

THE DUTCH-OKLAHOMAN DICHOTOMY: APPLYING THE NETHERLANDS' CRIMINAL SENTENCING PRINCIPLES IN AMERICA'S MOST CARCERAL STATE

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While much of the developed world struggles with the issue of overcrowded prisons, the Netherlands have emptied their prisons to one-third capacity without increased crime rates. This phenomenon is of special interest to Oklahoma, which recently became the most incarcerated state in the United States. This Note will discuss the Netherlands' penal strategies, particularly the use of alternative sanctions, and the structure and philosophy behind its criminal justice system. Additionally, it will analyze sentencing laws and practices in Oklahoma, its political culture, and the path that led it to its current carceral state. Finally, it will discuss possible ways that Oklahoma could learn from the Netherlands in reshaping its criminal justice practices. This Note concludes that Oklahoma could largely benefit from expanding its practice of community sentencing and electronic monitoring, for which it already has policy in place, but would not benefit from the expansive fine system that is favored in the Netherlands.

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I. INTRODUCTION

In a world plagued with overcrowded prisons and overwhelming recidivism, the Dutch are grappling with a unique problem—they have too few inmates.¹ The prison population in the Netherlands has been steadily decreasing since 2006.² In 2016, the Netherlands had an inmate rate of 59 inmates per 100,000 citizens.³ This is over eleven times fewer than that of the United States, whose inmate rate of 666 inmates per 100,000 citizens totaled nearly 2.1 million inmates.⁴ This means that one-third of Dutch prison cells remain empty, which has allowed the government to seize a unique and often lucrative opportunity to lease cells to other countries and provide housing to refugees.⁵

The exact cause of the prisoner shortage in the Netherlands is largely credited to the use of alternative sanctions.⁶ Alternative sanctions impose noncustodial sentences for minor offenses.⁷ Alternative sanctions utilized

1. See Lucy Ash, *The Dutch Prison Crisis: A Shortage of Prisoners*, BBC NEWS (Nov. 10, 2016), <https://www.bbc.com/news/magazine-37904263> [hereinafter *Dutch Prison Crisis*]; see also Chris Weller, *Dutch Prisons Are Closing Because the Country is So Safe—and No One Really Knows Why*, BUS. INSIDER (Apr. 26, 2016, 8:35 AM), <https://www.businessinsider.com/no-one-can-explain-why-dutch-crime-is-so-low-2016-4>.

2. Rob Smith, *Dutch Prisons Are So Empty They're Being Turned into Homes for Refugees*, WORLD ECON. F. (Feb. 2, 2018), <https://www.weforum.org/agenda/2018/02/netherlands-prisons-now-homes-for-refugees>.

3. *Id.*

4. *Id.*

5. See *id.*; see also Dan Bilefsky, *Dutch Get Creative to Solve a Prison Problem: Too Many Empty Cells*, N.Y. TIMES (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/world/europe/netherlands-prisons-shortage.html>; see generally Francis Pakes & Katrine Holt, *The Transnational Prisoner: Exploring Themes and Trends Involving a Prison Deal with the Netherlands and Norway*, 57 BRIT. J. CRIMINOLOGY 79 (2017) (discussing the Netherlands' agreements to house prisoners from Belgium and Norway).

6. Venetia Rainey, *How the Dutch Fixed a Prisons Crisis—and What Britain Can Learn from That*, PROSPECT (Dec. 12, 2017), <https://www.prospectmagazine.co.uk/magazine/how-the-dutch-fixed-a-prisons-crisis-and-what-britain-can-learn-from-that>.

7. *Alternative Sanctions, Fines and Other Sentences*, GOV'T NETH., <https://www.government.nl/topics/sentences-and-non-punitive-orders/alternative-sanctions-and-other-sentences> (last visited Sept. 23, 2018) [hereinafter "*Alternative Sanctions*"].

by the Dutch courts popularly include “[nonresidential] psychological treatment, electronic tagging[,] and suspended sentences”⁸ as well as fines and community service (sometimes called “community sentence”).⁹ The Netherlands stated and implemented punitive goals for incarceration, focusing very little on retribution, a popular theory of justice in the United States.¹⁰ Instead, carceral punishment in the Netherlands is “organized around the central tenets of resocialization and rehabilitation.”¹¹

Since the 1960s, popular punitivism has been a contentious point in United States political campaigns and media coverage of crime, causing American incarceration rates to soar despite declining crime rates.¹² The United States makes up only 5% of the world’s population but imprisons 25% of the world’s incarcerated persons.¹³ In 2018, Oklahoma became the most incarcerated state in the United States, with 1,079 incarcerated persons per 100,000 Oklahomans.¹⁴ The incline in Oklahoma’s incarcerated population is largely attributed to “tough on crime” politics and inconsistent punishments resulting from displaced prosecutorial discretion.¹⁵ As a controversial example, Oklahoma’s adoption of the “85 percent policy”¹⁶ and “three-strikes” laws requires citizens to serve much

8. Rainey, *supra* note 6.

9. *Alternative Sanctions*, *supra* note 7.

10. Ram Subramanian & Alison Shames, *Sentencing and Prison Practices in Germany and The Netherlands: Implications for the United States*, 27 FED. SENT’G REP. 33, 35 (2014).

11. *Id.*

12. Stephen Monterosso, *Punitive Criminal Justice and Policy in Contemporary Society*, 9 QUT L. & Just. J. 13, 13, 15, 19 (2009).

13. Bettina Muenster & Jennifer Trone, *Why is America so Punitive? A Report on the Deliberations of the Interdisciplinary Roundtable on Punitiveness in America (excerpted)*, 28 FED. SENT’G REP. 340, 340 (2016).

14. Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL’Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html>. This figure represents “people in state prisons, local jails, federal prisons, and other systems of confinement.” *Id.*

15. See Ryan Gentzler, *What’s Driving Oklahoma’s Prison Population Growth?*, OKLA. POL’Y INST. (May 2, 2019), <https://okpolicy.org/whats-driving-prison-population-growth/>.

16. Editorial, *Approach to ‘85 Percent’ Crimes is One Challenge for Oklahoma Criminal Justice Panel*, OKLAHOMAN (Dec. 9, 2016, 12:00 AM), <https://newsok.com/article/5530152/approach-to-85-percent-crimes-is-one-challenge-for-oklahoma-criminal-justice-panel>.

longer sentences than states without such laws.¹⁷ As the Oklahoma correctional system buckles to afford to staff and secure their prisons while operating at 114% capacity, many inmates requiring rehabilitative services, such as substance-abuse and mental health counseling, often go without them.¹⁸

While the comparison of the Netherlands and Oklahoma poses several hurdles, due largely to differences in culture and the nature of crime, molding a sentencing reform model after the Netherlands could prove enormously beneficial and relatively achievable for Oklahoma.¹⁹ For example, a mirroring of the Netherlands' use of alternative sanctions would allow Oklahoma prisons to save cell beds and valuable residential treatment for habitual offenders without the current exhaust of resources. While the imposition of criminal fines is likely not possible for Oklahoma because of the relatively high poverty rate when compared to the Netherlands, some alternative sanctions could be an easy transition for Oklahoma with fairly minor reallocations of budgetary resources. Expanding the community sentencing and electronic monitoring that are already being used in Oklahoma would cut costs, reduce recidivism, and more specifically address the state's high female incarcerated population.²⁰ In reaching this conclusion, this Note will examine the evolution of criminal sentencing in the Netherlands, as well as the current sentencing laws and qualifications for alternative sanctions.²¹ Comparatively, this Note will discuss Oklahoma's development of criminal sentencing laws and analyze the increase in the incarcerated population.²²

17. Editorial, *Oklahoma Three-Strikes Law an Example of Why More Corrections Reform is Needed*, OKLAHOMAN (May 3, 2015, 12:00 AM), <https://newsok.com/article/5415490/oklahoma-three-strikes-law-an-example-of-why-more-corrections-reform-is-needed>.

18. Shelby Cashman, *Oklahoma Looking for Answers to Solve High Incarceration Rate*, OKC FOX (July 12, 2018), <https://okcfox.com/news/local/oklahoma-looking-for-answers-to-solve-high-incarceration-rate>.

19. See generally Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 32 (2018).

20. See *infra* Section V.

21. See *infra* Part III.

22. See *infra* Part IV.

II. THE NETHERLANDS CRIMINAL SENTENCING BACKGROUND

In 2019, the Netherlands boasts a population of 17.1 million people.²³ It is also the twenty-seventh most densely populated country in the world.²⁴ The capital city Amsterdam alone claims seven million residents—nearly 40% of the entire country's population.²⁵ Over three-quarters of the Netherlands' religious population is Dutch Caucasian and Christian.²⁶ Compared with most other developed countries, the Netherlands' poverty rate is the seventh-lowest, with only 8.3% of citizens living below the poverty line.²⁷

The Netherlands is a constitutional monarchy and a parliamentary democracy, meaning that officials can only hold office so long as they have the approval of the Parliament.²⁸ The Parliament is comprised of two houses: the Lower House, which holds most supervisory powers over government officials, and the Senate.²⁹ Like the United States, the Netherlands' branches of government observe a separation of powers between the judiciary, the legislature, and the administration.³⁰ The Netherlands is separated into twelve provinces with a total of 450 municipalities that combinedly hold restricted legislative and executive powers.³¹ While the provincial and municipal governments are both run

23. *Netherlands Population 2019*, WORLD POPULATION REV., <http://worldpopulationreview.com/countries/netherlands-population/> (last visited Sept. 28, 2019).

24. *Id.*

25. *Id.*

26. *See id.* This religious statistic reflects the population that reportedly observes a religion. *Id.*

27. *Poverty Rate*, OECD DATA, <https://data.oecd.org/inequality/poverty-rate.htm> (last visited Oct. 21, 2019). The poverty rate of the Netherlands is compared with other 35 Organisation for Economic Co-Operation and Development (OECD) member countries, which include 30 out of 36 developed countries in the world. *Comparing List of OECD Member Countries*, OECD, <https://www.oecd.org/about/document/list-oecd-member-countries.htm> (last visited Nov. 10, 2019), and U.N. Dep't of Econ. & Soc. Affairs, *World Economic Situation and Prospects 2019*, at 169, tbl. A (2019).

28. P.J.P. TAK, *THE DUTCH CRIMINAL JUSTICE SYSTEM 1* (2008).

29. *Id.* at 1–2.

30. *Id.* at 2.

31. *Id.*

by directly elected councils, the councils are directed by a federally appointed chairman.³²

The judicial branch of the Dutch government consists of independent judges and public prosecutors under the supervision of the Ministry of Justice and Security.³³ Although the Ministry of Justice and Security oversees the functions of the judicial branch when it interacts with the public prosecutors, all judges are independent, and the Minister exercises no authority over them.³⁴ The Ministry of Justice and Security's main focuses are those pertaining to criminal justice: "legislation, crime prevention, child protection, law enforcement, administration of justice and legal aid, victim support, immigration regulation[,] and counter-terrorism."³⁵ Very uniquely compared to other justice systems, the administration of justice is entrusted solely to the life-appointed judges³⁶ Meanwhile, there is no jury system.³⁷

The Dutch criminal justice system has often been described as inquisitorial, as opposed to the pure adversarial systems as seen in the United States.³⁸ "The Dutch system differs fundamentally in that prosecutors do not view themselves as engaged in an adversary process. That is, the [Public Prosecution Service] expressly does not consider that its primary goal is to achieve the conviction of the accused."³⁹ The prosecutors' main goal is centered in truth finding, "instead of merely accusing the defendant and trying to convince the judge of his guilt."⁴⁰ The prosecutor plays a pivotal role in each decision-making step throughout the criminal justice proceedings, from police investigation to sentencing.⁴¹

32. Michael J. Wintle et al., *Netherlands*, ENCYC. BRITANNICA (Sept. 27, 2019), <https://www.britannica.com/place/Netherlands>.

33. TAK, *supra* note 28, at 4.

34. *Id.*

35. *The Dutch Government*, I AM EXPAT, <https://www.iamexpat.nl/expat-info/the-netherlands/dutch-government> (last visited Sept. 29, 2019).

36. Wintle et al., *supra* note 32.

37. *Id.*

38. E.T. Luining, *The Dutch Punishment Order: Controversy, Comparison and Compromise 6* (Oct. 10, 2014) (unpublished master thesis, Leiden University), <https://www.njb.nl/Uploads/2015/3/Master-Thesis-Criminal-Justice-Egge-Luining--The-Dutch-Punishment-Order.-Controversy--Comparison-and-Compromise-.pdf>.

39. Henk van de Bunt & Jean-Louis van Gelder, *The Dutch Prosecution Service*, 41 CRIME & JUST. 117, 124 (2012).

40. Luining, *supra* note 38, at 6.

41. *Id.* at 8, 10–11.

In 1999, the Dutch government sought to eradicate inequality in sentencing and promulgated more than thirty-five sentencing guidelines, most commonly known as the *Polaris* guidelines.⁴² Similar sentencing guidelines exist in the United States, in which factors present during the commission of a crime are assigned a preset number of points according to severity, such as bodily harm and use of violent or threatening language, that are added together during the sentencing phase of the proceeding.⁴³ The *Polaris* guidelines also provide for an increased point score for repeated criminal conduct, adding 10% to 20% of the total points depending on the number of repeat offenses.⁴⁴ Prosecutors are encouraged to individualize sentences for each unique offender and are allowed to deviate from the *Polaris* guidelines by simply stating on the record a verifiable reason for departing.⁴⁵ Prosecutors are the exclusive decisionmakers in bringing criminal charges and can decide under the “expediency principle” to not bring charges for reasons such as public interest, illness or addiction of the defendant, or lack of evidence.⁴⁶

Behind the development of the characteristically mild-mannered and inquisitorial justice system looms a dark past. Following the consummation of World War II, many European countries reconsidered how they defined justice.⁴⁷ “The ‘never again’ conviction that flows from reckoning with mass atrocities committed during the Second World War has [had] a strong influence on the nature of punishment” in the Netherlands and serves as a somber reminder of the courts’ duty to protect human dignity and rights.⁴⁸ With their own war-suffering in mind, Dutch prison professionals formed the Fick Committee of 1947 to better design Dutch imprisonment.⁴⁹ The Fick Committee recommended extensive alterations “that led to the 1953 Penitentiary Principles Act, which substituted resocialization for retribution as the key principle governing

42. TAK, *supra* note 28, at 135–36.

43. See generally U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (U.S. SENTENCING COMM’N 2018); see e.g., *id.* at § 2B3.2(b).

44. TAK, *supra* note 28, at 136.

45. *Id.* at 137.

46. van de Bunt & van Gelder, *supra* note 39, at 118, 126.

47. Muenster & Trone, *supra* note 13, at 342–43.

48. *Id.* at 342.

49. David Downes & René van Swaaningen, *The Road to Dystopia? Changes in the Penal Climate of the Netherlands*, 35 CRIME & JUST. 31, 39 (2007)

prison regimes, entailing a host of changes from austere isolation to communal association.”⁵⁰ These changes were also implemented through the entirety of the criminal justice system, and soon the Netherlands was reputed as the most “liberal and humane” justice system among Western countries with extensive welfare programs, acceptance of immigrants, and lenient drug and abortion laws.⁵¹

Social tolerance remains a pillar of Dutch culture, making it a hub for youth culture.⁵² For outsiders, the most notable example of Dutch tolerance is in relation to drug use and prostitution,⁵³ particularly in the nation’s largest city of Amsterdam’s “red light district.”⁵⁴ In the Netherlands, drug use is separated into two categories: soft and hard drugs.⁵⁵ Soft drugs are drugs that have acceptable health risks to the user, such as marijuana, and the possession and use of them has been generally decriminalized for people over the age of eighteen.⁵⁶ “Coffee shops” in the Netherlands are businesses that legally sell soft drugs, along with the more traditional purposes of coffee shops.⁵⁷ Coffee shops are legal vendors of marijuana, they must be licensed by the municipality and must continuously comply with advertising and quantity regulations.⁵⁸ Hard drugs, on the other hand, are drugs that have unacceptable health risks to the user, such as heroin, cocaine, or XTC.⁵⁹ The use, possession, or distribution of hard drugs is strictly illegal in all parts of the country.⁶⁰

The Dutch’s social tolerance is also evident in key criminal justice legislation. The Netherlands’ 1998 Penitentiary Principles Act⁶¹ (1998 PPA) is “[t]he main legislation on the enforcement of prison sentences.”⁶²

50. *Id.*

51. Michael Tonry & Catrien Bijleveld, *Crime, Criminal Justice, and Criminology in the Netherlands*, 35 *CRIME & JUST.* 1, 1–2 (2007).

52. Wintle et al., *supra* note 32.

53. TAK, *supra* note 28, at 11.

54. *See generally Red Light District*, THINGS TO DO AMSTERDAM (last visited Oct. 21, 2019), <https://thingstodoinamsterdam.com/red-light-district/>.

55. *Id.* at 21.

56. *Id.* at 21–22.

57. *Id.*

58. *Id.* at 22.

59. *Id.* at 21.

60. *See id.* at 21–22.

61. *See generally* Penitentiare beginselenwet 18 juni 1998, Stb. 1998, 430.

62. *Id.* at 141.

The 1998 PPA fundamentally focuses on “the re-socialization of prisoners in which incarceration is carried out with as few restrictions as possible through the principle of association.”⁶³ This goal has remained self-evident in the Dutch prisons, which encourages incarcerated persons to foster supportive relationships with people inside and outside the prisons in an effort to maintain sociability and functionality of citizens post-release.⁶⁴ These basic tenants of punishment outlined in the 1998 PPA also inform the sentencing laws of the Netherlands to use custodial sentencing sparingly and promote noncustodial and nonresidential treatments instead.⁶⁵

III. SENTENCING LAWS IN THE NETHERLANDS

A. Pre-Trial Transactional Settlement

To effectuate the goals of resocialization and rehabilitation in the Netherlands’ criminal justice system, “prosecutors . . . have broad power to divert offenders away from prosecution.”⁶⁶ In exercising this discretion, the prosecutor in most cases can decide to settle the case using a transaction.⁶⁷ A transaction is “a form of diversion in which the offender voluntarily pays a sum of money to the Treasury, or fulfils one or more (financial) conditions laid down by the prosecution service in order to avoid further criminal prosecution and a public trial.”⁶⁸ The objective of using a transaction as a form of trial deterrence is “lowering the workload of the courts and [having] a swifter criminal justice response towards certain (minor) wrongdoings.”⁶⁹ As of 1983, transactions can be used to divert both misdemeanors and felonies statutorily not punishable by more than six years.⁷⁰ Over one-third of all crimes handled by a public prosecutor in the Netherlands are settled by transactions.⁷¹ In choosing to

63. Subramanian & Shames, *supra* note 10, at 35.

64. *Id.*

65. *Id.* at 35–36.

66. *Id.* at 36.

67. TAK, *supra* note 28, at 87.

68. *Id.*

69. Luining, *supra* note 38, at 8.

70. TAK, *supra* note 28, at 87.

71. *Id.* at 88.

accept the prosecutor's offer of a transaction, the offender effectively avoids a public trial and, most importantly, the offense is not registered on his or her criminal record.⁷² It is important to note that an offender who agrees to a transaction and complies with the transaction conditions does not effectively plead guilty to a criminal offense.⁷³

However, non-compliance with the conditions of the transaction automatically results in the issuance of a writ of summons.⁷⁴ This automatic issuance proves to be counterintuitive to the goals of allowing prosecutors the discretion to issue transactions by adding to the workload of the court and prosecutor.⁷⁵ In response, the Dutch legislature statutorily vests the power in the prosecutor to impose sentences without first going through the court with a penal order.⁷⁶ A penal order allows the prosecution to impose:

a task penalty to perform non-remunerated work or compulsory participation in a training course lasting 180 hours; a fine; a withdrawal from circulation of seized objects; an order to pay to the treasury a sum of money to benefit the victim; the withdrawal of a driving license for a period of up to six months.⁷⁷

These conditions can be imposed conjunctively with instructions for the offender to comply with, such as surrendering objects eligible for forfeiture or payment of money to a victims' support charity, so long as the instructions do not infringe on the offender's religious freedom or civil liberties.⁷⁸

B. Custodial Sentencing

In situations in which the prosecutor has decided not to offer a transaction but rather prosecute the defendant resulting in a conviction, the Criminal Code lists the potential penalties in order of descending severity:

72. *Id.*

73. *Id.*

74. *Id.* at 89.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

imprisonment, detention, community service, or a fine.⁷⁹ The most severe penalty, imprisonment, can be imposed for life or a determinate sentence.⁸⁰ Unique from other countries, a life sentence in the Netherlands truly means that the inmate will be imprisoned for the rest of his or her life and can only be released by an official pardon from the King.⁸¹ In 2019, there was about thirty inmates in the Netherlands serving life sentences.⁸² Determinate imprisonment sentences can be imposed for anywhere between one day to thirty years.⁸³ Detention is a custodial sentence used for infractions, or lesser crimes, and generally cannot exceed one year absent special circumstances.⁸⁴ Cumulatively, these custodial sentences comprised 29.8% of the criminal sanctions imposed by Dutch district courts in 2015,⁸⁵ with roughly 95% of custodial sentences lasting two years or less.⁸⁶

C. Non-Custodial Alternative Sanctions

However, it is the use of noncustodial sentences, such as community service and fines, that makes the Dutch criminal justice system of special note. Community service is “unpaid [labor] for the benefit of the community”⁸⁷ and was introduced in the Dutch Criminal Code in 1989 to “ease the pressure on the prison system, to reduce recidivism rates, and to

79. Art. 9 para. 1(a) WETBOEK VAN STRAFRECHT [SR] [CRIMINAL CODE] (Neth.), translated in Criminal Code § 9(1)(a), Eur. Jud. Training Network, http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf (last visited Sept. 30, 2019).

80. *Id.* art. 10 para. 1.

81. *Custodial Sentences*, GOV'T NETH., <https://www.government.nl/topics/sentences-and-non-punitive-orders/custodial-sentences> (last visited Sept. 30, 2019).

82. *Id.*

83. *Id.*

84. TAK, *supra* note 28, at 113.

85. *Trends in the Netherlands 2017*, STATISTICS NETH. (CBS) 44 (Oct. 9, 2017 3:00 PM) https://www.cbs.nl/-/media/_pdf/2017/44/trends_in_the_netherlands_2017_web.pdf.

86. Subramanian & Shames, *supra* note 10, at 37.

87. Miranda Boone, *Only for Minor Offence: Community Services in the Netherlands*, 2 EUR. J. PROB. 22, 23 (2010), https://www.canonsociaalwerk.eu/1971_werkstraf/Only%20for%20minor%20offences.pdf.

be a more humane sanction compared to imprisonment.”⁸⁸ Community service sentences were first introduced as a substitute for detention sentences of six months or less but have now been recognized as an autonomous sentence without relation to a custodial sentence since 2001.⁸⁹ Community service sentences can be imposed by either the prosecutor as part of a pre-trial settlement⁹⁰ or by a judge upon conviction.⁹¹ These sentences can be carried out at either governmental or private organizations “involved in health care, environmental protection, and social and cultural work”—the most common being maintenance work, gardening and groundskeeping, cleaning and sanitation, and kitchen work.⁹² Weekend projects are available for those serving a community service sentence who have employment requiring their attendance during weekdays, minimizing the interference with the productive daily life of the offender.⁹³ In 2015, 25.5% of all criminal penalties imposed by Dutch district courts included a community service order.⁹⁴

While those who ascribe to the more draconian deterrence theory of punishment may argue that community service provides a much lesser deterrent of offending than the more traditional approach of imprisonment, there is significant data that points to the inconsequentiality of deterrence in punishment effectiveness. A comprehensive study conducted by Leiden University faculty in 2010⁹⁵ found that when analyzing the five years’ data after offenders were either released from a custodial sentence or had completed their community service orders, those who were sentenced to community service were 46.8% less likely to commit another offense.⁹⁶ In slightly longer terms, the recidivism rate for those who served a community service order was nearly 50% less over eight years after completion of the sentence than those who had served a custodial sentence

88. Hilde Wermink et al., *Comparing the Effects of Community Service and Short-Term Imprisonment on Recidivism: A Matched Samples Approach*, 6 J. EXPERIMENTAL CRIMINOLOGY 325, 325–26 (2010), <https://link.springer.com/content/pdf/10.1007%2Fs11292-010-9097-1.pdf>.

89. Boone, *supra* note 87, at 23–25.

90. TAK, *supra* note 28, at 87–88.

91. Boone, *supra* note 87, at 29.

92. *Id.* at 31.

93. *Id.*

94. *Trends in the Netherlands 2017*, *supra* note 85, at 46.

95. See generally Wermink et al., *supra* note 88.

96. *Id.* at 343.

for similar offenses.⁹⁷ This study and other similar research conducted on community service's effect on recidivism⁹⁸ call into question the true usefulness of the deterrence theory in administering an effective punishment, as one can assume that a more community-based sentence would have a less deterrent effect than an incapacitating and isolating incarceration.⁹⁹ These findings are also complimented by the intrinsic benefits of offenders remaining in their homes and with their families, and the fiscal benefits of maintained income of offenders' employment, reduced costs of incarceration, and low-cost service to the community.¹⁰⁰

The use of fines, the least severe form of punishment listed in the Dutch Criminal Code, plays a major role in alternative sanctions in the Netherlands. In 2015, 23.3% of all criminal sanctions imposed by the Dutch district courts were fines.¹⁰¹ The 1983 Financial Penalties Act, an integral part of Dutch criminal justice reform following spikes in prison population in the 1970s, aimed to "creat[e] better opportunities to reduce the use of imprisonment" and "expresse[d] the principle that fines should be preferred over prison sentences."¹⁰² The 1983 Financial Penalties Act created six fine categories ranging from €335 Euro to €670,000 Euro, the highest of which can only be applied to corporate bodies or individuals found guilty of certain organized crimes.¹⁰³ As is a common theme among all criminal justice interactions in the Netherlands, the judges and prosecutors retain significant discretion in implementing fines.¹⁰⁴ In particular, the 1983 Financial Penalties Act "urges courts to take into [consideration] the financial position of the offender" using a two-prong proportionality analysis "between the crime and the fine and between the fine and the ability to pay."¹⁰⁵ The court may also allow an offender to pay the fine in installments if necessary, although all fines are required to be paid within two years of the sentence.¹⁰⁶ If an offender fails to pay the fine,

97. *Id.* at 346.

98. *Id.*

99. *Id.* at 347.

100. *See id.* The lower "cost" referenced is to pay for the probationary supervision of the community service. *See id.*

101. *Trends in the Netherlands, supra* note 85, at 46.

102. TAK, *supra* note 28, at 115.

103. *Id.* at 116.

104. *Id.*

105. *Id.*

106. *Id.*

the amount owed can be recovered from the offender's property, or the prosecutor can opt to enforce default detention for a time period set at the imposition of the fine, customarily at a rate of €50 owed equaling one day in detention.¹⁰⁷

Although not an officially listed principle punishment in the Dutch Criminal Code, electronic monitoring (also referred to as electronic tagging) deserves an honorable mention as one of the more popular alternatives to traditional custodial sentences. “[Electronic monitoring] is a restriction of liberty that can be imposed as a sentence in [the] case [that] a full deprivation of liberty is considered to be too severe and inappropriate.”¹⁰⁸ It is implemented by monitoring and restricting offenders' movement through electronic ankle tethers, often prohibiting them from leaving their residence except for court-sanctioned program participation.¹⁰⁹ Electronic monitoring can be imposed either in lieu of serving the last part of a custodial sentence in detention as part of a penitentiary program¹¹⁰ or in combination with a suspended sentence.¹¹¹ The most common modality for electronic monitoring is part of a conditional sentence, which requires the offender to comply with certain requirements and restrictions to maintain the extended freedom in comparison to detention.¹¹² The average length of such conditional sentence under electronic monitoring is 128 days and averages a 66% successful completion rate.¹¹³ Electronic monitoring is meant to serve as an incentive system for offenders to display behavior changes in exchange for increased freedoms and encourages offenders to seek approved outside activities, such as education or employment.¹¹⁴

107. *Id.*

108. *Id.* at 117.

109. MIRANDA BOONE ET AL., CURRENT USES OF ELECTRONIC MONITORING IN THE NETHERLANDS 30, 41–42 (2016), https://openaccess.leidenuniv.nl/bitstream/handle/1887/49489/country_report_netherlandsfinal.pdf?sequence=1.

110. *Id.* at 11.

111. TAK, *supra* note 28, at 117.

112. See BOONE ET AL., *supra* note 109, at 10, 28–29.

113. *Id.* at 63, 66.

114. *Id.* at 30–31.

IV. CRIMINAL SENTENCING IN OKLAHOMA

A. Current Carceral State of Oklahoma

In 2018, Oklahoma unseated Louisiana, dubbed the “prison capital” of the world, to claim the ill-famed title of the most incarcerated state in the United States.¹¹⁵ Oklahoma incarcerates a shocking 1,079 persons per 100,000 residents,¹¹⁶ which also represents the highest female incarcerated population in the United States.¹¹⁷ Of the roughly 40,000 incarcerated persons, 28,000 reside in state prisons.¹¹⁸ Oklahoma claims a population of 3.95 million residents with many living in rural locations.¹¹⁹ The Oklahoman population is 72.6% Caucasian¹²⁰ and over three-quarters Christian, with the majority being Evangelical Protestant.¹²¹ While Oklahoman people of color comprise only about 25% of the general state population, they are well overrepresented in the 49% of the incarcerated population.¹²² In the United States, 13.4% of people fall below the poverty line.¹²³ Oklahoma has also surpassed this statistic, with 15.8% of its

115. Wagner & Sawyer, *supra* note 14.

116. *Id.*

117. Allison Herrera, *Why Oklahoma Has the Highest Female Incarceration Rate in the Country*, PRI (Oct. 3, 2017, 8:30 AM), <https://www.pri.org/stories/2017-10-03/why-oklahomas-female-incarceration-rate-so-high>.

118. Peter Wagner & Bernadette Rabuy, *Oklahoma Incarceration Pie Chart 2016*, PRISON POL'Y INITIATIVE (May 2016), https://www.prisonpolicy.org/graphs/50statepie/OK_pie_2016.html. The rest of the incarcerated population resides primarily in local jails, with a smaller percentage in federal prisons. *Id.*

119. *Oklahoma Population 2019*, WORLD POPULATION REV., <http://worldpopulationreview.com/states/oklahoma-population/> (last visited Oct. 1, 2019).

120. *Id.*

121. *Adults in Oklahoma*, PEW RES. CTR., <http://www.pewforum.org/religious-landscape-study/state/oklahoma/> (last visited Oct. 1, 2019).

122. *Oklahoma Population 2019*, *supra* note 119; see *Oklahoma Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/OK.html> (last visited Oct. 21, 2019). People of color represented in this statistic are 7.8% two or more races, 7.4% Native North American, 7.3% African American, 2.7% other races, and 2% Asian. *Oklahoma Population 2019*, *supra* note 119.

123. See Courtney Cullison, *New Census Data Shows that Oklahoma Fell Further Behind the U.S. on Poverty and Uninsured Rate for Second Consecutive Year*, OKLA. POL'Y INST. (May 2, 2018), <https://okpolicy.org/new-census-data-shows-that-oklahoma-fell-further-behind-the-u-s-on-poverty-and-uninsured-rate-for-second-consecutive-year/>.

residents living below the poverty line, representing one-sixth of the entire state population.¹²⁴

While the United States itself is often criticized as being a punitive nation compared to other developed countries, Oklahoma has notoriously harsh sentencing practices in comparison to other states.¹²⁵ Oklahoman courts are 23% more likely to impose a custodial sentence, instead of state-run community supervision, than other states.¹²⁶ Custodial sentences imposed for violent offenses are about the same as other states, but custodial sentences for non-violent property offenses in Oklahoma are about 80% to 100% longer than other states.¹²⁷ Particularly dissimilar to other states, custodial sentences for drug possession in Oklahoma are about twice as long as the national average.¹²⁸ These longer sentences for drug possession have added considerably to the incarceration rate, as drug possession is the most common felony conviction in Oklahoma.¹²⁹ The national average sentence for drug trafficking, which is the possession, distribution, transportation, or manufacturing of a drug in a specified quantity,¹³⁰ is six years.¹³¹ In Oklahoma, a conviction for the same crime would result in an average sentence of ten years and four months.¹³²

These harsh sentences directly correlate to the unusually high female incarceration rate in Oklahoma.¹³³ While the overall state prison population is only recently the nation's highest, Oklahoma has had the highest female incarcerated population in the United States for a

124. *Id.*

125. *See* Gentzler, *supra* note 15.

126. *See* OKLA. JUSTICE REFORM TASK FORCE, FINAL REPORT 7 (2017) [hereinafter "JUSTICE REFORM TASK FORCE"], https://apps.ok.gov/dcs/searchdocs/app/manage_documents.php?att_id=22034.

127. Chris Casteel, *5 Things About Oklahoma's Incarceration Rate*, OKLAHOMAN (Mar. 23, 2018, 2:35 PM), <https://newsok.com/article/5588182/5-things-about-oklahomas-incarceration-rate>.

128. *Id.*

129. *Id.*

130. OKLA. STAT. ANN. tit. 63, § 2-415(B); *see also* Dennis v. Poppel, 222 F.3d 1245, 1251–42 (10th Cir. 2000).

131. Victoria Law, *Why Are So Many Women Behind Bars in Oklahoma?*, NATION (Sep. 29, 2015), <https://www.thenation.com/article/why-are-so-many-women-behind-bars-in-oklahoma/>.

132. *See id.*

133. *Id.*

staggering twenty-seven years.¹³⁴ Roughly 42% of all Oklahoma female inmates are serving sentences for drug crimes.¹³⁵ Because female inmates represent over 10% of the total Oklahoman incarcerated population,¹³⁶ steps taken to slow the climb of the incarceration rate will necessarily address issues that result specifically in female incarceration.¹³⁷ Many experts studying the uniquely high female inmate population in Oklahoma draw connections from the state's high poverty rate to the consistent substance-abuse convictions of women.¹³⁸ A study conducted in 2015 on behalf of the Institute for Women's Policy Research, which surveyed women's well-being and status in all fifty states and District of Columbia over several years, found that Oklahoma ranked in the bottom one-third of states in many categories.¹³⁹ This was particularly evident in the study's findings on women's employment and earnings, with only 55.8% of Oklahoman women in the workforce and an average annual full-time salary of only \$32,000 compared to the national average salary of \$38,000 for a woman working full time.¹⁴⁰ Corresponding to the high unemployment rate and low salaries of women, Oklahoma also ranked in the bottom ten states for women's access to mental health services and health insurance.¹⁴¹ Without access to stable finances, health insurance, or mental health treatments, many women in Oklahoma have continuously

134. Matt Elliott, *Oklahoma No. 2 in the Nation in Incarceration in 2016*, MIAMI OK. (Jan. 16, 2018, 9:00 AM), <https://www.miamiok.com/news/20180116/oklahoma-no-2-in-nation-in-incarceration-in-2016>.

135. JUSTICE REFORM TASK FORCE, *supra* note 126, at 10.

136. See *Oklahoma Prison Population 1978-2015: Women*, PRISON POL'Y INITIATIVE (Jan. 2018), https://www.prisonpolicy.org/graphs/OK_Women_Counts_1978_2015.html (finding that 2,995 women are in Oklahoma prisons in 2015); *Oklahoma Profile*, *supra* note 122 (stating that the state prison population in Oklahoma is 27,000 people).

137. See *generally* SUSAN F. SHARP, *MEAN LIVES, MEAN LAWS: OKLAHOMA'S WOMEN PRISONERS* (2014).

138. See Law, *supra* note 131.

139. CYNTHIA HESS ET AL., *THE STATUS OF WOMEN IN THE STATES: 2015*, 2, 5, 38, 41, 54, 105, 124, 127, 129, 136, 141 (2015), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/R400-FINAL%208.25.2015.pdf>.

140. *Id.* at 39.

141. *Id.* at 127.

cycled in and out of the criminal justice system without resolving the underlying issues that brought them in.¹⁴²

Curiously, there is significant incongruence between the crime rates and imprisonment rates in Oklahoma. Although Oklahoma crime rates steadily declined between the 1980s and early 2000s¹⁴³ and have since remained fairly consistent, the incarceration rate continues to climb.¹⁴⁴ Between 1978 and 2015, the larger incarceration increase was seen in state prisons, jumping from about 150 to 700 state prison inmates per 100,000 residents, while the jail incarceration rate has remained relatively stable.¹⁴⁵ During the same time period, the national crime rate fell by 17%.¹⁴⁶ Harsher sentencing proponents argue that the decreasing crime rate expectedly coincides with an increased incarceration rate because it indicates “that locking up offenders can substantially reduce crime through incapacitation or deterrence.”¹⁴⁷ However, this argument fails to explain why analysis of twenty-five year periods, particularly between 1972 and 1997, shows that the incarceration rate steadily rose while the crime rate fluctuated in roughly five-year increments.¹⁴⁸

B. American and Oklahoman Criminal Justice Politics

Oklahoma’s political climate, much like that in many of the United States, has roared with a tough on crime rhetoric that can only be historized in relation to the broader national scheme of criminal justice politics. The tough on crime political ideology was propagated in America in the late

142. *Id.* at 126–27; see also Craig Deroche, *Point of View: Oklahoma Needs Restorative System for Women in Prison*, THE OKLAHOMAN (Sept. 29, 2018 12:00 AM), <https://oklahoman.com/article/5609965/point-of-view-oklahoma-needs-restorative-system-for-women-in-prison>.

143. *Oklahoma Crime Rates 1960 - 2013*, DISASTER CTR., <http://www.disastercenter.com/crime/okcrimn.htm> (last visited Aug. 28, 2019).

144. Linda G. Morrissey & Vickie S. Brandt, *Community Sentencing in Oklahoma: Offenders Get a Second Chance to Make a First Impression*, 36 TULSA L.J. 767, 769 (2013).

145. Joshua Aiken, *Oklahoma’s Prison and Jail Incarceration Rates*, PRISON POL’Y INITIATIVE (May 2017), https://www.prisonpolicy.org/graphs/OK_Prison_Jail_Rate_1978-2015.html.

146. Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL’Y REV. 9, 10 (1999).

147. *Id.*

148. *Id.*

1960s to “‘resonat[e] with an American public that was confused by social upheavals’ during the 1960s.”¹⁴⁹ President Richard Nixon’s 1968 presidential campaign began the often-mirrored “law and order” candidate platform,¹⁵⁰ which opposed radical changes in the social status quo and disavowed the civil disobedience tactics used by the Civil Rights Movement.¹⁵¹ After election, President Nixon advocated for the “tough on crime”—also known as the “war on drugs”—by boldly declaring that the “solution to the crime problem [was] not the quadrupling of funds for any governmental war on poverty but more convictions.”¹⁵² In the 1980s, the tough on crime torch was carried by President Ronald Reagan, who campaigned “on the promise to ‘get tough’ on street crime”¹⁵³ in response to the rising use of crack cocaine.¹⁵⁴ Between 1980 and 1995, “the number of drug arrests nearly tripled, from 581,000 to 1,476,000.”¹⁵⁵ Most consider tough on crime candidates to ascribe to the Republican party, but in the 1990s democrat Bill Clinton sought to bridge the parties in an effort of bipartisan crime control.¹⁵⁶ It was during his presidency of the United States that America saw a 47% increase in incarceration rates despite a 22% decrease in crime rates.¹⁵⁷

While politicians and media outlets often credit the tough on crime politics as an answer to the American people’s outcry for law and order, it appears that many Oklahomans and their elected official representatives do not always see eye-to-eye in implementing criminal sentencing

149. *Id.* at 13 (quoting DAVID J. KRAJICEK, *SCOOPED!* 146 (1998)).

150. *Id.*

151. Andrea Pitzer, *The Bitter History of Law and Order in America*, LONG READS (April 2017), <https://longreads.com/2017/04/06/the-bitter-history-of-law-and-order-in-america/>.

152. Emily Badger, *Is This the End of ‘Tough on Crime’?*, WASH. POST (Sept. 9, 2014, 4:32 PM) (quoting KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* 52 (2d ed. 2004)), https://www.washingtonpost.com/news/wonk/wp/2014/09/09/is-this-the-end-of-tough-on-crime/?noredirect=on&utm_term=.7dba0d3bfa2a.

153. *Id.*

154. Mauer, *supra* note 146, at 10–11.

155. *Id.* at 10–11.

156. *See id.* at 13.

157. JENNI GAINSBOROUGH & MARC MAUER, *DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990S* 3 (2000), <https://www.prisonpolicy.org/scans/sp/DimRet.pdf>.

policies.¹⁵⁸ The Truth in Sentencing Act of 1997 is most illustrative of this misunderstanding between constituents and elected officials.¹⁵⁹ The Truth in Sentencing Act, which was also passed by several other states in the late 1990s in efforts to gain federal funding for penal systems,¹⁶⁰ “aim[ed] to reduce the uncertainty about the length of time that offenders must serve in prison.”¹⁶¹ Several provisions of the controversial bill “would impose rigid guidelines on punishment practices—taking sentencing discretion away from both judges and juries.”¹⁶² Unfortunately for the Oklahoma legislature, their constituents were dissatisfied with the bill’s efforts—even after several subsequent revisions.¹⁶³

Ultimately, the legislature repealed the Truth in Sentencing Act one day before it was meant to go into effect and in its stead implemented a comprehensive legislative plan that addressed the constituents’ concerns.¹⁶⁴ The legislation provided a three-pronged approach to criminal sentencing and custodial release:

- 1) required criminals convicted of the most serious offenses, the “Eleven Deadly Sins,” to serve at [least] 85% of their sentence before becoming eligible for parole; 2) retained the emergency prison-population cap law that created provisions for eligible inmates with “good-time” credits to receive early release when the inmate prison count reaches 95% capacity; and 3) created the community sentencing program.¹⁶⁵

The community sentencing portion of the legislation, however, proved shockingly popular¹⁶⁶ considering politicians’ insistence that Oklahoma citizens wanted more incarceration. “Community sentencing, in contrast, would allow those convicted of non-violent offenses to serve their time in

158. Morrissey & Brandt, *supra* note 144, at 769–70.

159. H.B. 1213, 46th Leg., Reg. Sess. (Okla. 1997), http://webserver1.lsb.state.ok.us/cf_pdf/1997-98%20ENR/hB/HB1213%20ENR.PDF.

160. WILLIAM J. SABOL ET AL., INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES’ SENTENCING PRACTICES AND PRISON POPULATIONS, EXECUTIVE SUMMARY 1 (2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/195163.pdf>.

161. *Id.*

162. Morrissey & Brandt, *supra* note 144, at 769–70.

163. *Id.* at 770.

164. *Id.*

165. *Id.*

166. *Id.* at 772.

the community while undergoing supervised treatment, education[,] or other programs with the ultimate goal of reducing recidivism.”¹⁶⁷ This addresses a large portion of offenders as nearly half of all criminal convictions in Oklahoma, both felonious and misdemeanors, are substance-abuse related.¹⁶⁸ To qualify for community sentencing, the offender must have actually been convicted, entered a guilty plea, or pleaded *nolo contendere* to a qualifying offense on or after March 1, 2000.¹⁶⁹ The offender is also required to be “eligible for probation through either a deferred or suspended sentence.”¹⁷⁰ So long as an offender meets those requirements, he or she is then required to participate in an assessment of the offender’s risk of reoffending.¹⁷¹ After the recidivism assessment, the offender is still subjected to discretionary vetting by the sentencing court.¹⁷²

Although the Community Sentencing Act’s provisions are sparingly utilized by Oklahoman courts, averaging less than 2,000 community sentencing orders per year, the program has been successful.¹⁷³ Little over half of the offenders serving a community sentence were those convicted of drug offenses.¹⁷⁴ Offenders who completed their sentence pursuant to the Community Sentencing Act saw an 89% long-term success rate, meaning that they remained crime-free in the community for at least three years.¹⁷⁵

Noting the importance of expanding use of prison alternatives such as community sentencing, the Oklahoma government has in recent history taken steps in the right direction to mitigate the issues plaguing their criminal justice system.¹⁷⁶ In 2016, Governor Mary Fallin established the

167. *Id.*

168. *Id.*

169. *Id.* at 773.

170. *Id.*

171. *Id.* at 774.

172. *Id.* at 776.

173. 2008 COMMUNITY SENT’G ACT ANN. REP. 20, <http://doc.ok.gov/Websites/doc/images/Documents/Newsroom/Annual%20Reports/Community%20Sentencing%20Annual%20Report%202008.pdf>.

174. *Id.* at 9.

175. *Id.* at 20.

176. *See generally* Clint Patterson, *New Oklahoma Laws Ease Mandatory Sentences for Drug Crimes*, PATTERSON L. FIRM (July 9, 2018), <https://tulsaduexpert.com/blog/new-laws-ease-mandatory-sentences-drug/>.

Oklahoma Justice Reform Task Force, a bipartisan group comprised of judges, attorneys, law enforcement officers, corrections officials, mental health experts, and victim support advocates.¹⁷⁷ The Justice Reform Task Force was charged with developing new criminal justice and corrections policies, identifying cost-effective sentencing and supervision strategies, and recognizing opportunities for reinvestment of potential savings into policies to increase public safety and to reduce recidivism.¹⁷⁸ The findings by the Justice Reform Task Force inspired the passing of several bills signed by Governor Fallin that became effective in late 2018.¹⁷⁹ These bills were particularly aimed at the issue of non-violent drug crimes.¹⁸⁰ The most publicized of the bills, Senate Bill 649, provides that a previous conviction for the possession of a controlled substance may not be used by a prosecutor to enhance a punishment.¹⁸¹ However, counterintuitively, the bill also provides for a sentencing enhancement of up to two times the maximum sentence for the repeat of non-substance-abuse-related non-violent felonies, such as unauthorized use of a motor vehicle, forgery, or false personation of another.¹⁸² House Bill 2286 also tackled the issue of inmates serving overly long sentences in Oklahoma state prisons and sought to “overhaul[] Oklahoma’s parole system” by allowing non-violent offenders to be eligible for parole after serving one-quarter of their sentence with successful completion of mandated programming.¹⁸³ This parole eligibility is not available for those serving life without parole sentences for non-violent crimes and is contingent on the inmate’s good behavior.¹⁸⁴

177. JUSTICE REFORM TASK FORCE, *supra* note 126, at 3–4.

178. *Id.* at 4.

179. Patterson, *supra* note 176.

180. *Id.*

181. OKLA. STAT. ANN. TIT. 21, § 51.1(D); S.B. 649, 56th Leg., Reg. Sess. § 1(D) (Okla. 2018).

182. TIT. 21, § 51.1(E); Okla. S.B. 649, § 1(E).

183. Quinton Chandler, *Fallin Signs Seven Criminal Justice Reform Bills to Combat Prison Growth*, STATEIMPACT OKLA. (Apr. 27, 2018, 1:26PM), <https://stateimpact.npr.org/oklahoma/2018/04/27/fallin-signs-seven-criminal-justice-reform-bills-to-combat-prison-growth/>. See also OKLA. STAT. ANN. TIT. 57, § 332.7(C)(1); H.B. 2286, 56th Leg., Reg. Sess. § 2(C)(1) (Okla. 2018).

184. Chandler, *supra* note 183. See also TIT. 57, § 332.7(C); Okla. H.B. 2286, § 2(C).

Upon these passages, Oklahoman lawmakers were optimistic about the future of their state's criminal sentencing reform steps and "expect[ed] the changes to stop a projected 25[%] increase in state prison populations over the next eight years."¹⁸⁵ Although the Oklahoman state government was gaining momentum with Governor Fallin prioritizing criminal justice reform,¹⁸⁶ Governor Kevin Stitt, who was elected in November 2018, does not have any current plans for Oklahoma's prison population or criminal justice reform.¹⁸⁷

Effectuating this new parole availability law will require that Oklahoma state prisons expand their programming availability.¹⁸⁸ For the 2019 fiscal year, the Oklahoma Department of Corrections requested \$1.53 billion in state funding, a \$1 billion increase from previous years, with \$3 million planning to go towards expanding the availability of educational and substance-abuse treatments programs in state prisons.¹⁸⁹ In 2017, only around 28% of the Oklahoma inmates who were released back into the community and were assessed as having a need for substance-abuse treatment or cognitive behavior programming were able to get the treatment while incarcerated.¹⁹⁰ The budget request also accounted for \$1.4 million to hire thirty case managers to assist inmates in societal reentry¹⁹¹ and around \$1 million to expand community sentencing.¹⁹² However, the appropriations request is unlikely to be

185. Chandler, *supra* note 183.

186. See Press Release, Governor of Okla., Gov. Fallin Participates in White House Summit on Criminal Justice Reform (May 18, 2018), https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=223&article_id=43265.

187. See *Issues*, GOVERNOR FOR STITT <https://www.stittforgovernor.com/issues/> (last visited June 30, 2019).

188. Press Release, State of Okla. Dep't of Corr., ODOC 2019 Budget Request Unveiled - Includes Staff Raises, 2 Medium-Security Prisons, Expanded Programs (Nov. 29, 2017), <http://doc.ok.gov/odoc-2019-budget-request-unveiled-includes-staff-raises-2-medium-security-prisons-expanded-programs>.

189. *Id.*

190. OKLA. DEP'T OF CORR., FY'19 APPROPRIATIONS REQUEST, 26 (Jan. 16, 2018), http://appropriation.oksenate.gov/SubPSnJ/Agencies/2018/DOC_FY19BPR_Presentation.pdf.

191. State of Okla. Dep't of Corr., *supra* note 188.

192. OKLA. DEP'T OF CORR., *supra* note 190, at 33.

approved.¹⁹³ In recent years, the Oklahoma Department of Corrections has requested similar amounts of funding for programming expansion, higher salaries, and repairs in facilities but has consistently been approved for less than half of the appropriations requests.¹⁹⁴

V. ANALYSIS: POSSIBILITY OF APPLICATION

A. Crime Trend, Demographic, and Cultural Comparison

To best understand feasible solutions, the exploration of the possibility of criminal sentencing reform modeled after the Netherlands in Oklahoma requires simultaneous exploration into the cultural and demographic differences between the two sovereigns. A comparison of criminal sentencing between the Netherlands and Oklahoma requires an understanding of the recent trends within the two criminal justice systems. Since 2010, about half of the overall public security expenditure by the Dutch government has been allocated to prevent high-impact crimes, or crimes with a major impact on victims, such as sexual offenses, burglaries, and other violent offenses.¹⁹⁵ Since this increase in budgetary resources to preventative measures, such as enhanced police and private security forces, the high impact crime rate in all categories has steadily declined.¹⁹⁶ The number of robberies has declined by 60%, violent and sexual offenses are down 22%, and domestic burglaries have declined by about 33%.¹⁹⁷ In 2015, 88,800 people were convicted of a criminal offense, 33% of which were property crimes, and only 18% were violent or sexual crimes.¹⁹⁸

This is compared to Oklahoma, which with only 23% of the population of the entire Netherlands, had around 106% of the total number of crimes committed.¹⁹⁹ Most startling was the number of violent criminal

193. See KFOR-TV & K. Querry, “*This Is What We Need*,” *Department of Corrections Seeking \$1.57 Billion in Funding*, KFOR (Oct. 30, 2018, 1:49 PM), <https://kfor.com/2018/10/30/this-is-what-we-need-department-of-corrections-seeking-1-57-billion-in-funding/>.

194. *Id.*

195. *Trends in the Netherlands 2007*, *supra* note 85, at 44.

196. *Id.*

197. *Id.*

198. *Id.* at 46.

199. *Compare Netherlands Population 2019*, *supra* note 23 (17.1 million people in the Netherlands), and *Trends in the Netherlands 2007*, *supra* note 85, at 46 (around 88,800

convictions, including murder, rape, robbery, and aggravated assault, which was roughly the same at 16,473 despite the disparity in population between the whole nation of the Netherlands and the singular state of Oklahoma.²⁰⁰ Both violent and non-violent crimes in Oklahoma have remained relatively steady between 2015 and 2017, showing only a marginal 2% increase.²⁰¹

Besides the statistical crime trends, there are gaping cultural and societal differences that pose issues in comparing criminal justice in the Netherlands and Oklahoma. One of the most notable cultural differences is that the United States, being only one of three countries doing so, protects the right to bear arms in its Constitution.²⁰² Also, the United States is the only country to not constitutionally limit the right to bear arms.²⁰³ The right to bear arms is most often exercised in states like Oklahoma, with much of the population living in rural locations.²⁰⁴ In Oklahoma, there are 71,269 registered guns.²⁰⁵ Oklahoma is ranked fifth in the United States for the most deaths involving a firearm, many occurring in the state's second-most populous city of Tulsa.²⁰⁶ This provides a difficulty in comparing crime rates to the Netherlands, where there are only about 200,000 registered guns in the entire country, equaling roughly just one

convicted people in 2015), and *Oklahoma Population 2019*, *supra* note 119 (3.95 million people in Oklahoma), and 2017 OKLA. ST. BUREAU OF INVESTIGATION CRIME IN OKLA. 1–2, <https://osbi.ok.gov/file/4866/download?token=RE8dpx31> (125,477 offenses in 2015).

200. *Trends in the Netherlands 2017*, *supra* note 85, at 44; OKLA. ST. BUREAU OF INVESTIGATION, *supra* note 199, at 1–2.

201. OKLA. ST. BUREAU OF INVESTIGATION, *supra* note 199, at 1–2.

202. Brennan Weiss & James Pasley, *Only 3 Countries in the World Protect the Right to Bear Arms in Their Constitutions: the US, Mexico, and Guatemala*, BUS. INSIDER (Aug 6, 2019, 2:42 PM), <https://www.businessinsider.com/2nd-amendment-countries-constitutional-right-bear-arms-2017-10>.

203. *Id.*

204. Deborah White, *What is Gun Ownership Like State by State*, THOUGHTCO. (May 4, 2010), <https://www.thoughtco.com/gun-owners-percentage-of-state-populations-3325153>.

205. *Id.*

206. Corey Jones, *Oklahoma Fifth in Nation for Firearm Deaths as Nonprofit Decries 'Escalating Gun Crisis'*, TULSA WORLD (Jan. 25, 2018), https://www.tulsaworld.com/news/state/oklahoma-fifth-in-nation-for-firearm-deaths-as-nonprofit-decries/article_74e588f8-33ac-5daf-9f52-001c44ac9bbe.html.

firearm for every eighty-five people.²⁰⁷ People living in the Netherlands are twenty times less likely to be involved in a gun crime than those living in the United States.²⁰⁸ This cultural difference poses an issue in comparing prison populations and lengths of custodial sentences because many states, including Oklahoma, have a mandatory additional custodial sentence for the use of a firearm in the commission of a crime in an effort to deter gun violence.²⁰⁹ Predictably, areas with more guns will have more crimes committed with the use of a firearm, thus resulting in longer prison sentences. Therefore, it is important to keep American gun culture in mind when comparing it to countries with less firearm possession, like the Netherlands.

Another major difference when comparing the two criminal justice systems is the economic status and overall wellbeing of Oklahoma and Dutch citizens. Particularly impactful for Oklahomans is the difficulty of accessing health insurance and mental health care.²¹⁰ Oklahoma is ranked the second in the United States for the most uninsured residents, with 14.2% of Oklahomans without basic health insurance in 2017.²¹¹ The Oklahoma Health Care Authority reports that they have the resources to serve less than one-third of Oklahomans in need of state-funded mental health care treatment, including substance-abuse treatment.²¹² Easier access to mental health care is directly correlated to lower crime rates in violent crimes, drug crimes, and property crimes.²¹³ Without this access,

207. @johnthehoan, *The (Ridiculous) Weapon Laws of the Netherlands*, STEEMIT (2016), <https://steemit.com/guns/@johnthehoan/the-ridiculous-weapon-laws-of-the-netherlands>.

208. *Id.*

209. Bernard E. Harcourt, *Introduction: Guns, Crime, and Punishment in America*, 43 ARIZ. L. REV. 261, 267 (2001) (citing 18 U.S.C. 924(c)).

210. Jaclyn Cosgrove, *Board OKs Reductions That Will Limit Mental Health Care Access*, OKLAHOMAN (April 28, 2016, 1:36 PM), <https://newsok.com/article/5494853/board-oks-reductions-that-will-limit-mental-health-care-access>. Substance-abuse treatment is considered a subset of mental health care. *Id.*

211. Curtis Killman, *Oklahoma Climbs to No. 2 in Nation in Percentage of Population Without Health Insurance*, TULSA WORLD (Sept. 20, 2018), https://www.tulsaworld.com/news/local/oklahoma-climbs-to-no-in-nation-in-percentage-of-population/article_1ec05700-0711-5a0e-babd-0437e0b13a9c.html.

212. Cosgrove, *supra* note 210.

213. Samuel R. Bondurant et al., *Substance Abuse Treatment Centers and Local Crime*, 1–4 (Nat'l Bureau of Econ. Research, Working Paper No. 22610, 2016), <https://www.nber.org/papers/w22610.pdf>.

Oklahomans struggling with mental health issues are at a severe disadvantage when compared to Dutch citizens. In the Netherlands, the national government provides publicly financed health insurance and only 0.2% of citizens are uninsured.²¹⁴ The coverage provided by the government includes mental health services and substance-abuse treatments.²¹⁵

Coinciding with the insufficient access to health care in Oklahoma, the poverty rate is also astronomical compared to that in the Netherlands.²¹⁶ Not surprisingly, data from the Bureau of Justice Statistics shows a strong positive correlation between impoverished geographical areas and increased crime levels.²¹⁷ It is important to keep these economic differences in mind when comparing the two criminal justice systems.

B. Realistic Recommendations for Oklahoman Sentencing Reform

The Netherlands may serve as an ideal model for reducing the incarcerated population in Oklahoma, but not all of the measures taken by the Dutch criminal justice system can feasibly be implemented in a timely manner in Oklahoma. An increase in the use of community service is likely the most plausible, and possibly effective, adjustment. Community sentencing legislation has already proved popular among Oklahomans,²¹⁸ which predicates that an increased use of community service sentencing in lieu of custodial sentences for minor non-violent or drug-related crimes would also be popular.²¹⁹ Regardless of popularity, community sentencing in Oklahoma has been proven to be an effective tool for combatting recidivism.²²⁰ In fact, the Justice Reform Task Force published findings that “[f]or many offenders [in Oklahoma], incarceration is less effective at reducing recidivism than noncustodial sanctions.”²²¹ This reduction in

214. Joost Wammes et al., *The Dutch Health Care System*, COMMONWEALTH FUND, <https://international.commonwealthfund.org/countries/netherlands/> (last visited Oct. 1, 2019).

215. *Id.*

216. *Compare Poverty Rate*, *supra* note 27, and Cullison, *supra* note 123.

217. Crystal Ayres, *26 Poverty and Crime Statistics*, VITTANA, <https://vittana.org/26-poverty-and-crime-statistics> (last visited Oct. 1, 2019).

218. *See supra* Section IV.B.

219. Morrissey & Brandt, *supra* note 144, at 769.

220. *See* COMMUNITY SENT’G ACT ANN. REP., *supra* note 173, at 20.

221. *See* JUSTICE REFORM TASK FORCE, *supra* note 126, at 7.

recidivism is also supported by its use in the Netherlands, where offenders serving a community sentence were 50% less likely to recidivate.²²² As the Oklahoman correctional system buckles under the massive cost of its incarcerated, community sentencing would also ease the financial burden and allow reallocation of funds. The Oklahoma Department of Corrections pays about \$45 per day per inmate, while community sentencing supervision in Oklahoma costs only about \$5 per day.²²³

Expanded use of community sentencing would also address issues with the high female incarceration rate in Oklahoma, as many of the women serving custodial sentences are single parents.²²⁴ Even in circumstances of non-single mothers, “the effects of maternal imprisonment are often regarded as being more severe and destabilizing for their dependent children than paternal imprisonment.”²²⁵ As illustrated in the Netherlands’ utilization of the principle of association,²²⁶ allowing the maternal female offenders to serve their sentence while remaining with their children gives the woman a sense of stability, purposeful human interaction, and will curb harmful effects of parental incarceration on the child.²²⁷

Similarly to community sentencing, Oklahoma also already uses electronic monitoring to “provide[] eligible inmates the opportunity for supervised reintegration through home confinement, work release[,] . . . community-based treatment and support programs.”²²⁸ However, restrictions for electronic monitoring of offenders in Oklahoma require that the non-violent offender serve a custodial sentence and not have more

222. Wermink et al., *supra* note 88, at 346.

223. *Prison Spending in 2015*, VERA, <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> (last visited Oct. 21, 2019); COMMUNITY SENT’G ACT ANN. REP., *supra* note 173, at 2.

224. *See supra* Section IV.A.

225. Hayli Millar & Yvon Dandurand, *The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities*, 29 CRIM. L.F. 227, 236 (2018).

226. *See supra* Section III.A.; Subramanian & Shames, *supra* note 10, at 35 (stating that the principle of association in the Netherlands 1998 Penitentiary Principles Act focuses on “the re-socialization of prisoners in which incarceration is carried out with as few restrictions as possible”).

227. *See SHARP, supra* note 137, at 128.

228. *Frequently Asked Questions*, ST. OKLA. DEP’T CORRECTIONS, <http://doc.ok.gov/frequently-asked-questions1> (last visited Oct. 1, 2019).

than eleven months left of his or her custodial sentence to serve.²²⁹ To ease the pain of overcrowding, Oklahoma could follow the Netherlands' lead of sentencing low risk, non-violent offenders directly to electronic monitoring in lieu of any custodial sentence.²³⁰ Oklahoma gravely underutilizes electronic monitoring as a relief for prison overcrowding, as electronically monitored offenders make up less than 3% of the Oklahoma Department of Corrections' jurisdictional population.²³¹ Expanding the use of electronic monitoring, especially in lieu of custodial sentencing, provides another opportunity for the Oklahoma Department of Corrections to cut prison costs. While it costs Oklahoma about \$45 per day to house offenders in a state prison,²³² offenders who are electronically monitored pay the Oklahoma Department of Corrections no more than \$13.50 per day for active monitoring.²³³

Increased use of fines is likely the least effective change that Oklahoma could model after the Netherlands. Successful use of fine sentencing in the Netherlands is largely dependent on its low poverty rate, i.e., the increased likelihood that the offender will actually be able to pay the fine.²³⁴ In Oklahoma, one in six citizens falls under the poverty line, and 80% of criminal defendants are indigent.²³⁵ An increase of fine usage in Oklahoma criminal sentencing will likely result in few paid fines and would only serve to slow the process between the conviction and the eventual detainment after the offender does not pay the fine—this is often referred

229. *Global Positioning Satellite (GPS) Program*, ST. OKLA. DEP'T CORRECTIONS, <http://doc.publishpath.com/Default.aspx?shortcut=global-positioning-satellite-gps-program> (last visited Oct. 1, 2019).

230. See *supra* Section III.C.

231. JUSTICE REFORM TASK FORCE, *supra* note 126, at 30.

232. *Prison Spending in 2015*, *supra* note 223.

233. *Global Positioning Satellite (GPS) Program*, ST. OKLA. DEP'T CORRECTIONS, <http://doc.ok.gov/global-positioning-satellite-gps-program> (last visited Oct. 27, 2019).

234. See generally TAK, *supra* note 28, at 116.

235. Carly Putnam, *Census Data Confirms We Must Do More to Help Oklahoma Children and Families*, OKLA. POL'Y INST. (Sept. 26, 2019), <https://okpolicy.org/census-data-confirms-we-must-do-more-to-help-oklahoma-children-and-families/>; Gene Perry, *The Cost Trap: How Excessive Fees Lock Oklahomans into the Criminal Justice System Without Boosting State Revenue: Part II*, OKLA. POL'Y INST. (May 2, 2019), <https://okpolicy.org/cost-trap-excessive-fees-lock-oklahomans-criminal-justice-system-without-boosting-state-revenue-part-ii/>.

to as a “debtor’s prison.”²³⁶ Such increased criminal fine usage in poor American jurisdictions, most notably Ferguson, Missouri, has largely been criticized by American criminal justice scholars for being ineffective and overly aggressive.²³⁷

Beyond the use of alternative sanctions, the Oklahoma criminal justice system would greatly benefit from imposing shorter sentences when custodial sentences are deemed necessary. Ninety-five percent of custodial sentences in the Netherlands are for less than two years, with a 30% recidivism rate, which is almost identical to Oklahoma’s current recidivism rate.²³⁸ This comparison illustrates that the longer custodial sentences favored by Oklahoman courts do not have a positive correlation to lower recidivism rates, as was confirmed by the Oklahoma Justice Reform Task Force in finding that, when studying Oklahoman inmates, “[l]onger prison stays do not reduce recidivism more than shorter prison stays.”²³⁹ Longer custodial sentences pander to outdated and ineffective retributivist theories of criminal justice, popular among politically-elected Oklahoma policymakers.²⁴⁰ This incongruence between empirical evidence against retributive justice and Oklahoman policymakers’ insistence on its effectiveness demonstrates Oklahoma’s dire need for a shift in criminal justice theory.²⁴¹ Adopting the Netherlands’ restorative and rehabilitative criminal justice approach would allow Oklahoma to impose more effective penalties while taking into consideration the needs of its offenders to succeed post-release.²⁴² This would require a government-wide effort to better address larger societal issues, such as the

236. Valeriya Metla, *Debtor’s Prison: How Fines and Fees Trap Poor Americans in the Justice System*, L. STREET (June 4, 2015), <https://lawstreetmedia.com/issues/law-and-politics/debtor-s-prison-criminal-justice-fees-fines-affect-vulnerable-us/>.

237. See Magnus Lofstrom & Steven Raphael, *Crime, the Criminal Justice System, and Socioeconomic Inequality*, 30 J. ECON. PERSP. 103, 115 (2016).

238. B.S.J. WARTNA ET AL., NETH. MINISTRY OF JUSTICE & SEC., RECIDIVISM REPORT 2002-2008: TRENDS IN THE RECONVICTION RATE OF DUTCH OFFENDERS 2 (2011), https://www.wodc.nl/binaries/factsheet-2011-5a-def-4apr2012-mk_tcm28-71815.pdf; Subramanian & Shames, *supra* note 10, at 37.

239. JUSTICE REFORM TASK FORCE, *supra* note 126, at 9.

240. See Sean Murphy, *Oklahoma Prosecutors Resist Push for Prison Alternatives*, SPOKESMAN-REV. (Oct. 27, 2018, 8:55 AM), <http://www.spokesman.com/stories/2018/oct/27/oklahoma-prosecutors-resist-push-for-prison-altern/>.

241. See *id.*

242. See *supra* Part II.

devastating poverty rate, educational disparities, and inability to access mental health services in Oklahoma.

VI. CONCLUSION

While the Dutch and Oklahoman criminal justice systems may seem a world apart, learning from the Netherlands' successful criminal sentencing strategy could be the saving grace that Oklahoma's prison system desperately needs. It will require more than just legislation or the bridging of political divides. It will require a cultural change, eradicating popular punitivism, and a shift from the outdated punitive goals of deterrence and retribution to rehabilitation and resocialization. Expanding the use of community service sentencing and electronic monitoring sentences in place of custodial sentences could slow, or even reverse, the ever-rising prison population in Oklahoma. Reducing the length of custodial sentence would also greatly reduce the overcrowding of prisons, without raising recidivism rates. Turning the Oklahoman political energy from retributive justice towards the Netherlands' goals of rehabilitation of offenders and societal restoration would help Oklahoma better fulfill the needs of its citizens. Recent legislation has demonstrated small steps in the right direction, but larger leaps will be needed to provide more efficient justice and reduce recidivism with more effective sentencing.