SUSPENDED SENTENCES AND SERVICE LABOR IN ISRAEL—FROM ALTERNATIVES TO IMPRISONMENT TO NET-WIDENING

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I
INTRODUCTION

In 2013, Leslie Sebba opened his *Law and Contemporary Problems* article on sentencing reform with an apology.[1] He described how his study of Israel's introduction of suspended sentences, which grant judges the authority to suspend the sentences of individuals facing prison such that they ultimately may not serve them, was successful in reducing prison sentences in the early 1960s. This success led him to recommend that English authorities adopt suspended sentences, arguing that they would replace prison sentences. As Sebba described in his article, the result in England was very different than the one in Israel.[2] Building upon the legal transplants literature[3] and the policy transfer literature,[4] he showed that sentencing policies are so complex and inextricably linked to other policy features unique to each state that it is difficult to apply policy recommendations in one system based on the experiences of another system.

This article will show that there is an even more fundamental problem in the attempts to draw valid policy conclusions from sentencing research. Not only is it difficult to transfer conclusions from studies of one system to another, but an alternative measure that was once proven to reduce imprisonment in one system may not even continue functioning as an effective alternative to imprisonment in the same system at a later stage. Initial success does not immediately suggest

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1. Leslie Sebba, *Is Sentencing Reform a Lost Cause? A Historical Perspective on Conceptual Problems in Sentencing Research*, 76 LAW & CONTEMP. PROBS., no. 1, 2013, at 237.

2. *Id.*; *see also* Anthony E. Bottoms, *The Suspended Sentence in England, 1967–78*, 21 BRIT. J. CRIMINOLOGY 1, 5–8 (1981).

3. *See e.g.*, ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1993).

4. *See* CRIMINAL JUSTICE AND POLITICAL CULTURES: NATIONAL AND INTERNATIONAL DIMENSIONS OF CRIME CONTROL 3–7 (Tim Newburn & Richard Sparks eds., 2004); *see also* Tim Newburn, *Atlantic Crossings: 'Policy Transfer' and Crime Control in the USA and Britain*, 4 PUNISHMENT & SOC'Y 165, 165–94 (2002).

sustainable, long-term success since studies are often conducted soon after a new type of sentence is introduced, so many of the conclusions from these sentencing studies do not continue to hold following later developments.[5]

This article takes the same example used by Sebba—the Israeli suspended sentence sanction[6]—and another Israeli community service example called Service Labor as case studies.[7] This article shows how, even in the same system, a sanction can successfully reduce prison sentences when introduced and initially analyzed, but then have an unintended or potentially very different effect over time. Sometimes, it might even increase incarceration at a later stage.

In particular, as time passes, the legislature and the courts tend to forget the original purpose of the law, and without referring to that original purpose, change the nature of the reform. Laws that were originally adopted to reduce incarceration are, with the passage of time, amended and interpreted in ways that increase incarceration.[8] These amendments and court decisions, by neglecting the original intent and function of a law without even referring to it, might change the nature of the reform, leading to a very different use of a measure that originally succeeded in reducing imprisonment.[9]

This article concludes that the short-term success that alternatives to imprisonment have in reducing incarceration does not necessarily ensure long-term success. Legislation that reduces imprisonment in the short term might result in increased incarceration in the long term. This article even concludes, albeit cautiously, that legislatures should not rely on new alternatives to imprisonment as a means to reduce incarceration in the long term.

This article will try to substantiate this thesis as follows. Following this introduction, Part II, shows that suspended sentences mainly replaced sentences of immediate imprisonment shortly after this penalty was introduced to Israeli law in 1954. Part III describes the decade following this legislative reform and shows how judicial decisions and legislation inadvertently planted the seeds that would later change the nature of suspended sentences from mainly an alternative to imprisonment to a supplement to immediate imprisonment sentences. Part III

5. This observation is also mirrored in Webster and Doob's study of Canadian sentencing, where the initially successful conditional sentence was later seen as having "largely failed to deliver." *See* Cheryl Marie Webster & Anthony N. Doob, *Missed Opportunities: Canada's Experience with the Conditional Sentence* 82 LAW & CONTEMP. PROBS., no. 1, 2018, at 163.

6. Hok HaOnshin (Penal Law) 5737–1977, §§ 52–60, SH No. 2067 p. 26–28 (Isr.), *translated in* https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/43289694.pdf [https://perma.cc/ZY5B-KTXF].

7. *Id.* §§ 51A–51K, p. 22–26.

8. For a similar development of suspended sentences in England and Wales, see Bottoms, *supra* note 2, at 9 (showing that, despite the clear intention of the legislature and the court of appeal in R. v. O'Keefe ([1969] 2 Q.B. 29) that suspended sentences should only replace sentences of immediate imprisonment, later decisions by the courts and subsequent parliamentary amendments led to a different result).

9. *See e.g.*, Mona Lynch, *Mass Incarceration, Legal Change, and Locale: Understanding and Remediating American Penal Overindulgence*, 10 CRIMINOLOGY & PUB. POL'Y 673, 681 (2011) (explaining how changes to statutes and legal policies might be put into practice in ways "contrary to the stated goals of the formal laws or that subvert the aims of the legal change in question").

also analyzes the long-term effects of the decisions in this decade and shows that, with the passage of time, suspended sentences probably increase, instead of decrease, incarceration in Israel. Part IV takes another case study—imprisonment via service labor—and shows that while this measure was less successful as an alternative to incarceration from the start, it has, with the passage of time, likewise led to an increase in incarceration contrary to the original intent with which it was enacted. Part V concludes that even when studies show that an alternative to imprisonment is successful in reducing incarceration, these alternatives might do the exact opposite in the long run.

II
SUSPENDED SENTENCES AS AN ALTERNATIVE TO INCARCERATION—THE FIRST DECADE

A. The Suspended Sentence and Probation

In Israel, a suspended sentence is a sentence of imprisonment that the defendant has to serve only if he is convicted of a further offense that has been specified by the sentencing court—called the breach offense—within the conditional period set by that court.[10] In fact, in Israeli Penal Law, this penalty is called the Conditional Imprisonment Penalty, but since the term suspended sentence is better known outside of Israel, the article will use that term here.[11]

When the Knesset, the Israeli parliament, decided to adopt suspended sentences in 1954,[12] Israel already had a well-developed probation system.[13] While in England it was sometimes argued that there was nothing to be gained by adding suspended sentences alongside probation,[14] the debate in the Israeli parliament showed a general agreement that Israel needed to introduce

10. The conditional period in Israel can be between one and three years. For further discussion of the nature of suspended sentences in different jurisdictions, see Richard S. Frase, *Suspended Sentences and Free-standing Probation Orders in U.S. Guidelines Systems: A Survey and Assessment* 82 LAW & CONTEMP. PROBS., no. 1, 2018, 51; Arie Freiberg, *Suspended Sentences in Australia: Uncertain, Unstable, Unpopular and Unnecessary?* 82 LAW & CONTEMP. PROBS., no. 1, 2018, 81. The history of the suspended sentence is surveyed in MARC ANCEL, SUSPENDED SENTENCE (1971). *See also* Marc Ancel, *The System of Conditional Sentence or Sursis*, 80 L. Q. REV. 334 (1964).

11. Hok HaOnshin (Penal Law) 5737–1977, § 52, SH No. 2067 p. 26 (Isr.), *translated in* https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/43289694.pdf [https://perma.cc/585T-F6RP].

12. Penal Law Amendment (Methods of Punishment), 5714–1954, § 18, p. 235.

13. Probation of Offenders Ordinance 3, 1944.

14. In England the proposal to institute suspended sentences was originally rejected by the Advisory Council on the Treatment of Offenders in 1952 and again in 1957. The main reason was that there was nothing to be gained by adding the suspended sentences alongside probation. The Council concluded that: "[t]he suspended sentence is wrong in principle and to a large extent impracticable. It should not be adopted, either in conjunction with probation or otherwise." GREAT BRITAIN HOME OFFICE, REPORT OF THE ADVISORY COUNCIL ON THE TREATMENT OF OFFENDERS: ALTERNATIVES TO SHORT TERM IMPRISONMENT 32 (1957); *see also* Leslie Sebba, *Penal Reform and Court Practice: The Case of the Suspended Sentence*, *in* STUDIES IN CRIMINOLOGY 133, 135 (Israel Drapkin ed., 1969); Bottoms, *supra* note 2, at 1–4; Arnold Enker, *The Suspended Sentence: Israel's Experience*, 14 ISR. L. REV. 369, 373–75 (1979).

suspended sentences.[15] In fact, during this legislative process it was emphasized that suspended sentences should not replace probation sentences.[16] Rather, suspended sentences were useful when the defendant was unfit for probation or when probation was not severe enough for the offense.

The debate focused on combining suspended sentences with probation. While the original bill proposed combining probation orders together with suspended sentences, the Probation Service argued that the two sanctions were incompatible.[17] The suspended sentence, it was argued, was a form of punishment meant to deter, while probation was meant to rehabilitate. The Probation Service succeeded in convincing the Knesset, and the original 1954 law did not allow probation orders to be added to suspended sentences.[18] Yet, this changed following the 1963 amendment. The legislative bill explained that the supervision of a probation officer could assist the convict and supply an additional preventative measure to reduce recidivism.[19] Today, courts may add probationary supervision to a suspended sentence order.[20]

The suspended sentence has some similarities to probation since, in both cases, if the convicted defendant does not breach the court order during the specified period of time, he or she can avoid imprisonment. Yet a suspended sentence differs from probation in several respects. First, a probation order can include a variety of different terms;[21] whereas the only condition attached to a suspended sentence is the requirement not to commit a breach offense during the term of suspension.[22] Second, a probation officer supervises the fulfilment of the probation order, whereas no one actively supervises a suspended sentence.[23] Third, when probation is revoked the defendant is brought in for resentencing, where the court decides whether to impose an alternative sentence and which sentence to impose.[24] In contrast, in the case of a breach of a suspended sentence, the court is obligated to simply activate the pre-determined prison sentence that was set following the initial offense.[25] Fourth, while probation cannot be added

15. The perceived success of suspended sentences in some European jurisdictions and the need to enlarge the available penal options were mentioned as justification for the introduction of suspended sentence in Israel. *See* Penal Law Amendment (Methods of Punishment) Bill, 5714–1953, § 15, p. 7; DK (1953) 228, 231 (Isr.).

16. Sebba, *supra* note 14, at 144.

17. Penal Law Amendment (Methods of Punishment) Bill, 5714-1953, § 16, p. 7.

18. Sebba, *supra* note 14, at 157–58; Enker, *supra* note 14, at 380–81; *cf.* The Constitution, Law and Justice Committee, Rep No. 7/C, 2d Knesset, at 5 (Feb. 15, 1954).

19. Penal Law Amendment (Methods of Punishment) Bill, 5722–1962, § 18A, pp. 246, 254.

20. *See* Probation Ordinance (New Version), 5729–1969, § 1(1)(b)(2).

21. *Id.* § 5.

22. Hok HaOnshin (Penal Law) 5737–1977, § 52, SH No. 2067 p. 26 (Isr.), *translated in* https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/43289694.pdf [https://perma.cc/6DQ9-HLCZ].

23. Probation Ordinance (New Version), 5729–1969, §4(b).

24. *See id.* §§ 16–17, 20.

25. Hok HaOnshin (Penal Law) 5737–1977, § 55, SH No. 2067 p. 27 (Isr.), *translated in* https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/43289694.pdf [https://perma.cc/RX2D-KKJ5].

to sentences of immediate imprisonment, following a 1963 amendment to Israeli penal law, suspended sentences can be added to any type of sentence.[26] Finally, probation can be imposed as an alternative to conviction when the court decides that the consequences of conviction are disproportionally harsh and the violation was minor.[27] In fact, in theory (though, as we show below, not necessarily in practice) the court should first decide to sentence the defendant to imprisonment and only then decide whether to make all or part of the imprisonment term conditional.

B. The Original Goals of Suspended Sentences

The government mentioned two reasons for introducing the suspended sentence in 1954. First, the suspended sentence aimed to replace immediate imprisonment for first-time offenders, when the offense severity justified imprisonment.[28] Second, it was intended for cases where immediate imprisonment was too severe, yet probation was unfitting and recognizance or fines were not severe enough.[29] Two additional reasons were mentioned during the debate in the Knesset. The Minister of Justice said that the suspended sentence was also needed to help reduce prison overcrowding.[30] The Attorney General mentioned a fourth goal: the replacement of short incarceration sentences.[31] In his view, after the introduction of the suspended sentence, there would no longer be a need for short, immediate prison sentences.[32]

The second goal mentioned above indicates that suspended sentences were introduced not only as an alternative to immediate imprisonment, but also as an intermediate sanction—harsher than fines or probation but more lenient than immediate imprisonment—designed to ensure a proportional response that existing penalties did not allow.[33] Still, though the Knesset expected that in some cases it would also replace fines[34] and recognizance,[35] the primary purpose and

26. Penal Law Amendment (Methods of Punishment) (Amendment No. 5) Law 5723–1963, § 18(a).

27. Probation Ordinance, § 1(2).

28. Penal Law Amendment (Methods of Punishment) Bill, 5714–1953, p.10. However, the wording of the law does not refer specifically to first-time offenders, and, as this article will show below, the measure was imposed on repeat offenders too.

29. Sebba, *supra* note 14, at 144.

30. DK (1953) 228, 231 (Isr.). Similarly, sentencing reform in Canada included conditional sentences and was driven in part by increased incarceration and concerns about capacity. *See* Webster & Doob, *supra* note 5, at 166; *see also* Freiberg, *supra* note 10, at 88 (citing rising prison populations as a motivating factor for increased use of community-based alternatives).

31. The Constitution, Law and Justice Committee, Rep No. 54/C, 2d Knesset, at 2 (July 19, 1954).

32. *Id.*

33. *See* The Constitution, Law and Justice Committee, *supra* note 18, at 4.

34. The Attorney General supposed that the suspended sentence would replace most of the fines that were imposed prior to the enactment. *See* The Constitution, Law and Justice Committee, Rep No. 8/C, 2d Knesset, at 6 (Feb. 23, 1954).

35. *See* DK (1953) 233 (Isr.) (statement by the minister of justice explaining that he expects suspended sentences to replace recognizances in some cases); *see also* DK (1953) 372 (Isr.).

effect of suspended sentences was to replace sentences of immediate imprisonment.

C. The (Temporary) Success of Suspended Sentences in Reducing Incarceration

When enacted, the new suspended sentencing clause directed judges to determine whether to condition (or suspend) the prison sentence they had decided to impose. This wording instructed judges to first decide whether an imprisonment sentence was needed and only then decide whether to suspend it.[36] This two-step process was meant to indicate to judges that a suspended prison sentence was still a prison sentence, and that only the activation of the sentence—not its duration—should be altered through suspension.[37] Hence, the Knesset required that the prison term still be proportional to the severity of the offense and not longer just because of its suspension.[38] In other words, the term of the suspended sentence should be similar to the term that would have been imposed had the sentence been an immediate sentence.[39] That way, if the sentence was activated, the term remained proportional.

Initially, the Israeli Supreme Court seemed to accept this proposition.[40] In a 1957 decision, the Court made a clear distinction between criteria for setting the length of an imprisonment that adequately fit the severity of the offense, and the

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36. As this article shows above, the Knesset intended for suspended sentences to sometimes be imposed in cases where fines or a recognizance were previously used, and not merely as an alternative to imprisonment. Still the wording of the section did not fully reflect that intention. *Supra* text accompanying notes 34–35.

37. In Canada, the wording of the law also required a two-step process. Still, the Supreme Court held "[t]he requirement in § 742.1(a) that the judge impose a sentence of imprisonment of less than two years does not require the judge to first impose a sentence of imprisonment for a fixed duration before considering whether that sentence can be served in the community." Using purposive interpretation, the court also held "[a] conditional sentence need not be of equivalent duration to the sentence of incarceration that would otherwise have been imposed." R. v. Proulx, (2000) 1 S.C.R. 61; *see also* Webster & Doob, *supra* note 5 at 173–174.

38. *See* DK (1962) 15 (Isr.). The Minister of Justice criticized the conduct of the judges since they were imposing longer sentences simply because those sentences were suspended. He emphasized that the law was not meant to adversely affect offenders'' positions. Supreme Court Justice Berenson also said in the parliamentary hearing that it was a mistake to impose a longer sentence just because of the decision to suspend it. *See* The Constitution, Law and Justice Committee, Rep No. 131, 5th Knesset, at 8 (Feb. 5, 1963).

39. *See* DK (1962) 12 (Isr.) (comments of M.K. Zadok).

40. However, despite declaring that the sentence should not be longer because of its *de facto* suspension, in some cases the Supreme Court imposed longer suspended sentences when substituting for immediate imprisonment following appeals. *See e.g.*, CA 138/57 Greenberger v. The Attorney General 11 PD 1204 (1957) (Isr.) (sentencing the appellant to a three-month suspended sentence instead of one month of imprisonment); CA 90/58 Toledo v. The Attorney General 12 PD 932 (1958) (Isr.) (substituting a three-month prison sentence with a six-month suspended sentence); CA 149/55 Abu Shach v. The Attorney General 9 PD 1698, 1699 (1955) (Isr.) (substituting a six-month prison sentence with a twelve-month suspended sentence). Webster and Doob discuss a similar shift in conversion rate that derived from their Supreme Court's "purposive" interpretation of the legislation. In particular, "the rigid two-step decision-making process was abandoned and judges were thereafter allowed (if not encouraged) to hand down conditional sentences that were longer than the terms of incarceration they were meant to replace." Webster & Doob, *supra* note 5, at 174.

grounds for determining whether suspension of the sentence was appropriate.[41] In this case, the Supreme Court held that the appropriate sentence for the two defendants, both convicted of burglary, was nine months of imprisonment and that the three months imposed by the lower court was inappropriately lenient. Yet since these were the defendants' first convictions, and taking into account their families' situations (which were not specified) the Court determined that "it [was] justified, and hopefully also effective" to suspend the sentence; the defendants would only serve the sentence if they committed a felony or misdemeanor property offense in the following three years.[42] In other words, the court held that the length of sentence should be determined by the severity of the offense alone and should not increase merely because the sentence was suspended.[43]

In another decision, the Supreme Court expanded the use of suspended sentences beyond the original intended class of first-time offenders to include repeat offenders.[44] Recall that during the legislative process, it was assumed that suspended sentences would mainly be used for first-time offenders. Yet the Knesset did not explicitly add such a requirement to the law. In this case, the Court suspended a prison term of eight months, despite the defendant's record of previous offenses, because the defendant had found a steady job, which decreased the chance that he would reoffend.[45] This case opened the door for suspending the sentences of repeat offenders, which resulted in a further reduction of sentences of immediate imprisonment overall. In 1963, the Knesset added an amendment clarifying that suspended sentences could be imposed on repeat offenders too.[46]

As illustrated above, the case law indicates that suspended sentences mainly served to replace immediate imprisonment, even beyond the original legislative intent. Studies conducted shortly after the adoption of the law in 1954 show that suspended sentences did in fact mainly replace sentences of immediate imprisonment without creating a substantial widening of the net[47]—meaning without substantially replacing less intrusive penalties like fines and recognizance.[48] In 1953, before the suspended sentence was adopted,[49] 13.5% of sentences were for immediate imprisonment, while by 1955, this rate had

41. C.A. 224/56 Hasan v. The Attorney General 11 PD 733, 735 (1957) (Isr.).

42. *Id.*

43. *Id*.

44. CA 29/55 Mizrachi v. The Attorney General 9 PD 599, 599 (1955) (Isr.).

45. *Id.*

46. Section 18(c) to the Penal Law, following the 1963 amendment, states that "[u]nless the Court otherwise directs, the period of suspension shall begin on the date of the sentence or, where the sentenced person is serving a term of imprisonment at that time, on the date of his release from such imprisonment." Penal Law Amendment (Modes of Punishment) (Amendment No. 5) Law, 5723–1963, § 18(c).

47. For the problem of net-widening, see in this volume, Richard S. Frase, *Suspended Sentences and Free-standing Probation Orders in U.S. Guidelines Systems: A Survey and Assessment*, 82 LAW & CONTEMP. PROBS., no. 1, 201951; *see also*, Freiberg, *supra* note 10, 93.

48. See Sebba, *supra* note 14, at 146, Table 5.

49. The new law came into force on September 17, 1954.

decreased to only 5.2%.[50] This sharp decrease was accompanied by a simultaneous increase in suspended sentences from 0% in 1953 to 9.5% in 1955, while the share of other types of sentences did not substantially change.[51] Additionally, in the first years following the amendment it seemed that this change was sustainable. The rate of immediate imprisonment sentences remained around 5% the decade following the enactment.[52] As the Knesset intended, the adoption of suspended sentences did not initially impact the use of probation by replacing probation with suspended sentencing.[53]

In sum, when suspended sentences were introduced in Israel, they primarily replaced immediate sentences. These initial results were very encouraging for those who hoped the introduction of alternative sanctions would help decrease incarceration.

III
FROM SUBSTITUTE TO SUPPLEMENT—THE INTRODUCTION OF PARTIAL SUSPENSION

A. Partial Suspension Before 1963

As discussed, in the first decade after its introduction suspended sentences mainly replaced immediate imprisonment. Their use did not seem to substantially widen the enforcement net to cases that were unlikely to result in imprisonment before the enactment of the law. Yet the seeds for the drastic change in the function of suspended sentences were already planted in that first decade. Following decisions by the courts and the Knesset, which this article will describe below, by 1963 courts were allowed to partially suspend a sentence. *De jure*, this meant that judges, after deciding the term of imprisonment, suspended only part of it. *De facto*, as shown below, it allowed judges to add a suspended prison term to an immediate prison term. As a result, the main function of suspended sentences changed. Instead of replacing immediate imprisonment and other types

50. See Sebba, *supra* note 14, at 146, Table 5.

51. At that time in the Magistrates'' courts, there was an increase in the use of fines and an equally sizeable decrease in the use of recognizance. As Sebba (*supra* note 14, at 147–48) explained, the most probable explanation for these trends was that fines replaced recognizance and suspended sentences were mainly substituted for immediate imprisonment. However, in the district courts, suspended sentences also replaced fines. These were the cases mentioned by the Attorney General, in which the courts presumably thought fines inadequate but hesitated to impose immediate imprisonment, The Constitution, Law and Justice Committee, Rep No. 8/C, *supra* note 34, at 6; *see also* The Minister of Justice, DK (1953) 233 (Isr.). Yet, since the overwhelming majority of cases were handled by the Magistrates' Court as first instance, it is fair to say that only a few fines were replaced with suspended sentences.

52. *See* O. SCHMELZ & D. SALZMAN, CRIMINAL STATISTICS IN ISRAEL 1949–1962, VOLUME II: ANALYSIS 198, Table 188 (Publication of the Institute of Criminology, Jerusalem 1964) (showing that between 1955 and 1960 the rate of immediate prison sentence was between 4.8% and 6.8%). In 1963-1965 the rate of immediate imprisonment was between 4.4% and 5%. *See* The Criminal Statistic (1964; 1965), Central Bureau of Statistics, Special Series No. 247 at p. XXIII, Table X.

53. See Sebba, *supra* note 14, at 150.

of penalties, they became mainly a supplement to imprisonment and other sentences.

During the 1954 legislative session, one Member of the Knesset (M.K.) suggested allowing courts to suspend only part of a sentence.[54] At that time, this proposal was rejected for several reasons: First, the suspended sentence was meant to show mercifulness toward the defendant, and the defendant would not feel that effect if he was still to be immediately incarcerated for part of the sentence.[55] Second, if the suspension of the sentence could help correct the defendant's ways, immediate imprisonment would not be useful—but if a suspended sentence *could not* improve his ways, then there was no benefit to be derived from suspending even part of the sentence.[56] Third, there was concern that partial suspension would result in short immediate terms of incarceration supplemented by suspensions, and such short imprisonments are catastrophic to defendants and unhelpful to the state.[57] As a result, the Knesset voted to reject the proposal to allow partial suspension.[58] Yet despite this clear decision of the Knesset not to allow partial suspension, in several decisions the Supreme Court still decided to add a suspended sentence to immediate imprisonment.[59]

By 1963, about 10% of suspended sentence verdicts were partial suspensions.[60] As described below, instead of clarifying that this practice was contrary to the law, the Knesset amended the Penal Law to reflect the practice that had emerged. This Amendment is discussed in the next section.

B. The 1963 Law—Partial Suspension

In 1963 the Knesset revisited the issue of the suspended sentence. This was part of a comprehensive amendment to the Penal Law, including several sections regarding the suspended sentence.[61] Many of the proposed changes were heavily debated.[62] Yet one section in the bill—authorizing partial suspension of a

54. *See* the Constitution, Law and Justice Committee, Rep No. 54/C, *supra* note 31 (comments by M.K. H. Rubin).

55. *See id*. (comments by M.K. Y. Shapira).

56. *Id*.

57. *See id.* (comments by the Attorney General); *see* Sebba, *supra* note 14, at 161–62; *see also* S. Shoham & M. Sandberg, *Suspended Sentence in Israel, Bulletin of the Israeli Society of Criminology* 18 (1962) (Hebrew) (finding that breach is more likely following partial suspension and recommending prohibiting partial suspension).

58. *See* DK (1954) 2675 (Isr.).

59. *See, e.g.*, CA 88/57 Fried v. The Attorney General 11 PD 910, 912 (1957) (Isr.) (upholding a sentence of two years in prison in addition to a two-year suspended sentence); CA 25/58 Greenberg v. The Attorney General 12 PD 481, 482 (1957) (Isr.) (rejecting the appeal and sentenced the offender to nine months in prison and an additional nine-month suspended sentence); CA 91/59 The Attorney General v. Hindi 13 PD 1007, 1008 (1957) (Isr.) (accepting the appeal and sentenced the offender to a six-month imprisonment in addition to a twelve-month suspended sentence).

60. Sebba, *supra* note 14, at 163, Table 17.

61. Penal Law Amendment (Modes of Punishment) (Amendment No. 5) Law, 5723–1963; *see also* Sebba, *supra* note 14, at 154 (reviewing the major amendments relating to suspended sentence).

62. This amendment was discussed in eighteen meetings of the Constitution, Law and Justice Committee. *See* DK (1963) 1969 (Isr.).

sentence—passed with almost no debate at all.[63] This lack of debate is somewhat surprising since the issue was extensively debated in 1954, during which the government and the Knesset gave several convincing reasons not to allow partial suspension.[64] Moreover, several members of the Knesset and representatives of the Ministry of Justice participated in both the 1954 and 1963 debates. Still, they confirmed the amendment without discussing the potential consequences of such a fundamental change.

The only reason the government gave in support of allowing partial suspended sentences was that they reflected the existing practice of the courts.[65] It is true that, before 1963, courts sometimes supplemented immediate imprisonment with suspended sentences despite a clear legislative directive to the contrary. However, the amendment did much more than simply acknowledge existing practice—it actively contributed to the rise of the practice. In the 1950s and early 1960s, only about 10% of suspended sentences were added to immediate imprisonment. Since suspended sentences were imposed in about 10% of cases, the combination of suspended sentences and immediate imprisonment appeared only in about 1% of cases at that time. As will be shown in the next subsection, these numbers increased dramatically in the following decades.

C. The Effect of the Partial Suspension

Following the 1963 amendment, the law states that "when a Court imposes a penalty of imprisonment, it may—in the sentence—direct that *all or part* of that penalty be conditional."[66] With this, the Knesset allowed for partial suspension of a sentence and opened the door for a different use of suspended sentences: as a supplement to immediate imprisonment. While the amendment's effect was not immediately apparent, the whole attitude toward suspended sentences changed dramatically as time passed. In 1956, 10% of the sentences in the Magistrate Courts, the entity in charge of more than 90% of the criminal cases,[67] included

63. *See* the Constitution, Law and Justice Committee, Rep No. 110, 5th Knesset, at 10A (Dec. 12, 1962) (containing the only reference to the section allowing partial suspension, which was made by Mr. Shalgi, the representative of the Ministry of Justice, who said "courts, de facto are doing that anyway, so there is not real change"); *see also* the Constitution, Law and Justice Committee, Rep No. 115, 5th Knesset, at 10 (Dec. 26, 1962) (Judge Halevi mentioned that the most common sanction was a partial suspended sentence).

64. *See supra* text accompanying notes 54–58.

65. *See* the explanatory comment to the Penal Law Amendment (Modes of Punishment) (Amendment) Bill, 5722–1962, p. 252.

66. Penal Law Amendment (Modes of Punishment) (Amendment No. 5) Law, 5723–1963, § 18(a) (emphasis added). The amendment came into force on June 13, 1963. The amended section can be found today in § 52 to the Israeli Penal Law.

67. *See* SCHMELZ & SALZMAN, *supra* note 52, at 188, Table 177 (showing that about 93% of the criminal cases in 1956 were tried before the Magistrate courts). This rate has not changed substantially over the years. *See* THE ISRAELI JUDICIAL AUTHORITY, ANNUAL REPORT 2017, at 18, 26 (Apr. 23, 2018), https://www.gov.il/BlobFolder/reports/statistics_annual_2017/he/annual2017.pdf [https://perma.cc/5PSC-GKM9] (Hebrew) (showing that 42,966 of the 45,638 (~94%) criminal cases

suspended sentences.[68] In the second half of the 1960s this number started rising, reaching 17% in 1970.[69] While data for the second half of the 1970s is unavailable, by 1981, 49% of the sentences in the Magistrate Courts included a suspended sentence. [70] In 1990 it was 68.8%,[71] and, in 2010, 85% of Magistrate Court sentences included a suspended sentence.[72]

Yet these numbers do not reflect a shift from immediate imprisonment or other types of penalties to the suspended sentence. Only 15% of the sentences in the Magistrate Courts in 1992[73] and 18.8% in 2010[74] imposed a suspended sentence as the single sentence. In other cases, a suspended sentence was simply added to other types of penalties. A combined sentence of an immediate and a suspended sentence—sometimes with additional penalties—appeared in 15.9% of the sentences in 1992[75] and in 38.8% of the sentences in 2010.[76] Recall that, in the first decade following the introduction of suspended sentence, only 1% of sentences included such combinations.[77] Maybe even more revealing, in 1992, 94.4% of the immediate imprisonment sentences in the Magistrate Courts were supplemented with a term of suspended sentence.[78] This number increased to 97% in 2010.[79] These numbers tell the whole story: with an increase in partial suspensions, suspended sentences changed in function from primarily an alternative that avoided imprisonment, to a supplement to imprisonment.

It is true that, in 2010—the last year with available data—about 18.8% of sentences in Magistrate Courts still included suspended sentences as the sole penalty. One might argue that at least these sentences substituted immediate imprisonment, and hence suspended sentences still assist in reducing incarceration. Yet for two reasons, this is unlikely. First, as this article will show

recorded in 2017 (not including traffic offenses and juvenile cases) were tried before the Magistrate courts).

68. Criminal Statistic (1955–56), Central Bureau of Statistics, Special Series No. 81 at p. 32, Table 15.

69. Criminal Statistic (1970), Central Bureau of Statistics, Special Series No. 417 at p. 22, Table 13. These criminal statistics, both then and now, do not appear on regular basis.

70. Criminal Statistic (1981), Central Bureau of Statistics, Special Series No. 742 at p. 48, Table 16.

71. It apparently remained stable for a while because in 2000 it was 68.2%. CENTRAL BUREAU OF STATISTICS, STATISTICAL ABSTRACT OF ISRAEL (2003), Chapter 11, Table 11.4, http://www.cbs.gov.il/reader/shnaton/templ_shnaton.html?num_tab=st11_04&CYear=2003 [https://perma.cc/3PED-MTDH] (Hebrew) (last visited Dec. 24, 2018).

72. OREN GAZAL-AYAL, ET AL., CONVICTION AND ACQUITTAL RATES IN ISRAEL 19, 21 (2012), http://elyon1.court.gov.il/heb/Research%20Division/doc/Research1.pdf [https://perma.cc/Z7CP-JMZ4] (Hebrew).

73. Criminal Statistic (1992), Central Bureau of Statistics, Special Series No. 988 at p. 64, Table 18.

74. GAZAL-AYAL, ET AL., *supra* note 72, at 19.

75. Criminal Statistic (1992), supra note 73, at 62, Table 17.

76. Criminal Statistic (1992), *supra* note 73, at 64–65, Table 18.

77. An estimated 1% of sentences included such a combination since 10% of sentences included suspended sentences, and one tenth of these sentences were added to a term of immediate imprisonment. These data refer to all of the courts, but as the Magistrates are responsible for more than 90% of the sentences, the gaps are probably small.

78. Criminal Statistic (1992), *supra* note 73, at 62.

79. GAZAL-AYAL, ET AL., *supra* note 72, at 19.

below, in recent years the Supreme Court has indicated that suspended sentences are not the substitute for immediate imprisonment that they once were. Second, since almost all sentences of immediate imprisonment are supplemented by suspended sentences, more suspended sentences are imposed, and therefore, more suspended sentences are activated, resulting in more imprisonment. The article turns now to these two issues.

D. Suspended Sentences in Court Decisions After 1963

This article has shown that, following the 1963 amendment, courts began to use suspended sentences primarily as a supplement to other penalties. Virtually all sentences of immediate imprisonment also began to include a term of suspended sentence, and with this change in function the court also changed its attitude toward suspended sentences.[80] In 1985, the Supreme Court revisited the purposes of suspended sentences[81] holding that there were two goals to suspended sentences: the first, to refrain from unwarranted incarceration of defendants; the second, to deter defendants from reoffending. The Court then held that the main purpose of suspended sentences is the second goal—deterrence—while avoiding incarceration is only a secondary purpose.[82] When the aim is mainly deterrence, it makes sense to supplement and not only substitute immediate imprisonment with a suspended sentence.

In another development, the Supreme Court held that the suspended sentence is, in fact, a separate sentence from immediate imprisonment. Following the 2012 sentencing reform,[83] courts are required to construct in each case a proportionate sentencing range to fit the seriousness of the offense committed and the degree of the offender's culpability.[84] Only then can the court impose the sentence, usually within this proportionate range, based on circumstances that are unrelated to the commission of the offense (including the defendant's background or his behavior after committing the offense).[85] Thus, the construction of the sentencing range is probably the most important part of the sentencing decision. In practice, courts usually only determine the range for the most severe type of penalty and then add other supplementary measures without setting ranges for these measures. For example, if the sentence includes imprisonment, the court first determines the range for imprisonment and then

80. *Id*.

81. CA 823/84 The State of Israel v. Harari 39(2) PD 393 (1985) (Isr.).

82. *Id*. at 408; *see also* A.C.A 1553/15 Issa v. The "Samaria" Local Planning and Building Committee 9–10 (Nevo 2017) (Isr.) (holding that the main purpose of the suspended sentence is deterrence).

83. *See* Julian V. Roberts & Oren Gazal-Ayal, *Statutory Sentencing Reform in Israel: Exploring the Sentencing Law of 2012*, 46 ISR. L. REV. 455 (2013).

84. Penal Law Amendment No. 113 5773–2012 § 40(b) 2337 LSI 170 (stating that: "[t]he guiding principle in sentencing is proportionality between the seriousness of the offence committed by the offender and the degree of his culpability, and the type and severity of his punishment").

85. In some cases the court may deviate from the sentencing range for rehabilitation or to preserve public safety. Sections 40(d) and 40(e) to the Penal Law (available in English in Roberts & Gazal-Ayal, *supra* note 83, at 476–77).

adds fines, probation, license disqualification, or other penalties, without constructing a range for the terms of probation and disqualification and the amount of the fine.[86] Determination of the severity of these measures is made regardless of the range.

In the case of Yaniv Nachman, who was convicted of rape and indecent act offenses, the district court held that the sentencing range was four to six years of imprisonment but clarified that this range included the suspended part of the prison sentence.[87] The result was that most of the prison sentence was suspended, and the defendant was sentenced to only six months of immediate imprisonment, in addition to the time served on remand. On appeal by the State, the Supreme Court heavily criticized the district court.[88] The Court held that such a range means that the sentence can *de facto* range from a full suspended sentence to six years of immediate imprisonment, and that this range was too large.[89] The Supreme Court held that sentencing courts must make a clear distinction between suspended sentences and sentences of immediate imprisonment when determining the sentencing range and should expressly specify the lower limit of the immediate imprisonment range.[90] In this case, the Court held that the lower boundary of the range should be two years of immediate imprisonment.[91] As usual, the other types of penalties including suspended sentence, fine, and compensation to the victims were imposed with no reference to the range, at the end of the written sentence.[92]

In many ways, the *Nachman* decision only stated the way most courts had approached sentencing since the adoption of the 2012 sentencing reform. However, the decision is noteworthy in that it clarified for the first time that judges should distinguish between suspended sentences and immediate imprisonment in determining the sentencing range, and that when courts fit sentencing ranges to an offense's severity, the range should primarily refer to immediate imprisonment, if the case requires such a sentence. Suspended sentences, as well as fines and other penalties, should only be added later as a supplement. It follows that when imprisonment is the proportional sentence, suspended sentences cannot be substituted for this sentence. Suspended sentences can either supplement imprisonment or serve as the main sentence when proportionality does not require immediate imprisonment. While the wording of the statue indicates that the prison sentence is a unified measure, and

86. Probation can only be added to imprisonment served via service labor. *See* Probation Ordinance, § 11(b)(1).

87. DC (TA) S.C.C 39303-07-14 The State of Israel v. Nachman 9 (Nevo 2015) (Isr.).

88. CA 1079/16 The State of Israel v. Nachman (Nevo 2016) (Isr.).

89. *Id*. at 11.

90. *Id*. at 12.

91. *Id*. at 14.

92. We know of only one case in which the Supreme Court determined a separate range for suspended sentence and fines, despite including immediate imprisonment in the range. CA 3677/13 Alhurush v. The State of Israel (Nevo 2014) (Isr.). In all other cases, when the range includes immediate imprisonment, the court does not set a range for other types of penalties.

the court cansuspend all or part of this sentence, the Nachman court seems to adopt a different view.[93]

It seems that today, the suspended sentence is only imposed as the sole penalty when the court holds that the severity of the offense does not require incarceration. As a result, if suspended sentences were abolished, courts would likely rely more on fines, probation, and recognizance and only rarely impose immediate imprisonment in cases in which suspended sentences are currently used as the sole penalty. Therefore, eliminating suspended sentences would probably not substantially increase the use of actual imprisonment: they would primarily be replaced by other supplemental sentences. Consequently, while suspended sentences were successful in replacing immediate incarceration when first adopted, decisions by the Knesset and the courts changed it from an alternative to incarceration to a supplemental measure.

E. Activation of Suspended Sentences.

One might argue that even if most suspended sentences take the place of other intermediate sanctions such as probation or fines, some (even if we cannot know exactly how many) probably do replace immediate imprisonment, such that their use still reduces overall incarceration. However, even if that is true, suspended sentences, as they operate today, are more likely to increase, rather than decrease, incarceration rates overall. Since a suspended sentence is added to almost every sentence, and some of suspended sentences are likely to be activated by a further offense, the total number activated suspended sentences is large. As shown in Part III (C), more than 90% of sentences of immediate imprisonment are supplemented by a suspended sentence, and many offenders breach the terms of suspension. How many? One study from the early days of suspended sentences in Israel found that 13.2% of suspended sentences are breached.[94] Data from 1987 show that 33% of the prison sentences in the Magistrate Courts came from activation of suspended sentences.[95] In 1992, about 40% of prison sentences in the Magistrate Courts included activation of previously suspended sentence.[96] Newer data that is available only for Magistrate Court sentencing show that 22–24% of the prison sentences in those lower courts came from activation of a suspended sentence.[97] These data show that activated suspended sentences account for a substantial proportion of prison sentences.

93. Hok HaOnshin (Penal Law) 5737–1977, § 52, SH No. 2067 p. 26 (Isr.), translated in https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/43289694.pdf [https://perma.cc/585TF6RP].

94. Shoham & Sandberg, *supra* note 57, at 24, Table 4.

95. Criminal Statistic (1987), Central Bureau of Statistics, Special Series No. 859 at 59, Table 16.

96. Criminal Statistic (1992), *supra* note 73, at 62.

97. Data from 2010 show that 24% of the imprisonment sentences included activated of previously imposed suspended sentence. *See* GAZAL-AYAL, ET AL., *supra* note 72, at 19. The authors of this article have analyzed data that were extracted from the police criminal records for a different study and found that of offenders sentenced in Magistrate Court, 22% in 2014 and 2015, and 23% in 2016 had a suspended sentence that was activated in the sentencing decision. Nevine Emmanuel & Oren Gazal-Ayal, ""Punishment as Prize: The Case of Conditional Imprisonment Dataset"" (unpublished dataset 2018).

Before inferring the precise effect of suspended sentence activation on the rate of incarceration, a few words about activation law and practices are necessary. When suspended sentences were introduced in 1954, courts had no discretion about whether to activate a suspended sentence. If the defendant committed any breach offense within the term of suspension, the court was bound to activate the full suspended sentence.[98] The law considered every felony to be a breach offense, as well as certain misdemeanors specified in the original sentence.[99] In the 1963 amendment, the legislature decided that, like misdemeanors, only felonies specified by the first sentencing court as breach offenses would lead to activation, thus somewhat reducing the number of activations by decreasing the number of triggering acts.[100]

The 1963 amendment brought about another change in the activation law. Since judges tended to impose relatively long sentences when the sentence was to be suspended, offenders were often imprisoned for disproportionally long terms following minor breaches.[101] Thus, the Knesset, after a long debate, allowed courts to prolong the suspension period after a breach, instead of automatically having to activate the sentence.[102] However, this rule was supposed to be used as a rare exception, so prolonging the suspension was possible only where three cumulative conditions were met. First, no immediate prison sentence could have been imposed for the breach offense. This requirement was aimed at ensuring

98. Sebba, *supra* note 14, at 159–60; Enker, *supra* note 14, at 376.

99. Section 18(b) of the Penal Law Amendment 1954 determined: "A person who has been sentenced to suspended imprisonment will not bear his sentence unless he committed, within the period specified in the sentence, a felony or one of the misdemeanors specified in the sentence and has been convicted by a final judgment within the period or after it." (*translated in* S. Shoham & M. Sandberg, *Suspended Sentences In Israel: An Evaluation of the Preventive Efficacy of Prospective Imprisonment*, 10 CRIME & DELINQ. 74, 75 (1964).

100. Penal Law Amendment (Modes of Punishment) (Amendment No. 5), 5723–1963, § 18(b) (*available in* English in Sebba, *supra* note 14, at 168–70). The statute provides that the conditions of suspension may be fixed by reference to the ". . .type of offences, or by description or by way of reference to the relevant provisions of law." § 18(b), (d). However, contrary to the legislator's intent, the Supreme Court held that the sentencing judge may decide conviction of any felony breaches the terms of suspension since ""felonies"" is also type or category of offense within the meaning of the statute. CA 296/72 Ben-David v. The State of Israel 27 (1) PD 671, 672 (1973) (Isr.). In *Ben-David*, the court substantially expanded the chance that defendants will breach the terms of their suspended sentences and again increased the likelihood of imprisonment.

101. An example presented by M.K. E. Meridor exemplifies this trend. The story goes that, one Friday, Meridor received a phone call from a prison guard, who told him about an inmate serving a three-year prison sentence following an activated suspended sentence after he was found guilty of Possession of a small amount of cannabis for personal use. The Constitution, Law and Justice Committee, Rep No. 133, 5th Knesset, at 2 (Feb. 11, 1963). Another example cited by the Minister of Justice references a person who stole a small amount of money and was sentenced to a three-year suspended sentence. Two months before the end of his period of suspension, he committed a minor offense and the court had no choice but to activate the three-year sentence as originally pronounced. DK (1963) 1977 (Isr.). The Minister of Justice emphasized that many such cases existed.

102. *See* The Constitution, Law and Justice Committee, Rep No. 142, 5th Knesset, at 2–7 (Mar. 6, 1963); *see also* DK (1963) 1978 (Isr.) (confirming the amendment).

that this new power would only be used if the breach offense was a minor one.[103] Second, the activation of the sentence could not have been previously prolonged. If the defendant breached the terms of his suspended sentence twice, the court had to activate the sentence. Third, judges had to explain why it would be unjust to activate the sentence.[104] The legislators assumed that, given these conditions, decisions not to activate a sentence would be very rare.

This has not been the case. Data the authors of this article received for a different study show that in about 37% of sentences (2107 out of 5764) that followed a first breach of a suspended sentence of an adult offender, the court prolonged a suspension instead of activating the sentence.[105] In fact, in some cases the court even refrained from imposing an immediate prison sentence for a breach offense just in order to meet the first required condition for avoiding activation.[106] The high utilization of prolonging suspensions has likely mitigated the increase in imprisonment caused by activation of suspended sentences.

Another mitigating factor is a judge's power to impose sentences concurrently. The Penal Law states that the sentence for the breach offense and the activated suspended sentence should be imposed consecutively.[107] Yet, the Penal Law authorized courts, "for reasons which shall be recorded in the sentencing decision," to impose the two terms concurrently, in full or in part.[108] The data we received for a different study show that 27% of the activated sentences were imposed concurrently in full, and about 23.5% were imposed

103. The Attorney General, in the parliamentary hearing, emphasized that the proposal was intended, inter alia, for minor offenses. *See* The Constitution, Law and Justice Committee, Rep No. 142, *supra* note 102, at 4.

104. Penal Law Amendment 1963 § 18(d).

105. Nevine Emmanuel & Oren Gazal-Ayal, ""Punishment as Prize: The Case of Conditional Imprisonment Dataset" (unpublished dataset 2018).

106. *See, e.g.*, CA 229/78 Saadia v. The State of Israel, 32 (3) PM 256, 267–68 (1978) (Isr.) The defendant stole a Jerrycan of gasoline and was sentenced to three years of suspended sentence. He committed a subsequent offense, and the court held that the sentence for the breach offense should be one year of immediate imprisonment. Though courts must activate a suspended sentence if they imposes imprisonment for the breach offense, the trial court erroneously extended the term of suspension while imposing one year of immediate imprisonment for the breach offense. On appeal, the Supreme Court held that activation of the three-year term of imprisonment was too harsh, and to preempt such activation substituted a fine for the imprisonment. *See also* CA 536/70 Kassir v. The State of Israel, 25 (1) PD 281, 282 (1971) (Isr.). In this case, the three-year suspended sentence had already been extended once, so activation was mandatory. To avoid activation, the Supreme Court took the unusual step of treating the appeal against the activation order as an appeal against the original sentence. It extended the time for the filing of such an appeal—which had long since expired—altered the original order, and imposed three months immediate imprisonment in addition to three months imposed for further offense. In a separate study that the authors of this article conducted, they found that, for severe offenses, defendants with activatable suspended sentences are less likely to receive prison sentences for the breach offense than defendants without activatable suspended sentences, *ceteris paribus.* Nevine Emmanuel & Oren Gazal-Ayal, *Punishment as Prize: The Case of Conditional Imprisonment* (unpublished manuscript 2018).

107. Hok HaOnshin (Penal Law) 5737–1977, § 58, SH No. 2067 p. 28 (Isr.), translated in https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/43289694.pdf [https://perma.cc/585TF6RP].

108. *Id*.

concurrently in part.[109] Once again, the exception seems to have become the rule. This policy of imposing sentences concurrently also mitigated the effect of activated suspended sentences on imprisonment by reducing the total amount of incarceration for individuals convicted of further offenses.

Despite these exceptions, in most cases, when offenders breached the terms of their suspended sentences, the court activated the sentences and most of these activations were consecutive, at least in part. In these cases, the suspended sentences increased the overall imprisonment term. Moreover, following a second breach, activation is mandatory and thus, in cases of multiple breaches, suspended sentences certainly increase incarceration. Thus, even if some suspended sentences today replace immediate imprisonment, most of these sentences supplement other sanctions, and since they are often activated, suspended sentences are more likely to increase incarceration than decrease it.

In sum, suspended sentences successfully reduced incarceration, but only temporarily. With the passage of time, the courts and the Knesset made what might have been seen at the time as minor changes, but which in fact fundamentally changed the way suspended sentences are used. Instead of mainly replacing immediate imprisonment orders, suspended sentences today mainly supplement immediate imprisonment and other types of penalties. Since many of these suspended sentences are later activated, it is likely that today the option to impose suspended sentences increases the number of incarcerated people, and hence this penalty, in the long run, fails to serve as an alternative to incarceration.

IV
SERVICE LABOR

A. Service Labor as an Alternative to Prison

While suspended sentences were originally supposed to replace both immediate imprisonment and sometimes other penalties, service labor was introduced with one objective in mind: to replace immediate imprisonment.

An early version of service labor, called penal work, has existed in Israel since the time of the British mandate of Palestine.[110] In this version, at the request of the convict, the police were authorized to offer a convict who was sentenced to up to three months' imprisonment the opportunity to work daily for the duration of his sentence instead of being incarcerated.[111] Only a few dozen prisoners were given this option every year.[112]

In 1987, a modern version of service labor was introduced into the Penal Law.[113] The 1987 amendment authorized the sentencing judge to determine that

109. Nevine Emmanuel & Oren Gazal-Ayal, ""Punishment as Prize: The Case of Conditional Imprisonment Dataset" (unpublished dataset, 2018).

110. Penal Work Ordinance 1927.

111. *Id.* § 2.

112. *See* Penal Law (Amendment No. 25) Bill, 5746–1986, at 77 (Jan. 14, 1986).

113. *See* Penal Law (Amendment No. 21), 5747–1987, at 80 (Apr. 9, 1987).

a prison sentence of up to six months could be served in total or in part via service labor.[114] A convict sent to service labor is assigned to an employer by the prison authority and has to work five days a week for the duration of his prison sentence.[115] After the workday, he is not subject to specific restrictions.

When introduced in the legislature, the bill made it clear that the aim of service labor was to reduce prison overcrowding and to avoid the "devastating drawbacks of short imprisonments."[116] In other words, service labor was supposed to be an alternative to incarceration rather than a new supplemental intermediate sanction.

To ensure that service labor would be imposed only on people who would otherwise be sent to prison, the Knesset created several conditions. To use service labor, the court must first determine that the defendant is sentenced to immediate imprisonment; only then could the court consider whether his prison term should be served through service labor. Second, to ensure service labor is considered a way of serving a prison sentence and not an alternative sanction, a defendant that is sent to service labor is legally considered a prisoner, even though he is not in prison. This distinguishes service labor from probation and other types of community service that exist in Israel, which are supervised by social workers from the probation service rather than the prison authority.[117] In the service labor context, if the prisoner does not fulfill his obligations properly, the prison authority can send him to serve the remainder of the term in actual prison.[118] Third, the sentencing court must request a report from the director of service labor either before or after handing down the sentence, and only based on this report can the judge order that the imprisonment will be served via service labor. Thus, the judge has the option to first determine the regular sentence in months, then ask for a report, and then decide whether the prison sentence will be served in prison or by way of service labor. This is another way to avoid net-widening by ensuring that service labor will only be imposed on those who would otherwise be sent to prison.

Despite putting these mechanisms in place, a study conducted a few years after the introduction of service labor found that at least some net-widening nonetheless occurred. While the number of short incarceration sentences—sentences of up to six months that were not converted to service labor—declined by about 100 cases per year, the number of people serving service labor was about

114. Hok HaOnshin (Penal Law) 5737–1977, § 58, SH No. 2067 p. 28 (Isr.), translated in https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/43289694.pdf [https://perma.cc/585TF6RP].

115. *Id.* § 51F, p. 24.

116. The Penal Law (Amendment No. 25) Bill, 5746–1986, at 76.

117. Hok HaOnshin (Penal Law) 5737–1977, § 58, SH No. 2067 p. 28 (Isr.), translated in https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/43289694.pdf [https://perma.cc/585TF6RP].

118. *Id.* § 51I(a), p. 22. The service laborer may petition against a decision of the Prison Commissioner to the District Court. *Id.* § 51I(c)–(d).

ten times higher.[119] Due to fluctuations in sentencing statistics, it is not possible to conclude that only 100 of the 1000 service labor orders served as substitutes for incarceration. Moreover, some service labor orders might have replaced longer terms of imprisonment.[120] Still, the magnitude of difference in the numbers does indicate that service labor did more than just replace imprisonment. In fact, when prosecutors were asked in a questionnaire which sentences they thought service labor was meant to replace, they seemed to believe it was not prison sentence. About 60% of state prosecutors and 71% of police prosecutors replied that service labor could replace any sanction, including fines, probation, and suspended sentences.[121] Judges were slightly more attuned to the legislature's intent in their responses, though 35% of judges also agreed that service labor sometimes replaced non-custodial sanctions.[122]All in all, the study concluded that practitioners viewed service labor as sometimes replacing imprisonment but at other times replacing other, less severe sanctions, contrary to the legislature's intent. Despite all attempts to avoid it, service labor seems to have created a substantial problem of unintended net-widening from the start.

B. The First Reform of Service Labor

Originally, the Penal Law required judges to first sentence a convict to a term of immediate imprisonment and only then send him to the director of service labor, to examine whether a type of service labor would be an appropriate alternative to imprisonment. Since service labor was meant to be a way of serving a prison sentence, this should not have been problematic—if the convict was found unfit for any service labor, he would simply serve the appropriate sentence of imprisonment. In reality, however, judges often sentenced defendants to a few months of imprisonment, even if they believed incarceration was inappropriate for the case, so they could later convert the sentence to service labor in accordance with the conditions prescribed in the Penal Law.[123]

This was clearly not what the legislature had intended. Service labor should have been imposed only when the convict would have otherwise been sent to prison. By assigning service labor to cases that were inappropriate for prison on

119. Bilha Sagiv, Serving Prison Sentences by "Service Work" as a Model for Prison Alternatives, 218–19 (1997) (unpublished Ph.D. thesis, Faculty of Law, The Hebrew University).

120. *Id*.

121. *Id*. at 216, Table 6.5.

122. *Id*.

123. *See* CA 537/89 The State of Israel v. Avrahamien 43(4) PD 772, 778 (1989) (Isr.) (holding courts should usually request a report from the director of service work before issuing the sentence. That way they avoid a situation in which a court determines a term on the assumption that the defendant will serve it via service work, and later finds out that the defendant cannot serve his term in service work.) Yet, according to the law, if immediate imprisonment is unsuitable, the court should not impose service labor either, because service labor is merely a way of serving a prison sentence. Ergo, courts need not know whether the term will be served via service labor or incarceration when handing down the sentence. The insistence of the Supreme Court that courts will ask for the report before sentencing shows that the court believes that, in some cases, service labor does not replace a similar term of incarceration.

their merits, judges contributed to net-widening in contravention of the legislature's intent.

This improper practice was often revealed when judges first determined a prison sentence and only then received the service labor director's negative report determining that the convict was unfit to perform service labor. At that point in time, the prison sentence was final, and the judges faced a dilemma. They could send the defendant to prison, which would be an excessive punishment, or they could force the director to accept an unfit convict into a service labor program. In practice, some judges chose the first alternative[124] and others the second.[125]

One solution to this dilemma would have been to instruct judges not to impose an excessive term of imprisonment just because they were planning on ordering that the term be served via service labor. Yet rather than issue this clarification, the Knesset chose a different path. In a 2009 amendment, the Knesset mandated that only *after* a judge had a report from the director of service labor could a defendant be sentenced and the decision whether service labor was appropriate be made.[126] If the judge did not ask for such a report, service labor was not an option. In the bill's explanatory notes, the amendment was rationalized as a way to prevent judges from imposing prison terms with the intent that the sentence would be served via service labor, only to find out later that the convict was unfit for service labor.[127]

While this amendment solved the judges' dilemma, it inadvertently legitimized the practice of excessive prison terms for defendants who served their term in service labor. The 1987 version of the law assumed that a prison term should be determined without regard to the possibility that the sentence could be served via service work.[128] That is why judges did not have to know before sentencing whether service labor was a possibility or not. When the law requires

124. *See* C.C. 2520/06 (Rehovot) The State of Israel v. Ben Shemoul (Lawdata 2008) (Isr.) (emphasizing how service labor is sometimes imposed when actual imprisonment is inappropriate, contrary to the original intent of the legislature); *see also* CA 10292/06 Ploni v. The State of Israel (Nevo 2008) (Isr.) (accepting an appeal of two defendants who were sent to prison because they were unfit for service labor and holding that, while non-imprisonment sentence was too lenient, actual incarceration was too severe, and thus opting for the more lenient alternative sentence).

125. *See* Penal Law (Amendment No. 101) (Serving Imprisonment by Service Labor) Bill, 5768–2008, 582; *see also* The Constitution, Law and Justice Committee, Rep No. 13, 18th Knesset, at 9 (June 3, 2009) (the legal advisor of the Israel Prison Service discussing a case in which despite a negative report, the court ""forced"" the director to find a service work for the convict because the sentence was already given); *see also* CA 779/08 Mosley v. The State of Israel (Nevo 2009) (Isr.) (determining, in a majority opinion, that the director should continue to look for an employee for a defendant that was sent to prison because he was found unfit to service labor, following a plea bargain in which the parties agreed he will be sent to service labor).

126. *See* Penal Law (Amendment No. 102), 5769–2009, 240, § 51B(b)(1).

127. *See* Penal Law (Amendment No. 101) (Serving Imprisonment by Service Labor) Bill, 5768–2008, 582.

128. However, one member of the Knesset argued that judges would sometimes impose a six-month imprisonment to be served via service labor even in cases where the appropriate sentence was imprisonment for a longer period (nine months or even a year), to avoid sending an offender to prison. *See* DK (1986) 10, 14 (Isr.) (comments of M.K. Shulamit Aloni).

them to know whether service labor is possible before sentencing, it assumes they will take this information into account. Hence, it assumes that a term of service labor should not simply be a way of serving an equal term of imprisonment.

Though the wording of law still requires judges to see service labor as simply a way of serving a prison sentence, the structure of the law enables them to impose service labor even when imprisonment is inappropriate and to impose a longer term of imprisonment on convicts just because their sentence is to be served via service labor. As a result, net-widening—where more individuals are being assigned prison sentences and prison terms are longer—occurs just because judges know these terms will be served via service labor. If judges are only required to substitute one month of service labor for one month of incarceration, as the law requires, they do not need to know in advance whether service labor is possible at the time of sentencing.

When the law requires judges to know whether service labor is possible before sentencing, it implicitly allows them to treat a sentence of imprisonment differently when it is served via service labor and not incarceration. As will be shown in the next section, after this amendment judges openly held that a month of prison was to be replaced by more than one month of service labor, and hence, in practice, service labor is no longer just a way of serving an equally long prison term.

C. Adopting a Conversion Rate

The 2009 amendment changed the order of the decisions in the sentencing process, but it did not change the legislative wording, according to which service labor was simply a way of serving a prison sentence. As before, if a convict is sentenced to up to six months of imprisonment, the court can order that these six months will be served via service labor, and if the convict does not preform his service labor properly, the director can decide to send him to serve his remaining term of imprisonment behind bars. The only legal difference between serving a prison term in prison rather than through service labor is that incarcerated prisoners can be released on parole after serving two-thirds of their sentence, if they deserve an early release. Outside of this, they are meant to be equivalent sanctions: one month of service labor is a way of serving one month of a prison sentence.[129]

Yet judges found it hard to accept this legislated 1:1 ratio. Usually it is impossible to know what the sentence would have been if the judge thought the defendant would be serving it behind bars and not via service labor. Nevertheless,

129. There are several clear indicators in the law supporting the 1:1 ratio between imprisonment behind bars and imprisonment served via service labor. First, the fact that the law states that only when the court sentences the defendant to a term of up to six months of imprisonment may it decide that the term should be served by way of service labor. This means that six months of imprisonment are served via six months of service labor. Second, if the convict does not report to work, he is sent, following an administrative decision, to serve the remainder of his term in prison. § 51I(a) of the Penal Law. Again, one month of service labor is converted to one month of imprisonment in each of these cases. The mere fact that service labor is a way of serving a prison sentence indicates that the ratio should be 1:1.

in some instances, a conversion rate—converting prison time into a longer period of service labor time—has surfaced. In one appeals case, a panel of judges in the Tel Aviv District Court sentenced two defendants for a violation of the Prohibition of Violence in Sports Law.[130] One of the defendants was sentenced to two months of imprisonment, to be served via service labor. The other, who was found to be unfit for service labor, was only sentenced to one month of imprisonment for the same offense. The court's holding indicated that this shorter sentence was justified because of the difference between a prison sentence served via service labor and a sentence served behind bars.[131] Several other decisions also adopted a ratio of 1:2[132] or 1:3 in similar situations.[133] The Supreme Court even openly opted for a 1:2 conversion rate in one case, replacing, on appeal, a three-month sentence of imprisonment to be served behind bars with six months of service labor.[134] The initial intent of the legislature to substitute six months of service labor for six months of imprisonment has failed.

D. The Dorner Report and the 2018 Reform

In 2015, a public committee for the examination of penal policies, headed by former Supreme Court Justice Dalia Dorner, published its report, the Dorner Report.[135] The Dorner Report called for shortening long prison terms and for greater use of alternatives to incarceration. Among its recommendations, the committee stated that imprisonment rates in Israel should be reduced since the current high rates were costly and probably did not lead to lower rates of crime.[136]

On the issue of service labor, the committee recommended authorizing the courts to order that prison sentences of up to nine months (instead of six months) can be served by way of service labor.[137] However, the committee also raised concerns that judges would impose nine months of service labor in cases that

130. DC (TA) CA 60751-12-15 The State of Israel v. Mizrachi (Nevo 2016) (Isr.).

131. *Id.*

132. DC (Jer) C.C. 18158-01-14 The State of Israel v. Ploni (Nevo 2017) (Isr.) (accepting the petition of two offenders to convert six months of service labor to three months of immediate imprisonment, despite the objections of the prosecutor. The offenders asked to go to prison in order to shorten the sentence in a way that would not stand in their way to start school or work on time.).

133. DC (TA) CA 25366-03-16 Barbie v. The State of Israel (Nevo 2017) (Isr.).

134. CA 5857/16 Mahmali v. The State of Israel (Judicial Authority 2018) (Isr.).

135. Sharon Pulwer, *Israeli Panel Calls for Shorter Jail Terms, Improved Rehab for Offenders*, HAARETZ (Nov. 3, 2015), https://www.haaretz.com/israel-news/.premium-panel-calls-to-shorten-jail-terms-improve-rehab-1.5416699 [https://perma.cc/J42S-2QWV]. For the full report in Hebrew, see THE PUBLIC COMMITTEE TO EXAMINE PENAL POLICY AND THE TREATMENT OF OFFENDERS, REPORT (2015), http://www.justice.gov.il/Units/SanegoriaZiborit/News/Documents/dorner%20report.pdf [https://perma.cc/B6HF-P7M5] [hereinafter DORNER REPORT].

136. DORNER REPORT, *supra* note 135, at 28 ("Based on the above, the committee is of the opinion that an action is needed to reduce the use of imprisonment when imprisonment is not necessarily needed for incapacitation of offenders who are of high risk to the society, and to increase the use of less expensive and more effective penalties that do not violate the principle of proportionality, and thus bring about a more efficient use of the resources directed for the issue.").

137. *Id*. at 68.

currently result in six months of service labor instead of replacing actual prison sentences with longer service labor sentences.[138] The committee explained:

> Authorizing courts to order that sentences of more than six months will be served via service labor might result in the imposition of more than six months of service labor on defendants who would otherwise be sentenced to six months of service labor. In this case, the longer terms of service labor would not lead to reduction in incarceration. Moreover, there is a concern that when a judge will decide that the defendant deserves a sentence of imprisonment behind bars, he will choose a longer term of imprisonment, one that cannot be served via service labor, and as a result, imprisonment terms will be longer. It is true that judges can decide to impose shorter terms of imprisonment and still refrain from ordering that they are served via service labor, but they might still prefer to set a term that cannot be replaced with service labor, and hence impose longer sentences. Additionally, according to the discussion above, it will be harder on defendants serving longer terms of service labor to complete their duties, and hence more defendants will breach the service labor order and will be sent to prison for the remaining of the sentence, after the breach. These consequences, if materialized, will undermine the purpose for which we consider prolonging the maximum term of service labor—which is reducing incarceration.[139]

In other words, since longer periods of service labor are more likely to be breached, and convicts are more likely to serve the remainder of their sentence in prison after such a breach, the proposed change might result in more instead of less imprisonment and be counterproductive. In this way, the majority opinion in the committee stated that the recommended change would only be justified if the convict sent to service labor would be eligible for parole after serving two-thirds of their sentence, like incarcerated convicts.[140] With early release for convicts doing service labor, the risk of net-widening can be reduced. A minority opinion of four members of the committee argued against early release for convicts doing service labor.[141]

The committee's recommendation was brought before the Knesset by way of a proposed amendment to the law.[142] The representative of the Attorney General argued that if early release was allowed, prosecutors and courts would not be willing to replace longer prison sentences with service labor since they would deem the sentence to be too lenient.[143] One of the authors of this article, who was also the coordinator of the Dorner Committee, argued in the hearings that, without early release, prolonging service labor might result in higher rates of breach and, hence, more imprisonment.[144]After four hearings dedicated to that debate, the Knesset, in July of 2018, adopted a compromise allowing early release

138. *Id.* at 62–63.

139. *Id.* at 63.

140. *Id*. at 64–5.

141. *Id*. at 66. The members of the minority opinion were the deputy attorney general, the deputy state attorney, and the representatives of the prison service and police.

142. The Penal Law (Serving Imprisonment by Service Labor—Temporary Order) Bill, 5777–2016, 654.

143. *See* The Constitution, Law and Justice Committee Rep No. 589, 20th Knesset, at 9–10 (Apr. 30, 2018).

144. *See* The Constitution, Law and Justice Committee Rep No. 655, 20th Knesset, at 18 (July 3, 2018).

of up to six weeks, instead of three months, for prisoners sentenced to more than six months of service labor who performed their duties properly and complied with a rehabilitation program (if one was set for them).[145]

This new reform will come into effect in March of 2019 for a period of two years. The Ministry of Justice plans to accompany the legal change with research examining to what extent the new and longer service labor sentences will replace incarceration and to what extent they will replace shorter service labor sentences. This research is supposed to determine whether the new reform has succeeded in reducing incarceration, which is the professed aim of the amendment.[146] Only time will tell what the effects of this latest amendment are, but the debate in the Knesset indicates that the attempts to replace imprisonment with an equal term of service labor have failed. No one today is trying to revive the original goal of service labor: replacing short prison terms with service labor at a conversion rate of 1:1.

V
CONCLUSION

As more evidence and information about the social and economic harm of mass incarceration emerges, many jurisdictions around the globe struggle to reduce their prison populations.[147] One of the most obvious ways of achieving this goal is developing alternatives to imprisonment. Yet research indicates that these alternative sanctions, even if designed to replace imprisonment, often replace other, less severe sentences and frequently widen the net of social control.[148] As a result, when new alternatives are introduced, significant attention is directed toward research examining the effectiveness of the new measure in reducing imprisonment. Studies may utilize a before-and-after analysis to determine whether and to what extent the new sanction reduces imprisonment.

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145. The Penal Law (Amendment No. 133–Temporary Order), 5778–2018, 886 (July 26, 2018).

146. The Penal Law (Serving Imprisonment by Service Labor–Temporary Order) Bill, 5777–2016, 654.

147. *See generally The Growth of Incarceration in the United States: Exploring Causes and Consequences*, NATIONAL RESEARCH COUNCIL, WASHINGTON, DC (2014), https://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf [https://perma.cc/6W6E-VXCY]. For a review of studies examining the differences between nations and cultures see Sebba, *supra* note 1, at 258–60. *See also* Tapio Lappi-Seppälä, *Community Sanctions as Substitutes to Imprisonment in the Nordic Countries*, 82 LAW & CONTEMP. PROBS., no. 1, 2018, 17, 17–18; Hans-Jörg Albrecht, *Sentencing in Germany: Explaining Long-term Stability in the Structure of Criminal Sanctions and Sentencing*, 76 LAW & CONTEMP. PROBS., no. 1, 2013, 211–36.

148. Bottoms, *supra* note 2, at 8–9; *see generally* Julian V. Roberts & Andrew Ashworth, *The Evolution of Sentencing Policy and Practice in England and Wales, 2003–2015*, 10–20 (University of Chicago, 2016) (ebook); Keir Irwin-Rogers & Julian V. Roberts, *The Suspended Sentence Order in England and Wales, 2004-2017*, 82 LAW & CONTEMP. PROBS., no. 1, 2018, at 144. In New Zealand suspended sentences were abolished in 2002, as they led to increased rates of incarceration as a result of net-widening. Philip Spier, CONVICTION AND SENTENCING OF OFFENDERS IN NEW ZEALAND: 1989 TO 1997, 109–16, 140 (1998); *see also* Sentencing and Parole Reform Act 2002 (NZ). For a similar discussion in Australia, see Freiberg, *supra* note 10, notes 89–91.

The two Israeli case studies discussed in this article demonstrate that reliance on such research should proceed with caution. In some cases, new intermediate sanctions might succeed in replacing prison sentences immediately after their adoption. However, with the passage of time, the memory of their original purpose might erode, judges might change the way they use the intermediate sanctions, and the legislature might amend the law, disregarding the original intent behind the sanction. As a result, instead of reducing imprisonment, new measures might actually increase imprisonment.

After highlighting the difficulty of relying on alternative to imprisonment as a means for reducing imprisonment, one might expect us to propose possible solutions. Unfortunately, we have none. Despite trying, we failed to come up with measures that legislatures can take to ensure that alternatives to imprisonment will replace prison sentences in the long run. It might be argued that if legislatures clarify the purpose of the alternative in the wording of the law, courts will abide by it.[149] Yet there is no indication that such statements in the code would achieve their goal. In fact, the Israeli service labor legislation was very clear about its purpose and still failed to achieve it.

Alternatively, one could suggest that the decision to substitute an alternative for imprisonment should be done only after the judge hands out the sentence. For example, electronic monitoring enforcement programs in Denmark, Norway, and Sweden allow the prison authority, and not the sentencing judge, to convert the prison sentence to an electronic monitoring sentence after the court process is over.[150] That way, the judge who imposes the prison sentence is behind a veil of ignorance and cannot be sure whether the sentence will be converted, and hence cannot impose the alternative on defendants who would have been otherwise sentenced to a less severe sanction. Yet a law placing so much power in the hands of a non-judicial body is constitutionally problematic. Moreover, judges might find ways to influence the administrative decisions.[151] Judges might also learn over time under which circumstances prison terms are converted to the alternative measure and make decisions accordingly. Again, the pre-2009 Israeli service labor example shows that judges sent defendants to prison merely because they assumed that the prison term will be converted to service labor.[152]

149. Lynch, *supra* note 9; *see also* Bottoms, *supra* note 2, at 9 (criticizing the Home Secretary for not clarifying in the wording of the statue that suspended sentences were supposed to replace imprisonment sentences).

150. *See* Lappi-Seppälä, *supra* note 147, at 39.

151. For example, before the 1987 amendment the Israeli police had the power to convert short imprisonment sentences (of up to three months) into "penal labor" (the earlier version of service labor). When defendants wanted their sentence to be converted, they asked the sentencing judge to postpone their date for entering prison, to allow the police more time to consider their request. A study shows a high correlation between the judges' decisions in response to that request and the police decision to convert the sentence. In 88% of cases where a judge decided to postpone incarceration, the police converted the sentence. *See* Naomi Pugatsch & Zion Tucson, *Penal Work—An Alternative to Imprisonment*, 9 DELINQ. & SOC. DEVIANCE 102, 108 (1981) (Hebrew).

152. CA 537/89 The State of Israel v. Avrahamien 43(4) PD 772, 778 (1989) (Isr.).

A third option would require judges to convert prison sentences up to a certain term. Yet the English attempt to do this shows that in some cases such a rule leads judges to impose longer prison sentences when they believe that prison is required, in order to bypass the rule.[153] The Dorner Report, too, presented a similar concern that judges would send defendants to longer terms if they are instructed to convert short terms of imprisonment to alternatives.[154]

All in all, it seems that even when the measures succeed in reducing imprisonment in the short term, legislation cannot really trick judges into using the alternative to imprisonment as designed in the long term. It is even more difficult to discourage future legislatures from retrospectively endorsing the way judges utilize the law when amending it at a later stage, and *de facto* changing its purpose. This article thus tends to conclude that adopting alternatives to imprisonment is not an effective way to reduce incarceration. When the goal is to reduce the use of incarceration, one should probably look for the solution elsewhere.

That does not mean that intermediate sanctions are unnecessary. One might advocate using suspended sentences, community sentences, and many other noncustodial sanctions in order to increase the spectrum of available penalties and allow variety of measures to better fit the offenses and offenders. It does, however, mean that it is often wrong to call these intermediate sanctions alternatives to imprisonment.

153. *See* Bottoms, *supra* note 2, at 7 (showing that in some cases courts imposed longer term of imprisonment in order to avoid the 1967 Act's provisions that required suspending short sentences).

154. DORNER REPORT, *supra* note 135, at 63.