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## Suspended Sentencing In Spain: Why Their Model Could Alleviate Some Of America's Worst Federal Prison Issues

Ryan Lamon

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**SUSPENDED SENTENCING IN SPAIN:  
WHY THEIR MODEL COULD ALLEVIATE  
SOME OF AMERICA’S WORST FEDERAL  
PRISON ISSUES**

*By Ryan C. Lamon\**

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## I. INTRODUCTION

Overcrowding. The cost to the taxpayers. The dangers of a life inside prison. What if all of these problems could be alleviated or solved, all while not posing an increased danger to the general public? Implementing the suspended sentencing model commonly used in Spain as the automatic sentence for United States federal offenders who fit the commonly used criteria in Spain would help alleviate some of these key negative attributes that accompany prison sentences and the lives of those serving them.

Making suspended sentencing the automatic sentence for United States federal offenders will keep certain offenders out of prison. This will alleviate some of the prison overcrowding. The fewer offenders that are in the prison system, the lower the Bureau of Prisons' budget allocation needs to be, creating less strain on the federal budget and taxpayers. This will also keep first-time offenders (or offenders who have had a long spell of law-abiding behavior) out of federal prison and away from the dangers of a life inside prison.

This comment will begin by examining the history of suspended sentencing, both in the United States and Spain. While suspended sentencing by definition is the same in both countries, its history is very different. United States federal judges lost the ability to

use suspended sentencing in 1984.<sup>1</sup> However, suspended sentencing is still a commonly used tool in Spain today.<sup>2</sup> Next, the comment will discuss the model that is commonly used in Spain. This section will include the criteria that Spanish judges examine when deciding whether or not suspended sentencing would be appropriate. This comment will also argue why the Spanish model and commonly used criteria are good fits for the United States. Finally, this comment will argue that automatically implementing suspended sentencing at the federal level would be positive for both citizens and the government. This comment will only address suspended sentencing in the United States at the federal level, not at the state level.<sup>3</sup> Because there are fifty different states and fifty possible standards and relevant case law, examining only the federal system in this comment will create a better understanding of how suspended sentencing works in Spain and how it could work in the United States.

## II. BACKGROUND OF SUSPENDED SENTENCING

### A. What is Suspended Sentencing?

Suspended sentencing is defined as “a legal arrangement in which a person who has been found guilty of a crime is not sentenced to jail but may be sentenced for that crime at a future time if he or she commits another crime during a specified period.”<sup>4</sup> This means that while the offender is found guilty, he or she serves no time inside a jail or prison. This comment will advocate for making suspended sentencing the automatic option for federal offenders in

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<sup>1</sup> Sentencing Reform Act of 1984, H.R. 5773, 98th Cong. (1984).

<sup>2</sup> *Suspension of sentence in Spain for convictions of two years or less*, GASCÓN BERNABÉU (Nov. 30, 2018), <https://www.gbabogados.co.uk/suspension-sentence-spain-convictions-two-years-less/> (hereinafter *Suspension of sentence in Spain*).

<sup>3</sup> The reason for this is that some states in the United States do allow for some form of suspended sentencing, and states will have different standards for what sentences can be suspended. *See* 2A NH PRACTICE SERIES: CRIMINAL PRACTICE & PROCEDURE § 33.25 (2019); 8 TENN. JURIS. CRIMINAL PROCEDURE § 43 (2019) (outlining the practice of suspended sentencing in New Hampshire and Tennessee. *See* respectively).

<sup>4</sup> *Suspended sentencing*, MERRIAM-WEBSTER DICTIONARY, (2019) <https://www.merriam-webster.com/dictionary/suspended%20sentencing>.

the United States if they meet the criteria that Spain has commonly used. In this case, the automatic option means that the judge will not have discretion to change the ruling; if the suspended sentencing criteria are met, the offender must receive that suspended sentence.

Suspended sentencing is different than probation. These two alternative sentences seem similar and could easily be confused. The Cambridge dictionary defines “probation” for criminals as “the condition of being allowed freedom if they commit no more crimes and follow certain rules.”<sup>5</sup> This is different from suspended sentencing in one important way, and that is in the “certain rules” language. Unlike suspended sentencing, conditions of probation can be things that are not crimes. And, if those conditions are broken, the offender will put themselves in the position to have their alternative sentence revoked and be incarcerated.

In *United States v. Paul*, the 5<sup>th</sup> Circuit Court of Appeals upheld a probation condition which denied the defendant access to computers and the Internet.<sup>6</sup> In *United States v. Knights*, the United States Supreme Court stated that a probationer can be subject to a search requirement, which would lower a person’s reasonable expectation of privacy compared to that of someone not on probation.<sup>7</sup> None of these highlighted conditions of probation are in and of themselves illegal or something that the average person not on probation would be subjected to, but rather certain restrictions on legal activities set by a probation officer and enforced by a judge. If these conditions, which do not need to be crimes, are broken, then probation can be immediately revoked by the judge who is conducting the hearing on the probation violation.<sup>8</sup> In some states, conditions of probation need not even necessarily be broken in order

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<sup>5</sup> *Probation*, CAMBRIDGE DICTIONARY, (2019) <https://dictionary.cambridge.org/us/dictionary/english/probation>.

<sup>6</sup> *United States v. Paul*, 274 F.3d 155, 167-168 (5th Cir. 2001).

<sup>7</sup> *United States v. Knights*, 534 U.S. 112, 119-120 (2001).

<sup>8</sup> See *United States v. Gallo*, 20 F.3d 7, 14 (1st Cir. 1994) (“When revocation of probation is committed to judicial discretion, judges should not regard it as a routine response to every probation violation. Rather, revocation should be reserved for those instances in which the case history, coupled with the probationer’s behavior, indicates that it is a fair, just, and sensible outcome.”).

for probation to be revoked. The Supreme Court of Michigan articulated in *People v. Harper*, “a judge may revoke probation for ‘antisocial conduct or action on the probationer’s part for which the court determines that revocation is proper in the public interest.’”<sup>9</sup> While this holding is only applicable to the state of Michigan, it illustrates the clear differences between the cause for termination of an alternate sentence of probation versus a suspended sentence.

This is a crucial distinction between probation and suspended sentencing, as the only way for suspended sentencing to be revoked would be if the offender committed another crime.<sup>10</sup> In Spain, there is a punishment an offender can receive called a “suspended sentence plus probation.” This is essentially a hybrid of the two alternative sentences, in which the sentence is suspended if the criteria are met; but, there are also extra restrictions or requirements that the judge can enact that must be followed by the offender in order for the sentence to be successfully completed.<sup>11</sup> This hybrid sentence is extremely rare.<sup>12</sup> This comment, however, will only focus on suspended sentencing, how it has been used in Spain, and how it could be used in the United States.

## B. Spain’s Criteria for Suspended Sentencing

In Spain, suspended sentencing is a discretionary tool that judges can use to replace a sentence of incarceration when an offender meets certain criteria.<sup>13</sup> These criteria are as follows:

- (i) the prison sentence should not be more than two years;
- (ii) the offence should be the first offence of that person (or a relevant time has passed between his or her latest conviction and the present offence). A suspended sentence is possible even when the judge

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<sup>9</sup> *People v. Harper*, 479 Mich. 599, 627 (2007).

<sup>10</sup> *Suspension of sentence in Spain*, *supra* note 2.

<sup>11</sup> Jose Cid, *Is Imprisonment Criminogenic?: A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions* 6 EUROPEAN J. CRIM. 459 (2009).

<sup>12</sup> *Id.*

<sup>13</sup> Jose Cid, *Suspended Sentences in Spain: Decarceration and Recidivism*, 52 J. COMMUNITY CRIM. JUST. 5 (2005).

deals with a first offence, but the offender has committed another offence subsequently (prior to the court hearing); (iii) the person has paid compensation to the victim (except when the person is unable to do so).<sup>14</sup>

It is important to note that more recent reform has expanded the prison sentence length criteria in certain instances. If the crime was committed because of the offender's dependence on drugs, a sentence of up to five years can be considered for suspension, as long as the offender was convicted under detoxification programs.<sup>15</sup>

These criteria must be met for a judge to consider a suspended sentence in Spain.<sup>16</sup> The judge ultimately has the power to decide the sentence, so she may choose to forego suspended sentencing and impose an alternative sanction.<sup>17</sup> If the judge does not award a suspended sentence to an eligible offender, she must explain their reasoning for that decision.<sup>18</sup> Along with this requirement, judges are to consider the "criminal hazard posed by the convict."<sup>19</sup> This means that not only non-violent offenders could find themselves availed of a suspended sentence, but those convicted of violent crimes could receive this sentence as well. Even an offender who killed a thief has been granted a suspended sentence in Spain.<sup>20</sup> This, however, was a contested issue. Some people in Spain felt that

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<sup>14</sup> *Id.*

<sup>15</sup> Monica Aranda Ocaña, & Antigone Edizioni, *Alternatives to Prison in Europe Spain*, EUROPEAN PRISON OBSERVATORY 22 (2015), <http://www.prisonobservatory.org/alternatives/ALTERNATIVES%20TO%20PRISON%20IN%20EUROPE.%20SPAIN.pdf>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> C.P ch. 3(1), art. 80.

<sup>20</sup> *See Court Suspends Jail Sentence for Spain Thief Killer*, FRANCE24 (July 22 2019, 6:11 PM) <https://www.france24.com/en/20190722-court-suspends-jail-sentence-spain-thief-killer> (*hereinafter* FRANCE24)(A man named Borja W.V. was convicted of killing a thief when he chased a man from a bar who stole a woman's purse and punched the victim in the head. The victim died from a brain hemorrhage two days later. He was sentenced to two years in prison, with the sentence being suspended, and ordered to pay \$200,000 U.S.D. to the victim's two daughters.)

the killer should have served some time in prison due to the violent nature of the crime.<sup>21</sup> So, judges have a relatively broad range of discretion on when they can impose a suspended sentence. This is why if the Spanish system is implemented in the United States, it should be applied automatically to those who fit the criteria. While no one will be happy with every decision a judge makes, the uniformity of automatically applying suspended sentencing to only those offenders who meet the criteria will make for a fairer, safer system.

### C. What Kinds of Crimes Would be Suspended at the United States Federal Level Under the Model Used in Spain?

In the United States, roughly 2.3 million people are incarcerated across local, state, and federal facilities.<sup>22</sup> Of that population, approximately 83% of offenders are in the custody of state or county (local) department of corrections departments.<sup>23</sup> This means that the crime they committed was a violation of state or local law. This clear prison population disparity illustrates the fact that most crimes that are committed and prosecuted are violations of state or local law, not a violation of federal law. So that begs the question, what kinds of crimes would be eligible for suspended sentencing at the federal level?

Spain's criteria for suspended sentencing would make a number of federal offenders eligible for suspended sentences. Just because a crime is a federal offense does not mean that the crime is inherently more severe than a crime in violation of state law. Some federal crimes that offenders could commit and still have their sentences suspended include telemarketing and email marketing

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<sup>21</sup> *Id.*

<sup>22</sup> Wendy Sawyer & Pete Wagner, *Mass Incarceration: The Whole Pie 2019*, Slideshow 1, PRISON POL'Y INITIATIVE (Mar. 19, 2019) <https://www.prisonpolicy.org/reports/pie2019.html> (Note: This does not count youth offenders who are not in jail, those in immigration detention facilities, military confinements, Native American reservation confinement, involuntary commitments).

<sup>23</sup> *Id.*

fraud, blackmail, perjury, and even concealing an escaped prisoner.<sup>24</sup> Along with these crimes, any violations of federal laws enumerated in the United States Code and violation of codes of federal agencies would constitute a federal offense as well.<sup>25</sup>

Of the roughly 221,000 federal inmates from this 2019 data, approximately 97,000 are incarcerated for drug related offenses.<sup>26</sup> Along with those crimes, there are approximately 12,000 property crime offenses.<sup>27</sup> Both of these crime categories include situations where the offender could have committed the crime due to a drug addiction. Drug crimes obviously easily allude to this. If an offender is in possession of a controlled substance, then there is a clear argument that the offender committed the offense based on their addiction to drugs. Property crimes do not have such a clear-cut connection to substance abuse, but these crimes could also have been committed due to an addiction to drugs in some cases. Federal inmates who are under this property crime conviction statistic include both offenses of burglary and fraud.<sup>28</sup> Both of these offenses could stem from an offender's drug addiction: for instance, if an offender burglarized a house in an attempt to find drugs or money for drugs.<sup>29</sup> As for fraud, a number of different instances could occur involving an offender perpetrating fraud to acquire drugs as a result of their addiction.<sup>30</sup>

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<sup>24</sup> See 18 U.S.C. § 2325 (telemarketing and email marketing fraud statute); 18 U.S.C. § 873 (blackmail statute); 18 U.S.C. § 1621 (perjury statute); 18 U.S.C. § 1072 (concealing an escaped prisoner statute).

<sup>25</sup> See *United States v. Nichols*, 731 F.2d 545 (8th Cir. 1984) (Oscar Nichols was charged and convicted with two counts of possessing weapons and weapon accessories [a silencer for a sawed-off shotgun], in violation of the National Firearms Act, which is codified under the Internal Revenue Code).

<sup>26</sup> Sawyer & Wagner, *supra* note 22.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See *Thomas v. Artuz*, No. 06-CV-0254, 2011 U.S. Dist. LEXIS 17796 (W.D.N.Y. Jan. 4, 2011) (petitioner (Thomas) broke into a home looking for drugs. He and his cohorts were charged with multiple counts of burglary in the first degree and robbery).

<sup>30</sup> See *United States v. Downs*, No. 92-5829, 1993 U.S. App. LEXIS 17646 (6<sup>th</sup> Cir. July 1, 1993) (where the defendant (Downs) contested that he perpetrated the credit card fraud for the purpose of obtaining drugs; the Sixth Circuit found that

These types of crimes would increase the number of eligible offenders who could see their sentences suspended. Crimes that involve an offender committing the offense because of their dependence on drugs, the maximum time a sentence can be suspended under is increased to 5 years, again making more eligible for a suspended sentence.<sup>31</sup> Along with that requirement, the other requirement is that the offender is convicted and sentenced under a detoxification program.<sup>32</sup> The idea of a detoxification program is to help the offender shed their dependence on drugs, thus getting at the root of what caused their criminality in the first place.

This is something that could easily be instilled in those who receive a suspended sentence. The Federal Bureau of Prisons already has a Community Treatment Services wing that works with offenders with substance abuse problems in their homes or residential reentry homes.<sup>33</sup> These federal employees, including licensed professional counselors, social workers, psychiatrists, and more, could work with the offenders who receive this specialized requirement in conjunction with their suspended sentence.<sup>34</sup> This would expand the number of offenders who could take advantage of a suspended sentence, further increasing the benefits of suspended sentencing and allowing those in need of addiction services to get the required help.

#### D. The History of Suspended Sentencing in the United States at the Federal Level

Suspended sentencing was an alternate sentencing option available to and utilized by judges throughout the late nineteenth and early twentieth centuries.<sup>35</sup> It was a discretionary option that could be

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the lower court judge reasonably relied on the testimony of detectives and a confidential informant to find the fraud was for drugs).

<sup>31</sup> Ocaña & Edizioni, *supra* note 15.

<sup>32</sup> *Id.*

<sup>33</sup> *Substance Abuse Treatment*, FEDERAL BUREAU OF PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/substance\\_abuse\\_treatment.jsp](https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp) (last visited Mar. 21, 2021)

<sup>34</sup> *Id.*

<sup>35</sup> Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 538-39 (2002).

utilized, much like probation or other rehabilitation programs.<sup>36</sup> However, this option was taken away from judges by the Sentencing Reform Act of 1984 (S.R.A.).<sup>37</sup> The S.R.A. was created as an attempt to set up a more determinate and fair sentencing system and to address some of the disparities that were being seen across sentencing.<sup>38</sup> These disparities were one of the products of the extremely broad and relatively unfettered discretion afforded to judges and parole officials.<sup>39</sup>

There were a number of advocates for the Sentencing Reform Act prior to its eventual passing. One of the first arguments was from U.S. District Judge Marvin E. Frankel (S.D.N.Y.) in an address to the University of Cincinnati Law School in 1971.<sup>40</sup> He called for a national commission to study sentencing, corrections, and parole, and then formulate laws and rules based on the data.<sup>41</sup> Four years later, a group of Yale Law School professors advocated for a national sentencing commission to issue sentencing guidelines and review sentences.<sup>42</sup> Not everyone, however, was advocating for this sentencing commission.<sup>43</sup> Some members of the House of Representatives stated when the bill was being voted on that there was a prevailing opinion of “reluctance to have people in the middle of the problem try to solve it.”<sup>44</sup> This idea, that judges who are the ones currently sentencing offenders would then be the ones who are in charge of the commission, seemed to put off some members of

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<sup>36</sup> *Id.*

<sup>37</sup> H.R. 5773.

<sup>38</sup> Julia L. Black, *The Constitutionality of Federal Sentences Imposed Under the Sentencing Reform Act of 1984 After Mistretta v. United States*, 75 IOWA L. REV. 767, 769 (1990).

<sup>39</sup> *Id.* at 770.

<sup>40</sup> PAUL J. HOFER ET. AL., FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM, U.S. SENT. COMM., 4 (Nov. 2004) [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15\\_year\\_study\\_full.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

the House. What happened then was that the Sentencing Commission was created as an independent Commission within the Judiciary, but with a close connection to both the Legislative and Executive branches.<sup>45</sup>

The S.R.A. created a federal Sentencing Commission staffed by judges and legal scholars who were tasked with developing sentencing guidelines.<sup>46</sup> The S.R.A. was the first of its kind, as prior to this Act federal law contained no general sentencing provisions.<sup>47</sup> The Sentencing Guidelines that the Commission created work like a grid: judges compute the score based on the offender's criminal history and the severity of the crime.<sup>48</sup> Since the goal of the S.R.A. was to reign in sentencing discretion, indeterminate sentence structures, like parole and suspended sentencing, were eliminated at the federal level.<sup>49</sup> The S.R.A. of 1984 was challenged on constitutional grounds, but the constitutionality was upheld by the United States Supreme Court.<sup>50</sup>

#### E. The History of Suspended Sentencing in Spain

Suspended sentencing is not something that one would think of as being utilized throughout the history of Spain, especially considering the country's political history. Spain underwent a civil war from 1936 to 1939, which resulted in a dictatorship.<sup>51</sup> General Francisco Franco was promoted to commander-in-chief of the armed forces and Head of State in 1936 and did not relinquish power until

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<sup>45</sup> *Id.*

<sup>46</sup> Spector, *supra* note 35, at 540.

<sup>47</sup> Black, *supra* note 38, at 767.

<sup>48</sup> Spector, *supra* note 35, at 540.

<sup>49</sup> *Id.*

<sup>50</sup> *See Misretta v. United States*, 488 U.S. 361 (1989) (The basis of the challenge to the Constitutionality of the Sentencing Reform Act of 1984 was based on the petitioner bringing claim that (1) Congress had granted the United States Sentencing Commission excessive legislative discretion and that (2) Congress had upset the constitutionally mandated separation of powers between branches of the government. The Supreme Court did not agree with either argument.).

<sup>51</sup> D. Manuel Palacio, *Early Spanish television and the paradoxes of a dictator general*, 25 HISTORICAL JOURNAL OF FILM, RADIO AND TELEVISION 599, 599-600, (2005).

his death in 1975.<sup>52</sup> General Franco added 50,000 scheduled executions after assuming power, and in just the years of 1939 and 1940, between 370,000 and 500,000 people were interned in one of the concentration camps set up by the Franco regime.<sup>53</sup> These figures would lead one to believe that General Franco was not a large proponent of suspended sentencing; however, it was still used during his reign.

One very notable case was the suspension of a sentence for John Balson. Balson was a 17-year-old British student accused of insulting General Franco, a charge which he denied, saying he never meant to insult the General.<sup>54</sup> Balson was sentenced to six months and one day in jail, but the court suspended the sentence and allowed Balson to return to England.<sup>55</sup> While it is true General Franco did not sentence the student, one would think that many of the judges in Spain who ruled after the dictator took power would follow his principles. This seems to illustrate how prevalent suspended sentencing has been in Spain's criminal justice system, even when the country's leadership has taken a stance that seems in complete opposition to its goals and purposes.

Suspended sentencing in Spain adopted the model that is used today in 1995.<sup>56</sup> Suspended sentencing is the most common sentence handed down in Spanish criminal courts.<sup>57</sup> The most important change related to suspended sentencing resulted from a

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<sup>52</sup> *Id.*

<sup>53</sup> Conxita Mir, *The Francoist Repression in the Catalan Countries*, CATALAN HISTORY REVIEW 1: 133-147, 138, (2008).

<sup>54</sup> Videotape: Spain: British Schoolboy Given Suspended Sentence for Insulting General Franco, BRITISH PATHE (2020), <https://www.britishpathe.com/video/VLVAJOJROW89H8HK2DZGJPLBXIFZ-SPAIN-BRITISH-SCHOOL-BOY-GIVEN-SUSPENDED-SENTENCE-FOR-INSULTING/query/SUSPENDED>.

<sup>55</sup> *Id.*

<sup>56</sup> Cid, *supra* note 13, at 7.

<sup>57</sup> Sarah Armstrong et al, *International Evidence Review of Conditional (Suspended) Sentences Final Report*, SCOTTISH CENTRE FOR CRIME AND JUSTICE RESEARCH, 28 (2013), <http://www.sccjr.ac.uk/wp-content/uploads/2013/01/Conditional-Sentences-FINAL-january-2013.pdf>.

change to Spain's penal code, which occurred in 1995.<sup>58</sup> This change increased the upper limit for sentences that could be considered for suspension.<sup>59</sup> After the change, the penal code allowed for sentences of up to two years to be suspended, instead of previously only allowing sentences of up to one year in prison to be replaced with a suspended sentence.<sup>60</sup> Further changes were made to the criteria by Organic Law 15/2003. This law created the change that if the crime was committed because of the offender's dependence on drugs, a sentence of up to five years can be considered for suspension, as long as the offender was convicted under detoxification programs.<sup>61</sup>

This change is a progressive one. By giving a larger maximum sentence time to allow for a suspended sentence in cases where the offender committed the crime as a direct result of substance addiction, the law will allow more offenders with drug dependencies to get into treatment. This is because a greater number of sentences become eligible to have their sentence suspended. Instead of only cases in which the maximum sentence was two years, the threshold more than doubles if the crime was the direct result of an underlying substance abuse issue. This treatment could be the difference between life and death for some offenders, depending on the addiction level and the type of drug.

### III. THE ARGUMENT FOR WHY SUSPENDED SENTENCING SHOULD BE IMPLEMENTED AUTOMATICALLY AT THE FEDERAL LEVEL FOR OFFENDER'S WHO QUALIFY

#### A. Suspended Sentencing Has Worked in Spain

The goal of any punishment system is to correct behavior. The reason an offender is punished for their crime is that society feels that the behavior is not something that should be accepted. Therefore, one of the best metrics to determine whether or not a punishment system or style is effective is to see if, after the

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Ocaña & Edizioni, *supra* note 15.

punishment, the behavior has been corrected. This conduct of the offender's repeating their past criminal actions is called recidivism.<sup>62</sup> The lower the rate of recidivism, the better the punishment or sanction did.

In a study comparing the recidivism rates of offenders sentenced to a term of incarceration to offenders who received a suspended sentence in Spain, suspended sentencing was shown to reduce recidivism rates.<sup>63</sup> The study examined risk factors of the participants and made three distinct groups; low-risk offenders had no convictions and no imprisonment, medium-risk offenders who had prior convictions and no imprisonment, and high-risk offenders who had both prior convictions and prior imprisonments.<sup>64</sup> The study found that for each of these offender groups, the risk of recidivism dropped for those who had a suspended sentence compared to those who went to prison.<sup>65</sup> Low-risk offenders who went to prison reoffended at a rate of 19%, while low-risk offenders who had their sentences suspended only reoffended at a rate of 7%.<sup>66</sup> Medium-risk offenders who were incarcerated reoffended at a rate of 40%, while those medium-risk offenders who had their sentences suspended reoffended at a rate of 19%.<sup>67</sup> For the high-risk category, those offenders who experienced incarceration reoffended at a rate of 82%, while the high-risk offenders who received suspended sentences reoffended at a rate of 60%.<sup>68</sup> All of the offender groups showed that suspended sentencing as a punishment made it less likely that an offender would commit a subsequent crime compared to traditional incarceration.<sup>69</sup>

As the author of the study points out, there are a few reasons that this could happen. One possible reason for disparity would be

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<sup>62</sup> *Recidivism*, MERRIAM-WEBSTER DICTIONARY, (2019), <https://www.merriam-webster.com/dictionary/recidivism>.

<sup>63</sup> *Cid.*, *supra* note 11, at 471.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

that when offenders are released from prison, they may encounter barriers to establishing social links.<sup>70</sup> For example, the stigma of a prison sentence can have an extremely negative impact on someone's life. If a person is incarcerated, say for two years, there is a number of things they cannot do. They cannot work a job, they cannot see friends, they cannot have autonomy in making everyday decisions. This is not the case for a person who has their sentence suspended. If a person is not incarcerated, they maintain the freedoms they had prior to being convicted of the offense.

Along with this comes the social stigma of a prison sentence. This could be another factor for why there is such a disparity in recidivism rates. Stigma refers to a person's reluctance to associate themselves with another person who has a criminal record.<sup>71</sup> This stigma can be economic and social; economic in the sense of difficulty finding a job or a job that pays a good wage, or social in the sense of being able to find a spouse.<sup>72</sup> Spain has alleviated some of these concerns, especially compared to the United States. One considerable protection Spain has for people accused and convicted of crimes is that newspapers typically only use an accused or convicted criminal's initials to protect the privacy of the offender and their family.<sup>73</sup> This is in a stark contrast to how the United States operates in regard to freedom of the press. News stories, especially high-profile crimes, are constantly all over the American news media. Full names are used and pictures usually accompanying the name. Along with this, criminal records are not made public in Spain like they are in the United States.<sup>74</sup> If an offender receives a suspended sentence, they will still have a criminal record. So, in the United States, suspending a sentence will not reduce the stigma as much as it does in Spain, due to the considerable differences in the privacy standards regarding criminal records. For offenders in the United States, it seems that the stigma would be more prevalent than those

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<sup>70</sup> *Id.*

<sup>71</sup> Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J. LAW & ECON. 519, 520 (1996).

<sup>72</sup> *Id.*

<sup>73</sup> Shadd Maruna, *Judicial Rehabilitation and the 'Clean Bill of Health' in Criminal Justice*, 3 EUROPEAN J. PROBATION 97, 100 (2011).

<sup>74</sup> *Id.*

who receive a suspended sentence in Spain since if their criminal record is sealed and they do not actually become incarcerated at any point, there will be far less stigma associated with the offender.

The author of the study states another possible reason that could account for this dramatic recidivism disparity. This other possibility is labeling theory. Labeling theory is based on the idea that once in prison, the offender begins to label themselves as a prisoner or a criminal and adjusts their behavior accordingly.<sup>75</sup> The distinction is that if someone has received a suspended sentence, they will not label themselves in the same way as someone who has been incarcerated. While both would have a criminal record, the offender who had their sentence suspended will be much more likely to lead as close to a normal life as they had before the incident, which would be a stark contrast to the person who was incarcerated for their crime. It would be significantly easier to avoid self-labeling as a criminal if you do not serve any time in prison compared to someone who spends their sentence incarcerated.

Whatever the theory behind why the rates of recidivism are significantly lower than the rates of those who are incarcerated, the numbers do not lie. All three categories are based on previous criminal records and the risk of reoffending in the future saw a decrease in the recidivism rate for those who had their sentences suspended compared to those who were sentenced to incarceration.<sup>76</sup> The goal of the punishment is to prevent the offender from reoffending in the future, and this study shows that suspended sentencing is doing just that in Spain.

1. Spain's Model is Not Without Problems, but Implementing Suspended Sentencing Automatically Could Correct Some of Them

Spain's suspended sentencing model is not perfect. In Spain, suspended sentencing is a discretionary option available for judges to utilize.<sup>77</sup> One author has loosely described judicial discretion as "the

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<sup>75</sup> Cid, *supra* note 11.

<sup>76</sup> *Id.*

<sup>77</sup> Cid, *supra* note 13.

legal authority to choose; judicial choice within the bounds of justice and the limits of the law.”<sup>78</sup> This means that in Spain, the suspended sentencing model is a guideline for the judges to follow, but these guidelines are not a bright-line rule.<sup>79</sup>

While this discretion could be used to help more offenders receive suspended sentences, it could also pose a danger to the public. One instance that happened in Spain involved a sentence being suspended for someone who killed a purse snatcher.<sup>80</sup> A twenty-two-year-old nightclub worker, identified as Borja, chased down a man who had just stolen a woman’s purse.<sup>81</sup> When the worker caught up to the man, he punched the thief in the head, and the thief then died two days later.<sup>82</sup> The nightclub worker was facing a sentence of four years, but the court decided to suspend the sentence.<sup>83</sup> In addition to his sentence being suspended, Borja was required to pay €250 a month in compensation to the victim’s two daughters if he has the means to do so.<sup>84</sup> This act was met with people conflicted on whether or not the sentence should have been suspended. Some came to the defense of the worker, stating that he was a “hero,” while others stated that the man “took justice into his own hands.”<sup>85</sup> This shows that some felt the suspended sentence was proper, while others thought that the worker should not have had his sentence suspended. Since suspended sentencing in Spain is discretionary, it ultimately falls to the judge to make the decision.<sup>86</sup>

The argument could be made that here suspended sentencing was discretionarily used to allow a killer to go free. While in this case, Borja did not appear to have the intent to kill the purse snatcher, and therefore would not always be thought of as a “killer” in the same

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<sup>78</sup> Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U.J. GENDER SOC. POL’Y & L. 163, 215 (2009).

<sup>79</sup> Ocaña & Edizioni, *supra* note 15.

<sup>80</sup> FRANCE24, *supra* note 20.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Suspension of Sentence in Spain*, *supra* note 2.

sense as an offender who carried out a premeditated homicide, he was still the cause of the thief's death. And being the cause of a death seems incompatible with one of the goals of suspended sentencing: keeping the public at large safe.

This counterargument to suspended sentencing would not be as divisive of an issue if what this comment proposes were to be enacted. This is because there would be less discretion involved in the sentencing process. While the model from Spain is being used, this comment's advocacy is to take that model and apply it to eligible federal defenders who meet the criteria automatically. Because a suspended sentence would be applied to those offenders who fit the criteria, regardless of a decision from a judge, this discretion would be substantially limited. This limitation on judicial discretion would reduce the number of cases where outrage could be sparked, as the crimes that fit within the guidelines would most likely be crimes that do not warrant such a divisive reaction, such as drug possession or property crimes.

It is true that not everyone will be happy with every sentencing decision. Offenders who fit the criteria could have their sentences automatically suspended, and people may not agree with that. However, discretion was something that has led to problems in the United States of disparity in sentencing, dishonesty, and even excessively lenient sentences.<sup>87</sup> Constant examples have made their way into the news that show public outrage where people have felt that judicial discretion had let offenders off with sentences that were too lenient.<sup>88</sup> By limiting judicial discretion here, there can be fewer

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<sup>87</sup> Ilene H. Nagel, *Supreme Court Review: Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines New Federal*, 80 J. CRIM. L. & CRIMINOLOGY 883, 899 (1990).

<sup>88</sup> See Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N. Y. TIMES (June 6, 2016), <https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html> (This article discusses a well-known recent case in California in which former Stanford swimmer Brock Turner received what most considered an excessively lenient sentence for the sexual assault of an unconscious woman outside a bar. Turner was charged with three felonies, and was sentenced to six months, serving three, while the prosecutors were pushing for a sentence of six years by Judge Aaron Persky).

instances of sentencing disparities, thus eliminating some of these problems. For example, in the Brock Turner case discussed in footnote eighty-eight, the Judge handed down a six-month sentence, which was far shorter than the two-year minimum per felony (for a total of six years).<sup>89</sup> This problem arose from judicial discretion, which would be reduced under the model this comment advocates for because the suspended sentence would be implemented automatically.

#### B. Suspended Sentencing Would Work in the United States

Suspended sentencing has worked in Spain, but Spain is different than the United States. The United States has a far larger population than Spain.<sup>90</sup> Along with this great population disparity, there is also a vast difference in the number of people incarcerated in each country.<sup>91</sup> In Spain, there are approximately 59,275 prisoners.<sup>92</sup> In the United States, there are roughly 221,000 federal inmates.<sup>93</sup> So these major differences beg the question, would suspended sentencing even work in the United States?

The simple answer is yes. The United States has a long history of providing workable alternatives to incarceration. One very

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<sup>89</sup> Marina Koren, *Why the Stanford Judge Gave Brock Turner Six Months: The California judge said the sexual-assault victim suffered 'physical and devastating emotional injury,' but a prison sentence for her offender was not appropriate*, THE ATLANTIC (June 17, 2019), <https://www.theatlantic.com/news/archive/2016/06/stanford-rape-case-judge/487415/>.

<sup>90</sup> See *U.S. and World Population Clock*, U.S. CENSUS BUREAU (2020), <https://www.census.gov/popclock/>; WORLD FACTBOOK, U.S. CENTRAL INTELLIGENCE AGENCY (2019), <https://www.cia.gov/the-world-factbook/countries/spain/#people-and-society> (shows the populations of the United States and Spain respectively).

<sup>91</sup> See WORLD PRISON BRIEF, UNITED STATES OF AMERICA, <https://www.prisonstudies.org/country/united-states-america> (last visited Mar. 21, 2021) (illustrating number of incarcerated people in the United States). See also WORLD PRISON BRIEF, SPAIN, <https://www.prisonstudies.org/country/spain?page=2> (last visited Mar. 21, 2021) (illustrating the number of incarcerated people in Spain).

<sup>92</sup> WORLD PRISON BRIEF, SPAIN, <https://www.prisonstudies.org/country/spain?page=2> (last visited Mar. 21, 2021).

<sup>93</sup> Sawyer & Wagner, *supra* note 22.

common alternative to incarceration is probation. While probation is distinct from suspended sentencing, both keep offenders out of traditional incarceration, and probation in the United States has worked out well for offenders, the public, and the government. On the grounds of working out for offenders, studies have shown that probation supervision reduces recidivism rates by as much as thirty-four percent.<sup>94</sup> This helps offenders because if they are less inclined to reoffend, the offenders can get back to leading productive lives more quickly. The government also benefits from probation supervision as opposed to incarceration as well. It costs on average \$3.42 per day to keep an offender under supervision, which is less than one-twentieth of the average cost per inmate per day to be incarcerated (seventy-nine dollars).<sup>95</sup> This also creates a trickle-down benefit to the public. The less money that the government has to spend on supervision of those convicted of criminal offenses, the lower the government's budget in that area needs to be.

Probation is not the only alternative sentencing that has had positive effects when compared to incarceration. Electronic monitoring is another example of alternative punishment. This is a device, usually around the offender's ankle, that allows law enforcement to track the offender to make sure they are complying with location restrictions.<sup>96</sup> This monitoring is far less expensive than incarceration.<sup>97</sup> Monitoring does still have costs, such as salaries for those who monitor the offenders and the equipment to track them, but the costs are significantly lower than running a prison.<sup>98</sup> Along with this, it has been shown to reduce the rate of reoffending by as much as twenty-five percent.<sup>99</sup> Treatment is yet another alternative to incarceration that has been used commonly throughout the United States. A 2013 Vera Report showed that mental health treatment is less expensive and more effective than just incarceration.<sup>100</sup>

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<sup>94</sup> James Austin et. al., *A Guidelines Proposal: How Many Americans are Unnecessarily Incarcerated*, 29 FED. SENT. R. 140, 23 (Dec. 2016 – Feb. 2017).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

Treatment does have a higher upfront cross compared to incarceration, but these treatments offer long-term savings compared to incarceration.<sup>101</sup>

Perhaps the biggest benefit of alternative sentencing is actually received by the public. When it comes to the public, the first-ever national survey of victim's views on safety and justice indicated that seventy-five percent of victims prefer holding people accountable through alternative sentencing options as opposed to incarceration.<sup>102</sup> Additionally, this national survey showed that seventy-five percent of victims believe that prison makes people more likely to commit crimes in the future as opposed to the offender being placed in a rehabilitation situation.<sup>103</sup> Sixty percent of victims prefer shorter prison sentences and more spending on prevention and rehabilitation to prison sentences that keep people incarcerated for as long as possible.<sup>104</sup> So, it would seem from this nation-wide survey that crime victims would prefer alternative sentences compared to incarceration. The public would also benefit from lower recidivism rates. If there are fewer offenders reoffending, then the public can feel safer knowing that the overall crime rate should drop proportionally. The public also benefits from a lower cost to supervise these offenders. If the government does not need to spend as much money to supervise these offenders, this will in turn lower the amount needed to be collected by the government through taxes. Money could be saved by the public through a trickle-down effect as well. The fewer offenders reoffending would drop the crime rate in an area. This could in turn mean that fewer police officers are needed in that area, thus saving the public more money with fewer positions funded from their tax dollars.

Suspended sentencing is another alternative to incarceration and would operate in a similar manner if it were to be implemented at

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<sup>101</sup> *Id.*

<sup>102</sup> ALLIANCE FOR SAFETY & JUSTICE, CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS' VIEWS ON SAFETY AND JUSTICE 20, <https://www.allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

the federal level in the United States. Suspended sentencing is still an alternative sentence that some states use in the United States.<sup>105</sup> Suspended sentencing would likely give out benefits similar to the other forms of alternative sentencing options that are currently used in the country. Data has shown that in Spain, those who received suspended sentences were less likely to reoffend than offenders who received a sentence of traditional incarceration.<sup>106</sup> This decrease in the rate of reoffending was seen in all three groups used by the study: low-risk, medium-risk, and high-risk offenders.<sup>107</sup> The data surrounding multiple different alternatives to incarceration referenced in the previous paragraphs show that they reduce recidivism rates at a greater degree than sentences of incarceration. Suspended sentencing would reduce recidivism rates for offenders who receive it if implemented at the federal level.

As for the cost saving element, suspended sentencing would cost even less than other sentencing alternatives. Examining and applying Spain's model, the only post-sentence requirement for those receiving a suspended sentence is that no further crimes are committed for the duration of the suspended sentence.<sup>108</sup> Because of this, as soon as the sentencing is over, that offender is no longer creating any cost to the judicial system or the government through supervision requirements. The only limited exceptions to this would be if an offender's drug rehabilitation treatment ran for a longer time than the sentence of the offender, or if, like in the case of Borja, the court imposes a duty of compensation to the victim or their family. This would in turn create a situation where the government does not need as much money in their budget to supervise these offenders, as no supervision would be required. This now passes the savings on to the public.

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<sup>105</sup> See 2A NH PRACTICE SERIES: CRIMINAL PRACTICE & PROCEDURE § 33.25 (2019);8 TENN. JURIS. CRIMINAL PROCEDURE § 43 (2019) (outlining the practice of suspended sentencing in New Hampshire and Tennessee respectively).

<sup>106</sup> *Cid*, *supra* note 11.

<sup>107</sup> *Id.*

<sup>108</sup> *Suspension of Sentence in Spain*, *supra* note 2.

### 1. What About Our Safety?

One counter argument to suspended sentencing is that the public could be in danger by not placing those who break the law in prison. Those familiar with the American criminal justice system have no doubt heard the saying, “you do the crime; you do the time.” With suspended sentencing, the crime is committed, but the offender never spends any time in a jail cell. The United States consistently beats out much larger countries, such as India and China, for having the highest incarceration rate in the world.<sup>109</sup> So, it would seem that letting people convicted of crimes avoid a term of incarceration is not compatible with the “tough on crime” mentality in the United States. With this in mind, there is an argument that suspended sentencing creates a danger to the general public because certain offenders could be walking the streets.

This safety concern would be significantly alleviated following Spain’s model and implementing it in the United States. There are roughly 221,000 federal inmates in the United States.<sup>110</sup> Of those 221,000 inmates, approximately 97,000 of those inmates are incarcerated on drug related offenses.<sup>111</sup> In addition, 12,000 are incarcerated for property related crimes.<sup>112</sup> Combined, these inmates make up almost half of the federal incarceration population. It is important to note as well that not all of those 221,000 would have committed crimes eligible for a suspended sentence. Approximately 13,000 of those 221,000 inmates are incarcerated for “violent crimes,” most of which would not allow them to receive a suspended sentence.<sup>113</sup> These are crimes like homicide and robbery.<sup>114</sup> Property crimes and drug related crimes are not defined by the federal

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<sup>109</sup> Drew Kann, *5 facts behind America’s high incarceration rate*, CNN (Apr 21, 2019 3:50 PM), <https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html>.

<sup>110</sup> Sawyer & Wagner, *supra* note 22.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

government as “violent.”<sup>115</sup> While that does not necessarily mean that these offenders could not later become violent, they pose less of a risk to the general public. This is especially heightened when recidivism rates are lower when looking at those who received suspended sentences compared to those who were incarcerated. Probation, electronic monitoring, and treatment have all shown to have positive effects on recidivism rates in the United States.<sup>116</sup>

Lower recidivism rates lower the danger to the public since fewer crimes would be committed compared to if the offender was incarcerated. This creates a safer world for those in the general public. When suspended sentencing would appear to create a situation leading to fewer offenders reoffending, the argument that suspended sentencing actually creates a danger to the public seems to be rendered moot.

## 2. What About Our Respect for the Law?

A second counter argument against the policy of suspended sentencing is that we as a society will lose our respect for the law because offenders will know they will get off without ever setting foot inside a prison. Spain has seen some major examples that have brought out this argument, especially in the sports world. Two of the world’s best soccer players, who both played for clubs in Spain, have received suspended sentences in Spain. Lionel Messi was found guilty of tax fraud.<sup>117</sup> He was sentenced to twenty-one months, which was suspended.<sup>118</sup> He was ordered by the court to pay a fine of around two million euros.<sup>119</sup> Cristiano Ronaldo also pled guilty to tax fraud in

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<sup>115</sup> OFFICE OF JUSTICE PROGRAMS: BUREAU OF JUSTICE STATISTICS, *Terms and Definitions: Crime Types*, <https://www.bjs.gov/index.cfm?ty=tdtp&tid=3> (last visited Feb. 12, 2021).

<sup>116</sup> Austin, *supra* note 94 at 23.

<sup>117</sup> *Messi’s Spanish jail sentence for tax fraud to stand*, BBC News, (May 24, 2017) <https://www.bbc.com/news/world-europe-40026827>.

<sup>118</sup> *Id.*

<sup>119</sup> Ed Maylon & Liam Corless, *Gary Lineker jabs at Spanish legal system after Lionel Messi’s suspended sentence for tax fraud: Barcelona star Messi was given a custodial sentence by a court in Barcelona after being found guilty of three counts of tax fraud*, MIRROR (July 6, 2016), <https://www.mirror.co.uk/sport/football/news/gary-lineker-jabs-spanish-legal-8360866>.

Spain.<sup>120</sup> He was sentenced to two years, which was suspended, and ordered to pay back fines of nearly nineteen million euros.<sup>121</sup> Both of these high powered, very famous athletes did not serve any time in jail for the crimes they committed. These sentences drew criticism from former athletes and professionals alike. Former F.C. Barcelona soccer player Gary Linker criticized the suspended sentencing system after Messi's sentence was handed down from the court, saying that because Messi would not actually go to prison for fraud, "tax frauds the world over will be looking to move to Spain."<sup>122</sup> The President of the Association of Tax experts of the Spanish Ministry of Finance, Carlos Cruzado, publicly voice his criticisms on the fact that Cristiano Ronaldo received a suspended sentence.<sup>123</sup> He stated that he could understand how the "citizens have the feeling that such acts are not sufficiently punished."<sup>124</sup>

These are fair criticisms of suspended sentencing. These athletes used fraudulent practices to avoid paying taxes and can easily afford the fines that the court levied.<sup>125</sup> In these cases, the punishment does not seem to fit the crime, but these cases are the exception, not the rule. In 2018, the median household income in the United States was \$63,179.<sup>126</sup> This means that the vast majority of

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<sup>120</sup> Isla Binne, *Ronaldo accepts fine for tax evasion, avoids jail*, REUTERS (Jan. 22, 2019), <https://www.reuters.com/article/us-soccer-taxation-ronaldo/ronaldo-accepts-fine-for-tax-evasion-avoids-jail-idUSKCN1PG0R2>.

<sup>121</sup> *Id.*

<sup>122</sup> Maylon & Corless, *supra* note 119.

<sup>123</sup> *Football star in court: Massive criticism of Ronaldo's tax deal*, TELLER REPORT (Jan. 22, 2019), <https://www.tellerreport.com/sports/--football-star-in-court-massive-criticism-of-ronaldo-s-tax-deal-Bk0LOIVXN.html>.

<sup>124</sup> *Id.*

<sup>125</sup> See Christina Settini, *The Worlds' Highest-Paid Soccer Players 2019: Messi, Ronaldo, and Neymar Dominate the Sporting World*, FORBES (June 18, 2019), <https://www.forbes.com/sites/christinasettimi/2019/06/18/the-worlds-highest-paid-soccer-players-2019-messi-ronaldo-and-neymar-dominate-the-sporting-world/#602d23b7b55e> (This article highlights how much money Lionel Messi and Cristiano Ronaldo earn under their current contracts and various endorsement deals. Lionel Messi's earnings were \$127 million dollars, and Cristiano Ronaldo's earnings were \$109 million dollars).

<sup>126</sup> Paul Davidson & Charisse Jones, *More Americans Go Without Health Insurance for the First Time in a Decade*, USA TODAY (Sept. 10, 2019), <https://>

households, not just individuals, in the United States would not have the disposable income to pay fines levied by a court, even if they were not as astronomically high as the one Cristiano Ronaldo received. As a result, there should be no doubt that a majority of people would not start to lose for the law and break it just because they know they would not face any jail time under suspended sentencing, as a fine could still be levied.

It is true that if Spain's model was implemented automatically, offenders would undoubtedly know that if they meet the criteria, their sentence will be suspended. This in and of itself will not breed disrespect for the law because the vast majority of criminals are not committing crimes with the intention of getting caught.<sup>127</sup> Many criminals meticulously plan every aspect of the crime that they plan to commit and go to other great lengths to avoid being caught.<sup>128</sup> Stanton E. Samenow, Ph.D., stated that in forty-six years of conducting psychological evaluations of criminal offenders, "not once had [he] found that an offender in any way, shape, or form desired to be caught."<sup>129</sup> He further stated that many of the offender's regrets are not related to what they did, but rather their regrets surround the circumstances that lead to getting caught.<sup>130</sup>

So, if criminals do not desire to be caught, and go to great lengths to avoid such a fate, then logic would dictate that they are not thinking of the sentencing phase after trial that they could face if the police and prosecutors do in fact charge them with the crime. They would seem to think that the sentencing phase is something that they themselves would never face, as they would wholeheartedly believe they could commit the crime without being caught. This would seem

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[www.usatoday.com/story/money/2019/09/10/median-household-income-stagnant-last-year-poverty-fell/2271025001/](http://www.usatoday.com/story/money/2019/09/10/median-household-income-stagnant-last-year-poverty-fell/2271025001/) .

<sup>127</sup> Stanton E. Samenow, *Do Criminals Desire to Get Caught? Another myth with roots in Freud*, PSYCHOLOGY TODAY (Aug. 4, 2016), <https://www.psychologytoday.com/us/blog/inside-the-criminal-mind/201608/do-criminals-desire-get-caught-0>.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

to undermine the argument that suspended sentencing can create a situation where people lose respect for the law.

C. Automatically Implementing Suspended Sentencing at the Federal Level Would Help the Government, the Offenders Receiving These Sentences, and the Public at Large, Thus Making it the Ideal Sentencing Option For Those Who Fit the Criteria

1. The Cost That Could Be Saved Would Benefit the Country as a Whole

Earlier in this comment, some of the financial benefits of suspended sentencing were examined. Automatic implementation of a suspended sentence when the criteria are met would help alleviate some of the federal budget of the federal Bureau of Prisons (“B.O.P.”).

In the fiscal year 2019, the congressional budget request for the B.O.P. was \$7,042,328,000.<sup>131</sup> This budget was intended to cover staff and the operations of the B.O.P.<sup>132</sup> This astronomical budget request number was a 1.2% increase from the B.O.P.’s request for the 2018 fiscal year.<sup>133</sup> Automatically implementing suspended sentences for those offenders who meet the criteria used in Spain would help lower the need for such a large request.

This automatic implementation would help reduce the need for the B.O.P. to request so much money from the federal budget. This would happen because if the B.O.P. knows roughly how many offenders would commit crimes that would be eligible for suspended sentencing, and the Bureau could remove them from their financial estimates because those offenders would never be under its control. While this may seem like a difficult number to predict, the B.O.P. already has numbers tracking what type of crime breakdowns all of

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<sup>131</sup> U.S. DEP’T OF JUST.: FED. PRISON SYSTEM, FY 2019 PERFORMANCE BUDGET. CONGRESSIONAL SUBMISSION. SALARIES AND EXPENSES, 1, (2019).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

their inmates are incarcerated for.<sup>134</sup> If the B.O.P. were to examine how many criminals are currently incarcerated who would have received a suspended sentence and how many new inmates have come in within the last few years, they could make an estimate of how many inmates they could expect to receive a suspended sentence. Since the implementation of this would be automatic, the B.O.P. would never be financially responsible for these inmates.

The Bureau could even keep their estimate on the lower side and still save significant amounts of money. As previously stated, there are roughly 221,000 inmates incarcerated under federal supervision.<sup>135</sup> The average cost to incarcerate an inmate is seventy-nine dollars per day, or \$28,835 annually.<sup>136</sup> Of the 221,000 estimated federal inmates, 12,000 are incarcerated for property crimes.<sup>137</sup> Even if simply half of this one category of crime had offenders who would be diverted from incarceration, there would be savings of approximately \$173 million.<sup>138</sup> While this is a small drop in the over \$7 billion budget requested, those millions of dollars add up.<sup>139</sup>

The money that is saved could be used in a number of different ways. Most notably, it could be used as a tax break. This would be a massive benefit to the general public, as it would allow them to keep more of their money. If the B.O.P. wanted the money, they could invest that money into alternative sentencing programs, such as treatment. Studies have shown that treatment is less expensive in the long run and more effective at reducing the rate of reoffending than incarceration.<sup>140</sup> A number of crime victims would also seem to prefer this approach. Sixty percent of victims prefer shorter prison sentences and more spending on prevention and rehabilitation to prison sentences that keep people incarcerated for as

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<sup>134</sup> *Id.* at 4. (which contains a percentage breakdown of each federal inmates convicted crime).

<sup>135</sup> Sawyer & Wagner, *supra* note 22, at Slideshow 1.

<sup>136</sup> Austin, *supra* note 94, at 23.

<sup>137</sup> Sawyer & Wagner, *supra* note 22, at Slideshow 2.

<sup>138</sup> This number was derived by taking the annual cost of incarcerating an inmate annually (from footnote 124) and multiplying it by 6,000 (half of the federal inmates currently incarcerated for property crimes).

<sup>139</sup> U.S. DEP'T OF JUST.: FED. PRISON SYSTEM, *supra* note 131, at 1.

<sup>140</sup> Austin, *supra* note 94, at 23.

long as possible.<sup>141</sup> These uses of the money saved by automatically implementing suspended sentencing at the federal level for eligible offenders would either stay in the pockets of the general public or be reinvested into treatment programs in order to reduce the rate of reoffending long term. These are not the only things that can be done with the money. However, they are the two options that seem to far exceed the benefits of incarcerating people, each of which would put them at a higher risk of incarceration as compared to an alternative sentence.<sup>142</sup>

## 2. Offenders Benefit from Receiving Suspended Sentences Automatically if They Meet the Criteria.

It is no secret that incarceration disrupts the lives of those who experience it. If a person finds themselves incarcerated, they are cut off from society; they are unable to see their family, unable to continue their employment, and unable to do the things they used to with freedom. If people can avoid this incarceration, their lives would not need to be put on hold, which would help those who committed minor crimes.

Receiving a suspended sentence would alleviate these concerns. Because a person is not actually incarcerated when being granted this sentence, they are still free to do as they please. They can see family and friends as they please and resume their normal life prior to the incident.

One tricky instance is the continuity of employment. Remember, for someone to receive a suspended sentence, they must first be found guilty of a crime, whether by judge, jury, or plea bargain.<sup>143</sup> Therefore, while not facing incarceration, the offender will still have a criminal record due to this conviction. One study found that employers were half as likely to call an applicant back if they had

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<sup>141</sup> ALLIANCE FOR SAFETY & JUSTICE, *supra* note 102.

<sup>142</sup> See Austin, *supra* note 94, at 23 (which shows that various methods such as probation, electronic monitoring, and treatment have been shown to reduce the rate of reoffending compared to incarceration).

<sup>143</sup> *Suspended sentencing*, MERRIAM-WEBSTER DICTIONARY, *supra* note 4.

a conviction on their record, as opposed to a clean criminal record.<sup>144</sup> So, the employment realm is something that suspended sentencing would not fix. Remember, however, that this is a case-by-case basis. Some states have even started to pass laws banning employers from asking about prior convictions on their applications.<sup>145</sup> So, in theory, even if a person were fired, it would be easier to find a second job in some states because these employers could not ask about prior convictions.

Along with these disruptions, prison is also quite a dangerous place. Supreme Court Justice Marshall once stated that there are “very real dangers in prison life which may result from violence or intimidation directed at either other inmates or staff.”<sup>146</sup> He goes on to say that inmates could be coerced into testifying falsely or face retaliation if they do not go along with another inmate’s plan.<sup>147</sup> Other dangers include rioting, being taken as a hostage, and other dangerous behaviors directed towards inmates.<sup>148</sup>

Offenders also benefit from lower recidivism rates. In a study in Spain, all three categories of offenders, low, medium, and high risk, who received a suspended sentence reoffended at a lower rate than those who were incarcerated for their crimes.<sup>149</sup> This is a significant benefit to offenders. If an offender is less likely to commit subsequent crimes after their sentence, that can only help them. They will be less likely to get in trouble in the future and save them a great deal of costs down the road.

Suspended sentencing reduces all of these dangers. Because an offender who receives the suspended sentence does not step foot inside a prison, they will not be exposed to these dangers. The

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<sup>144</sup> Devah Pager, et. al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 195, 199 (2009).

<sup>145</sup> Dallan F. Flake, *ARTICLE: Do Ban-the-Box Laws Really Work?*, 104 IOWA L. REV. 1079, 1084 (2019).*Id.*

<sup>146</sup> *Ponte v. Real*, 471 U.S. 491, 514 (1985) (Marshall, J., dissenting).

<sup>147</sup> *Id.*

<sup>148</sup> *United States v. Concepcion Sablan*, 555 F. Supp. 2d 1205, 1239 (D. Colo. 2007).

<sup>149</sup> *Cid*, *supra* note 11.

offender avoids a number of dangers just by the sentence they receive. In this way, suspended sentencing helps the offender.

3. Even the general public would benefit from offenders receiving suspended sentences.

Offenders are not the only people who benefit from suspended sentencing. The public as a whole would also benefit from this automatic punishment being implemented on offenders who meet the criteria.

The first benefit to the public was addressed in the earlier subheading regarding the amount of money that could be saved by implementing suspended sentencing at the federal level. If the government needs less money to fund their programs, they can draw less money in taxes. This passes the savings onto the general public through a tax break. A simple tax break could help almost everyone in the country with some sort of expense or another.

Another benefit to the public has to do with the automatic nature of the suspended sentencing punishment being implemented. This benefit is consistency and predictability. If eligible offenders automatically receive the suspended sentence, there is consistency and predictability in the sentence handed down. This helps the public in a number of ways. The first being to help streamline the court process. The streamlining will help cases be heard in a timely fashion. This is a problem the federal courts have struggled with. In the Bronx, ten judges had to be brought in from outside the New York City jurisdiction as part of an “unprecedented plan” to try and shrink the “‘intolerable’ backlog of felony cases.”<sup>150</sup>

Having a more streamlined process helps offenders, victims, and the public. Bronx District Attorney Robert Johnson said that “victims, survivors, and defendants, some of whom may be innocent, should not have to endure the uncertainty and anxiety of having to

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<sup>150</sup> Patrick Wall, *DNAinfo: 10 Judges Will Head to Bronx to Target Criminal Case Backlog*, THE BRONX DEFENDERS (Jan. 15, 2013), <https://www.bronxdefenders.org/bxd-in-the-news-10-judges-will-head-to-bronx-to-target-criminal-case-backlog-dnainfo/> .

wait years before the resolution of their cases.”<sup>151</sup> Knowing at least one phase of this process will help relieve some of that anxiety. Along with this, it will help other cases in the system go faster. So, even offenders who don’t receive a suspended sentence can benefit. The streamlining of cases helps all of the other cases on the docket come to a quicker resolution.

A final benefit to the suspended sentencing structure laid out by this comment is that offenders in Spain reoffended at a lower rate when they received a suspended sentence compared to traditional incarceration.<sup>152</sup> The study that was referenced earlier showed that in Spain, those who received a suspended sentence were less likely to commit future crimes.<sup>153</sup> This is a massive benefit to the public. The first, and most obvious benefit, is that the general public is safer. If fewer offenders are reoffending because of the punishment they are given, then the public at large is safer. But there are also other, less obvious benefits to the public. One is that a decrease in the crime rate helps property values.<sup>154</sup> This research showed that if a crime rate was lower, then the property values in the area would be increased.<sup>155</sup> While this increase may not be substantial or immediately seen as savings by a person in the same manner as a lump sum of cash would, it is still a value provided to the public.

#### IV. CONCLUSION

The concept of punishments that are alternatives to incarceration is not a new idea. Many alternative sentences are employed today. Probation, rehabilitation, community service, and others are all tools that judges can use to ensure an offender is punished for their actions without being subject to incarceration. These alternative sentences have been shown to help reduce

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<sup>151</sup> *Id.*

<sup>152</sup> *Cid, supra* note 11.

<sup>153</sup> *Id.*

<sup>154</sup> Martin Maximino, *The Impact of Crime on Property Values: Research Roundup*, JOURNALIST’S RESOURCE (Mar. 12, 2014), <https://journalistsresource.org/studies/economics/real-estate/the-impact-of-crime-on-property-values-research-roundup/>

<sup>155</sup> *Id.*

recidivism rates more than traditional incarceration.<sup>156</sup> That is the goal of punishment; to ensure that the offender does not repeat the same behavior. Therefore, the punishment which creates a situation in which the fewest number of offenders go on to commit future crimes should be used.

Based on the data cited for the study looking at the alternative punishments in the United States, alternatives to incarceration have been shown to create such situations more commonly than incarceration.<sup>157</sup> Along with this, suspended sentencing has shown promise in Spain.<sup>158</sup> The alternative sentencing option was shown to reduce recidivism at a greater rate than traditional incarceration in Spain.<sup>159</sup> Suspended sentencing should be added to the options that federal judges have as alternatives to traditional incarceration.

But we shouldn't stop there. Automatically implementing the punishment of a suspended sentence would benefit offenders and the public even more than merely instituting the alternative sentence as a possible discretionary tool to be used. The key help to offenders is the reduction in recidivism.<sup>160</sup> This reduction in recidivism will help an offender get back on track to leading a lawful life. Along with this, the offenders who find themselves to be the beneficiaries of this sentence will avoid prison and the dangers that come with it.<sup>161</sup>

This benefit also helps the general public. The public always benefits from lower crime rates. The lower the crime rate is in an area, the less likely a person is to become the victim of a crime (barring other personal factors that could render a person more likely to become the victim of a crime). The automatic implementation of the sentencing tool also helps the public by streamlining the court system. The more quickly cases can get through the system, the

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<sup>156</sup> Austin, *supra* note 94 at 23.

<sup>157</sup> *Id.*

<sup>158</sup> Cid, *supra* note 11.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See *Ponte*, 471 U.S. 491 at 514 (Marshall J., dissenting), (which describes some of the dangers that those incarcerated face on a day-to-day basis).

sooner everyone is able to return to their normal lives and put the events with the judicial system behind them.

The cost saving elements to implementing suspended sentencing are perhaps the largest. In the fiscal year 2019, the Congressional budget request for the B.O.P. was \$7,042,328,000.<sup>162</sup> The average cost to incarcerate an inmate is seventy-nine dollars per day, or \$28,835 annually.<sup>163</sup> However, even if 22,000 offenders were eligible, roughly ten percent of the incarcerated population, then the government could save roughly \$634.4 million. This money that would be saved could be moved to other portions of the budget, such as upgrades to facilities, or, to the delight of many citizens, the B.O.P. could request significantly less in their need for funding, thereby passing the savings to the taxpayers.

Suspended sentencing is an alternative to incarceration that could benefit a large number of people in this country. Automatically implementing this punishment at the federal level will further confer the benefits onto a greater number of people and increase the benefits that the system provides. Implementing the suspended sentencing model commonly used in Spain as the automatic sentence for United States federal offenders who fit the commonly used criteria in Spain would help alleviate some of these key negative attributes that accompany prison sentences and life for those serving them, along with the general public.

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<sup>162</sup> U.S. DEP'T JUST.: FED. PRISON SYSTEM, *supra* note 130.

<sup>163</sup> Austin, *supra* note 94, at 23.