Between Prison and Probation: Intermediate Sanctions

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Latest state court figures indicate that nationwide the most severe sentence, prison, was given to 46% of convicted felons, and the least severe, probation, was given to 47% (*1*). Hence, more than 90% of all convicted felons received either the most or the least severe of the widely permissible penalties. Some observers recommend replacing current sentencing practices with a more graduated punishment system. Between prison and probation would exist a range of highly used and rigorously enforced intermediate sanctions. A felon receiving an intermediate sanction would be placed under the supervision of a probation officer but, unlike routine probation, would be closely supervised through electronically monitored house arrest, weekly contacts with the probation officer, and drug testing, and would be subjected to such additional penalties as a split sentence (a jail stay as part of the probation), a heavy fine, and community service.

Under proposed schemes, candidates for intermediate sanctions would include some of the felons now receiving minimal probation supervision (*2*) and some of those currently receiving prison. Regarding the latter, proponents argue that 15 to 25% of felons today receiving a prison sentence could be safely diverted and given an intermediate sanction in the community (*2*, *3*).

Expanded use of intermediate sanctions has a variety of overlapping aims, including cutting government spending by reducing reliance on costly prisons, satisfying the public's desire for punishment through penalties other than imprisonment, and making probation a more credible penalty to the public by making prison a real possibility for any breach of sanction requirements (*2*).

To learn more about the current use of intermediate sanctions in the justice system, I analyzed results from a follow-up survey of convicted adult felons placed on state probation in 1986. The survey tracked 12,370 probationers for 3 years, from 1986 to 1989. Statistically weighted, the 12,370 represented 79,000 probationers.

State courts in 1986 sentenced 268,000 adult felons to probation (*4*). The estimate is based on samples of cases drawn from court and prosecutor records of 100 counties in 37 states selected to be nationally representative. Samples from 32 of the counties in 17 states, consisting of 12,370 adult probationers altogether, formed the subjects for the follow-up. In all, 79,000 felons were given probation in the 32 counties in 1986, approximately one-fourth of the national total. The follow-up survey is based on information contained in state criminal history repositories and probation agency files.

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Noncompliance and Lax Enforcement

The follow-up investigated the prevalence of 12 intermediate sanctions. In all, 91% of the follow-up subjects had at least 1 of the 12 (Table 1), revealing that a graduated punishment system already exists. Whether probationers actually complied with sanction requirements was also investigated with survey data available on 10 of the 12 sanctions. I focused my analysis on sanctioned probationers who completed their probation term by the time of the follow-up in 1989 (22% of follow-up subjects). Results indicated that sizable numbers were discharged from probation before having fully complied, including 24% of those ordered to participate in alcohol treatment, 20% ordered for mental health counseling, 32% ordered for drug treatment, 25% ordered placed in a residential facility, 33% ordered for drug testing, 31% ordered for house arrest (*5*), 35% ordered for day reporting (*6*), 21% ordered to perform community service, 69% ordered to pay supervision fees (*7*), and 40% ordered to make restitution.

Table 1. Intermediate sanctions among probation follow-up subjects: their frequency of use and relationship to rearrest rates. S, sanctioned; U, unsanctioned.

Intermediate sanction	Sanctioned (%)	Rearrested for felony (%)	
		S	U
Any sanction	91	45	37*
Treatment			
Alcohol treatment	14	38	43*
Counseling	10	35	43*
Drug treatment	23	50	50
Surveillance			
Residential placement	5	44	42
Drug testing	31	52	48
House arrest	1	42	43
Day reporting	1	27	43*
Intensive supervision	10	56	39*
Retribution			
Split sentence	50	50	37*
Community service	12	35	43*
Supervision fees	32	42	42
Victim restitution	29	40	43

*Significant difference ($P < 0.05$) between sanctioned and unsanctioned.

Altogether, 49% of sanctioned subjects had not fully complied by the time of their probation discharge. Of the noncompliant probationers, only a minority of them (21%) had been punished with jail confinement for their noncompliance (*8*). One reason more were not punished is that disciplinary hearings were not held in most of the noncompliance cases (52%).

These results suggest that, at present, intermediate sanctions are not rigorously enforced. One reason may be inadequate resources for enforcing and monitoring drug tests, house arrests, community service, payment of fines, treatment participation, and the like. From 1977 (the first year of national probation expenditure data) to 1990 (the latest year), prison, jail, parole, and probation populations all about tripled in size. Yet only spending for prisons and jails had accelerated growth in overall government expenditures. In 1990, prison and jail spending accounted for two cents of every state and local dollar spent, twice the amount spent in 1977. Spending for probation and parole accounted for two-tenths of one cent of every dollar spent in 1990, unchanged from what it was in 1977 (*9*).

Inadequate funding may not be the sole reason for lax enforcement. To some extent, financial penalties are not enforced because collecting fines is not a priority of many probation agencies, and neither is it something that the agencies generally do well, according to Morris and Tonry (*2*). They recommend that this activity be privatized (*2*). Regarding intermediate sanctions more generally, Petersilia (*2*) discussed the possibility of having probation surveillance performed by police rather than probation agencies, explaining that police are better structured, manned, and trained for that activity than probation agencies (*10*).

Whether or not such reforms are adopted, given current indications of widespread noncompliance with intermediate sanctions, the likely net impact of a policy making prison a real possibility for any breach of requirements would actually be to raise, not reduce, prison population. To explain, prison diversion would reduce prison population, but the reduction might be more than offset were offenders currently receiving probation routinely sent to prison for sanction violations.

Prison Diversion

One of the proposed ways of expanding intermediate sanctions usage is through prison diversion. Felons who would otherwise receive a prison sentence would instead be placed on probation, where they would be subject to rigorously enforced intermediate sanctions. The proposal raises two policy issues: (i) How well at safeguarding the public does probation do compared to prison? (ii) Does probation with intermediate sanctions provide greater safety than routine probation?

Regarding the first question, I compared rates of rearrest for serious crime (felonies or serious misdemeanors) between the probation follow-up and a follow-up survey of felons released from prison in 1983 (*11*). In all, about 63% of 109,000 released prisoners were rearrested within 3 years; whereas, 43% of 79,000 probationers were rearrested within 3 years. But these data do not warrant a conclusion about whether probation is better than prison. Naturally probationers did better than prisoners. In large part they were selected for probation precisely because they did not have an extensive prior criminal record and therefore posed a lesser threat of continued criminality. Comparison of the subjects from the two follow-ups matched on a measure of prior record (prior arrests) (Table 2) illustrates the impact of the selection process in producing widely different overall rearrest rates between probation and prison. Probationers had a rearrest rate 20 percentage points below prisoners. However, after matching on prior arrests, this difference disappeared. That is, had the probation follow-up had the same mix of first offenders and repeaters as the prison follow-up, the overall rearrest rate of probationers would have differed little from that of prisoners (*12*). Thus, neither prison nor probation is clearly superior to the other in deterring future crime among those punished. These results agree with numerous past recidivism studies involving comparisons of probationers and prisoners matched on prior record. When a difference was found, sometimes it favored probation, other times it favored prison, but the difference usually amounted to no more than a few percent, hardly compelling evidence of the advantage of one sentence over the other given the uncertainty about the adequacy of matching that invariably exists in studies of this kind (*13*).

Table 2. Probation (Prob.) and prison follow-up subjects compared on (i) percentage rearrested, by prior arrests, and (ii) prior arrest percentage distribution. The 43% rearrest rate for probation includes cases missing information on prior arrests.

Number of prior arrests	Rearrested within 3 years (%)		Follow-up (%)	
	Prob.	Prison	Prob.	Prison
Total	43.0	62.5	100.0	100.0
0	36.2	38.1	56.6	9.1
1	51.1	48.2	19.9	10.8
2	58.3	54.7	10.7	10.8
3	63.0	58.1	5.6	9.7
4	72.1	59.3	3.4	8.0
5	59.8	64.8	2.0	7.0
6–9	69.3	67.7	1.5	18.8
10 or more	86.2	78.8	0.3	25.9

To evaluate the second question, I compared recidivism rates between probation follow-up subjects who received a particular intermediate sanction and those not receiving that sanction. Results were mixed (Table 1). Certain sanctions were associated with reduced rearrest rates during the 3-year follow-up period (alcohol treatment, psychological counseling, day reporting, community service), some with increased rates (intensive supervision, split sentences). Other sanctions were unrelated to rearrest rates (drug treatment, residential placement, drug testing, house arrest, supervision fees, victim restitution). However, these results are ambiguous because sanctioned and unsanctioned probationers differed in terms of risk of continued criminality. Consequently, the pre-existing risk difference rather than the effect of a sanction could possibly account for any rearrest rate difference observed between sanctioned and unsanctioned probationers. To illustrate, intensive supervision was generally for high-risk offenders, such as persons with prior arrests and convictions, frequent drug abusers, males, and the unemployed. Intensively supervised probationers had a higher rearrest rate than others, not necessarily because intensive supervision made them worse but in large part because they were high-risk offenders and high-risk offenders had high rearrest rates. Similarly, probationers ordered to receive alcohol treatment had a lower rearrest rate than others, not necessarily because treatment helped but in part because offenders with alcohol problems tended to be older than others and age was inversely related to recidivism.

Randomized experiments with intermediate sanctions overcome these interpretational difficulties. To date only intensive supervision has been subjected to such tests. But because intensive supervision is actually a combination of intermediate sanctions (for example, frequent drug testing combined with house arrest and weekly contacts with a probation officer), their results have significance beyond the question of whether one sanction alone is effective. Unfortunately, experimental results have been disappointing. No difference has been found in recidivism rates between probationers randomly assigned to intensive supervision and those assigned to routine probation (*14*). Petersilia and Turner interpreted results as challenging the basic premise of intensive supervision: "that increased surveillance will act as a constraint on the probationer and the likelihood of detection will act as a deterrent to crime" (*15*).

If Petersilia and Turner are correct, whatever public safety risks are associated with prison diversion would apparently be undiminished by imposing intermediate sanctions on diverted offenders. Relative to public safety, the best that can be said for diversion is that probation does as well as prison at deterring future crime among those punished. Still, one crime reduction benefit of prison over probation is clearly sacrificed by diversion: prison's capacity to protect the public by physically restraining, or incapacitating, the offender.

How many crimes will be committed that would have been averted depends on the target of the diversion policy. A policy of diverting first offenders (those with no prior arrest) would reduce prison use by 9% but add to probation caseloads some number of first offenders with an overall 3-year rearrest rate of 38% (Table 2). Some, but not all, of the 38% would have been averted (*16*). Diverting both first-time and second-time offenders would reduce prison use by about 20% (9.1 + 10.8%) but the rearrest rate of the added caseload members would then climb to 44% (the weighted average of 38% and 48%).

Unless prisons make offenders profoundly worse (and there is no evidence of that) (*17*), and unless removing an offender from society merely creates an enticing job opening for an otherwise law-abiding person to fill (and there is no persuasive evidence of that either, certainly not for most offenses) (*18*), such prison diversion policies would increase the level of crime above what it otherwise would be (*19*).

It is not obvious, however, that the increase would be large enough to detect in either of the nation's two crime indicators: the Federal Bureau of Investigation's measure of crimes reported to police, and the Bureau of Justice Statistics' (U.S. Department of Justice) measure of both reported and unreported crimes. Separate studies found that the potential impact of, first doubling, and then tripling the size of the U.S. prison population, was nontrivial: doubling the prison population from 1973 to 1982 potentially reduced reported crime by 10 to 20% below what it otherwise would have been, thereby potentially preventing from 66,000 to 190,000 robberies and from 350,000 to 900,000 burglaries in 1982 alone (*20*); tripling the prison population from 1975 to 1989 potentially re-

duced reported and unreported violent crime by 10 to 15% below what it would have been, thereby potentially preventing a conservatively estimated 390,000 murders, rapes, robberies, and aggravated assaults in 1989 alone (*21*). Fewer than 390,000 would have been prevented had prison diversion proponents succeeded in at least slowing prison population growth from 1975 to 1989. How many fewer is difficult to say, but the number could have been substantial even under a modest diversion policy. For example, the cost, in terms of violent crimes not prevented, of a 15% diversion policy would have been about 90,000 victims in 1989 if diversion were not done selectively (*22*). The cost, if done selectively, remains for prison diversion proponents to say.

REFERENCES AND NOTES

P. Langan and R. Solari, *National Judicial Reporting Program, 1990* (Bureau of Justice Statistics, U.S. Department of Justice, Washington, DC, 1993), tables 1.2 and 3.2. Probation is not to be confused with parole. Both restore the offender's freedom, condition that freedom on the offender's compliance with certain requirements, and subject the offender to punishment for noncompliance. But parole is a conditional release from prison. Probation is a court sentence generally imposed in lieu of prison. Prison is not to be confused with jail. Jail is for short-term confinement in a local facility. Prison is for relatively long-term confinement in a state facility. Note that the 46% given prison includes a small percentage with a combined prison-probation sentence. Lastly, a felony is widely defined as a serious crime punishable by prison confinement for a period longer than 1 year.

2. N. Morris and M. Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (Oxford Univ. Press, New York, 1990). See especially pp. 3, 13, 19, and 136.
3. J. Petersilia, *Expanding Options for Criminal Sentencing* (Rand Corp., Santa Monica, CA, 1987). See especially pp. 79 and 86.
4. P. Langan and M. Cunniff, *Recidivism of Felons on Probation, 1986–89* (Bureau of Justice Statistics, U.S. Department of Justice, Washington, DC, 1992), p. 3. This publication also contains additional details on the follow-up survey. See also M. Cunniff and M. Shilton, *Variations on Felony Probation* (National Association of Criminal Justice Planners, Washington, DC, 1991).
5. This sanction restricts the probationer to his home when not engaged in approved outside activities. It is monitored electronically or through unscheduled phone calls or unannounced home visits.
6. This sanction requires daily reporting to a daytime location to account for the probationer's whereabouts.
7. Supervision fees require the probationer to pay some of the supervision costs.
8. Since I restricted analysis here to subjects who completed their sentence, that automatically excluded subjects who were revoked and sent to prison. Hence, jail was the most severe penalty possible among subjects in this analysis. Twenty-six percent of the entire 79,000 follow-up subjects were sent to prison before completing probation, but only 4% of the 79,000 got prison solely for sanction noncompliance.
9. Data sources are available from the author.
10. I found evidence of poor surveillance practices in the probation follow-up survey: (i) probation agency files on 20% of follow-up subjects could not be located; and (ii) half of those rearrested while on probation had no record of arrest in their probation agency file.
11. A. Beck and B. Shipley, *Recidivism of Prisoners Released in 1983* (Bureau of Justice Statistics, U.S. Department of Justice, Washington, DC, 1989), table 11.
12. Results indicated that 66.4% of probationers would have recidivated compared to 62.5% of prisoners. This difference is possibly due to methodological differences between the two surveys, rather than real differences between probationers and prisoners.
13. For example, J. Petersilia and S. Turner, *Prison Versus Probation in California* (Rand Corp., Santa Monica, CA, 1986), p. 24.; D. Wagner and C. Baird, *Evaluation of the Florida Community Control Program* (National Institute of Justice, U.S. Department of Justice, Washington, DC, 1993), table 3.
14. J. Petersilia and S. Turner, *J. Crim. Law Crimin.* **82**, 3 (1992), p. 651; C. Lichtman and S. Smock, *J. Res. Crime Delinq.* **18**, 1 (1981), p. 81; M. Folkard, D. Smith, D. Smith, *IMPACT. Intensive Matched Probation and After-Care Treatment: Vol. II. The Results of the Experiment* (Home Office, London, 1976), p. 14.
15. Applying logistic regression to the probation follow-up data, I compared rearrest odds between those ordered and those not ordered intensively supervised after controlling for each of ten risk factors identified in the research literature as predictors of recidivism: employment status, drug usage, prior felony convictions, prior felony arrests, age, race, sex, Hispanic origin, property versus nonproperty offender, jurisdiction. I, too, did not find an association between intensive probation and reduced rearrests. I tested each of the other 11 intermediate sanctions in this same way and in each case also found no evidence of reduced recidivism. I then re-ran the 12 regression analyses, this time comparing sanctioned subjects with the 9% of probationers who had none of the 12 sanctions. With one exception (house arrest was associated with reduced rearrests), no evidence was found of reduced recidivism. However, it cannot be assumed that those receiving a particular sanction and those not receiving it were made entirely comparable after the ten controls for risk. Different controls might have produced different results. Comparability is best achieved through randomized experiments with intermediate sanctions. In the absence of such experiments, my regression analysis results offer policy guidance only to the extent that multivariate analyses using different methods and better data repeatedly fail to find an association between intermediate sanctions and reduced recidivism.
16. Diverted offenders who otherwise would have been incarcerated for the full 3 years (roughly 10% of first offenders) would have had all of their crimes averted. But most first offenders would not have served that long. Consequently, the 3-year rearrest rate overstates the incapacitative benefit of prison for them.
17. Prisons can make offenders worse and yet still have a net incapacitative benefit. To illustrate, among first offenders in the follow-ups, 38% of prisoners and 36% of probationers recidivated (Table 2). Assuming the 2% higher rate of recidivism is attributed to prison making them worse, and assuming (for illustration's sake) equal-sized cohorts, the net incapacitative benefit was 34%, since the net benefit is the gross incapacitative effect (36% for probationers) minus prisons' criminogenic effect (the 2% difference). To cancel out entirely their incapacitative benefit in situations where prison and probation are equally likely sentences, prisons would have to make enough worse that twice as many prisoners as matched probationers recidivated.
18. The phenomenon is called "replacement." To illustrate, removing a drug trafficker from a lucrative street corner by putting the person in prison might create an enticing opening for someone to take that person's place. To some as yet unknown extent, replacement seems plausible for drug trafficking and perhaps certain other business crimes, but for rape, assault, burglary, and most other crimes it is hard to imagine how replacement might apply.
19. M. Tonry, *Crime Delinq.* **36**, 1 (1990), p. 183.
20. A. Blumstein, J. Cohen, J. Roth, C. Visher, Eds., *Criminal Careers and Career Criminals* (National Academy Press, Washington, DC, 1986), vol. I, p. 5. I derived estimates of the number of crimes prevented from data in table 5-1.
21. J. Cohen and J. Canela-Cacho, untitled paper cited in A. Reiss Jr. and J. Roth, Eds., *Understanding and Preventing Violence* (National Academy Press, Washington, DC, 1993), p. 293. I derived the number of crimes prevented from the paper's data provided to me by J. Cohen.
22. Two-hundred percent net prison population growth from 1975 to 1989 is to 390,000 fewer crimes, as net 155% growth (the growth that would have occurred under a 15% diversion policy) is to 300,000 fewer crimes. The difference between 390,000 and 300,000 is 90,000 crimes not prevented and attributable to 15% diversion.