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The U.S. Sentencing Commission's Recidivism Studies: Myopic, Misleading, and Doubling Down on Imprisonment

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The U.S. Sentencing Commission's Recidivism Studies: Myopic, Misleading, and Doubling Down on Imprisonment

I. Introduction

The six-year college graduation rate at public universities is below 60%, and at privates it is 66%. Over one-third of college students will not graduate within six years. While some consider these numbers shocking and blame the institutions, often they evince only a shrug. The focus is on the success rate, not the failure rate. Recidivism numbers, on the other hand, highlight failure. Even though federal recidivism figures run close to the college noncompletion rate, it is the negative number that is highlighted, not the success rate. That negativity keeps the focus on more selective incapacitation rather than forcing a discussion about institutional barriers and reasons for failure.

Recidivism has become the new hallmark of criminal justice reform, as reflected in the U.S. Sentencing Commission's recidivism project. As of this writing, the Commission has issued three reports in 2020 alone, which ostensibly show the public safety threat posed by different types of offenders upon release from federal prisons. They also outline the parameters within which "safe" criminal justice reform can proceed. The comparative drug studies retrospectively validate the decrease in drug sentences as public safety neutral and therefore vindicate the Commission's and the courts' early-release decisions.

The studies reinforce sentence length as one of two crucial elements indicating the likelihood of reoffending. The other is prior criminal history. Yet the overly broad definition of "recidivism" and the focus on easily measurable and static risk factors create a feedback loop. Together these studies serve to reenforce the status quo and the Commission's role in it.

Recidivism has now replaced rehabilitation as the guiding principle of punishment. It is increasingly used to steer criminal justice policy despite research limitations. It serves as a stand-in for public safety, even though lengthy incarceration may have criminogenic and other negative ramifications for family members and communities. Yet the Commission emphasizes recidivism. It emphasizes what amounts to preemptive imprisonment for those with long criminal records to prevent future offending.

The Commission's work should come with a warning label. First, its recidivism studies should not be consumed on their own. Instead they must be read in conjunction with U.S. Probation and Pretrial Services recidivism research,

which includes data on the impact of programming, treatment, and services on reentry success, including recidivism. Second, the recidivism studies plainly raise questions about the Commission's role. Their negative tone and ongoing preference for imprisonment indicate that the Commission continues to adhere to its role as guardian of pro-imprisonment guidelines. If the Commission were to play a more useful and effective part in criminal justice reform, it should consider using its research strength in alternative ways to collaborate with other participants in the federal system.

Part II discusses the Drugs Minus Two retroactive guideline change and the judicial response. Part III turns to the Commission's recidivism study assessing reoffending by offenders who benefited from the decrease and those who did not, and compares it to the Commission's earlier data set from its crack-cocaine early-release recidivism study.

Part IV details the recidivism studies other government agencies have prepared and compares their approaches. Most of the discussion centers around studies done through the Administrative Services of U.S. Courts, which rely on probation data. With substantial changes in the treatment options and approaches available to federal probation officers, desistance and successful reintegration have improved. Still, the U.S. approach continues to be driven by concerns about undercounting recidivism events. As Part V's comparison to German recidivism studies indicates, the approach in Western Europe is different. This is less about a disagreement of data collection and analysis than it is a clash of philosophies and values that reveals some of the underlying reasons for the dramatically different imprisonment rates between the two countries.

Part VI circles back to the impact prison programming and reentry assistance can exert on desistance and reoffending. It highlights opportunities for change in an individual's criminal career. The last section assesses the Commission's work in light of discussions around public safety and the use of data in criminal justice. With the heightened focus on recidivism and risk assessment, the Commission's approach is important and disturbing. It threatens to propel us into data-driven selective incapacitation and continuously long prison terms, all in the name of public safety.



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II. Early Releases Under Amendments 782 and 788

In recent months the Commission has issued two data reports on the federal offenders convicted of drug trafficking felonies who were released early because of the Commission's 2014 decision to retroactively change the drug quantity table.¹ Amendment 782, also widely known as "Drugs Minus Two," decreased base offense levels under the drug quantity table by two. Offense level 38 was retained but with new and substantially higher threshold amounts.² A few months later, Amendment 788 made that reduction retroactive.³ The intended effect was to lower guideline sentences so that mandatory minimums would fall into, rather than below, the range.

In its official report outlining and justifying the proposed adjustments, the Commission acknowledged that the original sentence ranges needed to be modified to better reflect culpability. Drug quantity was an uncertain and often misleading measure of culpability, propelling the Commission to change the drug guidelines to focus on the actual role the offender played. Even though low-level offenders may handle a large quantity of drugs, they exercise no control and their financial gain is comparatively small.

The Commission also determined that previous sentence levels were not required to ensure guilty pleas or lead to cooperation with the government. Whether these are legitimate considerations in setting sentence ranges may be questioned, yet they carry important practical effects, including the Department of Justice's support for such modifications. The rationale for the decrease also included salutary effects on the federal criminal justice system in the form of savings for the Federal Bureau of Prisons (BOP) and decreased prison overcrowding.⁴

The Commission built this sentence reduction on its 2007 decrease of sentence levels for those convicted of crack cocaine offenses. The resulting recidivism studies that tracked the public safety impact of those convicted of crack cocaine trafficking and released early found no public safety impact.⁵ For that reason, the Commission predicted that early releases for other drug offenders also would have no negative effects on public safety.

The crack cocaine recidivism study was published in May 2014, shortly before the Commission decided to decrease all drug sentence levels. It compared reoffending rates, five years after release, between crack cocaine offenders released immediately before and those released after the 2007 Crack Cocaine Amendments went into effect. The former had served the full sentence imposed but would have been eligible for early release under those amendments; the latter benefited from a sentence reduction. The recidivism rate, as defined by the Commission, was lower among the group of offenders released early, though the Commission found no statistically significant difference between the two.⁶ This study proved the model for the larger recidivism study at issue here.

Because of the large number of inmates eligible for resentencing upon the sentence level decreases, the Commission mandated that despite the Amendment's

November 1, 2014, effective date, no releases would occur until November 1, 2015. In its 2020 recidivism study on these releases, the Commission notes that the delay in the release date was "an enhanced public safety precaution."⁷ To ensure public safety, the delay would provide courts with time for individual assessments, allow offenders to move into halfway houses, and prepare probation officers for the larger number of offenders requiring supervision.

Before the guideline change, the average sentence for common drug offenses was six years. After the change, the Commission predicted, it would be five years and one month—an eleven-month reduction. For those currently incarcerated, however, the deduction would be larger, as they had already spent longer in prison (nine years on average). Yet many would not be released immediately, even with the sentence reduction.⁸ Still, most would leave prison one to two years before they could have expected at sentencing. To most non-U.S. observers, the sentence lengths for drug offenses remain startling. After all, even with these sentence reductions, many of these offenders will serve a decade in prison.

All federal district court decisions issued between late 2014 and October 1, 2019, on motions pursuant to Amendments 782 and 788 are documented in the Commission's recidivism report from March 2020.⁹ District courts received more than the 46,000 motions the Commission had predicted. Still, they dispensed with the over 50,000 applications for reduced sentences with relative ease and granted almost two-thirds of them. Across districts, the numbers of applications differed starkly. Three of the four Texas districts were at the top of the motions scale, with a combined total of around 8,000 applications. Those amounted to about 14% of applications nationwide. Almost 40% of motions came from twelve (out of ninety-four) judicial districts. Just as the number of requests differed, so did the grant rates. The Middle District of Louisiana had the highest rate of denials, at 55.4%. A number of other districts also denied more than half of the motions that came before them. On the other hand, three districts granted every motion, and four more came close.¹⁰ Most of the denials went to offenders in criminal history category VI, many of whom were statutorily precluded from benefiting.

The grant percentage may be connected to the origin of the motions. While the defendant, the court, and the BOP could have moved for a sentence reduction, the BOP never did. Court involvement varied substantially. In both the Fifth and Eighth Circuits, about a quarter of petitions originated with the court. In the D.C. Circuit, defendants filed all motions.¹¹

The racial and ethnic makeup of offenders differed substantially between the drug types at issue. While African Americans made up 87% of the applicants in crack cocaine cases, less than 3% of the applicants in methamphetamine cases were black. The largest numbers of Hispanic offenders were convicted of powder cocaine or marijuana trafficking. About 86% of all applicants were African American. Their grant rate was slightly below that of both

White and Hispanic applicants. Three-quarters of the motions granted went to U.S. citizens. Only 7% of sentence reductions went to women.

Most of the decisions were straightforward.¹² After all, the primary consideration for a sentence reduction was the type and amount of drugs at issue, both of which had been found at sentencing. Many courts, therefore, chose to amend the sentence by granting the full two-level reduction, leading to a new sentence at the low end of the new guideline range.¹³

In its application note to Amendment 788, the Commission reminded district courts that the application note to § 1B1.10, which governs sentence reductions because of a guideline amendment, requires them “to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction.”¹⁴ In the reasons district courts gave for denying motions for a sentence reduction under Amendment 782, they mentioned 18 U.S.C. § 3553(a) factors, which include safety considerations or protection of the public 3.4% and 2.7% of the time, respectively. Most of the denials indicated that the offender was ineligible for a decrease because of the offender’s status as a career offender, a mandatory minimum, the type of sentence imposed, or the offender already having benefited from a 782 reduction, a departure, or a variance.¹⁵

The amount of reduction, in both number of months and percentage decreases from the current sentence, varied widely between districts and circuits. The District of Rhode Island had the smallest percentage decrease, at slightly below 14%, while Illinois Central saw sentences decrease by more than one-quarter. That difference amounted to 2.5 years.

Since the Commission had based its retroactive offense-level decrease on the earlier crack cocaine recidivism study, it replicated the study for the Amendment 782 reductions. The two studies provide insights into the Commission’s approach to recidivism and public safety.

III. “Drugs Minus Two” Recidivism Studied

The Commission’s 782 recidivism study was built on the earlier crack cocaine study as Amendment 782 was modeled on the decrease of crack cocaine base offense levels in 2007. After Congress adopted that decrease, the Commission made it retroactive the following year. In the subsequent three and a half years, the courts decided over 25,000 motions for sentence reductions. The overall grant rates then were similar to those for Amendment 782 six years later. Not quite two-thirds of the motions were granted, a marginally higher percentage than for Drugs Minus Two. Districts varied dramatically in their grant range, from a low of 34.5% in Puerto Rico to 100% in seven districts, though most of those saw a very low number of applications.¹⁶ Similarly, most of the denials occurred because offenders were legally ineligible for the reduction. Six percent of the denials could have reflected judicial concerns about the impact on public safety.¹⁷

To assess “recidivism” in the five years after release, for the crack-reduction study the Commission adopted the following definition: “a reconviction for a new offense; a rearrest with no case disposition information available; or a revocation of an offender’s supervised release.”¹⁸ The Commission modified this definition for the Drugs Minus Two recidivism study.¹⁹ It included not only supervised release revocations but also violations of their conditions if they led to judicial actions. Only “minor traffic offenses” were excluded.²⁰

Both studies compare the Retroactivity Group, which benefited from the reduction and was released early, with the Comparison Group, which was released shortly before the reduction became available but otherwise would have been eligible for the reduction. Both studies ultimately reached similar results, and their findings were often unsurprising.

The Drugs Minus Two study found no statistically significant difference between the two groups in their recidivist rate. Generally the Retroactivity Group, which served on average about seven years in prison while the Comparison Group served about one year longer, was less likely to run afoul of authorities. Their recidivism rate was about 28%, whereas that of the Comparison Group was 30.5%. Recidivism is slightly higher for younger offenders and those with a higher criminal history level.

Age and prior record are both standard risk factors. Even though the federal guidelines do not allow for the consideration of age at sentencing, the relationship of age to reoffending is widely acknowledged. Virginia’s Commission, for example, built age explicitly into its diversion scheme, which includes intermediate drug offenses.²¹ For most offenders, the most crime-prone years end in their mid- to late twenties. The older the offender at the time of release, the less likely they are to commit reoffenses, especially of a serious nature.

The Commission’s criminal history category is based, at least partially, on the relationship between prior criminal record and likelihood of reoffending. As the criminal history score goes up, so does the likelihood of recidivating. Any prior connection with the criminal justice system, even if it does not rise to the level of a conviction, increases the likelihood of a reconviction, and more serious offenses are more predictive of reoffending.²²

Also unsurprising is the finding that recidivist events are most likely to occur within the first twelve months upon release, with their likelihood tapering off subsequently. For both groups, the median time to recidivism was approximately fifteen months. While the crack cocaine study looked at five years after release, the 2020 Drugs Minus Two Retroactivity Study considers a three-year interval. Given that post-release supervision in drug trafficking cases was, on average, forty-nine months during fiscal year 2019,²³ these studies largely capture times during which the offenders were under supervised release—a time frame in which return to prison in some cases will be based on

noncriminal activity that amounts to a violation of supervised release requirements.

The Drugs Minus Two recidivism study provides greater detail than the crack cocaine study on the type of recidivism events measured. The latter study only separates arrests from sentence revocations. About 10% of the released were revoked, and a third of offenders were rearrested. The recidivism rate for both crack offender groups was in the mid-forty-percent range, which is substantially higher than in Drugs Minus Two.

For both groups in the Drugs Minus Two study, a third of the recidivism events were a court or supervision violation. A quarter fell into a miscellaneous category, and a quarter were drug trafficking or possession offenses, though there is no indication of the level of offense or whether they triggered an arrest or led to a conviction. The Commission indicates that for about 20% of recidivists in each group, a violent offense was the most serious event, but almost half of those qualified as “simple assault.”²⁴ That means that for 6% of those released, their worst recidivism event would be a simple assault. Presumably, the other 6% would have committed more serious violent offenses.

The Commission praises both the Commissioners and the federal judges for their judiciousness in setting out and applying the sentence reduction guidelines. Because the groups of those released early and those whose sentences expired have very similar reoffending outcomes, the Commission sees the care in release decisions as validated. It indicates that courts focused on 18 U.S.C. § 3582(c)(2) and § 1B1.10 to ensure public safety in denying a third of the motions for a sentence reduction. According to the Commission, almost a third of those, over 4,500, considered § 1B1.10. Curiously, the study then notes that “[p]articularly noteworthy” is that courts issued 552 denials explicitly citing public safety as a reason and 362 denials based on post-sentencing or post-conviction conduct.²⁵ The latter may or may not be public safety related. Even if one assumes that all of these 914 denials are based on public safety concerns, they constitute 5% of all denials and less than 2% of all petitions. Those numbers do not indicate a federal judiciary concerned about a highly dangerous offender population. They also do not show a judiciary engaged in searching analysis of motions with an eye to denying them. Instead, assuming that the basic elements required for eligibility were fulfilled, courts granted the motions except in very unusual cases.

In fact, the Commission’s release criteria may have been too narrow or the courts may have applied them too restrictively. After all, the data show that the early release group was slightly less likely to commit another offense than those released before the sentence change. There may have been more room for releases.

The Commission concludes, correctly, that the early releases did not endanger public safety. Yet that conclusion may be the most conservative that can be deduced from the data. After all, the Commission applies such a broad

definition of recidivism that it pulls in acts that do not pose any threat to the public and may not even indicate criminal activity but rather antisocial behavior. Indeed, *recidivism* is a markedly fluid term that may measure a broad array of real and alleged rule violations.

IV. Defining Recidivism: The Goldilocks Approach or Let a Thousand Flowers Bloom?

Recidivism has now become the hallmark of criminal justice reform. It is frequently used as a marker of public safety. Low, or at least stable, recidivism is increasingly a prerequisite of criminal justice reforms, at both the front and back ends.

The Commission used its crack cocaine recidivism study to support further drug law reform. In some states, those charged with drug possession or low-level trafficking and addicts benefit from diversion from a prison sentence based on predictions of low recidivism. Yet recidivism predictions have bedeviled other reform efforts, at least indirectly. While nonviolent offenders have received sentence discounts and alternative dispositions, those defined as violent are incarcerated longer. The offense committed is not the only predictor of recidivism. First offenders may receive alternative sanctions based on the likelihood of their reoffending. On the other hand, those with long records are statistically at greater danger of recidivating and therefore receive a sentence mark-up.²⁶ The crack cocaine and Drugs Minus Two recidivism studies reinforce the importance of prior criminal record in recidivism.

Yet the increasing use and rising importance of recidivism as a marker of public safety conceal the absence of a uniform and shared definition. Recidivism studies differ in time frame, definition of the event marked as recidivist, and type and amount of data collected.

The Commission defines recidivism broadly, pulling in both activities that are not adjudicated as criminal and those that would not be a violation but for the offender’s supervision status. It appears most concerned about undercounting recidivist events. That value choice leads it to rely on rearrest data, for example. In an earlier recidivism study, it bemoans that rearrests are only a weak measure of recidivism and that “many crimes go unreported to police or, if reported, do not result in an arrest.”²⁷ That, however, is a feature of all offense, not just recidivism, data.

The precautionary principle appears to drive the Commission’s approach. It fears undercounting rather than overestimating criminal conduct. That also explains the wide net it casts with its inclusion of all kinds and levels of offending.²⁸

Even within the federal system, however, the Commission’s choice is not universally shared. Annually, the Administrative Office of the U.S. Courts (AOUSC) issues a recidivism study on offenders placed on probation and supervised release.

The AOUSC counts the first rearrest for *serious* criminal activity during the supervision period. It excludes a host of minor criminal offenses, misdemeanors, and petty

offenses, because states report those inconsistently.²⁹ Indeed, those reporting differences contribute to the differences between state recidivism numbers, making the latter less comparable and therefore less valuable. The AOUSC also excludes arrests resulting from technical probation violations. It deems those of a different nature than criminal conduct and not indicative of future criminal rule-breaking.

The AOUSC groups recidivist events into three categories: major (commission of a felony), minor (a misdemeanor), and technical.³⁰ Data on federal probation are in many respects encouraging. Among drug offenders who started their supervised release between 2010 and 2013, only 18% were arrested within two years after release. Among that 18%, a quarter were arrested for drug involvement, but fewer than 20% for a violent offense. During that time, almost three-quarters of drug offenders completed supervision successfully. Among those who were returned to prison, most frequently it was because they violated supervision conditions.³¹

The Commission's definition of recidivism events, on the other hand, does not abide by any of the AOUSC limitations. It counts all arrests, including those arising from minor offenses, and supervision violations. As a result, the Sentencing Commission's data always show a higher level of recidivism than the AOUSC studies.

"Technical" revocations are difficult to group in the abstract. In many cases, they imply criminal conduct that law enforcement did not further investigate because they deemed revocation sufficiently punitive. Alternatively, they may be the only sanction available when an offender refuses compliance or continually fails despite additional chances. Those situations, however, may not show new offending. Probation data indicate the confluence of probation violations and new criminal conduct, though a large percentage of technical violations do not show such new criminal conduct.³²

The Bureau of Justice Statistics (BJS) issued its own study on the recidivism of federal offenders in 2016. It analyzed the five years after offenders were put on supervision in 2005. Three-quarters of these offenders were on post-release supervision. The study counted the first arrest, even if it occurred for a technical supervision violation but not for a traffic offense. More than two-thirds of arrests by federal officers involved a supervision violation. State arrests were more varied, though assault, general public order offenses, driving under the influence, and drug possession were the most frequent reasons.³³ The broader definition of recidivism events leads to results that are closer to the Commission's than to the AOUSC's. Yet the strength of the BJS study is its emphasis on the substantial difference between arrests and prison returns. While the cohort studied showed close to half being rearrested, less than a third were reimprisoned.³⁴

Even allowing for differences in the post-release time frame the studies employ, they demonstrate the impact that the definition of recidivism events has on their

findings and conclusions. Since its definition of recidivism is the slimmest, of the three, the AOUSC study will always show the lowest recidivism rate among federal offenders. The Sentencing Commission and the BJS recidivism studies paint a less favorable picture of federal releases. Yet BJS data challenge the assumption that all recidivist events are equally problematic or have the same impact on public safety.

Differences in the length of recidivism studies may result from outside time constraints, the urgent demand for results, availability of and access to data, or other methodological constraints. Federal recidivism studies tend to occur at the three- to five-year mark. Most federal offenders are under supervision during some or all of that time frame. The latest Commission data indicate that courts order supervised release in about three-quarters of offenses. Almost all drug trafficking offenders have supervised release included in their sentence. On average, the term of supervised release imposed hits three years. For drug trafficking offenders, however, it clocks in at four.³⁵ During that entire time, supervisees are subject to supervision rules, whose violations may lead to an arrest and reimprisonment. The inclusion of supervision violations, therefore, increases the recidivism count during all or a substantial part of the time frame of these recidivism studies.³⁶

These three studies embrace a number of different methodological approaches to assess recidivism. Despite their differences, they agree ultimately on what may be dubbed the "relevant conduct" accounting for recidivism. Under all of these measurements, the focus is on further criminal conduct rather than on the formal justice system's response. All studies indicate that the data present a substantial undercount as crimes remain undetected or unreported. This implies that "true recidivism" rates are substantially higher, that released offenders are more dangerous than the numbers indicate. The approach also suggests distrust of the criminal justice system. The legal system discounts criminal conduct through plea bargaining, declines to prosecute, or is hamstrung by legal rules from arriving at a conviction or sentence. The prevailing approach to recidivism makes an end run around the criminal justice system with the focus on arrest data. For these recidivism studies, it was of greater importance to document recidivism as accurately as possible than to focus solely on legal confirmation of criminal conduct. Yet other countries do not count recidivist events in the same way, which can lead to a very different approach to imprisonment, to criminal offenders, and to the criminal justice system itself. The framing of recidivism impacts not only criminal justice policy but broader societal attitudes toward those looking for another chance.

V. How Exceptional Are U.S. Recidivism Rates?

In recent years, many reformers have looked to Continental Western Europe for inspiration to decrease the size of our criminal justice system. Those countries have much lower

imprisonment rates and ostensibly much lower recidivism rates. While little attention has been paid to the latter, the tenor of the recidivism discussion there may be just as instructive as the data.

Even with a uniform set of definitions and methodology, recidivism rates would be difficult to compare within the United States. Reporting of offenses differs, as do charging and plea-bargaining policies. Both the Commission and BJS indicate that a reason for counting supervision violations is that in cases of a new offense, some law enforcement agencies would record a new crime, some note a supervision violation, and some do both. Similarly, prosecutors may differ between charging the new crime or proceeding based on the supervision violation.³⁷

These differences highlight how much more difficult cross-country recidivism studies will be. Among the most pronounced differences will be the definition and categorization of offenses, supervision guidelines, prosecution patterns, sentence types, and lengths of prison terms. Yet a comparison between the Commission's and a leading German recidivism study highlights the different choices made in assessing recidivism and some of the assumptions and perspectives that underlie those choices. It also illuminates ensuing public policy ramifications.

A. The German Recidivism Study: Definitions and Findings

A detailed German recidivism study, published in 2016, defines a recidivist event exclusively as a conviction. It does not include any criminal justice action that falls short of a new entry in the central criminal registry.³⁸ Any arrests and charges unresolved at the end of the German study's three-year time frame are not captured as recidivist events. The difference in the impact this choice has on German recidivism statistics, as compared to U.S. studies, is marked.

Dismissals and abbreviated proceedings of different types dominate German prosecutorial statistics. Germany does not distinguish between federal and state prosecutions, so the crimes at issue include both federal and state-level offenses. The German criminal procedure code explicitly permits prosecutorial dismissals for minor offenses that are akin to misdemeanors, if the offender's guilt is trivial and there is no public interest in a prosecution.³⁹ Misdemeanors can also be resolved through penal orders, which may lead to either a fine or a suspended jail term. The authors of the recidivism study indicate that once formal charges are filed in these cases, they usually result in a penal order.⁴⁰ In contrast to the Commission study, offenses for which no formal charge is filed are not counted as criminal convictions.

Despite differences both in the definition of recidivism and in offender populations, after three years about the same percentage of offenders—one-third—recidivated in Germany. Most of them did not receive an unsuspended prison term. Recidivism rates differed between offenders who had served time and those who had been sanctioned in

other ways. For those who completed a prior prison term, the recidivism rate hovered close to one-half. For juveniles sentenced to juvenile correctional institutions, the rate climbed to two-thirds. Those convicted of violations under the narcotics laws had a relatively high recidivism rate (over 50% after six years).⁴¹

Similar to U.S. data, most relapses occur during the first year after conviction or release from imprisonment. Even though the large German recidivism study focuses primarily on a three-year time horizon, a longer six-year period shows only "a minor rise of the reconviction rate."⁴² The difference between three and six years is nine percentage points, from 35% to 44%. After nine years the number increases to 47.5%, almost half of those with a criminal record.⁴³

Generally, those sentenced to a fine only, which is the primary disposition even for felony-level offenses, were less likely to recidivate than offenders sentenced to prison. This may not be surprising, as fines are generally imposed for less serious crimes and on offenders who "show a favourable prognosis."⁴⁴ With federal sentencing almost entirely focused on imprisonment, comparable data are nonexistent. In fiscal year 2019, 89% of federal offenders were sentenced to prison only; 0.5% got a fine-only sentence, and 6% probation only.⁴⁵ The pool of nonprison sentences is too small to draw any (reliable) conclusions about recidivism, especially since they are closely tied to certain crimes and prior criminal record.⁴⁶ The frequency of nonprison terms in the German study reflects, in part, the types of cases adjudicated but also the more limited frequency with which German courts impose nonsuspended sentences.

Just as in the United States, longer criminal records are connected to a greater likelihood of recidivating in Germany. They are also tied directly to more severe sentences.⁴⁷

In subsequent sentencing, only about 3% of recidivist events in Germany will lead to adult imprisonment within three years, which reflects the relatively minor nature of subsequent offending. Those initially sentenced to a custodial sentence are, however, the most likely to receive another custodial sentence. About one-third of younger offenders are reincarcerated, but less than a quarter of older offenders are.⁴⁸

Comparable to the Commission's data is the German finding that desistance increases continuously after age twenty-five. From a high of 45% for the youngest offender group, ages fourteen to fifteen, desistance drops initially to 40%, where it plateaus before it climbs again. The most likely reoffender group is between twenty-one and twenty-four, and even for them the chance is higher that they will not cross paths with the criminal justice system again. By the time those with a criminal record enter their mid-twenties, desistance increases, and by their sixties it stands at 85%. Prison and probation sentences both decline progressively from the mid-twenties on. Yet those with prior prison sentences have the highest recidivism rates in every age group, from slightly below 50% for those between twenty-five and twenty-nine to about 35% for those over

sixty.⁴⁹ The data cannot resolve the question of the extent to which the initial sentence reflects a poor social prognosis that persists, uninterrupted by imprisonment or whether the prison reinforces it.

Gender-based findings hold across the two countries, too. Gender substantially impacts desistance rates on both sides of the Atlantic. In Germany, women's recidivism rate (26%) is substantially lower than that of men (37%). The adult women most likely to recidivate served time previously. For that group the statistical difference from male recidivism rates is relatively limited, at only 6%. About 17% of females returned to prison within three years, compared to 26% of men.⁵⁰ As in the United States, the absolute number of women in the criminal justice system is substantially smaller than the number of men.⁵¹

The Commission study includes only U.S. citizens. Noncitizens with a federal drug conviction would be removed from the United States upon release. The German study, on the other hand, includes foreign nationals, though those with the longest prison terms are the most likely to be deported, which may explain their substantially lower recidivism rate following a prison sentence. Yet that pattern was replicated for other sanctions, though to a more limited extent.⁵² Whether fear of deportation is the primary incentive to limit further run-ins with the law or other elements of the immigrant background or status explain the differential is unclear.

The data show substantial parallels but ultimately great differences in the number of offenders who are returned to prison. One important limitation of the information provided, however, is that revocation of supervision, either during probation or after release, is not explicitly included in the recidivism study. Revocation data are being compiled by the national probation office but are not being published regularly. If revocations were considered, they might shed a somewhat different light on some of these data points. For example, 2011 supervision figures from most of the western part of Germany show revocations in 29% of cases for adults. Most of these are likely to have occurred because of new offenses. Those—and offenses not leading to reincarceration—would be captured in the recidivism study. Yet any revocations for technical violations would not be included.⁵³

Differences in definitional choices clearly impact recidivism findings. Nevertheless, many of the trends show substantial parallels. Still, European recidivism studies often differ markedly in rhetoric and tone.

B. The Framing of Recidivism

While translations camouflage some of the German phrasings, the German publications have a sharply different tone than U.S. studies, including the Commission's. First, the research regularly speaks of *Legalbewährung*, which amounts to desistance. Effectively the terminological choice focuses not on recidivism but on its opposite. The term captures the person's ability to continue a life without further offending, or at least without any offending that

registers formally. Second, much of the discussion emphasizes the relatively minor nature of subsequent offending, as captured in the reimprisonment rate. Third, reoffending data are based solely on new convictions rather than on arrests or probation violations. This reflects and reinforces confidence in the legal system and also shows the difference between proven reoffending, allegations of crime, and the violation of supervision rules. Supervision violations are counted toward the existing offense, rather than being considered recidivist events.

All of these differences are substantial, not solely statistically but in the values they display. Most people with a criminal conviction do not reoffend. In Germany a new offense, however, is deemed neither a systemic nor an individual failure if it is relatively minor, which equals any nonprison sentence. The framing of recidivism, therefore, is important for the criminal justice system and the expectations and trust citizens place in it. This is even more essential during times of reform.

The importance of framing has been studied initially in the context of medical decision making, with the so-called "Asian disease."⁵⁴ Decision makers are provided with two logically equivalent questions, one framed positively in terms of lives saved (or money gained), the other negatively as lives (or money) lost. The choices respondents make differ depending on whether the problem is presented from a gain or a loss perspective. The former leads to respondents acting averse to risk while the latter makes them more risk tolerant. That means they opt for the more certain positive outcome.⁵⁵ The effects of framing differ based on the respondents' educational attainment and their level of data sophistication. The type of data presentation—numerical or visual—also affects outcomes. Framing studies have now been done in numerous fields, though rarely in criminal justice.⁵⁶

Framing studies based on the "Asian disease" framework in the criminal justice field have focused on risk-based police decision making. The framing of recidivism lends itself to this analysis, too. The Sentencing Commission's reports, as well as other recidivism studies in the United States, focus on failure, defined broadly. For example, the Commission carefully defines and counts subsequent arrests and serious supervision failures, independent of whether they amount to criminal offending. German data, on the other hand, focus heavily on whether persons with a prior record remain free of subsequent convictions and especially of serious crime. Once the data are reframed in that manner, even new convictions frequently indicate that the individual presents no threat and that the system works effectively. With this approach, the longer the desistance period, the more successful the approach the criminal justice system employed initially.

Some U.S. reentry programs have begun to focus on desistance and the length of time during which an offender avoids running afoul of law enforcement. Similar to drug and alcohol abstinence programs, no longer is the success measured in a binary manner. Instead success becomes

a more sophisticated question about the length of time an offender can abstain from crime. Desistance goals should also include the seriousness of reoffending.

The framing of success and failure is closely related to the question of who is to blame or reward for the outcome. Is subsequent offending the individuals' fault because they failed to "learn their lesson," or is it a systemic failure because prison causes more crime or because reentry efforts are insufficient? Success, on the other hand, could focus on opportunities and support for change during incarceration and at reentry, rather than on the individual's innate characteristics. These questions, however, are missing from the Sentencing Commission's analysis. Its recidivism studies focus exclusively on the crime of conviction and prior criminal record as predictors of recidivism. They fail to consider the impact prison programming or reentry assistance may have had on offenders. The federal probation service frequently emphasizes those elements in its efforts to decrease recidivism.

VI. Not a Black Box: Prison Programming and Reentry Support

The starting point for the Sentencing Commission's Drugs Minus Two recidivism study, like its crack recidivism study, is the change in the length of the sentences served. Even though the offenders released served, on average, between six and ten years in prison and subsequently were on supervised release for three to five years, the Commission treats those years essentially as a black box. Yet the opportunities of which offenders availed themselves and the services available, inside and outside of prison, differed. While the impact of prison programming on post-release desistance lacks detailed and specific evaluation and remains often uncertain, U.S. Probation and Pretrial Services carefully evaluated and changed its techniques to facilitate reentry and prevent reoffending.

A. Prison Programming

Investment in programming indicates that we have left behind the "Nothing Works era," though we are still in the process of determining "what works." Despite or perhaps because of the proliferation of in-prison programs in BOP facilities, there is little knowledge as to what types of programming work most effectively, on their own or in combination with others.⁵⁷ Many current BOP programs are neither evidence-based nor validated. Yet meta-studies and assessments of specific small-scale programs indicate the effectiveness of programming, at least in reducing recidivism. Large prison-based residential drug and alcohol treatment programs have undergone robust assessment. Their evaluations indicate that individuals who have gone through them adjust better upon prison release, which includes preventing relapse and arrest. However, selection bias in admissions may overestimate the impact of these programs. Since other factors, such as a strong social network, also play an important role in post-release success, the precise role of any program is difficult to ascertain.⁵⁸

Evidence indicates that even program participation by itself lowers the risk of reoffending. Whether that is a function of the programs offered or rather of the characteristics that motivate some imprisoned persons to participate and ultimately help with their reentry and desistance remains unclear.⁵⁹ Even though we are far from understanding the effectiveness of prison programming, clearly it matters. Yet recidivism studies fail to reflect that fact, implying that the sentence imposed or served and prior record are destiny. While the Commission noted overcrowding as a reason for Amendments 782 and 788, the recidivism studies fail to account for its potential impact on opportunities for program participation and effective release preparation.⁶⁰

Reentry preparation and the probation officer assigned are often crucial tools for offender success. Probation services made substantial changes in the programming offered and supervision styles to be more effective. Recidivism studies, however, do not credit their work but instead often paint recidivism as almost inevitable.

B. Probation Supervision and Reentry Assistance

About three-quarters of federal offenders are sentenced to a period of supervised release after release from imprisonment. For those convicted of drug trafficking offenses, that figure is even higher. The supervision period for drug offenders runs between three and five years, a substantial period of time.⁶¹

Because the Commission compares recidivism rates at different release cycles, it may not compare identical populations. Federal probation data indicate that those currently released from prison have a worse reoffending prognosis than earlier cohorts. Between 1997 and 2013, the risk prediction score that federal probation uses increased by 50%. The number of career offenders and armed career criminals increased even more⁶² but did not play a role in the Commission's Drugs Minus Two study. The description of the composition of the released population implies either that judges were generally inclined to give the drug discount even to a riskier population group or that these drug offenders are not part of the group with a worse prognosis.

The levels at which probation officers uncover supervision violations, which they are required to report, have also increased substantially. They have an extensive array of electronic supervision tools at their disposal, and their drug testing ability has improved substantially.⁶³ All of these changes increase the likelihood of detection and could impact the number of revocations. Yet revocation rates have remained stable.

Federal probation officers are charged with assisting an offender to avoid future criminal offending. The risk an offender presents is the baseline starting point from which they assess the client's needs and then attempt to target services appropriately, adjusting them to the individual person's learning style. With growing knowledge about strategies that work with offenders, interventions can be

more targeted and pave the way for successful reintegration.

Federal offenders come with a combination of challenges. About 25% face substance abuse issues. A quarter received a point increase at sentencing for involvement of a gun. While 20% got a role adjustment downward, for 10% their role made them more culpable. Two-thirds had prior convictions, and even more had been arrested previously. Forty percent of those with a prior criminal record ran afoul of supervision rules. Almost all had allegations of violence against them. Federal probation, however, focuses not solely on such directly measurable indicators but also on other, less tangible predictors of success, such as their clients' thinking and social network. A quarter display anti-social thinking, but almost all have family and friends with strong prosocial tendencies. Criminogenic factors that reach well beyond a criminal record have a decidedly negative impact on reoffending.⁶⁴ Outside elements easily aggravate these risk factors. Among the most pressing are housing insecurity and financial pressures.⁶⁵ More risk factors increase the need for robust assistance upon release.

Staffing and budget cuts to probation services threaten positive results and increase revocations,⁶⁶ which count as an important marker of reoffending. The recidivism rate is not exclusively tied to the offender and does not exist in a vacuum. Instead, congressional investment in the U.S. Probation and Pretrial Services system—in removing barriers to reentry and providing programming for those released—impacts recidivism rates as they are currently defined.

In that the Commission's drug retroactivity study comparing two cohorts finds no impact of early release on offending, it supports the case for earlier release to protect the public purse. It omits the case for the probation system's role in addressing recidivism and its need for funding. Data from U.S. Probation and Pretrial Services show this, as they detail both challenges and the impact of interventions on behavior.

As the probation service approaches those released with the knowledge and confidence that it can make a positive impact, the Administrative Office of U.S. Courts in which it is housed has adopted a recidivism model that may be called conservative. The Commission remains firmly in the authoritarian camp, however.⁶⁷ It portrays offenders as defined by their criminal history and the crime of which they were convicted. Crime is not a social phenomenon but instead remains a personal failing. On the other hand, the probation service sees crime as arising from a mix of personal and societal shortcomings.

Sentencing, offender background information, and supervision intervention data together provide a much richer and nuanced picture of federal recidivism and of the impact that probation can have on reentry. Correlating recidivism with sentence length and criminal history only may provide support for current sentence levels but is unable to effectively determine the ideal point for public safety.

VII. Conclusion

The criminal justice system and federal sentencing cannot fix existing social inequities that have impacted many defendants long before they came to court. However, it can operate on the maxim of doing no harm, and that includes averting harm both to those convicted in federal court and the greater public.

The differences between the three federal offices in defining and counting recidivism is confusing at best and, in part, downright misleading. They also invite different policy responses.

The Commission's work is grounded deeply in risk prediction and management. It proceeds from the assumption that the state through its sentencing practices can guarantee security, by incapacitating and deterring offenders.⁶⁸ Its set of recidivism studies reflect its ongoing attempt to present sentence lengths and criminal record, the two factors that drive federal sentencing, as determinative for future offending, and therefore for public safety.

Rather than allowing for the prevention of future crime through modifications of social opportunities and individual thinking patterns, the Commission continuously attempts to find ways to focus prison lengths most effectively. While the AOUSC distinguishes between criminal wrongdoing and rule violations, the Commission does not. Its focus on correlating prior offending with later offending led it to conclude in an earlier, broader study that "the past predicts the future."⁶⁹ That assessment emphasizes the deterrent impact of long sentences and justifies lengthier risk-based sentences for those with more extensive prior records, potentially unrestrained by level of culpability and severity of the new offenses. It reinforces the "nothing works" philosophy that discarded rehabilitation as an aim of federal sentencing. Its apparent disregard of the influence of post-sentence supervision and in-prison programming is yet more surprising, given that the probation service is housed within the administrative office for federal courts and probation officers work closely with federal judges, whose work is the Commission's focus.

The different recidivism studies display more than a disagreement about definitions. They show substantial dissension over the purposes of punishment and the meaning of public safety. Their tone and research design are not only important for future Commission decisions on early release and length of imprisonment, they may also inform the construction of algorithms that predict risk.⁷⁰ Yet the research designs reveal the many choices and pitfalls of such risk-based sentencing that fails to allow for the impact of interventions.

Even though the differences between the U.S. studies are marked, the comparison with the German study highlights some of the challenges to criminal justice reform. Most startling may be the failure of the United States to trust its criminal justice system, as indicated by the inclusion of arrests and supervision violations in its recidivism studies. Similarly, the U.S. studies regularly focus on the multitude of crimes committed by those with a criminal

record but not captured, indicating that the population is much more dangerous than the data show. The German studies, on the other hand, repeatedly highlight the relatively minor nature of future offending, a point made in one of the Commission studies almost in passing. The differences in emphasis evince strikingly different attitudes, both toward the state as guarantor of security and toward the individual's ability and willingness to follow rules and orders.

Nothing displays the differences in recidivism numbers more powerfully than their public portrayal. In a report on recidivism, a leading German magazine's byline concluded that "only 35% of offenders commit another offense." The word "only" captures the attitudinal difference between the two sides of the Atlantic most aptly.⁷¹

Notes

- ¹ U.S. Sentencing Comm'n, 2014 Drug Guidelines Amendment Retroactivity Data Report (Mar. 2020) [hereinafter 2014 Retroactivity Data Report], <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20200324-Drug-Retro-Analysis.pdf>; U.S. Sentencing Comm'n, *Retroactivity and Recidivism: The Drugs Minus Two Amendment* (July 2020) [hereinafter *Recidivism Report*], <https://www.ussc.gov/research/research-reports/retroactivity-recidivism-drugs-minus-two-amendment>.
- ² U.S. Sentencing Comm'n, 2018 Guidelines Manual Annotated, Amendment 782, Supplement to Appendix C 59–69 (Nov. 1, 2018) [hereinafter *Amendment 782*], https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/APPENDIX_C_Supplement.pdf.
- ³ U.S. Sentencing Comm'n, 2018 Guidelines Manual Annotated, Amendment 788, Supplement to Appendix C 80–82 (Nov. 1, 2018) [hereinafter *Amendment 788*], https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/APPENDIX_C_Supplement.pdf.
- ⁴ See, e.g., Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 *Am. Crim. L. Rev.* 1 (2015); U.S. Sentencing Comm'n, *Policy Profile — Sensible Sentencing Reform: The 2014 Reduction of Drug Sentences* (2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/profile_2014_drug_amendment.pdf.
- ⁵ See, e.g., U.S. Sentencing Comm'n, Kim Steven Hunt & Andrew Peterson, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (May 2014) [hereinafter *Recidivism and Crack Cocaine Study*], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.
- ⁶ U.S. Sentencing Comm'n, *Amendment 782*, *supra* note 2, at 66–69; U.S. Sentencing Comm'n, *Recidivism and Crack Cocaine Study*, *supra* note 5.
- ⁷ U.S. Sentencing Comm'n, 2014 Retroactivity Data Report, *supra* note 1.
- ⁸ See U.S. Sentencing Comm'n, *Memorandum: Analysis of the Impact of the 2014 Drug Guidelines Amendment if Made Retroactive* (May 27, 2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140527_Drug_Retro_Analysis.pdf.
- ⁹ U.S. Sentencing Comm'n, 2014 Retroactivity Data Report, *supra* note 1.
- ¹⁰ *Id.* at tbl.1.

- ¹¹ *Id.* at tbl.8.
- ¹² See, e.g., Nathaniel W. Reisinger, *Redrawing the Line: Retroactive Sentence Reductions, Mass Incarceration, and the Battle Between Justice and Finality*, 54 *Harv. C.R.-C.L. L. Rev.* 301, 304–06 (2019).
- ¹³ See Caryn Devins, *Lessons Learned from Retroactive Resentencing after Johnson and Amendment 782*, 10 *Fed. Cts. L. Rev.* 39,74 (2018).
- ¹⁴ Amendment 788, *supra* note 3, at 82. U.S. Sentencing Comm'n, 2018 Guidelines Manual, § 1B1.10, <https://www.ussc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-1#NaN>.
- ¹⁵ U.S. Sentencing Comm'n, 2014 Retroactivity Data Report, *supra* note 1, at tbl.8.
- ¹⁶ U.S. Sentencing Comm'n, *Final Crack Retroactivity Data Report Fair Sentencing Act*, tbl.1 (Dec. 2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf.
- ¹⁷ U.S. Sentencing Comm'n, *Recidivism and Crack Cocaine Study*, *supra* note 5, at 2.
- ¹⁸ *Id.* at 3.
- ¹⁹ U.S. Sentencing Comm'n, *Recidivism Report*, *supra* note 1, at 7.
- ²⁰ *Id.* at 7–8.
- ²¹ See, e.g., Brandon J. Garrett, Alexander Jakubow & John Monahan, *Nonviolent Risk Assessment in Virginia Sentencing: The Sentencing Commission Data 15* (Mar. 1, 2018), [http://www.vscs.virginia.gov/2018meetings/UVA%20Law%20School%20-%20NVRA%20Sentencing%20Analysis%20and%20Judicial%20Survey%20\(Mar%201%202018\).pdf](http://www.vscs.virginia.gov/2018meetings/UVA%20Law%20School%20-%20NVRA%20Sentencing%20Analysis%20and%20Judicial%20Survey%20(Mar%201%202018).pdf).
- ²² See, e.g., U.S. Sentencing Comm'n, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* (Mar. 2017) [hereinafter *Criminal History and Recidivism*], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170309_Recidivism-CH.pdf.
- ²³ U.S. Sentencing Comm'n, 2019 Sourcebook of Federal Sentencing Statistics tbl.18 [hereinafter 2019 Sourcebook], <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/Table18.pdf>.
- ²⁴ U.S. Sentencing Comm'n, *Recidivism Report*, *supra* note 1, at 40, appendix D, tbl.D-1.
- ²⁵ *Id.* at 5.
- ²⁶ See, e.g., U.S. Sentencing Comm'n, *Criminal History and Recidivism*, *supra* note 22.
- ²⁷ *Id.* at 3.
- ²⁸ For a discussion of the precautionary principle in the criminal justice area, see, e.g., Heidi Mork Lomell, *Punishing the Uncommitted Crime, in Justice and Security in the 21st Century* 83, 95–96 (Barbara Hudson & Synnøve Ugelvik eds., 2012).
- ²⁹ James L. Johnson, *Comparison of Recidivism Studies: AOUSC, USSC, and BJS*, 81 *Fed. Probation* 52, 53 (June 2017).
- ³⁰ Matthew G. Rowland, *Too Many Going Back, Not Enough Getting Out? Supervision Violators, Probation Supervision, and Overcrowding in the Federal Bureau of Prisons*, 77(2) *Fed. Probation* 4, 7 tbl.4 (Sept. 2013), <https://www.uscourts.gov/federal-probation-journal/2013/09/too-many-going-back-not-enough-getting-out-supervision-violators>.
- ³¹ Matthew G. Rowland, *Projecting Recidivism Rates for Federal Drug Offenders Released Early from Prison*, 28 *Fed. Sent'g Rep.* 259, 261–262 (2016).
- ³² Rowland, *supra* note 30, at 3, 6.
- ³³ Joshua A. Markman, Matthew R. Durose, Ramona R. Rantala & Andrew D. Tiedt, *Bureau of Justice Statistics, Recidivism of Offenders Placed on Federal Community Supervision in 2005: Patterns from 2005 to 2010* 4 tbl.6 & 8, tbl.10 (June 2016),

- NCJ 249743, <https://www.bjs.gov/content/pub/pdf/ropfcs05p0510.pdf>.
- ³⁴ *Id.* at 6, tbl.8.
- ³⁵ U.S. Sentencing Comm’n, 2019 Sourcebook, *supra* note 23, at tbl.18 (2019 Datafile, USSCFY19) (2020), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/Table18.pdf>.
- ³⁶ Johnson, *supra* note 29, at 52–53. See also Robert Weisberg, *Meanings and Measures of Recidivism*, 87 S. Cal. L. Rev. 785, 799–804 (2014); Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 Emory L.J. 59, 75–78 (2017), <https://law.emory.edu/elj/content/volume-67/issue-1/articles/constructing-recidivism-risk.html>.
- ³⁷ See, e.g., Markman et al., *supra* note 33, at 1–2.
- ³⁸ Jörg-Martin Jehle, Hans-Jörg Albrecht, Sabine Hohmann-Fricke & Carina Tetel, Bundesministerium der Justiz, Legalbewährung nach strafrechtlichen Sanktionen 12–13 (2016) (registration in the German central offense registry occurs only when a criminal conviction is entered), https://www.bmjv.de/SharedDocs/Downloads/DE/Service/StudienUntersuchungenFachbuecher/Legalbewaehrung_nach_strafrechtlichen_Sanktionen_2010_2013.pdf?__blob=publicationFile&v=1. The study includes also juveniles and those between the ages of eighteen and twenty-one who are treated as *Heranwachsende*. The discussion here, however, focuses exclusively on adult offenders.
- ³⁹ StPO § 153, at <https://dejure.org/gesetze/StPO/153§.html>.
- ⁴⁰ Jehle et al., *supra* note 38, at 18–19.
- ⁴¹ Jörg-Martin Jehle, Federal Ministry of Justice and Consumer Protection, Criminal Justice in Germany 59 diagram 36; 85 tbl.38b (6th ed. 2015).
- ⁴² *Id.* at 59 diagram 36.
- ⁴³ Jehle et al., *supra* note 38, at 174–75.
- ⁴⁴ Jehle, *supra* note 41, at 58.
- ⁴⁵ U.S. Sentencing Comm’n, 2019 Sourcebook, *supra* note 23, fig.6, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/Figure06.pdf>. The remaining 4.45% received split sentences: “Prison and Alternatives” or “Probation and Alternatives.”
- ⁴⁶ While over two-thirds of those convicted of Food and Drug offenses received probation-only sentences, almost everyone convicted of child pornography, sexual abuse, or murder went to prison. *Id.* at tbl.13, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/Table13.pdf>.
- ⁴⁷ Jehle et al., *supra* note 38, at 83–85.
- ⁴⁸ *Id.* at 14, 41–43.
- ⁴⁹ *Id.* at 45–46.
- ⁵⁰ *Id.* at 51–52.
- ⁵¹ Jehle, *supra* note 41, at 15 diagram 5. Only about a quarter of suspects in criminal cases are female.
- ⁵² Jehle et al., *supra* note 38, at 53–54.
- ⁵³ Jörg-Martin Jehle, *Strafrechtspflege in Deutschland* 48 (6th ed. 2015).
- ⁵⁴ This problem long precedes the pandemic and is entirely unrelated to some conservative politicians labeling COVID-19, incorrectly, the “Chinese virus.”
- ⁵⁵ See A. Tversky & D. Kahneman, *The Framing of Decision and the Psychology of Choice*, 211 Science 453 (1981).
- ⁵⁶ See generally Rocio Garcia-Retamero & Mandeep K. Dhami, *On Avoiding Framing Effects in Experienced Decision Makers*, 66(4) Quarterly J. Experimental Psychology (2006) (Oct. 2012).
- ⁵⁷ See, e.g., Grant Duwe, National Institute of Justice, *The Use and Impact of Correctional Programming for Inmates on Pre- and Post-Release Outcomes* (June 2017), NIJ 250476, <https://www.ncjrs.gov/pdffiles1/nij/250476.pdf>.
- ⁵⁸ See generally, Bernadette Pelissier, Susan Wallace, Joyce Ann O’Neil, Gerald G. Gaes, Scott Camp, William Rhodes & William Saylor, *Prison Drug Program Outcomes: Federal Prison Residential Drug Treatment Reduces Substance Use and Arrests After Release* (n.d.), https://www.bop.gov/resources/research_projects/published_reports/recidivism/orepramjalcd.pdf.
- ⁵⁹ James M. Byrne, *The Effectiveness of Prison Programming: A Review of the Research Literature Examining the Impact of Federal, State, and Local Inmate Programming on Post-Release Recidivism*, 84(1) Fed. Probation 3 (June 2020), at https://www.uscourts.gov/sites/default/files/84_1_1_0.pdf.
- ⁶⁰ See Rowland, *supra* note 30.
- ⁶¹ See, e.g., U.S. Sentencing Comm’n, 2019 Sourcebook, *supra* note 23, at tbl.18, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/Table18.pdf>.
- ⁶² Rowland, *supra* note 30, at 5.
- ⁶³ *Id.* at 5–6.
- ⁶⁴ See generally Rowland, *supra* note 31.
- ⁶⁵ *Id.* at 260.
- ⁶⁶ Rowland, *supra* note 30, at 7, 10.
- ⁶⁷ The terminology is based on Leon Radzinowicz, *Ruckschritte in der Kriminalpolitik*, 105 Zeitschrift für die gesamte Strafrechtswissenschaft 247 (1993).
- ⁶⁸ See U.S. Sentencing Comm’n, *Criminal History and Recidivism*, *supra* note 22; U.S. Sentencing Comm’n, *Length of Incarceration and Recidivism* (Apr. 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200429_Recidivism-SentLength.pdf (finding sentences of ten years and more to have the strongest deterrent effect on offenders, with sentences of five to ten years also showing such impact but to a lesser degree).
- ⁶⁹ See U.S. Sentencing Comm’n, *Criminal History and Recidivism*, *supra* note 22; see also U.S. Sentencing Comm’n, *Length of Incarceration and Recidivism*, *supra* note 68.
- ⁷⁰ See, e.g., Eaglin, *supra* note 36.
- ⁷¹ *Von drei Straftätern wird einer rückfällig*, Spiegel Online (Feb. 14, 2014), <https://www.spiegel.de/panorama/justiz/kriminalitaetsstudie-von-drei-strafstaetern-wird-einer-rueckfaellig-a-953533.html>.