

MISSED OPPORTUNITIES: A POSTMORTEM ON CANADA'S EXPERIENCE WITH THE CONDITIONAL SENTENCE

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Our lives are defined by opportunities, even the ones we miss.
- F. Scott Fitzgerald

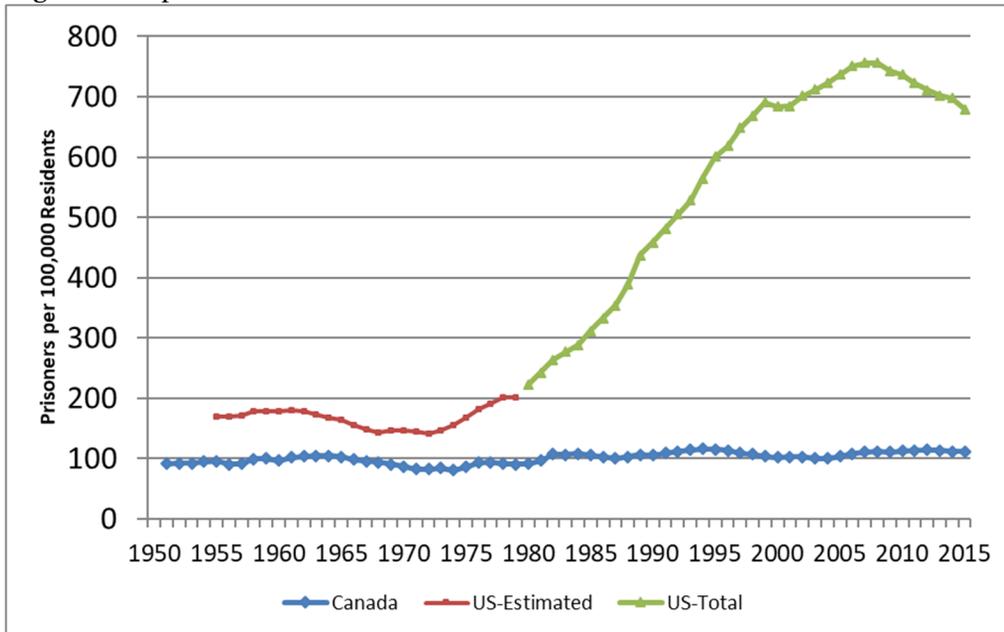
I INTRODUCTION

As with most things in life, context matters when examining criminal justice policy. Canada's conditional sentence of imprisonment is no exception. Introduced in 1996, it was a reflection of the time. Figure 1 begins our story.

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Figure 1: Imprisonment Rates: US and Canada¹

While the dramatic increase in America's imprisonment (particularly contrasted with Canadian trends) is now known well beyond those studying sentencing patterns and trends, less known are the similarities between Canada and the United States in the early 1970s. At that point in criminal justice history, Canada had enjoyed a relatively stable incarceration rate for at least two decades (if not since the late nineteenth century).² Similarly, the American imprisonment rate had shown relative stability for many decades, though the rate (per 100,000 residents) was likely about 50% higher than that of Canada.³

More importantly for our current purposes, both countries witnessed growth in their imprisonment rates starting in the mid-1970s. The reasons for these increases—as well as the responses—were almost certainly different in the two nations. For Canadians, this expansion in the use of incarceration was seen as a cause for concern. As we have written about elsewhere,⁴ Canada never

1. Data for this figure, as well as all other figures and tables in this paper, come from: STATISTICS CANADA, CANADIAN SOCIO-ECONOMIC INFORMATION MANAGEMENT SYSTEM (CANSIM) (2018), https://www150.statcan.gc.ca/n1/en/type/data?subject_levels=35 [https://perma.cc/2JC5-JLWU] [hereinafter CANSIM].

2. GOV'T OF CANADA, THE CRIMINAL LAW IN CANADIAN SOCIETY (1982). This important policy statement includes data suggesting that Canada's imprisonment rate between 1890 and 1950 ranged from roughly 82 to 110 per 100,000 total population. These rates are consistent with Canadian data after 1950.

3. Data for U.S. jails are not reliably available prior to 1980. We have estimated jail populations based on the proportion of the total population that was in jails (as opposed to prisons) after 1980.

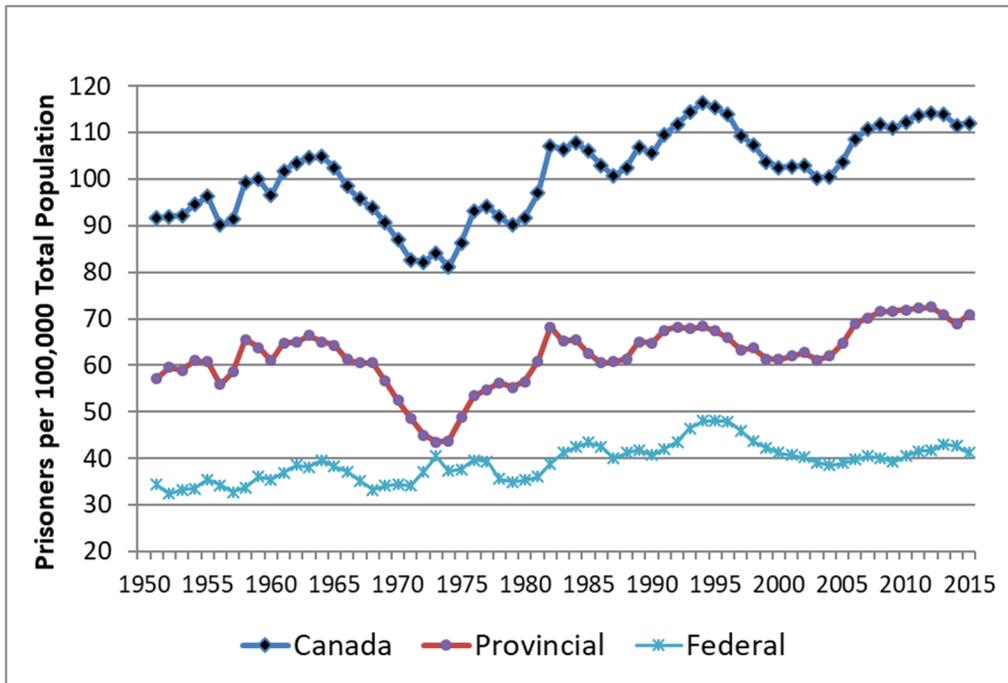
4. Cheryl M. Webster & Anthony N. Doob, *Penal Optimism: Understanding American Mass Imprisonment from a Canadian Perspective*, in AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT 121 (Kevin Reitz ed., 2018).

consistently or enthusiastically endorsed a “high imprisonment for crime reduction” policy. From the early twentieth century onwards, numerous Canadian reports concluded that prisons accomplished little, if anything, in reducing or controlling crime. Imprisonment was seen as necessary for some of those found guilty. However, report after report suggested that prison should be used with restraint and that Canada incarcerated too many people.⁵

Unsurprisingly, calls for measures to reduce rising imprisonment levels were heard. In Canada, the federal government has responsibility for the criminal law. Hence, unlike the United States and Australia, there is a uniform criminal law across the country; however, the administration of criminal justice is largely governed by provincial and territorial governments. More importantly, the responsibility for imprisonment is split between the federal and provincial (or territorial) governments. Specifically, prisoners in pretrial detention held on remand and those sentenced to less than two years are the responsibility of the provinces and territories, while those sentenced to two years or more are the responsibility of the federal government. The importance of this distinction is shown in Figure 2.

5. For an incomplete list, see Cheryl M. Webster & Anthony N. Doob, *Maintaining Our Balance: Trends in Imprisonment Policies in Canada*, in CANADIAN CRIMINAL JUSTICE POLICY (Karim Ismaili et al. eds., 2012).

Figure 2: Federal and Provincial Imprisonment Rates (Canada) per 100,000 Residents⁶



Between 1974 and 1994, Canada's overall imprisonment rate went from 81 to 116 prisoners per 100,000 residents, an increase of 43%. On an international scale, this increase may appear trivial compared to the U.S. increase during the same period—rising from 155 to 564 prisoners per 100,000 residents, a 264% increase. On a national scale, though, it was disconcerting for those responsible for imprisonment. Government officials at the provincial and territorial level of government were particularly alarmed by rising U.S. prison populations, genuinely concerned with their ability to cope in the case that Canada continued to follow America's lead.⁷

For Canada's provincial and territorial heads of corrections, *rates* were largely irrelevant. Rather, *numbers* counted. And the increase over this period was non-trivial. In 1974, provincial prisons housed an average of 9978 prisoners.⁸ Twenty years later, this number had risen to 19,812 —an increase of 99%. Much of this increase was simply because Canada's population had grown. But from a correctional perspective, whether the increase was due to population increases or

6. CANSIM, *supra* note 1.

7. Cheryl M. Webster & Anthony N. Doob, *Punitive Trends and Stable Imprisonment Rates in Canada*, in 36 CRIME AND JUSTICE 297, 333 (Michael Tonry ed., 2007).

8. CANSIM, *supra* note 1.

a more punitive justice system was irrelevant. Either way, additional capacity was needed.⁹

Nonetheless, nothing happened quickly. In quintessential Canadian fashion, multiple commissions and committees spent the next several decades examining the role that criminal law generally and imprisonment in particular should play in Canada's response to crime and criminals.¹⁰ As part of the continued reaffirmation of the need for restraint in the use of imprisonment, repeated recommendations were proposed for greater use of alternatives to prison, with an emphasis on community sanctions.¹¹ However, it was not until 1990 that the federal (Conservative) government released a set of policy papers¹² on sentencing and corrections and shortly thereafter tabled a sentencing bill. Unsurprisingly, both endorsed restraint in the recourse to custody. More notably for our current purposes though, the policy paper urged the development of intermediate sanctions. It noted, amongst other things, that

We share the concern that Canada relies heavily on incarceration as a sanction Imprisonment is not the most effective punishment for most crime. Custodial sanctions have been of particular concern respecting aboriginal people. Greater use of intermediate sanctions offers greater opportunity to engage the aboriginal communities in the solution of common problems.¹³

Although the Conservative government's 1990 legislative proposal was not passed before the 1993 election, the incoming Liberal government introduced its own sentencing bill in 1994.¹⁴ It included a new conditional sentence of imprisonment.¹⁵ Passed in 1996 as part of a package of statutory reforms to the Canadian sentencing process, this new criminal sanction constituted a direct attempt to respond to provincial and territorial concerns with their incarceration levels. Specifically, the conditional sentence is a sentence of imprisonment of less than two years—and, as such, falling under provincial, not federal, correctional

9. A perceptive reader might correctly note that if the 1964 overall rate (105 people per 100,000 population) was taken as the base rate, the increase would be much more modest. However, the metric most relevant to those running prisons is the total *number* of prisoners rather than the *rate* of incarceration. Even using the year 1964 as the starting point, the average number of prisoners in provincial and territorial prisons was 12,559. This value decreased between 1964 and 1974, but by 1977 had exceeded even its 1964 number. By 1994, there were, on average, 19,812 prisoners in provincial and territorial prisons—an increase of 58% since 1964.

10. Webster & Doob, *supra* note 7.

11. Importantly, the contribution made by the increase in the remand population (*see* Figure 3 and section IV(A) of this paper) was largely ignored in this discussion, in large part because it went unnoticed. Remand prisoners constituted 14% of the total prison population in 1978 (the first year in which data are available) and 16% in 1994.

12. SOLICITOR GENERAL OF CANADA, DIRECTIONS FOR REFORM: SENTENCING (1990); SOLICITOR GENERAL OF CANADA, A FRAMEWORK FOR SENTENCING, CORRECTIONS AND CONDITIONAL RELEASE (1990); SOLICITOR GENERAL OF CANADA, CORRECTIONS AND CONDITIONAL RELEASE (1990).

13. *Id.*

14. 35th Parliament, 1st Session, Bill C-41 (1996), <http://www.parl.ca/DocumentViewer/en/35-1/bill/C-41/royal-assent> [<https://perma.cc/L5YP-775S>].

15. Hereinafter denoted by its more common diminutive: the conditional sentence.

jurisdiction—that the sentencing judge permits the prisoner to serve in the community contingent on various statutory and court-ordered conditions.

In its early years, this new sanction was heralded as a success. Empirical examinations suggested that its introduction was associated with a significant drop in the number of admissions to custody, without being accompanied by a large degree of net-widening.¹⁶ Consequently, it was promoted as a potential model for other jurisdictions. In brief, this criminal sanction held significant promise for nations like Canada that were searching for effective strategies to limit or reduce growing incarceration rates.

This paper proposes to revisit the conditional sentence. With the benefit of over twenty years of practice since its introduction, we are well-situated to tell the longer-term story of this sanction, contextualized within a broader set of political and judicial events and decisions, as well as informed by more extensive longitudinal data. Within this larger framework, we would suggest that despite multiple attempts to fulfill early expectations and promises, the conditional sentence in Canada has largely failed to deliver. To this end, we begin—in Part II—by discussing the various challenges that the conditional sentence has faced in gaining legitimacy with both the Canadian public and the judiciary. Part III examines its vulnerability to penal populism under the most recent Conservative government (2006–2015) that likely was enabled by the public’s mistrust of this sanction. Part IV examines the empirical data that might speak to its success (or lack thereof) in bringing about reductions in the use of imprisonment. We conclude—in Part V—with a discussion of several lessons that the Canadian experience might provide for other jurisdictions looking to decarcerate. As part of this wider conversation, potentially unforeseen consequences of this sanction are explored. In particular, we suggest that although its addition to the list of available sanctions may have had little impact, the subsequent reduced availability of conditional sentencing may have created several counterproductive outcomes.

II

THE ELUSIVE SEARCH FOR LEGITIMACY

To say that the conditional sentence began its life on rocky footing would be an understatement. In fact, one scholar suggested this sentencing reform was largely doomed to fail from the start.¹⁷ Without necessarily disagreeing with this fatalistic position, we argue that it faced repeated challenges to its legitimacy almost immediately after its enactment that were never fully overcome.

16. Julian V. Roberts, *The Evolution of Conditional Sentencing*, 3 CRIM. REV. 267 (2002); Julian V. Roberts & T. Gabor, *The Impact of Conditional Sentencing*, 8 CANADIAN CRIM. L. REV. 33 (June 2003); Julian V. Roberts & T. Gabor, *Living in the Shadow of Prison*, 44 BRITISH J. CRIMINOLOGY 92 (2004); JULIAN V. ROBERTS, *THE VIRTUAL PRISON* (Cambridge University Press 2004).

17. Dawn North, *Conditional Sentencing At The Crossroads* (May 25, 2018) (unpublished Ph.D. Prospectus, Simon Fraser University) (on file with authors).

A. Badly Drafted Legislation

From the start, the legislation setting out the conditional sentence constituted a poorly drafted set of provisions for Canada's Criminal Code.¹⁸ It was part of a long bill—roughly seventy-five pages in length—that, for the first time, crafted both a statement of purposes and principles as well as attempted to create a single coherent section in the Criminal Code that addressed all aspects of sentencing.¹⁹ Attention appeared to be less focused on the conditional sentence than on other, more central, sentencing components. Symptomatically, a senior Justice official described this new sanction as a drafting “afterthought” to expand non-custodial alternatives.²⁰

Additionally, the federal government was under significant pressure to bring about decarceration. Simultaneous to Parliamentary discussions of the new sentencing bill, a federal-provincial-territorial committee was established in 1995 “to identify options to deal effectively with growing prison populations.”²¹ Underlining broad concerns about runaway prison population growth, there was uniform agreement that urgent solutions were needed. The ‘committee’s recommendations received unanimous support. Ironically, incarceration rates actually peaked in 1994 (Figure 2). However, no one would have known in 1995 that they were about to decline. Consequently, the report stated—in bold print and consistent with thinking at the time—that

[i]n determining the most appropriate use of incarceration, a clear distinction should be made between violent and non-violent offenders. It is recommended that all jurisdictions vigorously pursue community-based alternatives to imprisonment that will provide the best short and long term contribution to public safety.²²

Compounding the deficiencies in the initial drafting of the sections of the bill setting out the conditional sentence, this intermediate sanction received very little attention during the Parliamentary process. This lack of serious debate is largely rooted in the rather bizarre and unexpected focus of Parliament on another, largely irrelevant section of the bill. The proposed law contained a provision that read: “Evidence that the offence was motivated by bias, prejudice or hate based on the race, nationality, colour, religion, sex, age, mental or physical disability or sexual orientation of the victim . . . shall be deemed to be aggravating circumstances.”²³ With agreement from some Liberals, the right wing Reform Party (having split from, and almost completely decimated the former Progressive Conservative party) treated the inclusion of “sexual orientation” as if it had been written to overtly condone homosexuality at the cost of Christian

18. Criminal Code, R.S.C. 1985, c. C-46 (Can.).

19. An Act to Amend the Criminal Code (Sentencing) and Other Acts in Consequence Thereof, R.S.C. 1995, c. C-41, s. 742 (Can.) [hereinafter Bill C-41].

20. North, *supra* note 17, at 7.

21. MINISTRY OF THE SOLICITOR GENERAL, CORRECTIONS POPULATION GROWTH, REPORT FOR FEDERAL/PROVINCIAL/TERRITORIAL MINISTERS RESPONSIBLE FOR JUSTICE (Aug. 1996).

22. MINISTRY OF THE SOLICITOR GENERAL, CORRECTIONS POPULATION GROWTH, REPORT FOR FEDERAL/PROVINCIAL/TERRITORIAL MINISTERS RESPONSIBLE FOR JUSTICE (May 1996) (Can.).

23. Bill C-41, *supra* note 19, s. 718.2(a)(i).

values.²⁴ As the Minister of Justice responsible for the bill described to us in an interview about twenty years later,

[t]he one thing that preoccupied the House of Commons and the public for six months before [the bill] got passed . . . was the appearance of two words “sexual orientation” in the hate crimes provision Those boneheads didn’t spend a moment talking about the policy of conditional sentences, didn’t talk even about the . . . provisions for recognizing the [special] circumstances of Aboriginal [people in sentencing] which I thought was daring at the time. I expected to have the roof fall in on me over that. They focused on those two words.

The result was that nobody apparently examined the legislation carefully. Unsurprisingly, it was necessary to amend the new law soon after the bill received royal assent.²⁵ As part of the aptly entitled “Criminal Law Improvement Act, 1996,” judges were thereafter required to be satisfied not only that the sentence would not endanger the safety of the community but that it “would be consistent with the fundamental purpose and principles of sentencing set out [in specific Criminal Code sections],” presumably to emphasize proportionality.²⁶ More amendments quickly followed.

Arguably the most remarkable revision addressed an oversight in the original legislation pertaining to persons serving a conditional sentence who disappeared—for example, those who moved to another part of Canada and did not advertise that they were no longer in compliance with their conditional sentence order—and were not found until after the conditional sentence expired. According to the original law, these offenders would be deemed, by default, to have served the full conditional sentence. In other words, as long as one was not caught, the clock kept ticking until the original end date of the conditional sentence had been reached.

In response, a provision was added in 1999 that suspended the running of the conditional sentence as soon as a warrant was issued or the offender had been arrested or otherwise compelled to appear in court.²⁷ While other amendments were somewhat less embarrassing and often required only minor word changes,

24. Reflecting the Reform Party’s concerns, Roseanne Skokes (a Liberal MP from Nova Scotia) stated in debate at second reading of the bill that despite liking most of it, “. . . I wish to go on record today as taking exception to the specific inclusion of the wording of “sexual orientation” in the Criminal Code amendment. The inclusion of this wording in effect gives special rights, special consideration, to homosexuals. The reference to sexual orientation in the code and its proposed inclusion in the human rights legislation gives recognition to a faction in our society which is undermining and destroying our Canadian values and Christian morality. Such a special recognition of sexual orientation in our federal legislation is an overt condonation of the practice of homosexuality which is being imposed on Canadians. It has the effect of legislating a morality that is not supported by our Canadian and Christian morals and values. Canadians do not have to accept homosexuality as being natural and moral. Homosexuality is not natural, it is immoral and it is undermining the inherent rights and values of our Canadian families and it must not and should not be condoned.” 133 HOUSE OF COMMONS DEBATES 093, 1st Session, 35th Parliament (Sept. 20, 1994), at 1610 [Can.].

25. David Cole & Melvyn Green, *M. Kleiman, When Brute Force Fails: How to Have Less Crime and Less Punishment*, PUNISHMENT & SOC’Y, no. 3 (2012), at 368–72 (book review).

26. Criminal Law Improvement Act, R.S.C. 1996, c. C-17 (Can.).

27. An Act to Amend the Criminal Code, the Controlled Drugs and Substances Act and the Corrections and Conditional Release Act, R.S.C. 1996, c. C-51 (Can.).

the damage had likely already been done. The need for multiple and immediate revisions almost certainly undermined this sanction’s credibility, and by extension, its legitimacy in the eyes of Canadians.

B. Legislating an Apparent Contradiction in Terms

Even after legislative corrections, the conditional sentence continued to face significant challenges. Most obviously, the name—Conditional Sentence of *Imprisonment*—was almost certainly a serious mistake. This designation derived from the original description of its availability:

Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

- a) imposes a sentence of imprisonment of less than two years, and
- b) is satisfied that serving the sentence in the community would not endanger the safety of the community,

the court may . . . order that the offender serve the sentence in the community, subject to the offender’s complying with conditions of a conditional sentence order made under 742.3.²⁸

Said differently, it was designed to be a “Sentence of Imprisonment” that was not served in a prison. The fact that members of the public were much more likely to find it to be an acceptable sentence if its punitive conditions were made salient²⁹ was irrelevant. It was still a prison sentence without prison. This contradiction only served to further undermine its legitimacy.

The purpose of the sanction was unambiguous from the start: to reduce the use of imprisonment. That it was to be a substitute for real prison sentences of less than two years was understandable as it was *provincial* prison populations that were growing too quickly (see Figure 2). Importantly, the two-year-less-a-day limit on conditional sentences signalled that it was not designed to be a substitute for prison sentences for very serious cases. Nonetheless, for many Canadians, emphasizing the *possibility* of handing down what ultimately amounted to non-custodial sentences for serious or violent offenses (e.g., robbery, sexual assault and manslaughter) under the illusion that they were prison sentences was seen as a “get out of jail free” card.

The word “conditional” didn’t help. It presumably meant that freedom was conditional and offenders violating release conditions *could* quickly be imprisoned. Although accurate on paper, this interpretation has not necessarily corresponded to actual practice in Canada. Rather, breaches of conditions were often met with modifications (such as different conditions or an increase in conditions) rather than an immediate committal to custody for the duration of the order,³⁰ further reaffirming the public’s perception of the sanction as unacceptably lenient.

28. Criminal Code, R.S.C. 1985, c. C-46, s. 742.1 (Can.).

29. Julian V. Roberts, Dan Antonowicz, & Trevor Sanders, *Conditional Sentences of Imprisonment: An Empirical Analysis of Optional Conditions*, 30 C.R. (5th) 113 (2000).

30. ROBERTS, THE VIRTUAL PRISON, *supra* note 16.

In fact, this view was reinforced by a comparison of the consequences of breaching a conditional sentence to the consequences attached to a “suspended sentence and probation”—a community sanction that had existed for many decades.³¹ The legislation governing conditional sentences was almost certainly written with the goal of making breaches of a condition more likely to result in imprisonment than breaches of probation, even though other options, such as taking no action, are possible in the case of the conditional sentence. Notwithstanding this intention, a person who breached a probation order (a criminal offense in Canada) could easily be arrested, detained until trial, and subsequently receive a custodial sanction of up to four years in prison—an impossibility with a conditional sentence.

C. Lacking a Punitive Bite

One could easily argue that conditional sentences as initially legislated were insufficiently punitive to justify being used in place of custodial sanctions. This conclusion is rooted in two provisions. First, any normal reading of the legislation would suggest that a judge’s decision to impose a conditional sentence was to be made in two steps: the judge imposes a term of imprisonment of a fixed duration, and then, separately, determines whether this prison term should be served in the community. This two-stage process produces a “penological paradox.” As Gemmell explains:

[T]he judge must first determine that imprisonment is the only reasonable sanction in the circumstances then decide whether the offender should nevertheless serve that sentence in the community. The decision to impose a conditional sentence is almost a kind of *reductio ad absurdum* of the original decision that called for imprisonment.³²

It would not be difficult to imagine that most Canadians would question—if not outright reject—the notion of punitive equivalence of a custodial and non-custodial sanction.

Second, there was nothing in the original legislation governing conditional sentences that even hinted at a requirement that punitive conditions be imposed, although § 718.1 of the same piece of legislation stated clearly that “[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”³³ There is reason to believe that judges were often creative in constructing punitive or restrictive conditions (such as house arrest). However, these conditions were not, initially, discussed in the legislation. As time went on, the conditional sentence would sometimes be referred to in the public press as “house arrest,” but the paradox persisted.

Taken together, the assumption underlying both of these provisions that a conditional sentence could be crafted to be equally punitive as a prison sentence of the same length constituted a lethal blow to the initial legitimacy of the conditional sentence. Importantly, the government never made a serious attempt

31. Jack Gemmell, *The New Conditional Sentencing Regime*, 39 CRIM. L.Q. 334 (1997).

32. *Id.* at 337.

33. Criminal Code, R.S.C. 1985, c. C-46, s. 718.1 (Can.).

to educate the public or train judges (or, for that matter, anyone else in the criminal justice system) regarding the correct interpretation of the sanction's legislative provisions. Nor did it explain the appropriate ways to implement the conditional sentence. Equally relevant, the legislation is effectively silent on the offenses for which it might be used. As two senior Ontario judges who were hearing criminal cases at this time remarked a few years ago, "by dint of circumstances rather than design, only a token effort was made to 'pre-sell' this substantial reform to Canadian opinion-makers, the judiciary, the police and the media."³⁴

Not surprisingly, judges—like Canadians generally—were not enamoured with the value of this criminal sanction. Fifty-five percent of Canada's trial judges reported on a 1998 survey that they had handed down ten or fewer conditional sentences since they had become available.³⁵ Notably, those judges who did not use it were considerably less likely to report that it was as effective as a normal prison sentence for accomplishing proportionality or any of the standard purposes of sentences. Further, those who infrequently used this sanction also did not believe that conditional sentence orders were adequately enforced. Equally important, most (83%) of Canada's judges thought that few, if any, of the public understood the nature of this sanction.³⁶ Indeed, only 55% of judges thought that more than a few members of the public who were aware of the nature of conditional sentences supported their use.³⁷ Even more telling, only 20% reported that they never considered "the impact that a conditional order might have on public opinion."³⁸ Indeed, judges knew, soon after the sanction was legislated, that it could undermine public confidence in sentencing.

Perhaps unsurprisingly, the Supreme Court of Canada intervened in 2000, handing down a decision³⁹ in what—we suspect—was a valiant attempt to save the conditional sentence so that it could be used to reduce imprisonment. In fact, this court quoted itself from a previous case, noting that:

Canada's incarceration rate . . . places it second or third highest among industrialized democracies . . . [and] that incarceration is costly, frequently unduly harsh and ineffective, not only in relation to its purported rehabilitative goals, but also in relation to its broader public goals . . . The 1996 sentencing reforms . . . must be understood as a reaction to the overuse of prison as a sanction and must accordingly be given appropriate force as remedial provisions.⁴⁰

To this end, Canada's Supreme Court gave a benevolent interpretation in *R. v. Proulx* of how the duration of the conditional sentence should be determined and clarified that it required punitive conditions. Specifically, the Court

34. Cole & Green, *supra* note 25, at 369.

35. JULIAN V. ROBERTS, ANTHONY N. DOOB, & VOULA MARINOS, *JUDICIAL ATTITUDES TO CONDITIONAL TERMS OF IMPRISONMENT: RESULTS OF A NATIONAL SURVEY 4* (2000).

36. *Id.* at 18.

37. *Id.* at 19.

38. *Id.* at 21.

39. *R. v. Proulx*, [2000] 1 S.C.R. 61 (Can.).

40. *Id.* at 16.

substituted a “purposive” interpretation rather than one based on what was written in the legislation.⁴¹ That is, the rigid two-step decision-making process was abandoned and judges were thereafter allowed, if not encouraged, to hand down conditional sentences that were longer than the terms of incarceration that they were meant to replace.⁴² Further, the Court distinguished the “suspended sentence and probation” from the conditional sentence in terms of their sentencing objectives.⁴³ While the former was intended primarily to serve rehabilitative goals, the latter was to fulfill both rehabilitative and deterrent or denunciatory goals.⁴⁴ As such, the Supreme Court suggested that onerous and punitive conditions—including house arrest and curfews—should be the norm.⁴⁵ Further, it stressed that there should be a presumption of incarceration in cases of proven breach. Notably though, the Supreme Court of Canada decided not to restrict judicial discretion in terms of eligible offenses. Rather, it confirmed that this sanction was available for any offense that satisfies the minimal statutory requirements.⁴⁶

Although this decision attempted to address several of the initial problems in the legislation governing conditional sentences,⁴⁷ we believe that the sanction remained irrevocably tainted. Confidence in the law governing it and its perceived legitimacy were undermined from the start, and despite Supreme Court intervention, likely never fully recuperated. While sentencing judges were henceforward equipped with at least some guidance, skepticism persisted regarding other more practical challenges. Notably, sufficient monitoring and enforcement of the conditions handed down as part of the sanction were not guaranteed.⁴⁸

More importantly, there is little reason to believe that public opinion surrounding the conditional sentence improved. Even during this sanction’s honeymoon phase shortly after coming into force, a survey of Ontario residents found that the public—when a conditional sentence was described to them in detail—did not differentiate it very well from a sentence involving ordinary probation.⁴⁹ Further, there was already evidence suggesting that public support for its use varied substantially with the offense. While approximately 71% of respondents indicated that they probably or definitely preferred this sanction for assault causing bodily harm, only 44% probably or definitely favored it for a

41. *Id.* at 55–62.

42. *Id.* at 51–54.

43. *Id.* at 55–57.

44. *Id.* at 41, 67, 80.

45. *Id.* at 32, 103.

46. *Id.* at 127.

47. Allan Manson, *The Conditional Sentence: A Canadian Approach to Sentencing Reform or Doing the Time Warp Again*, 44 CRIM. L.Q. 375 (2001).

48. Julian V. Roberts, Cathy Hutchison & Rebecca Jesseman, *Supervising Conditional Sentence Orders: The Perceptions and Experiences of Probation Officers in Ontario*, 29 C.R. (6th) 107 (2005).

49. Voula Marinos & Anthony N. Doob, *Understanding Public Attitudes Toward Conditional Sentences of Imprisonment*, 21 C.R. (5th) 31 (1999).

series of break-and-enters and even fewer (40%) preferred this option for sexual assault.⁵⁰ A critical point about this survey is that the conditional sentence was described to respondents in ideal circumstances—including house arrest except for employment purposes—and respondents were told that offenders who violated any condition would serve the rest of the sentence in prison.⁵¹ It is likely that most Canadians, who had not been prompted with this description of the sanction, perceived the conditional sentence in considerably more lenient terms. Further, they would almost certainly have been unaware of the Supreme Court’s emphasis on punitive measures.

III

FALLING PREY TO PENAL POPULISM

The conditional sentence was clearly in trouble. Skepticism, if not outright mistrust, was mounting, particularly amongst the public. Unsurprisingly, this sanction was especially vulnerable to political manipulation. In preparing the material for their 2000 federal election platform, the federal Conservative party targeted the sanction with a promise that “[a] Progressive Conservative government would eliminate the option of conditional sentences for certain scheduled offences (crimes involving sex or violence).”⁵² The Canadian Alliance party⁵³ was equally clear when it asserted that:

Canadians are tired of a criminal justice system that says one thing, then does another. Some sentences may sound tough, but are undermined by introducing concurrent sentences, conditional sentences, suspended sentences, or parole after as little as one-sixth of sentence served. Canadians need to have confidence that our judicial system will keep criminals off our streets.

A Canadian Alliance government will crack down on career criminals through such measures as:

- Eliminating conditional sentences for violent offenders
- Requiring lifetime supervision for repeat violent or sexual offenders
- Automatic dangerous offender status for a third violent or sexual offence
- Consecutive rather than concurrent sentences for multiple violent offences.⁵⁴

50. *Id.* at 3.

51. *Id.*

52. PROGRESSIVE CONSERVATIVE PARTY OF CANADA, CHANGE YOU CAN TRUST: THE PROGRESSIVE CONSERVATIVE PLAN FOR CANADA’S FUTURE 21(2000).

53. The Canadian Alliance was essentially the right-wing Reform Party that had split off from the Conservative Party prior to the 1993 election. It subsequently reunited with the Conservatives to form the Conservative Party of Canada (in power 2006–2015).

54. CANADIAN ALLIANCE, A TIME FOR CHANGE: AN AGENDA OF RESPECT FOR ALL CANADIANS 18 (2000), https://www.poltext.org/sites/poltext.org/files/plateformes/can2000all_plt_en_14112008_173717.pdf [<https://perma.cc/FZ62-8B8J>]. Symptomatically, these political promises were presented under the sub-heading “Truth-In-Sentencing”—itself under the heading “Making Our Communities Safe” in a sub-section entitled “Our Justice System has Become Unjust” that was contained in a section entitled “Safer Communities, Stronger Communities.”

It is meaningful that the proposal to restrict conditional sentences came before three other proposals that deal with much more serious offenders than those who might receive this sanction.

In 2004, Canada had another federal election. This time the right-of-center parties had re-united into the Conservative Party of Canada. Their platform document (“Demanding Better”) had a section entitled “Demand Better Security.”⁵⁵ The context of the conditional sentence is telling: “Conditional sentences,” which have allowed child sex offenders, murderers, rapists, and impaired drivers the opportunity to serve their sentences at home rather than in prison, must be eliminated for serious offenders”⁵⁶

Notably, the Conservative party ignored the fact that conditional sentences could not be given to those convicted of murder or second time (or subsequent) impaired driving precisely because conditional sentences were unavailable for anyone who would otherwise be sentenced to two years or more in prison. However, we would suggest that it was likely unnecessary to have oversold their argument. The party knew that restricting conditional sentences was an easy sell.

Indeed, the Liberal government—with its bumbling of the conditional sentence—unintentionally encouraged the politicization of crime policy. In reality, cases of crimes against persons other than common assault accounted for only roughly 22% of all conditional sentences in 2004, the year conditional sentences accounted for the highest proportion of criminal sentences prior to the 2006 election.⁵⁷ Sexual assaults and weapons offenses accounted for 3% and 2%, respectively, of all conditional sentences that same year. After the Conservatives had implemented their desired changes in 2012 and 2013, with a majority government, these proportions changed only slightly. In 2015, crimes against persons other than common assault accounted for 18% of conditional sentences, with sexual assault accounting for 2% and weapons offenses representing 3%.⁵⁸

More importantly, most conditional sentences were not imposed in cases that would be of special concern to members of the public. Nevertheless, the Liberals handed those interested in capitalizing on allegations of sentence leniency an easy electoral issue. Indeed, actual figures on the relative use of the sanction overall, or the offenses that accounted for most of conditional sentences, are irrelevant if people are unaware of them.

Perhaps even more telling is that the Liberals, with a minority government in 2005, introduced yet another amendment to the conditional sentence.⁵⁹ In addition to a few minor wording changes, the government proposed restrictions on the use of this sanction for a number of serious and violent offenses—a

55. CONSERVATIVE PARTY OF CANADA, DEMANDING BETTER 36 (2004).

56. *Id.*

57. CANSIM, *supra* note 1.

58. *Id.*

59. An Act to Amend the Criminal Code (conditional sentence of imprisonment), 1st Session, 38th Parliament C-70.

problem that had plagued it from its birth. Specifically, this proposal stated that in deciding whether a conditional sentence should be ordered:

[T]he court shall not order that an offender serve his or her sentence in the community if the offender has been convicted of any of the following offences, unless the court is satisfied that it is in the interests of justice to do so because of exceptional circumstances:

- a) a serious personal injury offence . . .
- b) a terrorism offence
- c) a criminal organization offence
- d) an offence in respect of which, on the basis of the nature and circumstances of the offence, the expression of society's denunciation should take precedence over any other sentencing objectives.

If the court orders the offender to serve his or her sentence in the community because of exceptional circumstances, the court shall include in the record a statement of those circumstances.⁶⁰

Had this amendment passed, it probably would have had very little impact other than to provide a defense of the conditional sentence when the sanction was attacked. One senior Liberal Member of Parliament whom we interviewed referred to it as a “tweaking” of the legislation. In any case, thirty-three days after its introduction, the minority government fell on a confidence vote.

However, the floodgates to the politicization of crime had been opened. In the election campaign that followed (2006), the Conservatives promised a virtual tsunami of “tough-on-crime” legislation in its election platform. Notably, amendments to the conditional sentence were the second of fourteen crime proposals, the first being a promise to introduce a set of mandatory minimum penalties. Specifically, the Conservatives proposed to “[e]nd conditional sentences (“house arrest”) for serious crimes, including designated violent and sexual offences, weapons offences, major drug offences, crimes committed against children, and impaired driving causing death or serious injury.”⁶¹

The priority given to the conditional sentence almost certainly reflected its vulnerability to penal populism. Given the public's longstanding concerns with its use (particularly with more serious or violent offenses), attacking it continued to be an easy sell. Indeed, the Liberals had provided a ready-made issue for the Conservatives to use to sway public opinion. Canadians have long believed that sentences for criminal offenses are too lenient. Particularly given its explicit purpose of reducing imprisonment by having *prison* sentences served in the *community*, the conditional sentence had all of the markings of a “soft on crime” initiative.

Unsurprisingly, the Conservative 2006 legislative proposal to reduce the availability of conditional sentences was their first post-election crime bill.⁶² It would have barred the use of this sanction for all offenses punishable by ten years

60. *Id.* at 2–3.

61. CONSERVATIVE PARTY OF CANADA, STAND UP FOR CANADA: FEDERAL ELECTION PLATFORM 22 (2006).

62. An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment), 1st Session, 39th Parliament, C-9.

or more. Given Canada's high *legislated* maximum penalties, this cut-off point would have excluded many property offenses, including all break-and-enters, all thefts or frauds involving items valued at \$5,000 or more, and many other less serious crimes. In the end, under pressure from the opposition parties, the minority government, which apparently did not expect to be in power for long,⁶³ eliminated only personal injury, terrorism, or criminal organization offenses with maximum sentences of ten years or more from eligibility for the sanction.

Given that few Canadians likely had any idea of maximum sentences in criminal legislation, one would have thought that these new constraints would have been sufficient. They were not. In 2009, the Conservative government introduced further restrictions that did not make it through Parliament.⁶⁴ However, with a parliamentary majority two years later, they passed legislation that removed this sentencing option for a substantial number of offenses. Specifically, conditional sentences would, thereafter, be available only if the various principled exceptions did not apply and:

- (c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;
- (d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;
- (e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that
 - (i) resulted in bodily harm,
 - (ii) involved the import, export, trafficking or production of drugs, or
 - (iii) involved the use of a weapon; and
- (f) the offence is not an offence, prosecuted by way of indictment, under any of the following provisions.... [A list of 11 offences followed including any sexual assault, break and enter, and more serious thefts].⁶⁵

The Conservative government had, for all intents and purposes, gutted the conditional sentence. There is no doubt that these restrictions hit at the heart of the cases that were the probable focus of this sanction as it was originally introduced in 1994. In brief, this sanction's primary *raison d'être* had been nullified.

IV

UNFULFILLED PROMISES

The conditional sentence was designed to reduce Canada's growing provincial and territorial prison population. As such, it was expected to be used for offenders who would otherwise have received a real prison sentence. Within this context, success has generally been defined as a measurable reduction in the

63. PAUL WELLS, *THE LONGER I'M PRIME MINISTER* (2013).

64. 40th Parliament, 2nd session, Bill C-42 Ending Conditional Sentences for Property and Other Serious Crimes Act (2009).

65. Criminal Code, R.S.C. 1985, c. C-46, s. 742.1 (Can.).

prison population or admissions without any change in other non-prison sanctions, such as probation.

To a large extent, we believe that the empirical question of whether the use of prison sentences decreased because of the newly created availability of conditional sentences is impossible to answer adequately. First, it was implemented simultaneously across the country. As such, there are no jurisdictions in which the conditional sentence was unavailable that could act as a control group. Second, it was implemented at a time in which there was serious pressure to decrease the use of imprisonment *by any means*. Accordingly, it is difficult—if not impossible—to disentangle other contemporaneous changes designed to reduce incarceration, including other parts of the same legislation. These rival (legislative) explanations would include the requirement that sentences be proportional to the harm done and the principle that all available sanctions other than imprisonment should be considered for all offenders.⁶⁶

Third, both overall and violent crime rates in Canada peaked in the mid-1990s and have since declined.⁶⁷ Predictably, the number of adults charged also decreased. Similarly, Canada's provincial and territorial imprisonment rate peaked in 1994 after having risen since the early 1970s; by 2003, it had drifted back to its 1987 rate.⁶⁸ Importantly, this seemingly natural fluctuation over time constitutes yet another rival explanation for any drop in levels of incarceration attributed to the conditional sentence, which was introduced at a time in which imprisonment rates had already started falling. Consistent with this explanation, Canada's *federal* imprisonment rate also peaked in 1994 and began a similar long-term decline,⁶⁹ a phenomenon that parallels the provincial and territorial trends but upon which the conditional sentence would have had no impact.

Fourth, prison admissions were anything but stable across Canadian provinces and territories during the early 1990s. Illustratively, the change from 1990 to 1995 (the period prior to the availability of conditional sentences) varied from a 52% decrease in the number of *sentenced* admissions in Manitoba to a 62% increase in British Columbia.⁷⁰ However, any empirical analysis that compares the pre- versus post-periods largely assumes stability within at least the pre-period. Where prison figures prior to the availability of the sanction are unstable, it is plausible to explain any changes between pre- and post-rates as being the result of either a) pre-existing trends in some provinces if rates were already decreasing, or b) regression to pre-existing rates in others. More simply, any post-1996 drop in imprisonment levels may merely reflect already declining rates prior to 1996 or, conversely, a natural return to normal rates following unusually high levels before 1996.

66. Criminal Code, R.S.C. 1985, c. C-46, s. 718.2(e) (Can.).

67. Anthony N. Doob & Cheryl M. Webster, *Weathering the Storm? Testing Long-Standing Canadian Sentencing Policy in the Twenty-First Century*, 45 CRIME & JUST. 359 (2016), Fig 2.

68. *See id.*

69. *See id.*

70. CANSIM, *supra* note 1.

In brief, numerous competing explanations exist for any apparent drop in imprisonment following the introduction of the conditional sentence. Given the significant difficulties in ruling them out as explanatory factors, we would suggest that strong conclusions regarding the decarceration effects of the new sanction are inappropriate. But the question of whether the conditional sentence was successful in reducing imprisonment in Canada is probably a silly one. Obviously, *some* offenders received a conditional sentence who otherwise would have been handed down a custodial sanction. As such, the empirical point at issue should not be whether the conditional sentence reduced imprisonment very slightly. Rather, it is whether its availability had an *important* impact on incarceration rates.

A. Prior Research

Unfortunately, few empirical studies have examined this more restricted question. The most sophisticated attempt to-date is arguably the study conducted by Roberts and Gabor⁷¹ and expanded by Roberts.⁷² Comparing the four years prior to and following the availability of the conditional sentence, these scholars found a reduction in the rate per 10,000 adults *charged* (not sentenced) who received custodial sentences in eight of the nine jurisdictions for which they obtained data, with an aggregate decrease of 13%.⁷³ Further, they found a negative correlation ($r=-.45$) between changes in the custody rate across jurisdictions and the volume of conditional sentences imposed.⁷⁴ That is, as the number of conditional sentences increased, the custody rate (per 10,000 adults charged) decreased.

On their own, these results suggest—as the authors claim—a decarceration effect from the introduction of conditional sentences. The difficulty is ruling out alternative explanations for this drop. Indeed, there was a great deal of volatility during the period under analysis: declining crime rates, decreasing numbers of adults being charged, considerable instability in prison admissions during the years leading up to the enactment of this sanction, and explicit directives to judges to reduce their recourse to imprisonment by using all other available sanctions. Any of these factors could arguably constitute a rival explanation. To their credit, Roberts and Gabor acknowledge that “a considerable proportion of the drop in custody rates is explained by variables other than the introduction of conditional sentencing.”⁷⁵

As another illustration of the problem, one might note the co-existing trends in the remand rate—a phenomenon which only became salient years after the publication of this study. Figure 3 demonstrates this concern.

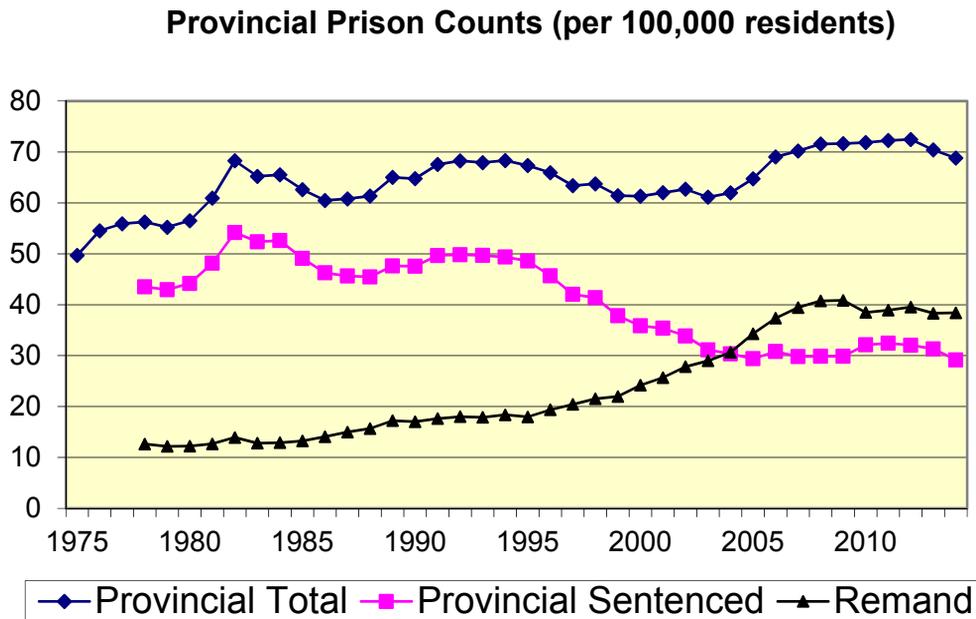
71. Julian V. Roberts & T. Gabor, *Living in the Shadow of Prison*, 44 BRIT. J. CRIMINOLOGY 92 (2004)

72. ROBERTS, *THE VIRTUAL PRISON*, *supra* note 16.

73. Roberts & Gabor, *supra* note 71, at 100.

74. *Id.*

75. *Id.*

Figure 3: Canadian Provincial Prison Rate (per 100,000 residents) (1978-2014)⁷⁶

While the provincial sentenced population shows a steady decline over time—most pronounced between the early 1990s and the mid-2000s—the remand population in Canada displays an increase over this same period. By 2005, it was well established that the growth in the remand population, composed largely of those awaiting trial—though including a few awaiting sentencing—was a serious problem. In fact, the long-term upward trend in the remand population overtook the sentenced population in 2005. The intersection of these two sub-groups of provincial prisoners in 2004 would suggest compensation at sentencing with credit off the sentence being given for time served in pretrial custody. Consequently, prison sentenced admissions would necessarily be reduced given some offenders would have served their entire custodial sentence before being sentenced. Similarly, sentenced prison counts would decrease as sentences became fewer or shorter because of pretrial credits.

Within this context, the growth in the pretrial detention population during the period examined by Roberts and Gabor⁷⁷ represents yet another compelling explanation for any drop in provincial sentenced imprisonment. When coupled with other equally relevant alternative explanations previously presented, the notion that one can convincingly assess the effects of the new sanction on imprisonment is dubious. While there are almost certainly cases in which

76. CANSIM, *supra* note 1.

77. Roberts & Gabor, *supra* note 73.

offenders were given conditional sentences in place of custodial sanctions, there is no *measurable* impact. On the one hand, Roberts and Gabor's interpretation of the 13% drop in the aggregate rates of sentenced admissions to custody⁷⁸ is plagued by the inability to isolate the effect of the new sanction from that of so many other competing, and arguably more plausible, factors, such as the increased credit being given for time in pretrial custody. On the other hand, while their correlation between the change in the custody rate and the rate at which the new sanction was used is in the predicted negative direction, it does not even approach traditional standards of statistical significance ($r=-.45$, $df=7$, $p=.227$) and is best interpreted as such.⁷⁹

B. Additional Analyses

Perhaps because of the multiple competing explanations for changes in sentencing patterns, almost no subsequent empirical analyses have been conducted on the effects of the conditional sentence in the past two decades. Our own attempt yields no real advances in overcoming the initial inherent difficulties. Our only advantage from previous studies is that we benefit from the passage of time—both in terms of access to more extensive longitudinal data and subsequent changes to the conditional sentence that might provide another vantage point in examining its impact. In brief, there continues to be no compelling evidence to suggest that the conditional sentence has had any measurable impact on provincial and territorial sentenced imprisonment. The arguments upon which we base this conclusion are twofold.

1. Use of the Conditional Sentence

Conditional sentences have played a small role in sentencing options. Table 1 examines the distribution of the most serious sentence handed down in Canadian criminal courts.

78. *Id.* at 100.

79. *Id.*

Table 1: Most Serious Component of Sentence (Canada, reporting jurisdictions)⁸⁰

	2006 (before restrictions)	2015
Custody	34.2%	38.3%
Conditional Sentence	4.2%	3.6%
Probation	28.6%	25.7%
Fine	25.3%	24.2%
All other	7.7%	8.2%
Total	100%	100%
Total Imprisonment rate Per 100K population	108.6	112.0
Provincial/territorial rate	68.9	70.9

As a snapshot of the overall use of the conditional sentence, we have chosen to examine sentencing data from 2006 and 2015. This choice is purposeful. The data from the first year represents a period in the life of this sanction before any of the legislated restrictions on its use. In contrast, the latter year constitutes a period subsequent to the enactment of the various restrictive provisions. Notably, even before Parliament limited the scope of the conditional sentence, it was only used in 4.2% of all criminal cases in which the offender was found guilty and sentenced. This proportion fell slightly to 3.6% in 2015. Clearly, it has never been a significant tool in the hands of sentencing judges.

However, its use varied across jurisdictions. Table 2 displays the breakdown of the most serious component of the sentence for all cases with “guilty” as the most serious decision. Data are presented from the six largest provinces that had data on the imposition of conditional sentences at sentencing. Expanding on Table 1, we present data for three different periods: before any of the restrictions were introduced (labelled as “early”), 2007 (the cusp of the initial legislative changes which received royal assent on May 31, 2007), and 2015 (the culmination of the various restrictions, the last coming into force on March 13, 2012).

80. CANSIM, *supra* note 1.

Table 2: The Relative Importance of Conditional Sentences (as the most serious component of the sentence) at Sentencing (reference years in parentheses)⁸¹

	Jurisdiction (in order of population size)					
	ON	BC	AB	MB	SK	NS
% of Guilty to custody: early (year as noted)	33.2 (1995)	34.5 (2000)	28.9 (1995)	33.8 (2005)	24.1 (1995)	21.2 (1995)
% of Guilty to custody (2007)	35.0	40.0	38.5	33.3	24.2	26.1
% of Guilty to Custody (2015)	34.8	48.5	44.3	46.3	35.0	28.3
% of Guilty to Cond. Sent: early (year as noted)	3.1 (1998)	8.9 (2000)	2.0 (1998)	3.9 (2005)	5.6 (2001)	6.3 (1999)
% of Guilty to Cond. Sent. (2007)	4.7	7.5	2.2	4.4	8.6	8.8
% of Guilty to Cond. Sent. (2015)	4.1	5.8	1.8	3.4	8.6	8.9

Note: Different reference years are used for “early” because of unavailability of data.

Most notably, the proportion of guilty cases handed down a conditional sentence was not large in any of the jurisdictions, for any period. Indeed, it is dwarfed by both custody and probation (not shown) in all six provinces. Nor was its use uniform. The conditional sentence appears to have been used the least frequently in Alberta (never exceeding 2.2%) and the most frequently in Nova Scotia (representing almost 9% of cases in 2007 and 2015).

Similarly, its use varied by offense type. Table 3 presents annual data for Ontario—Canada’s largest province, representing approximately 40% of all criminal cases. The proportion of all sentenced offenders receiving custody and conditional sentences for all offenses are displayed and subsequently broken down by various offense categories.

81. CANSIM, *supra* note 1.

Table 3: Percentage of All Sentenced Offenders Receiving Custody and Conditional Sentences by Offense Type (Ontario)⁸²

	All offenses		Violence		Property		Administration of Justice		Drug	
	Custody	CS	Custody	CS	Custody	CS	Custody	CS	Custody	CS
1994	34.4%		35.9%		38.5%		55.8%		31.0%	
1995	33.2%		34.6%		37.5%		53.7%		26.5%	
1996	34.2%		36.4%		38.2%		53.8%		26.6%	
1997	34.3%		33.7%		38.1%		51.6%		29.3%	
1998	37.4%	3.3%	35.1%	4.3%	41.5%	5.2%	57.4%	2.6%	27.0%	5.9%
1999	36.5%	3.9%	33.8%	4.9%	40.8%	5.7%	55.9%	2.9%	23.5%	8.9%
2000	37.2%	3.9%	34.6%	4.5%	40.9%	5.9%	57.9%	3.1%	22.9%	9.7%
2001	36.0%	4.2%	33.4%	4.5%	39.5%	6.2%	55.6%	3.4%	21.6%	10.9%
2002	36.8%	4.6%	32.6%	5.1%	40.4%	6.2%	55.1%	3.5%	26.6%	17.0%
2003	36.5%	5.2%	30.7%	5.3%	39.0%	6.7%	52.9%	4.5%	[35.5%]	[36.7%]
2004	34.3%	5.6%	28.9%	6.3%	37.2%	7.1%	48.3%	5.1%	27.3%	22.9%
2005	34.6%	5.2%	28.7%	5.9%	37.3%	6.4%	48.9%	5.4%	27.9%	20.3%
2006	33.5%	4.7%	27.7%	5.4%	36.4%	5.7%	46.4%	4.9%	29.3%	17.8%
2007	35.0%	4.7%	29.5%	5.2%	38.2%	5.9%	47.9%	4.6%	29.9%	19.1%
2008	33.6%	5.1%	29.0%	5.3%	36.1%	6.1%	46.6%	5.2%	30.0%	22.5%
2009	32.9%	5.2%	29.4%	5.2%	35.5%	6.6%	45.9%	5.8%	28.6%	24.8%
2010	33.3%	5.2%	31.9%	4.7%	37.3%	7.0%	48.2%	5.5%	26.4%	24.7%
2011	35.7%	5.7%	32.9%	4.9%	40.2%	7.3%	50.2%	5.7%	25.7%	26.8%
2012	36.1%	5.2%	34.6%	4.5%	39.9%	6.9%	52.0%	5.5%	24.7%	20.8%
2013	35.9%	5.0%	34.6%	5.0%	40.3%	6.7%	49.5%	5.9%	26.4%	17.0%
2014	35.5%	4.4%	33.8%	4.7%	40.3%	6.1%	48.2%	6.0%	27.5%	10.7%
2015	34.8%	4.2%	34.3%	4.5%	38.5%	5.8%	46.4%	6.0%	29.1%	8.9%

Notes: (1) There are differences between some of the figures in this table and those in Table 2 that are inconsequential (max difference=0.2%), relating to minor discrepancies in the numbers taken from different Statistics Canada tables. (2) For inexplicable reasons, recorded drug offenses dropped dramatically in 2003 but custody and conditional sentences did not drop substantially (2002 cases=4250; 2003, cases=1930; 2004, cases=3442). Caution is warranted for 2003 data.

Of the four offense types presented, conditional sentences were used considerably more frequently for drug offenses than for violent, property, or administration of justice offenses. While the proportion of sentenced drug offenders receiving this sanction often exceeded 20% over this eighteen-year period, it barely reached 7% for any of the other offense types. However, given that drug offenses typically represent less than 9% of all cases being sentenced, even this targeted use of the conditional sentence represents few cases in the overall scheme.

82. CANSIM, *supra* note 1.

Beyond giving a general picture of the use of this sanction, these sentencing data in Table 3 also allow us to explore the impact of the various restrictions legislated under the previous Conservative government. Specifically, we are looking for discontinuity—that is, change in the direction or magnitude of the use of the conditional sentence following legislated restrictions. In terms of the initial legislative changes (mid-2007), there appears to be very little evidence of an effect. In fact, there were some increases (rather than a predicted decrease) when comparing the years immediately prior to and following this amendment.

In contrast, the 2012 legislative restrictions appear to have had a slightly more discernible impact. With the exception of administration of justice offenses, which showed a very slight increase, all of the other categories seemingly witnessed a decline in the proportion of sentenced offenders receiving conditional sentences. Having said this, only drug offenses showed any substantial change in the use of this sanction. Indeed, it would appear—at least in terms of these Ontario data—that the conditional sentence never accounted for a large portion of sentences in any period, especially compared to normal custody and probation.

This observation also appears to find support more broadly.⁸³ While there was an increase in the proportion of guilty cases handed down a conditional sentence between the early period and 2007 for five of the six jurisdictions, there was a decrease between 2007 and 2015 in four of them. However, with the exception of British Columbia (which dropped from 7.5% to 5.8%), the declines were small. For the two other provinces, there was no change. Particularly given that the 2012 restrictions hit at the heart of the cases that were the focus of the conditional sentence, the lack of substantial impact further suggests that this sanction has never played a large role at sentencing.

2. Effectiveness in Reducing Imprisonment

Even though the conditional sentence was rarely used, this description does not necessarily mean that it was ineffective in reducing imprisonment. However, the picture painted in Table 3 is not encouraging. There appears to be no obvious discontinuity in the proportion of sentenced offenders receiving custody in Ontario over this period. Most notably, one cannot find evidence (with the possible exception of drug offenses) that the proportion of offenders sentenced to custody dropped noticeably with the introduction of this sanction in 1996. Similarly, one would have anticipated increases in the custody percentages following the introduction of the various restrictions on conditional sentencing. There is very little evidence of this phenomenon either. One would be tempted to conclude that the conditional sentence of imprisonment did nothing substantial to reduce incarceration. This ineffectiveness was likely a reflection—at least in part—of the fact that it accounted for only a small portion of sentences.

83. See *supra* Table 2.

The data in Table 2 appear to confirm this lack of effect. Given that the initial restrictions only came into force for offenses committed after mid-2007, the percentage of guilty cases given a custodial sentence should have dropped between the early years of the conditional sentence and 2007. Indeed, this sanction had been in force for approximately ten years. In Manitoba and Saskatchewan, the proportions were stable but not declining. Otherwise, they *increased* in the other four jurisdictions.

In contrast, the percentage of custody should have increased between 2007 and 2015. In 2015 both sets of restrictions on the use of the conditional sentence were in full force. In this case, there were changes in the predicted direction. In five of the provinces, the proportion of guilty cases given a custodial sentence increased. Further, the upturn is non-trivial. In only Ontario and Nova Scotia were there either no changes or only very small increases. While the introduction of the conditional sentence seemingly had no measurable impact in reducing imprisonment, its *de facto* elimination appears to have increased incarceration.

In sum, the trends in sentencing data do not provide compelling evidence of the effectiveness of this sanction in fulfilling one of its central objectives: reducing the use of imprisonment in Canada. However, one might argue that correctional data are more appropriate. As conditional sentences were designed explicitly to substitute custodial sanctions, this second data source might be better situated—empirically speaking—to examine this sanction’s direct effect on the Canadian prison population.

Yet they are not without their own limitations. As already discussed, one must be particularly attentive to the problem of the remand population as a confounding factor. As the pretrial detention population was increasing in many provinces over this period, those sentenced to “imprisonment” would get credit for time served. Hence, fewer people were going into prison as sentenced prisoners given that they would have served their custodial sanction (or at least a substantial part of it) before being convicted, rendering them no longer eligible for a prison sentence. Further, one must also recognize the difficulties in equating prison counts with conditional sentence counts. After the Supreme Court’s decision in Proulx, it would be expected that conditional sentences would often be longer than the prison sentence that it was replacing. Moreover, those serving sentences of less than two years in an actual provincial or territorial prison typically earn remission for a total of one third of their sentences.⁸⁴

With these caveats in mind, Table 4 presents both correctional counts (the average number of prisoners in provincial and territorial prisons on any given day) and admissions data (the total number of prisoners admitted to provincial prisons in a given year) for Canada as a whole. The numbers are expressed as rates per 100,000 people in the population.

84. Prisons and Reformatories Act, R.S.C. 1985, c. P-20, s. 6(1).

Table 4: Provincial and Territorial Correctional Counts and Admissions Data (Rates per 100,000 population)⁸⁵

	Column-1: Conditional sentence counts ²	Column-2: Provincial sentenced counts	Column-3: Provincial remand counts	Column-4: Conditional sentence admissions	Column-6: Provincial sentenced admissions ³	Column-7: Provincial remand admissions ³
1990	--	47.6	17.0	--	375.0	322.6
1995 ¹	24.9	48.6	18.0	49.6	362.2	368.3
2000	34.2	35.7	24.2	56.4	246.3	414.5
2005	43.2	29.6	34.3	57.9	245.9	425.2
2010	39.9	32.1	38.5	53.5	218.8	417.0
2015	24.8	28.2	41.6	35.1	198.3	377.9

Notes: (1) 1997 for conditional sentence counts and admissions. (2) Nova Scotia, New Brunswick, Northwest Territories and Nunavut are excluded because of completely missing or substantially missing data. (3) Alberta is excluded because of missing data.

Most immediately, the conditional sentence correctional counts (column 1) appear very large, particularly when compared with the sentenced counts (column 2). However, this difference is not a reflection of their frequent use. Rather, it is simply a consequence of the lack of direct comparability of the two measures. Not only are conditional sentences expected to be longer than their custodial counterpart, but they do not benefit from reductions stemming from remission, temporary absences, and parole.

If one were looking for the strongest evidence in favor of the conditional sentence reducing imprisonment, one would likely point to rows 2 and 3. Following the introduction of this sanction in 1996, conditional sentence counts increased by a rate of 9.3 per 100,000 (24.9 to 34.2). This growth was associated with a corresponding decrease in the sentenced counts which dropped by a rate of 12.9 (48.6 to 35.7). Even considering rising remand rates (of 6.2 from 18.0 to 24.2), this increase would not account for all of the reduction in sentenced counts. In fact, it would seem that even subtracting out the impact of remand, the actual reduction in sentenced counts of 6.7 (12.9 to 6.2) between 1995 and 2000 can be largely explained by the 9.3 increase in the use of conditional sentences. The difference (between 6.7 and 9.3) could arguably reflect some net-widening (the use of conditional sentences for offenders who would have otherwise received a non-custodial sanction).

However, the problem with this interpretation is twofold. First, it ignores other plausible explanations for the drop in the sentenced counts. For instance, violent crime rates were falling and fewer people were being charged over this same period. Even more persuasive, imprisonment rates were likely dropping naturally at this point after peaking in 1994 through regression toward the mean.

85. CANSIM, *supra* note 1.

Second, the suggestion that these data demonstrate the effectiveness of the conditional sentence in reducing correctional counts ignores other data. Using the same logic and time period as above but applied to the admissions data, the same conclusion is more difficult to draw. Even controlling for the 46.2 increase per 100,000 in the remand rate (368.3 to 414.5) by subtracting it out from the 115.9 drop in the rate of sentenced admissions (362.2 minus 246.3), we are still left with a decrease of 69.7 in sentenced admissions. Such a reduction cannot be attributed to conditional sentences as their rate only rose by 6.8 (49.6 to 56.4). Clearly, other factors were at play.

Similarly, one might point to the drop in the rate of conditional sentence counts between 2005 and 2010 (43.2 to 39.9). This reduction of 3.3 per 100,000 would seem to account for the 2.5 increase (29.6 to 32.1) in the rate of sentenced counts. That is, until one recalls that the remand counts increased by 4.2 (34.3 to 38.5), which would likely explain the entire drop in sentenced rates. Alternatively, one can compare the substantial drop in the rate of conditional sentence counts between 2010 and 2015 (39.9 to 24.8) to the mere 3.9 reduction in the rate of sentenced counts (32.1 to 28.2) over the same period. Beyond the fact that a reduction in conditional sentence counts should have caused an *increase* in the sentenced counts, the *decrease* in the sentenced counts is more likely explained by the 3.1 increase in the remand counts (38.5 to 41.6).

As one final illustration of the problems in demonstrating any measurable impact of conditional sentences on imprisonment rates, Table 5 presents data on the average daily provincial correctional population for Canada's four largest provinces—representing 86% of the Canadian general population.⁸⁶

86. Note that Quebec, Canada's second largest jurisdiction, was not included in Table 2 due to the unavailability of relevant data.

Table 5: Proportion of Provincial Correctional Population Serving a Conditional Sentence⁸⁷

	1995	2005	2015
Ontario	0%	6.0%	4.2%
Quebec	0%	20.4%	10.5%
British Columbia	0%	13.6%	8.0%
Alberta	0%	11.7%	8.1%

This table shows the proportion of the correctional population, which includes both those in custody and in the community, that is serving a conditional sentence. Most obviously, the percentage rose in all four jurisdictions with the introduction of conditional sentences in 1996. Further, the increase was non-trivial in three of the four provinces. Using British Columbia as an example, almost 14% of the provincial correctional population were serving conditional sentences in 2005. Indeed, these data appear encouraging in terms of the use of this sanction as well as its potential impact on imprisonment.

That is, until we compare them with the average daily provincial correctional population who were serving their sentence in the community (Table 6).

87. CANSIM, *supra* note 1.

Table 6: Proportion of Provincial Correctional Population Serving Sentence in the Community⁸⁸

	1995	2005	2015
Ontario	87.4%	87.4%	84.7%
Quebec	76.7%	77.1%	72.7%
British Columbia	86.0%	84.2%	82.1%
Alberta	75.0%	79.4%	70.5%

If conditional sentences were actually replacing custodial sanctions, we should see an *increase* in the percentage of those serving their sentence in the community. However, this does not appear to be the case for three of the four provinces. The proportion in the community remained virtually unchanged in Ontario and Quebec between 1995 (pre-conditional sentence) and 2005 (almost a decade after conditional sentences were introduced but before any restrictions). In British Columbia, the percentage actually decreased. While there was a 13.6% increase in the provincial correctional population in this jurisdiction that was serving a conditional sentence between 1995 and 2005 (Table 5), the proportion of this same correctional population serving sentence in the community actually fell over the same period.

This phenomenon would seem to support a net-widening explanation. In fact, net-widening becomes even more plausible when one recalls that conditional sentences should have automatically increased the proportion of the correctional population serving sentence in the community by virtue of not only adding to this population (by replacing otherwise custodial sentences), but also because this sanction was likely longer than the corresponding prison sanction and prisoners serve every day of it.

Equally notable, Alberta is the only province that saw an increase in the proportion of its correctional population serving sentence in the community between 1995 and 2005. However, while 11.7% of this jurisdiction's correctional population was serving a conditional sentence in 2005 (Table 5), we see only a 4.4% increase (from 75% to 79.4%) in the percentage of this population serving sentence in the community. Nonetheless, one might still argue that the

88. CANSIM, *supra* note 1.

conditional sentence had been at least partially effective in reducing imprisonment in this province (although the majority of the increase in the proportion of the correctional population serving sentence in the community would appear to come from net-widening). Yet even this suggestion overlooks the fact that this increase in the community correctional population occurred during a period in which other factors very clearly account for a large (32%) reduction in this province's prison population.⁸⁹ This reduction in the prison portion of the provincial correctional population, and consequential increase in the community component, provides a compelling alternative explanation for the increase in the percentage of the correctional population serving a sentence in the community. This account has little to do with the use of conditional sentences in lieu of custodial sanctions.

Beyond reaffirming the lack of a consistent, measurable decarceration effect of the conditional sentence, Tables 5 and 6 also reinforce the impact of the Conservative government's restrictions on this sanction. Between 2005 (before any of the legislative constraints were introduced) and 2015, the proportion of the provincial correctional population that was serving a conditional sentence decreased; furthermore, the proportion serving sentences in the community also dropped.⁹⁰ It appears possible that the functional removal of the conditional sentence may have created a void that was ultimately filled by prison.

V

FORESEEABLE CHALLENGES: UNFORESEEABLE CONSEQUENCES

The story of Canada's conditional sentence might be best summarized as one of missed opportunities. In contrast to other nations that, by 1996, had already embarked on—in some cases dramatic—prison expansion, Canadian criminal law and formal statements of criminal justice policy addressing the issue of criminal sanctions continued to reflect a longstanding culture of restraint in the use of imprisonment and a deep skepticism about prison as an appropriate response to crime.⁹¹ Within this context, the introduction of conditional sentences would have been seen as entirely fitting. There was no reason to believe that the door was not open to yet another strategy to reduce incarceration.

Unfortunately, the Canadian government stumbled through this criminal justice policy door. The legislative form of this new sanction was markedly flawed from the start. Most obviously, the bill introduced into Parliament lacked careful and thoughtful drafting. In addition, it is our understanding from private

89. Cheryl M. Webster & Anthony N. Doob, *Penal Reform 'Canadian Style': Fiscal Responsibility and Decarceration in Alberta, Canada*, 16 PUNISHMENT & SOC'Y, no. 1 (2014), at 3–31 (discussing, most notably, that the Premier of this province slashed the Justice Ministry's budget by 20%. In response, one prison was closed, police became more selective in whom they charged, prosecutors were more selective in whom they took through the criminal process, and judges became more selective in whom they sentenced to prison).

90. See Tables 5 and 6.

91. Webster & Doob, *supra* note 5; Webster & Doob, *supra* note 7.

discussions that there was little to no consultation prior to introducing it. Further, the Parliamentary process failed to conduct meaningful discussion and debate. As a result, changes were needed almost immediately. In fact, the law was amended four times, damaging its credibility and, more broadly, its legitimacy in the eyes of judges and Canadians generally.

But the law was also naïve. It seemingly failed to recognize—and, more importantly, address—the foreseeable public concerns surrounding this criminal sanction as being too lenient. Indeed, it had all of the characteristics of a “soft on crime” initiative, beginning with the apparent contradiction of terms in its very name. Although Roberts, Antonowicz, and Sanders⁹² have demonstrated that people who are given adequate information about conditional sentences are much more likely to accept them as legitimate, those responsible for introducing it were seemingly unconcerned with educating the public about what the sanction could entail—particularly its more punitive elements. Predictably, not only did the public generally dislike the conditional sentence, but disfavor was most acute among those who already thought that Canadian sentences were too lenient.⁹³

The political process was no better at selling the conditional sentence as a legitimate sanction. Less than a year after it became available, a general election was called. In its 1997 election platform, the Liberal Party suggested that

Minor, first-time offenders should be treated differently than serious, violent offenders. We have made changes to sentencing laws to encourage courts to distinguish between serious, violent crime requiring prison time and less serious, non-violent crime that can be handled more effectively in the community. A new Liberal government will propose alternatives to incarceration for low-risk, non-violent offenders . . .⁹⁴

Notably, there was no mention of “conditional sentences” by name or description. The direct link between this sanction and less serious and non-violent crimes likely would have gone a long way in educating the public about its role and value, as well as dispelling fears of inappropriate leniency. Similarly, despite Supreme Court intervention in Proulx in 2000, there continued to be no explicit mention of the assumption of harsher conditions, such as house arrest as part of this sanction. Rather, there was simply reference to community service, which is not necessarily seen as punitive.

Regrettably, there was also little training provided to judges, particularly in terms of the scope of the conditional sentence, as well as the initial perplexing methodology of how to devise a proportionate sentence in the community that was the same length as the custodial sanction that it was intended to replace. More broadly, while this sanction was well motivated by principled concerns about the overuse of incarceration, the government was apparently unwilling to make the difficult decisions to ensure its success. That is, the legislation was not written in a way that would accomplish decarceration. Rather, the language was merely aspirational rather than prescriptive or even presumptive, and there were

92. Roberts, Antonowicz, & Sanders, *supra* note 29.

93. Marinos & Doob, *supra* note 49.

94. LIBERAL PARTY OF CANADA, SECURING OUR FUTURE TOGETHER (1997).

no explicit guidelines or hurdles that would address the underlying principled issues surrounding the scope of the legislation.⁹⁵ Indeed, the law contained no mechanisms to limit its misuse in either direction: net-widening or using it for cases of serious violence without—at the very least—requiring that judges provide written justification for exceptional circumstances. Simply put, the government chose not to make policy.

Perhaps the only opportunity not missed was taken by the Conservatives to use this sanction for political purposes. Indeed, the Conservative government capitalized on the public's concerns with the overly lenient conditional sentence, campaigning on dramatically restricting its use. As nothing systematic had been done to explain to the public the nature of the sanction when it was actually being used, there were very few defenders of it by the time the Conservatives began dismantling it.

Had the story of Canada's experience with conditional sentences ended here, it would have been a disappointing and unfortunate—even if foreseeable—tale. This sanction was never a significant player in the sentencing game. Further, it did not seemingly achieve any measurable reduction in Canada's imprisonment rate. In fact, it appears to have been used with cases that would otherwise have received a suspended sentence. In brief, one would be hard-pressed to consider it a success on any dimension.

But the story may also have an unexpected twist. In light of the pessimistic findings, one might naturally assume that its *de facto* demise—brought about by the Conservative government's restrictions—would have simply translated into a return to pre-1996 sentencing practices. As it turns out, this assumption might not be true. In fact, two new phenomena may be emerging.

First, it is notable that while introducing a new sanction into the mix of community sanctions may not have reduced imprisonment, taking it away may have increased incarceration.⁹⁶ At first blush, the post-2012 rise in the use of prison would be expected as conditional sentences—intended to replace custodial sanctions—had been eliminated for a substantial number of eligible offenses. However, even during the supposed heyday of this sanction, there was no real decrease in imprisonment. Rather, cases never in jeopardy of custodial sanctions were seemingly being upgraded to conditional sentences. In fact, Gemmell had already warned of the temptation of net-widening as judges would see this sanction as a more robust probation order with a built-in pre-set penalty for failures.⁹⁷

Alternatively, the removal of this sanction *may* have left a void that has potentially been filled by prison. Rather than return to suspended sentences for

95. For example, even after the Supreme Court of Canada specifically interpreted the legislation as permitting the duration of a conditional sentence to be longer than the prison sentence that it replaced, the law was never changed to reflect this change, nor has it ever specifically included a reference to house arrest or other explicitly punitive conditions other than community service.

96. See *supra* Table 2.

97. Gemmell, *supra* note 31.

cases which had been previously “up-tariffed” to conditional sentences, some judges may have simply upgraded them to prison. That is, the legislative restrictions on this sanction may have ironically increased the use of imprisonment for cases that, twenty years earlier, would have received an ordinary community sanction. While speculative, this scenario is not implausible. More difficult might be trying to explain it. Some might be tempted to suggest that the threshold to custody has simply been lowered whereby Canadian judges are more willing to use incarceration. While leaving this discussion for another time, we might simply suggest that such an explanation seemingly flies in the face of Canada’s long-standing belief in restraint in the use of imprisonment and the Canadian judiciary’s resistance—particularly during the recent Conservative government’s reign—to tough-on-crime policies.⁹⁸

Second—and perhaps as the other face of the same coin—new suspended sentences have appeared, albeit largely in exceptional circumstances. Thoughtful judges, we believe, sometimes tried to craft conditional sentences as serious attempts to avoid imprisonment for certain offenders where prison could have serious harmful effects. When they were, or became, unavailable, but prison still appeared to be the expected sanction as mandated by the relevant Court of Appeal, the judge was left in an awkward position of how to sentence an offender when prison is the anticipated sanction but would be inappropriate for various reasons.

For decades, Canada’s Criminal Code has contained the possibility of suspending the passing of a sentence and placing the offender on probation. Normally this sanction is thought of as a simple probation sentence, and the suspended sentence does not receive any real attention. That is, although someone legally receives a “suspended sentence and probation,” in reality, it is the probation part of it that is the focus.

More recently, some judges have started taking seriously the possibility that they might suspend the passing of sentence by placing the offender on probation and making it clear that any violation of the terms of probation would trigger their re-sentencing for the original offense and that such a re-sentence will almost certainly involve imprisonment. In this way, suspended sentences are being rendered more punitive, particularly with the addition of more restrictive conditions attached to them (such as house arrest and electronic monitoring). An attentive reader will certainly note that this harsher suspended sentence bears substantial similarities to the conditional sentence.

Notably, several recent cases have adopted this approach. In one Ontario case, the judge was barred from imposing a conditional sentence for trafficking in cocaine because of the 2012 legislated restrictions.⁹⁹ In a 46-page judgment, Justice Green concluded that a non-custodial sentence would be appropriate in this particular circumstance—a sentence he, himself, described as “rare, if not

98. Doob & Webster, *supra* note 67.

99. R. v. McGill, [2016] ONCJ 138. (Can.),

unprecedented” for this offense.¹⁰⁰ But in doing so, he reminded readers that with suspended sentences, the judge was suspending the sentencing of a convicted offender and could, if circumstances were appropriate, re-sentence the person to a custodial term, much like what happens if a person were to breach a conditional sentence order.

In these cases, it would appear that we have come full circle. Specifically, a traditional suspended sentence is being imposed where, for more than a decade, a conditional sentence of imprisonment might have been appropriate. Judges have simply transformed—in a certain sense—the way in which the suspended sentence and probation has traditionally been conceptualized and imposed. Rather than being seen primarily as a rehabilitative sanction, it has been given a more punitive bite—precisely the same bite that the conditional sentence was meant to have. Some have considered this type of supposedly creative sentencing a work-around, arguably undermining the legislative intent.¹⁰¹ We suggest that it leads one to legitimately question whether conditional sentences were ever needed in the first place.

If there is a moral to this story, the Canadian experience with conditional sentencing suggests that for those serious about reducing imprisonment, this sanction likely is not the solution. At best, it might be useful in chipping away at incarceration, but even then, in no measurable way. To be effective, there must be a demonstrable need for a new sanction, and even then, it is fundamental to identify what the specific need is and subsequently target the sanction to address it. Simply adding alternatives to incarceration is insufficient, particularly if they are crafted without sufficient guidance and training, as well as sensitivity to natural public concerns with leniency.

But once again, context matters. While the introduction of the conditional sentence is likely to be interpreted as a failure by most Canadians, a broader perspective might provide some solace. On the one hand, this sentencing experiment might arguably be seen as a “failure in the right direction.” It was borne out of concern with rising imprisonment rates and was firmly embedded within a long-standing belief in restraint in the use of incarceration. Certainly when contrasted with the United States, our closest neighbor, any serious, principled, and rational search for alternatives to prison is arguably a laudable endeavour.

On the other hand, the Canadian experience with conditional sentences might also be interpreted as an inescapable failure. That is, the various causes of our lack of success may not be Canadian in origin. Rather, our failure may reflect broader problems with intermediate sentences generally. As others have argued

100. Like Justice Green, we are not suggesting that the approach in this case is as common as conditional sentences might have been. However, it is interesting that this approach has been followed elsewhere. *R. v. Sellars*, [2017] B.C.S.C. 2236. (Can.). See also a series of cases considered by the British Columbia Court of Appeal in which suspended sentences were used for ‘dial-a-dope’ trafficking charges for which conditional sentences are no longer available. *R. v. Voong*, [2015] 374 B.C.A.C. 166. (Can.).

101. North, *supra* note 17.

before us,¹⁰² penal equivalence is not rooted exclusively in quantitative (proportionate or retributive) questions of severity but is also a function of more qualitative (expressive) questions of sentencing goals. Simply put, even especially onerous conditional sentences may fail to express the public's condemnation as dramatically or unequivocally as a prison sentence. For certain offenses (and likely certain offenders), punishment is simply synonymous with imprisonment.

While the Canadian Parliament inadvertently muddied the waters even more, the logic or rationale for conditional sentences as a viable sanction between custody and probation is inherently murky. Even in a nation whose core values are arguably more communitarian, less violent, and more compassionate in nature than those of other comparable countries,¹⁰³ this sanction may simply be unable—in most cases—to capture our punitive imagination. In the end, and as we have argued elsewhere,¹⁰⁴ the most effective strategy to bring about decarceration continues to be rooted in finding ways of creating a moral change whereby prison is seen as a “Bad Thing.”¹⁰⁵ And at that point, new sanctions may not even be necessary.

102. See e.g., Voula Marinos, *Thinking About Penal Equivalents*, 7 PUNISHMENT & SOC'Y, no. 4, 441–55 (2005); see generally Arie Freiberg, *Affective Versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice*, 3 PUNISHMENT & SOC'Y, no. 2 (2001), at 265–78.

103. Webster & Doob, *supra* note 7.

104. Anthony N. Doob & Cheryl M. Webster, *Creating the Will to Change*, 13 CRIMINOLOGY & PUB. POL'Y, no. 4 (2014).

105. Michael Tonry, *Making American Sentencing Just, Humane, and Effective*, 46 CRIME & JUST., no. 1 (2017), at 441–504.