

SUSPENDED SENTENCES AND FREE-STANDING PROBATION ORDERS IN U.S. GUIDELINES SYSTEMS:

A SURVEY AND ASSESSMENT

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I INTRODUCTION

Sentences to probation and other community-based sentences require backup sanctions to encourage compliance with the conditions of probation and respond to violations of those conditions. The most severe backup sanction in felony cases in the United States is revocation of release and commitment to prison. But such revocations have been a major contributor to mass incarceration;¹ moreover, such revocations can result in offenders whose crimes do not justify a prison sentence being sent to prison—the problem of “net-widening.”²

Legal systems have taken a variety of approaches in structuring backup sanctions for probation violations, particularly custodial sanctions. This article surveys and critiques two kinds of suspended prison sentences frequently used as backup sanctions in U.S. state and federal guidelines systems, and a third option that employs more limited custodial backup sanctions.

When a court employs the first type of suspended sentence—a suspended-execution prison sentence (SEPS)—it first imposes a specified prison term and then suspends some or all of that term and places the offender on probation with specified conditions. If the offender violates those conditions, the court has the option of executing the suspended prison term, usually with minimal hearing or other procedural requirements. In some systems, the court may also choose to execute only part of the suspended prison term.

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1. See, e.g., Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1019–21 (2013).

2. See Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL’Y 51, 52 (2013). A broader definition of net widening than the one suggested in text would include not just offenders diverted *into* prison via suspended sentence followed by revocation but also cases where a suspended sentence replaces, *without revocation*, a less onerous non-prison disposition such as a fine. See, e.g., Oren Gazal-Ayal & Nevine Emmanuel, *Suspended Failure of Alternatives to Imprisonment*, 82 LAW & CONTEMP. PROBS. no. 1, 2019 at 111. However, net-widening of the latter type is not a bad thing if the new intermediate option fills a need for a sanction in between fining and custody, provided that few such offenders end up in prison due to breach and revocation.

By contrast, the second type of suspended sentence—suspended imposition of sentence (SIS)—involves a form of deferred sentencing: the court places the offender on probation without making any decision about what specific prison term should be imposed for the crime or crimes for which the offender has just been convicted. In the event that the conditions of probation are violated, the court holds a formal sentencing hearing, with all of the procedural requirements of such a hearing, and may then impose any sentence that could have been imposed when the SIS was first pronounced.

Under the third option noted above, local jail terms are used to sanction probation violations. This takes two forms. In the first, although probation is combined with a suspended-execution or suspended-imposition sentence that could be revoked, courts are encouraged to use jail terms to sanction probation violations. In the second, probation is imposed as a free-standing sentence with only non-prison custodial backup sanctions, rather than as a condition of a SEPS or SIS sentence. Under this approach the option of commitment to prison is off the table once the court places the offender on probation.³

Each of the options above has advantages and disadvantages, which will be explored in Part III of this article. Part II provides a survey of the varying ways in which one or more of the options has been used in the nineteen U.S. guidelines systems that are currently in operation.

Given the wide variety of issues addressed in this symposium, from legal systems in many countries, it is important to clarify the limited scope of this article. First, the article assumes a U.S. perspective and focuses on suspended or deferred prison sentences, not the shorter custodial terms that would usually be served in a local—city- or county-run—jail or workhouse.⁴ It focuses on prison sentences because they raise the most salient and important custody-sentence issue in the U.S. context. Reflecting the greater severity of U.S. sentencing compared to other developed countries, and perhaps the more frequent use of pretrial detention, there does not seem to be widespread concern about the overuse of jail sentences in the United States—although there should be.

3. As reported in the other articles in this issue, one or both of the suspended-sentence options described in text appear to be widely used in jurisdictions outside of the United States, including all of the Scandinavian countries, many other continental European countries, England and Wales, Israel, and Canada. However, unlike some foreign systems that impose suspended sentences unaccompanied by probationary supervision, it appears that in U.S. guidelines systems suspended sentences for felony-level crimes are almost always combined with probation. The third option described in text is less widely used outside of the United States, but Finland applies an analogous rule: custodial sanctions are not authorized for violations of release conditions that do not involve a new criminal offense. See Tappio Lappi-Seppälä, *Community Sanctions as Substitutes to Imprisonment in the Nordic Countries*, 82 LAW & CONTEMP. PROBS. no. 1, 2019 at 17.

4. The article does not address suspended fines. It likewise disregards most forms of pre-conviction conditional dismissal that impose probation-like conditions enforced with the threat of resumed prosecution (making them somewhat analogous to suspended imposition of sentence). Such informal “sentencing” options are not a part of any existing guidelines system; however, they are endorsed and regulated under the revised Model Penal Code. See MODEL PENAL CODE: SENTENCING §§ 6.02 A–B (AM. LAW INST. 2017).

Decisions to impose and execute a prison sentence are treated more seriously, given the greater severity and disruptiveness of that sanction: prison terms usually have a maximum duration longer than one year and are served in a state-run facility that is often geographically remote from the offender's home community. The focus on prison sentences also means that this article examines only sentencing of felony-level crimes—in almost all U.S. jurisdictions, misdemeanor offenses are punishable with no more than one year of custody, to be served in a local jail or workhouse. The exclusion of misdemeanor sentences is also consistent with the article's focus, explained below, on U.S. sentencing under guidelines, most of which only apply to felonies.⁵

Second, the article examines backup custodial sanctions only in guidelines systems, even though each of the three options described above (and certainly the first two) can be found in many states without guidelines. It focuses on guidelines sentencing for three reasons: First, the actual impacts of different backup-sanction rules are easier to see in a guidelines system because, compared to non-guidelines sentencing, there is usually less of a gap between formal law and actual practice and more available data on sentences imposed. Second, guidelines can and do include sentencing rules that lessen the disadvantages of one or more of the three backup-sanction options—and do so in ways that are more predictable and effective than they would be in a non-guidelines system. Third, I am more familiar with these issues under guidelines sentencing, given my long-standing interest in this sentencing structure, and the detailed information the University of Minnesota has collected on these systems as part of our Sentencing Guidelines Resource Center.⁶

A final preliminary comment also relates to the U.S. context and guidelines focus of this article: unlike in other nations, whose experiments with increased or decreased use of various kinds of suspended sentences are described in several articles in this issue, the use of suspended sentences appears to be a long-standing practice in U.S. guidelines jurisdictions, and one that showed little change when guidelines were adopted.⁷ Moreover, the frequency of probation and other non-custodial sentences has remained fairly constant in U.S. state jurisdictions in

5. When examining sentencing in the United States, another reason to focus solely on felony-level crimes is that there is no nationwide data on misdemeanor sentencing—the only sentencing data for the United States as a whole is limited to felonies. *See, e.g.,* SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006–STATISTICAL TABLES (Dec. 2009), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=2152> [<https://perma.cc/2MDV-J8CV>].

6. The website of the Robina Institute's Sentencing Guidelines Resource Center contains guidelines and other primary documents, detailed profiles and other background information for each system, and a growing collection of multi-jurisdictional overviews addressing various dimensions of guidelines sentencing and guidelines commissions. Univ. of Minn., Robina Inst. of Criminal Law & Criminal Justice, SENTENCING GUIDELINES RESOURCE CENTER, <https://sentencing.umn.edu/> [<https://perma.cc/77HQ-YEDE>] (last visited Sept. 5, 2018).

7. Washington State is the only U.S. guidelines jurisdiction that sought to make major changes in the use of suspended sentences. *See infra*, text accompanying notes 26–27.

recent decades.⁸ Thus, notwithstanding increased levels of overall sentence severity as reflected in steadily rising prison populations and incarceration rates, it appears that U.S. policymakers continue to believe in community-based programs and continue to support the rehabilitation and reintegration goals of suspended sentences and probation.

II

HOW SUSPENDED SENTENCES AND NON-PRISON BACKUP SANCTIONS ARE USED UNDER GUIDELINES

The survey below begins with some further details about U.S. jurisdictions—what counts as a guidelines system, and which jurisdictions have such a system.

A. Where, When, and What Kinds of Guidelines

For purposes of this article, a sentencing guidelines system is one with the following characteristics:

1. Judges are given a set of recommended sentences for most crimes, or at least most felonies;
2. The recommended sentences are deemed to be appropriate in typical cases, that is, cases not presenting aggravating or mitigating factors that might justify departure from the recommendation;
3. Such recommended sentences are developed by a legislatively created sentencing guidelines commission, regardless of whether the rules are embodied in statutes and even if the commission ceased to exist at some point after the guidelines went into effect.

This definition thus excludes legislatively drafted presumptive sentences like those that California and several other states adopted in the mid-to-late 1970s, without input from a sentencing commission.⁹ The existence of a commission,

8. The estimated proportion of sentenced felons receiving probation or other non-custodial sanctions in state courts was 31 percent in both 1986 and 2006 (national sentencing data is not available for earlier or later years, and no separate estimates are provided for guidelines states). Biennial reports between 1986 and 2006 show probation rates that varied between 29 and 32 percent. See PATRICK A. LANGAN, PH.D. & JOHN M. DAWSON, BUREAU OF JUSTICE STATISTICS, PROFILE OF FELONS CONVICTED IN STATE COURTS, 1986 (Jan. 1990), <https://www.bjs.gov/content/pub/pdf/pfcsc86.pdf> [<https://perma.cc/7C8C-X3GS>]; ROSENMERKEL ET AL., *supra* note 5; *Data Collection: National Judicial Reporting Program*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=241> [<https://perma.cc/7WPC-S48N>] (collecting biennial reports on felony sentencing, 1986 2006) (last visited Nov. 4, 2018). In federal courts, however, the proportion of cases receiving non-custodial sanctions fell after the guidelines went into effect and was less than 8 percent in 2006. 2006 *Sourcebook of Federal Sentencing Statistics*, fig. D, U.S. SENTENCING COMM'N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2006/FigD_0.pdf [<https://perma.cc/J4LX-2984>] (last visited Sept. 6, 2018).

9. Florida represents a borderline case because its commission-drafted guidelines were replaced in 1998 with statutory presumptive minimum sentences; it is included in the survey because its current punishment code carries over elements of the former commission-drafted guidelines system. See Pamala L. Grisct, *Criminal Sentencing in Florida: Determinate Sentencing's Hollow Shell*, 45 CRIME & DELINQ. 316 (1999). Massachusetts is another borderline case; it is included because, even though the state's initial and revised commission-drafted guidelines have not received legislative approval, it appears that judges

especially one that remains in existence after the guidelines are implemented, is important when examining any issue of sentencing policy, including the different ways to structure backup sanctions for community-based sentences. Such a body can, and most commissions do, collect and analyze data on sentences imposed under the guidelines, on revocations or other sanctions for violations of the conditions of community sanctions, and on the ways in which sentencing and revocation decisions translate into higher or lower prison populations.

The nineteen state and federal jurisdictions that currently have sentencing guidelines meeting the above definition are shown in Table 1. They are listed in order of the initial effective dates of their commission-drafted guidelines, alongside the years of operation of that jurisdiction's guidelines commission. Besides the variations in their approaches to structuring community-based sanctions, discussed below in Subpart B, these nineteen systems also vary considerably in many other ways, including the degree to which recommended sentences are legally binding or only advisory; whether parole release discretion was retained or mostly abolished; and the manner in which prior record enhancements are used.¹⁰ But except as noted below, it does not seem that such variations undercut the comparability of the suspended-sentence and free-standing backup sanctions discussed below.

generally follow the commission's recommended sentences (so, in effect, the commission's proposals are functioning like advisory guidelines). See MASS. SENTENCING COMM'N, SURVEY OF SENTENCING PRACTICES FY 2013 (2014), <https://www.mass.gov/lists/surveys-of-massachusetts-sentencing-practices> [<https://perma.cc/L9Z7-MP4T>]. Some researchers have classified Alaska as a "guidelines" system. See, e.g., NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 8 (July 2008), https://www.ncsc.org/~media/microsites/files/csi/state_sentencing_guidelines.ashx [<https://perma.cc/X6X2-XZ4F>]. However, that state is excluded because its statutory presumptive sentences were not developed by a commission (although they were later endorsed by a short-lived sentencing commission); rather, they were drafted by the legislature and supplemented with appellate case law adding additional presumptive sentences. See Teresa W. Carnes, *Sentencing Reform in Alaska*, 6 FED. SENT'G REP. 134 (1993).

10. For reviews of U.S. guidelines systems as of 2004, 2012, and 2018, respectively, see Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005); RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM (2012) [hereinafter FRASE, JUST SENTENCING]; and Richard S. Frase, *40 Years of American Sentencing Guidelines: What Have We Learned?*, in 48 CRIME AND JUSTICE: A REVIEW OF RESEARCH (Michael Tonry ed.) (forthcoming 2019). Prior record enhancements in U.S. guidelines systems are the subject of another Robina Institute project; for further details, visit Univ. of Minn., Robina Inst. of Criminal Law & Criminal Justice, *Criminal History Enhancements*, <http://robinainstitute.umn.edu/areas-expertise/criminal-history-enhancements> [<https://perma.cc/ZA85-GP5D>] (last visited Sept. 6, 2018).

Table 1: U.S. Sentencing Guidelines Systems, as of June 2018¹¹

Jurisdiction	Guidelines Commissions — years in operation	Years when each commission's guidelines first went into effect
Minnesota	1978–	1980
Pennsylvania	1978–	1982
Maryland	1996–	1983
Florida	1982–1997	1983
Washington	1981–	1984
Delaware	1984–	1987
Federal courts	1984–	1987
Oregon	1985–	1989
Tennessee	1986–1995	1989
Kansas	1989–	1993
Arkansas	1993–	1994
No. Carolina	1990–	1994
Virginia	1994–	1995
Massachusetts	1994–	1996
Ohio	1990–	1996
Utah	1983–	1998
Michigan	1994–2002, 2015–	1999
Washington, D.C.	1998–	2004
Alabama	2006–	2006

B. Which Systems Use Each Approach to Structuring and Enforcing Probation Conditions?

As shown in Table 2, U.S. guidelines systems use a variety of custodial backup sanctions, alone or in combination, to enforce conditions of probation and other community-based sentences.¹² Suspended-execution prison sentences (SEPS) are

11. Univ. of Minn., Robina Inst. of Criminal Law & Criminal Justice, *supra* note 6.

12. The categorization shown in Table 2 disregards custodial backup sanctions that are only available for limited types of cases. In addition to cited works, other sources for this summary include the Univ. of Minn., Robina Inst. of Criminal Law & Criminal Justice, *supra* note 6, and descriptions of probation rules in ten guidelines systems that were compiled by another Robina project. ROBINA INST. OF CRIMINAL LAW & CRIMINAL JUSTICE, PROFILES IN PROBATION REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN 21 STATES (Kelly Lyn Mitchell & Kevin R. Reitz eds., 2014), <http://robinainstitute.umn.edu/publications/profiles-probation-revocation-examining-legal-framework-21-states> [<https://perma.cc/7F5S-QDGB>]. [hereinafter ROBINA INST. 2014]. Those ten states are:

available for all cases in twelve of the nineteen guidelines systems; SEPS is the sole option in five systems and one of several options in seven systems. Suspended-imposition sentences (SIS) are available for all cases in eleven of the systems; SIS is the sole option in four systems and one of several options in seven systems. The third alternative, using jail (or occasionally, short prison terms) as backup sanctions, is authorized in five systems, two of which rely on jail terms as the sole custodial backup sanction for most cases.

Table 2: Available Custodial Backup Sanctions [CBS] For Violations of Probation Conditions, In U.S. Sentencing Guidelines Systems¹³

Suspended-execution Prison Sentence [SEPS] only	Alabama District of Columbia Kansas Maryland Tennessee
Suspended-imposition of Sentence [SIS] only	Arkansas Florida Michigan Pennsylvania
SEPS and SIS are both available in most cases	Delaware Massachusetts Minnesota Ohio Virginia
SEPS and/or SIS available, non-prison CBS encouraged*	Federal courts (SIS) North Carolina (SEPS) Utah (SEPS and SIS)
Only non-prison CBS are available in most cases*	Oregon Washington

* See text for further details on these systems.

The two suspended-sentence options each operate in a fairly similar manner in the indicated jurisdictions, as described at the outset of this article. At the time of the initial sentencing under SEPS or the deferred sentencing under SIS, judges either elect a specific sentence from within the range of prison terms authorized for that offender's conviction offense and prior record or impose a longer or shorter term based on a finding of aggravating or mitigating offense

Alabama, Florida, Massachusetts, Minnesota, North Carolina, Ohio, Oregon, Pennsylvania, Utah, and Washington. Tennessee is not profiled in either of the Robina sources cited above; that state's backup-sanction rules are found in TENN. CODE ANN. § 40-35-303(C)(1) (2018).

13. Univ. of Minn., Robina Inst. of Criminal Law & Criminal Justice, *supra* note 6.

circumstances. When a SEPS or SIS sentence is used to sanction violations of release conditions, some systems allow judges to execute part of the prison sentence while suspending or continuing to suspend the remainder; other systems require the judge to execute the entire prison term.

Greater variation is found among the five systems using more limited custodial backup sanctions. For most offenders in Oregon and Washington, probation is a truly free-standing penalty, not a condition of a suspended sentence, and jail commitment is the only authorized custodial backup sanction for violation of release conditions—prison is off the table. By contrast, the federal courts, North Carolina, and Utah combine probation with a suspended sentence which could be revoked, but courts are encouraged—and sometimes required—to use shorter custodial backup sanctions.¹⁴

Here is some further detail on each of these five systems and on the corresponding provisions of the revised Model Penal Code:

1. Federal Courts

This guidelines system combines limited custodial backup sanctions with suspended imposition sentences. The Guidelines Manual¹⁵ regulates sanctioning of probation violations in three ways. First, it defines three grades of violation seriousness: violations that are criminal offenses are ranked according to the authorized maximum penalty for that offense, and the lowest grade also includes non-criminal violations. Second, the Manual specifies which kinds of violations merit revocation of probation. Third, it provides, for each violation grade, ranges of recommended custodial terms and permissible substitutions of home or other residential detention that courts may impose as sanctions for probation violations. These custodial terms are often shorter than the applicable recommended sentence range for the conviction offense. However, unlike all state guidelines that include limited custodial backup sanctions, many of the federal ranges are partly or entirely above one year in length, the traditional minimum prison duration.

Moreover, all of the federal guidelines provisions summarized above are “policy statements,” not formal “guidelines,” and judges were not required to follow them even when the formal guidelines were legally binding—that is, before *Booker v. United States*¹⁶ rendered the guidelines advisory. Furthermore, federal sentencing statutes provide that, when probation is revoked, the judge is permitted to impose any sentence that would have been authorized by statutes and guidelines for the conviction offense.¹⁷ This means that, functionally, all

14. These five systems also differ in another respect: three of the systems (North Carolina, Oregon, and Washington) have legally binding guidelines enforced with appellate review; in the other two systems (Utah and the federal courts), guidelines rules and policy statements are advisory, with little or no substantive appellate review.

15. U.S. SENTENCING GUIDELINES MANUAL §§ 7B1.1–1.4. (U.S. SENTENCING COMM’N 2016).

16. *Booker v. United States*, 543 U.S. 220 (2005).

17. 18 U.S.C. § 3565 (2012).

federal probation sentences represent deferred (SIS) sentencing—prison is never completely off the table.

2. North Carolina

Like the federal system, North Carolina combines limited custodial backup sanctions with the possibility of revoking a suspended sentence, but the latter is always SEPS—judges must impose a prison term in all felony cases but may then suspend its execution.¹⁸ Since 2011, revocation to prison has not been allowed for the first two technical violations of felony probation conditions (violations other than absconding or the commission of a new offense); instead, courts may impose a jail term of up to 90 days per violation.¹⁹ And since 2012, probation officers have had authority to sanction release violations with a “quick dip” jail term of two or three days—up to six days per month in each of three months. These quick dip sanctions can be imposed without a court hearing if the offender consents, which they almost always do; the use of this option grew almost ten-fold from 2013 to 2017.²⁰

3. Utah

Like the two systems described above, Utah combines free-standing, non-prison backup sanctions with the possibility of revoking a suspended sentence which, as in North Carolina, is always SEPS.²¹ The Utah guidelines²² recommend a series of graduated sanctions for probation violations, beginning with non-custodial sanctions and then moving to increasingly severe custodial options. Probation officers may, with written court or probation agency approval, impose up to five jail days in a 30-day period, with one to three jail days per sanction.

When the court holds a full hearing, the following recommended and maximum jail sanctions apply: for an offender’s first release-revocation within a probation sentence, 15 jail days (30 day maximum) may be imposed; for the second release-revocation within the same probation sentence, 30 jail days (60 days maximum) may be imposed; and for the third and subsequent release-revocations, 45 jail days (90 days maximum). The court may revoke probation and execute the suspended prison term if it finds that the offender’s conduct on probation “presents a substantial threat to public safety which cannot be addressed through behavior modification sanctions,” as illustrated by the

18. N.C. GEN. STAT. § 15A-1342(c) (2018).

19. N.C. GEN. STAT. § 15A-1344 (2018).

20. N.C. SENTENCING & POLICY ADVISORY COMM’N, JUSTICE REINVESTMENT ACT: IMPLEMENTATION EVALUATION REPORT 2018 at 21 (Apr. 15, 2018), <https://www.nccourts.gov/documents/publications/jra-implementation-evaluation-report> [<https://perma.cc/54CN-JXX6>].

21. Unless a prison term is mandatory, judges have authority to impose a prison sentence and then suspend its execution. UTAH CODE ANN. § 77-18-1(2)(a) (West 2018). Judges may also utilize a de facto SIS procedure, plea in abeyance, as discussed in text *infra*.

22. UTAH SENTENCING COMM’N, 2017 ADULT SENTENCING & RELEASE GUIDELINES 41 (Oct. 1, 2017), <https://justice.utah.gov/Sentencing/Guidelines/Adult/2017%20Adult%20Sentencing%20and%20Release%20Guidelines.pdf> [<https://perma.cc/LLF4-FMF>].

following examples: conduct involving “dangerous weapons, fleeing via high speed chase, violent arrest behavior, new person crime allegations, high priority CCC [community corrections center] walk[a]ways; [designated] sex offender[s], repeat DUI violations, [and] person crime absconder[s].”²³

Finally, although the term “suspended imposition of sentence” is not used, Utah’s formal “plea in abeyance” procedure has most of the attributes of SIS and is classified as SIS for present purposes. This procedure permits the court to accept a guilty or nolo contendere plea pursuant to the parties’ plea-in-abeyance agreement, defer sentencing, and impose probation-like conditions; if those conditions are violated the court may enter judgment of conviction and impose any sentence authorized for the offense to which the original plea was entered.²⁴

4. Oregon

This is the guidelines jurisdiction that has gone the furthest to replace suspended prison sentences with free-standing, non-prison custodial backup sanctions for violations of probation conditions. SEPS and SIS are only allowed for certain sex offenders.²⁵ However, a deferred sentencing option equivalent to SIS applies to offenders who received probation by means of a downward dispositional departure from a recommended-prison sentence or who were convicted in a guidelines grid cell where either prison or probation is allowed.²⁶ In all other cases, the guidelines provide only non-prison custodial sanctions for violations of probation conditions. All grid cells with recommended-probation sentences are grouped into three zones, from the least to the most serious combination of current offense severity and prior record. Depending on the zone, if probation is continued—that is, not revoked—violations of conditions can be sanctioned with up to one, 1.5, or two months in jail. If probation is revoked, the offender can be further sanctioned with up to six months in jail. Thus, total pre-revocation plus post-revocation custodial sanctions for probation violations are seven, 7.5, or eight months in jail, depending on the grid zone.

5. Washington

Although Washington abolished most suspended sentences when it adopted guidelines, it still makes some use of both SEPS and SIS, as well as free-standing probation with non-prison custodial backup sanctions. SEPS is only authorized

23. *Id.* at 42.

24. UTAH CODE ANN. §§ 77-2a-2–4 (West 2018). A number of other guidelines states (such as Massachusetts, Minnesota, North Carolina, Ohio, and Pennsylvania) also employ pre-conviction probation-like orders. ROBINA INST. 2014, *supra* note 12. However these various forms of pretrial diversion appear to be less structured and have less formal court involvement, so for purposes of the present study they are not deemed to be the functional equivalent of SIS.

25. OR. REV. STAT. § 137.010(3) (2018); OR. ADMIN. R. 213-005-0008(2)(c) (2018).

26. There are three such “border boxes,” located along a line on the grid separating recommended-prison cells from recommended-probation cells. When probation is ordered in such a case, or by means of downward departure in a recommended-prison cell, “the sentence upon revocation shall be a prison term up to the maximum presumptive prison term which could have been imposed initially, if the presumptive prison term exceeds 12 months.” OR. ADMIN. R. 213-010-0002(2) (2018).

for sex offenders and certain drug-dependent offenders. SIS is not formally authorized at all, but the deferred sentencing option applied to certain custodial-parent and drug-dependent offenders is functionally equivalent to SIS. If such an offender violates the conditions of release, the court may impose any sentence within the applicable standard guidelines range for that offense and offender prior record. For all other offenders, violations of conditional release—usually referred to as “community custody,” not probation—may only be sanctioned with jail terms. An administrative hearing officer may, depending on the seriousness and frequency of violations, impose any of the following: non-custodial sanctions for a first low-level violation; up to three days in jail for a second or subsequent low-level violation; and up to 30 days in jail for a high-level violation. In addition, the sentencing court may impose up to 60 days in jail per violation.²⁷

6. Revised Model Penal Code Provisions

Although suspended sentences (SEPS or SIS) are the preferred backup sanction among existing U.S. guidelines systems, they are not preferred under the recently approved revisions to the sentencing and corrections provisions of the Model Penal Code. The Code does not authorize SIS, and only authorizes SEPS in optional language indicated in brackets.²⁸ Instead, the Code treats probation as a free-standing sentence, with its own custodial sanctions for violations of conditions. But, unlike most of the free-standing custodial sanctions in existing guidelines systems, the Code’s custodial sanctions for release violations are not limited to jail terms—authorized sanctions for probation violations include imprisonment for the full term of the supervision period, which can be as long as three years in felony cases.²⁹

7. The Revocation Decision Itself

Regardless of the form in which community-based sanctions are imposed, judges in almost all guidelines systems, and under the revised Model Penal Code, retain broad or even total discretion when deciding whether to revoke release and, with or without revocation, which of the available backup sanctions to impose for violations of release conditions.

27. ROBINA INST. 2014, *supra* note 12. For further details on Washington’s rules, see FRASE, JUST SENTENCING, *supra* note 10, at 142–44.

28. MODEL PENAL CODE: SENTENCING § 6.02(2) (AM. LAW INST. 2017). The original (1962) version of the Code took the opposite approach, authorizing suspended imposition but not suspended execution. Perhaps one reason for the omission of suspended imposition in the revised Code is that some of that option’s functions are served by the revised Code’s provisions for Deferred Prosecution and Deferred Adjudication. See discussion *supra*, note 4. Like some state systems (including Alabama, Minnesota, and North Carolina), the Code also provides that, when a court revokes probation that was combined with a suspended-execution sentence, the court may execute the prison sentence or impose custodial or other sanctions less severe than the suspended prison term. MODEL PENAL CODE: SENTENCING § 6.15(3)(e) (AM. LAW INST. 2017).

29. *Id.* §§ 6.03(5), 6.15(3)(e).

III

ADVANTAGES AND DISADVANTAGES OF EACH APPROACH TO STRUCTURING AND ENFORCING PROBATION CONDITIONS

What are the policy arguments in favor of using each of the three main types of backup sanctions described above? If one were only concerned with minimizing prison commitments, a version of the third option, found in two of the state guidelines systems (Oregon and Washington), would appear to be best. Probation is imposed as a free-standing penalty, and prison is effectively off the table—violations of the conditions of probation are sanctioned only with non-custodial measures and local jail terms. The latter are almost always much shorter than prison terms and are served closer to the offender's home community; jail sanctions are usually also much more compatible with visiting and with day-time release for work, education, training, or treatment.

And yet, as noted in Part II, no U.S. guidelines system uses the third option for all felony cases, and only five of the nineteen systems use it at all. Are these policy choices just a reflection of the overly punitive character of U.S. sentencing? Or are there disadvantages to using the third option, or advantages to using one or both of the suspended-sentence options? How do SEPS and SIS compare to each other? And even if the primary concern is to minimize prison populations—to lessen the costs, burdens, and adverse consequences of imprisonment, and maximize the rehabilitative and reintegrative advantages of community-based sentences—is there any evidence that a system's choice of backup sanctions actually contributes to a relatively higher or lower prison rate?

The answers to these questions will be explored in the subparts below, which first examine the pros and cons of each option and then move on to some broader issues.

A. Suspended-Execution Prison Sentences (SEPS)

1. Advantages

Compared to SIS or more limited custodial backup sanctions, one potential advantage of imposing but then suspending a specified prison term is that it may give the offender a more concrete incentive to comply with release conditions.³⁰ In addition, both SEPS and SIS leave substantial room for later tightening of sanctions in case of noncooperation or new—or at least unforeseen—indications of offender risk. Modern criminal justice systems need effective mechanisms to encourage and reward the offender's cooperation with release conditions and to respond to lack of cooperation or heightened risk; limited custodial backup sanctions may lack both sufficient compliance incentives and sufficient scope to tighten sanctions in light of the offender's conduct or changed circumstances while on probation.

30. See Joan Petersilia, *Probation in the United States*, in 22 CRIME AND JUSTICE: A REVIEW OF RESEARCH, 149, 163 (Michael Tonry ed., 1997).

Another potential advantage of SEPS is that the duration of the suspended term can provide a valuable expressive statement of conviction-offense seriousness. This statement is made at a point in time—soon after entry of a guilty plea or guilty verdict—when the court is most familiar with the facts of that offense; the court's choice of a prison term within the recommended guidelines range, or any higher or lower term that is entered by departing from the range, can thus reflect any case specific aggravating or mitigating offense circumstances. Many writers have argued, from retributive, communicative, or utilitarian perspectives, that punishment serves important expressive, censoring purposes. It conveys to the offender, to other would-be offenders, and to the general public not only the wrongfulness and harmfulness of the crime, but the degree of wrongfulness and harmfulness relative to other crimes.³¹ The length of a suspended-execution prison term also sends the important expressive message that, even though a particular offender was deemed a low-enough risk to be put on probation, his crime was a serious wrong against the victims, society, or both.

Although some writers have argued that the expressive function of punishment requires “hard treatment” in the form of actual incarceration, fine payment, or other concrete measures,³² other writers have argued that it does not³³—that expressive values can effectively be served by symbolic statements of crime seriousness such as those conveyed by offense grading and authorized penalties, recommended guidelines sentences for typical forms of each offense, and the severity of suspended prison terms and fines. As indicated in Part II, most guidelines systems, like many systems lacking guidelines, make regular use of suspended prison sentences—a form of conditional hard treatment that in most cases is never actually carried out. If and when a suspended prison term is executed, however, it repeats and emphasizes the expressive, norm-reinforcing message about the seriousness of the offender's crime. By contrast, and as further discussed below, free-standing backup sanctions—and, in most cases, also SIS—

31. See, e.g., MODEL PENAL CODE: SENTENCING (AM. LAW INST. 2017); MODEL PENAL CODE (AM. LAW INST., Proposed Official Draft 1962); R. ANTONY DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001); ALFRED C. EWING, THE MORALITY OF PUNISHMENT (1929); JOEL FEINBERG, THE EXPRESSIVE FUNCTION OF PUNISHMENT, IN DOING AND DESERVING (Joel Feinberg ed., 1970); FRASE, JUST SENTENCING, *supra* note 10; Kent Greenawalt, *Punishment*, in ENCYCLOPEDIA OF CRIME AND JUSTICE (Joshua Dressler ed., 2d ed. 2001); HERBERT L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1968); John Kleinig, *The Hardness of Hard Treatment*, in FUNDAMENTALS OF SENTENCING THEORY: ESSAYS IN HONOUR OF ANDREW VON HIRSCH (Andrew Ashworth & Martin Wasik eds., 1998); NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974); IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT (1989); PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED? HOW MUCH? (2008); ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993); Johannes Andenaes, *The General Preventative Effects of Punishment*, 114 U. PA. L. REV. 949 (1966); Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984); Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (Summer 1958); Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163 (2009); Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263 (1981).

32. See, e.g., Duff, *supra* note 31.

33. See, e.g., Ewing, *supra* note 31; H.M. Hart, *supra* note 31; Feinberg, *supra* note 31.

lack the symbolic expressive value of a SEPS, and the reinforcing message of crime seriousness when backup sanctions are imposed.

A further advantage of SEPS is that, because the prison term is imposed at the time of trial or guilty plea, this option will likely better assure proportionality and consistency in the use of custodial backup sanctions, compared to either SIS or jail backup sanctions. As further discussed in Subpart E below, proportionality of punishment relative to the seriousness of the conviction offense, and consistency among offenders committing the same offense in the same manner (also referred to as parity or uniformity), are important values not just under a retributive theory of punishment but also from a utilitarian (crime-control) perspective, and it is especially important to avoid disproportionately severe punishment. When an offender is sent to prison solely for violation of probation conditions, with no conviction for a new offense, his imprisonment represents punishment for the crime that led to the probation sentence, so the prison term should be proportionate to the seriousness of that crime.

By contrast, when the conditions of SIS probation are violated, it is very likely that backup sanctions will be inconsistently applied and not reflect the relative seriousness of the offender's original conviction offense. Instead, the backup-sanction prison term is likely to be heavily influenced by the nature of the offender's probation violation, by a perceived need for strong deterrence of such violations, or by the court's annoyance at the offender's lack of cooperation. SEPS probation avoids these distortions, since the appropriate prison term for the conviction offense will already have been determined at the time the offender was placed on probation.

As for jail backup sanctions, the five jurisdictions that use this option as the primary or encouraged sanction for release violations do not structure these sanctions in ways designed to promote offense proportionality and consistency, although it would be possible to do so. Instead, these jurisdictions generally prescribe a single maximum jail penalty for all probation violations or for large groups of offenders. On the other hand, the relatively short duration of jail terms limits the potential for serious inconsistency within the group of offenders receiving probation.

2. Disadvantages

The most serious potential problems with the use of SEPS are overuse of prison as a backup sanction and net-widening. As to the first, there is a risk of excessive frequency of revocation to prison because judges may take the easiest course, or think "I already decided that," and reflexively execute the suspended prison term. As for net-widening, there are multiple dimensions to this problem. First, at the time of sentencing the judge and other participants may pay insufficient attention to the duration of the prison term if everyone expects that term to be suspended and never served. Second, since the offender is ostensibly being given a break by having his prison term suspended, the judge may be inclined to impose excessive conditions of the suspension. Third, if the offender

later violates any of those conditions—which is all the more likely with excessive conditions—the judge may feel that he or she must respond by executing the suspended prison sentence, even if the judge would have agreed at the time of initial sentencing that such an executed prison term would be too severe.

However, there are ways to mitigate all of the problems noted above. Reflexive overuse of prison as a backup sanction can be discouraged by rules that provide guidance and promote restraint in the use of that sanction, that authorize and encourage the use of shorter jail terms instead of prison, and that explicitly allow partial execution of the suspended prison term.³⁴ As for the net-widening problem, sentencing guidelines can, and most do, restrain the severity of recommended suspended prison sentences by specifying their normal durational range, just as they do for recommended executed sentences, and by requiring courts to give written reasons, consistent with guidelines policies, for deviating from the normal duration. To make this work well, however, defense counsel must recognize that many of their clients are going to violate conditions, and that counsel thus needs to protect the future as well as the present interests of the client. As for the risk of judges piling on extra probation conditions that then make violation and revocation more likely, some state guidelines have limited excessive probation conditions in one of two ways. Oregon specifies the maximum number of “punishment units,” calculated using equivalency formulas to accommodate different types of probation conditions, that can be imposed in each guidelines grid cell carrying a recommended probation sentence. Minnesota gives offenders the right to refuse probation and accept immediate execution of the recommended suspended prison term if the proposed probation conditions are more onerous than the applicable prison term would be.

Another potential disadvantage of SEPS, compared to SIS, is that the former limits the judge’s ability to impose a more severe prison sentence in response to either serious but unforeseen offender risk factors that become apparent once the offender is on probation, or the seriousness of release violation conduct, especially criminal conduct. However, as noted above, any executed prison sentence should be proportionate to the seriousness of the offender’s original conviction offense. When judges revoke SIS probation and sentence the offender to prison, that prison term can exceed proportionality limits if the term is based on post-offense behavior, perceived needs for deterrence, or annoyance rather than on the conviction offense itself. Moreover, there are serious legality and fairness problems when SIS revocation yields a prison sentence that is enhanced because of alleged new criminal conduct which has not been admitted or proven in accordance with proof beyond a reasonable doubt and other procedural requirements.

34. However, the option of partial execution, in response to release violations, undercuts one of the supposed advantages of SEPS—the increased compliance incentive of a specified suspended prison term.

B. Suspended Imposition of Sentence (SIS)

1. Advantages

SIS may, in comparison to SEPS, lessen or avoid the risk of excessive revocations to prison, thus lowering prison costs, avoiding net-widening, and sparing a larger proportion of offenders from having any kind of prison sentence on their record. The requirement to hold a full sentencing hearing, instead of just summarily executing the previously-imposed prison term, or part of it, tends to discourage SIS revocations. And even if the court holds the hearing, imposes a prison sentence, and orders revocation to prison, it may feel less bound to execute the full sentence than if that sentence had already been imposed at an earlier sentencing hearing. In some cases, deferred sentencing might also be less punitive than imposition of a prison term at the time of entry of the guilty plea or guilty verdict because, with the passage of time, cooler emotions may reduce the pressures for greater severity from the community, the victim, or both. Of course, lower punishment severity at a deferred sentencing hearing, due to reduced victim or community concern about the conviction offense, could result in a penalty that is disproportionately lenient relative to that offense. But as further discussed in Subpart E below, there are principled as well as practical reasons to err on the side of leniency rather than severity when punishing offenders.

Another advantage of suspended imposition, in some jurisdictions, is the beneficial effect it can have on the offender's conviction record. If he complies with all conditions and is discharged from probation, the offender may be eligible to have the conviction expunged or re-categorized as a lower degree of crime. For example, under Minnesota law, when an offender is discharged from a SIS for a felony-level crime, the conviction offense is thereafter deemed a misdemeanor.³⁵ For this reason, and also because the practice is supported by guidelines commentary,³⁶ suspended imposition is often used in low-level felony cases, especially for first-time offenders. The expungement or offense-lowering effect of suspended imposition can be quite valuable for disadvantaged and other marginally employable offenders, as well as those whose chosen career would be jeopardized by a felony record. Of course, these same benefits could also be achieved under SEPS by simply extending the expungement or offense-lowering provisions to those sentences.³⁷

SIS might also be better than SEPS from a crime control perspective because the former allows the court to impose a sentence that accounts for the most recent information about the offender's degree of recidivism risk. Where that risk level

35. MINN. STAT. § 609.13 (2018).

36. MINN. SENTENCING GUIDELINES AND COMMENTARY cmt. 3.A.101 (MINN. SENTENCING GUIDELINES COMM'N 2017).

37. This option can be provided regardless of how probation is structured. For example, in Washington (which makes use of both free-standing probation and, for some types of cases, suspended sentences), offenders convicted of nonviolent crimes can move to withdraw their guilty plea and clear their conviction record after they have successfully completed probation or community control. See ROBINA INST. 2014, *supra* note 12, at 87.

is higher than was anticipated at the time of initial sentencing, the judge can impose a longer sentence than he or she might have imposed at the earlier stage of processing. But, as previously noted, that advantage may be outweighed by the risk that, when suspended-imposition probation is revoked, the prison sentence imposed will be disproportionately severe, inconsistent across offenders, or based on unproven allegations of new criminal activity.

2. Disadvantages

SIS provides a less concrete compliance incentive than SEPS. The latter says to the offender: “this will be your custody sentence if you do not cooperate.” SIS also makes a much less effective expressive statement about the seriousness of the offender’s crime. A suspended-execution sentence says to the offender and the public: “this is how serious the crime was.” By contrast, the court never gets the opportunity to send that message if it suspends imposition and the offender complies with all probation conditions and is discharged. In that case, only the authorized statutory penalty and any applicable presumptive guidelines suspended prison sentence express offense seriousness. But statutory maximums are almost always an excessive indicator of crime seriousness because they are based on the worst ways of committing the crime. Guidelines presumptive sentences do a better job of expressing crime seriousness, but they assume a typical offense and offender. Retributive and expressive punishment goals require judges, using their durational departure powers, to impose a specific prison term that reflects any case-specific aggravating or mitigating circumstances. Those circumstances can be more accurately assessed at the initial sentencing—when the offense details are fresh in the minds of all parties—than in a deferred sentencing that will be held months or even years later. Moreover, as previously noted, any prison term imposed in a later revocation hearing is likely to be strongly influenced by the offender’s recent violations of release conditions, and less reflective of the crime for which he is actually being sent to prison. Finally, suspended-imposition sentences are subject to many of the same risks of net-widening as were discussed above in connection with suspended-execution sentences. Judges may be tempted to impose excessive conditions of the suspension and may later feel obligated to punish violations of those conditions—which are all the more likely to be violated, if they are excessive—resulting in the imprisonment of an offender whose crimes do not justify an executed-prison sentence.

C. Free-Standing Probation with Only Non-Prison Custodial Backup Sanctions

1. Advantages

As suggested earlier, this approach—especially if not combined with either kind of suspended sentence—seems likely to produce more parsimonious use of imprisonment. If prison is essentially taken off the table, once probation is granted, there can be no risk of unnecessary and excessive revocations to prison, and the offender will never get any kind of prison record.

2. Disadvantages

Although lesser, non-prison breach sanctions are more parsimonious, in some cases they may provide insufficient incentive for offender compliance. Moreover, if judges fear the sentence is insufficient, they may hesitate to pronounce a community-based sentence in the first place. The fact that no guidelines jurisdiction has completely abandoned the use of suspended-execution and suspended-imposition sentences for all felony crimes seems to reflect a widespread belief that the threat of a specified suspended prison term, or at least a possible prison term, is sometimes needed to ensure compliance with all important conditions of probation. In any case, even if non-prison breach sanctions are effective and parsimonious, these sanctions can be incorporated into a suspended-execution or suspended-imposition regime, as North Carolina and Utah have done. Courts can be directed to use the shorter jail options first and use the ultimate sanction of revocation to prison only as a last resort.

As with SIS, another problem with a free-standing probation sentence is that it conveys no expressive value beyond the conviction itself. Unlike a suspended-execution custody term, a free-standing probation order provides no authoritative, case-specific pronouncement about the severity of this offender's crime.

It may also be difficult, when relying solely on jail terms to sanction probation violations, to maintain sanction proportionality relative to the offender's conviction offense. In systems that use SEPS or SIS and that show the durations of recommended prison terms in a grid format, these durations display steadily increasing penalty severity as offense severity increases (usually along the vertical axis of the sentencing grid), and as criminal history category increases (usually along the horizontal axis). As illustrated in Figure 1, the Minnesota main guidelines grid, there are no major jumps or discontinuities when one crosses the heavy dark "disposition" line which separates grid cells recommending probation with a specified suspended prison term from cells just over the line recommending an immediately-executed prison sentence.³⁸ Granted—and as further discussed in Subpart E below—there can be major jumps in penalty severity as one crosses the disposition line, between offenders below the line who are recommended for and successfully complete probation, and the only modestly more serious offenders just above the line who are recommended for and receive immediate prison. But at least among offenders who end up in prison—those on one side of the disposition line who were sent directly to prison, and those on the other side who were imprisoned after revocation of probation—the prison terms served by offenders are relatively proportional to offense severity and criminal history; there are no major jumps in penalty severity between revoked offenders on the probation side of the line and those on the prison side who are directly sent to prison.

38. MINN. SENTENCING GUIDELINES AND COMMENTARY § 4.A. The single figure in cells above and to the right of the disposition line is deemed to be the most appropriate executed prison term, but a range is provided within which judges may sentence without meeting "departure" requirements.

Figure 1: Minnesota Main Grid (all felonies except sex crimes and drug crimes)
Presumptive Sentence Lengths in Months

SEVERITY LEVEL OF CONVICTION OFFENSE (Common offenses listed in italics)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Murder, 2nd Degree</i> (intentional murder; drive-by-shootings)	11	306 261-367	326 278-391	346 295-415	366 312-439	386 329-463	406 346-480	
<i>Murder, 3rd Degree</i> <i>Murder, 2nd Degree</i> (unintentional murder)	10	150 128-180	165 141-198	180 153-216	195 166-234	210 179-252	225 192-270	240 204-288
<i>Assault, 1st Degree</i>	9	86 74-103	98 84-117	110 94-132	122 104-146	134 114-160	146 125-175	158 135-189
<i>Aggravated Robbery 1st Degree;</i> <i>Burglary 1st Degree (with</i> <i>weapon or assault)</i>	8	48 41-57	58 50-69	68 58-81	78 67-93	88 75-105	98 84-117	108 92-129
<i>Felony DWI</i>	7	36	42	48	54 46-64	60 51-72	66 57-79	72 62-84 ²
<i>Assault, 2nd Degree</i> <i>Burglary, 1st degree (occupied</i> <i>dwelling)</i>	6	21	27	33	39 34-46	45 39-54	51 44-61	57 49-68
<i>Residential Burglary;</i> <i>Simple Robbery</i>	5	18	23	28	33 29-39	38 33-45	43 37-51	48 41-57
<i>Nonresidential Burglary</i>	4	12 ¹	15	18	21	24 21-28	27 23-32	30 26-36
<i>Theft Crimes (Over \$5,000)</i>	3	12 ¹	13	15	17	19 17-22	21 18-25	23 20-27
<i>Theft Crimes (\$5,000 or less)</i>	2	12 ¹	12 ¹	13	15	17	19	21 18-25
<i>Assault 4th Degree;</i> <i>Fleeing a Peace Officer</i>	1	12 ¹	12 ¹	12 ¹	13	15	17	19 17-22



Presumptive commitment to state prison (executed prison sentence). First Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.



Presumptive stayed (suspended) prison sentence. At the discretion of the judge, up to a year in jail and/or non-jail sanctions can be imposed as conditions of probation. However, certain offenses in this section of the grid always carry a presumptive commitment to state prison, pursuant to Guidelines policy or applicable mandatory-sentence statutes.

1 One year and one day

2 Cell range capped at the statutory maximum.

Such jumps, or “cliffs,” are much more likely to occur in a system that only allows probation violations to be sanctioned with jail terms. For example, cliffs can be seen in the excerpt from the Oregon guidelines grid shown in Table 3, by comparing the penalty ranges³⁹ for low-criminal-history offenders just above and just below the disposition line—offenders in Criminal History Categories F, G, H, and I, at Offense Severity levels 7 and 8. For these low-history offenders, penalties are on average 270 percent higher at Offense Severity level 8 than at level 7. This dramatic increase in severity is much greater than the average penalty increase of 91 percent for low-history offenders at level 9, compared to level 8. Table 3 also shows a substantial “plateau” effect: low history offenders at Offense Severity levels 6 and 7 who violate probation conditions all have the same zero- to eleven-month range of custodial penalties; sanction severity is not proportionate to the offender’s Offense Severity level and Criminal History Category.

39. OR. ADMIN. R. 213-004-0001 (2018). In order to compare custody-sentence severity for offenders with recommended executed prison sentences above the disposition line (Severity level 8) with custody sentences applied to probation violators below the line (Severity level 7), it is necessary to take into account three types of custody available for the latter offenders: jail terms that can be imposed as a condition of probation (up to 3 months); additional jail sanctions that can be imposed for probation violators without revoking probation (up to 2 months); and further jail sanctions that can be imposed after probation has been revoked (up to 6 months). Accordingly, the effective range of custodial sanctions for Severity level 7 offenders below the disposition line has a maximum of 11 months (3 + 2 + 6). And since judges have discretion to impose no jail time under all three custody types, the effective floor of the total custody range is zero.

Table 3: Oregon Sentencing Guidelines Grid Excerpt (Offense Severity levels 6 to 9), Illustrating “Cliff” and “Plateau” Effects Created When Probation Violations Are Only Sanctioned with Jail Time*

	Criminal History Category (CHC)									Average increase in sentence, ‡ from the Severity level below, for:	
	A	B	C	D	E	F	G	H	I	CHC A-E	CHC F-I
Sev. 9	66- 72	61- 65	56- 60	51- 55	46- 50	41- 45	39- 40	37- 38	34- 36	79%	91%
Sev. 8	41- 45	35- 40	29- 34	27- 28	25- 26	23- 24	21- 22	19- 20	16- 18	39%	270 %
Sev. 7	31- 36	25- 30	21- 24	19- 20	16- 18	0- 11**	0- 11**	0- 11**	0- 11**	37%	0%
Sev. 6	25- 30	19- 24	15- 18	13- 14	10- 12	0- 11**	0- 11**	0- 11**	0- 11**		

* All custody terms shown are in months. The horizontal and vertical lines represent the “disposition line” that separates presumptive-prison from presumptive-probation grid cells.

** Total custody range, combining: probationary jail range (0-3 months), pre-revocation violation sanction range (0-2 months), and post-revocation violation sanction range (0-6 months).

‡ Percentage sentence increases are calculated based on the mid-points of grid cell ranges. For example: in CHC-A, the increase from Severity level 7 to level 8 is from 33.5 months to 43 months.

3. Summary

The most important potential advantages and disadvantages of each of the three ways of structuring custodial backup sanctions, discussed above, are listed in Table 4. A guidelines jurisdiction might view any of these three structures as best overall, depending on which policy goals and undesired collateral consequences that jurisdiction deems to be most important.

Table 4: Three Principal Ways to Structure Custodial Backup Sanctions [CBS], Employed in U.S. Sentencing Guidelines Systems: Potential Advantages and Disadvantages of Each Structure

	Advantages	Disadvantages
Suspended-execution Prison Sentence [SEPS]	<ul style="list-style-type: none"> • Concrete compliance incentive for offenders • Offense-seriousness expressive value of SEPS terms • Proportionality of CBS to the seriousness of conviction offenses 	<ul style="list-style-type: none"> • Least parsimonious—too many knee-jerk and unnecessary revocations to prison • Greatest risk of net-widening (revocation to prison of offenders who don't belong there) • Pre-determined CBS maxima can't fully accommodate unforeseen or increased offender risk
Suspended-imposition of Sentence [SIS]	<ul style="list-style-type: none"> • Compared with SEPS, fewer prison commitments (so less cost, and fewer offenders with a prison record) • CBS severity can be based on the latest offender risk information 	<ul style="list-style-type: none"> • Compared with SEPS, less concrete compliance incentive for offenders • Moderate net-widening risk • Lost expressive value of SEPS terms • Less proportionate CBS durations
Free-standing Probation with only jail (not prison) CBS	<ul style="list-style-type: none"> • Fewest prison commitments (so no net-widening, lowest cost, and fewest offenders with a prison record) 	<ul style="list-style-type: none"> • Least compliance incentive for offenders • (as a result of above) Judges may grant fewer probations • Least offense-seriousness expressive value • Least offense-proportionate CBS durations

D. Some Common Problems in the Use of Community-Based Sentences

Regardless of whether probation is imposed as a condition of SEPS, SIS, or a free-standing probation order with its own, more limited backup sanctions, there

is a risk of excessively severe probation conditions,⁴⁰ leading to inevitable violations and pressure to impose custodial sanctions to respond to those violations. As noted previously, the judge may be tempted to impose excessively severe or numerous probation conditions if he or she feels, or the prosecutor strongly argues, that the offender is being given a break by not being immediately sent to prison. Excessive intermediate sanctions then lead to problems of enforceability, disproportionality, and net-widening. To guard against the imposition of excessive probation conditions, guidelines should include the following provisions, some of which are already found in some state systems:

1. The starting point, or presumption, for judges should be that no conditions of probation other than the requirement to obey the law are needed. Probation conditions should then be imposed only if and to the extent that the judge finds that they are necessary, likely to achieve applicable sentencing purposes in a cost-effective manner, and not disproportionately excessive relative to the seriousness of the offender's conviction offense and prior record. The effect of this start-at-zero presumption is that there are no formal requirements of minimum severity in the use of probation or other community-based sanctions. This is consistent with the widely recognized principle of parsimony—sanctions should be no more severe than necessary to achieve their crime-control purposes. It is also consistent with a limiting retributive model, further discussed in Subpart E, below, under which the offender's desert—that is, his degree of culpability and moral blameworthiness—does not impose strong requirements of minimum sanction severity. The start-at-zero presumption is also consistent with the way in which community-based sanctions have been incorporated into most guidelines systems: such systems either set no proportionality limits on probation conditions or only set upper, maximum-severity limits. As a practical matter, minimum-severity requirements for community-based sentences would be enforced sporadically at best, especially in local jurisdictions with limited resources for such sanctions. Minimum-severity requirements would also greatly complicate sentencing rules and procedures. Admittedly, the start-at-zero approach permits equally culpable offenders to receive different levels of sanction severity. But these differences are limited in degree and, under the rules set out below, will usually not involve disparate use of custodial sanctions.

2. All cells of the guidelines grid that carry a presumptive non-prison sentence should specify not only the duration of the maximum custody term in prison or jail that can be imposed in case of revocation of release, but also two other limits: the maximum number of punishment units that can be imposed as a condition of probation without upward departure and the maximum number of allowable probation-condition jail or other full-time custody days that can be imposed without departure. Punishment units would be computed using a system of equivalency scales for each type of probation condition. This suggestion reflects

40. Some may argue that there is also a risk that probation conditions will *not be severe enough*, resulting in disproportionate leniency relative to the offender's crime and loss of public respect and support. This question is discussed in Subpart E.

a blend of state-guidelines approaches: some states—Kansas and Minnesota, for example—list only the suspended prison term or range of terms in cells with recommended probation sentences, whereas Oregon lists only the maximum punishment units⁴¹ and allowable jail days.

3. The duration of probation terms should be limited, as lengthy terms contribute to higher prison populations: the longer an offender is under supervision, the greater the likelihood that he or she will eventually violate one or more conditions of release and be revoked to prison. U.S. jurisdictions differ considerably in the lengths of probation terms that they authorize and impose, as well as on issues such as whether and under what circumstances offenders can be discharged early and how often this actually occurs. In many systems, it appears that excessively long probation terms are often imposed.⁴² For example, in Minnesota the maximum probation term for most felonies is four years or the maximum authorized prison term for that offense, which could be twenty years or more, *whichever is longer*, and the average term imposed is about four years, although many offenders are discharged early.⁴³ The revised Model Penal Code provides that felony probation should not extend for more than three years,⁴⁴ which seems like a sensible rule. The Code also authorizes early discharge at any time if the court finds that the purposes of sentencing no longer justify continuation of supervision.⁴⁵

4. Offenders should have the right to refuse probation and demand execution of the recommended suspended prison or jail term provided for their offense and prior record. The right to refuse probation exists in many jurisdictions⁴⁶ and serves to reinforce upper limits on the severity of probation conditions. If those conditions are very onerous and the suspended prison term is not very long, many offenders will choose to refuse probation and go to prison to “get it over with,” thereby also avoiding the risk that they will not successfully complete probation and end up suffering both the onerous probation conditions and the prison term. In Minnesota, the proportionality of probation conditions is maintained by allowing offenders to demand execution of the recommended suspended prison term upon a showing that the proposed conditions of probation are more onerous than the prison term⁴⁷—an assessment that courts make case by case, although it would be more consistent if based on the kinds of sanction equivalency scales suggested above. The right to refuse probation also has practical value because

41. The Oregon punishment units scale assigns unit values to each day of jail, inpatient treatment, part-time incarceration, house arrest, and community service imposed as a condition of probation.

42. See ROBINA INST. 2014, *supra* note 12.

43. Minn. Stat. §609.135, Subdiv. 2(a) (2018); ROBINA INST. 2014, *supra* note 12.

44. MODEL PENAL CODE: SENTENCING § 6.03(5) (AM. LAW INST. 2017).

45. *Id.* § 6.03(6)

46. See Jay M. Zitter, Annotation, *Right of Convicted Defendant to Refuse Probation*, 28 A.L.R. 4th 736 (2010).

47. See *State v. Rasinski*, 472 N.W.2d 645, 650–51 (Minn. 1991). However, an offender may not demand execution of sentence if he would serve less than nine months in prison. MINN. STAT. § 609.135, Subdiv. 7 (2018).

offenders who strongly object to their required conditions make poor candidates for probation and can informally refuse probation by failing to comply with conditions thereby provoking revocation.

5. Sentencing guidelines should strongly discourage reflexive revocation to prison or jail and excessive backup sanctions. Guidelines should (1) encourage a graduated response and more restrictive intermediate sanctions in lieu of prison or jail; (2) specify the kinds of new offenses and violations of release conditions that presumptively do or do not merit custodial sanctions; (3) specify normal upper limits on the severity of custodial sanctions for commonly occurring types of violation of probation conditions; and (4) reduce fiscal pressures to overuse direct-prison sentences and revocations to prison by providing state subsidies to fund effective community-based options, with charge-backs against those subsidies when low-level offenders are sent to prison. Each of these methods has been employed in one or more guidelines systems.⁴⁸

6. In case of revocation of release, offenders should be given credit for jail and other onerous conditions of probation that they have already completed, using equivalency scales for various types of conditions, as suggested above. In addition to preventing aggregate sanctions that are disproportionately severe relative to the offender's conviction offense and prior record, such credit should reduce enforcement and prison-revocation costs. It may also discourage judges from imposing unnecessary release conditions—each additional unneeded condition imposed and completed would reduce the magnitude of revocation sanctions still available to the judge to enforce the remaining conditions, thereby reducing offender compliance incentives at that point.

E. Are Probation Conditions Sometimes *Too Lenient*? When?

The previous subpart argued that probation conditions are often too severe, thereby increasing rates of non-compliance and revocation to prison. Accordingly, judges should impose no conditions, other than to obey the law, unless the judge finds that one or more conditions are necessary and likely to achieve applicable sentencing purposes to a sufficient extent to justify their costs. This approach is easily defended on utilitarian (crime control) grounds: unnecessary probation conditions waste limited public resources that might help to prevent crime if otherwise deployed. Although utilitarian theory provides support for penalties that are proportionate to crime seriousness and consistently applied,⁴⁹ any increase in deterrence benefits from greater sentence proportionality and consistency in the application of probation conditions is likely to be outweighed by losses in flexibility and efficiency when seeking to match probation conditions with individual offender risks and needs.

But what about retributive punishment goals? If each offender should be punished in proportion to his or her blameworthiness, how can we justify major

48. For further discussion, see FRASE, JUST SENTENCING, *supra* note 10, at ch. 3.

49. For further discussion of utilitarian proportionality principles, see *id.* at ch. 2.

differences in punishment severity between offenders who receive and complete probation, compared to offenders committing a similar offense who are not deemed suitable probation candidates due to higher risk or previous failures on probation, and are therefore sentenced directly to prison? This question does not assume that a probation sentence with minimal conditions lacks punitive bite. The burden of living under constant threat of probation revocation is, by itself, a significant punishment, albeit still less severe than incarceration.

In theory, it would be possible to add onerous probation conditions, greatly increase the duration of probation, or both so that the aggregate burdens of the probation sentence are roughly comparable to those of a prison term that is deemed proportionate to the offender's crimes. But such enhanced probation sentences would be much costlier to administer, both directly, in terms of supervision costs, and indirectly, through higher revocation rates. And in practice, such a system would often be a sham, with no ability—and perhaps even without serious efforts—to enforce all of the conditions. Perhaps for these reasons, no U.S. guidelines system has attempted to require fully offense-proportionate probation conditions; there are virtually no minimum requirements for the severity of probation conditions.

This “proportionality gap”—between the severity of probation conditions and of the prison alternative imposed on similar offenders who are denied probation at sentencing or are later sent to prison after revocation—poses a serious challenge for any strict retributive theory that specifies a single deserved penalty or narrow range of penalties for a given case. The different degrees of sentence severity typically given to probationers and those sent to prison are much easier to accommodate under a negative, limiting-retributive (desert-range) theory, that is, a theory under which the offender's degree of culpability and moral blameworthiness only sets outer limits on punishment severity.

There are two main varieties of negative or limiting retributivism.⁵⁰ The first—what some have called the “imprecise-desert” theory—is based on the view that judgments about desert, even relative or “ordinal” desert,⁵¹ can only be made in very rough terms that define a range of “not-undeserved” penalties. The second limiting retributive theory is more precise, but asymmetric. It assumes that judgments about relative desert can be made with a reasonable degree of precision, or at least as much precision as any other legal finding that is commonly made by courts. But the asymmetric-desert theory further posits that it is especially important to avoid punishing an offender more severely than he deserves because such a result is a much greater injustice than punishing the offender less than he deserves. An analogous asymmetric value judgment underlies criminal procedure requirements of jury unanimity and proof beyond reasonable doubt, as well as criminal law doctrines such as the rule of lenity whereby ambiguous criminal statutes are construed in the defendant's favor.

50. *Id.*

51. A comparison of one crime, or offender, to another crime or offender.

Many have argued that it is both necessary and just to give some offenders less than they deserve, at least initially, to conserve resources and avoid making some offenders more crime-prone.

All of this is more than just academic theory. In most respects the Minnesota sentencing guidelines have implemented an asymmetric limiting retributive model, and to a lesser extent, so have other guidelines systems. No modern sentencing system, with or without guidelines, seems have adopted either a strict retributive sentencing model or an imprecise-desert limiting retributive model. Nor has any system adopted a pure crime-control model; all systems place offense-based maximum-severity limits on punishment that may not be exceeded even if it can be shown that greater severity would be cost-effective from a crime-control perspective.⁵²

Nevertheless, even under a limiting retributive model, most probation sentences require some minimum degree of sanction severity, either to promote fairness to other offenders similarly situated except as to amenability to probation—a deontological argument—or to avoid depreciating the seriousness of the probationer’s offense and undermining public respect and support for the sentence—a utilitarian or “expressive” rationale.⁵³

F. The Effects on Prison Rates of Different Ways of Structuring Probation and Backup Sanctions

In the previous discussion, some of the suggested advantages and disadvantages of different ways of structuring probation and backup sanctions were based on assumptions about the likely effects of different structures on revocation rates and prison populations. Can these effects be measured with data on sentencing, revocation, and prison populations in systems that use different options? Unfortunately, at present the answer is no. Most guidelines commissions maintain and analyze substantial amounts of data on sentences imposed, but to my knowledge no commission publishes data on probation revocations, broken down by backup sanction type if more than one type is used in that jurisdiction. It is unknown how many commissions even collect such data. Prison population data, however, is available for each state, and some rough patterns emerge: Table 5 shows the average per capita prison rates in 2016, the most recent year with data, for the states in the five groups of systems shown in Table 2.

52. For further discussion of varying retributive accounts, and the ways in which they have been implemented under U.S. guidelines and other sentencing regimes, see FRASE, JUST SENTENCING, *supra* note 10, at ch. 2–3.

53. For further discussion of the potential loss of perceived legitimacy and public confidence in probation sentences that lack substantial punitive bite, see Keir Irwin-Rogers & Julian V. Roberts, *Swimming against the Tide: The Suspended Sentence Order in England and Wales, 2004–2017*, 82 LAW & CONTEMP. PROBS. no. 1, 2019 at 144 and Cheryl Marie Webster & Anthony N. Doob, *Missed Opportunities: Canada’s Experience with the Conditional Sentence*, 82 LAW & CONTEMP. PROBS. no. 1, 2019 at 163.

Table 5: Per Capita Prison Rates in 2016 for U.S. Sentencing Guidelines States By Type of Available Custodial Backup Sanctions [CBS] For Violations of Probation Conditions*⁵⁴

1. SEPS only (4 states)	536	
2. SIS only (4 states)	595	
3. SEPS and SIS both available in most cases (5 states)	428	
4. SEPS and/or SIS available, non-prison CBS encouraged	363	
North Carolina (SEPS)		438
Utah (SEPS and SIS)		287
5. Only non-prison CBS are available, in most cases	400	
Oregon		466
Washington		333

* Per capita rate equals the number of prison inmates with sentences over one year, per 100,000 state residents. Rates for groups of states are unweighted averages of the individual state rates.

As predicted, the two groups of states—groups 4 and 5 in this table—that use or encourage the use of non-prison custodial backup sanctions have lower average prison rates (363 and 400 inmates per 100,000 state residents) than the three groups of states that use only SEPS, SIS, or both for backup sanctions. But there are major variations within groups 4 and 5: North Carolina’s rate is 50 percent higher than Utah’s, and Oregon’s rate is 40 percent higher than Washington’s. Indeed, the North Carolina and Oregon prison rates are both actually higher than the average rate for group 3 (428 per 100,000), comprised of states that do not require or encourage non-prison backup sanctions. Moreover, in several of these states there are other known factors that also strongly determine the state’s prison rate. In Oregon, mandatory-minimum prison sentences often apply; in Utah, crime rates are relatively low so we would expect that state’s prison rate to also be low. In short, although it is plausible to suppose that prison rates are affected by different ways of structuring probation and backup sanctions for non-compliance, much more research is needed to specify the relative contribution of these and other determinants of state incarceration rates.

Another way to assess the impacts that different methods of structuring non-prison sanctions have on prison populations would be to examine prison rates before and after a major change in such structures. But Washington State is the only guidelines jurisdiction to have made such a change in recent decades—SEPS and SIS were largely abandoned when the guidelines went into effect. And again, the evidence is equivocal. Although the percentage of felons receiving an immediate prison sentence fell slightly in the first few years of guidelines

54. *Prisoners in 2016*, BUREAU OF JUSTICE STATISTICS (2018), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6187> [<https://perma.cc/VG9M-U8DE>].

sentencing in Washington, those rates then went back up and stabilized at rates almost double what they had been before the guidelines.⁵⁵

IV

CONCLUSION

This article has examined three types of custodial backup sanctions, to enforce conditions of probation, that are used in U.S. state and federal jurisdictions with sentencing guidelines. Each type has advantages and disadvantages with respect to important sentencing policy and sentencing reform goals, especially controlling prison population growth and avoiding net-widening; assuring adequate incentives for offender compliance with release conditions; allowing courts to increase sanction severity in response to heightened and unforeseen offender risk; providing an expressive statement about the relative seriousness of the offender's crime and not depreciating its seriousness; maintaining proportionality between executed custodial backup sanctions and the seriousness of the offender's crime; and mitigating the damaging collateral consequences to offenders of having a record of felony conviction or a record of imprisonment. Many of the disadvantages of each type of custodial backup sanction can be mitigated by appropriate statutory and guidelines rules for judges. This article has suggested additional safeguards that should be implemented, regardless of the type of backup sanctions employed.

55. See FRASE, JUST SENTENCING, *supra* note 10, at 145.
