

# FOREWORD

## ALTERNATIVES TO IMPRISONMENT: RECENT INTERNATIONAL DEVELOPMENTS

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In recent years, international crime trends have been relatively stable or declining. A recent report from the United Nations noted that

At the global level, violent crimes for which police-recorded data are available (intentional homicide, robbery and rape) have slightly decreased over the past decade. The decrease has clearly been more pronounced for property crimes: motor vehicle theft almost halved, and burglary has been reduced by more than a quarter. Criminal offences related to drug trafficking remained relatively stable over time, while drug possession offences showed a marked increase since 2003 (a 13 per cent increase).<sup>1</sup>

Surprisingly, however, this trend has not reduced the use of custody as a sanction. Many jurisdictions continue to report high rates of imprisonment. A recent report concluded that

Despite the global downward trends in crime, between 2000 and 2015 prison populations rose unrelentingly by almost 20 percent—a rate slightly higher than the world population growth over the same period. The number of women and girls in prison worldwide increased by 53 percent between 2000 and 2017.<sup>2</sup>

This paradoxical state of affairs—falling or stable crime rates and rising prison populations—has triggered an international search for increasingly effective, alternatives to imprisonment. Further, the financial crisis of 2008–2009 provided an additional impetus for the movement towards greater use of alternatives. As with most other public services, criminal justice budgets in all nations have been cut repeatedly in recent years.

This special issue of *Law and Contemporary Problems* explores recent experiences in several Western nations. Contributing authors explore a range of alternative sanctions and programs, and draw conclusions about their relative effectiveness. Much of the literature on alternatives is specific to a single jurisdiction; there has been insufficient learning across boundaries, despite the

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1. 13TH U.N. CONG. ON CRIME PREVENTION & CRIMINAL JUSTICE, THE STATE OF CRIME AND CRIMINAL JUSTICE WORLDWIDE 4 (2015).

2. PENAL REFORM INT'L & THE THAI. INST. OF JUSTICE, GLOBAL PRISON TRENDS 2018: THE REHABILITATION AND REINTEGRATION OF OFFENDERS IN THE ERA OF SUSTAINABLE DEVELOPMENT 7 (2018).

obvious common elements of sanctions in different countries. This special issue contains papers initially presented at an international conference held in May 2018, at the Faculty of Law, University of Haifa.<sup>3</sup> The issue aims to encourage greater dialogue between scholars with a view toward promoting greater awareness of the successful elements of alternative sanctions.

Several contributions explore the oldest and most prevalent alternative to a sentence of imprisonment: the suspended sentence.<sup>4</sup> All jurisdictions operate some form of suspended sanction, whether it is a suspended sentence generally conceived or a suspended term of imprisonment.<sup>5</sup> The appeal of conditional and suspended sanctions is understandable: they offer a way of marking the seriousness of the offense without necessarily depriving the offender of his or her liberty. Suspended sentences are frequently invoked as an appropriate response to crimes serious enough to warrant imprisonment, but which were committed by an individual who, for various legally-relevant reasons, should not be imprisoned. One obvious target clientele would be single parents or offenders with caring responsibilities for vulnerable adults or young children. Yet in order to convey sufficient penal censure or denunciation, these sanctions must carry meaningful consequences for the offender. These consequences also need to be apparent to crime victims and the wider public if they are to be seen as a credible alternative to imprisonment. A common criticism of suspended, conditional, or inchoate sentences is that they fail in this important respect—a failure which is discussed by several contributors to this volume.

Alternative or intermediate sanctions are created or amended for a variety of reasons, but many come into being with the explicit objective of reducing the number of custodial sentences imposed. How often do they succeed in this objective? Several contributors highlight the analytic challenges in determining whether—and to what degree—the introduction or amendment of an alternative to custody has affected the volume of prison admissions or size of the prison population. As Freiberg notes,

It is difficult to accurately measure whether suspended sentences affect imprisonment populations, as these are influenced by many factors such as crime rates, reporting, prosecution and conviction rates, sentencing policies such as mandatory and presumptive sentencing, remand in custody rates, and the availability of other sanctions.<sup>6</sup>

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3. Research workshop of the Israel Science Foundation.

4. Suspended sentences of one kind or another have existed in European courts for over a century. See e.g., MARC ANCEL, *SUSPENDED SENTENCES* (1971); Leslie Sebba, *Penal Reform and Court Practice: The Case of the Suspended Sentence*, in 21 *STUDIES IN CRIMINOLOGY* 133 (Israel Drapkin ed., 1969).

5. Suspended sentences can take several forms. Most commonly they involve the imposition of a specific sentence, the execution of which is suspended. In other cases, a court suspends the decision as to the sanction that ultimately will be imposed. Conditional sentences such as the Conditional Sentence of Imprisonment in Canada function rather differently. In this case, a sentence of imprisonment is imposed but the offender is permitted to remain in the community (rather than having to go to prison) as long as he or she complies with a set of court-imposed conditions. The offender's ability to remain in the community is therefore conditional upon compliance with these conditions, hence the name "conditional sentence."

6. Arie Freiberg, *Suspended Sentences in Australia: Uncertain, Unstable, Unpopular, and Unnecessary?*, 82 *LAW & CONTEMP. PROBS.*, no. 1, 2019 at 81, 94.

A central question addressed by several contributions is whether alternative sanctions, including the suspended sentence, have reduced the use of custody as a sanction. Analysis of trends in several countries reveals a mixed pattern. The Nordic countries appear to have deployed alternative sanctions most effectively. Tappio Lappi-Seppälä reports findings from four such countries: Finland, Norway, Denmark, and Sweden.<sup>7</sup> He concludes that alternatives, namely community service and electronically monitored community penalties, “have substantially decreased the number of offenders that would otherwise entered the prison system.”<sup>8</sup> It is unclear why the Nordic countries have embraced alternatives to a greater degree than other Western nations. The explanations probably lie in the more moderate penal climates that have existed for decades in that region. The result is that these countries have a longer history and wider range of alternative sanctions available. Taken together, this explains their lower imprisonment rates. Less positive findings emerge from other jurisdictions.

In their examination of sentencing in Canada, Cheryl Webster and Anthony Doob explore a variation on the suspended sentence order known as the “conditional sentence of imprisonment.”<sup>9</sup> Unlike a suspended sentence, where the implementation of the sanction is suspended for a specified period of time, offenders serving a conditional sentence in Canada are understood as serving a prison sentence, albeit one discharged in the community. Offenders serving a conditional sentence of imprisonment remain at home but are (or should be) subject to rigorous restrictions on their mobility. Webster and Doob explore almost twenty years of data and suggest that the conditional sentence has had only a modest impact on the volume of admissions to custody in Canada. In addition, legislative changes to the sanction have triggered other problems in the sentencing process. The gradual restriction of the conditional sentence by subsequent legislation may have created a void which has been filled by prison sentences. The misfiring of conditional sentences has also had the effect of distorting judicial use of the suspended sentence; courts have resorted to prison sentences in response to changes to the conditional sentencing regime. Webster and Doob conclude that the Canadian experience suggests that conditional sentencing is not an effective way of reducing the use of imprisonment as a sanction.

Keir Irwin-Rogers and Julian Roberts studied the use of the suspended sentence orders (SSOs) in England and Wales.<sup>10</sup> Like a term of immediate imprisonment, this is a sentence of custody; the SSO should not be used as an option for cases which have not passed the “custody threshold.” The nature of this sanction was significantly amended by the United Kingdom Parliament in

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7. Tapio Lappi-Seppälä, *Community Sanctions as Substitutes to Imprisonment in the Nordic Countries*, 82 LAW & CONTEMP. PROBS., no. 1, 2019 at 17.

8. *Id.* at 45.

9. Cheryl Webster & Anthony N. Doob, *Canada’s Conditional Sentence of Imprisonment: The Unfortunate Failure of a Bad Idea*, 82 LAW & CONTEMP. PROBS., no. 1, 2019 at 163.

10. Keir Irwin-Rogers & Julian V. Roberts, *Swimming Against the Tide: The Suspended Sentence Order in England and Wales*, 82 LAW & CONTEMP. PROBS., no. 1, 2019 at 137.

2005. Until then, courts were required to find “exceptional circumstances” prior to imposing a suspended sentence order. After this requirement was removed, the use of the sanction increased dramatically, rising from only a few thousand orders to almost 50,000 within a few years. In their article, Irwin-Rogers and Roberts conclude that the revitalized sanction had an immediate effect in reducing the use of imprisonment, but that this trend towards decarceration declined over time. Arie Freiberg’s analysis of the suspended sentence in Victoria and other Australian states makes it clear that the sanction failed in several important respects and, as a result of this failure, was subsequently abolished as a sanction in Victoria in 2014.<sup>11</sup>

Why might alternative sanctions introduced to replace custody fail to do so? One explanation for this, long documented in the academic literature, is that the replacement sanctions have been used in place of high-end community penalties, undermining the main objective of these alternatives: replacing terms of immediate imprisonment.<sup>12</sup> Scholars have termed this phenomenon “net-widening,” and it is documented in several contributions to this symposium. For example, Keir Irwin-Rogers and Julian Roberts note the dramatic increase in the use of suspended sentence orders in England and Wales, but conclude that in a significant proportion of cases the SSO was applied to offenders who would previously have received a community penalty.<sup>13</sup> Similarly, Webster and Doob find evidence of net-widening in their analysis of the conditional sentence in Canada.<sup>14</sup> Moreover, failure to comply with the conditions of these alternatives to imprisonment has resulted in offenders being required to serve their sentences in custody, further contributing to increases in prison populations. Even in the Nordic countries where, as noted, community sanctions had a strong decarceration effect, some net-widening occurred.<sup>15</sup> These instances of imprisonment are particularly hard to justify given the offense of conviction was insufficient to warrant imprisonment in the first place.

The relationship between decarceration and net-widening is complex. In some cases, a new or reformed alternative sanction reduces the use of custody (decarceration) while also increasing some of the community bound case-load (net-widening). Indeed, this is the most common outcome. There is also evidence to suggest that the balance between the two effects—decarceration and net-widening—changes over time. Oren Gazal-Ayal and Nevine Emmanuel concentrated on that time effect.<sup>16</sup> They demonstrate that in Israel, suspended

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11. Freiberg, *supra* note 6, at 103.

12. For an early discussion, see ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 318–22 (6th ed. 2015); A.E. Bottoms, *The Suspended Sentence in England 1967–1978*, 21 BRIT. J. CRIMINOLOGY 1 (1981). For a review of the more recent literature, see SARAH ARMSTRONG ET AL., INTERNATIONAL EVIDENCE REVIEW OF CONDITIONAL (SUSPENDED) SENTENCES: FINAL REPORT (2013).

13. Irwin-Rogers & Roberts, *supra* note 10, at 143.

14. Webster & Doob, *supra* note 9, at 188.

15. Lappi-Seppälä, *supra* note 7, at 32.

16. Oren Gazal-Ayal & Nevine Emmanuel, *Suspended Sentences and Service Labor in Israel—From*

sentences were originally used to replace only custodial sentences, and the result was a decline in the use of incarceration. With the passage of time, however, courts and the legislature lost sight of the original intention, and subsequent changes in case law and statutes altered the function of suspended sentence. Suspended sentences eventually became a supplement to custodial and other sentences. Their effect in reducing incarceration diminished. This study also revealed how another community-based alternative—service labor—failed to reduce incarceration despite the clear intention of the legislature. More importantly, with the passage of time, even the limited decarceration effect of service labor disappeared. This study emphasizes the difficulty in relying on research that examines the effect of an alternative sanction in the short term, in order to draw conclusions for the long run.

Irwin-Rogers and Roberts also report that the reformed suspended sentence order had a rapid, significant decarceration effect on sentences of immediate imprisonment in England and Wales, but that the sanction was increasingly applied to community orders in subsequent years.<sup>17</sup> Webster and Doob note a similar trend in Canada: the conditional sentence of imprisonment appears to have achieved an immediate reduction in the use of custody, but the effect proved short-lived.<sup>18</sup> The reasons why courts apply a sanction ostensibly designed to replace custody to community caseload are complex. The examples discussed in these contributions make it clear that when net-widening occurs, there are implications for other sanctions as well. The introduction of a new alternative to imprisonment may change the ways that courts employ a number of other sanctions. Deficiencies—perceived or otherwise—in existing community sanctions will cause courts to apply a substitute sanction to the community caseload, thereby resulting in net widening.

Despite the variation in structure and severity, the conditional and suspended sentences addressed in this collection of essays share a common set of challenges. One such challenge arises from the protean nature of suspended and conditional sentences. If they are constructed to allow a court great flexibility in terms of the number and intrusiveness of conditions, as well as the duration of the order, it becomes hard to locate them on a scale of severity. Most such sanctions carry a wide range of optional conditions, and courts often enjoy wide discretion in responding to willful breaches of these conditions. The severity of a suspended sentence order or a conditional sentence cannot therefore be specified in advance, the way that a two-year prison sentence may be deemed twice as severe as one lasting twelve months. If a court is contemplating replacing a six-month sentence of imprisonment with one of these two sanctions, it is unclear how long the replacement sanction should last, or which conditions should apply. The consequence is that the well-established sentencing principles of parity and proportionality become harder to implement. For example, if two individuals

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*Alternatives to Imprisonment to Net Widening*, 82 LAW & CONTEMP. PROBS., no. 1, 2019 at 111.

17. Irwin-Rogers & Roberts, *supra* note 10, at 144.

18. Webster & Doob, *supra* note 9, at 191.

convicted of crimes of comparable seriousness receive, respectively, a suspended sentence and an immediate prison sentence, parity will be undermined unless the two sanctions can be equated for their perceived and absolute severity. One solution is to develop tables of penal equivalents created by an appellate court or a sentencing commission with some expertise in this area.

A second issue arises in the context of breach of conditions attached to an alternative sanction. Offenders sentenced to alternatives to custody are required to comply with the conditions of their sentence. Assuring effective supervision and monitoring adherence to these conditions is one of the most complex challenges confronting the agencies and professionals charged with the task. Conditions that are excessively onerous are likely to trigger breach, resulting in a hearing. The consequence of the breach hearing may involve committal to custody. Inadequate supervision or monitoring of conditions will undermine judicial, professional, and public confidence in the sanctions, as discussed below. Yet an inflexible response to breach, resulting in committal to custody, is another form of net-widening, as discussed by Richard Frase in his contribution examining suspended sentences in U.S. guideline systems.<sup>19</sup> Frase discusses three types of custodial back-up sanctions that are used to enforce probation conditions in American state and federal guidelines. Revocations of release, and subsequent committal to custody, have emerged as a significant contributor to mass incarceration in the United States. Frase stresses the importance of clear statutory rules and guidelines for courts to follow in order to ensure that these back-up responses do not escalate the rate of incarceration for breach of probation. Frase proposes a number of procedural safeguards that should be implemented to address the shortcomings of the use of custody as a back-up sanction.

When the back-up response for breach is imprisonment, the adoption of an alternative sanction might result in more, instead of less, incarceration. As Gazal-Ayal and Emmanuel show, due to net-widening, service labor and suspended sentences in Israel mostly replace other non-custodial sentences but often result in imprisonment following breach.<sup>20</sup> Meghan M. O'Neil and J.J. Prescott discuss an even more significant problem: people being imprisoned for failing to pay relatively small fines.<sup>21</sup> While in most jurisdictions the inability to pay a fine should not result in imprisonment, many of the poorest members of society fail to prove that they lack the ability to pay and are therefore imprisoned. O'Neil and Prescott demonstrate how online platforms can assist litigants and judges in assuring a more accurate estimation of the ability to pay, and hence reduce the risk of unjustified incarceration following failure to pay fines. Their findings suggest that online tools can improve accuracy, and therefore the effectiveness,

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19. Richard S. Frase, *Suspended Sentences and Free-standing Probation Orders in U.S. Guidelines Systems: A Survey and Assessment*, 82 LAW & CONTEMP. PROBS., no. 1, 2019 at 51.

20. Gazal-Ayal & Emmanuel, *supra* note 16, at 133.

21. Meghan M. O'Neil & J.J. Prescott, *Targeting Poverty in the Courts: Improving the Measurement of Ability to Pay*, 82 LAW & CONTEMP. PROBS., no. 1, 2019 at 199.

of fines as punishments, and in this way may make the use of fines as sanctions more socially attractive.

Another challenge emerging in all of the countries discussed in this special issue concerns judicial and community reaction to intermediate sanctions such as the suspended or conditional sentence. Although alternative sanctions such as the suspended sentence, the community order, and intensive probation can be relatively demanding—and in some cases the penal equivalent of a short period of imprisonment—the public, ever willing to perceive leniency in sentencing, seldom appreciate this reality. Adverse community reaction was an issue for the courts in the Australian state of Victoria. As Freiberg notes in his discussion, the phrase “walks free” was often used in public and media discourse surrounding the suspended sentence.<sup>22</sup> Public criticism also triggered the more restrictive amendments to the conditional sentence in Canada, and, much earlier, the suspended sentence order in England and Wales. When community confidence in a sanction declines, judicial enthusiasm for the sanction usually wanes as a consequence. The lesson seems clear: in the present climate, alternatives to imprisonment need to be carefully constructed and sold to the public as an adequate replacement for a term of custody. Without this, the sanction may fail.

The recidivism research comparing prison with alternative sanctions is useful in this respect. In recent years, researchers in many countries have compared recidivism rates associated with offenders receiving different sentences. Many systematic reviews of this literature have now been published, summarizing research from many countries.<sup>23</sup> The general conclusion is that prison is not associated with lower recidivism rates than less severe penalties, principally community-based orders. In the most recent and the most sophisticated research to date, Aarten, Denkers, Borgers, and Van der Laan compared recidivism rates for two carefully matched samples of offenders: those who had received a partially suspended custodial sentence, and those who had received a fully suspended sentence.<sup>24</sup> These researchers found that offenders sentenced to prison were more likely to re-offend. The Ministry of Justice in the United Kingdom has conducted a series of studies comparing recidivism rates of offenders sentenced to custody with a control group sentenced to community-based sentences. After controlling for the background variables of offenders, the study found higher rates of recidivism in the group sent to prison. Offenders sentenced to custody re-offended at a higher rate than offenders who received a community order.<sup>25</sup> Similarly, offenders sentenced to a community order re-offended at a slightly higher rate than similar, matched offenders who received a

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22. Freiberg, *supra* note 6, at 91.

23. See, e.g., GEORGIA ZARA & DAVID FARRINGTON, *CRIMINAL RECIDIVISM: EXPLANATION, PREDICTION AND PREVENTION* (2016).

24. Pauline G.M. Aarten et al., *Reconviction Rates After Suspended Sentences: Comparison of the Effects of Different types of Suspended Sentences on Reconviction in the Netherlands*, 59 *INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY* 143, 154 (2015).

25. AIDEN MEWS ET AL., *THE IMPACT OF SHORT CUSTODIAL SENTENCES, COMMUNITY ORDERS AND SUSPENDED SENTENCE ORDERS ON RE-OFFENDING* 31 *tbl.B1* (2015).

less severe sanction, such as a fine.<sup>26</sup>

Two contributions in particular highlight the importance of critical actors in the use and administration of alternatives to imprisonment. Pauline Aerten reports one of the first studies to examine the longitudinal relationship between deterrence, alliance, and probation supervision compliance.<sup>27</sup> The results of this study have implications for probation officers and policymakers in the field of probation in many jurisdictions. In her analysis of Dutch probation sentences, Aerten notes that compliance with probation supervision requirements is enhanced when a positive relationship exists between the probation officer and the person serving a probation sentence. This finding underscores the importance of the individual probation officer in ensuring the success of any community-based sanction.

Neil Hutton draws similar conclusions in his article about recent developments in Scotland.<sup>28</sup> Courts in Scotland must apply a custody threshold, which involves a presumption against the use of short (less than three-month) terms of immediate imprisonment. According to section 17(3A) of the Criminal Justice and Licensing (Scotland) Act, “[a] court must not pass a sentence of imprisonment for a term of 3 months or less on a person unless the court considers that no other method of dealing with the person is appropriate.”<sup>29</sup> Similar, albeit more general, provisions operate in England, Wales, and Canada to restrict the use of sentences of imprisonment. Hutton notes that a culture develops among the principal court actors regarding the question of whether the custody threshold has been passed. This consensus is reflected in the collective experiences of legal professionals. The key to a successful filter for admissions to custody, therefore, rests with the culture of the courts as much as it does with any specific statutory wording.

## CONCLUSION

If there is one lesson to be drawn from the diverse experiences reported in the contributions to this special issue, it is that there are no easy or obvious solutions to reducing the volume of admissions to custody by creating alternative sanctions and encouraging courts to replace the use of prison terms. Alternatives to imprisonment vary greatly in their ability to reduce the use of incarceration, and, as has been documented here, a sanction which achieves some success in one jurisdiction may fail in another. Moreover, alternative sanctions may decarcerate initially, only to ultimately widen the net of social control. Any jurisdiction wishing to employ a sanction which is fully or partially suspended therefore faces a number of hurdles. Some of these involve the resistance of legal and other

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26. MINISTRY OF JUSTICE, PROVEN REOFFENDING STATISTICS QUARTERLY BULLETIN: JANUARY TO DECEMBER 2014, ENGLAND AND WALES 45 tbl.1 (2016).

27. Pauline G.M. Aarten, *Exploring Probation Supervision Compliance in the Netherlands*, 82 LAW & CONTEMP. PROBS., no. 1, 2019 at 227.

28. Neil Hutton, *Articulating the Custody Threshold?*, 82 LAW & CONTEMP. PROBS., no. 1, 2019 at 1.

29. Criminal Justice and Licensing (Scotland) Act 2010, § 17(3A).

criminal justice professionals, others the perceptions and attitudes of the wider community. A poorly conceived or inadequately resourced alternative may do as much harm as good. While appellate courts may be able to address imperfections in legislative definitions of alternative sanctions, there is always a danger that these sanctions will be misapplied by trial courts. When this happens, there will be calls to repeal or amend the sanction.

Despite the mixed success in several countries, suspended sentences and other intermediate sanctions have been at least partially successful both in curtailing prison populations and in promoting a more effective, humane, and efficient system of sentencing. The experience in the Nordic countries in particular is encouraging. The challenge to scholars is to determine the elements of a successful alternative sanction – elements which may vary significantly across jurisdictions as well as over time.