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VIOLENT OFFENDING, DESISTANCE, AND RECIDIVISM

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This Article reviews what is known from the field of criminology about the nature of crime patterns in general, focusing particularly on violence, violent people, and how violence manifests in the lives of individuals who commit crime. Broad consensus exists in the research community that offending careers of individuals who commit crimes vary substantially from person to person. Most people tend to commit non-violent crimes and while many violent offenders recidivate after being released from prison, the majority do not. Moreover, the type of violent crime committed—expressive versus instrumental—may be an important distinction. We draw several conclusions from the research on violence and violent recidivism and what it can mean for policy makers and their decision-making. Armed with accurate information about violent offending, policymakers and practitioners may be able to propose appropriate policy changes and make more informed decisions about the likelihood of violent offending and recidivism among persons who commit crimes.

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I. VIOLENT OFFENDING, DESISTANCE, AND RECIDIVISM

Almost without exception, Americans believe that violent crime is increasing.¹ Violent crime in the United States refers to homicide, forcible rape, robbery, and aggravated assault.² America certainly has more violence than other Western countries. Homicide rates are higher in the United States than in Europe, Japan, or even Canada.³ But this is not new. Crime rates have always been much higher in America than in other wealthy nations.⁴ Yet, violent crime in the United States has steadily fallen over the last two decades.⁵ It is true, however, that the number of reported violent crimes has risen slightly in the past few years, driven largely by a number of metropolitan areas.⁶ Among the various types of violent crime reported in the United States, simple assault is the most common, accounting for sixty-three percent of the overall violent crime rate in 2018.⁷

Concern with violence has partially driven the expansion of the American prison population, leading some to call the current period one of “mass imprisonment.”⁸ At the end of 2017, nearly 1.5 million individuals were

1. RACHEL E. MORGAN & BARBARA A. OUDEKERK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2018, at 1 (2019), <https://www.bjs.gov/content/pub/pdf/cv18.pdf> [<https://perma.cc/62XG-TK92>].

2. Unif. Crime Reporting Program, *Table 2: Crime in the United States by Community Type, 2018*, FED. BUREAU INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-2> [<https://perma.cc/95S5-NBQM>]; *U.S.: Number of Reported Violent Crime 1990–2018*, STATISTA (Sept. 30, 2019), <https://www.statista.com/statistics/191129/reported-violent-crime-in-the-us-since-1990> [<https://perma.cc/B9HG-P9KN>].

3. *Intentional Homicide Rate: Countries Compared*, NATIONMASTER, <https://www.nationmaster.com/country-info/stats/Crime/Violent-crime/Intentional-homicide-rate> [<https://perma.cc/LC2N-Z2JG>].

4. CAROL B. KALISH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INTERNATIONAL CRIME RATES 2 (1988), <https://www.bjs.gov/content/pub/pdf/icr.pdf> [<https://perma.cc/WT63-3DKV>].

5. *U.S.: Number of Reported Violent Crime 1990–2018*, *supra* note 2 (showing that reported violent crimes dropped in both the years between 1998 and 2008 and between 2008 and 2018).

6. Unif. Crime Reporting Program, *supra* note 2.

7. MORGAN & OUDEKERK, *supra* note 1, at 10.

8. See David Garland, *Introduction: The Meaning of Mass Imprisonment*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 1, 1–2 (David Garland ed., 2001).

incarcerated in America's state and federal prisons.⁹ The U.S. holds "5 percent of the world's population but 25 percent of its prisoners,"¹⁰ and the vast majority of these prisoners are incarcerated by the states.¹¹ While the prison population has fallen slightly in the last decade—about five percent since 2010—this is a very small decline when juxtaposed against the dramatic decline in U.S. crime rates, especially the steep drop in violent crime.¹²

Prevailing wisdom is that our prisons are filled with individuals who have committed drug crimes and that if we released the drug offenders, the U.S. prison population would decline dramatically. The fact is that over fifty-five percent of prisoners in 2016 were incarcerated for committing a violent offense.¹³ It is also a fact that the vast majority of persons incarcerated for violent offenses are eventually released.¹⁴ Only eleven percent of those incarcerated in the United States are serving a life sentence or were sentenced to life without the possibility of parole.¹⁵ Questions about reducing prison populations are thus not about whether or not to release people but about when to release them. The vast majority will be released. To reduce the prison population and hence, reduce the high costs of maintaining such a high rate of incarceration, policymakers need to consider how to manage those committing violent offenses in a way that more of their sentence could be supervised in the community with or without a shorter period of incarceration.

The continued concern over violent crime in the U.S., whether accurately perceived or not, affects Americans' views on criminal justice responses to crime, policing, drug policy, and even employment and housing programs. It also influences federal, state, and local policies related to crime and related matters (e.g., size and deployment of police force, probation revocation policies, and the location of halfway houses). Some of these policies may be based on a poor understanding of offending patterns over the life course of an

9. JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2017, at 1, 3 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [<https://perma.cc/WE9M-EZ5S>].

10. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 1 (2017).

11. See BRONSON & CARSON, *supra* note 9, at 4.

12. PFAFF, *supra* note 10, at 2–4.

13. BRONSON & CARSON, *supra* note 9, at 21.

14. See ASHLEY NELLIS, THE SENTENCING PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 10 (2017), <https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/> [<https://perma.cc/P8U8-HWFD>].

15. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 8 (2019), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/D3NF-9QYN>].

individual offender and hence, uneducated guesses about the impact of sentencing and incarceration policies for individual offenders.

To make informed decisions on changes in incarceration policies for individuals committing violent offenses, we need to better understand who is in our prisons and more importantly, what happens when they return to the community. In this Article, we review what is known from the field of criminology about the nature of crime in general, violence and violent people in particular, and how violence manifests in the lives of individuals over time.

II. BACKGROUND

Broad consensus exists in the research community that offending careers of individuals who commit crimes vary substantially from person to person. Yet, researchers disagree about the underlying causes of this heterogeneity in offending patterns across stages of life.¹⁶ Several theories have been proposed to account for the divergent offending trajectories or patterns of offending over a person's lifetime observed among individuals who commit crimes. Some researchers explain crime patterns over the life course using a neuropsychological framework¹⁷; others prefer arguments that focus on personal agency and decision making¹⁸ or contextual factors and "hooks for change"¹⁹ (e.g., marriage, employment). These theoretical explanations have been examined in numerous studies, and we provide a brief overview of the research on offending patterns, where violent offending fits in, and some proposed explanations.

16. See, e.g., Arjan A.J. Blokland & Hanneke Palmen, *Criminal Career Patterns*, in PERSISTERS AND DESISTERS IN CRIME FROM ADOLESCENCE INTO ADULTHOOD 13, 45 (Rolf Loeber, Machteld Hoeve, N. Wim Slot & Peter H. Van Der Laan eds., 2012); Glen H. Elder, Jr., *Age Differentiation and the Life Course*, 1 ANN. REV. SOC. 165, 165 (1975); Anthony Fabio, Li-Chuan Tu, Rolf Loeber & Jacqueline Cohen, *Neighborhood Socioeconomic Disadvantage and the Shape of the Age-Crime Curve*, 101 AM. J. PUB. HEALTH S325, S325 (2011); Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 674-75, 679 (1993); Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 CRIMINOLOGY 555, 585 (2003).

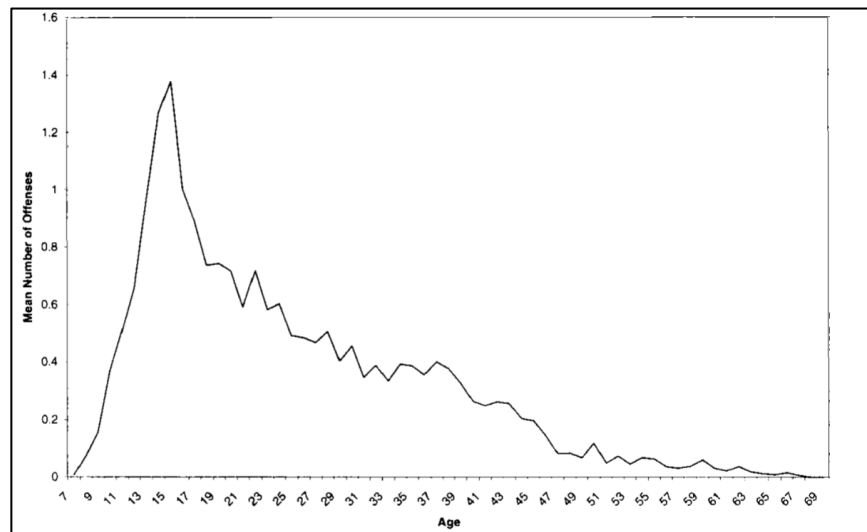
17. Moffitt, *supra* note 16, at 674, 680; Terence P. Thornberry & Marvin D. Krohn, *Applying Interactional Theory to the Explanation of Continuity and Change in Antisocial Behavior*, in INTEGRATED DEVELOPMENTAL & LIFE-COURSE THEORIES OF OFFENDING 183, 190-91 (David P. Farrington ed., 2005). But see Anne C. Petersen & Lisa J. Crockett, *Pubertal Timing and Grade Effects on Adjustment*, 14 J. YOUTH & ADOLESCENCE 191, 192, 202 (1985).

18. RONET D. BACHMAN & RAYMOND PATERNOSTER, STATISTICS FOR CRIMINOLOGY AND CRIMINAL JUSTICE 123-24 (2017).

19. John H. Laub & Robert J. Sampson, *Turning Points in the Life Course: Why Change Matters to the Study of Crime*, 31 CRIMINOLOGY 301, 304 (1993).

First, it is important to discuss what is known in criminology as the age-crime curve. When examining the population overall, it is clear that criminal behavior tends to start in the early teens, increases throughout late adolescence, peaking in the teenage years (seventeen to nineteen years), and then declines in the early twenties.²⁰ The age-crime curve was first identified by Adolphe Quetelet in France in 1831,²¹ and the relationship between age and crime has been found in samples in both Western and Eastern countries, in all time periods, and with some variation across gender and racial groups.²² The relationship is so robust that in 1990, two prominent criminologists, Michael Gottfredson and Travis Hirschi, made the claim that crime unambiguously declines with the biological aging of the individual, and little more is needed to explain desistance from crime.²³

FIGURE 1: PREVALENCE OF CRIMINAL OFFENDING BY AGE²⁴



In 1993, Professor Terrie Moffitt, a psychologist by training, proposed that criminal offending over the life course is more complex than the standard age-

20. Moffitt, *supra* note 16, at 675.

21. Darrell J. Steffensmeier, Emilie Anderson Allan, Miles D. Harer, & Cathy Streifel, *Age and the Distribution of Crime*, 94 AM. J. SOC. 803, 803 (1989).

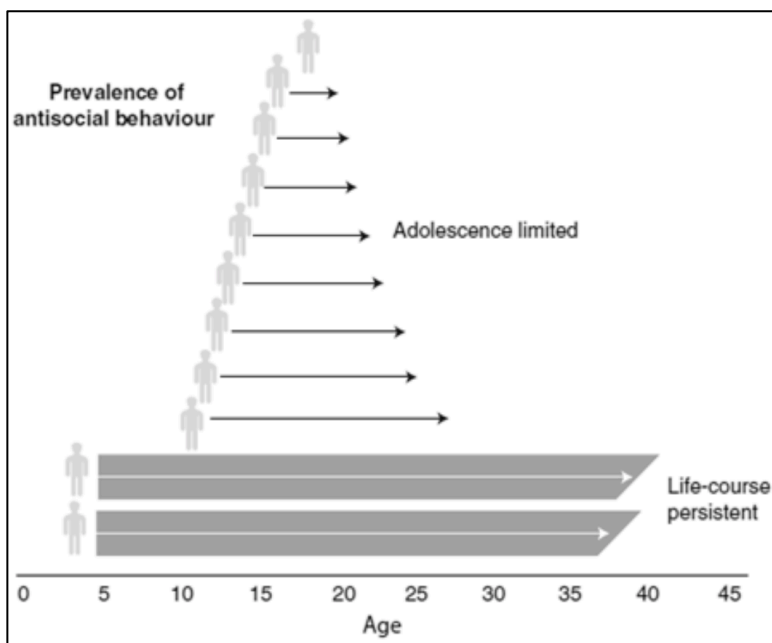
22. See, e.g., DAVID MAGNUSSON, *INDIVIDUAL DEVELOPMENT FROM AN INTERACTIONAL PERSPECTIVE* 120 (1988); Steffensmeier, Allan, Harer & Streifel, *supra* note 21, at 825 (stating that there are slow declines in criminality after peak ages in France and Norway).

23. MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, *A GENERAL THEORY OF CRIME* 131–33 (1990).

24. Sampson & Laub, *supra* note 16, at 566.

crime curve would predict.²⁵ Rather, offending trajectories should be perceived through the lenses of biological and social maturity which distinguish two types of offenders: “life-course-persistent” offenders and “adolescent-limited” offenders.²⁶ As seen in Figure 2, the overall age-crime curve masks the offending patterns of these two distinct groups. Adolescent-limited offenders engage in minor crime during the teenage years and then quickly stop offending.²⁷ Life-course persistent offenders start offending early in childhood and continue offending well into the adult years.²⁸ Thus, the right hand “tail” of the age-crime curve is really part of a relatively flat offending pattern from childhood into adulthood of this small but problematic group. One of the main behavioral distinctions between the two groups according to Moffitt is engaging in violent offending among the life-course persistent offenders.²⁹

FIGURE 2: ADOLESCENT-LIMITED AND LIFE-COURSE PERSISTENT OFFENDING PATTERNS³⁰



25. Moffitt, *supra* note 16, at 675.

26. *Id.* at 676.

27. *Id.* at 685–86.

28. *Id.* at 679.

29. *Id.* at 680.

30. *Id.* at 677.

Life-course persistent offenders begin problematic behavior well before adolescence, and their antisocial behaviors persist throughout the life course.³¹ Moffitt maintained that the reason for their offending is due to subtle neuropsychological dysfunctions that disrupt normal development of language, memory, and self-control.³² These cognitive deficits increase vulnerability to criminogenic aspects in the child's social environment.³³ Moreover, due to their neuropsychological dysfunctions, these individuals display signs of antisocial behavior during childhood, and they engage in both minor and serious forms of delinquency during adolescence.³⁴ The neuro-psychological deficits create a high propensity to *commit violent crimes*.³⁵ These individuals comprise approximately six percent of the male population, but they account for more than fifty percent of all violent offenses.³⁶

In contrast, adolescent-limited offenders are those youth who transition into criminal behavior at the normative time in the life course.³⁷ That is, their prevalence rates of delinquency typically accelerate after the age of fourteen rising to a peak at about sixteen or seventeen years, and then declining thereafter—following the typical age-crime curve.³⁸ The peak of delinquency during adolescence and late teens is due to the adolescent period of emotional turbulence, confusion, doubt, and escapist ideation, which has long been recognized by developmental psychologists.³⁹ For these youth, their delinquency represents an attempt to overcome their “child-like” status in adult society.⁴⁰ Unlike the individuals who start offending much earlier, those who start in adolescence are believed to engage primarily in rebellious behaviors that symbolize autonomy, independence, and maturity such as smoking, drinking, minor theft, and sexual intercourse—*but not violence*.⁴¹

31. *Id.* at 679.

32. *Id.* at 680.

33. *Id.* at 682.

34. *Id.* at 680.

35. *See id.*

36. *Id.* at 676.

37. *Id.* at 690, 692, 695.

38. *Id.* at 675.

39. 1 G. STANLEY HALL, ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATIONS TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION AND EDUCATION 325, 405 (1904).

40. *See* Moffitt, *supra* note 16, at 688.

41. DAVID P. FARRINGTON, JEREMY W. COID, LOUISE M. HARNETT, DARRICK JOLLIFFE, NADINE SOTERIOU, RICHARD E. TURNER, & DONALD J. WEST, CRIMINAL CAREERS UP TO AGE 50 AND LIFE SUCCESS UP TO AGE 48: NEW FINDINGS FROM THE CAMBRIDGE STUDY IN DELINQUENT DEVELOPMENT 43 (2nd ed., 2006), <https://www.bl.uk/collection-items/criminal-careers-up-to-age-50->

This dual taxonomy of offenders and explanation for violent offending has been met with considerable research on individual offending patterns. According to the theory, because there are two groups of offenders, there should be two distinct patterns of offending over the life course.⁴² The life-course persistent offenders should demonstrate a prolonged engagement in crime from childhood far into adulthood, while the adolescent-limited offenders should be observed to engage in offending during adolescence but desist after late teens.⁴³ However, tests of Moffitt's dual offending taxonomy have yielded limited empirical support for the two-group solution.⁴⁴ As more recent studies have used improved statistical techniques to examine individual offending trajectories among those who commit crimes, researchers have found more than two groups whose offending behaviors evolve in different ways.

Specifically, researchers have discovered more than two-group solutions using well-known longitudinal data, including the Philadelphia birth cohort, the Cambridge Study in Delinquent Development, the Racine data, the National Collaborative Perinatal Project, and the Rochester Youth Development Study.⁴⁵ Research on these long term studies of individuals utilizes what is known as trajectory modeling, which essentially divides individuals into groups based on the offending patterns in the data.⁴⁶ Debate has focused on both how many groups exist and what causes the group differences.⁴⁷

Early transitions to criminal behavior clearly have important consequences for criminal behavior trajectories and life chances. But they represent only one form of transition into crime. Researchers have also found that a group of offenders exist who neither start offending during early childhood nor

and-life-success-up-to-age-48-new-findings-from-the-cambridge-study-in-delinquent-development-2nd-edition [https://perma.cc/7BH4-NYQW].

42. Arjan A.J. Blokland, Daniel Nagin, & Paul Nieuwebeerta, *Life Span Offending Trajectories of a Dutch Conviction Cohort*, 43 CRIMINOLOGY 919, 920–21 (2005).

43. Moffitt, *supra* note 16, at 677.

44. Blokland, Nagin, & Nieuwebeerta, *supra* note 42, at 923–24.

45. MARVIN E. WOLFGANG, TERENCE P. THORNBERRY, & ROBERT M. FIGLIO, FROM BOY TO MAN, FROM DELINQUENCY TO CRIME 1, 7 (1987); DAVID P. FARRINGTON, CAMBRIDGE STUDY IN DELINQUENT DEVELOPMENT (GREAT BRITAIN), 1961–1981, at 1 (1999), https://library.carleton.ca/sites/default/files/find/data/surveys/pdf_files/csdd-uk-61-81-cbk.pdf [https://perma.cc/J6K2-KZ78]; Elaine P. Eggleston & John H. Laub, *The Onset of Adult Offending: A Neglected Dimension of the Criminal Career*, 30 J. CRIM. JUST. 603, 613–14 (2002); Zenta Gomez-Smith & Alex R. Piquero, *An Examination of Adult Onset Offending*, 33 J. CRIM. JUST. 515, 515–16, 518–19, 523 (2005); Farrington, Coid, Harnett, Jolliffe, Soteriou, Turner, & West, *supra* note 41, at v–vi.

46. Blokland, Nagin, & Nieuwebeerta, *supra* note 42, at 923–24.

47. *Id.*

adolescence—they begin accelerating into criminal behavior *after entering adulthood*.⁴⁸ In a review of fifteen studies, adult-onset offenders represented about *half* of the adult offender population.⁴⁹ For example, in a follow-up of 975 males from the 1945 Philadelphia birth cohort, about eighteen percent of youth who were not delinquents experienced an adult arrest.⁵⁰ And, in a British study, “16.4 percent of non-delinquents had an adult conviction . . .”⁵¹ However, other researchers argue that when a self-reported offense history is included, the vast majority of people who commit crimes, including violent crimes, have a history of antisocial behavior that dates back to childhood.⁵²

Moreover, using trajectory modeling to examine offending patterns among offenders from the Netherlands, four groups were identified who demonstrated distinct offending patterns from age twelve to seventy-two: sporadic offenders, low-rate desisters, moderate-rate desisters and high-rate persisters.⁵³ The sporadic offenders stayed inactive in offending most of the time from age twelve to seventy-two.⁵⁴ The low-rate desisters only demonstrated activeness in offending during adolescence, fitting the profile of what Moffitt described as adolescent-limited offenders.⁵⁵ However, there was a group of moderate-rate desisters who desisted in their forties and a group of high-rate persisters who were active in offending from age twelve to their seventies.⁵⁶ Other studies

48. Jeffery Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469, 469, 474–75 (2000).

49. Eggleston & Laub, *supra* note 45, at 604.

50. WOLFGANG, THORNBERRY, & FIGLIO, *supra* note 45, at 195–96.

51. Eggleston & Laub, *supra* note 45, at 616.

52. Donald R. Lynam, Alex R. Piquero, & Terrie E. Moffitt, *Specialization and the Propensity to Violence*, 20 J. CONTEMP. CRIM. JUST. 215, 217, 225 (2004); Amber L. Beckley, Avshalom Caspi, Honalee Harrington, Renate M. Houts, Tara Renae McGee, Nick Morgan, Felix Schroeder, Sandhya Ramrakha, Richie Poulton, & Terrie E. Moffitt, *Adult Onset Offenders: Is a Tailored Theory Warranted?*, 46 J. CRIM. JUST. 64, 67 (2016).

53. Blokland, Nagin, & Nieuwbeerta, *supra* note 42, at 923, 930–31.

54. *Id.* at 931.

55. *See id.* at 931, 933.

56. *Id.*

showed a similar picture.⁵⁷ Researchers found more than two offender trajectory groups in data collected in Canada,⁵⁸ Finland,⁵⁹ and Sweden.⁶⁰

In response to the recent crime trajectory findings that have identified persistent offenders—people who commit crime into late adulthood—Sampson and Laub analyzed offending trajectories from age seven up to age seventy for a sample of boys recruited in the late 1930s from a disadvantaged Boston area.⁶¹ Sampson and Laub identified six offending groups, including two groups whose offending peaked in their thirties and one group who did not desist until their early sixties.⁶² Sampson and Laub concluded that “[a]ging out of crime is ... the norm—even the most serious delinquents desist.”⁶³ Moreover, they rejected the hypothesis that adult offending trajectories could be predicted from childhood, arguing that there are no life-course persistent offenders.⁶⁴ However, unlike contemporary young and middle-aged adults, the social context in which the sample experienced adulthood (the 1950s and 1960s) was characterized by plentiful living-wage, industry-related jobs, and a strong social norm for marriage.⁶⁵ Indeed, Sampson and Laub remarked, “The men made a commitment to go straight without even realizing it. Before they knew it, they

57. See e.g., PETER J. CARRINGTON, ANTHONY MATARAZZO, & PAUL DESOUSA, CANADIAN CTR. FOR JUSTICE STATISTICS, COURT CAREERS OF A CANADIAN BIRTH COHORT 17, 40 (2005), <https://www150.statcan.gc.ca/n1/en/pub/85-561-m/85-561-m2005006-eng.pdf?st=sDwTmN2O> [<https://perma.cc/2B7Z-X5ZB>].

58. *Id.* at 6–8, 17, 40; MARC LE BLANC & MARCEL FRÉCHETTE, MALE CRIMINAL ACTIVITY FROM CHILDHOOD THROUGH YOUTH: MULTILEVEL AND DEVELOPMENTAL PERSPECTIVES 97–98 (1989).

59. Lea Pulkkinen, Anna-Liisa Lyyra, & Katja Kokko, *Life Success of Males on Nonoffender, Adolescence-Limited, Persistent, and Adult-Onset Antisocial Pathways: Follow-up from Age 8 to 42*, 35 AGGRESSIVE BEHAV. 117, 120–121 (2009).

60. Carl-Gunnar Janson, *Delinquency Among Metropolitan Boys: A Progress Report*, in PROSPECTIVE STUDIES OF CRIME AND DELINQUENCY 147, 147 (Katherine Teilmann Van Dusen & Sarnoff A. Mednick eds., 1983); Lynn Kratzer & Sheilagh Hodgins, *A Typology of Offenders: A Test of Moffitt's Theory Among Males and Females from Childhood to Age 30*, 9 CRIM. BEHAV. & MENTAL HEALTH J. 57, 58–61 (1999); MAGNUSSON, *supra* note 22, at 114–116; Håkan Strattin, David Magnusson & Howard Reichel, *Criminal Activity at Different Ages: A Study Based on a Swedish Longitudinal Research Population*, 29 BRIT. J. CRIMINOLOGY 368, 380 (1989).

61. Sampson & Laub, *supra* note 16, at 561.

62. *Id.* at 581–82.

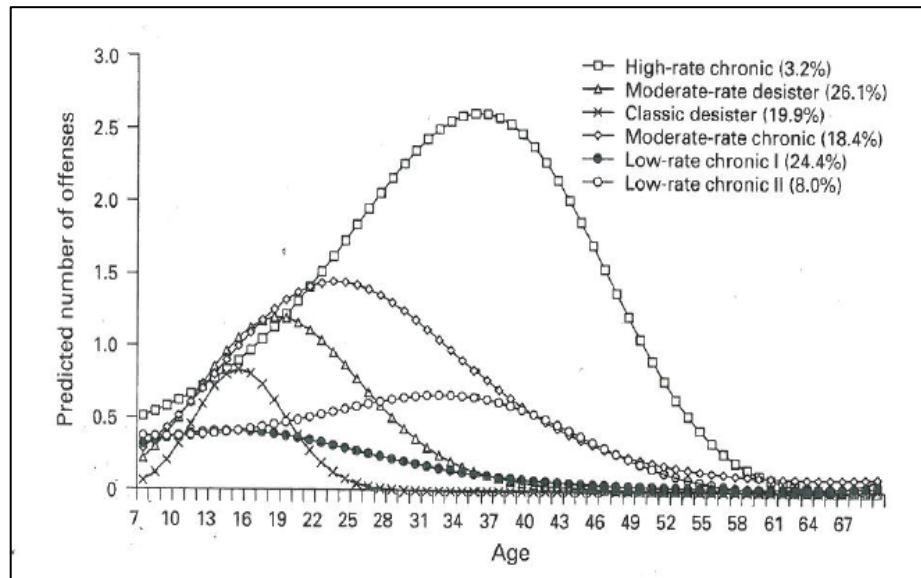
63. *Id.* at 569.

64. See *id.* at 575–76, 584.

65. The solid manufacturing jobs that were found to be associated with criminal desistance for the Gluecks' sample in the 1950s are not generally part of the current economic landscape. In this era, higher education is less affordable to people suffering from structural disadvantage, and the majority of offenders find themselves trapped in financial hardship due to low levels of education and few technical skills.

had invested so much time in a marriage or a job that they did not want to risk losing their investment.”⁶⁶ Thus, it is uncertain whether the experiences of the sample of boys and men that Sampson and Laub analyzed would translate into adult offending patterns in the 21st century.

FIGURE 3: OFFENDING TRAJECTORIES FOR TOTAL CRIME: AGES 7 TO 70⁶⁷



With a clear research finding that more than two offender trajectory groups characterize the population of individuals who commit crimes, the next question is whether those individuals who have long careers in offending—Moffitt’s life-course persistent offenders—are also those individuals who commit violent crimes. Put another way, do all violent offenders have an early childhood onset? And do all individuals who have long criminal careers commit violent offenses? Due to relatively limited research attention on crime-specific offending trajectories, only a handful of studies have examined specialization in violent crime among those who demonstrate a prolonged offending trajectory.⁶⁸ Overall, empirical studies have not found a solid

66. JOHN H. LAUB & ROBERT J. SAMPSON, *SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70*, at 147 (2003).

67. Sampson & Laub, *supra* note 16, at 582.

68. See Blokland, Nagin, & Nieuwbeerta, *supra* note 42, at 923; see also Rolf Loeber & Dustin Pardini, *Neurobiology and the Development of Violence: Common Assumptions and Controversies*, 363 *PHIL. TRANSACTIONS ROYAL SOC’Y* 2491 *passim* (2008).

association between violent offending and a higher level of persistence in crime.

In the study of offenders' crime trajectories in the Netherlands, a group of high-rate persisters—individuals who committed more crimes every year and kept active in offending from age twelve until the age of seventy-two—actually demonstrated the *lowest* propensity to commit violent crime.⁶⁹ The high-rate persisters—the *most active offenders*—actually committed primarily *property* crimes, while the sporadic and low-rate offenders committed a higher percentage of violent crimes.⁷⁰

Violent offending trajectories were also examined in a longitudinal study of youth from Pittsburgh. Known as the Pittsburgh Youth Study,⁷¹ the researchers identified a three-group solution for violent offending pathways and a four-group solution for nonviolent offending trajectories (represented by theft).⁷² In addition, a group of active violent offenders emerged whose onset of antisocial behavior was not in childhood as Moffitt predicted but after the age of 15.⁷³ Third, violent and nonviolent offending specialization did not overlap: half of the respondents who showed at least moderate levels of violence did not seem to engage in an equivalent level of theft—a nonviolent offense.⁷⁴ Lastly, the research team found that childhood characteristics such as psychopathic features and ADHD symptoms did not explain the trajectory of violent offending from adolescence to young adulthood.⁷⁵

These patterns of specialization and generalization have received limited research attention, particularly for older adult offenders. The predictors of violent crime specialization as well as explanations for the heterogeneity of crime trajectories are largely formulated based on the context of youth and young adult life, including childhood psychopathological development, family context, the youth's peer group, and youth exposure to violence.⁷⁶

69. Blokland, Nagin, & Nieuwebeerta, *supra* note 42, at 934–35.

70. *Id.*

71. Loeber & Pardini, *supra* note 68, at 2491.

72. *Id.* at 2493–94.

73. *Id.* at 2499.

74. *Id.*; Eric Lacourse, Véronique Dupéré, & Rolf Loeber, *Developmental Trajectories of Violence and Theft*, in ROLF LOEBER, DAVID P. FARRINGTON, MAGDA STOUTHAMER-LOEBER, & HELENE RASKIN WHITE, *VIOLENCE AND SERIOUS THEFT: DEVELOPMENT AND PREDICTION FROM CHILDHOOD TO ADULTHOOD* 231, 231–68 (2008).

75. Loeber & Pardini, *supra* note 68, at 2496.

76. Fabio, Tu, Loeber, & Cohen, *supra* note 16, at S327; Petersen & Crockett, *supra* note 17, at 193; Eggleston & Laub, *supra* note 45, at 608.

Correspondingly, interventions would lie in educating youth to learn to control aggressive impulses in a supportive and non-coercive family environment.⁷⁷

However, whether those early predictors from adolescent life can adequately explain the specialization in and late onset of *violent offending* some researchers have observed during young and middle adulthood has not received much attention. In one study,⁷⁸ a group of “late bloomers”—those who don’t engage in crime until entering adulthood—shared some of the early deficits that persistent offenders exhibit, including “lower intelligence, emotional problems, and lower academic competence.”⁷⁹ The researchers hypothesized that this group does not begin offending early or exhibit high rates of offending during adolescence because they are buffered by strong social bonds such as a supportive family during adolescence.⁸⁰ Cocooned⁸¹ by an advantaged family background, the adult-onset offender has certain deficits (e.g., neuroticism and risk taking) but counterbalances those by being especially attentive and careful in their schoolwork, which insulates them from crime during adolescence.⁸² It is not until they begin to experience independence from family and a lack of structure that the effects of their deficits become manifest.⁸³ Once the family and school have less influence as a natural consequence of moving out of adolescence, these individuals are faced with both the loss of buffering factors and an increase in life stressors due to problems encountered in both employment and relationship trajectories.⁸⁴ Their deficits in human capital become a serious disadvantage in obtaining employment and, consequently, establishing a quality relationship with a partner.⁸⁵

Some studies have been successful at identifying predictors that may differentiate adult-onset and late-bloomers from other offenders.⁸⁶ One study

77. FARRINGTON, COID, HARNETT, JOLLIFFE, SOTERIOU, TURNER, & WEST, *supra* note 41, at 66.

78. See Thornberry & Krohn, *supra* note 17, at 196–97; see also Marvin D. Krohn, Chris L. Gibson, & Terence P. Thornberry, *Under the Protective Bud the Bloom Awaits: A Review of Theory and Research on Adult-Onset and Late-Blooming Offenders*, in HANDBOOK OF LIFE-COURSE CRIMINOLOGY 183, 186–198 (Chris L. Gibson & Marvin D. Krohn eds., 2013).

79. Khron, Gibson, & Thornberry, *supra* note 78, at 191.

80. *Id.* at 196.

81. *Id.* at 195.

82. *Id.* at 198.

83. *Id.* at 191.

84. *Id.* at 198.

85. *Id.*

86. Gomez-Smith & Piquero, *supra* note 45, at 521–23; Pulkkinen, Lyyra, & Kokko, *supra* note 59, at 125. For an exception, see Laub & Sampson, *supra* note 19, at 305–06.

in Finland⁸⁷ found that adult-onset offenders did as well in school as non-offenders, but adult-onset offenders were more neurotic and were more likely to be higher risk takers than non-offenders.⁸⁸ In another study,⁸⁹ the late-blooming group was more likely to have a constellation of psychopathological characteristics than the high chronic group, and the parents of late bloomers were more likely to be employed with no history of a criminal record.⁹⁰

In response to these studies showing possible adult onset of offending, the New Zealand research team extended analyses of offending among 931 individuals with a follow-up to age thirty-eight.⁹¹ Beckley and her colleagues identified one-third of the convicted men in the study as adult-onset (i.e., first conviction after age twenty).⁹² However, using a combination of data sources, including parent and teacher reports of antisocial behavior during childhood, self-reported offenses during adolescence, evidence of police contact or arrest, and official conviction records, eighty-five percent of the official adult-onset men had evidence of juvenile antisocial activities.⁹³ For example, thirty-four percent met diagnostic criteria for childhood conduct disorder, eighty-six percent self-reported criminal behavior during adolescence, and twenty-four percent had an official arrest record.⁹⁴ Moreover, the official adult-onset men, as compared to the official juvenile-onset men, were *less* likely to have convictions for violent and weapons crimes.⁹⁵

With the exception of the New Zealand study, the few studies on crime trajectories that encompassed both young and middle adulthood have only examined general offending trajectories and not trajectories of a specific type of crime.⁹⁶ Studies of specialization and generalization in offending help to shed light on offending patterns involving violent crimes.

87. Pulkkinen, Lyyra, & Kokko, *supra* note 59, at 133.

88. *Id.* at 124–25.

89. Victor van der Geest, Arjan Blokland, & Catrien Bijleveld, *Delinquent Development in a Sample of High-Risk Youth: Shape, Content, and Predictors of Delinquent Trajectories from Age 12 to 32*, 46 J. RES. CRIME & DELINQ. 111, 111–12 (2009).

90. *Id.* at 134–35 (stating that late bloomers “scored significantly higher than the other groups on multiple psychopathology” and “did not have ‘risky’ parents or more problematic family backgrounds”).

91. Beckley, Caspi, Harrington, Houts, McGee, Morgan, Schroeder, Ramrakha, Poulton, & Moffitt, *supra* note 52, at 69.

92. *Id.* at 71–72.

93. *Id.* at 72–73.

94. *Id.* at 73.

95. *Id.* at 74.

96. Brian Francis, Keith Sothill, & Rachel Fligelstone, *Identifying Patterns and Pathways of Offending Behaviour: A New Approval to Typologies of Crime*, 1 EUR. J. CRIMINOLOGY 47, 50 (2004).

III. SPECIALIZATION AND GENERALIZATION IN OFFENDING

Research on individual offending trajectories and crime specialization shows that there are multiple offending trajectories, that those who commit violent crimes are not the most persistent or active offenders, and that while there is great versatility in offending types, there are individuals who do not commit violent offenses at all. Further, the vast majority of persons desist from crime by their forties, leaving a small active group and another small low-rate group who commit crimes into late adulthood.⁹⁷ The latter group were deemed by Laub and Sampson to consist mainly of nuisance type offenses.⁹⁸ Research has demonstrated that the majority of people age out of criminal behavior fairly early while the small but problematic groups are those who wind up in prison.⁹⁹ We turn next to the question of whether a distinction can be made between those who commit violent offenses and the presumed non-violent offender.

An important aspect of research on criminal trajectories is the extent to which people specialize in certain types of offending. Criminal specialization is generally regarded as a preference for a specific offense, such as theft, assault, or robbery or as a preference for specific categories of offenses such as property crimes, violent crimes or drug-related crimes.¹⁰⁰ Criminal generalization is the opposite: the tendency to commit a variety of offenses or to move across offense categories.¹⁰¹

Research on specialization is problematic for multiple reasons but mainly because it requires data on large numbers of people across a long period of time. Still, research suggests that while crime generalization is common, some people tend to specialize in certain types of offending.¹⁰² Further, crime generalization is related to seriousness and frequency of offending such that high rate, serious offenders tend to commit a wide range of offenses *and* commit violent offenses.¹⁰³ Research from multiple studies indicates that people tend to commit a variety of offenses; that is, people do not commit only robberies, but also burglaries, thefts, and other forms of incentive-driven crimes.¹⁰⁴ Because of the relationship between frequency of offending and generalization, people

97. Sampson & Laub, *supra* note 16, at 569–70; *see also supra* Figure 3.

98. Sampson & Laub, *supra* note 16, at 567, 569.

99. *See id.* at 569.

100. Jacqueline Cohen, *Research on Criminal Careers: Individual Frequency Rates and Offense Seriousness*, in 1 CRIMINAL CAREERS AND “CAREER CRIMINALS” 292, 293 (Alfred Blumstein, Jacqueline Cohen, Jeffrey A. Roth, & Christy A. Visher eds., 1986).

101. *Id.*

102. *Id.* at 390–91.

103. *Id.* at 317.

104. *Id.* at 317, 388, 390.

who commit more overall crime also tend to commit a wider variety of crimes. Research has tended to focus on violent offending and whether violent offenders commit a wider variety of crimes, rather than focusing on persons who do not commit violent crimes. One of the problems plaguing research on crime specialization is that different studies use different definitions and group crimes into different categories.¹⁰⁵ This has led some researchers to call for studies on crime “themes” rather than types.¹⁰⁶ For example, one could group all property crimes under one theme and all crimes involving weapons into another theme.¹⁰⁷

Some research efforts have been made to investigate the association between age and a specific type of crime. Using official data from the FBI, Steffensmeier, Allan, Harer, and Streifel examined the age-crime curve when property offenses were sub-grouped into low-yield, high-risk property crime (robbery, auto theft, burglary, and vandalism) and more remunerative property crimes with lower risk (forgery, fraud, and gambling).¹⁰⁸ The peak age as well as the rate of decline were substantially different across the two kinds of property crimes, with the peak age for crimes like burglary around eighteen years while the peak age for gambling was thirty-nine years.¹⁰⁹ Moreover, using National Survey of Youth data, Massoglia took on the question of age and crime specialization from another angle—offender’s volatility of crime specialization.¹¹⁰ Results revealed within-person change in crime specialization as people transitioned from adolescence to young adulthood.¹¹¹ For example, those who engaged in violent offenses during adolescence, largely ended violent offending in young adulthood and began to engage in substance misuse.¹¹² An observed decrease in one type of crime can be a result from a within-person change in crime specialization instead of desistance from all criminal behavior.

While not the focus of specialization research, it is possible to assess the approximate proportion of persons who do not engage in violence. That is,

105. *Id.* at 367–74.

106. See 1 CRIMINAL CAREERS AND “CAREER CRIMINALS” 7 (Alfred Blumstein, Jacqueline Cohen, Jeffrey A. Roth, & Christy A. Visher eds., 1986).

107. See e.g., *id.* at 22; Francis, Sothill, & Fligelstone, *supra* note 96, at 65; Sampson & Laub, *supra* note 16, at 567.

108. Steffensmeier, Allan, Harer, & Streifel, *supra* note 21, at 808–09, 814.

109. *Id.* at 813–14.

110. Michael Massoglia, *Desistance of Displacement? The Changing Patterns of Offending from Adolescence to Young Adulthood*, 22 J. QUANTITATIVE CRIMINOLOGY 215, 215–16, 219, 236 (2006).

111. See *id.* at 233–33.

112. *Id.* at 231–32.

people may engage in a wide variety of crimes, but not violent crime, while others commit a variety of crimes including violence. In a classic study by the RAND Corporation that examined offending among people incarcerated in three large states, approximately forty-one percent of the sample did not engage in violence.¹¹³ Although they committed a wide variety of offenses, they did not engage in violent offenses.¹¹⁴ Other findings indicated that drug and auto theft offenses were often highly specialized offenses, while property crimes seemed to show a higher degree of specialization than violent offenses.¹¹⁵ Research on a sample of people followed from youth well into adulthood in New Zealand demonstrated differences between violent and non-violent offenders.¹¹⁶ Again, people committed a wide variety of offenses, but there was a group that did not engage in violence which led the researchers to conclude that violent and non-violent offending may be different phenomena.¹¹⁷

Research examining the differences between violent and non-violent offending is weak, but the New Zealand researchers found that those with violent histories demonstrated greater childhood misconduct, and were “suspicious, alienated, callous, cruel, unempathetic, and prone to overreact to stress.”¹¹⁸ Further, among persons in this sample who had been incarcerated and then released from prison in the 1990s, the authors identified a specific group of violent offenders who exhibited greater childhood abuse and running away from home as youth than non-violent offenders.¹¹⁹

In terms of criminal justice decision-making, it is difficult to determine the risk posed by people who commit crimes of violence based on one’s pattern of criminal offending. Examining patterns retrospectively can identify violent and non-violent groups and even certain risk factors associated with group membership. Development of risk prediction models that would attempt to do so prospectively—that is, predict which individuals will commit violent offenses in the future—is not yet feasible. Further, not all forms of violence are the same; a problem we turn to below.

113. JAN M. CHAIKEN & MARCIA R. CHAIKEN, *VARIETIES OF CRIMINAL BEHAVIOR* 73–75 (1982).

114. *Id.*

115. See Cohen, *supra* note 100, at 340–41.

116. Lynam, Piquero, & Moffitt, *supra* note 52, at 217, 223.

117. *Id.* at 225–26.

118. *Id.* at 225.

119. Beckley, Caspi, Harrington, Houts, McGee, Morgan, Schroeder, Ramrakha, Poulton, & Moffitt, *supra* note 52, at 70.

IV. EXPRESSIVE VERSUS INSTRUMENTAL VIOLENCE

One way of looking at offending themes concerning violent crimes is to group them according to underlying motivations. The examination of crime as expressive or instrumental was introduced by Seymour Feshbach in 1964.¹²⁰ Feshbach noted that expressive aggression was produced by anger or rage in response to situations, and that the goal was to cause harm to the person seen as causing the situation.¹²¹ He further noted that aggressive responses were impulsive and not rationally thought out.¹²² Instrumental aggression differs from expressive aggression in that the action is not the end goal but rather is an instrument towards some other end.¹²³ For example, someone may harm a person in a robbery, but the goal is not to cause harm but rather to gain reward through the acquisition of goods. Instrumental crime is thought to be more premeditated than expressive crime.

Researchers have attempted to differentiate expressive and instrumental offending. Studies have found groups of expressive offenders who tended to commit crimes specifically associated with violence such as assault, rape, or murder, while others tended to commit more instrumental crimes such as robbery or assault in conjunction with drug dealing.¹²⁴ It should be noted that had these studies focused on crime type specialization, they would have found evidence of generalization, whereas the theme approach reveals specific offending groups based on expressive and instrumental themes.

However, what is lacking in the literature are studies of repeat offending or recidivism, based on expressive versus instrumental offending patterns. This is partly due to the type of data required for such analysis. Expressive versus instrumental distinctions are based on the underlying motivation of the perpetrator, which requires contact with the people being studied. Most recidivism research utilizes administrative data and clusters people based on sentence or charged offenses.¹²⁵ One innovative research approach examined

120. Seymour Feshbach, *The Function of Aggression and the Regulation of Aggressive Drive*, 71 PSYCHOL. REV. 257, 257–261 (1964).

121. *Id.* at 264.

122. *Id.* at 271.

123. *Id.* at 258, 265.

124. Donna Youngs, Maria Ioannou, & Jenna Eagles, *Expressive and Instrumental Offending: Reconciling the Paradox of Specialisation and Versatility*, 60 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 1, 8–9 (2016).

125. See e.g., 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) 1, 10 (2018), <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf> [<https://perma.cc/P97U-K7J6>]; van der Geest, Blokland, & Bijleveld, *supra* note 89, at 128.

offense patterns among a sample of 200 offenders, all of whom had committed at least five offenses.¹²⁶ Rather than defining offense groups a-priori, they allowed the data to group offenses.¹²⁷ Their analyses identified a distinct split between persons who committed predominately expressive versus instrumental types of offenses.¹²⁸ The authors suggest that grouping offending patterns by instrumental versus expressive themes could lead to potentially different rehabilitative approaches.¹²⁹ Treatments for expressive oriented offenders might focus on anger management and impulse control, whereas treatment for instrumental focused offenders would center more on education and skill building.¹³⁰ However, the recidivism rate of violent offenders is of paramount importance, and we now turn to that topic.

V. VIOLENT OFFENDING AND RECIDIVISM

Recidivism rates are the focus of Departments of Correction and courts as states seek to lower the cost of corrections by lowering prison populations. Since most people in prison have been incarcerated before, lowering recidivism rates equates to fewer people returning to prison. The gold standard for recidivism studies are the reports produced by the Bureau of Justice Statistics, the most recent of which came out in 2018 and focuses on a sample of 67,966 people released from prison in thirty states in 2005.¹³¹ It is thus the largest and longest running recidivism study in the United States with data on 9-year, post release recidivism outcomes. Overall, eighty-three percent of the sample had been arrested in the nine years since leaving prison.¹³²

Persons incarcerated for a current violent offense made up 25.7 percent of the sample.¹³³ People whose most serious offense related to their current sentence was a violent crime were rearrested at *lower* rates than any other category of offense.¹³⁴ 43.8 percent of the total sample was arrested in the first year after release, while 38.9 percent of violent offenders, 50.8 percent of property offenders, 42.8 percent of drug offenders, and 40.5 percent of those serving time for a public order offense were arrested in the first year after

126. Youngs, Ioannou, & Eagles., *supra* note 124, at 9.

127. *Id.* at 14–16.

128. *Id.* at 8.

129. *Id.* at 19.

130. While treatment exposure has been demonstrated to reduce recidivism, a detailed examination of the effectiveness of different treatment modalities is beyond the scope of this Article.

131. ALPER, DUROSE, & MARKMAN, *supra* note 125, at 1.

132. *Id.*

133. *Id.* at 2.

134. *Id.* at 10.

release.¹³⁵ For the nine-year follow up, 83.4 percent of all offenders, 78.7 percent of violent, 87.8 percent of property, and 81.9 percent of public order offenders recidivated within nine years of release.¹³⁶ These data indicate that, while the differences were not large in magnitude, persons convicted of violent offenses recidivated at lower rates than all other offenders. When examining type of recidivism event, violent offenders were more likely to be arrested for a violent crime than other offenders.¹³⁷ In fact, nearly forty-three percent of persons released after serving a sentence for a violent crime were rearrested for a violent crime in the nine years following their release.¹³⁸ While these numbers are far from encouraging, taken as a whole it appears that the majority of violent offenders do not go on to commit a subsequent violent offense after being released from prison.¹³⁹

This review of research on violent offending indicates that (1) most people age out of offending, generally by age forty to fifty,¹⁴⁰ (2) people who commit crimes tend to commit a variety of offenses, and people who commit crimes frequently tend to commit more types of crimes,¹⁴¹ (3) most people tend to commit generally non-violent crimes,¹⁴² (4) not all crimes of violence come from the same underlying motivation—violence may be expressive in nature for some, but for others, violent offending serves as a means towards a specific end,¹⁴³ and (5) while many violent offenders recidivate after being released from prison, the majority do not.¹⁴⁴ Next, we attempt to draw some conclusions from this research on violence and violent recidivism and what it can mean for policy makers and their decision-making.

135. *Id.*

136. *Id.* at 11.

137. *Id.*

138. *Id.*

139. While the definition of violent, property, and drug offense is straight forward, public order offenses included “violations of the peace or order of the community or threats to the public health or safety through unacceptable conduct, interference with a governmental authority, or the violation of civil rights or liberties. This category includes weapons offenses, driving under the influence, probation and parole violation, obstruction of justice, commercialized vice, disorderly conduct, and other miscellaneous or unspecified offenses.” *Id.* at 17.

140. *Id.* at 7, 9.

141. *See id.* at 1.

142. *Id.* at 9.

143. Youngs, Ioannou, & Eagles, *supra* note 124, at 15.

144. ALPER, DUROSE, & MARKMAN, *supra* note 125, at 10.

VI. CONCLUSIONS AND POLICY RECOMMENDATIONS

One of the problems of research informed policy is that research is backwards looking, and policy is forward looking. Research examines the result of some change in circumstances, while policy makers attempt to change circumstances in a way that achieves a desired result. Research on violent offending tells us what people *did*, and from that research, inferences can be made about what people *may* do or are more *likely* to do, but it will not tell us what they *will* do. This makes it difficult to adjust policy based on research alone. Studies of recidivism tell us that people who are older, with less serious criminal records, who started offending later, and are female are less likely to reoffend than their counterparts, but it cannot tell you that “John” will recidivate and “Tom” won’t. The criminological literature is rife with failed attempts to develop tools to predict who will or will not offend after release based on known individual risk factors.

While this situation may leave policy makers in a quandary, the answers may lie in not targeting individuals at risk but rather targeting groups of individuals. This adjustment moves away from the focus on individual failures or successes and towards individuals in groups and the risk level of the group. That is, rather than focus on whether John or Tom will recidivate, a focus could be on policy changes that affect groups of offenders and then measure changes in recidivism rates based on the policy changes. For example, the research presented in this Article showed that there are a group of people who do not seem to commit violent crimes. Modifications to sentencing guidelines could include an appropriate sentence reduction for those never convicted of a violent crime. Likewise, with respect to age, we know that beyond the mid to late forties, the likelihood of violent offending is particularly low. Changes could be made to clemency rules that would allow persons above a specified age the ability to request a sentencing modification based on their age. Recidivism rates could be examined and if they remained in an acceptable range, the policy might be deemed as non-detrimental to public safety.

The world is not a safe place. We tell our children this and hope they heed the lesson in order to survive when they walk out the door. People die and are maimed on our highways every day, and other harrowing accidents and tales of human misfortune fill our news programs every night. While we mourn, we accept these tragic circumstances as an unfortunate cost of living on the planet as we hope the next tragedy does not involve ourselves or our loved ones. But crime is different, and violent crime brings forth an emotional reaction that other tragic situations do not. This is largely due to the sense of injustice felt when a person is harmed at the hands of another. And unlike accidents, violent crimes leave us with a villain in the form of the person who caused the harm.

Our literature and media engrain our consciousness with a determination to punish evil and praise good, and our legal system is designed to find fault, ascribe blame, and protect us from harm. All of this leads to a framework designed to punish wrongdoers, often to the fullest extent possible, and to attempt to avoid all harm by insulating ourselves from those who cause harm. Our overflowing prisons are the result of this approach as people languish for years repaying their debt, instilling in us a sense that justice has been done and ensuring that those who are incarcerated cause us no more harm.

Our punitive approach may have worked or at least been acceptable when the scale of the problem was smaller and populations and crime rates did not require the construction of prison after prison to house those whom we have deemed unfit to live among us. We now live in an era associated with mass incarceration in which approximately two million people are residing behind bars on any given day. The price of this approach is growing, and policy makers are seeking ways to reduce prison populations without impacting public safety.¹⁴⁵

Knowing that people generally age out, or desist from offending as they age and that the majority of violent offenders do not go on to commit violent crimes after release, it may be time to reconsider our approach towards imprisonment, recidivism, and what we are asking from our prison systems. While we call our prison agencies departments of correction, expecting these agencies to correct what has led people to them is an undue expectation. By the time someone gets to prison, especially for a violent offense, virtually every other social system has failed, from our families, schools, and communities to our economic systems. Expecting our prisons to correct longstanding individual problems is unreasonable. Releasing enough individuals to have an impact on prison populations cannot be accomplished without accepting some amount of risk. Research suggests that releasing many of them can be accomplished by accepting a low to moderate amount of risk.¹⁴⁶

The tolerable level of risk is what needs to be reconsidered when addressing the possibility of violent recidivism. In the United States, we have essentially set the bar near zero, as evidenced by the Willie Horton incident in which a prisoner released on furlough who subsequently committed assault, rape, and robbery in another state was influential in affecting the presidential aspirations

145. See MICHAEL JACOBSON, *DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION* 13, 191–92 (2005).

146. See, e.g., Joan Petersilia, *Prisoner Reentry: Public Safety and Reintegration Challenges*, 81 PRISON J. 360, 370–373 (2001).

of Governor Michael Dukakis in 1988.¹⁴⁷ These types of events have made both politicians and the prison system overly risk averse. But Horton was one of approximately 600,000 people released that year.¹⁴⁸ If the reaction to a tragic car accident was akin to what happened after the Horton case spread through the media, the speed limit would be ten miles per hour; clearly not a speed that would allow society to function. What is needed is agreement on a reasonable and broadly accepted level of recidivism that does not try to prevent all harm by keeping tens of thousands of people incarcerated.

A lesson might be learned from traffic engineers who make recommendations for speed limits. The goal is not to prevent all accidents, but to find the speed that keeps traffic flowing while creating the safest roads possible. In the United States, engineers follow the eighty-fifth percentile rule, which actuates to the speed at which eighty-five percent of drivers travel at or below the speed limit.¹⁴⁹ They do not attempt to set the limit at a range that creates the fewest accidents, recognizing that accidents are going to happen. A similar approach to developing an “acceptable” level of recidivism might involve setting a baseline rate. For example, in the federal recidivism study mentioned earlier, 24.5 percent of released violent offenders committed a violent offense within three years under current release strategies.¹⁵⁰ Were states to make policy changes that shortened sentences, relaxed release conditions, created medical exceptions to sentences or other mechanisms, and the three-year rates remained within an acceptable margin relative to the 24.5 percent base rate, the changes might be considered successful. If recidivism rates were to increase by a margin of, say, ten percent to twenty-nine percent, the policy changes might need to be scaled back.

The point is that there is currently no benchmark for what an acceptable recidivism rate might be; states simply attempt to achieve the lowest one possible, which is leading to a scramble of different “definitions” of recidivism as new metrics are applied that allow pronouncement of a lower rate without really changing anything.¹⁵¹ The metric we suggested above is simply an example. There may be other, better ways to set a benchmark. Such an approach recognizes the reality that we live in an unsafe world and that bad

147. Nancy E. Marion & Willard M. Oliver, *Crime Control in the 2008 Presidential Election: Symbolic Politics or Tangible Policies?*, 37 AM. J. CRIM. JUST. 111, 112, 122 (2012).

148. Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled A New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 8 (2013).

149. James Jondrow, Marianne Bowes, & Robert Levy, *The Optimal Speed Limit*, 21 ECON. INQUIRY 325, 149, 149 n.3 (1983).

150. ALPER, DUROSE & MARKMAN, *supra* note 125, at 11.

151. *See id.* at 3 (discussing how the BJS measures recidivism).

things are going to happen and, rather than attempt to eliminate all risks, a rational mechanism should be developed that balances public safety, costs to the community, and the needs of justice.