

The University of Chicago Law School Roundtable

Volume 2 | Issue 2

Article 3

1-1-1995

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Recommended Citation

Tonry, Michael (1995) "Intermediate Sanctions in Sentencing Reform," *The University of Chicago Law School Roundtable*: Vol. 2: Iss. 2, Article 3.

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Intermediate Sanctions in Sentencing Reform

MICHAEL TONRY

Sentencing reform has been on federal and state policy agendas since the early 1970s, but since then the political challenges confronting policymakers have changed little: overcoming the hostility of judges who resent perceived intrusions on their authority and autonomy, resisting demagogic political proposals for penalties that are unjustly and unaffordably severe, and educating legislators and others about the practical limits of affordable policy options.

Although cynical politics and "three strikes and you're out" proposals distort sentencing policy debates in the 1990s, they camouflage perceptible progress at overcoming the other political problems. Judges in many jurisdictions have come to accept the desirability of presumptive standards for sentencing and, behind the headlines, legislators in many states have accepted the need to couple sentencing policy with corrections resources. As a result, in many jurisdictions there is perceptible progress toward making sentencing fairer, holding judges accountable for their decisions, and creating realistic and affordable policies.

Detailed sentencing policies increasingly are set by sentencing commissions, administrative agencies to which legislators have delegated authority for policy formulation within statutory constraints and subject to legislative ratification or rejection. The first commission was created in Minnesota in 1978¹ and nearly twenty states now have or have had commissions.² Those who believe in incremental but demonstrable progress in the quality of government operations and in the sophistication of government policies have reasons to be heartened by the sentencing commission story. The earliest commissions had to survive and to demonstrate that they could develop and implement credible sentencing policies. Some, in Connecticut, Maine, South Carolina, and New

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1. Michael Tonry, *The Success of Judge Frankel's Sentencing Commission*, 64 U Colo L Rev 713, 717 (1993).

2. Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 *Judicature* 173, 174 (1995).

York, did not survive. Others, in Minnesota, Pennsylvania, and Washington, survived and devised credible sentencing policies.³

Agencies concerned with survival and with management of controversial changes in government operations cannot do everything at once. Minnesota's commission, for example, had statutory authority to establish guidelines for felonies and for misdemeanors and to create presumptions governing the use of incarcerative and nonincarcerative sentences.⁴ The commission developed guidelines only for felonies and created presumptions concerning which offenders should be sent to prison and for how long. Misdemeanor sentencing was unaffected and judges retained complete and nonreviewable discretion over the use of penalties other than state imprisonment (including jail terms up to twelve months and all nonincarcerative penalties).⁵

Since then, successive commissions have marched through a series of policy challenges. Minnesota and Washington established a "resource constraint"—a policy specifying that the projected effects of sentencing standards be compatible with available and planned prison resources.⁶ Most new commissions have adopted a similar policy.

Pennsylvania's sentencing commission moved beyond Minnesota's and developed guidelines for felonies and misdemeanors.⁷ Most more recent commissions have done likewise. Similarly, as time has passed, newer commissions have fine-tuned their policies about such things as handling of juvenile adjudications, adjusting the weight of prior records to vary with the seriousness of previous crimes and the nature of current ones, and scaling the seriousness of crimes.

Until recently, however, little progress has been made on two major facets of sentencing policy: plea bargaining and nonincarcerative sanctions. Little need be said concerning plea bargaining. It has been clear since the earliest days of sentencing guidelines that rules that make judges' decisions more predictable potentially increase the importance of plea bargaining.⁸ If guidelines set a presumed sentence for every possible combination of current offense and criminal record, counsel can determine the applicable presumptive sentence by deciding what charges to file or dismiss. A small literature accumulated in the 1970s and early 1980s on proposals for regulating plea bargaining in a guidelines jurisdiction,⁹ but only one body, the U.S. Sentencing Commission,

3. Tonry, 64 U Colo L Rev at 718-20 (cited in note 1); Michael Tonry, *Failure of the U.S. Sentencing Commission*, 39 Crime & Delinq 131 (1993).

4. Minn Stat Ann § 244.09-5 (West 1992).

5. Id § 244-I(4), II(D) (Appendix).

6. Tonry, 64 U Colo L Rev at 719 (cited in note 1).

7. Frase, 78 Judicature at 174 tbl 1 (cited in note 2).

8. Franklin E. Zimring, *Making the Punishment Fit the Crime*, 6 Hastings Ctr Rep 13 (Dec 1976).

9. See generally Don M. Gottfredson, Leslie T. Wilkins, and Peter B. Hoffman, *Guidelines for Parole and Sentencing* (Lexington, 1978); Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U Pa L Rev 550 (1978); Michael Tonry and John C. Coffee,

has tried to do so. A system of "real offense sentencing" in which, regardless of the offenses with which the defendant was charged or convicted, judges apply the guidelines to their assessment of what really happened, using a civil law balance-of-probabilities evidentiary standard, was adopted by the federal commission—with disastrous results.¹⁰ The real offense system is widely disparaged as unjust and unethical—particularly in its effective nullification of the rules of evidence, the criminal law's beyond-a-reasonable-doubt burden of proof, and the significance of acquittals. As a result, plea bargaining lawyers—often with tacit judicial approval—disingenuously circumvent the guidelines in a third or more of cases.¹¹

Concerning the other major unfinished business, incorporation of nonincarcerative sanctions into sentencing policy, progress is being made.¹² In 1994, newly adopted guidelines took effect in North Carolina that cover felonies and misdemeanors and that structure judges' discretion concerning all possible sentences.¹³ Also in 1994, and to achieve the same goals, Pennsylvania's commission fundamentally overhauled a system of guidelines that had been in effect since 1980.¹⁴

These policies were adopted, and similar policies were considered elsewhere, for three reasons. First, a system of sentencing guidelines that encompasses only prison sentences is fundamentally incomplete. In Minnesota, for example, only 20 percent of felons are sentenced to state prisons.¹⁵ Second, if justice requires that punishments be scaled to the severity of crimes, there is a stark discontinuity in a system that contains no presumed applicable sanctions between prison and probation.¹⁶ Third, fifteen years of experimentation with intermediate sanctions instructs that judges often use them for less serious offenders than those for whom the sanctions are designed; guidelines offer a

Jr., *Enforcing Sentencing Guidelines: Plea Bargaining and Review Mechanisms*, in Andrew von Hirsch, Kay A. Knapp, and Michael Tonry, eds, *The Sentencing Commission and Its Guidelines* 142 (Northeastern, 1987).

10. Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L Rev 1179 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 Stan L Rev 523 (1993); David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn L Rev 403 (1993).

11. See, for example, Ilene H. Nagel and Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S Cal L Rev 501 (1992).

12. Most of the American and European intermediate sanctions research mentioned in this Article is discussed in detail in Michael Tonry and Kate Hamilton, *Intermediate Sanctions in Overcrowded Times* (Northeastern, 1995).

13. North Carolina Sentencing and Policy Advisory Committee, *Revised Summary of New Sentencing Laws and the State-County Criminal Justice Partnership Act* (1994); NC Gen Stat § 15A-1340.

14. Pennsylvania Commission on Sentencing, *Sentencing Guidelines Implementation Manual* (4th ed 1994).

15. Minnesota Sentencing Guidelines Commission, *Report to the Legislature* (1994).

16. Norval Morris and Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* 1-8 (Oxford, 1990).

mechanism for assuring that such sanctions are more often applied to appropriate offenders.¹⁷

This Article explores recent experience and evaluation research concerning intermediate sanctions. Section I describes the burgeoning of intermediate sanctions since 1980 and summarizes the findings of evaluation research concerning the use and effects of such programs. Section II gives an overview of problems that impede achievement of their primary goals—reductions in recidivism, costs, and prison use. Section III discusses the sentencing policy approaches now in use for establishing and implementing intermediate sanctions as part of a scaled continuum of sanctions in a rational sentencing system.

I. The Development of Intermediate Sanctions

Three major developments in the 1960s and 1970s led to the perceived need in the 1980s and 1990s to develop intermediate sanctions that fall between prison and probation in their severity and intrusiveness. First, initially on the basis of doubts about the ethical justification of rehabilitative correctional programs,¹⁸ and later on the basis of doubts about their effectiveness,¹⁹ rehabilitation lost credibility as a basis for sentencing. With it went the primary rationale for individualized sentences.

Second, initially in academic circles²⁰ and later in the minds of many practitioners and policymakers, “just deserts” entered the penal lexicon, filled the void left by rehabilitation, and came to be seen as the primary rationale for sentencing. With it came a logic of punishments scaled in their severity so as to be proportionate to the seriousness of crimes committed and a movement to narrow officials’ discretion by eliminating parole release, eliminating or limiting time off for good behavior, and constraining judges’ discretion by use of sentencing guidelines and mandatory penalties.²¹

Third, beginning in the 1960s and continuing into the 1990s, crime control policy became a staple issue in election campaigns and proponents of “law and order” persistently called for harsher penalties. With this came a widespread belief that most sentences to ordinary probation are insufficiently punitive and substantial political pressure to increase the severity of punishments. Because, however, most states lack sanctions other than prison that are widely seen as

17. *Id.* at 9-32.

18. Francis A. Allen, *The Borderline of Criminal Justice* 25-41 (Chicago, 1964).

19. Douglas Lipton, Robert Martinson, and Judith Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (Praeger, 1975); S. R. Brody, *The Effectiveness of Sentencing: A Review of the Literature* (H. M. Stationery, 1976); Lee Sechrest, Susan O. White, and Elizabeth D. Brown, eds, *Rehabilitation of Criminal Offenders: Problems and Perspectives* (Nat'l Acad Sci, 1979).

20. Norval Morris, *The Future of Imprisonment* (Chicago, 1974); Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (Northeastern, 1976).

21. American Friends Service Committee, *Struggle for Justice* (Hill & Wang, 1971); von Hirsch, *Doing Justice* (cited in note 20).

meaningful, credible, and punitive, pressure for increased severity has been satisfied mostly by increases in the use of imprisonment.

These developments resulted in a quadrupling in the number of state and federal prisoners between 1975²² and mid-1994²³ and in substantial overcrowding of American prisons. At year-end 1993, the federal prisons were operating at 136 percent of rated capacity and thirty-nine state systems were operating above rated capacity.²⁴ An additional fifty-one thousand state prisoners in twenty-two jurisdictions were being held in county jails because prison space was unavailable.²⁵

Whatever the political and policy goals that vastly increased numbers of prisoners may have satisfied, they have also posed substantial problems for state officials. Prisons cost a great deal to build and to operate, and these costs have not been lightly borne by hard-pressed state budgets in the recessionary years of the early 1990s. In 1994, corrections budgets were the fastest rising component of state spending.²⁶ However, the failure to deal with overcrowding led prisoners to file unconstitutional conditions suits in federal courts, and throughout the 1990s as many as forty states have been subject to federal court orders related to overcrowding.

Intermediate sanctions have been seen as a way both to reduce the need for prison beds and to provide a continuum of sanctions that satisfies the just deserts concern for proportionality in punishment. During the mid-1980s, intermediate sanctions such as intensive supervision, house arrest, and electronic monitoring were oversold as being able simultaneously to divert offenders from incarceration, reduce recidivism rates, and save money while providing credible punishments that could be scaled in intensity to be proportionate to the severity of the offender's crime. Like most propositions that seem too good to be true, these were not.

During the past decade's experimentation, we have learned that some well-run programs can achieve some of their goals, that some conventional goals are incompatible, and that the availability of new sanctions presents almost irresistible temptations to judges and corrections officials to use them for offenders other than those for whom the programs were created.

The goals of diverting offenders from prison and providing tough, rigorously enforced sanctions in the community have proven largely incompatible. A major problem, and one that has repeatedly been shown to characterize intensive supervision programs, is that close surveillance of offenders reveals higher levels of technical violations than are discovered in less intensive

22. In 1975, the prison population was 240,593. *Statistical Abstract of the United States: 1993* 210 tbl 343 (US Bureau of the Census, 113th ed 1993).

23. In mid-1994, the prison population was 1,012,851. US Department of Justice, *State and Federal Prison Population Tops One Million* (Oct 27, 1994) (press release).

24. Bureau of Justice Statistics Bulletin, *Prisoners in 1993* 6 tbl 8 (US Dept of Just, 1994).

25. *Id.* at 5.

26. National Conference of State Legislatures, *State Budget Actions—1993* (1993).

sanctions.²⁷ Revocations for conduct constituting new crimes are seldom higher for offenders in evaluated programs than for comparable offenders in other programs. Nor is there reason to suppose that offenders in evaluated new programs commit technical violations at higher rates. But if they do breach a curfew or stop performing community service or get drunk or violate a no-drug-use condition, the closer monitoring to which they are subject makes the chances of discovery high; once the discovery is made, many program operators believe they must take punitive action—typically revocation and resentencing to prison—to maintain the program's credibility in the eyes of judges, the media, and the community.

A second major lesson is that elected officials and practitioners often prefer to use intermediate sanctions for types of offenders other than those for whom programs were designed. Many evaluations of intensive supervision programs and boot camps, for example, have shown that any realistic prospects of saving money or prison beds require that they be used mostly for offenders who otherwise would have served prison terms.²⁸ Yet many elected officials and practitioners resist acknowledging that persistent finding.

Elected officials resist because they are risk averse. Even in the best run programs, offenders sometimes commit serious new crimes, and officials are understandably concerned that they will be held responsible for supporting the program. The Massachusetts furlough program for prisoners serving life sentences from which Willy Horton absconded, for example, had been in operation for fifteen years and was started under Republican Governor Francis Sargent in 1971, but Democratic Governor Michael Dukakis was held politically accountable for Horton's 1986 rape of a Maryland woman.²⁹ As a result of this and similar incidents, elected officials often support new intermediate sanctions but then take pains to limit eligibility to low-risk offenders. One illustration is the series of recent federal proposals for boot camps for nonviolent first-time youthful offenders. Young non-violent first-offenders, however, are among the least appropriate imaginable participants in boot camps if the aims include cost savings and reduced demands on prison beds. Recent evaluation research on boot camps concludes that they are likely to save money and prison resources only if most of their inmates would otherwise have served a lengthy prison sentence.³⁰ Non-violent first offenders typically are sentenced to probation or short jail terms and seldom are sentenced to lengthy prison terms, and thus they are not generally appropriate candidates

27. Joan Petersilia and Susan Turner, *Intensive Probation and Parole*, 17 *Crime & Justice* 281, 281 (1993).

28. *Id.* at 287-90, 303, 308-10, 318; Dale G. Parent, *Boot Camps Failing to Achieve Goals*, 5 *Overcrowded Times* 8 (Aug 1994).

29. Michael Tonry, *Malign Neglect: Race, Crime and Punishment in America* (Oxford, 1995).

30. Doris Layton MacKenzie, *Boot Camps: A National Assessment*, 5 *Overcrowded Times* 1, 17 (Aug 1994); Parent, 5 *Overcrowded Times* at 8-10 (Aug 1994) (cited in note 28).

for boot camps.

Practitioners, particularly prosecutors and judges, also often resist using intermediate sanctions for the offenders for whom they were designed. In part, this is because they too are reluctant to be seen as responsible for crimes committed by participants. This is why, as documented by evaluations of intensive supervision probation programs,³¹ judges are often unwilling to cooperate in projects in which—as part of experimental evaluations—target categories of offenders are to be randomly assigned to a community penalty or incarceration.

In part, judges' "misuse" of intermediate sanctions occurs because they often believe new community penalties are more appropriate for some offenders than either prison or probation. Forced by limited program options to choose between prison and probation, they will often choose probation because prison is seen as too severe or too disruptive of the offender's and his family's lives, albeit with misgivings because they believe ordinary probation too slight a sanction. Once house arrest or intensive supervision becomes available, those penalties may appear more appropriate than either probation or prison.

This not uncommon pattern, where judges use intermediate sanctions for offenders other than those program planners had in mind, is often pejoratively characterized as "net widening." That epithet oversimplifies the problem. From the perspectives of the desirability of proportionality in punishment and of availability of a continuum of sanctions, the judges' preference to divert offenders from probation to something more intrusive is understandable, perhaps admirable. From the perspective, however, of the designers of a program intended to save money and prison space by diverting offenders from prison, the judges' actions defy the program's rationale and obstruct achievement of its goals.

Probably the most important lesson learned from fifteen years' experience with intermediate sanctions is that they are seldom likely to achieve their goals unless means can be found to set and enforce policies governing their use. Otherwise, the combination of officials' risk aversion and practitioners' preferences to be guided solely by their own judgments about appropriate penalties in individual cases will likely undermine program goals.

Means must be found to establish policies governing the choice of sanction in individual cases. Two complementary means are available. First, discretion to select sanctions can be shifted from judges and prosecutors to corrections officials. "Back-end" programs to which offenders are diverted from prison by corrections officials, or released early, have been much more successful at saving money and prison space than have "front-end" programs. Similarly, parole guidelines have been much more successful and less controversial in reducing parole release disparities than sentencing guidelines have been in reducing sentencing disparities.³² Presumably these findings occur because

31. Petersilia and Turner, 17 *Crime & Just* at 305, 326-28 (cited in note 27).

32. Arthur D. Little, Inc., *An Evaluation of Parole Guidelines in Four Jurisdictions*

decision processes in bureaucracies can be placed in fewer hands and can be more readily regularized by use of management controls than can decisions of autonomous, politically selected judges.

Second, sentencing guidelines, which in many jurisdictions have succeeded in reducing disparities in who goes to prison and for how long,³³ can be extended to govern choices among intermediate sanctions and between them and prison and probation. Some states have made tentative steps in this direction and many are considering doing so.

II. General Impediments to Effective Intermediate Sanctions

In retrospect it was naive (albeit well-intentioned) for promoters of new intermediate sanctions to assure skeptics that recidivism rates would fall, costs would decline, and pressure on prison beds would diminish if new programs were established.³⁴ The considerable pressures for net widening and the formidable management problems involved in implementing new programs interact in complex ways. Although these challenges are now well-understood, that knowledge has been hard won.

A. RECIDIVISM

Consider first recidivism rates. From influential evaluations of community service,³⁵ intensive supervision,³⁶ and boot camps,³⁷ to mention only a few, comes a robust finding that recidivism rates (for new crimes) of offenders sentenced to well-managed intermediate sanctions do not differ significantly from those of comparable offenders receiving other sentences. Recidivism and revocation rates for violation of other conditions, by contrast, are generally higher.

From different perspectives, both findings may be seen as good or bad. The finding of no effect on rates of new crime may be seen by many as good if the offenders involved have been diverted from prison and the new crimes they commit are not very serious. Sentences to prison are much more expensive to administer than sentences to house arrest, intensive supervision, or day reporting centers, and if the latter are no less effective at reducing subsequent criminality, they can potentially provide nearly comparable public safety at greatly reduced

(1981) (unpublished report available through the National Institute of Corrections or the National Criminal Justice Research Service); Alfred Blumstein, et al, eds, 1 *Research on Sentencing: The Search for Reform* 28-31, 126-32 (Nat'l Acad, 1983).

33. Tonry, 39 *Crime & Delinq* 131 (cited in note 3); Tonry, 64 *U Colo L Rev* 713 (cited in note 1).

34. James M. Byrne, Arthur J. Lurigio, and Joan Petersilia, eds, *Smart Sentencing: The Emergence of Intermediate Sanctions* xiv (Sage, 1992).

35. Douglas Corry McDonald, *Punishment without Walls: Community Service Sentences in New York City* (Rutgers, 1986).

36. Petersilia and Turner, 17 *Crime & Just* 281 (cited in note 27).

37. Doris Layton MacKenzie and Claire Souryal, *Multisite Evaluation of Shock Incarceration* (Nat'l Inst Just, 1994).

cost.

But not “comparable public safety”: by definition, crimes committed in the community by people who would have been in prison would not otherwise have occurred. Thus, if diverted intermediate sanction participants commonly commit violent or sexual crimes, “no difference in recidivism rates” provides little solace. If, however, participants seldom commit violent or sexual crimes, the open-eyed choice that must be made is between a few avoidable serious crimes and many avoidable minor crimes, and substantial costs to hold people in prison. The option of holding every offender until he will no longer offend is impracticable, even if it were just. Property offenders particularly have high reoffending rates; more than 30 percent of American and English males are arrested for nontrivial crimes by age thirty, and all offenders cannot be confined forever.³⁸ In effect, this trade between costs and allowing avoidable crimes to happen is made whenever community sentencing programs are established.

From the other side of the punishment continuum, the no-effect-on-new-crimes finding raises different issues. If ordinary probation is no less effective at preventing new crimes than is a new intermediate sanction at ten times the average cost per offender, the case for sentencing offenders to the new program instead of probation cannot be made on cost-effectiveness terms. That does not mean that no case can be made; Joan Petersilia and Susan Turner, among others, have offered the just deserts argument for intermediate sanctions: they can deliver a punishment that is more intrusive and burdensome than probation and more appropriately proportioned to the offender's guilt.³⁹ This is a plausible argument, but it shifts the rationale from utilitarian claims about crime and cost reductions to normative claims about the quality of justice.

The equally robust finding that participants in intermediate sanctions typically have higher rates of violation of technical conditions than comparable offenders otherwise punished provokes a not-quite-parallel set of concerns. Most observers agree that the raised violation (and related raised revocation) rates result from the greater likelihood that violations will be discovered in intensive programs, and not from greater underlying rates of violation. From the perspective that “the law must keep its promises,” the higher failure rates are good. Offenders *should* comply with conditions, and consequences should attach when they do not.

The contrary view is that the higher failure rates expose the unreality and injustice of conditions—like prohibitions on drinking or drug use or expectations that offenders will conform to middle-class behavioral standards they have never observed before—that many offenders will foreseeably breach and that do not involve victimization of others. Many offenders have great difficulty in achieving conventional, law-abiding patterns of living and many will stumble along the way; a traditional social work approach to community corrections would expect

38. See, for example, Christy Ann Visher, et al, *Criminal Careers and “Career Criminals”*, (Nat'l Acad, 1986).

39. Petersilia and Turner, 17 *Crime & Just* 281 (cited in note 27).

and accept the stumbles (so long as they do not involve serious new crimes) and hope that through them, with help, the offender will learn to be law-abiding. From this perspective, it is an advantage of low-intensity programs that they uncover few violations and a disadvantage of high-intensity programs that they uncover more.

Thus the evaluation findings on recidivism and revocation rates elicit different reactions from different people in light of different conceptions of how the corrections system ought to work. In addition, however, they illuminate a major impediment to aspirations to reduce prison use by means of establishment of intermediate sanctions.

B. PRISON BEDS

If all offenders in a community program were diverted from long prison terms, a 30 percent revocation rate for technical violations (whatever the rate for new-crime violations, but here assuming 20 percent) would not be an insurmountable problem. The net savings in prison beds would be the number of persons diverted from prison multiplied by the average time they would otherwise spend in prison less the number of persons revoked for violations multiplied by their average term to be served. Unless the gross revocation rate approached 100 percent, or the average time to be served after revocation exceeded the average time that would have been served if not diverted, bed savings are inevitable.

The combination of net widening and elevated rates of technical violations and revocations makes the calculation harder and makes prison bed savings difficult to achieve. For front-end programs, a 50 percent rate of prison diversion is commonly counted a success. Consider how the numbers work out. The 50 percent diverted from prison save prison beds, on the calculation and assumptions described in the preceding paragraph. The 50 percent diverted from probation are a different story. They would not otherwise have occupied prison beds, and if half (on the assumption that the revocation rate is 30 percent for technical violations and 20 percent for new crimes) suffer revocation and imprisonment, they represent new demand for beds, and a higher demand than would otherwise exist because many more of their technical violations will be discovered and acted upon.

Whether a particular program characterized by 50 percent prison diversion will save or consume net prison beds depends on why offenders' participation is revoked and in what percentage of cases, and whether they are then sent to prison and for how long. But 50 percent is a high assumed prison diversion rate. If the true rate is 30 percent or 20 percent, net prison bed savings are unlikely.

C. COST SAVINGS

The third often-claimed goal of intermediate sanctions is to save money. Interaction of all the preceding difficulties makes dollar savings unlikely except in the best of cases. If a majority of participants in a program are diverted from

probation rather than from prison, and if technical violation and revocation rates are higher in the intermediate sanction than in the ordinary probation and parole programs to which offenders would otherwise be assigned, the chances of net cost savings are slight. For boot camps, for example, assuming typical levels of participant non-completion and typical levels of post-program revocation, Dale Parent has calculated that "the probability of imprisonment has to be around 80 percent just to reach a break-even point—that is, to have a net impact of zero on prison bedspace."⁴⁰

Cost analyses must, however, look beyond diversion rates, revocation rates, and prison beds. At least three other considerations are important. First is the issue of transaction costs. Net-widening programs that shift probationers to intensive supervision and then shift some of those to prison cost the state more because they use up additional prison space. But in addition, these programs create new expenses for probation offices, prosecutors, courts, and corrections agencies administering each of those transfers. Correctional cost-benefit analyses often ignore cost ramifications for other agencies, but the other agencies must either pay additional costs or refuse to cooperate. For example, community corrections officials often complain that courts sometimes do not take violations seriously and that, when they do, police assign such low priority to execution of arrest warrants for program violators that they are in effect meaningless.⁴¹

Second is the problem of marginal costs. Especially in the 1980s, promoters of new programs commonly contrasted the average annual costs per offender of administering a new program (say \$4,500) with the average annual cost of housing one prisoner (say \$18,500) and claimed substantial potential cost savings.⁴² This ignores the complexities presented by net widening and raised revocation rates; it also ignores a more important problem of scale.

For an innovative small program of fifty to one hundred offenders (and many were and are of this size or smaller), the valid comparison is with the marginal, not the average, costs of housing diverted offenders. Unless a prison or a housing unit will be closed or not opened because the system has fifty fewer inmates, the only savings will be marginal costs for food, laundry, supplies, and other routine items. The major costs of payroll, administration, debt service, and maintenance will be little affected. In a prison system with five thousand, fifteen thousand, or fifty thousand inmates, the marginal costs saved by diverting a few hundred are scarcely noticeable.

Third is the issue of savings to the larger community associated with crimes avoided by incapacitating offenders. If believable values could be attached to crimes that would be averted by imprisonment but that would occur if offenders were assigned to community penalties, they would provide important data for

40. Parent, 5 *Overcrowded Times* at 9 (Aug 1994) (cited in note 28).

41. See McDonald, *Punishment without Walls* (cited in note 35).

42. See, for example, Billie Erwin, *Evaluation of Intensive Probation Supervision in Georgia* (Ga Dept of Corrections, 1987); Billie Erwin and Lawrence Bennett, *New Dimensions in Probation: Georgia's Experience with Intensive Probation Supervision* (Nat'l Inst Just, 1987).

considering policy options. Unfortunately, this subject has as yet received little sustained attention and has generated few believable findings. Some conservative writers have claimed that increased use of imprisonment is highly cost-effective.⁴³ Kleiman and Cavanagh, for example, estimated “benefits of incarcerating that *one inmate* for a year at between \$172,000 and \$2,364,000.”⁴⁴

Liberal scholars have responded by showing the implausibility of many of the assumptions made in such calculations. Zimring and Hawkins, for example, showed that, on the assumptions made in Zedlewski's analysis about the number of crimes prevented for each inmate confined, the 237,000 increase in the prison population that occurred between 1977 and 1986 should have “reduce[d] crime to zero on incapacitation effects alone. . . . [O]n this account, crime disappeared some years ago. . . .”⁴⁵ That is true of all the cost-benefit analyses mentioned in the preceding paragraph. If their assumptions about the number of crimes prevented by confining offenders are correct and are used to calculate the number of crimes prevented since prison populations began in 1975 to quadruple, we should have been living in a crime-free society since the mid-1980s.

One of the conservative contributors to this debate later recanted more extreme claims and concluded that “the truth, we find, lies . . . arguably closer to the liberal than to the conservative view.”⁴⁶ These debates have, however, been more ideological than scientific and offer little guidance for thinking about intermediate sanctions. What is left is the need mentioned earlier to weigh the kinds of risks particular offenders present with the costs that will be incurred if alternate sanctioning choices are made.

No one who has worked with the criminal justice system should be surprised by the observation that the system is complex and that economic and policy ramifications ripple through it when changes are made in any one of its parts. Sometimes that truism has been overlooked to the detriment of programs on behalf of which oversimplified claims were made. Georgia, for example, operated a pioneering front-end intensive supervision program (ISP) that was at one time claimed to have achieved remarkably low recidivism rates (for new crimes) and to have saved Georgia the cost of building two prisons.⁴⁷ It was later realized that many or most of those sentenced to ISP were low-risk offenders convicted of minor crimes who otherwise would have received probation. From serving

43. See, for example, Edwin W. Zedlewski, *Making Confinement Decisions* (Nat'l Inst Just, 1987); John J. DiIulio, *Crime and Punishment in Wisconsin*, 3 Wis Policy Research Inst Rep 1 (1990); John J. DiIulio and Anne M. Piehl, *Does Prison Pay?* (1991) (unpublished manuscript on file with author); William Barr, *The Case for More Incarceration* (US Dept Just, Office of Policy Development, 1992).

44. Mark A. Kleiman and David Cavanagh, *A Cost-Benefit Analysis of Prison Cell Construction and Alternative Sanctions* (1990) (unpublished manuscript on file with author) (emphasis in original).

45. Franklin E. Zimring and Gordon Hawkins, *The Scale of Imprisonment* 97 (Chicago, 1991).

46. DiIulio and Piehl, *Does Prison Pay?* (cited in note 43).

47. Erwin, *Intensive Probation Supervision in Georgia* (cited in note 42); Erwin and Bennett, *New Dimensions in Probation* (cited in note 42).

initially as an exemplar of successful ISP programs that save money and reduce recidivism rates, Georgia's ISP program now serves as an exemplar of net-widening programs that increase system costs and produce higher rates of revocation for violation of technical conditions.⁴⁸

III. Is There a Future for Intermediate Sanctions?

Despite the seemingly disheartening evaluation findings that suggest that most intermediate sanctions do not reduce recidivism, corrections costs, and prison crowding while simultaneously enhancing public safety, there is a future for intermediate sanctions.

There is a need to develop credible, enforceable sanctions between prison and probation that can provide appropriate deserved penalties for offenders convicted of mid-level crimes, and numerous studies document the capacity of well-managed corrections departments to implement such programs. There is a need, for their sake and ours, to help offenders establish conventional, law-abiding patterns of living, and the evaluation literature suggests ways that can be facilitated. There is a need to develop intermediate sanctions that can serve as cost-effective substitutes for confinement, and the evaluation literature suggests how that can be done. Finally, there is a need to devise ways to assure that intermediate sanctions are used for the kinds of offenders for whom particular programs were created, and experience with parole and sentencing guidelines shows how that can be done.

Three major obstacles stand in the way. The first, and most difficult, is the modern American preoccupation with absolute severity of punishment and the related widespread view that only imprisonment counts. The average lengths of prison sentences are much greater in the United States than in other Western countries.⁴⁹ The ten-, twenty-, and thirty-year minimum sentences that are in vogue for drug crimes are unimaginable in most countries. Despite a trebling in the average severity of prison sentences for violent crimes between 1976 and 1989,⁵⁰ and additional increases since 1989, federal crime legislation passed in 1994 conditions prison construction grants to states on substantial additional increases in sentences for violent offenders, using 1993 averages as a base.⁵¹

This absolute severity frustrates efforts to devise intermediate sanctions for the psychological (not to mention political) reason that few other sanctions seem commensurable with a multi-year prison sentence. Half or more offenders

48. Todd R. Clear and James M. Byrne, *The Future of Intermediate Sanctions: Questions to Consider*, in Byrne, Lurigio, and Petersilia, eds, *Smart Sentencing* at 319, 321 (cited in note 34).

49. Michael Tonry, *Malign Neglect* tbl 7-1 (cited in note 29).

50. This increase has been documented by the National Academy of Sciences Panel on the Understanding and Control of Violence. Albert J. Reiss, Jr., and Jeffrey Roth, eds, 1 *Understanding and Controlling Violence* 1-3 (Nat'l Acad, 1993).

51. Scott Wallace, *Crime Bill Offers Funds to States for Prisons*, 5 *Overcrowded Times* 4, 12 (Oct 1994).

convicted of serious crimes in Sweden, Germany, and England are sentenced to fines. (The abandonment of unit fines in England did not result in a reduction in use of fines, which continued to be imposed on a "tariff" fixed-amount basis.)⁵²

In European countries, the prison sentences avoided by use of fines would have involved months or at most a few years, making a burdensome financial penalty an imaginable alternative. By contrast, most of the American day fine pilot projects would use day fines as punishments for misdemeanors or noncriminal ordinance violations or as a mid-level punishment between supervised and unsupervised probation.⁵³ Likewise, with the rare exception of New York's community service project started by the Vera Institute,⁵⁴ community service orders (CSOs) are generally ordered as probation conditions and not as sentences in their own right.

Successful efforts have been made to replace prison sentences of six or fewer months (moderately severe penalties in those countries) with day fines in Germany⁵⁵ and with community service orders in the Netherlands.⁵⁶ In Sweden, however, less than a quarter of prison sentences are for terms of six months or longer,⁵⁷ and in the Netherlands less than 15 percent are for terms of a year or longer.⁵⁸ Equivalent crimes in the United States would be punished by terms measured in years; in 1991, 90 percent of state inmates were sentenced to terms longer than one year and 57 percent to terms longer than five years.⁵⁹

Because the modern emphasis on absolute severity of punishments for crime is the product of partisan and ideological politics, it will not readily be changed. It does, however, stand in the way of substantial development of a continuum of punishments in which moderately punitive and intrusive sanctions serve as penalties—in place of incarceration—for moderately severe crimes.

The second, not unrelated, obstacle to fuller development of intermediate sanctions is widespread commitment to "just deserts" rationales for punishment and the collateral idea that the severity of punishment should vary directly with the seriousness of the crime.⁶⁰ This has been translated in the federal and most

52. Michael Tonry, *Sentencing Matters* ch 4 (Oxford, 1996).

53. See, for example, Susan Turner, *Day-Fine Projects Launched in Four Jurisdictions*, 3 *Overcrowded Times* 5, 6 (Dec 1992).

54. McDonald, *Punishment without Walls* (cited in note 35).

55. See Thomas Weigend, *Germany Reduces Use of Prison Sentences*, 3 *Overcrowded Times* 1 (Apr 1992); Hans-Jorg Albrecht, *Sentencing Reform in Germany*, 6 *Overcrowded Times* 1 (Feb 1995).

56. Peter Tak, *Sentencing and Punishment in the Netherlands*, 5 *Overcrowded Times* 5, 8 (Oct 1994); *Sentencing in the Netherlands*, 7 *Acta Criminologica* 7, 17 (1994); Peter Tak, *Adoption and Use of Community Service Orders in the Netherlands*, 6 *Overcrowded Times* 4, 12-13 (Apr 1995).

57. Nils Jareborg, *The Swedish Sentencing Reform*, in Chris Clarkson and Rod Morgan, eds, *The Politics of Sentencing Reform* (Oxford, 1995).

58. Tak, 5 *Overcrowded Times* 5 (Oct 1994) (cited in note 56); Tak, 7 *Act Criminologica* 7 (cited in note 56).

59. Allen Beck, et al, *Survey of State Prison Inmates* (Bureau of Just Stat, 1993).

60. von Hirsch, *Doing Justice* (cited in note 20).

state sentencing guidelines systems into policies that tie punishments to the offender's crime and criminal history and little else.⁶¹

Such policies and their commitment to "proportionality in punishment" constitute a gross oversimplification of the cases that come before criminal courts. Crimes that share a label can be very different; "robberies" range from schoolyard takings of basketballs to gangland assaults on banks. Offenders committing the same crime can be very different; a thief may have been motivated by a sudden impulse, by the need to feed a hungry child, by a craving to buy drugs, or by a conscious choice to make a living as a supplier of stolen wares.

Punishments likewise vary. Despite a common label, two years' imprisonment can be served in a maximum security prison of fear and violence, in a minimum security camp, at home under house arrest, or in some combination of these and other regimes. Even a single punishment—confinement in Illinois's Stateville Prison for three years—may be differently experienced; three years' imprisonment may be a rite of passage for a young gang member, a death sentence for a frail seventy year old, or the ruin of the lives of an employed forty-year-old man and his dependent spouse and children.

Nonetheless, commitment to ideas of proportionality is widespread, and it circumscribes the roles that intermediate sanctions can play. Although few reasonable people would disagree with the empirical observations in the preceding paragraph, sentencing policies based on ideas of proportionality somehow reify sentencing categories into something meaningful. If guidelines specify a twenty-four-month prison term for offense *x* with criminal history *y*, it seems unfair to sentence one offender to community service or house arrest when another like-situated (in the narrow terms of the guidelines) is sentenced to twenty-four months. It seems more unfair to sentence one offender subject to a twenty-four-month guidelines sentence to house arrest when an offender convicted of a less serious crime receives an eighteen-month prison sentence.

Commitment to proportionality interacts with the modern penchant for severe penalties. If crimes punished by months of incarceration in other countries are punished by years in the United States, comparisons between offenders are more stark. If in Sweden two offenses are ordinarily punished by thirty- and sixty-day prison terms, imposition of a day fine order on the more serious offender, out of consideration for the effects of a prison term on his family and employment, produces a contrast between a thirty-day sentence and a sixty-unit day fine. Convert the example to American presumptive sentences of two and four years and the contrast is jarring between any intermediate sanction and a two-year sentence for someone convicted of a less serious crime.

Net widening is the third obstacle to further development of intermediate sanctions. As discussed earlier, there is a natural tension between practitioners who make decisions in individual cases and want to achieve individualized justice in each case, and policymakers who try to take a systemic perspective and want officials' decisions to be standardized and predictable. In a jurisdiction that lacks

61. Tonry, *Sentencing Matters* ch 1 (cited in note 52).

well-developed community penalties, it is understandable that judges and prosecutors want to use newly available resources for what seem to them suitable offenders. From the perspective of system planners, however, sentencing otherwise probation-bound offenders to a program intended for prison-bound offenders frustrates the purpose of the program.

There are two solutions to the net-widening problem. The first is to shift control over program placements from judges to corrections officials wherever possible. For some programs, such as boot camps and back-end forms of ISP and house arrest, this is relatively easy and makes it likelier that such programs will achieve their goals of saving money and prison space without increasing recidivism rates.

Transfers of authority to corrections officials can, however, at best be a partial solution. No one (whom I know or can imagine) wants all sentencing authority shifted into bureaucratic hands, and judges therefore will retain authority to decide who will be sent to jail or prison. A slightly more plausible alternative would be to limit judicial authority to the choice between prison and probation and to allow probation and prison authorities to decide what other sanction (such as house arrest, intensive supervision probation, or treatment participation) should be applied either as probation conditions or as custodial regimes.

Few people would want to place full authority over questions of confinement in bureaucratic hands. After all, judges are concerned with questions of liberty and justice, and most people would probably rest easier having judges make threshold decisions about confinement. In addition, it is hard to imagine any role for fines and community service in a sentencing system where judges lacked authority to order such sentences.

The alternative is to structure judges' decisions about intermediate sanctions by use of sentencing guidelines. A substantial body of evaluation and other research demonstrates that well-conceived and implemented guidelines can change sentencing patterns in a jurisdiction and achieve high levels of judicial compliance (sometimes, as with the federal guidelines, grudging compliance).⁶²

Most state guidelines systems, however, establish presumptions for who is sent to state prisons and for how long, but do not set presumptions concerning nonprison sentences or choices between prison and other sanctions. Two broad approaches for setting guidelines for nonprison sentences have been tried.⁶³

The first, which seems to have been a dead end, is to establish "punishment units" in which all sanctions can be expressed.⁶⁴ Thus, a year's confinement might equal ten units, a month of house arrest three units, and a month's community service two units. A twenty-unit sentence could be satisfied by any

62. Tonry, 39 *Crime & Delinq* 131 (cited in note 3); Tonry, 64 *U Colo L Rev* 713 (cited in note 1).

63. The literature is tiny. See Andrew von Hirsch, Martin Wasik, and Judith Greene, *Punishments in the Community and the Principles of Desert*, 20 *Rutgers L J* 595 (1989); Morris and Tonry, *Between Prison and Probation* (cited in note 16).

64. Morris and Tonry, *Between Prison and Probation* at 19-32 (cited in note 16).

sanction or combination of sanctions equaling twenty. This idea was taken furthest in Oregon, where sentencing guidelines, in addition to setting presumptive ranges for jail and prison sentences, specify a number of punishment units for every crime/criminal history combination for which a state prison sentence is not presumed appropriate.⁶⁵

Oregon's experience, however, illustrates the limits of such policies until either America's penchant for severe punishment or the logic of just deserts loses influence. Reference to experience with community service orders can demonstrate why that is so. In the Netherlands,⁶⁶ England and Wales,⁶⁷ and Scotland,⁶⁸ CSOs are intended to serve as nonincarcerative alternatives to prison sentences of up to one year; in each country, 240 hours is regarded as the maximum feasible work obligation. This is because well-run programs place extensive demands on staff time—finding suitable jobs, ensuring that offenders attend, investigating reasons for non-attendance, taking action against persistent non-attenders—and 240 hours is seen as a practical limit of feasibility. Likewise, the best-known and best-documented American CSO project, developed by New York's Vera Institute, was designed to punish offenders who would otherwise receive a six-month jail term and required seventy hours of work, again for practical reasons of administrative feasibility.⁶⁹

Although in theory Oregon's guidelines incorporate the punishment units idea and authorize alternative uses of incarcerative and nonincarcerative penalties, in practice they do not. Oregon's guidelines are straightjacketed by just deserts logic: imprisonment is the most punitive sanction, and any alternative must be comparably restrictive and unpleasant. Thus, one day's custody in jail or prison equals one day in house arrest or a restitution center or inpatient treatment, or equals twenty-four hours of community service or participation in a work crew. The rationale for all the day-equals-a-day exchange rates is self-evident: in each case, the defendant is subject to around-the-clock controls on movement. The rationale for the one-day-equals-twenty-four-hours exchanges is presumably that a day's community service involves only eight hours and, to be as burdensome as jail, which deprives liberty for twenty-four hours a day, can count only as one-third day's confinement.

The practical effect of Oregon's policy is to limit "nonincarcerative sanctions" either to sanctions that are in substance confinement (house arrest, inpatient treatment, etc.) or to crimes that are of trifling severity. The Vera Institute's community service program (in lieu of six-month jail terms) in Oregon could substitute only for three days' confinement. The 240-hour European

65. Oregon Criminal Justice Council, *First Year Report on Implementation of Sentencing Guidelines* (1991).

66. Tak, 6 *Overcrowded Times* 4 (Apr 1995) (cited in note 56).

67. Ken Pease, *Community Service Orders*, 6 *Crime & Just* (1985).

68. Gill McIvor, *Sentenced to Serve: The Operation and Impact of Community Service by Offenders* (Avebury, 1992); Gill McIvor, *CSOs Succeed in Scotland*, 4 *Overcrowded Times* 1, 6-8 (June 1993).

69. McDonald, *Punishment without Walls* at 36-37 (cited in note 35).

programs could replace ten days in jail. Thus, Oregon has not taken the punishment units idea very far. No jurisdiction has taken it further.

The overwhelming problem lies in the idea of proportionality mentioned earlier and can be further illustrated by Washington State's more modest effort at exchange rates.⁷⁰ Partial confinement and community service were authorized as substitutes for presumptive prison terms on the basis of one day's partial confinement or three days' community service for one day of confinement. The partial confinement/confinement exchange is probably workable for short sentences (house arrest, if included as partial confinement, is seldom imposed for more than a few months), but the community service exchange is not. The difficulty is that community service programs must be enforced to be credible, and experience in this country and elsewhere instructs that they must be short.

It is easy to criticize the Oregon Commission for not carrying its innovation further and the Washington Commission for lack of imagination, but that would be unfair. Working out exchange rates in a system predicated on strong ideas of proportionality in punishment is very difficult, if not impossible. If punitive literalism governs, the range for substitution between prison and community penalties is tiny. A system like New York's community service program, seventy hours' work in place of six months' jail, can be justified (the idea was to give repetitive property offenders some meaningful enforced penalty rather than impose a jail term that no one expected would have deterrent effects), but it requires a loosening of proportionality constraints which no sentencing commission has yet been prepared to accept. Pennsylvania's commission in 1993 gave serious consideration to a punishment unit system but abandoned it when the problem of exchange rates proved insoluble.⁷¹ (There are other problems with the punishment rate approach: inevitably the exchange rates are arbitrary; if conditions like treatment participation, restitution, observance of curfews, drug testing, and electronic monitoring are given unit values, comparisons between offenders become even more implausible.)

The other approach is to establish different areas of a guidelines grid in which different presumptions about choice of sentence govern. Both North Carolina and Pennsylvania adopted such systems in 1994. Table 1 shows the Pennsylvania grid (the North Carolina grid is similar in principle though it varies in detail). The Pennsylvania grid scales offenses by seriousness along a vertical axis and criminal histories by their extent along a horizontal axis. To this point, the Pennsylvania grid is like every other state's. It differs in the four bands which give judges discretion over the types of sentence that are presumed appropriate.

For cases falling in the top band, only prison sentences are deemed appropriate and the presumptive minimum terms before eligibility for parole release are to be chosen from ranges indicated in the individual cells. A judge who imposes a different kind of sentence or a different minimum must provide reasons for this

70. Washington State Sentencing Guidelines Commission, *A Decade of Sentencing Reform: Washington and Its Guidelines, 1981-1991* (1992).

71. The author was involved in discussions of draft documents.

Table 1
Pennsylvania's Guideline Sentence Recommendations

Offense Gravity Score	Prior Record Score															
	0		1		2		3		4		5		REVO			
	Mitigated	Aggravated	Mitigated	Aggravated	Mitigated	Aggravated	Mitigated	Aggravated	Mitigated	Aggravated	Mitigated	Aggravated	Mitigated	Aggravated		
13	48-60-120	-	54-66-120	-	60-72-120	-	66-78-120	-	72-84-120	-	78-90-120	-	84-96-120	-	108-120	-
12	42-54-72	.84	45-57-75	.87	48-60-78	.90	54-66-84	.96	60-72-90	.102	66-78-96	.108	72-84-102	.114	108-120	-
11	30-42-60	.72	33-45-63	.75	36-48-66	.78	42-54-72	.84	48-60-78	.90	54-66-84	.96	60-72-96	.108	108-120	-
10	18-30-48	.60	21-33-51	.63	24-36-54	.66	30-42-60	.72	36-48-66	.78	42-54-72	.84	48-60-84	.96	108-120	-
9	2-8-20	.26	6-12-27	.33	9-15-30	.36	15-21-36	.42	21-27-42	.48	27-33-48	.54	33-39-60	.66		
8	RS-6-18	.24	3-9-21	.27	6-12-24	.30	12-18-30	.36	18-24-36	.42	24-30-42	.48	30-36-48	.54		
7	RS-4-12	.18	1-7-15	.21	4-10-18	.24	10-16-24	.30	16-22-30	.36	22-28-36	.42	28-34-42	.48		
6	RS-3-9	.12	3-6-11 ^{1/2}	.15	6-9-15	.18	9-12-18	.21	12-15-21	.24	15-18-24	.27	18-21-27	.30		
5	RS-6-9	.9	RS-1-6	.9	RS-3-9	.12	3-6-11 ^{1/2}	.15	6-9-15	.18	9-12-18	.21	12-15-21	.24		
4	RS-3-6	.6	RS-6-9	.9	RS-9-12	.12	RS-3-9	.12	3-6-11 ^{1/2}	.15	6-9-15	.18	9-12-18	.21		
3	RS-RIP-3	.3	RS-3-6	.6	RS-6-9	.9	RS-9-12	.12	RS-3-9	.12	3-6-11 ^{1/2}	.15	6-9-15	.18		
2	RS-RIP-3	.3	RS-RIP-3	.3	RS-RIP-3	.3	RS-3-6	.6	RS-6-9	.9	RS-1-6	.9	RS-3-9	.12		
1	RS-RIP-3	.3	RS-RIP-3	.3	RS-RIP-3	.3	RS-RIP-3	.3	RS-3-6	.6	RS-6-9	.9	RS-6-9	.9		

REVO = Repeat Violent Offender Category
 REFL = Repeat Felony I & II Offender Category
 RIP = Restrictive Intermediate Punishments
 RS = Restorative Sanctions
 11^{1/2} = Denotes county sentence of less than 12 months
 Gray shaded area indicates Level 3 sentencing options apply

departure, which the parties may appeal.

In the next band down, however, the judge may choose between incarcerative sentences and "restrictive intermediate sanctions," which include inpatient treatment programs and residential rehabilitation centers, as well as halfway houses, house arrest, and intensive probation supervision. In the next lower band, the judge may choose between intermediate sanctions and "restorative sanctions" (restitution, community service, fines, ordinary probation). In the fourth and lowest band, the judge may choose only among restorative sanctions.

A system much like Pennsylvania's was proposed by the District of Columbia Superior Court Sentencing Commission in 1987 but never took effect.⁷² The Pennsylvania and North Carolina systems took effect in the fall of 1994; how they will work in practice remains to be seen. From a "just deserts" perspective, they may be seen as steps backward. In the second band, Pennsylvania allows judges to choose among a minimum prison sentence of up to twenty-one months (for some cases), a period of unspecified duration in an inpatient drug treatment program, and intensive supervision probation. Offenders who are "like" in the categories of a guidelines grid may receive very different sentences.

Systems like Pennsylvania's and North Carolina's face at least two major challenges. First, the American fondness for harsh sentences may lead judges (by themselves or under pressure from prosecutors) to resist the guidelines' invitation to substitute intermediate sanctions for jail and prison terms. Second, state and county legislators may fail to appropriate the funds that are required to make intermediate sanctions effective and credible. Even judges who in principle would prefer to impose community penalties will not do so if credible, enforced programs are unavailable. Judges may sentence moderately serious offenders to a well-run house arrest or intensive supervision program but will seldom do so if the ostensibly intensive program is simply underfunded, overworked probation under a different name.

Readers, I hope, will draw at least four conclusions from this Article. First, for offenders who do not present unacceptable risk of violence, well-managed intermediate sanctions offer a cost-effective way to keep them in the community at less cost than imprisonment and with no worse later prospects for criminality.

Second, boot camps, house arrest, and intensive supervision are highly vulnerable to net widening when entry is controlled by judges. For boot camps, the solution is easy: have corrections officials select participants from among admitted prisoners. For house arrest and ISP, the solution is less easy: while corrections officials can control entry to back-end programs, sentencing guidelines may be able to structure judges' decisions about admission to front-end programs.

Third, front-end intermediate sanctions are unlikely to come into widespread

72. D.C. Superior Court, Sentencing Guidelines Commission, *Initial Report of the Superior Court Sentencing Guidelines Commission: The Development of Felony Sentencing Guidelines* (1987).

use as prison alternatives unless sentencing theories and policies become more expansive and move away from oversimplified ideas about proportionality in punishment.

Fourth, there is no free lunch. Promised reductions in recidivism, cost, and prison use as a result of creation of new intermediate sanctions were never realistic, though for the most part they were offered in good faith. Intermediate sanctions can reduce costs and divert offenders from imprisonment, but those results are not easy to obtain.

