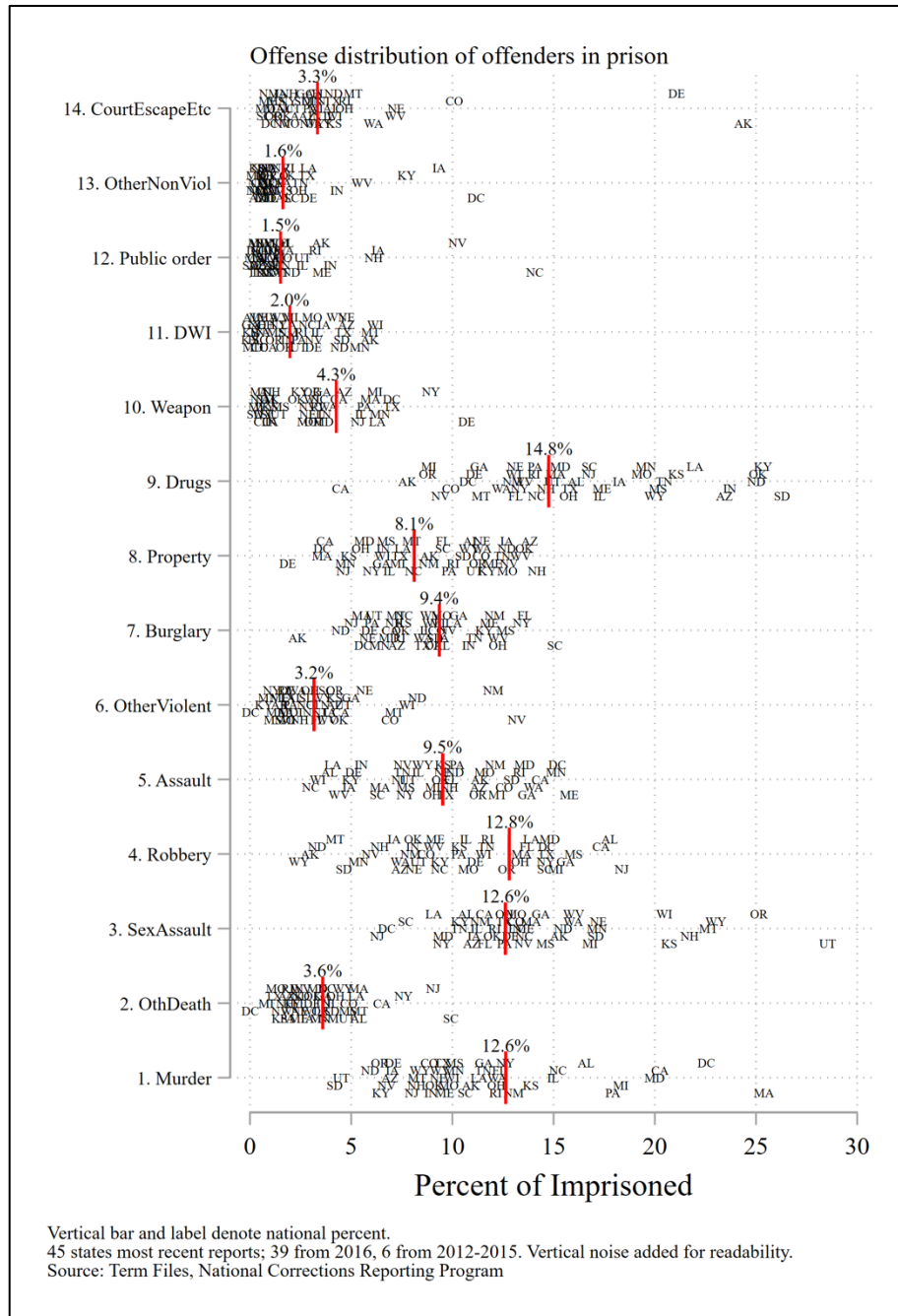


TABLE 1: NATIONAL OFFENSE MIX FOR DIFFERENT GROUPS OF PRISONERS
(NCRP)⁷²

	Percent of Prisoners				Change in Prisoners	
	In prison*	Admitted*	Released*	In Prison Any Year 2000– 2016**	# Admitted Minus # Released*	% Change*
Murder	12.6	1.4	1.3	2.1	258	0.2
Other Death	3.6	1.2	1.1	1.6	32	0.1
Sexual Assault	12.6	4.6	4.5	6.1	-354	-0.2
Robbery	12.8	7.0	7.3	7.5	-3,227	-2.1
Assault	9.5	10.4	10.1	9.2	-593	-0.5
Other Violent	3.2	2.4	2.4	2.6	-185	-0.5
Violent Subtotal	54.4	27.1	26.8	29.1	-4,069	-0.6
Burglary	9.4	10.7	11.1	10.2	-4,171	-3.7
Property	8.1	16.0	16.1	16.1	-4,164	-4.2
Drugs	14.8	24.0	24.3	26.8	-6,756	-3.8
Weapon	4.3	5.4	5.1	4.0	525	1.0
DWI	2.0	4.1	4.3	5.0	-1,884	-7.9
Public order	1.5	2.1	2.1	1.9	-259	-1.4
Other Non- violent	1.6	2.3	2.1	2.1	571	2.9
Court Escape, Etc.	3.3	6.8	6.6	4.1	-394	-1.0
Non-Violent Subtotal	44.9	71.3	71.8	70.1	-16,532	-3.0
Unknown	0.7	1.6	1.4	0.8	933	11.0
Number	1,212,756	533,377	553,045	4,855,570	-19,668	-1.6

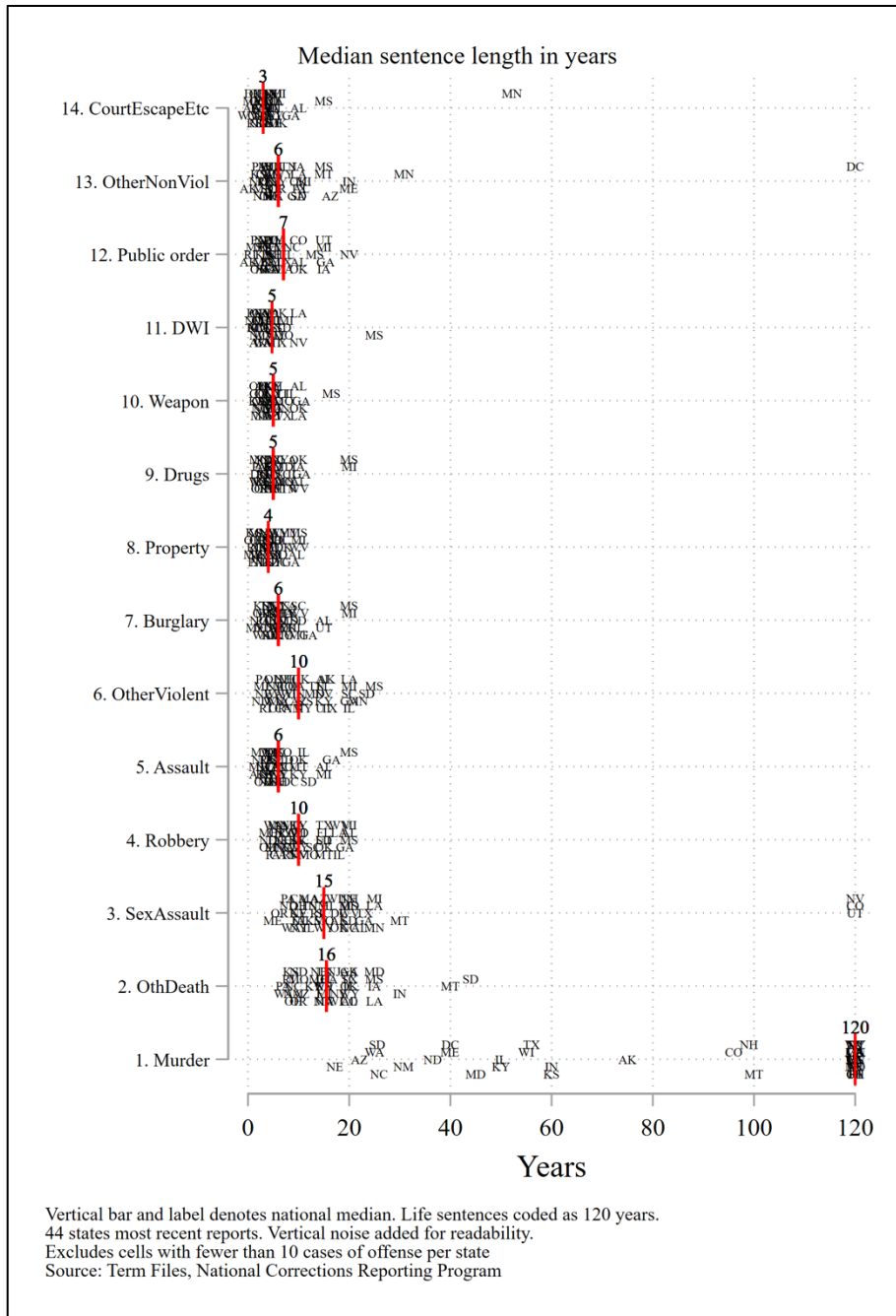
The offense mix of people entering and leaving prison is different from the mix of people in prison. Those who have long sentences spend more time in prison and are a larger share of the snapshot of those in prison. Those who receive short sentences are a higher percentage of those entering and leaving prison. Table 1 shows the offense that has the longest sentence (i.e. the offense

72. Data was from 2016 in all except six states. Each person was counted once if they were ever in prison 2000–2016 and categorized by their first offense in the first record.

in the first offense field) for four groups of prisoners: those in prison in the last year for which there is data in the NCRP, generally 2016; those admitted to and released from prison in the last year of data; and those in prison at any time during 2000–2016, where each person is counted only once no matter how many spells they had in prison or how many years they spent in prison. Inspection of the table reveals that nonviolent and drug offenders are a higher proportion of those entering and leaving prison, which violent offenders are a larger share of those in prison. The mix of offenses for those who have ever been in prison in the seventeen-year period is between the two, as many of those with shorter sentences have had multiple spells in prison during this period. The last two columns show the net change, i.e., the number of admissions minus the number of releases by offense in the last year, and the percentage change, calculated by dividing the net change by the number in prison in the last year.⁷³ Overall, the number in prison declined by 1.6%, a rate of decline that, if continued, would reduce the prison population to its early 1970s level by the late 2040s. These changes varied markedly across offense groups. There were large decreases in those imprisoned for drunk driving, drugs, and property offenses and smaller decreases for robbery and public order offenses but increases (if smaller) in those in prison for homicide, weapons charges, and other nonviolent crimes.

73. The percentage change should strictly be calculated using the previous year's in prison count as the base, but that correction will not affect the argument in this Section.

FIGURE 6: MEDIAN SENTENCE LENGTH BY OFFENSE, FOR EACH STATE AND NATIONAL MEDIAN



People who have longer sentences are a higher proportion of those in prison at any one time. Figure 6 shows median sentence lengths by offense category, where life sentences and other very long sentences have been recoded to 120 years. Again, the red bar and label is the national median and the state postal codes mark each state's median sentence length. The figure shows the extreme variation between states in sentence lengths within offense group.

It is important to make distinctions among types of crimes that go beyond the superficial and misleading dichotomy of violent versus nonviolent. For example, sexual assault and robbery are both classified as “violent” offenses, but they are very different types of crimes. Robbery is classified as violent and burglary as nonviolent, but both involve theft and make their victims feel frightened. Specific offenses arise from different specific circumstances, and the prospects for preventing a repeat of the offense without incarceration likely vary greatly depending on these specific circumstances. In some cases, there is likely little risk to the community from the offender remaining in the community and receiving educational or therapeutic services or being helped to find a job. In some cases, outright decriminalization seems appropriate. In others, there are obvious risks of recurrence, but therapy is likely to be more effective than imprisonment. In still other cases, the seriousness of the harm done may seem to require retribution.

In addition, the specific charge listed in an official record is a constructed object, as police, prosecutors, defense attorneys, and the accused mutually negotiate both how to describe what occurred and which of a variety of legal offense categories to apply to it, where those categories themselves are ill-defined and overlapping. Pfaff argues that prosecutors choosing to charge felonies rather dropping charges or charging misdemeanors was a major source of the rise in incarceration,⁷⁴ although Beckett argues that Pfaff overstates this case and that both the ratio of prison sentences to felonies and the average sentence length went up with incarceration.⁷⁵ As I discuss these offense groups, I remind the reader of the heterogeneity within each offense category as part of entertaining policies for decarceration. Nothing in the official records makes it possible to tell what the mix of more and less serious circumstances actually is within these data.

A. Homicide

The iconic violent offender is a murderer, but murderers are only 13% of all people in prison nationally and only about a quarter of all “violent”

74. *Causes of Growth*, *supra* note 10, at 3; *LOCKED IN*, *supra* note 10, at 6.

75. Beckett, *supra* note 6, at 247 n.8.

offenders. They are tiny fraction of the number entering prison. State laws differ, but all recognize “degrees” of homicide with varying penalties, often depending on the degree of prior planning or intent and circumstances that may have contributed to impulsive killing.⁷⁶ Even so, the median sentence for someone convicted of homicide is a life sentence, both nationally and in most states, and in no state is the median sentence for murder less than fifteen years. Depending on state laws, some people convicted of murder did not actually kill anyone, especially those convicted under “felony homicide” laws that say that anyone involved in a felony can be convicted of murder if anyone dies in the commission of the felony. Although past indeterminate sentences allowed most murderers with “life” sentences to be released on parole after ten to twenty years, the reduction in the availability and use of parole has led to a steady increase in the number of murderers in prison, as more enter each year but fewer leave.

The “other death” category (4% nationally) includes voluntary, involuntary and vehicular manslaughter as well as attempted murder. These crimes typically have much shorter sentences, with a national median of fifteen years and state medians ranging from under five to over forty years.

B. *Sexual Assault*

About 13% of prisoners were convicted of sexual assault, generally forcible rape, but also including sexual abuse of a child, statutory rape, forcible sodomy, and attempted rape. The median sentence length for sexual assault is fifteen years, with most state medians falling in the five- to thirty-year range. However, in three states (Nevada, Utah, and Colorado), the median sentence is life in prison. Again, there is variation within the offense. Forcible rape typically combines violence with misogyny. The majority of rapes are not reported, especially those among people who have a prior acquaintance. Many rapists operate in a culture of toxic masculinity that views sexual predation as normative. Recent studies of long-untested DNA samples from rape kits suggest that many rapists are repeat offenders and that even men who raped acquaintances were often serial rapists.⁷⁷ Some rapists, particularly child rapists, were sexually abused themselves and have deep treatment needs. However, state laws also criminalize consensual sex between teens who are

76. See, e.g., WIS. STAT. §§ 940.01, 940.06 (2019).

77. Rachel Lovell, Misty Luminais, Daniel J. Flannery, Laura Overman, Duoduo Huang, Tiffany Walker, & Dan R. Clark, *Offending Patterns for Serial Sex Offenders Identified Via the DNA Testing of Previously Unsubmitted Sexual Assault Kits*, 52 J. OF CRIM. JUST. 68, 75 (2017).

only a few years apart in age.⁷⁸ In some states, two juveniles having consensual sex can both be charged with having sex with a minor.⁷⁹

C. *Robbery*

Robbery (13% of those in prison nationally) is classed as a violent crime because it involves the use of force in a theft, but its motivation is primarily to obtain property, and robbers are generally not violent in the same sense as rapists are. Although unarmed robbery is a less serious crime than armed robbery, I combined the armed and unarmed robbery categories in analysis because most of the cases in the NCRP are armed robbery and the sentence length distributions were not markedly different. Many states define “armed” as the victim’s perception that there is a weapon, whether there is one or not.⁸⁰ Unarmed robbery can involve intimidation without actual use or even threat of force, and under some circumstances a purse snatching or other theft from a person can be construed as a use of force and charged as a robbery. States’ median sentence lengths for robbery ranged widely from two to twenty-five years, with ten years being the national average.

D. *Assault*

Assault is the next largest category of violent offenses, accounting for 10% of prisoners and about 10% of those entering and leaving prison, with a median sentence length of ten years and a wide range of state medians from one to twenty-two years. Most state laws and the Uniform Crime Reports distinguish between simple assault—typically a misdemeanor that would not draw a prison sentence—and aggravated assault involving bodily harm. Most assaults in prison records are aggravated assault. As with armed and unarmed robbery, simple assaults and aggravated assaults in prison records do not differ markedly in their distributions of sentence lengths and are thus grouped together in this analysis.

Assaults are extremely heterogeneous. Some assaults are brutal one-sided attacks. Some are shootings. On the other hand, many male subcultures involve fighting as a normative activity. There is an ill-defined boundary between “disorderly conduct” (having a fight) and “assault” (attacking someone). By definition, an assault should have a victim and a perpetrator, but some police and prosecutors sometimes charge all participants in a mutual fight with assault. There is similarly an ill-defined boundary between simple and

78. *See, e.g.*, WIS. STAT. § 948.093.

79. *See, e.g.*, CAL PENAL CODE § 261.5 (2019).

80. *See, e.g.*, WIS. STAT. § 943.32.

aggravated assault, as a prosecutor might treat a bruise as “bodily harm.” Further, many states classify as aggravated assault any hitting or sometimes even touching or pushing or physically resisting of certain categories of persons (e.g., teachers, police) regardless of whether any harm was done, or any display of any weapon, again regardless of harm done.⁸¹ Some assaults are tied to turf defense in illegal drug markets. Some assaults are part of patterns of domestic violence that are also tied up with gender roles, although it should be noted that domestic violence often involves mutual fighting. Other assault charges arise from patterns of policing and prosecution that use assault charges to control populations prone to mutual fighting or resistance to authority. In some cases, the authorities have charged attempted murder in cases of assaults and even mutual fights.

E. *Other Violent*

The “other violent” crimes category, accounting for 4% of prisoners, is a very heterogeneous residual, including attempted murder, kidnapping, reckless endangerment, and a host of other infrequent offenses. The median sentence length for this heterogeneous group is ten years, with a state range of one to twenty-five years, comparable to robbery, higher than assault, and lower than sexual assault or other deaths.

F. *Nonviolent Offenses*

Although this Article is focusing on violent offenses, nonviolent offenses remain important sources of imprisonment. Even after the steep declines in imprisonment for drug offenses in California and elsewhere, drug offenses remain the single largest offense category in prison, at 14%, despite their relatively low median sentence length of five years (state medians from two to twenty years). Drug offenders are 24% of the people entering prison and continue to be a major source of people churning through the prison system in many states. Other “nonviolent” offense categories that still account for a substantial fraction of prisoners despite low median sentence lengths include burglary (9% of prisoners, median sentence of six years, range one to twenty years), which is classed as a nonviolent property crime that typically draws a lower sentence length, but can often be frightening for the victim. Property crimes (primarily theft, but also various forms of larceny and fraud) account for 8% of prisoners nationally and have a median sentence length of four years (range less than one to ten).

81. See, e.g., 720 ILL. COMP. STAT. 5/12-2 (2019).

Other offense categories that combined account for about 7% of all those in prison nationally (keeping in mind that this would be listed as the main offense only if the record does not include any offenses in any of the more serious categories) include weapons charges (2.9%), driving while intoxicated (1.7%), various public order offenses (1.2%), and a heterogenous collection of other nonviolent offenses (1.5%) that have median sentence lengths of five to six years and some states where the medians are ten, fifteen, or even twenty years. The category I call “court, escape, etc.” offenses which are not primary crimes, but are secondary procedural offenses like missing a court date, bail jumping, or escape (2.8%).

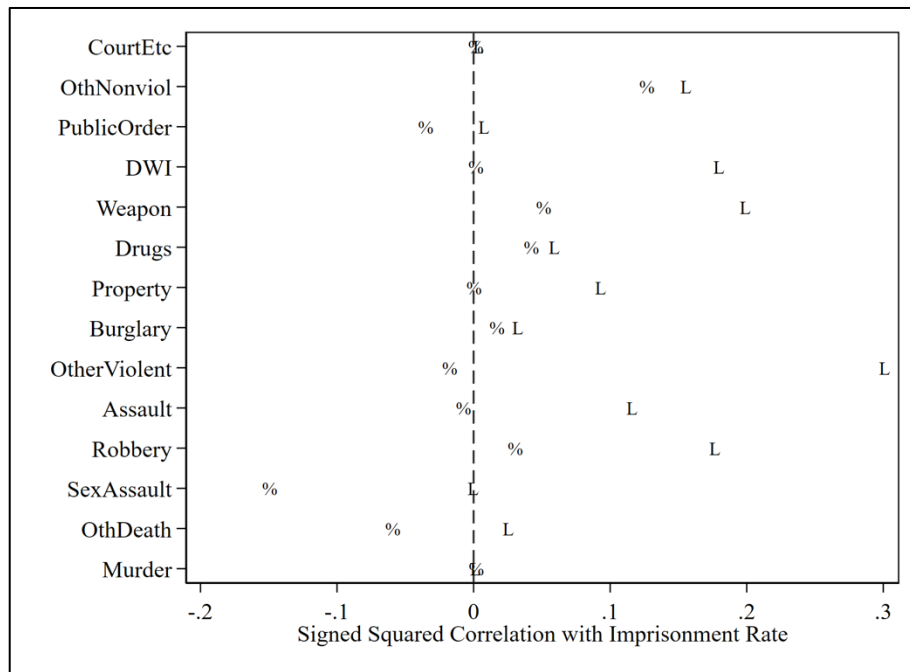
VI. SENTENCE LENGTHS AS ONE DRIVER OF INCARCERATION RATES

As the above discussion indicated, the states vary greatly in the median sentence length for a given offense category. The number of people in prison at any one time is a function of the rate at which people enter prison, the rate at which they leave, and how long they stay in prison before they leave. The number in prison grows if more people enter than leave. The steady-state size of the prison population is a function of both the volume of people entering and leaving prison and the average time people spend in prison before leaving. People who have very long sentences enter prison but never leave and so add continually to the size of the prison population. Imprisonment grew in the late 1980s and early 1990s from an influx of new prisoners both from the drug war and from an increase in the ratio of prison sentences to arrests.⁸² Imprisonment grew after the late 1990s more from increased sentence lengths than from new admissions.⁸³ The difference in average sentence lengths is a product of both the mix of offenders in prison and policies about sentence lengths for offenses.

82. Beckett, *supra* note 6, at 247–48.

83. *Id.*

FIGURE 7: SIGNED BIVARIATE R^2 FOR RELATION BETWEEN IMPRISONMENT RATE AND OFFENSE PERCENT AND MEDIAN SENTENCE LENGTH



To see the importance of offense mix and sentence length, Figure 7 shows the magnitude of the bivariate relation between a state's imprisonment rate per 100,000 population of all ages and (a) the proportion of people in prison in each offense category and (b) the state's median sentence length for the offense category. The square of a correlation coefficient (r^2) can be interpreted as the percent of variation in one variable (here the imprisonment rate) that can be accounted for another variable. As the squares of both positive and negative numbers are positive, I add back the negative sign to the r^2 when the correlation is negative. The graph uses symbols for the signed r^2 for the offense percentage (%) and median sentence length (L). The graph shows the positive correlation between sentence lengths and the imprisonment rate for the "middling" offenses: especially "other violent" and "other nonviolent" but also robbery, assault, property crimes, weapons, and driving while intoxicated. The correlation with sentence length is positive but smaller for burglary and drug sentences, and essentially zero for murder and sexual assault. The correlations are generally smaller both positive and negative for the offense percentages, which is mathematically necessary as the percentages add to a constant total within a state. Interestingly, the correlation with the sexual assault percentage is negative, so that states with a higher percentage of rapists in prison have

lower overall imprisonment rates, while the largest positive correlation is with the percentage categorized as other nonviolent.

VII. RETURNS TO PRISON

The previous sections of this Article have focused on those who are in prison and what their characteristics are. This Section examines those released from prison and asks what happens to them. It uses reincarceration as a proxy for recidivism. More specifically, it uses the appearance of a second record for the same person in the NCRP records as a proxy for recidivism, after investigating the second record for information about why the person was reincarcerated. The sample is people who were released from prison from 2007 to 2016. There are two ways of looking at the data. The first is to take everyone who was released from prison at least five years before their state stopped reporting data (i.e., usually by December 2011 but earlier for six states, as noted above) and examine their outcome five years after release. The second is to perform a survival analysis across ten years in which the calculations of the monthly and cumulative probabilities of returning to prison were adjusted for changes in the risk pool.⁸⁴ These two approaches calculate the risk of return to prison on different pools of people, but give broadly similar results.

The concept of “recidivism” for a violent offender would imply that the offender commits another violent offense. However, the measurement of recidivism is rarely a direct measure of criminal activity. It is, instead, a measure of rearrest or reincarceration. There are two problems with these measures. First, they are measures of the behavior of social control agents (police, prosecutors, and judges), not direct measures of offender behavior. They exclude offenses that are not recorded by the criminal justice system, including both offenses never reported to police and offenses where the official response makes no record in the data being examined. At the same time, measures of recidivism based on arrest or reincarceration over-represent people who are under close supervision by police or other agents as they are both more likely to get caught, less likely to be let off with an unrecorded warning, and more likely to be incarcerated. Secondly, these measures often fail to record what the person was arrested or reincarcerated for. If the arrest was for vagrancy or the reincarceration was for a technical violation of the terms of

84. Calculation of the probability of returning to prison in month M uses the number still free in the previous month $M-1$. The number still free at the end of month M is the number still free after the previous month ($M-1$) minus those returned to prison in month $M-1$ and minus those who were censored in month $M-1$, that is, who had been released $M-1$ months ago. Calculation of the cumulative probability weights each month's monthly probability of return by the fraction (number still free at month $M-1$)/(number initially released) in adding it to the cumulative total. These empirical proportions were computed directly.

parole, the term “recidivism” would inappropriately imply a repeat of violent behavior.

A. *Prior Studies*

Prior research on recidivism reports widely varying results. Michael Ostermann, Laura Salerno and Jordan Hyatt review the literature showing that estimates of recidivism rates vary widely from small fractions to large majorities depending on the exact measure used.⁸⁵ They examine 12,309 individuals released from New Jersey correctional facilities in 2008 and examined only in-state records.⁸⁶ They show, first, that estimates of recidivism vary greatly depending on whether parole revocations for technical violations are counted as recidivism and, second, that the time to recidivism varies greatly depending on whether court processing times are taken into account.⁸⁷

Pew Foundation researchers worked with the Association of State Correctional Administrators to determine three-year return-to-prison rates for people released from thirty-three states in 1999 and from forty-one states in 2004. States reported their returns to prison in the same state and also classified them as technical violations or new crimes.⁸⁸ They found that 45% released in 1999 and 43% released in 2004 were reincarcerated within three years.⁸⁹ California skewed the results; the average for other states was a stable 40%.⁹⁰ They also found wide variation between states in both the total rates of return and in the proportion of returns that were for new crimes rather than technical violations.⁹¹ The states also varied in whether their recidivism rates were higher in for the 2004 or 1999 cohort.⁹² The report discusses variations in both the mixes of offenders and in how the state handles their post-release supervision as well as the problems of inconsistent measures used by different states.⁹³

The most comprehensive study relevant to the present study was conducted by statisticians in the Bureau of Justice Statistics (BJS) who obtained information from thirty states and the FBI about the arrest records of a sample

85. See Michael Ostermann, Laura M. Salerno, & Jordan M. Hyatt, *How Different Operationalizations of Recidivism Impact Conclusions of Effectiveness of Parole Supervision*, 52 J. RES. CRIME & DELINQ. 771, 789 (2015).

86. *Id.* at 777.

87. *Id.* at 772.

88. PEW CENTER ON THE STATES, *supra* note 13, at 33.

89. *Id.* at 9.

90. *Id.* at 12.

91. *Id.* at 12, 14.

92. *Id.* at 10–11.

93. *Id.* at 12, 17–19, 33, 36–37.

of prisoners originally released in 2005 and followed first through 2010⁹⁴ and then through 2014.⁹⁵ The reports discuss the problems of inconsistent and incomplete information from the different states. The five-year follow-up found that 77% of all released offenders had been arrested at least once and the nine-year follow-up found that this figure had risen to 83% by year nine.⁹⁶ One part of the five-year follow-up used NCRP records for twenty-three states. In these twenty-three states, the arrest had led to a return to prison for 55%, either for a conviction or a revocation for a technical violation.⁹⁷ Their analysis of twenty-nine states found that by year five 77% had been arrested, 60% had been adjudicated, 55% convicted, 45% incarcerated, and 28% imprisoned for a new crime.⁹⁸ Violent offenders had the lowest recidivism rates although they were only modestly lower than the overall averages. In year one after release, 11% of violent offenders had been arrested for a violent crime; the cumulative percent was 34% by year five, and 43% at year nine.⁹⁹ Violent offenders were more likely to have been arrested for a nonviolent than violent offense, 35% in year one, 67% by year five, and 75% by year nine.¹⁰⁰ Although those whose prior incarceration was for a violent crime initially had a higher rate of arrest for violent crimes than other released offenders, by year six property offenders had a slightly higher rate of arrest for violent crimes than violent offenders.¹⁰¹ Released drug offenders had the lowest rates of arrest for violent crime. A comparison with a 1994 study found that overall rates of arrest were roughly comparable overall, but violent offenders released in 2006 were somewhat less likely to be arrested than those released in 1994, and public order offenders more likely to be arrested.¹⁰² Both reports also have information on arrests and incarceration in states other than those where the person was released; of those

94. See MATTHEW R. DUROSE, ALEXIA D. COOPER, & HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 1 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> [<https://perma.cc/V8TC-BX8H>].

95. MARIEL ALPER, MATTHEW R. DUROSE & JOSHUA MARKMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014), at 1 (2018), <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf> [<https://perma.cc/6WKH-TWUA>].

96. See DUROSE, COOPER, & SYNDER, *supra* note 94, at 1; ALPER, DUROSE, & MARKMAN, *supra* note 95, at 1.

97. DUROSE, COOPER, & SYNDER, *supra* note 94, at 1.

98. *Id.* at 1, 15.

99. ALPER, DUROSE, & MARKMAN, *supra* note 95, at 11.

100. *Id.*

101. *Id.* at 10.

102. DUROSE, COOPER, & SYNDER, *supra* note 94, at 4.

arrested, 7.5% in the first year and 14.2% by year nine were arrested in a different state from where they were released.¹⁰³

B. *Measurement of Recidivism*

In the present analysis, “success” or nonrecidivism is the lack of a second NCRP record for someone who was released from prison. This assumption that no record is a success embodies many potential errors. The person may have died or been deported, and thus not at risk of being reincarcerated. People who actually were reimprisoned may not be correctly recorded, either because the incarceration was in another state or because there was a failure in the record-matching process. If there is a second record, further coding indicates whether the person had a new offense versus a technical violation and, if there was a new offense, whether it was violent.

The NCRP has data fields distinguishing between probation and parole revocations that include new commitments and those that do not, although the documentation does not list these as the fields about which there can be high confidence. A direct comparison of the offenses listed in two sequential records reveals an imperfect correspondence between the NCRP’s admission categories and the presence of new offenses in the readmission record compared to the prior record. In some cases, revocations without new commitments occur while adjudication on the new crime is in process. In other cases, there can be errors in the admission classification. In distinguishing between revocations with and without a new crime, I compared the offense, offense count, and “added offense” fields in the current and prior record as well as the nature of the prior release (conditional or unconditional) and the NCRP admission classification. All cases of an NCRP admission classification of “new commitment only” are coded as new crimes, even if the offense records are identical. If the NCRP admission classification involved any parole revocation, or if it involved a probation revocation and the previous release type was conditional, I compared the two records to look for new crimes. Any new crime or increase in the counts on a previous crime is coded as a new crime. The one exception is if the only new crime is procedural, such as bail jumping, the “crime” of violating supervision, or failure to meet a court date, or escape (another charge that may be used for failing to show up for required appointments). This is not counted as a new crime, an exception that applied to 2.6% of the cases of returns to prison.

I analyzed cases where the release was either unconditional or conditional (to community supervision) and eliminated cases where the release was due to

103. ALPER, DUROSE, & MARKMAN, *supra* note 95, at 12.

death or other reasons (e.g., escape or transfer). Cross-tabulating release status and subsequent admission status show a high level of correspondence, i.e., much higher rates of new convictions for those released unconditionally and much higher rates of parole revocation for those released conditionally. Nevertheless, errors remain such as a release coded as death followed by an admission record, or a release coded as unconditional followed by a parole revocation. Other sequences of offense records could plausibly be matching failures. As noted above, some cases were dropped for gross mismatching in gender and either race or date of birth (or both). Some small fraction of people classified as returned with a new crime are probably match errors. On the other hand, match failures also will lead some who did return to prison being categorized as not returning. I thus present these data cautiously, but these sources of error are comparable to all the other large studies of recidivism of those released from prison.

C. Overall Rates of Returns to Prison

TABLE 2: OFFENSE MIX OF PEOPLE IN SAMPLES FOR STUDY OF RETURNS TO PRISON AND FOR LAST VALID YEAR OF DATA AND PERCENT RETURNED TO PRISON IN TWO MEASURES OF RETURNS

	Frequency			% of Released			% Returned to Prison	
	Sample 1st Released 2007-16	Sample 5-Year Outcome	Released in Last Valid Year	Sample 1st Released 2007-16	Sample 5-Year Outcome 1st Release	Released in Last Valid Year	Sample 1st Released 2007-16	Sample 5-year Outcome
Murder	30,081	13,883	7,465	1	1	1	16	20
Other Death	33,753	16,900	6,337	2	1	1	18	21
Sexual Assault	127,278	62,934	25,135	6	5	5	25	29
Robbery	169,174	84,459	40,496	8	7	7	36	42
Assault	210,081	105,824	55,901	10	9	10	30	35
Other Violent	58,640	29,682	13,045	3	3	2	27	32
Violent Subtotal	629,007	313,682	148,379	29	27	27	29	34
Burglary	234,822	119,444	61,424	11	10	11	41	46
Property	356,109	200,408	89,295	16	17	16	36	39
Drugs	566,272	328,368	134,562	26	28	24	30	32
Weapon	95,479	46,755	28,107	4	4	5	33	38
DWI	115,544	66,616	23,617	5	6	4	23	25
Public order	40,481	23,843	11,539	2	2	2	28	29
Other Non-violent	45,897	24,406	11,563	2	2	2	29	32
Court Escape, Etc.	86,209	46,311	36,706	4	4	7	37	40
Non-violent Subtotal	1,540,813	856,151	396,813	71	73	72	33	36
Unknown	5,851	3,386	7,853	0	0	1	37	42
Total	2,175,671	1,173,219	553,045	100	100	100	32	35

As Table 2 shows, the offense mix of people released from prison is different from the mix of those in prison. Only 27–29% are violent offenders. Drugs are the largest offense group, 24–28% of the total, followed by property at 16–17%, burglary at 10–11%, assault at 9–10%, robbery at 7–8%, sexual assault at 5–6%, and DWI at 4–6%. Looking at the percentage of those released who return to prison within five years, burglary offenders are most likely to return to prison, followed by robbery. The least likely to return to prison are released homicide offenders.

The gross rates of return to prison for all released prisoners in the first release sample is 32% (unadjusted for time at risk), and the proportion who were returned to prison within five years of first releases 2006–2011 is 35%. This is lower than the 55% reported in the BJS study using NCRP data for those released from twenty-three states in 2005, but that study was not restricted to first releases and is earlier than this study.¹⁰⁴ The BJS report does not list the specific twenty-three states.¹⁰⁵ There are eighteen states in the NCRP term dataset used for this study that have releases for 2005 and that are on the list of thirty states in the BJS study.¹⁰⁶ The overall rate of return to prison within five years in those eighteen states 55%, the same as the BJS reports for its full sample. For states in 2005, the five-year return rate was 45% for first releases and 68% for later releases. For my study period of releases 2006–2011, these states had an overall rate of return of 49%, 36% for first releases and 61% for later releases. Further, my analysis (not shown) indicates that the rate of return to prison within five years declined every year between 2006 and 2011. Thus, the sources of difference between the BJS results and the present study are (1) the inclusion of more states in this study, (2) the later time frame of this study after reform movements in some states had reduced revocations for technical violations, and (3) a sample of first releases, rather than all releases.

104. See DUROSE, COOPER, & SYNDER, *supra* note 94, at 1.

105. *See id.* at 14.

106. *See id.* at 16.

FIGURE 8(A): PROBABILITY OF RETURNS TO PRISON BY MONTH AFTER RELEASE, BY RELEASE TYPE PER MONTH

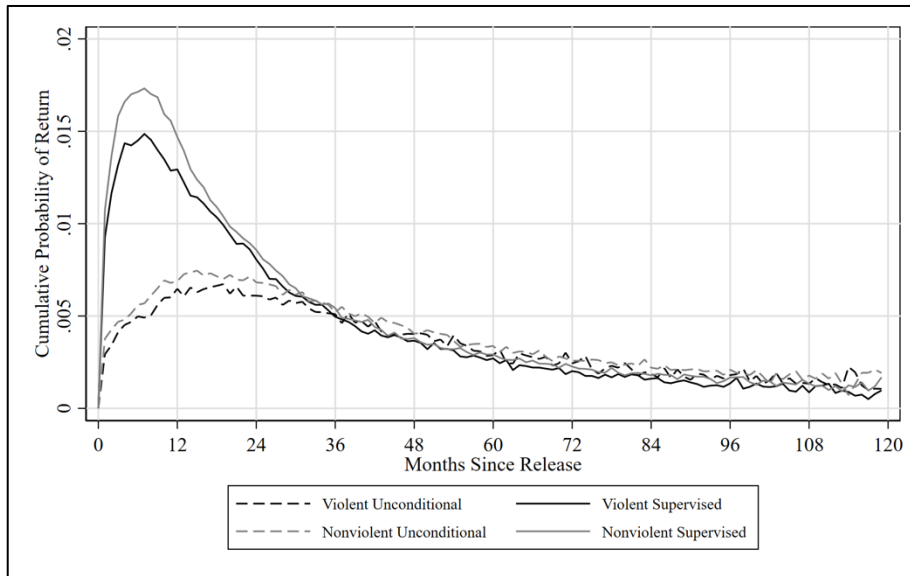
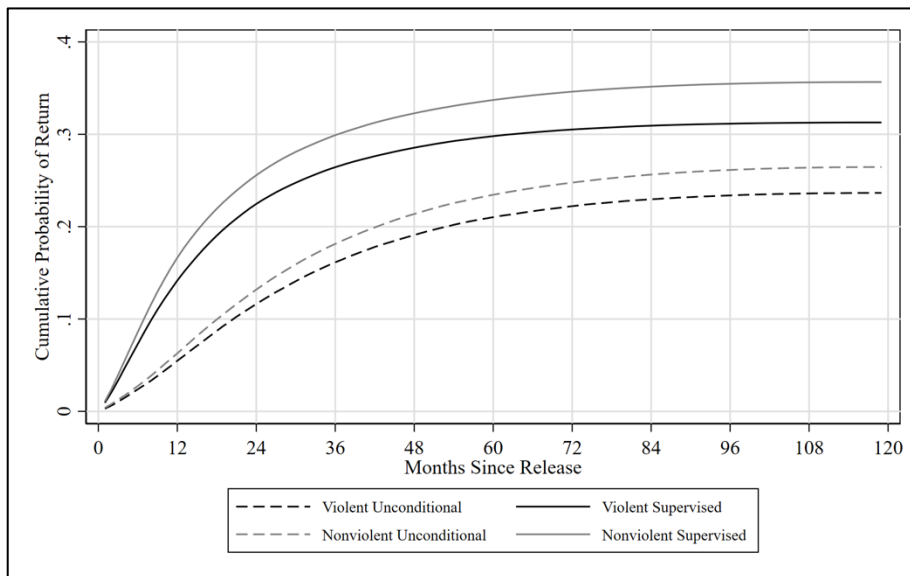


FIGURE 8(B): PROBABILITY OF RETURNS TO PRISON BY MONTH AFTER RELEASE, BY RELEASE TYPE PER MONTH



As Figure 8 shows, nonviolent prisoners have higher rates of return to prison than violent offenders, and those released conditionally to supervision (parole or its equivalent) have higher rates of return to prison than those released unconditionally, with most returns to prison occurring within the first three years. The monthly risk of returning to prison peaks at about six months for those released to supervision and peaks at about thirteen months for those released unconditionally; after thirty-six months the risks for all groups are broadly similar with those released unconditionally having higher monthly rates of return than those released to supervision and nonviolent offenders continuing to have higher rates of return than violent offenders. By ten years after release, for those released to supervision, 36% of nonviolent and 31% of violent offenders had returned to prison; for those released unconditionally 26% of nonviolent and 24% of violent offenders had returned.

D. Types of Returns to Prison

FIGURE 9(A): RETURNS TO PRISON BY MONTHS AND TYPE OF RETURN FOR VIOLENT AND NONVIOLENT OFFENDERS, RELEASED CONDITIONALLY TO SUPERVISION

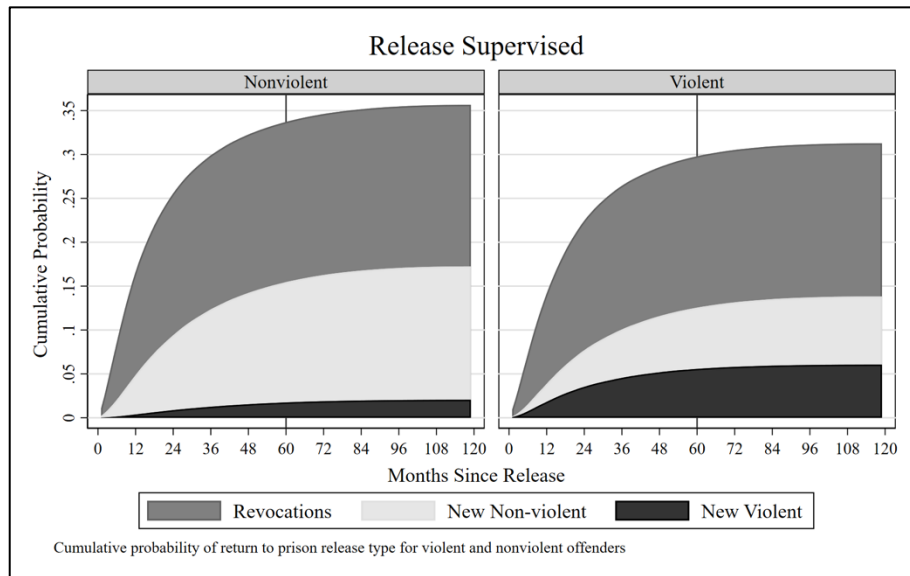
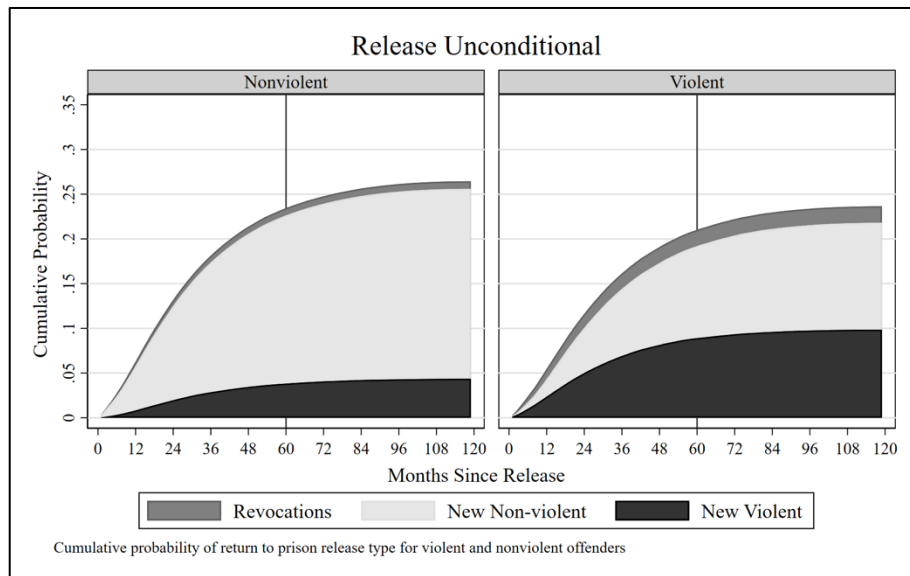


FIGURE 9(B): RETURNS TO PRISON BY MONTHS AND TYPE OF RETURN FOR VIOLENT AND NONVIOLENT OFFENDERS, RELEASED UNCONDITIONALLY



Figures 9(a) and (b) break out the returns to prison by type of return as well as by offense type (violent vs. not) and release type (unconditional vs. conditional/supervised). The return types are revocation with no new crime, a new nonviolent crime, or a new violent crime. For offenders released unconditionally, about 26% of nonviolent and 22% of violent offenders return to prison with a new crime. The new crime for previously nonviolent offenders is overwhelmingly nonviolent: only about 4% have a new violent offense. For those released unconditionally whose previous offense was violent who are returned to prison with a new crime, the split is closer to even but still more nonviolent than violent: 10% violent and about 12% nonviolent. Only 1% of nonviolent and 2% of violent offenders released unconditionally who are recorded as reentering prison on a revocation with no new crime; most of these are in New York or D.C., and this is probably a data inconsistency problem with either the release or admission category.

Among nonviolent offenders released conditionally to supervision, 18% of return to prison on technical violations with no new crime and 17% return with a new crime, with only 2% having a new violent crime. Among violent offenders, 17% return on technical violations with no new crime and 14% return with a new crime and there is still a predominance of nonviolent crime, 6% violent and 8% nonviolent.

As the time plots show, the large majority of people who returned to prison did so within five years. Another way to calculate the outcomes is to sample those who were released at least five years before the end of data collection and calculate their five-year outcomes.

TABLE 3: FIVE-YEAR OUTCOMES FOR PRISONERS RELEASED 2006–2011¹⁰⁷

Unconditional						
Offense Group at Release	Still Out	Revoked Only	New Non-Violent	New Violent	New Crime Total*	N
Murder	84	1	7	9	15	2,279
Other Death	85	1	7	6	14	3,036
Sex Assault	79	2	10	9	19	20,412
Robbery	67	4	17	13	29	18,931
Assault	73	1	14	12	26	32,259
Other Violent	78	0	12	10	21	7,325
All Violent	75	2	13	11	24	84,242
Burglary	63	1	28	7	35	34,465
Property	68	0	26	5	31	72,461
Drugs	74	1	21	4	25	91,394
Weapon	73	2	18	7	25	15,013
DWI	80	0	17	3	19	13,528
Public order	74	0	21	4	25	11,721
Other Non-Violent	77	1	17	5	22	9,064
Court Escape, etc.	68	1	25	6	31	18,149
All Non-Violent	71	1	23	5	28	265,795
Nonviolent	67	2	22	9	32	613
All Offenses	72	1	21	6	27	350,650
N	252,208	3,557	72,517	22,368	94,885	350,650

107. New Crime Total refers to the sum of new violent and new nonviolent.

Supervised						
Offense Group at Release	Still Out	Revoked Only	New Non-Violent	New Violent	New Crime Total*	N
Murder	79	14	4	4	8	11,604
Other Death	77	14	5	4	9	13,864
Sex Assault	67	24	3	6	10	42,522
Robbery	56	25	11	8	20	65,528
Assault	62	21	10	7	17	73,565
Other Violent	65	19	9	7	16	22,357
All Violent	63	22	8	7	15	229,440
Burglary	50	26	21	3	24	84,979
Property	57	22	19	3	21	127,947
Drugs	65	19	15	2	16	236,974
Weapon	57	22	17	4	21	31,742
DWI	73	11	14	1	16	53,088
Public order	67	13	18	3	21	12,122
Other Non-Violent	63	22	13	2	15	15,342
Court Escape, etc.	54	25	16	4	20	28,162
All Non-Violent	61	20	17	2	19	590,356
Nonviolent	56	17	18	10	27	2,773
All Offenses	61	21	14	4	18	822,569
N	505,097	169,461	118,298	29,713	148,011	822,569

Table 3 show the types of returns to prison for those released unconditionally and conditionally to supervision, broken out by offense types. There do appear to be small variations in the rates of being returned to prison for a new crime depending on the prior offense category, with burglary, property, and robbery having the highest reoffense rates and homicide the lowest.

E. State Variations

FIGURE 10: OUTCOMES FIVE YEARS AFTER FIRST RELEASE, NATIONAL AND STATE PERCENTAGES

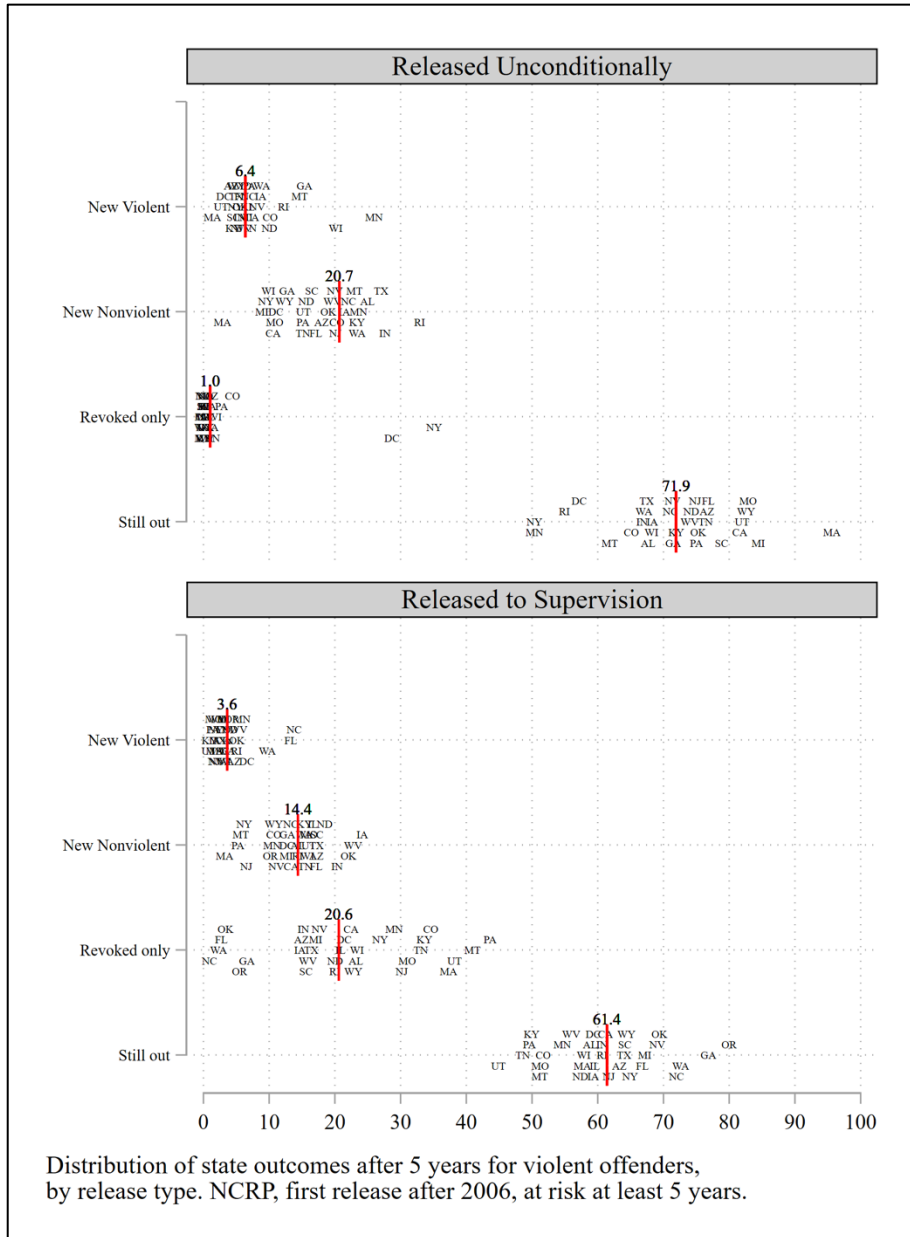


Figure 10 shows how the states vary in their five-year outcomes for those conditionally and unconditionally released. Again, there are wide between-state variations in the rates of return to prison that doubtless reflect state differences in supervision and prosecution practices for repeat offenders, as well as variations in the overall propensity to reoffend.

F. *Implications of Returns to Prison*

To sum up the results of Table 3 and Figures 8 and 9, only a small minority of those experiencing their first release from prison returned to prison in the same state with a new crime. Even when the prior offense was violent, less than half of the new crimes were violent. Only about 10% of violent offenders released unconditionally and 6% of offenders released conditionally were back in prison with a new violent offense at the end of ten years. Of those released unconditionally, 76% were still free ten years later, as were 69% of those released to supervision. Over half of the people reincarcerated after a release to supervision had no new crime but were imprisoned on technical violations. Even for those who had a new crime, the majority of new crimes were nonviolent.

These data do not directly reflect on the counterfactual: what would have been the new crime rate for people if they had not been incarcerated for their prior crime? On the one hand, prisoners are incapacitated from crime while incarcerated, and the pool of people released from prison are older than they were at the time of their initial conviction, and most people exhibit a pattern of crime desistance over time. On the other hand, in addition to the somewhat mixed research that shows some criminogenic effects on individuals who have been incarcerated, a growing body of research shows how incarceration of a family member has the collateral damage of harmful and potentially criminogenic effects on others in the family. Nevertheless, the proportions of new crimes in this study does not suggest that releasing violent offenders from prison will unleash a crime wave. To the contrary, violent as well as nonviolent offenders were being released for decades as crime has declined. This is not to deny that some released prisoners committed new crimes, nor to deny the likely criminogenic effects of prisons. But it is important to put things into perspective. Similarly, these results suggest that many of these people who did not reoffend after a period in prison may not have reoffended anyway, if they had been on probation instead.

States varied greatly in the proportion of their released prisoners who returned to prison, and it is beyond the scope of this study to explore the factors that account for this difference. State differences in returns for technical violations are obviously linked to differences in state policies, but this implies that the sources of policy differences should be investigated. There were also

substantial state differences in the proportion of released prisoners who returned with a new crime. Again, some of this difference may be due to local practices in reporting and categorizing offenses or in local practices in how people on supervision are processed if they commit crimes. Some of it also may be due to the mix of prisoners in terms of their offenses and criminal histories prior to imprisonment which, again, are linked to state practices and policies about the use of imprisonment and the sentences imposed in response to crimes. Some of it may be due to local economic or social conditions, including matters of racial demographics and inequality.

To sum up, the study of returns to prison suggests that the “alternatives to incarceration” for many violent as well as nonviolent offenders may simply involve not incarcerating them.

VIII. RETURNS, SENTENCE LENGTHS AND TURNOVER

Returning to the 1970s incarceration rate would require cutting the present prison population by 75%. As Beckett and others have argued, the low-hanging fruit of low-level drug offenders or other low-level nonviolent offenders is not enough to reduce incarceration. In this Section, I use data to reflect on hypothetical types of reforms and their potential impacts on imprisonment rates.

TABLE 4: PERCENT OF PRISONERS BY IN PRISON BY ADMISSION TYPE

	1st Spell	Returned + New	Revocation Only	Total
Murder	10.7	1.6	0.3	12.6
Other Death	2.8	0.7	0.1	3.6
Sexual Assault	10.3	1.7	0.7	12.6
Robbery	8.0	3.6	1.2	12.8
Assault	5.4	3.2	0.9	9.5
Other Violent	2.2	0.8	0.2	3.2
Violent Subtotal	39.4	11.6	3.4	54.4
Burglary	4.3	3.4	1.6	9.4
Property	3.5	3.3	1.3	8.1
Drugs	7.0	5.4	2.3	14.8
Weapon	2.1	1.7	0.4	4.3
DWI	0.9	0.7	0.4	2.0
Public order	0.6	0.8	0.1	1.5
Other Non-Violent	1.1	0.4	0.1	1.6
Court Escape Etc.	1.2	1.6	0.5	3.3
Nonviolent Subtotal	20.7	17.4	6.8	44.9
Unknown	0.3	0.0	0.4	0.7
Total Percent	60.4	29.0	10.6	100.0
Number	732,673	351,994	128,089	1,212,756

One reform implied by the analysis of returns to prison is to stop imprisoning people for technical violations of probation or parole. Table 4 shows the percentage of prisoners in prison at the end of the NCRP data by offense and return type. Of all prisoners, 60.5% are in their first spell in prison, according to the NCRP records, 29% are in a second or subsequent spell with a new crime in the most recent spell, and 10% entered their current spell on a revocation with no new crime. To be classified as revocation with no new crime in this study of those in prison at the end of data collection, a prisoner (1) had a prior record in the NCRP; (2) had a current admission status that included a probation or parole revocation; and (3) had no new crime in the current record compared to the prior record. There are cases where there is no prior record but

the current record says the prison admission was for a revocation with no new commitment; in this analysis, they are classed as having a new crime on a first admission. Stopping technical violations would make a significant cut (10%), and preventing the return to prison for new crimes would make an even bigger cut (29%). But even combined, these are not enough.

Similarly, decriminalizing drugs and releasing all drug offenders would produce a 14% cut¹⁰⁸—significant but alone not enough.

Another conversation has involved the need to consider releasing people with life sentences, especially for crimes other than murder, and others with very long sentences, who are aging in prison for crimes they committed decades ago while young. A new report by The Sentencing Project calls attention to the 44,000 people serving “virtual life sentences” of at least fifty years.¹⁰⁹ But this, too, is a low-hanging fruit that isn’t a big enough group to reform the system. The 44,000 people are the equivalent of three tenths of one percent of the total number in prison in the 2016 NCRP data set, which appears to be the source of this figure.¹¹⁰ Adding these “virtual life” sentences to the life sentences in the NCRP, we get 192,831 prisoners, or 16% of the prison population.

108. *See supra* Table 4.

109. THE SENTENCING PROJECT, VIRTUAL LIFE SENTENCES 1 (2019), <https://www.sentencingproject.org/publications/virtual-life-sentences/> [https://perma.cc/E6YW-3K43].

110. I calculate 38,458 people serving sentences fifty years or more but less than the 120 years I used as the maximum sentence, including both “life” sentences and very-long nonlife sentences like consecutive fifty-year sentences.

TABLE 5: DISTRIBUTION OF PRISONERS BY YEARS TO PROJECTED RELEASE AND TIME IN PRISON SO FAR (PERCENT OF ALL PRISONERS)¹¹¹

Years to Projected Release*	Time In So Far		Total
	< 10 Years	10+ Years	
0/3 Years	41.3	4.0	45.3
3+/5 Years	11.3	1.2	12.5
5+/10 Years	12.3	2.3	14.5
10+/20 Years	9.0	2.5	11.4
20+/50 Years	5.1	2.2	7.3
50+ Years	3.2	4.4	7.5
No Information	0.9	0.4	1.4
Total	83.0	17.0	100.0
N	100,6877	205,879	1,212,756

To provide some basis for conversation, I used the NCRP projected release date supplemented by the mandatory release date, parole eligible date, and sentence length¹¹² to calculate the number of years before the prisoner could be expected to be released. All very high values were top coded to 120 years. I recoded negative values to zero if they were smaller than -1.5 years and otherwise treated them as errors and recoded them as missing. For time already served, I set a relatively low threshold of having already served at least ten years. Table 5 shows the relation between time already spent in prison and projected remaining time in prison. Overall, 17% of those in prison have been in prison ten or more years in their current spell. While 58% (.044/.075) of those in the 50+ “virtual life” group have already been in prison ten years, only 26% (.044/.170) of those who have been in prison ten years expect to be there more than fifty years (i.e., for the rest of their lives). In short, a 17% cut from some sort of blanket policy of releasing everyone who has served at least ten years would be significant, but it is not enough to produce the kind of wholesale cuts that are needed to return to 1970s incarceration rates.

111. Years to Project Release was calculated from projected release date and end date of dataset. If no projected date was given, mandatory release date was used. If no projected or mandatory dates were given, the parole eligible date was used. If none of these were available, the sentence length was used. Negative values to -1.5 were treated as 0, smaller negative values were recoded to missing.

112. Sentence length was used only if all other information was missing, in which case expected release date was calculated from sentence length and prison admission date.

TABLE 6: PERCENT OF PRISONERS BY OFFENSE AND TIME TO RELEASE¹¹³

	Projected Years to Release from Prison						No Info	Total
	0/3 years	3+/5 years	5+/10 years	10+/20 years	20+/50 years	50+ years		
Murder	1.9	0.6	1.3	2.0	2.4	4.5	0.1	12.6
Other Death	0.9	0.5	0.8	0.8	0.4	0.2	0.0	3.6
Sexual Assault	3.6	1.4	2.3	2.3	1.7	1.3	0.1	12.6
Robbery	4.8	1.9	2.5	2.0	1.0	0.6	0.1	12.8
Assault	5.1	1.4	1.4	0.9	0.4	0.2	0.1	9.5
Other Violent	1.3	0.4	0.5	0.4	0.2	0.3	0.0	3.2
Violent Subtotal	17.6	6.1	8.9	8.4	6.1	7.0	0.3	54.4
Burglary	5.2	1.4	1.3	0.9	0.3	0.2	0.1	9.4
Property	5.6	1.1	0.8	0.4	0.1	0.1	0.1	8.1
Drugs	8.8	2.2	2.1	1.1	0.4	0.1	0.2	14.8
Weapon	2.6	0.6	0.6	0.3	0.1	0.0	0.0	4.3
DWI	1.3	0.3	0.2	0.1	0.0	0.0	0.0	2.0
Public order	0.8	0.2	0.2	0.1	0.0	0.0	0.0	1.5
Other Nonviolent	0.8	0.2	0.3	0.1	0.1	0.0	0.1	1.6
Court Escape Etc	2.4	0.4	0.3	0.1	0.1	0.0	0.0	3.3
Nonviolent Subtotal	27.6	6.4	5.6	3.1	1.2	0.5	0.6	44.9
Unknown	0.1	0.0	0.0	0.0	0.0	0.1	0.5	0.7
Total	45.3	12.5	14.5	11.4	7.3	7.5	1.4	100.0
Number	549,413	151,602	176,269	138,841	88,580	91,358	16,693	1,212,756

At the other end of the distribution, Table 5 shows that 45% of those in prison are projected to be released within three years, and 59% are projected to be released within five years. Not replacing them by stopping prison admissions entirely would dramatically cut incarceration. Table 6 shows the offense distribution of the projected years to release. Those projected to get out soon are majority nonviolent but include a substantial minority of violent offenders. The mix of people entering prison is 73% nonviolent offenders, with 24% still being drug offenders despite the decline of the drug war.¹¹⁴ The

113. Projected Years to Release from Prison was calculated from projected release date and end date of dataset. If no projected date was given, mandatory release date was used. If no projected or mandatory dates were given, the parole eligible date was used. If none of these were available, the sentence length was used. Negative values to -1.5 were treated as 0, smaller negative values were recoded to missing.

114. See *supra* Table 1.

largest categories of violent offense for admissions to prison are assaults and robbery. What proportion of these people really needed to go to prison at all? How many of these were charged with a felony when the circumstances could have warranted a misdemeanor charge? How many would be better handled with restorative victim-centered processes than with imprisonment? These questions cannot be answered with these data. What we can say is that a substantial fraction of prisoners turns over rapidly and decarceration has to involve reducing prison admissions.

At the same time, of course, incarceration reductions can also come from speeding up the time to release for those currently in prison as well as by reducing sentence lengths for those newly sentenced to spend time in prison.¹¹⁵ States vary greatly in the sentences they impose for similar crimes. Shortening effective sentence lengths to the low end of the distribution within offense groups would be another way to cut incarceration, especially in the states with high sentences.

As with the mix of offenders and sentences and rates of return to prison, the states are extremely variable in their distributions of time to projected release for their prisoners.

IX. OVERALL CONCLUSIONS AND IMPLICATIONS

This data overview has been focused on providing some descriptive information about state prison systems to inform conversations about possible reforms aimed at reducing the prison population. As such, it has necessarily been relatively superficial in each topic covered. It has shown the importance of unpacking the idea of a crime, a criminal, a violent offense, or a violent offender to reveal the great diversity of specific actions within each of these categories. There is no way of knowing how the actions of people in the BJS “armed robbery” or “aggravated assault” or “murder” category were distributed across the range of more and less harmful actions that could receive that category label. It is impossible to know within the scope of the data how many cases involved more serious actions being plea-bargained down to a lesser charge than the details of the case warrant, or how many cases involved what outside observers would consider over-charging given the case details. But any discussion of reducing a culture of punishment has to talk back to the homogenization of crime.

It has been shown that the states vary tremendously not only in their overall imprisonment rates, but in the mix of offenses in their prisons and in the sentence lengths given to particular offense groups. Offense-group-specific

115. Calculating the reductions from this approach requires detailed analyses that are beyond the scope of this Article.

median sentence lengths have moderately strong correlations with state imprisonment rates, suggesting that one path to reducing imprisonment is for states with longer sentences to shorten them to the levels of other states.

The analysis of returns to prison for those released 2007–2016 showed that, in recent years, the majority of people released from prison the first time have not gone back, contrary to past research from the height of the drug war when people were cycling in and out of prison on short sentences. It has shown that those who do go back to prison mostly enter on technical violations, not new crimes, and that the new crimes are more often nonviolent than violent, even for people who were imprisoned for violent crimes.

The analysis of time in prison and expected time to release showed that nearly 60% of prisoners are projected to be released within five years, meaning significant prison downsizing is possible from reforms focused on sending many fewer people to prison so that those released from prison are not replaced.

The analysis also called attention to possibilities for reducing prison populations from reducing time served for those who are sent to prison, both by shortening sentences to those found in some states and by increasing the use of parole or other early release mechanisms.

The overview also emphasized the huge variations between the U.S. states in their overall imprisonment rate, their recent history of increasing or decreasing incarceration rates, their mix of offenders, their sentence lengths by offense, and their patterns of return to prison after release. National summaries obscure these variations. This means that patterns that are true in one state may not be true in others, and reforms that create large reductions in incarceration in one state may have little impact in another. It also means that national-level summaries often obscure the details of what is happening in different places.

The rise of mass incarceration was a political process that began in the 1960s with a concern about controlling the black urban poor¹¹⁶ and built on early 20th Century discourses that portrayed black people as inherently criminal.¹¹⁷ This impulse became intertwined with the high crime rates of the 1960s and 1970s, feminist-influence victim's rights and other movements that fed the punishment boom.¹¹⁸ A politically-motivated and racially-targeted “war” on crack cocaine in the Reagan-Bush years initially centered in black

116. See ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 29 (2016).

117. KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 85 (2010).

118. See Marie Gottschalk, *Hiding in Plain Sight: American Politics and the Carceral State*, 11 ANN. REV. POL. SCI. 235, 240–41 (2008).

urban areas drove up both total incarceration and the black/white disparity in incarceration in the late 1980s and early 1990s.¹¹⁹ A politically motivated “war” on violent crime and “three strikes” laws in the Clinton years fueled further increases in overall incarceration from the mid-1990s to the mid-2000s and spread mass incarceration into predominantly white rural areas and small cities, thus lowering the racial disparity in incarceration and changing the offense mix of prisoners.¹²⁰ The manifest racial disparities in imprisonment became a major wedge for pushing back and challenging the injustice of the system.¹²¹ Black imprisonment rates began to fall in the late 2000s even as white rates continued to rise.¹²²

There are consequences of past policies that have contributed to current problems. The aforementioned extreme racial disparities in imprisonment sent a large fraction of a generation through prison and is still having indirect consequences in black communities. There is evidence that a police focus on drug enforcement increased homicide and violent crime.¹²³ The drug war incentivized police to focus on drug enforcement rather than other activities through both federal funding initiatives and forfeiture laws, leading to gross injustices including even in extreme cases to “plant” evidence and falsely accuse people of drug dealing; it also has led to a reliance on informants coerced by the threat of high penalties that has led to false accusations and a general erosion of the social fabric that would otherwise prevent crime.¹²⁴ In addition, the decades of mass incarceration plus the decline in wages for jobs in the bottom half of the income distribution have had impacts on children and families that have increased economic instability and contributed to substance abuse and violence.¹²⁵

Development of proposed reforms to reduce incarceration thus needs to be informed by continuously updated information about just what is happening in

119. HINTON, *supra* note 116, at 317–18.

120. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 56–57 (2012).

121. *Id.* at 100–01; Loic Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 *PUNISHMENT & SOC’Y* 95, 110 (2001).

122. *Education and Poverty*, *supra* note 14, at 1.

123. Alfred Blumstein, *Approaches to Reducing Both Imprisonment and Crime*, 10 *CRIMINOLOGY & PUB. POL’Y* 93, 95 (2011); Harold J. Brumm & Dale O. Cloninger, *The Drug War and the Homicide Rate: A Direct Correlation?*, 14 *CATO J.* 509, 516 (1995); Andrew J. Resignato, *Violent Crime: A Function of Drug Use or Drug Enforcement?*, 32 *APPLIED ECON.* 681, 687–88 (2000).

124. ETHAN BROWN, *SNITCH: INFORMANTS, COOPERATORS & THE CORRUPTION OF JUSTICE* 43–44 (2007); Eric Blumenson & Eva S. Nilson, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 *U. CHI. L. REV.* 35, 112–14 (1998).

125. See Kirk & Wakefield, *supra* note 30, at 175.

the system now. Studies from decades ago may not be correct about current conditions, and even current studies from one locale do not necessarily apply to others, nor can reforms based on national statistics necessarily have the same consequences in different places.

The data show that taking seriously the goal of unraveling mass incarceration and getting the rates back to 1970s levels will need to impact the whole system and cannot be achieved by any single reform. Working from these data, this package of reforms would logically include the following:

Reforms that reduce the replacement of released prisoners by reducing use of prison sentences for offenders:

- Don't give prison sentences at all when the circumstances of the crime imply a low likelihood of repetition and the need for community retribution is low
- Provide treatment instead of imprisonment to people whose underlying issue is mental health or addiction
- Increase the use of victim-centered restorative practices that hold offenders accountable and seek to restore victims without the use of incarceration

Reforms that prevent returns to prison for released offenders:

- Don't reincarcerate people for technical violations that are not crimes
- Don't reincarcerate people for crimes that would not draw a prison sentence if the person were not on parole
- Shift the focus in parole to a short-term emphasis on providing reentry support, not a long-term period of supervision and rules that are inconsistent with rebuilding social ties and employment
- Provide treatment to people with mental health or addiction issues
- Provide reentry help with housing, employment, and reestablishing family and social ties

Reforms that reduce the amount of time newly sentenced people spend in prison:

- Give shorter sentences—states that are above average in sentence lengths within offense categories should reduce their sentences
- Change laws regarding the mandatory minimums and maximum sentences for crimes

- Change prosecutorial and judicial practices regarding sentences
- Offer parole as an option in sentences

Reforms that get many of the people currently in prison out of prison faster:

- Change the rules for parole or effectively resentence people to allow them to leave prison sooner
- Recalculate the sentences for people held on charges for which the penalties have subsequently been reduced
- Release drug offenders
- Release people currently held in prison before their expirations of their current sentences by expanding the use of parole or clemency or other mechanisms to allow people out of prison

This checklist of reforms is an abstract list based on the data, not detailed prescriptions for best practices. Just as mass incarceration resulted from a confluence of political and social processes operating at many levels, the barriers to reform are similarly complex political and social forces operating at many levels in many arenas. Exactly what reforms would cut incarceration the most vary from system to system, as do the political and social forces that will shape the path of reforms. But any reforms need to be guided by data.

APPENDIX 1. FREQUENCIES FOR STATES IN THE DIFFERENT ANALYSES¹²⁶

State	NPS 2016	NCRP In Prison in Last Valid Year of Data		NCRP Released in States with Good Data on Returns*	
	Freq.	Freq.	Year	Continuous Outcomes Released 2007– 2016*	Five Year Outcomes Released 2007– 2011**
Alabama	28,883	24,792	2016	47,777	26,227
Alaska	4,394	3,783	2013		
Arizona	42,248	41,862	2016	90,618	49,844
Arkansas	17,537				
California	130,390	128,900	2016	237,144	158,609
Colorado	19,862	19,844	2016	43,151	23,465
Connecticut	14,957				
Delaware	6,585	5,099	2016		
District of Columbia	-	5,011	2015	10,456	5,553
Florida	99,974	98,221	2016	190,753	102,863
Georgia	53,627	53,449	2016	89,174	46,070
Hawaii	5,602				
Idaho	8,252				
Illinois	43,616	43,476	2016	81,247	35,219
Indiana	25,546	25,862	2016	85,205	48,210
Iowa	9,031	9,443	2016	20,089	11,054
Kansas	9,920	9,807	2016	12,347	
Kentucky	23,018	23,183	2016	65,398	36,612
Louisiana	35,682	35,658	2016		
Maine	2,404	2,357	2016	4,020	
Maryland	19,994	22,066	2012		

126. States excluded for too few releases were New Hampshire and New Mexico. States excluded for extreme data patterns that suggested errors or inconsistencies: Nebraska, Ohio, Maryland. Only supervised releases were included for Oregon and Illinois due to too few cases of unconditional releases. Outcomes adjusted for time at risk. States were also excluded if they did not have at least five years of data.

State	NPS 2016	NCRP In Prison in Last Valid Year of Data		NCRP Released in States with Good Data on Returns*	
	Freq.	Freq.	Year	Continuous Outcomes Released 2007– 2016*	Five Year Outcomes Released 2007– 2011**
Massachusetts	9,403	8,851	2016	16,584	6,305
Michigan	41,122	40,987	2016	60,915	33,601
Minnesota	10,592	9,950	2016	25,582	12,312
Mississippi	19,183	18,833	2016	20,911	
Missouri	32,461	32,437	2016	55,168	29,014
Montana	3,814	2,564	2016	5,109	1,798
Nebraska	5,302	5,224	2016		
Nevada	13,637	13,645	2016	25,045	9,743
New Hampshire	2,818	2,652	2016		
New Jersey	19,786	21,371	2016	57,586	34,212
New Mexico	7,055	7,144	2015		
New York	50,716	50,060	2016	91,984	49,900
North Carolina	35,697	35,633	2016	105,725	68,278
North Dakota	1,791	1,719	2014	4,646	1,718
Ohio	52,175	50,941	2016		
Oklahoma	26,546	27,315	2016	52,725	26,959
Oregon	15,166	14,985	2013	13,155	3,601
Pennsylvania	49,244	51,544	2016	74,924	34,974
Rhode Island	3,103	2,481	2016	12,791	7,683
South Carolina	20,858	20,792	2016	54,598	31,755
South Dakota	3,831	3,751	2016		
Tennessee	28,203	31,193	2016	57,667	29,754
Texas	163,703	149,498	2016	352,516	189,498
Utah	6,182	6,019	2016	12,469	6,263
Vermont	1,735				

State	NPS 2016	NCRP In Prison in Last Valid Year of Data		NCRP Released in States with Good Data on Returns*	
	Freq.	Freq.	Year	Continuous Outcomes Released 2007– 2016*	Five Year Outcomes Released 2007– 2011**
Virginia	37,813				
Washington	19,104	17,406	2016	40,295	21,060
West Virginia	7,162	7,398	2016	15,640	8,892
Wisconsin	23,377	23,195	2016	36,646	19,410
Wyoming	2,374	2,355	2016	5,611	2,763
Number of States	50	45		36	33
Total Number	1,315,475	1,212,756		2,175,671	1,173,219