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Intermediate sanctions offer hope to probationers

Consider this fact: Although the United States represents only 5 percent of the world's population, it accounts for almost 25 percent of the world's prison population. And a large proportion of this group goes in and out through a revolving door — nationally, almost two-thirds of parolees fail to complete parole successfully.

In the face of all this bad news, a program recently showed there may be hope. In fact, the program is actually called HOPE — an acronym for Hawaii's Opportunity Probation with Enforcement. And, interestingly, it bears some similarities to a statutorily created Illinois procedure that recently withstood a constitutional challenge. *People v Hammond*, 2009 Ill. App. LEXIS 1310, 4th Dist., filed December 21, 2009.

The HOPE program was discussed by George Washington University law professor Jeffrey Rosen in a recent article in *The New York Times Magazine*. Jeffrey Rosen, "Prisoners of Parole," Jan. 10, 2010, p. 37.

The program was the result of the courtroom experiences of a Hawaii state trial judge named Steven Alm. Judge Alm was troubled by the high proportion of cases on his call that concerned convicted offenders with drug problems on probation who were facing charges of probation violation.

What particularly bothered Judge Alm was that so many of them had previously violated probation five or 10 times — for violations such as missing appointments and testing positive for



Criminal Procedure

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drugs — and the government had simply ignored the violations. Then on the next violation, without warning, the prosecutor suddenly asked for revocation and serious jail time.

Asking the government to ignore repeated probation violations struck him as too soft. But the policy of ignoring most violations and then arbitrarily blowing the whistle and asking for a lengthy prison sentence seemed too hard.

In true Goldilocks fashion, he looked for a middle ground that was "just right." He figured that a small punishment that was a certainty would be a better deterrent than a severe punishment imposed capriciously.

So, with the help of the public defender, he held a meeting with current probationers to introduce a new policy: for the first time, the probation rules would be strictly enforced.

Judge Alm told them: "I can guarantee that everyone in this courtroom wants you to succeed on probation, but you have not been cutting it. From now on, you're going to follow all the rules of probation, and if you don't, you're going to be arrested on the spot and spend some time in jail right away." This was the beginning of the HOPE program.

The HOPE group of probationers was thus told that *any* violation would *always* result in a swift and certain small punishment. The control group of probationers, however, continued to believe that most violations would be ignored, while occasionally a violation would result in serious prison time.

The result? Within six months the rate of positive drug tests fell by 14 percent for the control group. But the HOPE group showed a startling decline of 93 percent.

These results confirmed findings of behavioral scientists that human beings are notoriously "loss-averse." Experiments by Daniel Kahneman and Amos Tversky have shown that when subjects are asked to gamble on a coin-flip and told that losing would cost \$20, the subjects on average demand \$40 for winning. In other words, the pain of a loss is approximately twice as powerful as the joy of a win. As Kahneman and Tversky said, "In human decision making, losses loom larger than gains." Jonah Lehrer, "How We Decide" (2009), p. 76-77.

And behavioral economists have determined that people are more sensitive to the actual likelihood of a loss as opposed to its severity. In other words, the certainty of a small loss will affect behavior more than the mere possibility of a greater loss.

The HOPE program is succeeding, based on the proposition that probationers are more likely to obey the law when they are subject to fair and consistent, rather than arbitrary and capricious, punishments. Scholars and penologists are beginning to take note.

For the last 15 years, Illinois has had a statutory procedure that shares some similarities with the HOPE program. It can be found at Section 5-6-4(i) of the Unified Code of Corrections. 730 ILCS 5/5-6-4(i) (West 2008). It, too, tries to deal with probation violations by imposing sanctions short of serving a sentence in the penitentiary.

The 4th District in *People v Hammond* described Section 5-6-4(i)'s operation: "When the defendant commits a technical violation of probation, the probation officer may either file a report of violation or, with the approval of his or her supervisor, serve on the defendant a notice of intermediate sanctions. If the probation officer serves upon the defendant a notice of sanctions, the defendant must make a choice then and there: yes or no to the sanctions. If the defendant rejects the sanctions, the probation officer files a report of violation with the circuit court. If the defendant accepts the sanctions, the probation officer sends a copy of the notice of sanctions to the State's Attorney and files another copy with the court, and the sanctions go into effect immediately. If the defendant completes the sanctions, the court shall not revoke probation for the technical violation or violations that occasioned the sanctions or impose any other sanctions. ... There are no covert exceptions, limitations, conditions, or qualifications." *Hammond*, at *20.

Hammond consists of three consolidated cases that all boil down to the same constitutional issue: Does Section 5-6-4(i) violate separation of powers by interfering with the powers of the state's attorney? That is, may the trial judge and/or the probation department prevent a state's attorney from filing a probation revocation petition by invoking the "intermediate sanctions" under Section 5-6-4(i)?

The 4th District emphatically answered, "Yes." The court held that the judiciary absolutely has the power to trump the decision of the state's attorney in this area.

"Granting, denying, continuing, or discontinuing probation is an essentially judicial function," the court said.

A probation officer, the court further held, was just as much a judicial employee as a judge. It thus held that the legislature had the power to allow the judicial branch to invoke "intermediate sanctions" and to trump the power of the executive branch to file a probation revocation petition in court.

One of the cases in *Hammond* provides a textbook example of why the Illinois statute's HOPE-style "intermediate sanctions" is such a worthy idea.

The defendant was serving probation for unlawful delivery of a controlled substance. A condition of his probation was that he could not enter a place that sold liquor as its principal business. One year into his probation, the police found him in a bar. Although this was his first violation, the state's attorney proceeded to file a petition for revocation of probation.

As an alternative to revocation — and over the prosecutor's objection — the trial judge ordered the probation department to pursue "intermediate sanctions" under Section 5-6-4(i).

When the state's attorney indicated that he would appeal the trial judge's order, the judge responded: "[You're] going to take this up on appeal because this person over 21 years of age has been successfully on a term of probation for a term of years and he does the stupidest thing ever and goes into a bar. ... To me, this case is exactly why we have [intermediate sanctions under Section 5-6-4(i)]. ... He wasn't accused of any other crimes. It's a technical violation."

It is a sentiment that Judge Alm would applaud. This is an area of the law in which Illinois appears to be well ahead of the national curve.

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