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### Journal Item

How to cite:

Irwin-Rogers, Keir and Roberts, Julian V. (2019). Swimming Against the Tide: The Suspended Sentence Order in England and Wales, 2000-2017. *Law & Contemporary Problems*, 82(1) pp. 137-162.

For guidance on citations see [FAQs](#).

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Version: Version of Record

Link(s) to article on publisher's website:

<https://scholarship.law.duke.edu/lcp/vol82/iss1/7/>

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# SWIMMING AGAINST THE TIDE: THE SUSPENDED SENTENCE ORDER IN ENGLAND AND WALES, 2000–2017

KEIR IRWIN-ROGERS & JULIAN V. ROBERTS\*

## I INTRODUCTION

Suspended sentences of various forms have been an element of western sentencing for decades,<sup>1</sup> and almost all common law jurisdictions operate some form of suspended sanction. Yet of all the alternatives to institutional imprisonment, suspended sentences have proved the most problematic. This was noted fifty years ago by Leslie Sebba, who identified this sanction as the “one form of sentence whose very existence in the penal system is controversial: the suspension of execution of sentence and in particular, the suspension of sentences of imprisonment.”<sup>2</sup>

The essence of the suspended sentence is that “it threatens future punishment for past misconduct.”<sup>3</sup> Although closer to institutional confinement than a community order and therefore more severe, in many regimes, a suspended sentence is significantly less onerous than a term of immediate imprisonment.<sup>4</sup> Suspended sentences are also sometimes described as a means for the person being sentenced to avoid *any* punishment, so long as they desist from further offending during the period in which the sentence is suspended. A number of jurisdictions have responded to this criticism by requiring suspended sentence orders to carry mandatory and optional requirements. While this type

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1. For discussion of representative jurisdictions, see, for example, Peter Tak, *Sentencing and Punishment in the Netherlands*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 188 (Michael Tonry & Richard Frase eds., 2001); Thomas Weigend, *Sentencing and Punishment in Germany*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 188 (Michael Tonry & Richard Frase eds., 2001); Josep Cid, *Suspended Sentences in Spain: Decarceration and Recidivism*, 52 PROBATION J. 169 (2015).

2. Leslie Sebba, *Penal Reform and Court Practice: The Case of the Suspended Sentence*, in 21 STUDIES IN CRIMINOLOGY 133 (Israel Drapkin ed., 1969).

3. THOMAS O'MALLEY, SENTENCING LAW AND PRACTICE 642 (3d ed. 2016).

4. See KAREN GELB, THE PERFECT STORM? THE IMPACTS OF ABOLISHING SUSPENDED SENTENCES IN VICTORIA (2013).

of reform may move the suspended sentence away from its original purpose,<sup>5</sup> it can also help to promote judicial and community confidence in the sanction.

Suspended sentence regimes around the world vary greatly, but they can broadly be divided into two categories based on the requirements attached to the orders. Some versions require people merely to refrain from further offending and therefore have the same effect on all those sentenced to the same length of order. Others allow courts to impose a range of requirements tailored to the specific risks and needs of the individual. The current English suspended sentence order falls into the second category.

The suspended sentence order (SSO) has been available to courts in England and Wales since 1967.<sup>6</sup> Between 1991 and 2005, courts could impose an SSO only in exceptional circumstances; thus the sanction accounted for only a small number of cases. Since then, as a result of several reforms, the volume of suspended sentences has risen dramatically, from under 3000 in 2004 to over 40,000 in 2007.<sup>7</sup> This is the most dramatic shift in English sentencing practice in many decades and is at odds with the experience in some other jurisdictions included in this article. The conditional sentence of imprisonment has been greatly restricted in Canada, while the suspended sentence has been abolished in the Australian state of Victoria. The dramatic increase in usage in England and Wales represents a rare change in the use of a sanction and provokes a number of important questions, several of which are addressed in this article:

- Has this alternative to institutional imprisonment reduced the use of immediate terms of custody in England and Wales, as envisaged by the legislation? Or have we witnessed another example of widening of the net?
- To what extent do trends in the imposition of SSOs converge or diverge across offense types and the profiles of those subject to these sanctions?
- Which kinds of requirements are attached to SSOs, and how do patterns and trends in SSO requirements compare to those imposed as part of a community order?
- Has the increase in the number of people sentenced to SSOs affected breach rates and subsequent admissions to prison?

#### A. Overview of Article

This article explores recent trends relating to the SSO in England and Wales and proceeds as follows: Section II briefly summarizes the history of the SSO and outlines its current form; Section III presents an analysis of the most recent empirical trends over the period 2000–2017 and addresses key questions arising

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5. MARCEL ANCEL, UNIVERSITÉ DE PARIS, SUSPENDED SENTENCES (1971).

6. Criminal Justice Act 1967, c. 80, § 39; see ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE (6th ed. 2015).

7. See *infra* Table 1.

from the ongoing critique of the sanction; Section IV outlines some recommendations for improving the content and implementation of SSOs in England and Wales and discusses about the role and utility of the sanction in sentencing regimes; and Section V briefly concludes.

## II

### THE SUSPENDED SENTENCE ORDER: CURRENT STATUTORY REGIME

#### A. Origins, Evolution, and Structure of the Suspended Sentence

The U.K. Parliament has legislated several key changes to the suspended sentence regime in place since 1967.<sup>8</sup> In 1991, the availability of the SSO was restricted to exceptional cases. Unsurprisingly, this reform reduced the volume of such orders imposed from approximately 20,000 in 1990 to only 2500 in 1995.<sup>9</sup> Thereafter, the number of SSOs imposed between 1995–2004 remained relatively stable. The most significant recent reforms arose as a result of the Criminal Justice Act 2003 (CJA 2003), which resulted in the wholesale restructure of penal sanctions implemented in the community.<sup>10</sup> Various community sentences were combined into a single “Community Order,” with sentencers able to choose from a list of twelve possible requirements. The same list of requirements was made available for the SSO (discussed further below). The CJA 2003 also removed the “exceptional circumstances” restriction in Section 5(1) of the Criminal Justice Act 1991.

In 2012, Parliament increased the length of the immediate prison sentence that could be suspended from twelve to twenty-four months. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) also removed the condition that all people serving SSOs must be made the subject of a requirement.<sup>11</sup> The latter amendment was aimed at extending the SSO to people whose crimes merited a term of custody but who posed a low risk of serious harm and did not have any particular criminogenic needs that might otherwise have been addressed by a rehabilitative requirement.<sup>12</sup>

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8. While the Criminal Justice Act 1967 contained a mandatory requirement that all sentences of imprisonment under six months be suspended unless the case fell within specified exceptions, this fetter on judicial discretion was abolished by the Criminal Justice Act 1972. The main rationale for the introduction of the suspended sentence into the sentencing framework at this time was to reduce the use of short sentences of imprisonment. See Anthony Bottoms, *The Suspended Sentence in England, 1967–1978*, 21 BRIT. J. CRIMINOLOGY 1 (1981).

9. See GEORGE MAIR, NOEL CROSS & STUART TAYLOR, CTR. FOR CRIME & JUST. STUD., *THE COMMUNITY ORDER AND THE SUSPENDED SENTENCE ORDER, THE VIEWS AND ATTITUDES OF SENTENCERS* (2008).

10. Criminal Justice Act 2003, c. 44 § 177(2A).

11. Legal Aid, Sentencing and Punishment of Offenders Act 2012, c. 10 § 68.

12. LASPO introduced other, less significant changes to the SSO regime. For example, the maximum duration of a curfew was extended from six to 12 months, and courts were granted the power to impose a fine in response to breach instead of activating and imposing a term of immediate imprisonment.

The intention of these reforms was to extend the ambit of the SSO and to provide greater flexibility to courts in their use of the sanction. In fact, Mair, Cross, and Taylor regard the post-2000 amendments as having essentially created a brand-new sentence.<sup>13</sup> Initial judicial reaction to the changes has been mixed. Mair et al. report findings from interviews with a small number of sentencers who were divided on the utility of the new sentence. Approximately half of the respondents were “generally positive,” while the rest expressed some reservations, principally in terms of the volume of orders that were being imposed.

### 1. Current Structure of the Suspended Sentence Order

The SSO is defined by Section 188 of the CJA 2003. Sentencers may suspend a sentence of imprisonment of up to two years, and not less than fourteen days. The sentence may be suspended for a period of between six months and two years. This is known as the *operational period*. During the operational period, if the person subject to the SSO is required to comply with one or more conditions, these must be completed within a specified time known as the *supervision period*. The supervision period must be for at least six months, and normally the operational and supervision period last for the same duration. Failure to comply with one or more of the court-ordered requirements during the supervision period may result in the court activating the term of imprisonment that was suspended by the original order.<sup>14</sup>

As with some other sanctions discussed in this special issue,<sup>15</sup> an SSO is a custodial sentence. As an SSO is not a high-end alternative to custody, the custody threshold must have been crossed prior to the imposition of this sanction, and the court must have determined that custody is the only option. As with the original statutory framework of the Canadian conditional sentence, a court first determines the length of sentence prior to considering whether it should be suspended. For example, a court may not replace a one-year term of immediate imprisonment with a two-year suspended sentence order. The terms of imprisonment must be equivalent in length, whether they are to be served immediately or suspended. Whether these terms are served immediately or

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13. MAIR, CROSS & TAYLOR, *supra* note 9.

14. The increase in the ceiling of the operational period (from twelve to twenty-four months) was intended to increase the number of orders in cases where the crime justified imprisonment, but where it was still not in the public interest to institutionalize the person being sentenced.

15. The SSO is similar to, but also different from, the Conditional Sentence of Imprisonment (CSI) discussed by Webster and Doob in this issue. See Cheryl Marie Webster & Anthony N. Doob, *Missed Opportunities: Canada's Experience with the Conditional Sentence*, 82 LAW & CONTEMP. PROBS. no. 1, 2019 at 163. The principal distinction between the two sanctions is that although both are forms of imprisonment, a person in Canada serving a CSI is serving a sentence of imprisonment. Someone serving an SSO in England is not actually discharging a sentence of imprisonment. See JULIAN V. ROBERTS, *THE VIRTUAL PRISON: COMMUNITY CUSTODY AND THE EVOLUTION OF IMPRISONMENT* (Alfred Blumstein & David P. Farrington eds., 2004). Conceptually, this means that, if both sanctions were arrayed along the same vertical scale of severity, the SSO should sit beneath the CSI, although both are deemed a sentence of imprisonment.

suspended does, however, result in manifestly different impacts on the lives of those subject to them, an issue involving penal equivalence to which the article will return later.

The CJA 2003 enumerates twelve requirements that may be imposed as part of an SSO. They include: unpaid work; an activity requirement; a program requirement; a prohibited activity requirement; a curfew; an exclusion requirement; a residence requirement; a foreign travel prohibition; mental health; drug and alcohol treatment; a supervision requirement; an attendance center requirement; and electronic monitoring. The potential requirements mirror those that may be imposed as part of a community order. The critical difference between the requirements that may be imposed for the two sanctions is that all community orders must include a requirement that is imposed for the purposes of punishment, whereas SSOs do not. As noted, a 2012 reform<sup>16</sup> removed the obligation for SSOs to contain a requirement, meaning that a person subject to an SSO without a requirement must only refrain from further offending during the operational period to avoid breaching the sanction.

### III

#### RECENT TRENDS IN THE USE OF SUSPENDED SENTENCES

##### A. Use of Suspended Sentence Orders, 2000–2017

This article focuses on the use of the SSO during the period immediately prior to and since the 2003 reforms. Table 1 summarizes trends in the use of principal sanctions across all courts.<sup>17</sup> As illustrated in this table, prior to 2004, the use of the SSO was relatively stable, accounting for only a few thousand cases and less than 1% of all sanctions imposed. Following the CJA 2003 reform, there was a surge in the volume of SSOs. By 2005, 9666 SSOs were imposed by the courts; and by 2006, the volume of these orders more than tripled to 33,509. The number continued to rise over the next decade, peaking in 2015. In 2017, the most recent year for which data are available, 53,148 SSOs were imposed, representing 4.4% of all sentenced cases.

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16. Legal Aid, Sentencing and Punishment of Offenders Act 2012, c. 10 § 68.

17. There are two levels of trial court in England and Wales. All cases originate in the magistrates' courts and almost all (approximately 95%) are resolved there. The remainder are transferred to the Crown Court for trial and/or sentencing. The sentencing powers of lower courts are restricted to a maximum of six months of imprisonment for a single count.

**Table 1: Volumes and Rates of Disposals, all courts, England and Wales, 2000-2017**

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017		
<b>Immediate custody</b>																				
Cases	106,187	106,273	111,607	107,670	106,322	101,236	96,017	95,206	99,525	100,231	101,513	106,170	98,047	92,799	91,313	90,348	89,812	86,275	7	
Rate	7	8	7	7	7	7	7	7	7	7	7	8	8	8	8	7	7	7	7	
<b>Suspended sentence</b>																				
Cases	3,072	2,755	2,519	2,717	2,855	9,666	33,509	40,688	41,151	45,157	48,118	48,153	44,642	48,628	52,979	57,072	56,317	53,148	4	
Rate	0.2	0.2	0.2	0.2	0.2	1	2	3	3	3	4	4	4	4	4	5	5	5	4	
<b>Community sentence</b>																				
Cases	155,538	164,997	186,520	191,422	201,503	204,247	190,837	196,424	190,171	195,903	189,321	175,525	149,327	123,087	112,638	114,286	102,938	95,112	8	
Rate	11	12	13	13	13	14	13	14	14	14	14	13	12	11	9	9	8	8	8	
<b>Fine</b>																				
Cases	1,013,347	930,121	972,737	1,033,617	1,082,690	1,025,064	961,535	941,534	890,296	946,146	893,931	856,808	823,298	792,942	853,335	891,922	910,704	896,611	75	
Rate	71	69	69	69	70	69	68	67	65	67	66	65	67	68	70	72	74	74	75	
<b>Other<sup>1</sup></b>																				
Cases	146,205	144,348	146,225	154,401	153,982	142,240	138,673	140,890	140,921	119,468	132,464	126,083	114,513	112,271	105,430	93,321	78,264	70,733	6	
Rate	10	11	10	10	10	10	10	10	10	9	10	10	9	10	9	7	6	6	6	
<b>Total offenders</b>	1,424,349	1,348,494	1,419,608	1,489,827	1,547,352	1,482,453	1,420,571	1,414,742	1,362,064	1,406,905	1,365,347	1,312,739	1,229,827	1,169,727	1,215,695	1,246,949	1,238,035	1,201,879		

Ministry of Justice, Sentencing Statistics (Annual), Main bulletin tables, tbl. 1.2 (2010), <https://www.gov.uk/government/statistics/sentencing-statistics-annual-ns> [https://perma.cc/8JUF-YUSD]. Ministry of Justice, Offender Management Statistics Quarterly: October to December 2017, Overview tables, tbl. Q5.1 (2018), <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2017> [https://perma.cc/373F-QBPL].

There is a similar pattern in the Crown Court, where the most serious cases are sentenced. The number of SSOs rose from 1539 in 2004 to 20,772 in 2017. More significantly, the percentage of cases attracting an SSO rose from 2% in 2004 to 27% in 2017. In terms of the percentage of all custodial sentences, immediate and suspended combined, SSOs accounted for 32% in 2017, up from 3% in 2004.<sup>18</sup> This dramatic shift in English sentencing has attracted little attention from the media, although occasionally tabloid newspapers have condemned the increased use of suspended sentences, particularly in the context of violent crimes or persistent offenders. One headline drew attention to the use of SSOs for repeat offenders: “Almost 12,000 criminals walked free from court with suspended sentences last year – despite having 10 or more past convictions.”<sup>19</sup>

### B. Widening of the Net?

Where have all the additional SSOs come from? For decades, scholars have documented a tendency for the courts to use suspended sentences of imprisonment in place of high-end community orders, thus undermining the primary purpose of the sanction—namely, replacing terms of immediate imprisonment.<sup>20</sup> The data summarized in Table 1 suggest that the net-widening noted by these scholars has persisted. Since the suspended sentence is a form of custody, which should only be imposed after a court has determined that the custody threshold has been crossed, the revitalized SSO should have reduced rates of immediate prison sentences. At least from a long-term perspective, this appears not to have been the case. The rate of sentences of immediate imprisonment across all courts remained relatively stable over the period 2004–2017, from 6.9% to 7.2% of cases. Second, the rate of community orders across all courts declined 52% over the same period, from 13% of cases in 2004 to 7.9% in 2017. The shifting pattern of sanctions can be seen to an even greater extent in the Crown Court, where the rate of community orders declined from 30% in 2004 to 6.7% in 2017.

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18. MINISTRY OF JUSTICE, CRIMINAL JUSTICE SYSTEM STATISTICS QUARTERLY, Crown Court data tool (2018), <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2017> [https://perma.cc/WNJ5-8X9R].

19. See Daily Mail Reporter, DAILY MAIL, May 10, 2014, <https://www.dailymail.co.uk/news/article-2625103/Almost-12-000-criminals-walk-free-court-suspended-sentences-despite-having-10-previous-convictions.html> [https://perma.cc/NF7L-EB7F]. To date, the broadsheet newspapers in England have overlooked this aspect of current sentencing practice.

20. See ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 318–22 (William Twining, Christopher McCrudden & Bronwen Morgan eds., 6th ed. 2015); Carol Hedderman & Rebecca Barnes, *Sentencing Women: An Analysis of Recent Trends*, in EXPLORING SENTENCING PRACTICE IN ENGLAND AND WALES 93 (Julian V. Roberts ed., 2015); Anthony Bottoms, *The Suspended Sentence in England, 1967–1978*, 21 BRIT. J. CRIMINOLOGY 1 (1981). For a review of the international experience with suspended sentences, see SARAH ARMSTRONG, GILL MCIVOR, FERGUS MCNEILL & PAUL MCGUINNESS, SCOTTISH CTR. FOR CRIME & JUSTICE RESEARCH, INTERNATIONAL EVIDENCE REVIEW OF CONDITIONAL (SUSPENDED) SENTENCES: FINAL REPORT (2013).



Data on previous convictions highlights the potential for SSOs to result in net-widening. As SSOs ought to be imposed only in cases where the offense has crossed the custody threshold, one might expect the previous convictions profiles of people sentenced to SSOs to be closer to those receiving immediate sentences of custody than those receiving community orders. This is not, however, borne out by the data. In 2016, the previous conviction profiles of people subject to SSOs were closer to those of people subject to community orders than those subject to sentences of imprisonment. Moreover, individuals subject to SSOs actually had *fewer* previous convictions, on average, than those subject to community orders.<sup>21</sup> This provides a strong indication that individuals sentenced to SSOs are being drawn primarily from a cohort who, absent the existence of SSOs, would otherwise have received community orders as opposed to sentences of immediate imprisonment.

Taking a long-term perspective on sentencing trends and looking across all courts, however, might serve to mask some notable changes over shorter periods. Between 2004 and 2007 in the Crown Court, for example, there does appear to have been a significant degree of decarceration associated with the initial rise of suspended sentences. While 61% of cases received a sentence of immediate imprisonment in 2004, this had declined to 56% by 2007.<sup>22</sup> During the same period, suspended sentences rose from 2% to 19% of all cases. Although this indicates some degree of decarceration, net-widening also appeared to take place during this time, as the rate of community orders declined from 30% to 18%.

Finally, an indication of both decarceration and net-widening can be seen by looking at the correlation coefficients for SSOs and community orders, and SSOs and sentences of immediate imprisonment. Between 2004–2017, across all courts, there was a moderate to strong negative relationship between both SSOs and community orders (-.68) and SSOs and sentences of immediate imprisonment (-.62).<sup>23</sup> While these coefficients, as well as the aggregate statistics discussed above, provide preliminary indications of the likely impact of SSOs on other disposals, they do not account for any potential exogenous factors that might mediate these relationships. To estimate more precisely the extent to which SSOs have led to decarceration or net-widening, further in-depth analysis

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21. MINISTRY OF JUSTICE, OFFENDER MANAGEMENT STATISTICS QUARTERLY: OCTOBER TO DECEMBER 2016, Offending History Data Tool: Sanction statistics (2017) <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2016> [https://perma.cc/4269-FFE2].

22. MINISTRY OF JUSTICE, CRIMINAL JUSTICE SYSTEM STATISTICS QUARTERLY: DECEMBER 2014, Crown Court data tool (2015), <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2014> [https://perma.cc/6RZY-KMMZ].

23. MINISTRY OF JUSTICE, CRIMINAL JUSTICE SYSTEM STATISTICS QUARTERLY: DECEMBER 2017, Overview tables (2018), <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2017> [https://perma.cc/JF86-P33A]; MINISTRY OF JUSTICE, CRIMINAL JUSTICE SYSTEM STATISTICS QUARTERLY: DECEMBER 2014, Overview tables (2015), <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2014> [https://perma.cc/TGM2-H3K2].

of sentencing trends is needed. This research should control for exogenous factors, such as shifts in the rates of different offence types coming before the courts.

To the extent that net-widening has occurred over the period 2004–2017, the cause is puzzling. It is unclear why a court, liberated from using an SSO except in exceptional circumstances, would turn its attention to cases formerly sentenced to a community order, particularly in light of the guidance issued by the Sentencing Guidelines Council in 2004.<sup>24</sup> Low levels of judicial confidence in community orders may supply part of the answer.

Community penalties have struggled to attract the confidence of the courts or the legislature in England and Wales. One manifestation of this lack of confidence is the reform introduced in 2003 when Parliament legislated that all community orders must contain at least one requirement imposed for the purposes of punishment.<sup>25</sup> This controversial step was taken in order to correct a perception that community orders were purely rehabilitative in nature and had no punitive impact on those receiving them. If courts did lack confidence in even high-end community orders with many demanding requirements, the new freedom to impose instead a term of imprisonment, albeit suspended, might have proved welcome—hence the increase in SSOs accompanied by a simultaneous drop in the volume of community orders.

### 1. Guideline on the Use of Suspended Sentence Orders

These data, suggesting that courts were using the SSO for cases which might otherwise have attracted a community order rather than immediate imprisonment, demonstrate that previous guidance has failed to correct a long-standing misapplication of the sanction. In 2004, the Sentencing Guidelines Council, the statutory body responsible for issuing sentencing guidelines at the time, issued a guideline for a number of sanctions, including the newly amended SSO. That guideline stressed that, prior to imposing an SSO, courts must already have decided that a prison sentence is justified, with the clear implication that an SSO would replace a term of immediate imprisonment and not a community order.<sup>26</sup> This guidance appears to have fallen on deaf ears.

Awareness of the continuing misapplication of the suspended sentence order led the Sentencing Council of England and Wales (SCEW) to issue further guidance on the use of this and other sanctions.<sup>27</sup> In 2016, the SCEW

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24. NEW SENTENCES: CRIMINAL JUSTICE ACT 2003, § 2.2.12 (SENTENCING GUIDELINES COUNCIL 2003).

25. Criminal Justice Act 2003, c. 44 § 177(2A).

26. NEW SENTENCES: CRIMINAL JUSTICE ACT 2003, § 2.2.12 (SENTENCING GUIDELINES COUNCIL 2003).

27. The Sentencing Council issues offense-specific and generic guidelines, and all courts have a statutory duty to follow any relevant guideline unless it “would be contrary to the interests of justice to do so.” Coroners and Justice Act 2009, c. 25 § 125(1). See Julian V. Roberts, *Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales*, 51 BRIT. J. CRIMINOLOGY 997 (2011).

issued a definitive guideline for the use of principal sanctions, including the SSO.<sup>28</sup> The guideline, applicable to anyone sentenced on or after February 1, 2017, makes it clear that an SSO should not be imposed in place of anything other than a term of immediate custody:

A suspended sentence MUST NOT be imposed as a more severe form of community order. A suspended sentence is a custodial sentence. *Sentencers should be clear that they would impose an immediate custodial sentence if the power to suspend were not available.* If not, a non-custodial sentence should be imposed.<sup>29</sup>

The guideline also provides some guidance regarding the factors that should incline a court towards or away from a suspended sentence, if the custody threshold has been passed.<sup>30</sup> The most recent development came in May 2018, when the Chair of the Sentencing Council sent a memo to courts across the country warning them against imposing the SSO as a more severe form of community order.<sup>31</sup> While the next batch of sentencing statistics is required before the likely impact of these interventions becomes apparent, data from 2017 provide a preliminary indication that the interventions may be having their desired effects: across all courts, there was a marginal fall in the rates of SSOs and sentences of immediate imprisonment, accompanied by a deceleration in the decline of community orders.

### C. Profiles of People Receiving an SSO

The increase in SSOs was relatively consistent for males and females. In 2000, 1% of both males and females received an SSO.<sup>32</sup> In 2017, 17% of males and 19% of females convicted of indictable offenses across all courts received an SSO.<sup>33</sup> This finding—that the SSO is being used at similar rates for males and females—is consistent with earlier research.<sup>34</sup> The absence of any significant divergence is surprising since the SSO is particularly appropriate for those

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28. IMPOSITION OF COMMUNITY AND CUSTODIAL SENTENCES. DEFINITIVE GUIDELINE (SENTENCING COUNCIL FOR ENGLAND AND WALES 2017).

29. *Id.* at 7.

30. There are three factors cited that oppose the use of an SSO: offender poses a risk; only immediate imprisonment is sufficient; and the offender has a history of noncompliance. Similarly, three factors that should incline a court to impose the order are also cited: a realistic prospect of rehabilitation; strong person mitigation; and immediate custody would result in significant harmful impact upon others. *See* IMPOSITION OF COMMUNITY AND CUSTODIAL SENTENCES DEFINITIVE GUIDELINE, p. 8 (SENTENCING COUNCIL FOR ENGLAND AND WALES 2017).

31. In his letter, the Chairman noted that: “There is evidence that suspended sentence orders, which are custodial sentences, are sometimes being imposed incorrectly as a more severe form of community order.” *See* Letter from Lord Justice Treacy, Chairman of the Sentencing Council for England and Wales, to John Witherow, Editor, *The Times*, (May 2, 2018).

32. MINISTRY OF JUSTICE, SENTENCING STATISTICS (ANNUAL), Sentencing Statistics supplementary tables (2010), <https://www.gov.uk/government/statistics/sentencing-statistics-annual-ns> [<https://perma.cc/U7G8-C4W4>].

33. MINISTRY OF JUSTICE, CRIMINAL JUSTICE SYSTEM STATISTICS QUARTERLY: DECEMBER 2017, Outcomes by offence tool (2018), <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2017> [<https://perma.cc/AHK7-BWCH>].

34. SUNITA PATEL & STEPHEN STANLEY, CTR. FOR CRIME & JUSTICE STUDIES, THE USE OF THE COMMUNITY ORDER AND THE SUSPENDED SENTENCE ORDER FOR WOMEN (2008).

convicted of an offense of sufficient seriousness to justify custody, but where there is significant personal mitigation or where immediate custody would have a significant harmful impact upon others. Being a primary caregiver for young children is one common such factor, and women are significantly more likely to be in this position.<sup>35</sup>

As shown in Table 2, in 2017, across all courts and in relation to indictable offenses, the highest rates of SSOs relative to other disposals were imposed for violent offenses (24%), possession of weapons (27%), and fraud (26%). The lowest rates of SSOs were imposed for robbery (6%), drug offenses (11%), and theft (13%). These patterns were relatively similar for males and females.<sup>36</sup>

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35. STATISTA, *Lone Parent Families in the United Kingdom 2017, by Parent's Gender* (2018) <https://www.statista.com/statistics/281640/lone-parent-families-in-the-united-kingdom-uk-by-gender/> [<https://perma.cc/UM49-5SNU>].

36. MINISTRY OF JUSTICE, *CRIMINAL JUSTICE STATISTICS QUARTERLY: DECEMBER 2017, Outcomes by offence tool* (2018), <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2017> [<https://perma.cc/KEU7-D8EY>].

**Table 2:** Percent of indictable offenses resulting in Suspended Sentence Orders by offence group, all courts, 2004-2017

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Violence	2	4	15	20	20	21	22	21	21	23	24	26	25	24
Sexual Offenses	1	2	6	8	8	8	8	8	8	10	12	13	15	15
Theft Offenses	0	1	6	7	7	7	7	7	8	9	10	12	12	13
Robbery	0	1	3	5	5	5	6	6	7	7	8	8	6	6
Criminal Damage & Arson	0	1	3	4	5	5	5	6	6	7	11	14	16	15
Drug Offenses	1	1	5	6	6	6	6	7	7	9	11	12	12	11
Possession of Weapons	1	2	9	10	12	16	16	17	18	21	23	26	27	27
Public Order Offenses	1	3	14	20	22	15	16	15	14	16	18	19	19	18
Miscellaneous Crimes Against Society	1	1	5	7	8	9	9	10	11	13	15	17	19	21
Fraud Offenses	2	4	11	14	17	18	18	20	23	26	25	28	28	26
All Indictable Offenses	1	2	7	9	9	10	10	10	10	12	14	16	16	17

MINISTRY OF JUSTICE, CRIMINAL JUSTICE SYSTEM STATISTICS QUARTERLY: DECEMBER 2014, Outcomes by offence tool (2015), <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2014> [https://perma.cc/RQ4F-UTHR]. Ministry OF JUSTICE, CRIMINAL JUSTICE SYSTEM STATISTICS QUARTERLY: DECEMBER 2017, Outcomes by offence tool (2018), <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2017> [https://perma.cc/KEU7-D8EY].

#### D. Analysis of the Requirements Attached to Suspended Sentence Orders

One critical issue relating to noncustodial sentences in various jurisdictions is the nature and onerousness of the requirements attached to sanctions implemented in the community. A recurring criticism of community penalties, conditional sentences of imprisonment, and suspended sentences is that the absence of demanding conditions diminishes the penal weight and character of the sanction. This criticism is particularly acute with respect to sanctions such as the Canadian conditional sentence and the English SSO since both are considered *forms* of imprisonment, rather than alternatives to custody.<sup>37</sup> A common critique of both sanctions is that they carry minimal penal weight and are not, therefore, equivalent to the sentence of custody that they displace. If this is true, the imposition of an SSO in place of immediate imprisonment is likely to undermine parity and proportionality as well as public confidence in the sanction more generally.

Table 3 summarizes the pattern of requirements attached to an SSO in 2010 and 2017. The vast majority of SSOs have either one or two requirements attached to them. The most prevalent of these requirements by far are supervision and unpaid work. It is important to note that the Offender Rehabilitation Act 2014<sup>38</sup> introduced the Rehabilitation Activity Requirement to replace both the supervision and specific activity requirements, which accounts for the significant decline of the latter between 2010 and 2017. Interestingly, the provisions in LASPO 2012, which enabled SSOs to be imposed without specific requirements beyond the condition not to commit a further offense, did not result in any significant change in the average number of requirements attached to SSOs, indicating that the courts are handing down relatively few requirement-free SSOs.

Many of the potential requirements are used sparingly. Table 3 shows that even those addressing common criminogenic triggers, such as alcohol and drug treatment, were attached in fewer than 10% of all cases. The 2017 data reveal no significant difference between the types of requirement attached to SSOs and those attached to community orders. Similarly, the same dataset shows no significant difference between the number of requirements attached to SSOs, averaging 1.6, and the number attached to community orders, averaging 1.5.<sup>39</sup>

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37. Although as noted the CSI is actually discharged whereas the SSO is suspended.

38. Offender Rehabilitation Act 2014, c. 11, sch. 5 (Eng).

39. MINISTRY OF JUSTICE, OFFENDER MANAGEMENT STATISTICS QUARTERLY: OCTOBER TO DECEMBER 2017 (2018). <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2017> [<https://perma.cc/AZ7M-FWEZ>].

**Table 3:** Requirements attached to a Suspended Sentence Order, 2010 and 2017

	2010	2017
Supervision	66%	5%
Rehabilitation Activity Requirement	--%	65%
Unpaid Work	50%	47%
Accredited Program	23%	14%
Curfew	17%	16%
Specified Activity	10%	<1%
Drug Treatment	8%	8%
Alcohol Treatment	5%	1%
Other requirements (including prohibited activity; exclusion; mental health; electronic monitoring; attendance center and residential requirements)	<1%	<1%

MINISTRY OF JUSTICE, OFFENDER MANAGEMENT STATISTICS QUARTERLY: OCTOBER TO DECEMBER 2017, Probation: 2017, tbl. A4.10 (2018), <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2017> [<https://perma.cc/DY4Q-SALY>] (percentages rounded).

One explanation for the relatively low use of some requirements, particularly drug and treatment orders, is judicial awareness of the likelihood of noncompliance leading to breach and committal to custody.<sup>40</sup> Probation officers overseeing the implementation of SSOs have also highlighted that while many requirements—such as alcohol treatment, attendance center requirements and mental health treatment requirements—are available in theory, they have been unavailable in practice due to a lack of resources.<sup>41</sup> Probation officers have reported this being a particular cause for concern given the links between their clients' offending behavior and problems around alcohol abuse and mental health. By diminishing their penal character, the relatively low number of requirements attached to SSOs—whether for reasons of breach or lack of availability—is likely to undermine public, political, and judicial confidence in the sanction.<sup>42</sup>

40. GEORGE MAIR, NOEL CROSS & STUART TAYLOR, CTR. FOR CRIME & JUSTICE STUDIES, *THE USE AND IMPACT OF THE COMMUNITY ORDER AND THE SUSPENDED SENTENCE ORDER* 28 (2007).

41. *Id.*

42. *See infra* Section IV.

### E. Compliance, Breach, and Deterrence

An important concern arising from the use of SSOs, particularly if a significant proportion draw upon cases that would otherwise have received community orders, is the rate at which these orders are breached and terminated early. If SSOs are associated with a high termination rate for breach, the prison population will increase accordingly. The termination rate is likely to be affected by the ambit of the sanction and its use by the courts. A highly selective application is likely to result in a low breach rate, as courts select primarily the lowest-risk cases for an SSO. As the ambit broadens, so too may the volume of higher-risk cases. This is notable in light of the recent 2012 reform, which raised the cap on terms of imprisonment that SSOs can displace from one to two years.

Before reviewing trends in SSO termination and compliance rates, it is useful to place breach statistics in a wider context of recidivism research. The U.K. Ministry of Justice has conducted extensive multivariate research to explore the relationship between different sanctions and recidivism rates.<sup>43</sup> More specifically, the research compared recidivism rates for short custodial sentences, SSOs, and community orders, using a large cohort and applying propensity score matching. Results demonstrate that people sentenced to an SSO had the lowest recidivism rates of the three sanctions, with the greatest difference in rates emerging between immediate custody and SSOs. For each cohort studied, the one-year reoffending rate was highest for those sentenced to short-term custody. Similar trends have emerged in other jurisdictions. Lulham, Weatherburn, and Bartels report data from New South Wales showing that, after matching for key background variables, people sentenced to prison reoffended more quickly after release than comparable individuals sentenced to a suspended sentence.<sup>44</sup>

In England and Wales, the escalating use of the SSO between 2006 and 2017 was accompanied by a significant decline in breach rates for both noncompliance with SSO conditions and conviction for a subsequent offense. In 2006, over half of SSOs were terminated for either noncompliance or reconviction. By 2017, this had declined to less than a third. The most significant decline occurred in relation to breach rates for noncompliance: from a high of 28% in 2006, breach rates for noncompliance dropped to 12% in 2009 and remained relatively stable thereafter. Concomitantly, the percentage of SSOs that ran their full course or were terminated early for good progress rose dramatically, from 37% in 2006 to 71% in 2017.<sup>45</sup> These trends suggest that the increase in the use of SSOs has not created a significant additional threat to the community.

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43. AIDAN MEWS ET AL., MINISTRY OF JUSTICE, *THE IMPACT OF SHORT CUSTODIAL SENTENCES, COMMUNITY ORDERS AND SUSPENDED SENTENCE ORDERS ON RE-OFFENDING* (2015).

44. Rohan Lulham, Don Weatherburn & Lorana Bartels, *The Recidivism of Offenders Given Suspended Sentences: A Comparison With Full-Time Imprisonment*, 136 CRIME & JUST. BULL. 1 (2009).

45. MINISTRY OF JUSTICE, *supra* note 39.



To the extent that burgeoning SSO caseloads reflect an increase in the number of people who would otherwise have received community orders, probation officers tasked with responding to noncompliance might have been reluctant to instigate breach proceedings with the knowledge that these people would likely be sent to prison to serve their sentence.<sup>46</sup> Indeed, research on penal sanctions implemented in the community has highlighted that rates of compliance may be more dependent on particular compliance policies and professional discretion than the actual behavior of those subject to these sanctions.<sup>47</sup> Given that the decline in rates of compliance occurred at the same time as a significant shift in the profiles of those receiving SSOs, however, compliance rates might also have been shaped to some extent by a shift in the overall propensity of this cohort to comply with the conditions of these sentences.

Deterrence is not cited as a justification for the imposition of SSOs over and above other disposals in current U.K. legislation or SCEW guidance. The potential for these sentences to deter people from reoffending has, however, been noted by U.K. politicians, as well as by researchers and legislators in other jurisdictions.<sup>48</sup> It is, therefore, worth examining the links between the severity of SSOs and the likelihood of noncompliance and reconviction. A Freedom of Information Act Request revealing data on SSO terminations between 2012–2016 showed little variation in termination rates over time.<sup>49</sup> This provides a preliminary indication that the LASPO 2012 provisions enabling courts to impose fines upon breach, as opposed to termination and activation, has not had a significant impact in practice. SSO termination rates varied widely across different offense categories. In 2016, for example, the highest termination rate for reconvictions and noncompliance combined was 52% for theft and handling offenses, compared to only 13% for sexual offenses.

The same data provide an insight, albeit limited, into the potential differential deterrent effect of SSOs based on their severity. Dividing SSOs into a relatively lenient category, under one-year custodial term, and a relatively severe category, one-year and over custodial term, revealed considerable variation in noncompliance and reconviction rates. In relation to noncompliance with SSO conditions, there is a higher termination rate associated with the relatively lenient category of SSOs. For SSOs with a custodial term of under one year imposed for burglary offenses, for example, the termination rate for noncompliance was 19%. In contrast, for SSOs with a

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46. See GEORGE MAIR & HELEN MILLS, *CTR. FOR CRIME & JUSTICE STUDIES, THE COMMUNITY ORDER AND THE SUSPENDED SENTENCE ORDER THREE YEARS ON: THE VIEWS AND EXPERIENCES OF PROBATION OFFICERS AND OFFENDERS* (2009).

47. Gwen Robinson, *What Counts? Community Sanctions and the Construction of Compliance*, in *WHAT WORKS IN OFFENDER COMPLIANCE: INTERNATIONAL PERSPECTIVES AND EVIDENCE-BASED PRACTICE* 26 (Pamela Ugwudike & Peter Raynor eds., 2013).

48. Loraine Bartels, *The Weight of the Sword of Damocles: A Reconviction Analysis of Suspended Sentences in Tasmania*, 42 *AUSTL. & N.Z. J. CRIMINOLOGY* 72 (2009).

49. MINISTRY OF JUSTICE, *FREEDOM OF INFORMATION ACT REQUEST 180307001* (2018).

custodial term of one year and over, the termination rate for noncompliance was just 13%. For violent offenses, the figures were 11% and 8% respectively.

It is of course possible that these findings are not the product of an enhanced deterrent effect associated with longer SSOs, but of professional discretion in enforcement of noncompliance—specifically, the reluctance of probation officers to breach an SSO that will result in relatively severe consequences for the person serving it. However, there is a similar pattern in relation to breach and revocation for further offenses. For SSOs with a custodial term of under one year imposed for violent offenses, 17% were terminated for a further offense, whereas for those with a custodial term of one year and over, the termination rate was just 12%. For burglary offenses, the figures were 26% and 20% respectively. Comparable patterns were observed across other offense types.

Had the differences in breach and revocation rates been found only in relation to noncompliance, these may have been attributable solely to variation in the way professionals exercised their discretion around enforcement. Given that the same pattern was found in relation to further offenses, however, the data on SSO breach and revocation provide at least a preliminary indication that relatively lengthy and severe SSOs may exert an enhanced deterrent effect in relation to both reoffending and noncompliance. Further analysis controlling for factors such as the differential offending profiles of those subject to SSOs, however, is needed to scrutinize these statistics and control for exogenous factors that could be contributing to the observed variation.

## IV

### SUMMARY AND DISCUSSION

#### A. Summary

Between 2004–2017, the volume and rate of SSOs increased rapidly. While the aggregate sentencing statistics indicate that the initial expansion of SSOs led to the displacement of sentences of immediate imprisonment, constituting a process of decarceration, in the years that followed SSOs increasingly appeared to displace community orders, constituting net-widening. Further in-depth analysis controlling for shifts in offense types and examining short-term trends is required before definitive conclusions can be drawn on this issue.

The requirements attached to SSOs are broadly similar to those attached to community orders: the vast majority of both contain either one or two requirements. By far the most prevalent of these requirements are supervision and unpaid work. There is little difference in the rates at which courts impose SSOs on males and females.

Rates of compliance across SSOs and community orders are broadly comparable, with successful completion rates for SSOs increasing markedly

between 2006 (37%) and 2017 (71%).<sup>50</sup> This is likely to reflect changes in compliance policies and practices, as opposed to any substantive change in the behavior of those subject to these sanctions. Termination rates for noncompliance vary widely depending on offense type: for example, in 2016, theft and handling offenses had a relatively high termination rate of 52%, whereas the termination rate for sexual offenses was just 13%. Although further analysis controlling for exogenous factors is needed before firm conclusions can be drawn, the available data provide a preliminary indication that relatively severe SSOs might lead to lower termination rates for noncompliance and new offenses compared to relatively lenient SSOs.

## B. Finding a Place for the Suspended Sentence Order

The evidence discussed in this article suggests that the courts in England and Wales have often misapplied the SSO, displacing community orders instead of sentences of immediate imprisonment. However, this article does not endorse the abolitionist position taken in Victoria, Australia.<sup>51</sup> The question is whether there is some penal space for the SSO between an executed custodial sentence and a noncustodial sanction. This article proposes that there is a role for a sanction of this kind within the sentencer's toolkit, and argues that there are crimes of sufficient seriousness to justify imprisonment, but which are committed under particular circumstances, or by particular people, which justify suspension of the sentence. It seems excessively restrictive to argue that because imprisonment is justified, it must also be executed.

Few sanctions have attracted as much criticism over the years as the suspended sentence. Moreover, such criticism has emerged from academics,<sup>52</sup> as well as the mass media,<sup>53</sup> politicians, and lobby groups. A central element of most critiques is that the suspended sentence is a deceptive sanction: while it represents itself as a form of imprisonment—with the statutory framework and legal guidance treating it as a term of custody—it falls short of having the same impact on the lives of those subject to it. Other, similar forms of suspended sanction attract a comparable degree of criticism. The most common criticism of the conditional sentences of imprisonment in Canada was that someone serving a CSI was deemed to be serving a sentence of imprisonment, when in fact they spent their sentence in their own home.<sup>54</sup>

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50. MINISTRY OF JUSTICE, *supra* note 39.

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

52. E.g., Mirko Bagaric, *Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments*, U. N.S.W. L.J. 534 (1999); Freiberg, *supra* note 51. For a recent and comprehensive discussion of the suspended sentence, see Tom O'Malley, *That Measure of Wise Clemency: Defending the Suspended Sentence*, 28 IRISH CRIM. L.J. 39 (2018).

53. See *supra* note 19.

54. See Webster & Doob, *supra* note 15.

One of the objectives of the Supreme Court judgment in *Proulx*<sup>55</sup> was to ensure a closer correspondence between the onerousness of a conditional sentence and the term of immediate custody that it had replaced. That judgment directed courts to ensure that all conditional sentences should carry punitive conditions; conditions designed to promote rehabilitation or restorative justice were insufficient. In addition, the Court abandoned the one-to-one correspondence between a conditional sentence and the term of institutional imprisonment it replaced. Henceforth a court could impose, for example, an eighteen-month conditional sentence instead of a six-month term of custody.<sup>56</sup>

Penal interventions need to be diverse and protean. The diversity of offending and of those sentenced requires sanctions that permit a high degree of individualization. A sanction regime with only a limited number of penalties, for example, a fine, probation, or prison, would lack the necessary flexibility. There is a clear a priori attraction to creating a wide range of sanctions for courts to deploy at sentencing. To this we add two caveats. First, all sanctions need to carry a degree of what we might call penal validity: they need to affect the person subject to them in a way that the community would expect; or at least, sanctions cannot have an impact greatly at odds with community expectations. Imagine the following regime of fines. A person is ordered to pay £5,000, a sum which is commensurate with the gravity of their conduct and their means to pay. However, the payment may be made at any point up to ten years after it is imposed, and the person subject to the fine may reduce their financial liability by applying a wide range of income-tax deductions (for children; mortgage relief, etc.). A fine implemented in this form would lack penal validity as a sanction.<sup>57</sup> Equally, a suspended sentence regime must attract the confidence of the community, or it will be less likely to be used by courts.

### 1. Suspended Sentence Orders and the Principle of Penal Restraint

It is important to note a foundational sentencing principle that underpins the use of sanctions such as the SSO: the principle of penal restraint, or parsimony at sentencing. This principle requires that the courts should impose the least onerous sanction that achieves the purposes of sentencing. The principle of penal restraint has been placed on a statutory footing in a wide range of common law jurisdictions. In England and Wales, the principle is reflected in the statutory requirement that imprisonment be imposed only if no lesser sentence is appropriate: “The court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence

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

56. See Julian V. Roberts & Patrick Healy, *Recent Developments in Conditional Sentencing*, 80 CANADIAN B. REV. 1035 (2001).

57. A more realistic example would be a regime where the maximum fine was, say \$100. Few employed offenders would experience any discomfort.

and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.”<sup>58</sup>

The Canadian version of the restraint principle is at once clearer and more relevant to the use of different sanctions, including an SSO: Sections 718.2(d)-(e) of the Criminal Code states that “an offender should not be deprived of liberty, if less restrictive alternatives may be appropriate in the circumstances; and (e) all available sanctions other than imprisonment should be considered for all offenders.” This wording focuses a court’s attention on the sanctions less severe than immediate imprisonment, including forms of imprisonment that are either suspended, as in England and Wales, or served in the community as a conditional sentence of imprisonment, as in Canada.

Restraint is a simple principle, albeit one that is a challenge to operationalize. The academic critique of the custody threshold in this jurisdiction is that it is insufficiently robust to prevent the imposition of custody in cases where a noncustodial alternative would be sufficient.<sup>59</sup> Providing courts with a multiplicity of sanctions is one way of promoting the application of the restraint principle. An SSO offers an additional option to courts contemplating cases that have only just passed the custody threshold or that are more serious but where there are unusual or particularly compelling sources of mitigation. Cases in the first category are particularly appropriate candidates as they would involve relatively short sentences of imprisonment which can be readily replaced by an SSO. Seen in this light, the SSO contributes to promoting restraint and to underscoring the message that institutional imprisonment should be reserved for those who represent a significant risk or those convicted of a crime the gravity of which means that a noncustodial alternative would entail a violation of ordinal proportionality requirements.

### C. Reforming the Current Regime in England and Wales

We now offer two main reforms to ensure the SSO fulfills its primary purpose of reducing the number of short custodial sentences,<sup>60</sup> while also attracting the confidence of all stakeholders.

#### 1. Enhancing the Operational Period of the SSO

Since the SSO purports to be a sentence of imprisonment, its legitimacy is put at risk if these orders are perceived to be a soft option that entail significantly less punitive weight than the immediate sentences of imprisonment they are designed to displace. Central to our recommendations, therefore, is a requirement that the SSO carry a degree of penal validity, in terms of its

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58. Criminal Justice Act 2003, c. 44 § 152(2).

59. See Nicola Padfield, *Time to Bury the Custody Threshold?*, 8 CRIM. L. REV. 593 (2011); Julian V. Roberts & Lyndon Harris, *Reconceptualizing the Custody Threshold in England and Wales*, 28 CRIM. L.F. 477 (2017).

60. HOUSE OF COMMONS JUSTICE COMMITTEE, TOWARDS EFFECTIVE SENTENCING: FIFTH REPORT OF SESSION 2007–08 VOLUME 1, 2008, HC 186–I (2008).

statutory platform, its impact on the person subject to it, and its relation to other sanctions.

In this regard, the experience with an ancillary sanction in Canada, the CSI, is instructive. The original statutory framework, which determined the nature of conditional sentences actually imposed and served, was flawed and rightly attracted much public and media criticism. One obvious weakness of the legislation was that a CSI had to be the same length as the term of institutional imprisonment it replaced. Since time at home is unlikely to carry the same punitive weight as time in a penal institution, this one-to-one correspondence was potentially fatal to the public image of the sanction, as well as the principle of parity at sentencing.<sup>61</sup> The appellate courts were not slow to react to the problem. In a guideline judgment in 2001, the Supreme Court decoupled the length of a CSI from the term of straight imprisonment it would replace.<sup>62</sup>

This approach could be followed in England and Wales. Courts could be allowed to enhance the length of SSOs so that they exceed the duration of the immediate sentences of imprisonment they displace. One of the potential issues with this option, however, would be the consequences of breach and termination of the SSO. Consider the case of someone convicted of domestic burglary warranting a two-year sentence of immediate imprisonment, but for which the judge has reason to suspend the sentence. If the suspended term of custody was enhanced to three years and the person breached the SSO within a week of its commencement, would it be just to subject them to three years of imprisonment, given that the original offence warranted only a two-year prison sentence?

An alternative, of which we are in favor, would be to leave unchanged the suspended term of imprisonment, but to enhance the SSO's operational period. While it is difficult to compare the punitive bite of time served in custody with time served in the community, we suggest that a 1:2 ratio of imprisonment versus time served in the community is straightforward and likely to command greater public and court confidence than the current legislation that gives courts the discretion to suspend SSOs for any period not less than six months and not more than two years. Guidance from the Sentencing Council suggests that the operational period should reflect the length of the sentence, citing an example that echoes our suggested 1:2 ratio. However, we would highlight that the courts are not bound by this ratio, nor indeed are they currently able to impose an operational period twice the length of the custodial term they are displacing in cases where this term exceeds one year.<sup>63</sup>

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61. We use the term “unlikely” advisedly because there will be cases where the subjective experience of a CSI is the equivalent of a term of immediate imprisonment. *See* discussion in Roberts & Healy, *supra* note 56. In all likelihood the same cannot be said for the SSO in England and Wales.

62. *R. v. Proulx*, [2000] 1 S.C.R. 61.

63. The current maximum limit that restricts operational periods to a duration of no more than two years means that for any custodial term over one year that is suspended, an operational period twice this length is not possible under the current regime.

In England and Wales, people subject to determinate sentences of imprisonment serve half of their sentence in custody and half in the community subject to post-custodial license conditions. Therefore, a person sentenced to two years of immediate imprisonment for domestic burglary would be required to serve one year in custody and one year in the community on license. Our proposal is that, if sentences are to be suspended, the operational period ought to last twice as long as the period of imprisonment, plus the equivalent additional time the person would have spent in the community subject to post-custodial license conditions. In relation to our hypothetical domestic burglary case, therefore, this would translate to a suspended sentence with a two-year term of imprisonment and an operational period of three years (as opposed to the likely two-year operational period under the current sentencing framework).

What might the likely consequences of an enhanced operational period be? First and foremost, it would increase the severity of the SSO. In this particular case, not only would the person subject to the SSO be required to abide by certain conditions in the community for an additional year, but during this time they would also be subject to breach and the possibility of imprisonment for the remainder of the sentence. Regarding our current case of someone convicted of domestic burglary and sentenced to a two-year term of imprisonment with an operational period of three years, how much time in custody ought the person serve if they breach the SSO after precisely one year? One straightforward approach would be to allow every two months served in the community—subject to the SSO—to equate to one month of imprisonment. This mirrors our suggestion that the operational period ought to last for double the length of the term of custody that would have been imposed had the sentence not been suspended. In relation to our example, therefore, if the SSO was breached after one year, the person who had breached the order would be required to serve a remaining six months in prison following termination, plus the additional twelve months subject to post-custodial license conditions, which would have been required had the sentence not been suspended.

This recommendation, which we argue would bring the SSO more into line with the penal weight of the immediate terms of imprisonment these orders are designed to replace, is quantitative rather than qualitative in nature. The precise penal character of SSOs, however, depends not only on the duration of the operational period, but on the specific requirements attached to these orders. Nevertheless, we think it is appropriate that the courts and other criminal justice professionals retain the authority and discretion to shape the precise content of SSOs. While we do not favor an approach that mandates a specific number of requirements being attached to these orders, our second recommendation is designed to enhance the availability, and consequently the take-up, of rehabilitative requirements in particular.

## 2. Increase Investment in the Quality and Administration of SSOs

Given an average annual cost of imprisonment of around £35,000 per person and an average annual cost of SSOs of around £4,300 per person,<sup>64</sup> our proposals would continue to see SSOs costing the state significantly less than the sentences of immediate imprisonment they are designed to replace. Indeed, the additional costs of the enhanced operational periods may ultimately reduce costs, if they lead to the courts applying these sentences correctly and as they were originally intended: in place of sentences of immediate imprisonment as opposed to community orders. To reiterate, one of the likely reasons for the net-widening process described in this article is potential for the courts to perceive SSOs as lacking a level of punitive weight broadly equivalent to immediate sentences of imprisonment. As a result, the courts have largely used SSOs to displace community orders. If SSOs are revised so that their operational period is double that of the custodial term they are displacing—plus the additional period of time people would otherwise have served subject to post-custodial license in the community—it seems reasonable to expect that the courts will be more willing to use the SSOs as intended.

In light of the considerable cost differentials, we think there is a strong case for investing additional money to enhance the quality and administration of SSOs. For example, as noted above, some of the requirements that are available in theory—such as alcohol treatment, attendance center requirements, and mental health treatment requirements—are unavailable in practice due to a lack of resources. As addressing problems around mental health and substance abuse can be integral to supporting people to refrain from crime,<sup>65</sup> it would be prudent to use a proportion of the savings gained from displacing sentences of immediate imprisonment with SSOs to better fund and thereby increase the availability of these rehabilitative requirements.

Increasing the availability of rehabilitative requirements not only has the potential to bring about reductions in reoffending, but also to enhance public and judicial confidence in these sanctions. Indeed, there are some notable examples of deterrence-based strategies being used in conjunction with the provision of considerable levels of training, employment and other forms of support, to divert people away from crime.<sup>66</sup> SSOs have the potential to function in a similar manner to reduce the likelihood of reoffending, combining the deterrent threat of SSO termination, and consequent time in prison, with an enhanced level of support that better funded SSOs might provide in the

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64. NATIONAL AUDIT OFFICE, PROBATION: LANDSCAPE REVIEW (2014) <https://www.nao.org.uk/wp-content/uploads/2014/03/Probation-landscape-review.pdf> [<https://perma.cc/TPJ9-8ABZ>]; PRISON REFORM TRUST, PRISON: THE FACTS: BROMLEY BRIEFINGS SUMMER 2017 (2017).

65. Marie Needham et al., *Association Between Three Different Cognitive Behavioral Alcohol Treatment Programs and Recidivism Rates Among Male Offenders: Findings From The United Kingdom*, 39 ALCOHOL, CLINICAL & EXPERIMENTAL RES. 1100 (2015).

66. Anthony Braga & David Weisburd, *The Effects of 'Pulling Levers' Focused Deterrence Strategies on Crime*, 8 CAMPBELL SYSTEMATIC REVIEWS. 1 (2012).



community. The broad and inclusive approach to sentencing rationales promoted by the Criminal Justice Act 2003 Section 142(1) provides ample support for penal sanctions that attempt to reduce crime through deterrence, reform, and rehabilitation.

#### D. Drawing Lessons from the English Experience

The literature on the suspended sentence makes it clear that the structure of any such sanction, as well as its interaction with the sentencing regime in which it is embedded, determines its success or failure. A suspended sentence that works in one jurisdiction may fail in another. Unlike institutional imprisonment, the contours of which are relatively constant, the penological context of suspended sentences varies greatly. This may explain why the Australian versions have foundered while the English equivalent has flourished.<sup>67</sup>

The experience in England makes it clear that a suspended sentence of imprisonment can be accommodated within the range of judicial options at sentencing. Critics of suspended sentences might have predicted a number of negative outcomes as a result of such a striking and sudden shift in sentencing practices, including an increase in crime and reoffending rates, widespread public opposition to the expanded use of the sanction, and a significant drop in the use of community orders as a result of net-widening. Two of these problems have not arisen to any significant degree; the latter requires further analysis before conclusions can be drawn with any confidence. Crime rates have been falling in recent years, while there has been little change in reoffending rates. Although no study has explicitly explored public reaction to the use of suspended sentences, the level of public confidence in sentencing increased during the period in which the volume of suspended sentences rose. In relation to the issue of net-widening, the evidence suggests an initial decarceration effect when the CJA 2003 removed the “exceptional circumstances” provision from the imposition of SSOs. While net-widening also appears to have taken place, the picture is not straightforward; in-depth scrutiny of sentencing data in the coming years is required before firm conclusions can be drawn on this issue.

It is all very well to emphasize the conceptual complexities and legislative deficiencies of a given sanction, but perhaps it is worth considering one of the individuals on whom this order has been imposed. Sara Smith<sup>68</sup> was convicted of excise tax evasion amounting to approximately £70,000, arising from a family business in which she had repeatedly made trips to the continent, returning with goods the value of which was not fully declared. Sara was a young mother with three young children, of whom one was an infant, and another had special needs. She had no prior convictions. At the time of sentencing, an SSO was only available if the court decided it was justified by exceptional circumstances. In light of the seriousness of the fraud and related aggravating factors, the trial

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67. Freiberg, *supra* note 51.

68. R. v. Smith (Sara Jane) [2001] EWCA Crim 1476.

judge imposed twelve months immediate custody. Smith appealed her sentence, but the Court of Appeal ruled that the appellant's circumstances were not exceptional and therefore upheld the term of immediate imprisonment.

The defendant in this case was not a small fish caught up in the ever-widening net created by a reformed sanction: she was an individual heading for prison, with the suspended sentence seen as a last resort. If an individual with this profile were sentenced today, it seems highly likely that the trial court would have imposed an SSO to prevent the defendant's children being deprived of their mother as a result of her imprisonment.<sup>69</sup> In the present penal climate, courts are unlikely to impose a community order in a case of this nature; the custody threshold would clearly be perceived to have been crossed.<sup>70</sup> Returning to the previous "only in exceptional circumstances" regime, or abolishing the SSO altogether, would inevitably mean this woman would enter prison. This case illustrates both the current utility of a suspended sentence of imprisonment, as well as the wisdom of removing the exceptional circumstance requirement.

## V

### CONCLUSION

Suspended sentences have the potential to play an important role in enabling courts to avoid institutionalizing people for relatively short terms of imprisonment. In order to do so, however, they must command the confidence of sentencers and a range of other stakeholders. The intention of our proposals is not to fundamentally alter the overall severity of sentencing in England and Wales, but to address some of the flaws and limitations regarding the content and implementation of this particular sanction.

First, by enhancing the operational period of SSOs so that their duration is twice as long as the term of custody being suspended (plus an equivalent additional period of time that people would otherwise have served subject to post-custodial license in the community), our proposals would increase the punitive weight of SSOs. This would increase sentencers' confidence in these sanctions. In turn, we think it is reasonable to expect that the courts would be

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69. The starting point sentence under the current guideline is 26 weeks for this profile of fraud, (FRAUD, BRIBERY AND MONEY LAUNDERING OFFENCES. DEFINITIVE GUIDELINE (SENTENCING COUNCIL FOR ENGLAND AND WALES 2014) but the presence of several aggravating factors would likely have resulted in a longer term of custody, at which point the question would be whether a suspended sentence order would be appropriate. To resolve this issue a court would turn to the Council's 2016 guideline which as noted (*supra* note 28) states that one of the factors which would make an SSO appropriate is that imposition of immediate custody would result in significant harm to other parties, in this case the defendant's children.

70. By the courts at least. Many academic commentators and advocacy groups would likely take a different view. The public also may find some form of suspended sentence to be a more appropriate option, particularly if constructed to have greater impact upon the defendant. For example, one survey found most members of the public believed that being a main caretaker for children should result in a more lenient sentence. See Julian V. Roberts & Mike Hough, *Custody or Community? Exploring the Boundaries of Public Punitiveness in England and Wales*, 11 CRIMINOLOGY & CRIM. JUST. 181 (2011).

more willing to impose SSOs in place of sentences of immediate imprisonment, rather than community orders as has largely been the case in recent years. By increasing the number of SSOs at the expense of sentences of immediate imprisonment, our proposals have the potential to significantly reduce both the economic costs associated with imprisonment as well as some of the human harms associated with institutionalization. Second, reinvesting some of these savings to increase the quality and availability of rehabilitative requirements, such as alcohol treatment, attendance centers, and mental health treatment, would ensure that these services were adequately funded and resourced, thereby enhancing both the quality of SSOs and the confidence of sentencers in these sanctions.

In short, the English experience demonstrates that there is a role for a suspended sentence of imprisonment at sentencing, even when the statutory framework is far from perfect. That said, the current regime in England and Wales clearly requires amendment. Parliament should undertake appropriate reforms, particularly if research in the coming years suggests that the Sentencing Council's guideline on the use of disposals has failed to correct the problem of net-widening identified in this and previous publications.