

# COMMUNITY SANCTIONS AS SUBSTITUTES TO IMPRISONMENT IN THE NORDIC COUNTRIES

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## I

### INTRODUCTION

The Nordic countries make up a region in Northern Europe and the North Atlantic that consists of Denmark, Finland, Iceland, Norway, Sweden, and associated territories including the Faroe Islands, Greenland, Svalbard, and Åland. These countries house a little over 27 million people.<sup>1</sup> Economic and social models of the region are characterized by a comprehensive welfare state based on the principle of universal coverage and social rights. The social and economic security and smaller welfare differences are reflected also in high levels of social and institutional trust and lower levels of fear and punitiveness.

The Nordic Model of Criminal Justice is to be seen as a part of this large socio-economic and political complex.<sup>2</sup> Explanations for these differences go back to macro-level socio-economic and political structures and cultural traditions.<sup>3</sup> Nordic exceptionalism additionally is a product of the role of the welfare state.<sup>4</sup> Specific meso-level policies that have contributed to these differences deal with concrete penal practices and reforms, including sanction structures, sentencing principles and priorities, and especially the development and application of community alternatives as substitutes to imprisonment. These countries were able to resist the punitive pressures and trends that started to influence penal

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1. 10.1 million in Sweden, 5.7 million in Denmark, 5.5 million in Finland, 5.3 million in Norway and 335,000 in Iceland.

2. For this discussion, see Tapio Lappi-Seppälä, *Penal Policy in Scandinavia*, in 36 CRIME AND JUSTICE, A REVIEW OF RESEARCH 217–95 (Michael Tonry ed., 2007), <https://www.journals.uchicago.edu/doi/pdfplus/10.1086/592812> [<https://perma.cc/JZB7-B2DX>]; Tapio Lappi-Seppälä, *Trust, Welfare, and Political Culture: Explaining Differences in National Penal Policies*, in 37 CRIME AND JUSTICE, A REVIEW OF RESEARCH 313–87 (Michael Tonry ed., 2008), <https://www.journals.uchicago.edu/doi/pdfplus/10.1086/525028> [<https://perma.cc/W84N-XMN8>]; JOHN PRATT & ANNA ERIKSSON, *CONTRASTS IN PUNISHMENT: AN EXPLANATION OF ANGLOPHONE EXCESS AND NORDIC EXCEPTIONALISM* (2013).

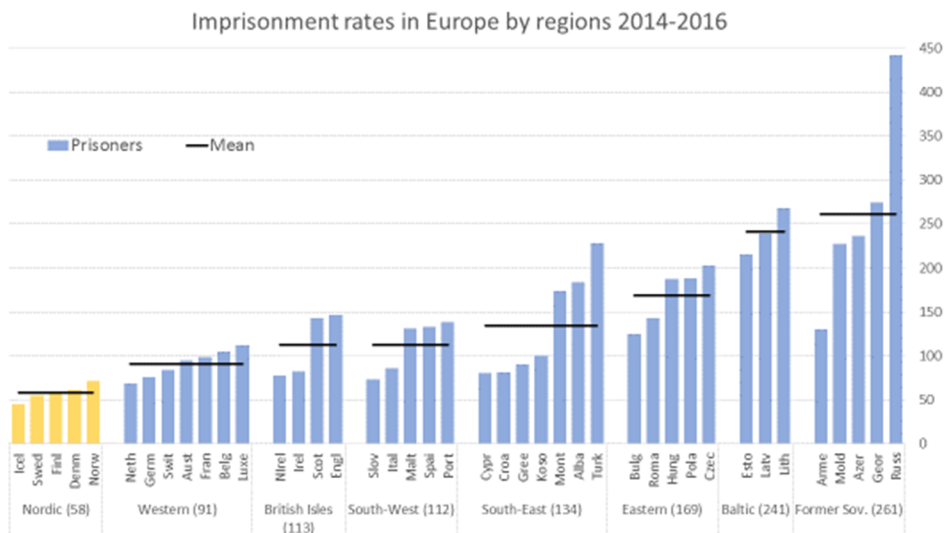
3. See *supra* note 2 and accompanying text.

4. For critical comments, see PENAL EXCEPTIONALISM? NORDIC PRISON POLICY AND PRACTICE (Thomas Ugelvik & Jane Dullum eds., 2012).

policies in western democracies during the last decades, first in the United States in late 1970s and subsequently elsewhere. Today, the Nordic region has the lowest incarceration rate in Europe.<sup>5</sup>

This article examines the development and implementation of three varieties of community sanctions as alternatives to imprisonment in Denmark, Finland, Norway, and Sweden. The discussion proceeds in five additional parts. Part II gives an overview of the sanction system in the Nordic countries and how the community sanction options fit within the larger Nordic criminal justice system. Part III discusses conditional and suspended sentences, Part IV discusses community service, and Part V discusses electronic monitoring. Parts III through V each begin with a brief history about the introduction and adoption of these alternatives in each country, followed by a description of the present regulation. Each of these Parts ends with a statistical overview of the implementation of the alternatives in practice since their adoption to the present. Part VI discusses the impact and effects of the use of alternatives from the points of view of the overall use of imprisonment, social and economic consequences, and crime prevention.

**Figure 1:** Imprisonment rates in Europe by regions 2014/2016



5. See Figure 1, *supra*. In the mid-2010s, the Scandinavian incarceration rate varied between 45 to 70 per 100,000 with an average of 58 per 100,000. The corresponding figures for other Western European countries are between 69 to 112 (average 95), British Isles 78–147 (113), South-Western Europe 73–138 (112), South-Eastern Europe 80–228 (134), Eastern Europe 125–203 (169), Baltic Countries 215–268 (261), and the Former Soviet Region in Europe 130–442 (261) with Russia in the lead. Global world leaders in incarceration rates may be found in the United States (698), Caribbean Islands including the Seychelles and St Kitts & Nevis (799 and 607, respectively) and in Turkmenistan (583). See, e.g., ANDREW COYLE ET AL., *IMPRISONMENT WORLDWIDE. THE CURRENT SITUATION AND AN ALTERNATIVE FUTURE 16* (2016); Institute for Criminal Policy Research, Birkbeck, Univ. of London, *WORLD PRISON BRIEF*, <http://www.prisonstudies.org/> [<https://perma.cc/8W8A-Y8Y5>] (last visited Oct. 7, 2018).

## II

## NORDIC SANCTION SYSTEM OVERVIEW

Sanctions employed in the Nordic countries range in penal severity from fines to imprisonment. Fines represent the most used sanction in the Nordic countries. A substantial part of middle-range offenses, and all minor offenses, are punished by fines. In all, fines represent around forty to sixty percent of all sanctions imposed by the courts.<sup>6</sup> Fines are imposed as day-fines, a system adopted in Finland, Denmark, and Sweden in the 1920s and 1930s. The day-fine system aims to ensure comparable severity for offenders differing in income and wealth. The number of day-fines an offender receives is based on the seriousness of the offense, and the amount of a single day-fine depends on the daily personal income of the offender.

Imprisonment represents the other end in the scale of penal severity. The most severe sentence in Denmark, Finland, and Sweden is life imprisonment, which in practice means a prison term usually ranging from 15 to 18 years.<sup>7</sup> Norway abolished the life sentence and replaced it with a 21-year maximum term.<sup>8</sup> The maximum term of imprisonment for a single offense not eligible for a life sentence is 16 years in Denmark, 12 years in Finland, and 10 years in Sweden (but 18 for murder).<sup>9</sup> These are nominal sentence lengths, which are substantially diminished by remission allowances and parole release. Typical prison terms in these countries are fairly short, ranging usually from two to six months.

Community sanctions comprise the middle range of penal severity between fines and unconditional imprisonment. They are used less frequently than fines but more often than imprisonment. While there are national differences in details, the basic structure of community alternatives is similar among the Nordic countries. Conditional imprisonment and suspended sentences form the backbone of the community sanction system. Around the 1990s, the system was complemented by community service, and around the 2000s, by electronic monitoring. At present, the system of community sanctions are comprised of five options as follows:<sup>10</sup>

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6. For an overview of sentencing practices in these countries, see Tapio Lappi-Seppälä, *Nordic Sentencing*, in 45 CRIME AND JUSTICE: A REVIEW OF RESEARCH 17 (Michael Tonry ed., 2016).

7. For details of the severest sanctions in the Nordic counties, see Tapio Lappi-Seppälä, *Life Imprisonment and related institutions in the Nordic Countries*, in LIFE IMPRISONMENT AND HUMAN RIGHTS 461–505 (Dirk van Zyl Smit & Catherine Appleton eds., 2016). On life imprisonment especially, see Doris Schartmueller, *How Long is Life? Comparing the Process of Release for Life-Imprisoned Offenders in Denmark, Finland and Sweden*, EUR. J. ON CRIM. POL. & RES., May 2018, at 1–18; Doris Schartmueller, *Life Imprisonment in Scandinavia: The Ultimate Punishment in the Penal Environments of Denmark, Finland, and Sweden* (August 2015) (unpublished Ph.D. dissertation, Northern Arizona University) 246–47.

8. See Lappi-Seppälä, *supra* note 7, at 472.

9. See *id.* at 7, at 474; Schartmueller *supra* note 7, at 6.

10. These alternatives apply both for adults and for juveniles. In addition, there are specific sanctions to be applied only for juveniles or young adults, which is not the focus of this article. See generally Tapio Lappi-Seppälä, *Nordic Youth Justice*, in 40 CRIME AND JUSTICE: A REVIEW OF RESEARCH 199–264 (Michael Tonry ed., 2011), <https://www.journals.uchicago.edu/>

1. conditional or suspended sentence, possibly combined with other sanctions;
2. probation or supervision as an independent or a complementary sanction;
3. community service as an independent or a complementary sanction;
4. treatment orders, usually as a complementary sanction;
5. electronic monitoring, either as an independent penal sanction or as a way of serving (all or a part of) a prison sentence.

The following will discuss the role of the three most important community sanctions as replacements for imprisonment in the Nordic Countries: conditional imprisonment and suspended sentences, community service, and electronic monitoring.<sup>11</sup>

### III

#### CONDITIONAL IMPRISONMENT AND SUSPENDED SENTENCES

##### A. History

Norway was the first Nordic country to introduce conditional and suspended sentences in 1894.<sup>12</sup> Denmark followed in 1904 and Sweden in 1905.<sup>13</sup> In Finland, proposals for a conditional sentence were presented in 1904, but the law was passed only after the civil war in 1918.<sup>14</sup> The conditional sentence was adopted according to the continental model applied in France and Belgium. In this form, the court imposes the sentence but postpones the enforcement of the sanction.<sup>15</sup>

Conditional sentencing was initially reserved for first offenders and for short sentences only and did not include any additional elements. However, the Nordic countries soon attached optional supervision orders to the sanction. This was the case in Denmark in 1905, Sweden in 1918, Norway in 1919, and Finland in 1940.<sup>16</sup> Supervision orders were targeted especially for young offenders.

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doi/pdfplus/10.1086/661113 [https://perma.cc/6GWY-A4QV] (describing the development of youth justice and the institutional and statutory approaches to juvenile detention and punishment in Denmark, Finland, Norway and Sweden).

11. Independent probation and treatment orders, mainly concerning Sweden, will be discussed briefly in connection of these three main alternatives.

12. Tapio Lappi-Seppälä, *Sentencing and Sanctions in Finland*, 5 PEKING U. L. J. 102, 115 (2017).

13. *Id.*

14. *Id.*

15. Subsequently Sweden (1939), Norway (1955) and Denmark (1961) also adopted the model where the actual setting of the sentence length is suspended. However, the application of this version has gradually been reduced (and abolished in Denmark). For the history of community sanctions in the Nordics, see TORSTEN ERIKSSON, KRIMINALVÅRD. IDÉER OCH EXPERIMENT [CORRECTIONAL IDEAS AND EXPERIMENTS] (P.A. Norstedt & Söner förlag 1968). See also JUSTITISMINISTEREN, STRAFFELOVRÅDETS BETÆNKNING OM SAMFUNDSTJENESTE MV. BETÆNKNING 1545/2014 [PENAL CODE'S REPORT ON SOCIAL SERVICES ETC. REPORT 15/2014] 209–10 (2014) (Den.), [http://justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2014/Straffelovraad\\_betaenk.pdf](http://justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2014/Straffelovraad_betaenk.pdf) [https://perma.cc/LJ4U-W6X3] [hereinafter JUSTITISMINISTEREN].

16. Tapio Lappi-Seppälä, *Nordic Youth Justice*, 40 CRIME & JUSTICE 199, 207 (U. OF CHICAGO PRESS) (2011).

Later, other attachments and combinations emerged. Norway and Denmark allowed a combination of conditional and unconditional prison sentences. The possibility of combining fines with conditional sentence was introduced in Finland in 1976.<sup>17</sup> Norway and Denmark combined conditional sentences with treatment orders and programs in the 1990s and 2000s in order to reduce the use of unconditional prison sentences especially following drunk driving. Then, the emergence of community service created even more combinations. Denmark and Sweden defined community service as a specific sanction attached to conditional imprisonment, and in 2001 Finland established a possibility to supplement long conditional sentences (over one year) with short community service orders (14–90 hours).<sup>18</sup>

Sweden also started to combine suspended sentences with transfer orders to social care (*samhällsvård*), organized by the child welfare authorities in the 1940s. Subsequently this practice evolved into an independent probation-type of supervision order in 1965 (*skyddstilsyn*).<sup>19</sup> Probation became the central community sanction in Sweden, while the other Nordic countries continued to operate with conditional and suspended sentences. It also started to serve as the main sanction in Sweden for juveniles and first offenders for whom fines were an insufficient sanction.

During the period of liberal penal politics (1960s through the early 1990s), the use of conditional sentences reached levels that were hard to exceed without adding extra elements or “enhancements” to the sentence. The law of conditional sentences became more complex and differentiated.

## B. The Varieties of Conditional Sentences

### 1. Types of suspended and conditional sanctions

In suspended or conditional sentences the offender is convicted but exempted from serving the sentence. The content of the punishment may or may not be specified in the original sentence. Suspended sentences are arrangements where the content of the sanction is not yet fixed, and the pronouncement of the sanction is deferred. Conditional sentences are arrangements where the contents of the sanction is fixed, but the enforcement of the sentence is suspended under certain conditions.

The way that courts impose conditional sentences varies across the Nordic countries. In Finland and Denmark, the court imposes the sentence but

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17. See Tapio Lappi-Seppälä, *Sentencing and Punishment in Finland: The Decline of the Repressive Ideal*, in PUNISHMENT AND PENAL SYSTEMS IN WESTERN COUNTRIES 115 (Michael Tonry et al. eds., 2001).

18. See 515/2003 Finnish Penal Code 6:10. For an English translation of Finnish criminal law, see THE MINISTRY OF JUSTICE, FINLAND, *The Criminal Code of Finland, Ch. 6 § 10(1)*, <https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> [<https://perma.cc/R37C-WB7Y>] (last visited Dec. 27, 2018).

19. Probation, also known as protective supervision (*skyddstilsyn*) means a period of three years, where the sentenced person is supervised during the first year. The Swedish probation can be ordered together with fines, short prison sentences, treatment orders, and community service.

postpones the enforcement. In Sweden, the court postpones the pronouncement of the sentence for a probation period.<sup>20</sup> In Norway, both options are utilized, however the postponement of enforcement (conditional imprisonment/sentence) is more common.

Limitations on lengths of conditional sentences imposed also varies across the Nordic countries. In Finland, conditional sentences are only available for prison sentences under two years. Norway, Denmark and Sweden have no formal limits, but conditional sentences lasting more than two years are quite rare.

## 2. Combinations

Conditional imprisonment can be combined with supervision, fines, community service, or with other specified sanctions in order to increase the severity of the sentence while still avoiding immediate imprisonment. Denmark and Norway also combine conditional sentences with short-term prison sentences, mainly for general deterrence. Attaching fines to the conditional sentence in Finland in 1976 and adding community service as a condition for conditional sentence in Denmark and Sweden in late 1990s also served the aim of creating a community sanction with enough credibility to replace prison sentences for drunk driving. However, the introduction of the combination of community service with conditional imprisonment over twelve months in Finland in 2001 was motivated by other reasons. The main aim of this reform was to promote a smoother application of the proportionality principle by creating a new intermediate step between conditional and unconditional prison sentences for more serious offenses. The combinations presently utilized in the Nordic countries are displayed in Table 1.

**Table 1:** Attachments to conditional imprisonment/suspended sentence

	FIN	DEN	NOR	SWE
Fines	X	X	X	X
Supervision	X*	X		(X)***
Specific conditions		X	X	
Treatment		X	X	X
Community service	X**	X		X
Unconditional imprisonment		X	X	X***

\*Only offenders below 21 years

\*\*Only with over 8 months conditional sentences

\*\*\*Only with probation (*skyddstilsyn*)

## 3. Contents

Conditional imprisonment may be ordered with or without supervision in Finland and Denmark. In Finland, offenders between the ages of fifteen and twenty at the time of the offense may be placed under supervision if supervision is considered “justified in view of the promotion of the social adjustment of the

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20. However, when community service is attached as a condition, the court also pronounces the length of the prison term.

offender and of the prevention of new offences.”<sup>21</sup> Such supervision is ordered for fifty percent of conditionally sentenced juveniles younger than eighteen and for thirty percent of offenders between the ages of eighteen and twenty.<sup>22</sup>

Supervision is carried out both by probation officers and volunteer workers and entails elements of support and control. Support may include lodging, education, training, or work, which is integral to reducing the risk of recidivism. The control element may vary depending on other conditions attached to the sentence. In Finland, supervision can be discontinued after six months if it is no longer needed. In Denmark, about half of the conditional sentences include supervision and other conditions.<sup>23</sup> In Sweden, supervision is used only as a part of the probation order. In Norway, supervision was removed as an addition to conditional imprisonment once community service was transformed into community punishment in 2003.<sup>24</sup>

In Denmark and Norway, conditional sentences may be attached to additional supplementing sanctions, such as to the obligation to participate in rehabilitative programs or mediation, to pay compensation to the victim, or to report regularly to the police. The condition may also include a very specific order; for example, a person convicted of sexual relations with children is not allowed to obtain employment at institutions or schools attended by children.

Courts may supplement conditional sentences with treatment orders. Treatment orders appear in different forms. In Denmark, conditionally sentenced persons suffering from substance abuse or mental disturbance may be required to undergo treatment for alcohol or drug abuse or outpatient psychiatric treatment.

Norway applies a specific program for drunk drivers (*promilleprogram*), which allows conversion of unconditional prison sentences to conditional sentences, provided that the offender is willing to submit him- or herself into a program consisting of an eight-week-long course with discussions on traffic-safety and crime and meetings with probations officers twice a month during a period of twelve months. The annual number of *promilleprogram* conditional sentences varies around 500.<sup>25</sup>

In Sweden, probation (*skyddstilsyn*) and suspended sentences can be combined with contract treatment. Contract treatment is targeted primarily at long-term substance abusers when there is a link between the abuse and crime. Contract treatment can be used as a normal sub-condition to probation, or it may

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21. See 401/2015 Finnish Penal Code 6:10. For an English translation of Finnish criminal law, see THE MINISTRY OF JUSTICE, FINLAND, *The Criminal Code of Finland, Ch. 6 § 10(2)*, <https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> [<https://perma.cc/57LM-UZEY>] (last visited Oct. 20, 2018).

22. See Seuraamusjärjestelmä [The System of Criminal Sanction]. Institute of Criminology and Legal Policy. Katsauksia 32/2018.

23. See GORM TOFTEGAARD NIELSEN, STRAFFERET 2. SANKTIONERNE [CRIMINAL LAW 2: THE PENALTIES] 40–41 (Jurist - Og Okonomforbundets Forlag 2014).

24. See Part IV, *supra* at 28.

25. JUSTITSMINISTEREN, *supra* note 15, at 334.

be used to justify not imposing a prison sentence. In the latter case, this sanction is used more clearly as an alternative to imprisonment. The court also declares the length of the original prison sentence that would have been passed had the offender not been accepted to take part in the treatment program.

#### 4. Sentencing Criteria

Historically, the conditional sentence in Europe was a creation of the sociological school and the late nineteenth century individual preventive movement. Its use has been guided by rehabilitative aims, usually constrained by the requirements of general prevention. Consequently, the rules governing the use of conditional sentences reflect changes in general criminal political thinking and in the principles of punishment.

Countries differ in terms of the legislative guidance relating to sentencing criteria. The Norwegian and Danish legislators have left this issue largely in the hands of the judiciary, whereas Sweden and Finland have provided more detailed legislative guidance in sentencing.<sup>26</sup> In Finland, sentencing criteria for conditional imprisonment were amended in 1976 and 2001. The first change stressed the shift from individualized and prognostic sentencing towards proportionality-based and more predictable sanction practices, emphasizing general prevention over treatment ideology. This did not entail a move towards more severe practices, but rather turned the presumption in favor of conditional imprisonment. Prison sentences were to be imposed conditionally, unless the “maintenance of general respect for the law” required unconditional imprisonment.<sup>27</sup> The following years witnessed a substantial increase in the use of conditional sentences. Subsequently, the wording of the sentencing provisions was further revised. Critics pointed out that general preventive arguments, while relevant at the legislative level, are less apt in individual sentencing due to the fact that single decisions largely lack such an effect. The formulation invites the courts to base their decisions on empirically unfounded speculations on the general preventive effects, which also creates a risk of inconsistent application of the law. Thus, in 2001, Finland replaced the general prevention-oriented criteria with more proportionality-oriented rules that obligated the courts to take into account the

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26. The Danish law simply states that the court can suspend measures, where it finds it “unnecessary that a penalty should be executed.” STRAFFELOVEN [STRFL] § 56.1 (Den.). Norway’s new criminal code leaves the decisions even more open by stating that “The court may decide that enforcement of prison sentence will be suspended partially or as a whole.” Lov om straff (straffeloven) 20 mai 2005 nr. 28 § 34 (Nor.). With regard to suspended sentences, see Lov om straff (straffeloven) 20 mai 2005 nr. 28 § 60 (Nor.). However, in both countries the criteria for imposing conditional sentence is well developed through court practice and legislative preliminary works. See NIELSEN, *supra* note 23, for a discussion of the Danish approach to conditional sentencing. See also MAGNUS MATNINGSDAL, STRAFFELOVEN. ALMINNELIG BESTEMMELSER. KOMMETARUTGAVE [PENAL CODE. GENERAL PROVISIONS. COMMENTARY] 294, 574 (Universitetsforlaget 2017) (describing and analyzing the Norwegian sentencing regime).

27. Former wording of the Conditional Sentence Act, §1. On the role of general prevention sentencing, see Tapio Lappi-Seppälä, *Human Neoclassicism: Proportionality and Other Values in Nordic Sentencing*, in PROPORTIONALITY, PUNISHMENT, AND JUSTICE—MAKING THE PUNISHMENT FIT THE CRIME (Michael Tonry ed., forthcoming in 2019) (on file with author).



seriousness of the act, culpability of the offender, prior convictions, and especially the young age of the offender.

The most important single issue in the implementation of the conditional sentence in the Nordic countries is the question of whether and to what extent the offense-type should have relevance in conditional versus unconditional sentencing. Drunk driving is the most notable example in Nordic sentencing traditions of an offense that has been punished unconditionally due to general preventive reasons. Other similar offenses include perjury and some crimes against officials. Such traditions seem to be hard to change. Sweden even included this principle in legislation in 1988 where the type of offense is an independent argument to be taken into account in sentencing.<sup>28</sup> In practice this means that the threshold of a prison sentence is lower for “type-offenses” (*artbrott*), even if the severity of the offense would not have required a prison sentence. This concept was introduced in the law during the parliamentary process for political reasons. Since then it has been widely criticized in sentencing theory,<sup>29</sup> however, without notable success, with the partial exception of the wider implementation of community service and electronic monitoring in drunk driving.

Finnish law-reform in 1976 distanced itself from this reasoning by establishing that all offenses are on an equal position when considering the choice between conditional and unconditional imprisonment. Danish law falls in between Sweden and Finland by admitting that the type of the offense has some independent value in sentencing. However, recent changes have been aimed to reduce this impact.<sup>30</sup> Whereas the concept of *artbrott* is unknown to the Norwegian legislator, certain offenses have been given a strong presumption in favor of unconditional imprisonment.<sup>31</sup>

Ultimately the criteria courts use in choosing between conditional and unconditional sentences are part of a wider complex of sentencing law. Few countries in the Nordic region have explicit sentencing legislation for this decision alone—with the exception of Finland, noted above. Therefore, the use of this sanction is governed by general sentencing rules and principles, as defined in sentencing law and practice. Finally, the role of conditional sentences is also much dependent of other alternatives in use, as well as on the conditions and combinations in use.

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28. See, e.g., Martin Borgeke, *Brottets art - några tankar kring en svårgripbar företeelse* [*The Nature of the Crime - Some Thoughts About a Difficult Phenomenon*], 2 SVENSK JURISTTIDNING [SVJT] 218 (1999), <https://svjt.se/svjt/1999/218> [<https://perma.cc/24CV-KLVN>].

29. See, e.g., *id.*

30. See NIELSEN, *supra* note 23, at 35–38; see also JUSTITISMINISTEREN, *supra* note 15, at 209–10.

31. For a list of crimes given a presumption toward unconditional imprisonment, such as assault leading to bodily harm, drunk driving with blood alcohol concentration over the legal limit, and exceeding speeding limits by 50 km/h, see JUSTITISMINISTEREN, *supra* note 15, at 322–23.

### 5. Probation Period and Revocation.

Imposing a sentence conditionally means that the enforcement will be suspended for a specific probation period determined by the court. In Finland and Denmark, the length of the probation period is at least one year and at most three years, with either one or two years being the most common term. The practical meaning of the probation period is that the behavior of the offender during that period determines whether the original conditions on sentencing shall be revoked—and therefore the sentence will be enforced—or not. The thresholds for the revocation of a conditional imprisonment vary. Still, the main rule is that revocation shall take place only if a new offense is committed, not because of a mere breach of conditions. In Finland, conditional imprisonment may be revoked only if the new offense merits an unconditional prison sentence. A previous conditional sentence may also be revoked only partially.

The probation period is not necessarily the same as the supervision period, provided that the conditional sentence is coupled with supervision. In Finland, supervision lasts one year and three months, and the probation period varies from one to three years. Both in Finland and Denmark, courts may terminate supervision when it is no longer necessary for rehabilitative aims.

### C. Practice and Application

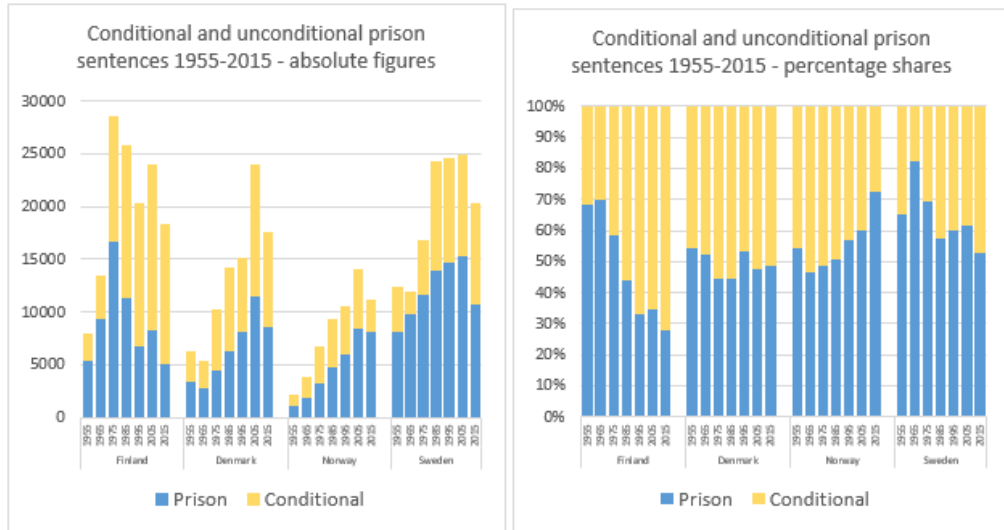
After a slow start in the early 1900s, the use of conditional sentences increased when sentencing juveniles in the 1930s and 1940s. By the 1960s and 1970s, over half of the prison sentences were imposed conditionally in Finland, Denmark, and Norway, and in Sweden, probation had occupied a similar role. This change was especially rapid in Finland in the 1970s. In the mid-1960s, thirty percent of all prison sentences were imposed conditionally. In the mid-1990s, conditional sentences represented sixty-five percent of all Finnish sentences.<sup>32</sup> Conditional imprisonment is among the key tools through which Finland managed to reduce its prison populations by more than fifty percent between 1970 and 1990.<sup>33</sup> Figure 2 displays the number of imposed conditional sentences and unconditional prison sentences from 1955 through 2015 in the Nordic countries (both absolute figures and percentage shares).

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32. See Tapio Lappi-Seppälä, *supra* note 17.

33. See Tapio Lappi-Seppälä, *Penal Policies in the Nordic Countries 1960–2010*, 13 J. SCANDINAVIAN STUD. CRIMINOLOGY & CRIME PREVENTION 85, 89, 92 (2012).

**Figure 2:** Unconditional and conditional prison sentences in the Nordic countries from 1955–2015<sup>34</sup>



Norway: Excluding minor offenses (*forseelser*)

As depicted in Figure 2, the Finnish prison sentences differ from the rest of the Nordic countries, with a declining number of prison sentences from the mid-1970s onwards. The trend was the opposite in the other Nordic countries up until 2005. Also, the ratio between conditional and unconditional sentences has evolved differently. While in the mid-1960s one out of three prison sentences was imposed conditionally in Finland, by the 2000s the ratio was reversed. Today, the proportion of conditional sentences to all prison sentences varies from thirty percent in Norway to a little over seventy percent in Finland. A more detailed view of the use of different combination is provided in Table 2.

34. For data on Finland, see [http://pxnet2.stat.fi/PXWeb/pxweb/fi/StatFin/StatFin\\_oik\\_syytr/statfin\\_syytr\\_pxt\\_001\\_fi.px/?rxid=d8adb81c-4f53-4409-96bf-dc3c324eaf28](http://pxnet2.stat.fi/PXWeb/pxweb/fi/StatFin/StatFin_oik_syytr/statfin_syytr_pxt_001_fi.px/?rxid=d8adb81c-4f53-4409-96bf-dc3c324eaf28) [https://perma.cc/6MZY-KCME]. For data on Denmark, see <http://statistikbanken.dk/statbank5a/default.asp?w=1536> [https://perma.cc/JR9X-5Q72]. For data on Norway, see <https://www.ssb.no/statbank/table/10622/?rxid=8d8f7d26-5c47-4a67-879e-02b7f096a81f> [https://perma.cc/B5N7-5FB7]. For data on Sweden, see <https://www.bra.se/brott-och-statistik/kriminalstatistik/personer-lagforda-for-brott.html> [https://perma.cc/B9PX-28Y4].

**Table 2:** Unconditional and conditional prison sentences in the Nordic countries (absolute numbers)

	FIN 2016	DEN 2017	NOR 2015	SWE 2016
All conditional/suspended sentences (and probation in Sweden, “skyddstilsyn”)	12763	8794	5735	8864 (5380)
Of which were combined with ...				
Fines	5120	913	4024	..
Supervision	700	..	-	..
Specific conditions	-	..	..	..
Community service	295	2637	-	3385 + (984)
Community service and fine	-	1449	-	..
Combination unconditional and conditional imprisonment	-	561	2449	-
Unconditional prison sentences (all)	4964	8475	10868	10399

.. = No Data

- = Not Valid

In Finland courts impose some 13,000 conditional prison sentences annually. Each year around 700–800 sentences are revoked (enforced). This equals around five percent of all conditional sentences imposed annually.

#### IV

#### COMMUNITY SERVICE

##### A. History

Experiments with community service as a sanction began in Denmark in 1982 and in Norway in 1984.<sup>35</sup> Sweden followed in 1990 and Finland in 1991.<sup>36</sup> Community service gained wider application first in Finland in the beginning of the 1990s. Other Nordic countries expanded the use of community service in the shift of the 1990s and 2000s. Denmark and Sweden created a combination of community service and conditional/suspended sentences during this period, increasing the number of annual orders from 1000 to 4000 in Denmark and from 2000 to 4000 in Sweden. Norway, in turn, increased the credibility of community service by changing its title to community punishment, including other elements in the sentence, and expanding its scope to include drunk driving. This resulted in an increase of annual cases from 500 to 2500.

Community service was presented as a more constructive and less stigmatizing alternative to imprisonment, which would allow the offender to maintain his or her contacts to the outside world and possibly even to create new positive contacts with work-life. Further arguments related to the need of developing functional intermediate penalties, given the fact that conditional sentences only consists of mere warnings or formal supervision. Occasionally

35. See generally 88 NORDISK TIDSSKRIFT FOR KRIMINALVIDENSKAB [NTFK] 91 [(2001), <https://tidsskrift.dk/NTFK/issue/view/5489> [<https://perma.cc/CHE7-ABMC>].

36. *Id.*

proponents also stressed the symbolic reparative and restorative dimensions of a sanction that eventually would give the offender a concrete possibility to pay back to society the damages and losses caused by the crime.

But underneath these beneficial social outcomes one also finds the simple aim of reducing the use of imprisonment. By the 1970s and 1980s, the use of conditional sentences had been stretched to its limit by expanding its application criteria and by pronouncing that prison sentences should, as rule, be imposed conditionally, unless otherwise required. Community service provided a new tool to limit the use of unconditional imprisonment even further. Concrete solutions how to do this varied across the countries.

## B. The Varieties of Community Service

### 1. Types

Community service appears in different forms. Finland and Norway treat it as an independent sanction. In Denmark and Sweden, however, community service is attached either to conditional imprisonment or to a probation order. In Finland, conditional prison sentences exceeding one year may be combined with a short community service order (“CSO”). In Denmark, community service can be combined with fines and unconditional imprisonment.

The possibility of combining community service with other conditions also varies from country to country. In Denmark, community service may be attached with separate conditions concerning residence, school attendance, or work. Norway also allows specific conditions to be imposed regarding the offender’s dwelling, work, and treatment. The maximum number of community service hours varies from 240 to 420 across the Nordic countries.

**Table 3:** Community service in the Nordic countries

	FIN	DEN	NOR	SWE
Started	1991	1982	1984	1990
Status	Independent sanction	Condition for conditional imprisonment	One part of “Community punishment”	Condition for conditional imprisonment
Other contents/conditions	No	Specific conditions	Specific conditions	No
Replacement scope	Up to 8 months	Up to 12 months	Up to 12 months	Up to 12 months
The number of hours	20–240	30–240	30–420	20–240

Countries also differ in how strictly community service has been defined as an alternative to imprisonment. During the experimental phase in Denmark, community service was targeted only to replace prison sentences. However, when the sanction was made a permanent part of sentencing alternatives, the scope of application was widened to include other community sanctions, especially

conditional sentences.<sup>37</sup> In Norway, community service was originally designed to replace only prison sentences. However, when community service was renamed community punishment in 2003, the scope of the sanction was extended to replace penalties for juvenile offenders who would have previously been sentenced to supervised conditional imprisonment.<sup>38</sup> Finland, the last country to adopt community service, was able to study the experiences elsewhere in Europe and followed a stricter policy in this respect. Legislation was drafted in a manner that should, in principle, guarantee that there would not be net-widening.

## 2. Community Service in Finland

The preconditions for imposing community service are detailed in the sentencing legislation. The system is based on a two-step procedure. First, the court is supposed to make its sentencing decision by applying the normal principles and criteria of sentencing without considering the possibility of community service. Second, if the result of this deliberation is unconditional imprisonment—and the prerequisites described below are satisfied—the court may transform the sentence into community service. In principle, community service may therefore be used only in cases in which the accused would otherwise have been sentenced to unconditional imprisonment.

The prerequisites for sentencing the offender to community service are fourfold. First, the convicted person must consent to community service. Second, the prison sentence can last at most eight months. Third, the offender must be deemed capable of carrying out the CSO. The offender's ability to do so is evaluated on the basis of a specific suitability report prepared by the Criminal Sanctions Agency. The fourth criterion concerns the offender's prior criminal career. Community service is not available for first-time offenders, nor are prison sentences. However, the law limits the number of previous convictions an offender may have and still be eligible for community service. These limits are expressed by giving the court the power to consider whether prior prison sentences or CSOs form an obstacle to converting the prison sentence into a CSO.<sup>39</sup> The wording of the law indicates—by using a plural form—that one previous CSO does not present an obstacle to subsequent CSO issuances. This provision has been interpreted as such in practice.

The court must always determine the number of hours of community service to be served. In commuting the prison sentence to community service, one day of

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37. See Britta Kyvsgaard, *Samfundssanktioner og samfundstiltag i Danmark* [Community Sanctions and Measures in Denmark], 88 NTFK 94–110 (2001), <https://tidsskrift.dk/NTfK/article/view/71512/103473> [<https://perma.cc/6UEU-P2MY>].

38. See Paul Larsson & Jane Dullum, *Fra samfunnstjeneste til samfunnsstraff. Utviklingen i bruken av samfunnsstraffer og konfliktråd i Norge* [From Community Service to Community Punishment. Developments in the Use of Community Sanctions and Victim-Offender Mediation in Norway], 88 NTFK 154–68 (2001), <https://tidsskrift.dk/NTfK/article/view/71515/103476> [<https://perma.cc/NJW7-AG6A>].

39. See 401/2015 Finnish Penal Code 6:11. For an English translation of Finnish criminal law, see THE MINISTRY OF JUSTICE, FINLAND, *The Criminal Code of Finland, Ch. 6 § 11*, <https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> [<https://perma.cc/TFA2-GMU3>] (last visited Oct. 20, 2018).

imprisonment corresponds to one hour of community service. Thus, two months of custodial imprisonment should be commuted into roughly 60 hours of community service.<sup>40</sup>

Community service consists of regular, unpaid work carried out under supervision. The sentence is usually performed in segments of three or four hours, ordinarily on two days each week. Ideally, the service would be performed over a period that roughly conforms to the corresponding sentence of imprisonment without release on parole. The Probation Service approves a service plan for the performance of a CSO. The plan is prepared in cooperation with the organization with whom the place of work had been arranged. The offender should be allowed an opportunity to be heard in the drafting of the service plan.

Approximately half of the service places were provided by the municipal sector, some forty percent by non-profit organizations, and ten percent by parishes. The share of the state has been under two percent. Further, the offender can use up to ten hours to address substance abuse issues, either in terms of a traffic safety course organized by the Traffic Safety Organisation or at a treatment clinic.

The performance of a CSO is supervised quite intensively. In Finland, supervision is specifically focused on ensuring proper performance of the work. Unlike in the other Nordic countries, community service does not contain any extra supervision aimed at controlling the offender's behavior in general. Minor violations are dealt with by reprimands, whereas more serious violations are reported to the public prosecutor, who may take the case to court. If the court finds that the conditions of the CSO have been seriously violated, it converts the remaining portion of the CSO into unconditional imprisonment. The hours that have already been worked are then credited in full to the offender.

Over one-half of the CSOs are imposed for drunk driving. A typical CSO is for 70–90 hours. The proportion of interrupted orders has varied around fifteen percent (of those sentences started each year).

### C. Practice

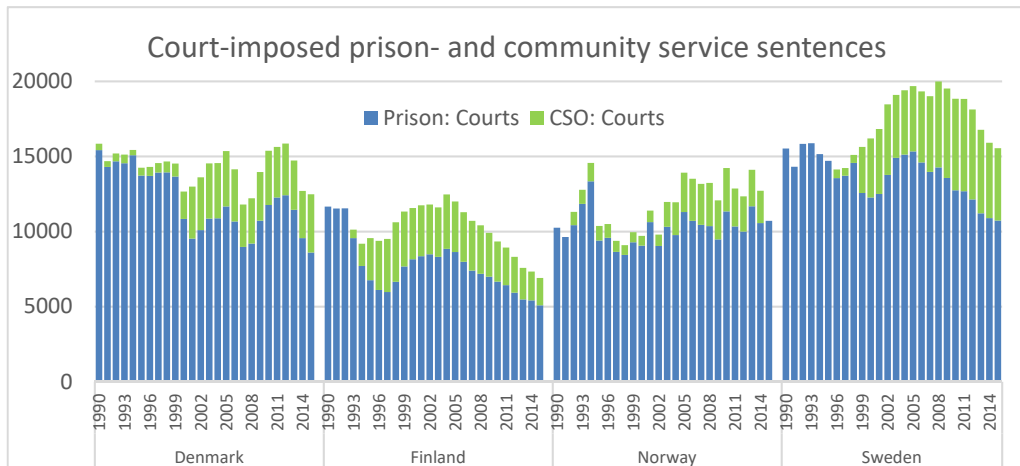
The use of community service is measured below by sentencing statistics. Figure 3 contains data regarding court-imposed CSOs and unconditional prison

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40. But, as prisoners are (in this offender group) released after serving half of the sentence, the actual conversion rate is two to one. Thus, in the end, the enforcement of community service lasts twice as long as the corresponding prison sentence. The first phase implementation of community service in Finland is analyzed in JUKKA-PEKKA TAKALA, RANGAISTUS JA SIIHEN SOVELTUMINEN: YHDYSKUNTAPALVELUKOKEILUN ALKUVAIHEITA JA ONGELMIA [PENALTY AND SUITABILITY: EARLY STAGES AND PROBLEMS OF COMMUNITY SERVICE EXPERIMENTATION] 151 (Oikeuspoliittinen tutkimuslaitos, Julkaisuja 1993). Enforcement practices and experiences are analyzed in HENRIK LINDERBERG, BROTT OCH STRAFF: EN UNDERSÖKNING AV SAMHÄLLSTJÄNSTEN SOM STRAFF [CRIME AND PUNISHMENT: A SURVEY OF COMMUNITY SERVICE] (Åbo Akademis Förlag 2001). For an analysis of the effects of recidivism, see Marja-Lisa Muiluvuori, *Recidivism Among People Sentenced to Community Service in Finland*, 2 J. SCANDINAVIAN STUD. CRIMINOLOGY & CRIME PREVENTION 72, 72–82 (2001).

sentences from 1990 through 2015. Community service includes all sentences where this option has been included as a part of other type of punishment, excluding the combination of unconditional imprisonment and community service.

**Figure 3:** Community service orders and imprisonment in courts from 1990 through 2015(absoluted numbers)



The decisive periods for the evaluation of possible net-widening effects correspond to those years when the use of community service has been expanded in these countries. In Finland this took place from 1992 through 1995, in Sweden in 1999, in Denmark in 2000, and in Norway in 2003.

In all countries but Norway, the statistics reveal a clear replacement effect. In Denmark, community service came to replace the very short prison sentences, abolished in 1999.<sup>41</sup> In Finland, the number of imposed prison sentences fell drastically between 1992 through 1995 while the number of CSOs increased by equal numbers. In Sweden, the adoption of the combination of community service and conditional imprisonment is visibly responsible for the quick drop in sentencing statistics. Only in Norway was the more modest increase in the use of community service not reflected in the number of imposed prison sentences. As the graphs also indicate, the replacement effect in all countries but Norway took place in a short period of one to two years. After that, the ratios between different sanctions have remained fairly stable in those countries.

Tables 4 and 5 compare the recent use of community service with corresponding data regarding unconditional prison sentences and the number of prisoners.

41. For Danish statistics, see JUSTITSMINISTERIETS FORSKNINGSKONTOR, UDVIKLINGEN I ANTALLET AF SAMFUNDSTJENESTEDOMME [THE TREND IN THE NUMBER OF COMMUNITY SERVICES] (2015) (Den.), [http://www.justitsministeriet.dk/sites/default/files/media/Arbejdsomraader/Forskning/Forskningsrapporter/2015/Samfundstjenestedomme\\_sept2015.pdf](http://www.justitsministeriet.dk/sites/default/files/media/Arbejdsomraader/Forskning/Forskningsrapporter/2015/Samfundstjenestedomme_sept2015.pdf) [<https://perma.cc/6PLK-PSG3>].



**Table 4:** Community service in courts and in enforcement (2015–2017, latest available, absolute numbers)

	FIN		DEN		NOR		SWE	
	CSO	Prison	CSO	Prison	CSO	Prison	CSO	Prison
A. Imposed orders/sentences in courts	1639	4964	4086	8475	2032	10868	4367	10399
B. Started enforcement during the year (flow)	2329	3397	4421	4824	1914	6602	4960	8581
C. In enforcement (stock)	1217	2859	2492	3579	1209	3927	2072	5664

**Table 5:** Clients in community service as a percent of prisoners (2015–2017, latest available, absolute numbers)

	FIN	DEN	NOR	SWE
As % of prison sentences	33.0	48.2	18.7	42.0
As % of prison entries (flow)	68.5	91.6	29.0	57.8
As % of daily prison population (stock)	42.6	69.6	30.4	36.6

The annual number of CSOs is the highest in Denmark (4086), as is the share of CSO sentences of prison sentences (48%), the share of clients starting CSO compared to admitted prisoners (92%), and the share of offenders serving community service of the daily number of prisoners (70%). The last row in table helps to estimate the impact of community service on daily prison populations. However, there are two caveats to be made in these comparisons.

First, there is no early release from community service. Therefore, offenders serving community service stay in the statistics longer. In Finland, a three-month (90 hour) community service also lasts three months, but a corresponding prison sentence lasts only one and a half months. This is reflected in the stock-based figures. Therefore, the figures in the last line are not directly convertible to prisoners, assuming that, without the existence of community service, all offenders serving community service should be counted as prisoners. Since in Finland prisoners in this group are released after serving half of the sentence, the impact of CSOs should be only half of what the last row in table indicates.<sup>42</sup>

Second, probably none of the countries achieved a one hundred percent replacement rate even if Figure 3 points that direction for Finland. Therefore, one should deduce from the final calculation that CSOs in part have replaced penalties other than unconditional prison sentences.

But even in the presence of these sources of error, the conclusion remains that CSOs have reduced both the number of people entering prisons and the daily prison populations to a substantial degree. This impact may even exceed fifty percent of incoming prisoners in Finland. One may assume, based on the trends observed in Figure 3, that daily prison populations could be ten to twenty percent higher without the introduction of community service.

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42. Additional problems relate to the fact that it is somewhat unclear how countries that attach CSO as a condition to conditional sentence mark this sanction in their statistics—will it remain there as long the supervision period lasts, or only as long as the actual service lasts?

The profile of offenses resulting in CSOs is consistent across the Nordic countries. Drunk driving represents around forty to fifty percent of all CSOs, followed by other property offenses and violent crimes, including basic forms of assault.

## V

### ELECTRONIC MONITORING

#### A. Forms of Electronic Monitoring

Electronic monitoring (“EM”) has expanded incrementally since the late 1990s. Reforms started on an experimental basis. After the experimentation and evaluation phases, the arrangements were made permanent. Subsequently the scope of EM application was expanded as well. EM appears in the Nordic criminal justice systems in the following main forms:<sup>43</sup>

1. EM as a court-ordered independent community sanction (“EM-sentence”).
2. EM as administratively managed form of enforcement of the whole prison sentence (“EM-enforcement”).
3. EM as a form of early release and part of the release process (“EM-release”).
4. EM as technical device used during the enforcement (“in-prison EM”). This may take place during furloughs or visits, or during enforcement in prison (usually in open prisons).
5. In addition, EM has been used in connection with coercive and preventive measures, including pre-trial detention, travel ban and restraint orders.

EM-sentences and EM-enforcement are usually referred to as “front-door” models, and the EM-release is usually referred to as a “back-door” model. Since there are differences between court-based and administrative solutions, the following divides the front-door model into EM-sentence and EM-enforcement.

#### B. Introducing Electronic Monitoring

The first applications took place in Sweden in the mid-1990s, where EM enforcement was used to replace short—up to three-month—prison sentences. In 2001 the scope of EM-enforcement was expanded to six months. At the same time, Sweden started an experiment with EM-release wherein prisoners could apply for EM-release up to six months before regular release, which would take place after two-thirds of their time had been served. In 2007, this release-form was renamed “expanded-release” (*utökad frigång*) and offered, with specified conditions, to all prisoners after having served half of their sentences. In 2005, Sweden started experimenting with in-prison EM (“EM-control”) by allowing

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43. The following text will mainly discuss the first three forms of EM.

the use of EM as a control measure in selected open prisons. Then, in 2018, the possibility to use EM in connection of restraint orders was expanded.

Finland started experimenting with in-prison EM-control in the late 1990s by replacing escorted prison leaves with furloughs controlled via mobile phones. In 2006 a form of EM-release for long-term prisoners in connection of the adoption of new release form. In 2011, Finland adopted the EM-sentence in the form of a new sanction called “monitoring sentence” to replace short—maximum six-month—prison sentences.<sup>44</sup> At the same time, EM-control was expanded to use in selected open prisons. In 2018, Finland adopted a new combination of prison sentence and an extra period of EM after release (“combination sentence”)<sup>45</sup> for serious violent recidivists. Starting in 2019, the courts may impose an electronically monitored travel-ban or “remand arrest” during the pre-trial period, using EM as a coercive measure.<sup>46</sup>

Denmark adopted EM-enforcement in 2005 to replace prison sentences of three months or less.<sup>47</sup> At first, EM-enforcement covered only traffic offenses, including drunk driving. In 2006, the scheme was extended to include all offenders under the age of twenty-five at the time of the offense.<sup>48</sup> In 2008, the age requirement was removed, and in 2010 and 2015, the sentence limit was raised from three months to six months.<sup>49</sup> As a result, all prisoners, regardless of the crime, with a sentence not more than five months may apply to serve the sentence under EM.<sup>50</sup>

In 2008, Norway started a restricted experiment of both EM-enforcement and EM-release.<sup>51</sup> The former was to replace prison sentences up till four months.<sup>52</sup> The latter gave the prisoner the opportunity to apply to serve the remaining last

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44. See 17/2010 Hallituksen esitys eduskunnalle valvontarangaistusta ja sähköistä valvontaa avolaitoksissa koskevaksi lainsäädännöksi [Government’s Proposal to Parliament For Legislation on Supervision and Electronic Control in Open Institutions] (Fin.), <https://www.finlex.fi/fi/esitykset/he/2010/20100017> [<https://perma.cc/93CE-9GPO>].

45. See 268/2016 Hallituksen esitys eduskunnalle yhdistelmärangaistusta koskevaksi lainsäädännöksi [Government’s Proposal for Parliamentary Legislation on a Combination of Criminal Laws] (Fin.), <https://www.finlex.fi/fi/esitykset/he/2016/20160268> [<https://perma.cc/98F8-GUAN>].

46. See 252/2016 Hallituksen esitys eduskunnalle tutkintavankeuden vaihtoehtoja ja järjestämistä koskevaksi lainsäädännöksi [Government’s Proposal to Parliament for Legislation on Alternatives and Arrangements for Pre-trial Detention] (Fin.), <https://www.finlex.fi/fi/esitykset/he/2016/20160252> [<https://perma.cc/UV6F-7ZJT>].

47. For details, see Anette Storgaard, *Dänemark, in ELEKTRONISCHE ÜBERWACHUNG VON STRAFFÄLLIGEN IM EUROPÄISCHEN VERGLEICH - BESTANDSAUFNAHME UND PERSPEKTIVEN, FORUM VERLAG GODESBERG* (Frieder Düinkel, Christoph Thiele & Judith Treig eds., 2017) 313–24.

48. *Id.*

49. *Id.*

50. *See id.*

51. JUSTIS - OG ØKONOMFORBUNDETS, ST.MELD. NR. 37 (2007–2008) STRAFF SOM VIRKER - MINDRE KRIMINALITET - TRYGGERE SAMFUNN -(KRIMINALOMSØRGSMELDING) [REPORT NO. 37 (2007–2008) CRIMINAL PUNISHMENT - LESS CRIME - SAFER SOCIETY (CRIMINAL CARE REPORT)] (2007–2008) (Nor.), <https://www.regjeringen.no/contentassets/d064fb36995b4da8a23f858c38ddb5f5/no/pdfs/stm200720080037000dddpdfs.pdf> [<https://perma.cc/JN58-PPKX>].

52. *Id.*

four months in EM. In 2014, these practices were made permanent and nationwide.<sup>53</sup>

**Table 6:** The modes of electronic monitoring in the Nordic countries in 2018

	FIN	DEN	NOR	SWE
<b>EM-sentence</b>	Monitoring sentence Combination sentence	NO	NO	NO
<b>EM-enforcement</b>	NO	Max 6 months	Max 4 months	Max 6 months
<b>EM-release</b>	Max 6 months	Max 6 months	Max 4 months	Min 3 months served
<b>In-prison EM</b>	Prison furloughs Open prisons	Prison Furloughs		Prison furloughs Open prisons
<b>EM as coercive measure</b>	Travel ban Pre-trial remand			Restraint orders

Given this variance, there is no Nordic Model of electronic monitoring in a technical sense. However, the basic penological approaches and substance of the sanctions share strong similarities.

## B. Shared Features of EM in the Nordics

### 1. Aims

The central aims of EM relate to counteracting the adverse social and economic effects of imprisonment and prison environment, including stigmatization, interruption of schooling and work-relations, worsening of the economic situation, and damage to social and family life. For example, a Norwegian report stressed the importance of “maintaining work, stay[ing] in school or in other activities during the enforcement.”<sup>54</sup> A Swedish legislator stressed the aim of EM-release in reducing reoffending by providing offenders with an opportunity to spend time in the community with more support and control than they would receive following their conditional discharge from prison.<sup>55</sup> The Finnish law mentions as a criterion for imposing an EM-sentence the aim to “uphold and maintain the offenders’ social capacity and skills.”<sup>56</sup>

53. See INGBORG RASMUSSEN ET AL., EVALUERING AV SONING MED FOTLENKE [EVALUATION OF ATONEMENT WITH ANKLE MONITORS], Vista Analyse (2016), [https://www.vista-analyse.no/site/assets/files/5598/va-rapport\\_2016-02\\_evaluering\\_av\\_soning\\_med\\_fotlenke\\_revidert\\_version05082016.pdf](https://www.vista-analyse.no/site/assets/files/5598/va-rapport_2016-02_evaluering_av_soning_med_fotlenke_revidert_version05082016.pdf) [https://perma.cc/7Z9F-JPNH].

54. REPORT NO. 37, *supra* note 51.

55. See BROTTSFÖREBYGGANDE RÅDET (BRÅ), UTÖKAD ANVÄNDNING AV ELEKTRONISK FOTBOJA INOM KRIMINALVÅRDEN. SLUTRAPPORT. RAPPORT 2007:19 [ENHANCED USE OF ELECTRONIC MONITORING IN THE FIELD OF JUSTICE. FINAL REPORT. REPORT 2007:19] (2007), [https://www.bra.se/download/18.cba82f7130f475a2f180009036/1371914725213/2007\\_19\\_slutrapport\\_utokad\\_anvandning\\_av\\_fotboja.pdf](https://www.bra.se/download/18.cba82f7130f475a2f180009036/1371914725213/2007_19_slutrapport_utokad_anvandning_av_fotboja.pdf) [https://perma.cc/7M22-HFD9].

56. 401/2015 Finnish Penal Code 6:11a. For an English translation of Finnish criminal law, see THE MINISTRY OF JUSTICE, FINLAND, *The Criminal Code of Finland, Ch. 6 § 11*, <https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> [https://perma.cc/GF2R-HJK2] (last visited Oct. 20, 2018).

While EM always contains a strong element of supervision, the sanction has also a strong focus on social reintegration. This is reflected in the contents of EM in the Nordics. Offenders must either work or take part in other activities, programs, or treatment provided by the prison or probations services. Passive house arrest is thus deliberately rejected.

## 2. General preconditions

Both forms of EM—front-door and back-door—share a set of general preconditions, with some variation depending on the situation and context. The general preconditions are as follows:

1. To be allowed to serve the sentence in EM, the offender must have a permanent address as opposed to residence in a homeless shelter. The probation and social welfare services are usually obliged to find a dwelling for those in need.
2. If the offender has cohabiting family members, they must also formally accept EM.
3. The offender must have an occupation or work, be participating in some active labor market program for the unemployed, or be enrolled in education. EM is always associated with some sort of activity in order to avoid idle house arrest.
4. The offender must agree to abstain from all alcohol and substance use. This is a major element of EM and is ensured by using both breath analyses and urine tests.

Offenders who are otherwise eligible for EM must nevertheless apply to receive EM-enforcement and EM-release. The offender needs to give his or her consent to receive an EM-sentence.

Specific formal requirements and conditions vary depending on the type of EM at issue. If the offender fails to keep to the conditions while serving the EM sentence, the sentence may be converted into imprisonment.

## 3. Contents

Under EM, a detailed schedule is drawn indicating where the offenders should stay and for how long. The offender is required to stay at home during the night and when there is no work or no program scheduled. This schedule is electronically monitored with the help of a specific tag attached to the person under supervision or sometimes by mobile phones. The tag sends a continuous signal to the central computer in the probation service, thus causing an alarm if the offender leaves the designated area.

Conditions further include abstinence from alcohol and other substance use. Offenders serving under EM must accept unannounced weekly control visits that involve blood tests for alcohol and drug abuse. Drug use is checked for by means of urine or blood tests at the beginning of the implementation period and subsequently when necessary. The number of tests varies depending on the

country and probably also by region.<sup>57</sup> Supervision at the person's place of work is performed by a contact person employed by the probation service.

#### D. Modes of EM in Practice

##### 1. EM as a Mode of Enforcement of Prison Sentence (EM-enforcement)

In the most widely used version of EM in Denmark, Norway and Sweden, the prison administration converts the prison sentence into EM. This form of EM is, in fact, a voluntary program offered by the prison and probation services as a way of serving a prison sentence. It is an alternative to imprisonment and not part of the probation program.<sup>58</sup>

Offenders who meet the formal criteria for EM-enforcement receive a letter informing them about the opportunity to serve the prison sentence at home under intensive surveillance and control. Offenders who are willing to participate send an application. For those who apply for EM, a personal inquiry report is prepared. To be approved, the offender must fulfil the general conditions set forth above. The selection is made by the prison and probation services, guided by the law and administrative regulations. Then, an enforcement plan is drafted. The plan is prepared together with the probation service. The number of days to be served under monitoring is the same as would have been served in prison. Thus, the rules of early release apply also to EM-enforcement and to EM-sentence in Finland.

In Sweden, 6500 offenders were offered the opportunity for EM from 2005 through 2006.<sup>59</sup> Of those, sixty-eight percent (4455 offenders) applied and eighty-one percent of those who applied (3631 offenders) were approved.<sup>60</sup> The most common reason for not granting EM was that the convict did not cooperate in the investigation carried out by the probation service. Of those approved, eighty-four percent (3061 offenders) started the sentence. Of those put under EM,

57. The Danish law sets the number of weekly control visits in law to 1-3. See Lov nr. 367 af 24.05.2005 om ændring af lov om fuldbyrdelse af straf m.v.

58. Danish approaches to electronic monitoring are summarized in DAVID W.M. SORESENEN & BRITTA KYVSGAARD, *AFSONING I HJEMMET: EN FORLØBSANALYSE VEDRØRENDE FODLÆNKEORDNINGEN* [IMPRISONMENT AT HOME: A PROGRESS REPORT ON THE ANKLE LINKAGE SCHEME] (Justitsministeriets Forskningsenhed 2009), [http://www.justitsministeriet.dk/sites/default/files/media/Arbejdsomraader/Forskning/Forskningsrapporter/2009/Rapport\\_om\\_forlaenkeforloebet.pdf](http://www.justitsministeriet.dk/sites/default/files/media/Arbejdsomraader/Forskning/Forskningsrapporter/2009/Rapport_om_forlaenkeforloebet.pdf) [https://perma.cc/AU9D-7R5A]. For Norway, see INGEBORG RASMUSSEN ET AL., *supra* note 53. The Swedish approach is analyzed in BROTTSFÖREBYGGANDE RÅDET (BRÅ), *FÄNGELSE I FRIHET: EN UTVÄRDERING AV INTENSIVÖVERVAKNING MED ELEKTRONISK KONTROLL. RAPPORT 2003:4 [PRISON IN FREEDOM: AN EVALUATION OF INTENSIVE MONITORING WITH ELECTRONIC CONTROL. REPORT 2003:4]* (2003), [https://www.bra.se/download/18.cba82f7130f475a2f1800015427/1371914730512/2003\\_fangelse\\_i\\_frihet.pdf](https://www.bra.se/download/18.cba82f7130f475a2f1800015427/1371914730512/2003_fangelse_i_frihet.pdf) [https://perma.cc/CV9A-J9Q8]. See also BROTTSFÖREBYGGANDE RÅDET (BRÅ), *supra* note 55.

59. BROTTSFÖREBYGGANDE RÅDET (BRÅ), *UTÖKAD FRIGÅNG OCH ÅTERFALL. SLUTRAPPORT OM 2007 ÅRS REFORM AV UTSLUSSNING I KRIMINALVÅRDEN. RAPPORT 2010:8 [INCREASED LIBERTY AND RELAPSE. FINAL REPORT ON THE 2007 REFORM OF DISCHARGES INTO THE PRISON. REPORT 2010:8]* (2010), [https://www.bra.se/download/18.744c0a913040e4033180005916/1371914719015/2010\\_8\\_utokad\\_frigang.pdf](https://www.bra.se/download/18.744c0a913040e4033180005916/1371914719015/2010_8_utokad_frigang.pdf) [https://perma.cc/6DLQ-J9EB].

60. *Id.*

thirty-five percent had previously been sentenced to imprisonment. The failure rate is around nine percent. Practically all interruptions relate either to alcohol or drugs. About six percent of the convicted offenders were forced to quit EM, usually as a result of violations of the ban on drugs or alcohol or because they had otherwise broken the rules.<sup>61</sup> In Norway, 4461 offenders applied in 2014, fifty-nine percent (2632) were accepted, and 2461 of those accepted started the enforcement. Failure rates range around five percent of started programs.<sup>62</sup> Drunk driving and other traffic offenses represent about fifty percent of all cases of EM-enforcement.

## 2. EM as a Part of Release Process (EM-release)

All Nordic countries implement EM as a means for earlier release. Denmark, Finland, and Norway set a fixed time limit for the release, ranging from four to six months prior to regular early release.<sup>63</sup> Sweden changed their system in 2010 so that EM became a normal part of early release that can be applied after an offender has served half of the sentence. In contrast, regular early release takes place after an offender has served two-thirds of the sentence.<sup>64</sup> Also in this case, release on EM takes place after application.

EM-release has largest practical relevance in Finland, where the use of this option increased from 100 annual cases in 2006 to 690 annual cases in 2016.<sup>65</sup> Corresponding figures for Norway were 100 (in 2010) and 383 (in 2016).<sup>66</sup> In Sweden, the numbers slightly decreased from 800 in 2009 to 549 in 2015.<sup>67</sup> Denmark adopted EM-release too recently to observe any significant trends, with 68 cases in 2016.<sup>68</sup> The Swedish statistics show that, from 2005 through 2006, 1600 prisoners were released of the group that was in principle eligible for the program. Of these, thirty-two percent (500) were granted release and 311 started EM.<sup>69</sup> In Norway, of the nearly 700 prisoners who applied for EM release in 2014, forty-two percent (270) were granted EM release.<sup>70</sup>

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61. See BRÅ, *supra* note 59.

62. See RASMUSSEN ET AL., *supra* note 53.

63. See Table 6, *supra* at 36.

64. See BRÅ, *supra* note 65.

65. For further detail on electronic monitoring in Finland, see Leena Mäkipää, *Valvotun Koevapauden Toimeenpano ja Sovelletavuus [Enforcement and Applicability of Supervised Probationary Freedom in Finland]*, OIKEUSPOLIITTISEN TUTKIMUSLAITOKSEN TUTKIMUKSIA (2010), <https://helda.helsinki.fi/bitstream/handle/10138/152428/koevapaus249.pdf?sequence=2> [<https://perma.cc/3S56-UP94>]. For latest numeric details, see KRIMINALVÅRDEN, NORDISK STATISTIK: FÖR KRIMINALVÅRDEN I DANMARK, FINLAND, ISLAND, NORGE OCH SVERIGE [NORDIC STATISTICS FOR CORRECTIONAL SERVICES IN DENMARK, FINLAND, ICELAND, NORWAY AND SWEDEN 2012-2016] (2018), [https://www.rikosseuraamus.fi/material/attachments/rise/julkaisut-tilastollinenvuosikirja/q14GI3wkh/Nordisk\\_statistik\\_2012-2016.pdf](https://www.rikosseuraamus.fi/material/attachments/rise/julkaisut-tilastollinenvuosikirja/q14GI3wkh/Nordisk_statistik_2012-2016.pdf) [<https://perma.cc/59MJ-UGPR>].

66. See NORDISK STATISTIK, *supra* note 65.

67. *Id.*

68. *Id.*

69. See BRÅ, *supra* note 59.

70. See Lappi-Seppälä, *supra* note 6.

Supervision is fairly intensive. In addition to the control EM provides, the offenders are monitored by means of visits at home and at the workplace, and by telephone controls. Usually checks are conducted two to four times per week. In the course of these control visits, breath tests are conducted routinely, and urine samples are taken on occasion. In Sweden, six percent of the offenders were found to be in breach of their release conditions during the period of EM, primarily due to alcohol and drug use.<sup>71</sup>

In Finland, the program “probationary liberty under supervision” was designed especially for long-term prisoners who needed more support and more intensive program work.<sup>72</sup> Since its inception, the average prison term served by prisoners released on EM supervised probation has been around three years.<sup>73</sup> Also, technical supervision forms only one part of the program. Substantial elements in the process consist of supportive activities and program work. In most cases the offenders also have to visit prison regularly.<sup>74</sup> The daily average in enforcement is little over 200, and the mean length is around three and a half months. The failure rate, also known as conversion percentage, has remained at fifteen percent. The present number of offenders in EM-release corresponds around seven percent of the daily prison population in Finland.

### 3. EM as a Court-Ordered Sanction (Finland)

Unlike EM-enforcement—where the court sentences the offender to imprisonment and the prison administration, upon application by the offender, allows the offender to serve the sentence on EM—here EM is handed down as a sentence by the court in the first instance. EM as an independent sanction imposed by the courts is in use only in Finland (“monitoring sentence”), and was implemented beginning in 2011.<sup>75</sup> Monitoring sentences are designed for offenders who would not qualify for community service and are therefore at risk of being sentenced to prison.

The qualification criteria are defined in detail in law.<sup>76</sup> EM can only replace prison sentences under six months.<sup>77</sup> EM is subsidiary to community service. If the offender is suitable for community service, community service should be used as a first choice. Since the rules of community service require that it only be used as an alternative to a prison sentence,<sup>78</sup> EM can also only be used to replace a prison sentence.

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71. See BRÅ, *supra* note 59.

72. Tapio Lappi-Seppälä, *Prisoner Resettlement in Finland*, in PRISONER RESETTLEMENT IN EUROPE 2.6 (Frieder Dünkel et al. eds., 2019).

73. *Id.*

74. For further explanation, see Mäkipää, *supra* note 65.

75. See Lappi-Seppälä, *supra* note 6.

76. 401/2015 Finnish Penal Code 6:11a. For an English translation of Finnish criminal law, see THE MINISTRY OF JUSTICE, FINLAND, *The Criminal Code of Finland*, Ch. 6 § 11, <https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> [<https://perma.cc/PK4K-ZMPY>] (last visited Oct. 20, 2018).

77. *Id.*

78. See Part IV, *supra* at 26.



According to the law, previous “prison or monitoring sentences” may prevent the imposing of a monitoring sentence.<sup>79</sup> However, previous CSOs do not, as a rule, present an obstacle for EM. The law mentions also that the court needs to pay attention to “the nature of the offense.”<sup>80</sup> The law does not explicitly rule out any offense categories but makes a clear reservation that in cases where people living in the same household as the offender would be at risk—such as violence in close relationships or against children—this option is not useable. Also, arguments related to special-prevention are included. A monitoring sentence can be imposed if it could promote the offender’s social situation and prevent further offenses. The offender must be able to carry out the monitoring sentence without considerable risk that the EM sentence is converted into prison terms.<sup>81</sup>

Since one of the essential aims of the monitoring sentence is to promote the offender’s social situation and support his or her integration into society, the offender has an obligation to work or attend to other activity. Work or other activity usually vary between ten and forty hours per week. Activities are not, in principle, scheduled between 9:00 p.m. and 6:00 a.m. The working time and duration are established individually in each offender’s sentence plan.

In addition to EM, the probation officers conduct unannounced visits to the offender’s home to check the offender’s presence and abstinence from drugs. These visits are to be done discretely and without drawing unnecessary attention. In practice, meetings can also take place outside the offender’s house and without disturbing family members.

A breach of conditions during the monitoring phase may lead to the conversion of the EM sentence into imprisonment. However, the offender first receives a written warning or reprimand. In case of serious breaches—such as new crime or repeating the previous breaches—the Criminal Sanctions Agency may bring the matter to court, and the already-started enforcement is canceled or will not be started.

In 2015, the courts imposed around 250 monitoring sentences.<sup>82</sup> The average length of the sentence was approximately three months.<sup>83</sup> The enforcement was interrupted and the sentence was converted to imprisonment in around ten

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79. 401/2015 Finnish Penal Code 6:11a. For an English translation of Finnish criminal law, see THE MINISTRY OF JUSTICE, FINLAND, *The Criminal Code of Finland, Ch. 6 § 11*, <https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> [<https://perma.cc/6MSS-RPL6>] (last visited Oct. 20, 2018).

80. *Id.*

81. See 17/2010 Hallituksen esitys eduskunnalle valvontarangaistusta ja sähköistä valvontaa avolaitoksissa koskevaksi lainsäädännöksi [Government’s Proposal to Parliament For Legislation on Supervision and Electronic Control in Open Institutions] (Fin.), <https://www.finlex.fi/fi/esitykset/he/2010/20100017> [<https://perma.cc/Q8YM-3X75>]. Like in all forms of EM (see above), the sentence also requires that adults living in the same place consent to it. Offender must also have a dwelling suitable for the enforcement of monitoring sentence.

82. See Seuraamusjärjestelmä, *supra* note 22.

83. *Id.*

percent of cases.<sup>84</sup> The most common offense punishable by EM was drunk driving.<sup>85</sup>

### E. Statistical Overview

The use of EM can be measured both with court statistics and enforcement statistics. Basic figures from both sources from four countries in 2015 are displayed in the following table.

**Table 7:** Electronic monitoring 2015 in courts and in enforcement (absolute numbers and per 100,000 pop.)

	FIN	DEN	NOR	SWE
<b>A. Flow-statistics (entries)</b>				
Front-door	247	2813	2838	1827
Back-door	702	87	306	597
<b>All forms of EM</b>	972	2900	3144	2424
<b>Prisoners (admittals)</b>	3397	4824	6602	8581
<b>EM-% of prisoners</b>	28.6	60.1	47.6	28.2
<b>EM / pop</b>	17.6	50.9	60.5	24.5
<b>B. Stock-statistics</b>				
Front-door	48	389	251	235
Back-door	209	16	57	143
<b>All forms of EM</b>	257	405	308	378
<b>Prisoners</b>	2859	3579	3927	5664
<b>EM-% of prisoners</b>	8.9	11.3	7.8	6.7
<b>EM / pop</b>	4.7	7.1	5.9	3.8

The front-door version is used more extensively in Denmark, Norway, and Sweden, whereas back-door (EM-release) is used more actively in Finland. Denmark and Norway report ten times more front-door cases than Finland. The offenders and offenses represented vary between these two forms of EM, and also between countries. In Denmark, EM cases consist largely of first-time offenders or juveniles and young adults; whereas in Finland monitoring sentences are imposed only for offenders with prior records—either previous conditional sentences or CSOs.

Another possible explanation for the difference in numbers in front-door EM is that in the majority of Nordic countries the decision powers are given to the prison administration, whereas in Finland decisions are made by the courts. Based on the percentage of back-door cases in Finland, it seems that the decisions taken in prison administration can be guided much more effectively than court practices.

Compared to front-door cases, offenders in EM-release (back-door) cases have longer criminal histories and also longer sentences. In Finland, the average

84. *Id.*

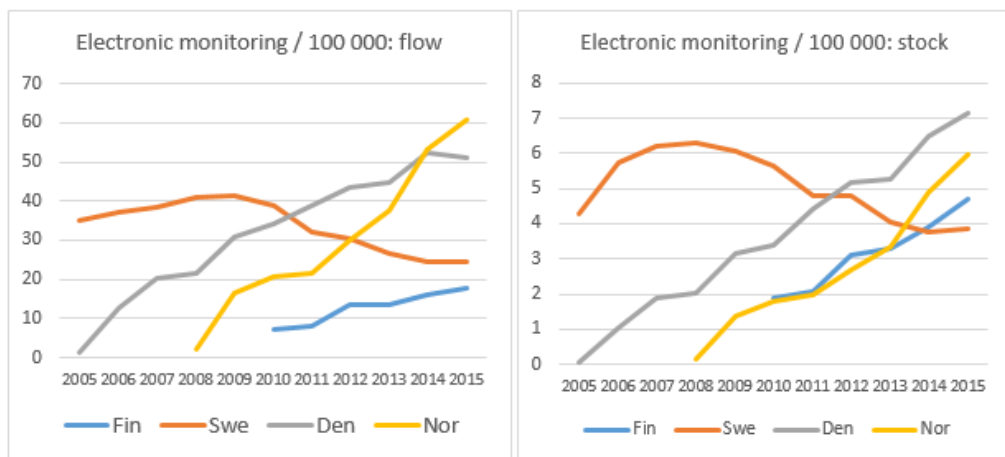
85. *Id.*

sentence for offenders released on EM has been around three years, whereas typical sentences in front-door EM range from one to three months. In all, it appears EM in Finland has targeted more problematic cases compared to the other Nordic countries.

Taking both front-door and back-door EM together, the annual number of offenders placed under EM corresponds to sixty percent of annually admitted prisoners in Denmark. The corresponding figure for Norway is forty-eight percent, twenty-nine percent for Finland, and twenty-eight percent for Sweden. However, since EM is mainly targeted at short-term prisoners, its impact on the daily prison populations is weaker. In Denmark, the number of offenders under EM in any given day represents eleven percent of the total prison population. For Finland the corresponding figure is nine percent, eight percent for Norway, and seven percent for Sweden.

The development in the overall implementation of EM (both flow and stock) over the last 10 years relative to population is displayed in figure below.

**Figure 4:** Offenders under EM (enforcement statistics) from 2005–2015: Flow and stock / 100,000 pop.



The three Nordic countries that have more recently adopted EM have steadily expanded its use. Counted relative to population, Norway and Denmark are in the lead, whereas the numbers have been in decline in Sweden.

## VI

### ESTIMATING THE EFFECTS

#### A. Effects on the Use of Custody

The adoption and development of community sanctions as alternatives to custody emerged in three phases. The first phase has a long history, going back over a century and to the birth of the conditional and the suspended sentence.

The conditional sentence played a prominent role as a substitute to imprisonment especially in Finland during the 1970s and 1980s. Following the rapid increase of property crime and drunk driving, the number of conditional sentences increased from around 5000 to 16,000, while unconditional prison sentences remained constant on an annual basis of around 10,000.<sup>86</sup> The increase of these middle-rank offenses that were previously largely punished by unconditional prison sentences was absorbed by a widened application of fines and conditional sentences.

While conditional sentencing grew in popularity, it was not without critics. The main problem with conditional imprisonment is in its public image as a soft option. Efforts to expand the use of the conditional sentence as a replacement for imprisonment have, therefore, often been accompanied by the introduction of different enhancements, such as fines, extra conditions, community service, or short prison sentences. Another type of criticism stresses the severity difference between conditional and unconditional prison sentences, which calls for the creation of middle-range alternatives between these two. Thus, in the second phase of the development of community sanctions, community service came to serve this aim, both as an independent sanction, as well as an attachment to a conditional sentence.

After a low-profile initial phase in the 1980s, community service occupied a substantial role as an alternative to custody first in Finland during the early 1990s. From 1991 through 1995, the number of prison sentences fell from around 11,000 to 6000, and the number of CSOs increased from zero to 4000.<sup>87</sup> Shortly after, the application of community service increased in Sweden from around 500 cases in 1998 to 3000 in 1999, and the number of imposed prison sentences fell from 14,500 to 12,500.<sup>88</sup> In Denmark, imposed CSOs increased from 850 in 1998 to 3500 in 2001, while the number of imposed prison sentences fell from 14,000 to 10,000.<sup>89</sup> However, the increase in the use of community service, newly defined as “Community Punishment,” in Norway from 750 in 2002 first to 1600 in 2003 and then to 2800 in 2006, was accompanied by a slight increase in the number of imposed prison sentences from 9500 to 11,000.<sup>90</sup>

The third phase of alternatives to incarceration took place during the 2000s in the form of EM. Experimentation with the back-door version started in Sweden in the mid-1990s, but it took ten years before the other Nordic countries agreed to introduce this technology in sanction and enforcement structures. However, once introduced in the other Nordic countries, the implementation of both front-door and back-door versions expanded rapidly. Today, the number of offenders entering EM is between thirty to sixty percent of the number of

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86. See Tapio Lappi-Seppälä, *supra* note 18.

87. See Figure 3, *supra* at 32.

88. *Id.*

89. *Id.* This drop was also influenced by the abolishment of short-term arrest-type of prison sentence (Haefte) at the same time.

90. Figure 3, *supra* at 32.

prisoners admitted annually to prisons.<sup>91</sup> This means that, both in Denmark and Norway, almost 3000 offenders are saved from starting a prison sentence; in Sweden, the corresponding figure is a little below 2000; and in Finland, which applies court-based EM-sentence instead of enforcement based EM-enforcement, the figure is a little below 300.<sup>92</sup> However, when it comes to the daily number of prisoners serving their sentence (stock-statistics), these effects are much smaller, since EM-enforcement mostly concentrates on short sentences primarily for drunk driving offenses. Without EM, the daily prison population in the Nordic countries would exceed their present levels on average by around ten percent.<sup>93</sup>

The added impact of community service and EM on prison use may be roughly estimated by placing the figures in the same table. Due to difficulties in counting the stock-based data with community service, only flow-based figures are reported.

**Table 8:** Entries in correctional services (2016 or latest, absolute numbers)

Entries to the correctional services (flow)	FIN	DEN	NOR	SWE
Community service	2329	4421	1914	4960
All forms of EM	972	2900	3144	2424
Prisoners (admittals)	3397	4824	6602	8581

It is evident—even taking into account possible net-widening effects of community service in Norway, and probably also in Denmark and Sweden—that both new alternatives have substantially decreased the number of offenders that would have otherwise entered the prison system. In the case of EM, flow-entries can, in fact, be directly converted into avoided prison sentences. Of course, the possibility remains that the option for the enforcement under EM has lowered the threshold of imprisonment and that, without this option, part of today's prison sentences would have directly turned into community service or conditional sentences. This hypothesis, however, has not yet been tested.

## B. Effects on Recidivism

Reoffending studies began in the Nordic countries in the 1960s. A quasi-experimental study from 1966 based on matched comparisons between prison, conditional sentence, and fines showed highest reconviction rates after imprisonment in all risk-groups.<sup>94</sup> The same result was confirmed in the mid-1970s.<sup>95</sup> Subsequent studies focused on community service. A Finnish study was

91. Table 7, *supra* at 42.

92. *Id.*

93. *Id.*

94. BENGT BÖRJESON, OM STRAFFENS VERKNINGAR [ABOUT THE EFFECTS OF PUNISHMENT] (1967).

95. ULLA BONDESON, KRIMINALVÅRD I FRIHET. INTENTION OCH VERKLIGHET [CRIMINAL JUSTICE IN FREEDOM. INTENT AND REALITY] (1977).

able to benefit from a natural experiment, as community service was first tested only in part of the country in selected courts. A quasi-experimental design compared two matched groups of offenders: one group of offenders was sentenced to community service in the part of the country where community service was in use on experimental basis. They were matched to the other group of offenders with similar backgrounds, who were convicted for similar offenses in a part of the country without a community service sanction. The study revealed a consistent pattern showing that the community service group had around ten to fifteen percent fewer reconvictions throughout different follow-up periods.<sup>96</sup>

Most recent data regarding recidivism comes from a Danish study.<sup>97</sup> The study was able to benefit from the fact that only about half of the offenders that have been found eligible to community service by the Danish probation service were actually sentenced to community service between 2005 and 2006.<sup>98</sup> This provided the possibility to compare reoffending among those sentenced to community service and those deemed to be eligible for community service, but still sentenced to prison. This setting substantially reduces the usual selection problems in these types of studies. In addition, the researches had a large sample size (n=1602), with rich data about individual background factors including prior offending, alcohol abuse, drug abuse, mental health, physical health, employment, education, family type, marital status, housing situation, immigration/emigration, and geography.<sup>99</sup> Results showed significant differences in reoffending rates. Of those sentenced to a CSO, fifty percent were reconvicted during a follow-up period of three years while the corresponding figure in the prison group was fifty-eight percent, thus indicating a reduction of fourteen.<sup>100</sup> This result corresponds closely with those from the Finnish study.

The effects of EM on reconviction rates have been analyzed in Sweden, Denmark, and Norway. Research from the Swedish Crime Prevention Council measured recidivism with the help of a control group of 260 prisoners. The groups were matched in terms of criminal record and the estimated risk for reoffending. Five different factors of recidivism were analyzed: any subsequent conviction, any subsequent prison sentence, the number of subsequent convictions, the number of offenses included in subsequent convictions, and the time-lapse between release and reconviction. Reoffending rates were systematically lower in the EM-group, although the results varied somewhat according to the age and risk-group.<sup>101</sup> A Danish study based on matched comparisons showed fifteen percent lower recidivism rates in the EM group than in the control group within a two-year follow-up period, and twenty-four percent lower recidivism rates in

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96. See Muiluvuori, *supra* note 40.

97. Christian Klement, *Comparing the Effects of Community Service and Imprisonment on Reconviction: Results From a Quasi-Experimental Danish Study*, 11 J. EXPERIMENTAL CRIMINOLOGY 237 (2015).

98. See *id.* at 239.

99. *Id.* at 238.

100. See *id.* at 249.

101. See BROTTSFÖREBYGGANDE RÅDET (BRÅ), *supra* note 55.

serious crimes.<sup>102</sup> Matched comparison in Norwegian samples recorded reoffending rates in EM groups between approximately six to twelve percent and five to fifteen percent in the control group, depending on the type of EM (release or sentence) and the year of the sample which gives in average difference of two to three percent, and an approximately twenty-five percent lower reconviction rate in the EM group.<sup>103</sup>

### C. Economic Consequences

As a corrective measure, both community service and EM are considerably cheaper than prison. A price tag for one day in a Finnish closed prison is around 200 euros and in an open prison around 115 euros. EM-release costs around 54 euros per day, less than half of the cost of one day in open prison and around one quarter of the cost of one day in a closed unit. A Norwegian cost-benefit analysis with qualitative and quantitative indicators provides strong results in favor of EM over imprisonment. Using only quantitative indicators, total saved costs per each EM-client, as compared to one prisoner in open prison, were 73,000 Norwegian Krone (7500 euros) for the EM-sentence and 103,000 Norwegian Krone (10,500 euros) for EM-release.<sup>104</sup>

However, in considering economic consequences, one should also take into account also the price of social consequences. For example, how much does the loss of educational potential cost to the society, what is the value lost in labor-input, lost tax income, and what is the price of increased crime through higher reoffending? And should we not also give a price-tag for the sufferings and personal losses of those sentenced to imprisonment after all?

### D. Social Effects

The importance of social and human costs (“non-reconviction benefits”) have long been acknowledged but only recently been taken seriously in empirical analyses in measuring the possible beneficial effects of community alternatives. These include positive contact to work-life and resulting enhancement of the offender’s economic situation, better self-control over substance abuse, better preservation of family ties, better prospects in education and general well-being, and so forth.

These dimensions have been the target of recent Danish studies, conducted by the Rockwool foundation. Andersen & Andersen (2014) and Andersen (2015)

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102. See TANJA TAMBOUR JØRGENSEN, AFSONING I HJEMMET. EN EFFEKTEVALUERING AF FODLÆNKEORDNINGEN [IMPRISONMENT AT HOME. AN EVALUATION OF THE TAGGING SCHEME] (Justitsministeriets Forskningskontor 2011), [http://www.justitsministeriet.dk/sites/default/files/media/Arbejdsomraader/Forskning/Forskningsrapporter/2011/Afsoning\\_i\\_hjemmet\\_En\\_effektevaluering\\_af\\_fodlaenkeordningen.pdf](http://www.justitsministeriet.dk/sites/default/files/media/Arbejdsomraader/Forskning/Forskningsrapporter/2011/Afsoning_i_hjemmet_En_effektevaluering_af_fodlaenkeordningen.pdf) [<https://perma.cc/Q2MH-V4QB>].

103. See RASMUSSEN ET AL., *supra* note 53, at 42–44, 64–65.

104. See *id.* at 11–12. Effects were measured in terms of reoffending, effects on third parties (family-members), victims, and on the general sense of justice. Other effects included participation in the labor-market, schooling and education, impact on the overall use of imprisonment, and the experiences of the offenders themselves.

examine the effects of EM on post-release social welfare dependency and compare it to enforcement in prisons.<sup>105</sup> The study compares a Danish EM-enforcement sample sentenced between April 2006 and July 2008, when EM was taken into use in Denmark, to a historical control group.<sup>106</sup> The latter consisted of offenders that were sentenced before the law reform from 2003 to April 2006 and who would have served their sentences under EM, had that option been available at that time.<sup>107</sup> This setup makes it possible to compare groups that are quite similar, if not identical, in observed and unobserved characteristics. Results show that serving a sentence under EM decreases the dependency rates by up to seven percent or more within a year after release.<sup>108</sup>

Another Danish study, based on the same setup, measured the causal effects of EM to family situations and young offenders' educational outcomes.<sup>109</sup> The analysis shows that, compared to imprisonment, the Danish EM-program increases the completion rates of upper-secondary education significantly, by eighteen percent, among program participants three years post-release.<sup>110</sup> In all, fifty-three percent of offenders that served their sentence under EM instead of prison were able to accomplish their secondary level education in three years, whereas the corresponding figure in the control (prison) group was forty-two percent.<sup>111</sup> Also divorce rates were lower in the EM-groups, a factor closely related to reoffending risk.

#### E. Overall Effects on Crime

Public discussions regarding the expansion of community alternatives often boil down to the question of how such a change would affect crime in general. The greatest challenge to expanding the implementation of these alternatives is overcoming the public belief—actual or assumed—that these options are too soft compared to incarceration and cannot provide the necessary protection against crime. Another claim is that community alternatives do not act as punishments severe enough to meet the demands of “just deserts.” The confines of this article allow commentary on only the first claim.

There exists a vast literature about general preventive effects of punishment; most of it is concentrated on capital punishment, but some is also focused on imprisonment. In both cases, the context of analysis is usually the United States. Experiences of penal changes in one culture, such as the United States, that go beyond the imaginable scales in other cultures, such as the Nordic countries, are

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105. See Lars H. Andersen & Signe H. Andersen, *Effect of Electronic Monitoring on Social Welfare Dependence*, 13 CRIMINOLOGY & PUB. POL'Y 349, 349–79 (2014).

106. See *id.* at 360.

107. See *id.* at 359.

108. *Id.* at 368.

109. See Britt Østergaard Larsen, *Educational Outcomes After Serving with Electronic Monitoring: Results from a Natural Experiment*, 33 J. QUANTITATIVE CRIMINOLOGY 157, 157–78 (2017).

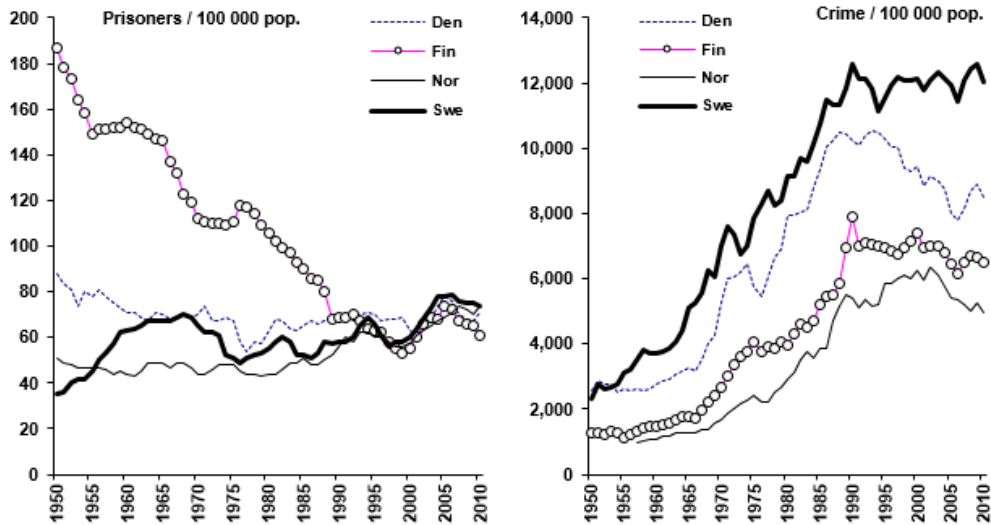
110. *Id.* at 172.

111. *Id.* at 169.



hard to transfer.<sup>112</sup> Nordic countries may provide an example of countries with both a history of harsh penal policy, such as Finland, and countries with a lengthy period of stable and moderate penal policies. Still, these countries share strong social and structural similarities. As such they form a natural experiment to test experiences how a decrease in the use of imprisonment in one country, Finland, is reflected in the crime rates, when compared to countries which have kept their penal system more or less stable. Figure 4 provides information on prisoner rates and reported crime in Finland, Sweden, Denmark, and Norway from 1950 through 2000.

**Figure 5:** Prison rates and crime rates 1950 through 2010<sup>113</sup>



A simple comparison between the Nordic countries reveals a striking difference in the use of imprisonment, as well as a striking similarity in the trends in recorded criminality. Between 1960 and 1990, crime was increasing, consistent with the trend in all developed industrialized countries. This can be attributed to the socio-economic development and to the changed crime opportunity structures. But this symmetry was not disturbed by opposite trends in the use of imprisonment in Finland, compared to the other Nordic countries.

112. For discussion in the United States, see Shawn D. Bushway & Raymond Paternoster, *The Impact of Prison on Crime*, in *DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM* 119–50 (Steven Raphael & Michael A. Stoll eds., 2009). For an overview of research on deterrence and general prevention, see Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, in *23 CRIME AND JUSTICE, A REVIEW OF RESEARCH* 1, 1–42 (Michael Tonry ed., 1998), <https://www.jstor.org/stable/pdf/1147539.pdf?refreqid=excelsior%3A029b1a410e8dda7e02310d77f8909d94> [<https://perma.cc/8PYJ-NB43>].

113. Data are compiled from HANNS VON HOFER, TAPIO LAPPI-SEPPÄLÄ & LARS WESTFELT, *NORDIC CRIMINAL STATISTICS 1950–2010*, Stockholms Universitet, Kriminologiska institutionen (2012).

The figures support the general criminological conclusion—relevant also to the discussion about the scope and limits of alternative sanctions as substitutes to imprisonment—that crime rates rise and fall according to their own laws and dynamics, and sentencing policies in turn develop and change according to dynamics of their own. These two systems are fairly independent of one another. The grand-scale factors explaining the level of criminality override any effects that might be obtainable by use of criminal sanctions. As for Finland, this means that it was possible to decrease the use of imprisonment into one third without disturbing the symmetry of Nordic crime trends. There is no reason to believe that things would be very different in other contexts.<sup>114</sup>

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114. For comparisons crime and incarceration rates in other jurisdictions, including the United States, see Tapio Lappi-Seppälä, *American Exceptionalism in Cross-Comparative Perspective: Explaining Trends and Variation in the Use of Incarceration*, in *AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT* 195–271 (Kevin R. Reitz ed., 2017).