Probation in Pennsylvania

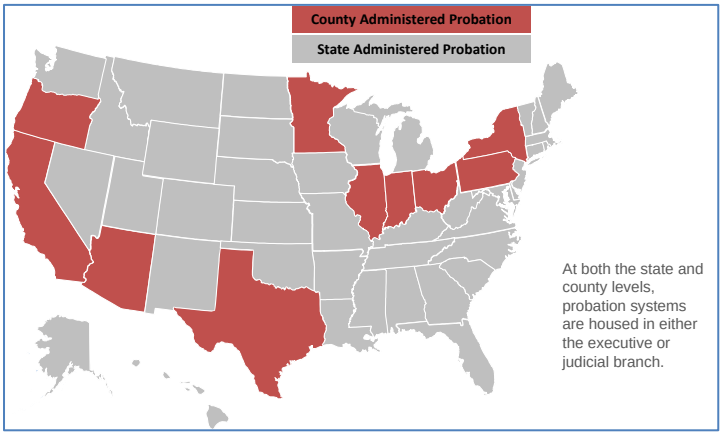
Statement of Carl Reynolds, Senior Legal & Policy Advisor
The Council of State Governments Justice Center

Introduction

This statement is a response to a request from Senator Baker, Pennsylvania Senate Judiciary Committee Chair, to learn more about the Justice Reinvestment (JR) 2.0 analysis of probation in Pennsylvania. Part One of the statement summarizes this analysis and related policy options. Part Two describes how Pennsylvania laws can promote evidence-based practices in probation, using the guidance of the Model Penal Code: Sentencing.[1]

Part One: Summary of JR 2.0 Probation Analysis and Policy Options

The following analysis and graphics are from The Council of State Governments (CSG) Justice Center's presentations in 2016 to the JR 2.0 Working Group, focusing on probation in Pennsylvania.[2] Pennsylvania is one of just 10 states with county-administered probation, a decentralized model that presents challenges for quality control, data collection, and other system objectives.[3] JR 2.0 in Pennsylvania focused significantly on county-administered adult probation and the limited state resources devoted to that "system."

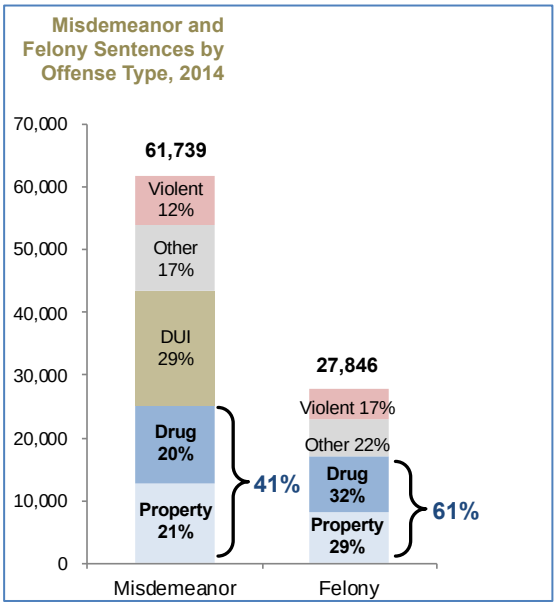


[1] Kevin R. Reitz, "Model Penal Code: Sentencing," (Am. Law Inst. Proposed Final Draft, 2017). The MPC is designed to assist state legislatures to standardize penal laws and was originally published in 1962 by the American Law Institute, see https://www.ali.org/publications/show/model-penal-code/.

[2] Unless otherwise indicated, data slides are credited to CSG Justice Center analysis of Pennsylvania Commission on Sentencing data from 2014.

[3] "Firearm Survey, Second Edition," American Probation and Parole Association Adult and Juvenile Probation and Parole National (October 2006).

1. JR 2.0 in Pennsylvania focused on property and drug offenses, which comprise 61 percent of felony sentences, as shown below.



Violent

Misdemeanor
- 62% Simple Assault
- 14% Terroristic Threats
- 14% Reckless Endangerment
- 7% Stalking/Harassment

Felony
- 31% Robbery
- 31% Aggravated Assault
- 15% Rape/Sexual Assault
- 11% Homicide
- 10% Burglary of Occupied House

Other

Misdemeanor
- 15% Escape/Hindering/Resisting
- 11% Disorderly Conduct
- 9% Criminal Mischief/Trespassing
- 8% Instruments of Crime
- 7% Weapons
- 6% False ID to Law Enforcement

Felony
- 26% Weapons
- 19% Trespassing
- 6% Sex Offender Registry
- 5% Child Pornography

Drug

Misdemeanor
- 59% Possession
- 39% Drug Paraphernalia

Felony
- 93% Possession w/Int. to Deliver
- 5% Acquisition by Fraud

Property

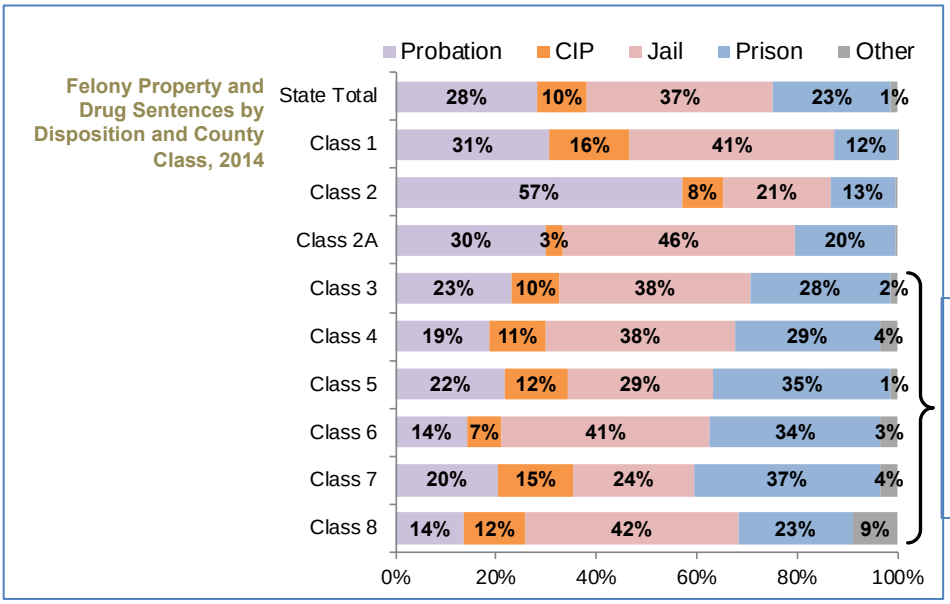
Misdemeanor
- 94% Theft/Retail Theft
- 4% Bad Checks

Felony
- 72% Theft/Retail Theft
- 19% Other Burglary
- 7% Forgery

2. Three-quarters of Pennsylvania's criminal justice population is on county supervision or is locally incarcerated, but outcomes for this local population are largely unknown.

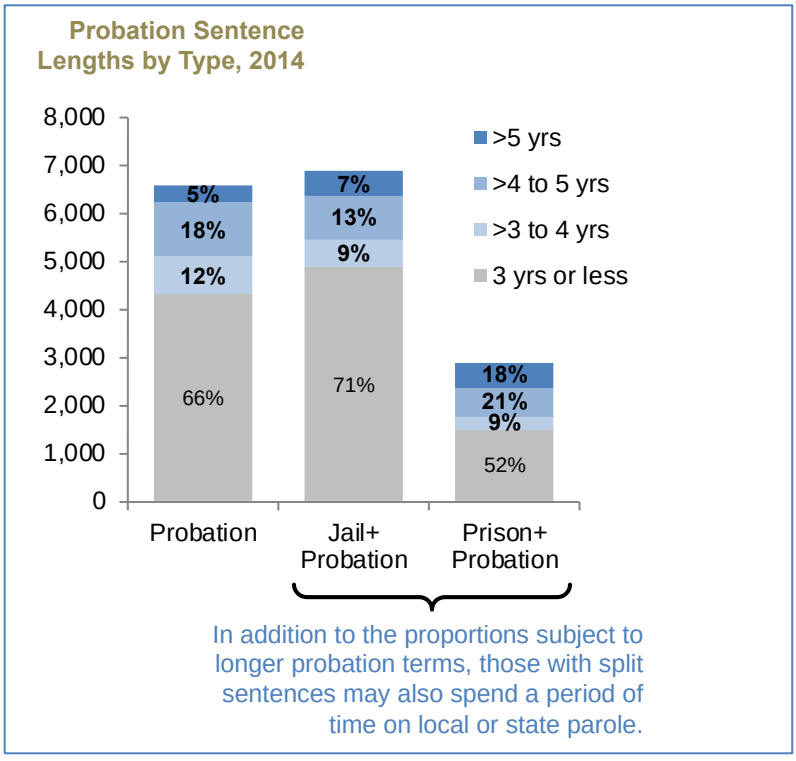
Criminal Justice Population	% of Total	Recidivism Measure: Supervision Violation	Recidivism Measure: Re-arrest	Recidivism Measure: Re-incarceration
Probation, CIP, Local Parole and other county supervised cases	**66%**	Some summary information in CAPP report	Not reported	Some summary information in CAPP report
Jail	**10%**	N/A	No regular statewide tracking or reporting; some occurs in individual counties	
Prison	**14%**	N/A	Reported annually in a published report	
Parole and other state supervised cases	**11%**	Reported annually in a published report		

3. Felony property and drug sentences vary widely by county class, with Allegheny County (Class 2) sentencing the largest portion to probation.



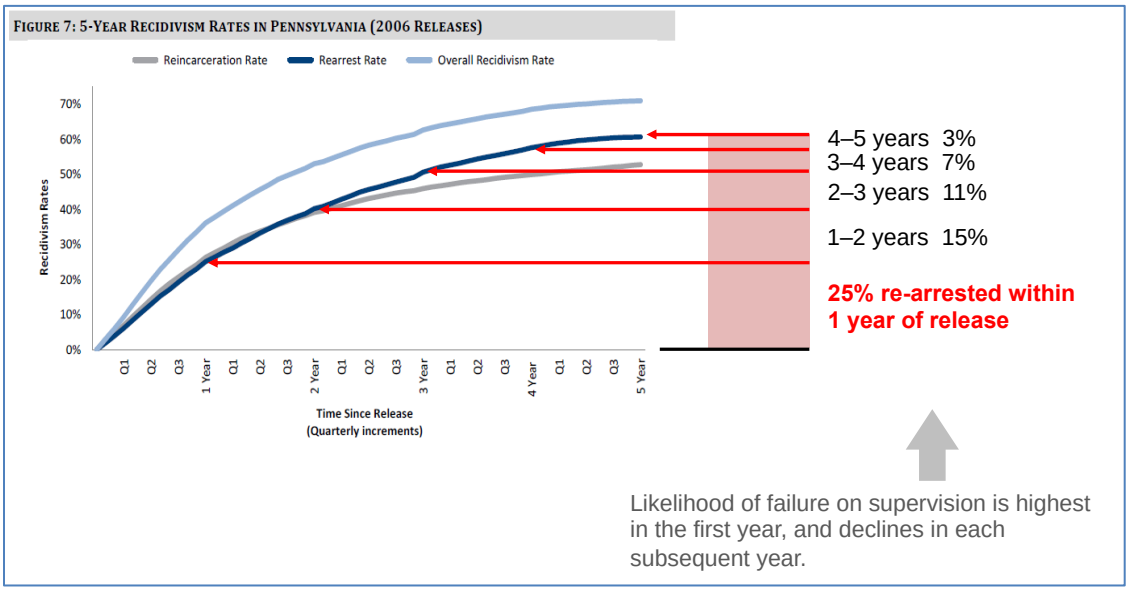
Use of prison sentences for property and drug offenses in Classes 3 through 8 is twice as high as 1 and 2.

4. Probation terms are permitted by statute for up to the maximum penalty for the offense, and 35 percent of probation terms are longer than three years. The chart below depicts the proportion of people subject to probation terms of different lengths.

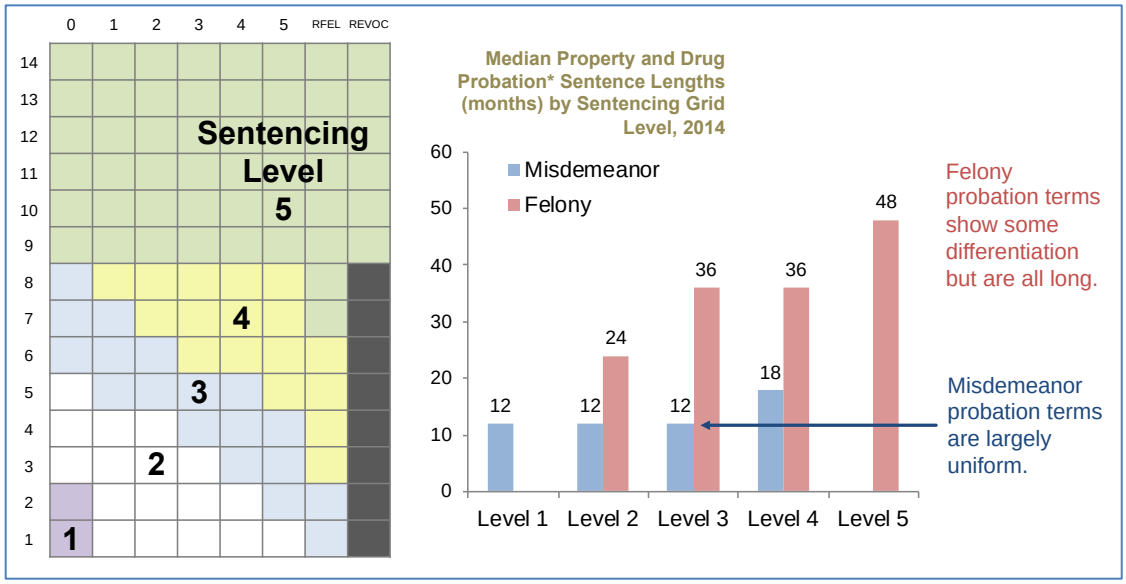


In addition to the proportions subject to longer probation terms, those with split sentences may also spend a period of time on local or state parole.

5. The likelihood of recidivism is highest in the first year on supervision and decreases in each subsequent year.[4] The chart below is excerpted from a report by the Pennsylvania Department of Corrections.

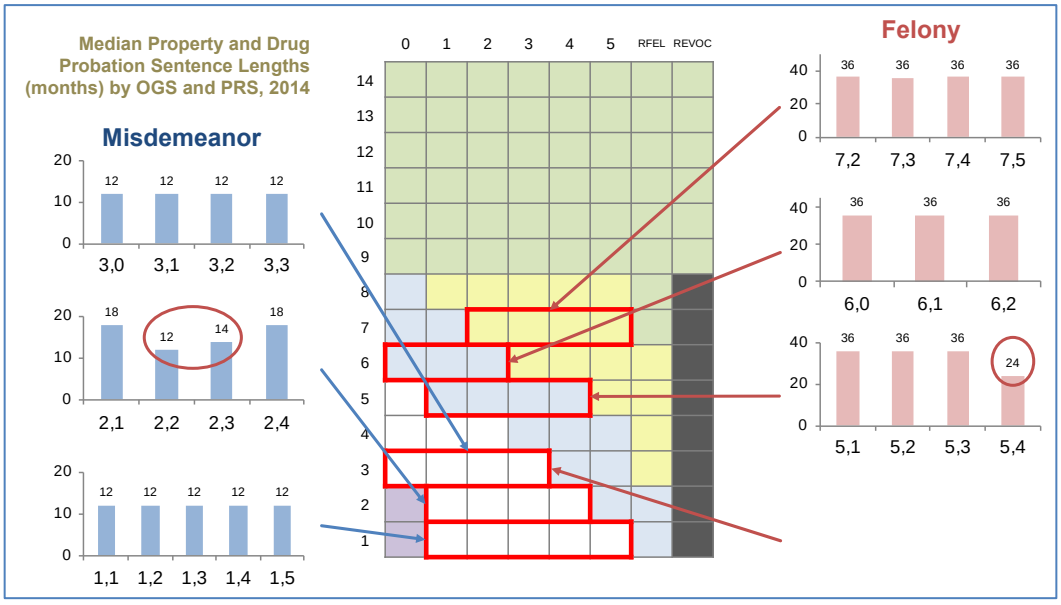


6. Probation terms (the length of probation imposed) generally reflect the incremental increases one might expect across sentencing levels in terms of Pennsylvania's sentencing guidelines and a simplified depiction of the guidelines "grid" shown below.

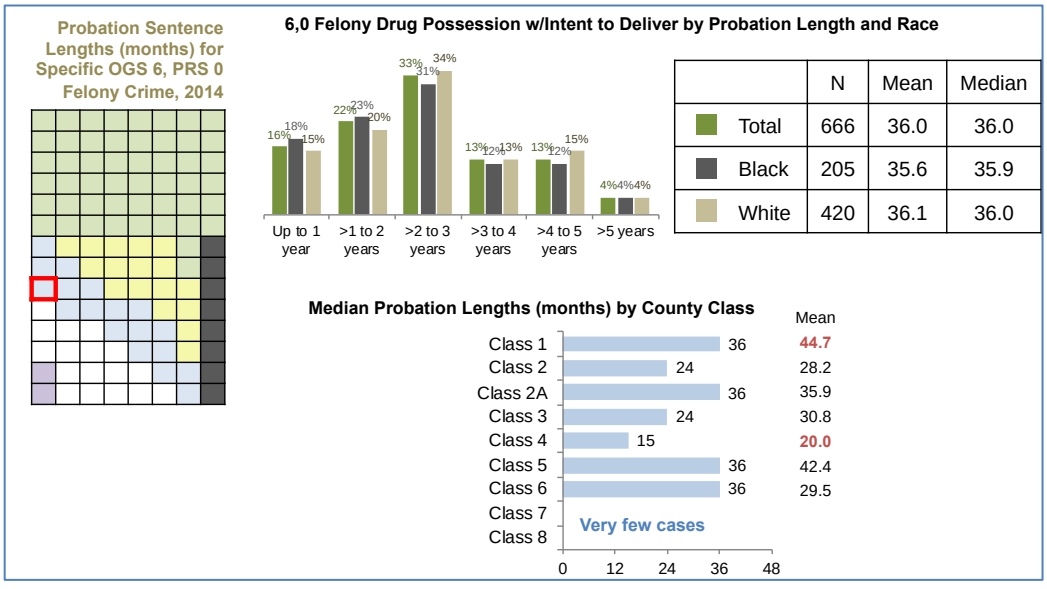


[4] Recidivism Report, Pennsylvania Department of Corrections (2013).

7. Probation terms do not correlate with guidelines Prior Record Scores (PRS), which are a measure of criminal history and a proxy for risk of recidivism. This lack of correlation shows a disconnect between sentencing and risk reduction: Increasing risk, as indicated by higher PRS scores (farther to the right on the grid), would logically suggest longer terms of supervision, but that is not what the data depicts.

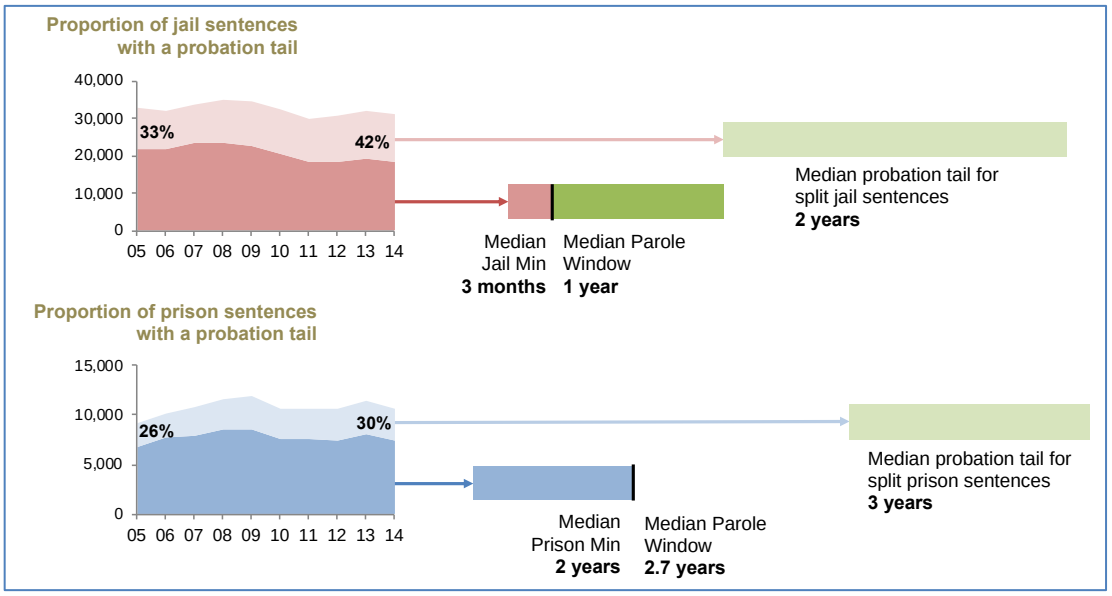


8. Felony probation terms within a single guidelines grid cell and for an example crime (possession with intent to deliver) show a large range (up to one year to over five years) and geographic disparity.

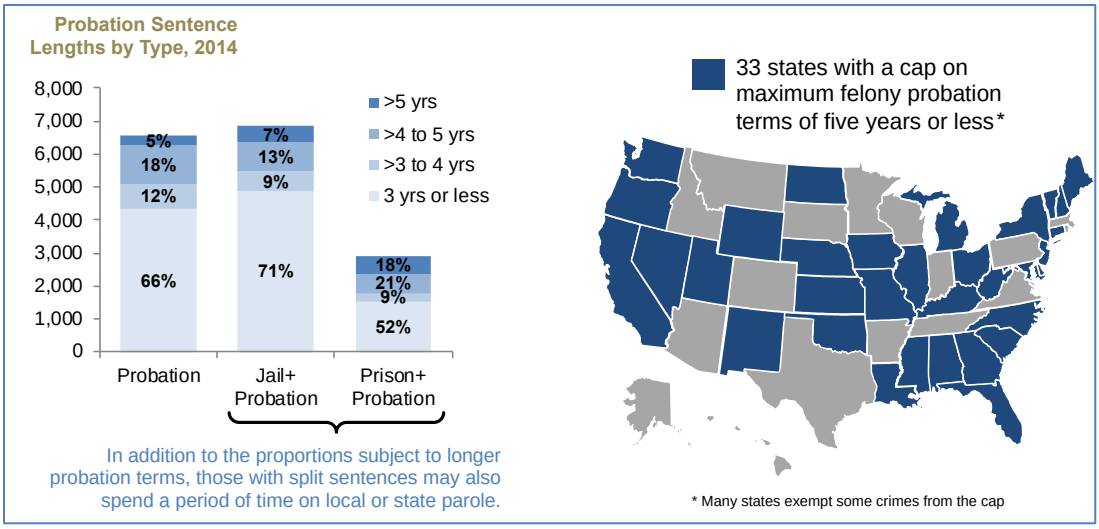


	N	Mean	Median
Total	666	36.0	36.0
Black	205	35.6	35.9
White	420	36.1	36.0

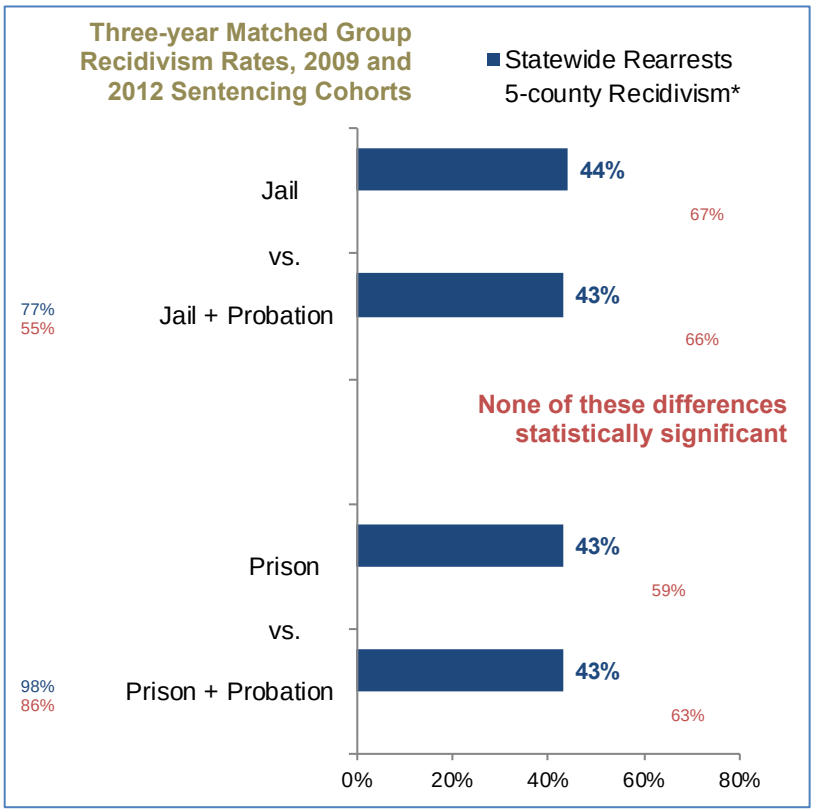
9. The growing volume of "split sentences"—adding a term of probation after jail or prison, referred to here as a probation "tail"—tends to add significant supervision time on top of a likely parole period.



10. In Pennsylvania, one-third of felony straight probation sentences and half of felony prison split sentences have probation terms over three years in length. The chart below on the left depicts the proportion of people subject to probation terms of different lengths.



11. Split sentences show no recidivism-reduction benefit compared to straight incarceration sentences to jail or prison.[5]



12. Uniquely, Pennsylvania has enacted two versions of probation, with the addition of county intermediate punishment (CIP) in 1990. Current 42 Pa.C.S. § 9721 lists CIP as a distinct sentencing option along with guilt without punishment, probation, total confinement, partial confinement, a fine, and state intermediate punishment. Current law treats CIP as a kind of "parallel universe" alongside probation.

[5] In JR 2.0, recidivism analysis using Propensity Score Matching (PSM) was conducted through a collaboration among researchers from the CSG Justice Center, the University of Maryland, PA Department of Corrections, PA Commission on Sentencing, and PA Commission on Crime and Delinquency. When random placement in treatment and control groups is not possible to compare outcomes between different treatment groups that have inherent selection bias, researchers have to control for the covariates (factors that may contribute to the outcome). PSM is a statistical approach to reducing the bias due to covariates and measuring the effect of the treatment on matched groups by comparing outcomes for subjects who were comparable, in terms of covariates, prior to treatment. "Treatment" here refers to the different sentencing dispositions.

	Probation	CIP
Created	1909	1990
Purpose	None stated	Diversion from confinement
Allowable Term	Up to maximum penalty	Up to maximum penalty
Eligibility	12 mitigating factors to suggest use	Nonviolent, elaborately defined
Conditions	List of 14	Same list plus electronic monitoring and intensive supervision
State Funding Agency	PBPP	PCCD
State Funding	$24M	$18M
County Funding	$117M - the portion spent locally on CIP is unknown	

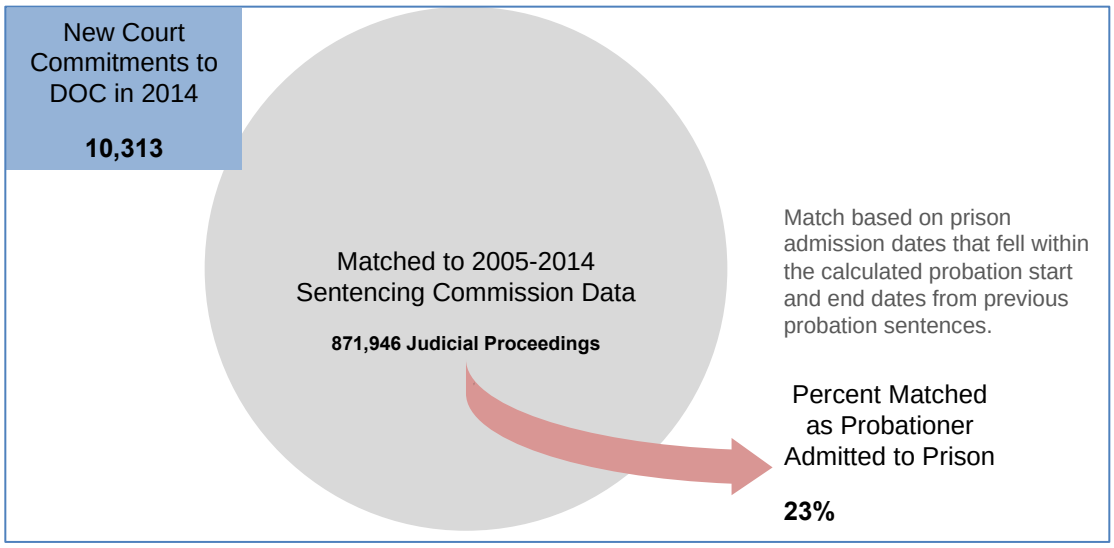
Each option has individual statutes allowing placement, listing potential conditions, and describing revocation, and all of these individual statutes are almost identical within these categories.[6]

13. An estimated 23 percent of people admitted to prison as "new court commitments" in 2014 were on probation or CIP immediately before admittance and therefore were presumably revoked to prison. The fact that this important metric had to be estimated represents a serious flaw in data collection that is otherwise exemplary in Pennsylvania: There is no statewide case-level data on probation.

[6] SB 501 strikes CIP from the list of sentencing options and makes other amendments for the same purpose, as the JR 2.0 working group agreed that CIP as a sentencing option is duplicative and an unnecessary complication in Pennsylvania law. SB 501 consolidates probation and CIP, choosing the best of each statute.

- Placement on probation remains under 42 Pa.C.S. § 9754.
- Conditions of probation are now under 42 Pa.C.S. § 9763 (formerly sentence of CIP).
- Revocation of probation remains under 42 Pa.C.S. § 9771, and revocation of CIP under 42 Pa.C.S. § 9773 is repealed.

CIP also operates in the law as a (1) substitute for certain mandatory minimums and (2) as a method of allowing state funding for county-level punishment. SB 501 retains those two roles for CIP, (1) under the rubric of "restrictive conditions of probation" and (2) reserving CIP programs for eligible people as defined by the Sentencing Commission, and restricting state funding to those programs meeting the definition of restrictive conditions of probation.



14. The structure of CIP and Drug & Alcohol Restrictive Intermediate Punishment resembles approaches in Ohio and Texas, but those states (which also have county-administered probation) invest much greater amounts of state funding in community treatment alternatives.

Texas

Diversion program residential beds, alternative sanction programs	$129M
Community corrections beds, alternative sanction programs	$46M
Treatment alternatives to incarceration	$12M
Total	$187M

Ohio

Jail diversion programs	$14M
Prison diversion	$47M
Secure residential	$75M
Total	$136M

Pennsylvania

CIP	$3M
Drug and Alcohol Restrictive Intermediate Punishment (D&A RIP)	$15M
Total	$18M

Are CIP and D&A RIP models that Pennsylvania could build upon to provide sentencing options for probationers who otherwise would receive a sentence to incarceration?

15. Texas spends about $800 state and $450 county dollars per probationer per year, versus $100 and $730, respectively, in Pennsylvania.[7]

[7] Legislative Budget and Finance Committee, Funding of County Adult Probation Services, February 2015.

Texas

In Texas
State funding for local probation in FY2016 - $311M
County Funding - $170M (includes program participant fees, supervision fees, and other funds including federal grants)

Total felony and misdemeanor probationers (2015) – 383,000

= **$800** per probationer per year from state funds
$450 per probationer per year from county funds
$1,250 per probationer per year total

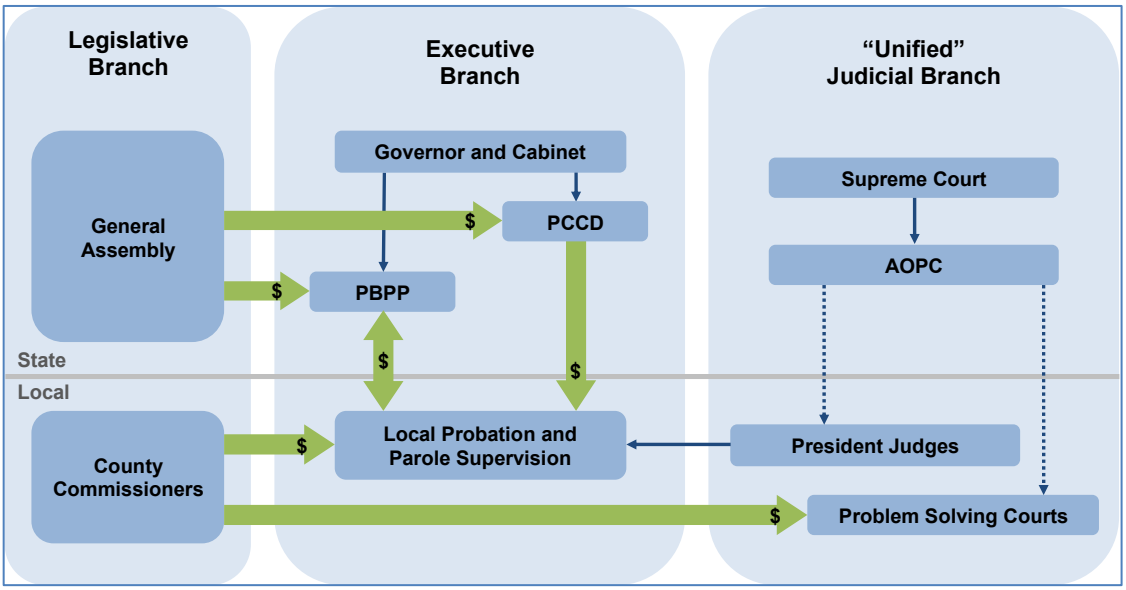
Pennsylvania

In Pennsylvania
State funding for local probation in FY2015 (GIA + PCCD funds) - $24M
County funding - $177M (includes fees grants and county funds)

Total felony and misdemeanor probationers, local parolees, and those on CIP, ARD and bail supervision (2014) – 244,000

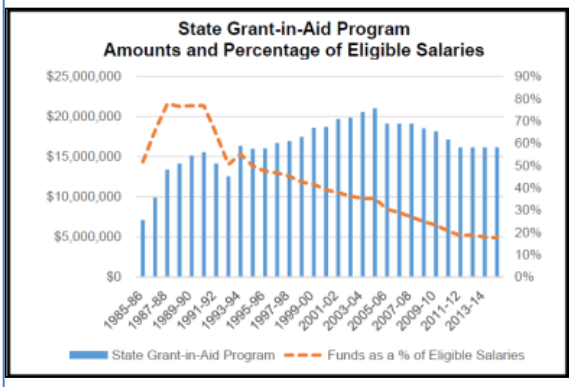
= **$100** per probationer per year from state funds
$730 per probationer per year from county funds
$830 per probationer per year total

16. Pennsylvania's state funding and guidance of county probation and related programs do not reflect an intentional design. Grant-in-aid funding for probation flows through the Board of Probation and Parole, and CIP funding flows through the Commission on Crime and Delinquency. Probation fees are collected locally; then half of the proceeds are sent to the state; then the money is returned to the county.

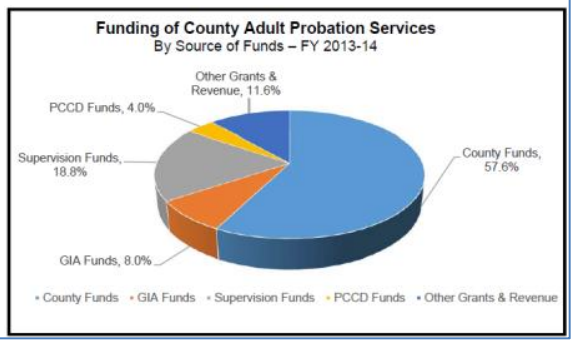


17. State grant-in-aid funding has declined, and counties bear most of the cost of local supervision. The quotes below are excerpts from an excellent analysis by Pennsylvania's Legislative Budget and Finance Committee.[8]

"State Grant-in-Aid funding has declined markedly in the last 10 years, both in real dollars and as a percentage of eligible salaries."



"As state GIA funds have fallen, the amount counties contribute to their probation and parole offices has increased. On average, county funds comprised 58 percent of total funding for county probation and parole offices in FY2013–14. In FY1998–99, county funds comprised, on average, only 45 percent of total funds."



The JR 2.0 Policy Framework published in June of 2016[9] described the primary policy options focused on Pennsylvania's probation "system" on pages 8–9 and 12–13:

POLICY OPTION 2:
Improve the state's approach to funding and supporting county probation.

A. Increase state funding for county probation.

The state provides inadequate funding for county probation and uses an outdated formula to determine funding. These practices contribute to high probation caseloads, insufficient supervision to reduce recidivism, and a large number of people whose supervision is revoked, resulting in high incarceration costs for both county and state prisons. . . .

Pennsylvania's current funding structure for county probation includes funding from the PBPP for GIA and funding from PCCD for CIP. The GIA formula was last amended in 1986 with the intention of covering 80 percent of salaries for county probation personnel, but the funding currently covers only about 18 percent of those salaries and has never come close to covering the intended 80 percent.60 PCCD uses the CIP funding to target more intensive services to people who are at a high risk of reoffending and provide grant funding for counties that use CIP to divert people from incarceration. . . .

[8] Legislative Budget and Finance Committee, Funding of County Adult Probation Services, February 2015.
[9] Justice Reinvestment in Pennsylvania, at https://csgjusticecenter.org/jr/pa/.

This policy option requires Pennsylvania to increase funding for county probation, update the state's funding formula for probation, and change the GIA mechanism.

The new funding formula should be based on the number of people under supervision and the resources needed to improve their behavior. People who fall into higher levels on the sentencing grid tend to be at a high risk of reoffending or have committed a more serious offense. People in higher grid levels also tend to have greater treatment and programming needs, so increased resources for these people would, in turn, help to reduce the likelihood of recidivism. More funding for people who fall into the higher levels on the grid would provide judges and prosecutors with greater assurance that these people are receiving effective monitoring and interventions.

To ensure that state funding for each county does not decline due to the funding formula change, the amount of GIA funding each county received for FY2016 would be the minimum amount each county would receive annually moving forward, even after the transition to the new funding formula. The funding allocated to counties would be based largely on the number of people sentenced to probation in the previous fiscal year. . . .

This policy option creates a state-level governing body to provide oversight and support for county probation departments. This governing body would be operated by a board that includes criminal court judges as well as other stakeholders, such as chief probation officers. This body would not take over the responsibilities of the counties or take control of the operations executed at the local level, but instead would focus on guiding county probation and parole departments, managing state funding for those departments, selecting training and technical assistance providers, supporting data collection, and assisting in the implementation of a strategic plan to improve county probation supervision.

B. Provide state support for local probation departments.

Currently in Pennsylvania, 65 separate county probation departments—which oversee both probation and parole at the county level—provide supervision for approximately 244,000 people.62 At the state level, PBPP provides GIA funding, as well as auditing and training, to these departments. Local departments also receive funding from PCCD, which administers funding for CIP. Neither agency provides sufficient constructive oversight or support to help improve adult probation and parole supervision practices.

This policy option creates a state-level governing body to provide oversight and support for county probation departments. This governing body would be operated by a board that includes criminal court judges as well as other stakeholders, such as chief probation officers. This body would not take over the responsibilities of the counties or take control of the operations executed at the local level, but instead would focus on guiding county probation and parole departments, managing state funding for those departments, selecting training and technical assistance providers, supporting data collection, and assisting in the implementation of a strategic plan to improve county probation supervision.

This policy option ensures that counties will receive the support they need to improve supervision, reduce recidivism, and decrease the number of revocations to prison. . . .

POLICY OPTION 5:

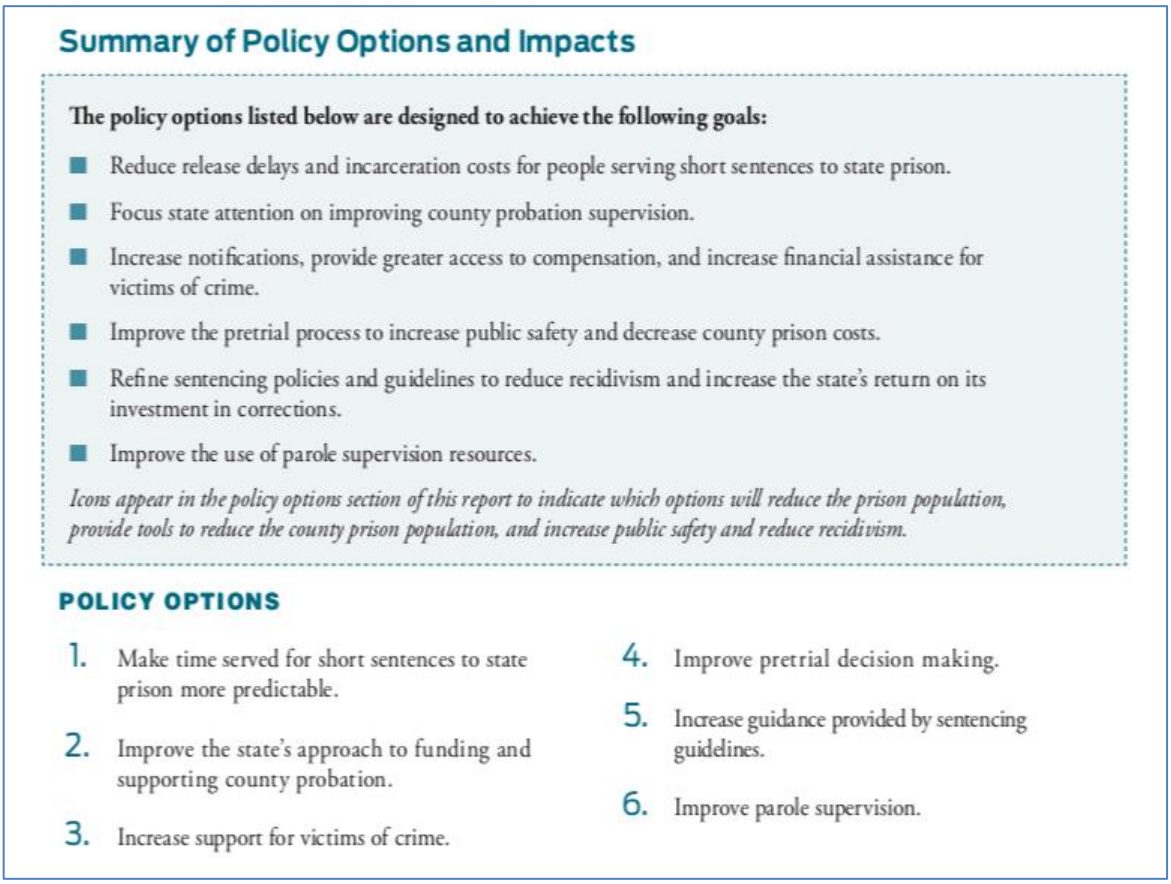
Increase guidance provided by sentencing guidelines.

. . . C. Provide guidance on probation terms, maximum sentences, and split sentences within the sentencing guidelines.

Currently, the state's sentencing guidelines do not provide any information or advice on probation term lengths, maximum sentences, or split sentences. Without guidance, the length of sentences to supervision may be longer than necessary, which leads to a strain on limited resources and an

inability of probation and parole officers to provide effective supervision and improve recidivism outcomes. Since the guidelines do not provide recommended probation term lengths, probation terms that are imposed do not reflect a person's criminal history and may be either longer or shorter than would be advisable based on a person's risk of reoffending. . . .

The entire JR 2.0 policy framework is summarized here:



Summary of Policy Options and Impacts

The policy options listed below are designed to achieve the following goals:

- Reduce release delays and incarceration costs for people serving short sentences to state prison.
- Focus state attention on improving county probation supervision.
- Increase notifications, provide greater access to compensation, and increase financial assistance for victims of crime.
- Improve the pretrial process to increase public safety and decrease county prison costs.
- Refine sentencing policies and guidelines to reduce recidivism and increase the state's return on its investment in corrections.
- Improve the use of parole supervision resources.

Icons appear in the policy options section of this report to indicate which options will reduce the prison population, provide tools to reduce the county prison population, and increase public safety and reduce recidivism.

POLICY OPTIONS

1. Make time served for short sentences to state prison more predictable.
2. Improve the state's approach to funding and supporting county probation.
3. Increase support for victims of crime.
4. Improve pretrial decision making.
5. Increase guidance provided by sentencing guidelines.
6. Improve parole supervision.

Part Two: Overview of Probation Sentencing in the Model Penal Code and Pennsylvania

Part Two of this statement is organized around several key topics related to the administration and parameters of probation sentencing and supervision, shown here.

Purpose

Probation law should reflect the state's policy for what is expected of probation as a sentencing option, i.e., the purpose of probation. Many states continue to describe probation in statute or case law as a judicial "act of grace,"[10] even though it is the disposition of choice in a large majority of cases. States vary with regard to whether probation supervision is tied to a "suspended" sentence or can be imposed as a sentence in its own right. States also vary with regard to who can and cannot receive probation, or who must (presumptively) receive probation.

Model Penal Code ("MPC") § 6.03 states: "(2) The purposes of probation are to hold offenders accountable for their criminal conduct, promote their rehabilitation and reintegration into law-abiding society, and reduce the risks that they will commit new offenses."[11]

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[10] "Probation has traditionally been regarded as an act of grace by the court. *Escoe v. Zerbst,* 295 U.S. 490 (1935)." *Commonwealth v. Watson et al.,* 215 Pa. Superior Ct. 498 (1969).

[11] In its entirety, MPC § 6.03. Probation.
(1) The court may impose probation for any felony or misdemeanor offense.
(2) The purposes of probation are to hold offenders accountable for their criminal conduct, promote their rehabilitation and reintegration into law-abiding society, and reduce the risks that they will commit new offenses.
(3) The court shall not impose probation unless necessary to further one or more of the purposes in subsection (2).
(4) When deciding whether to impose probation, the length of a probation term, and what conditions of probation to impose, the court should consult reliable risk- and needs- assessment instruments, when available, and shall apply any relevant sentencing guidelines.
(5) For a felony conviction, the term of probation shall not exceed three years. For a misdemeanor conviction, the term shall not exceed one year. Consecutive sentences of probation may not be imposed.
(6) The court may discharge the defendant from probation at any time if it finds that the purposes of the sentence no longer justify continuation of the probation term.
(7) For felony offenders, probation sanctions should ordinarily provide for early discharge after successful completion of a minimum term of no more than 12 months.

MPC § 6.02 authorizes probation as a complete sentence in a case, to be imposed without imposing and suspending a prison term. The Comment after § 6.02 describes the American Law Institute's ambivalence toward suspended sentences and helpfully discusses the pros and cons of that common practice.

MPC § 6.03(1) allows the court to impose probation for any felony or misdemeanor offense.

Pennsylvania law does not codify the purpose of probation, but 42 Pa. C.S. § 9722, Order of probation, sets out a list of mitigating factors that a judge may accord "weight in favor of an order of probation"[12] and 42 Pa.C.S. §

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(8) The court may impose conditions of probation when necessary to further the purposes in subsection (2). Permissible conditions include, but are not limited to:

(a) compliance with the criminal law;
(b) completion of a rehabilitative program that addresses the risks or needs presented by an individual offender;
(c) performance of community service;
(d) drug testing for a substance-abusing offender;
(e) technological monitoring of the offender's location, through global- positioning-satellite technology or other means, but only when justified as a means to reduce the risk that the probationer will reoffend;
(f) reasonable efforts to find and maintain employment, except it is not a permissible condition of probation that the offender must succeed in finding and maintaining employment;
(g) intermittent confinement in a residential treatment center or halfway house;
(h) service of a term of imprisonment not to exceed a total of [90 days];
(i) good-faith efforts to make payment of victim restitution under § 6.04A, but compliance with any other economic sanction shall not be a permissible condition of probation.

(9) No condition or set of conditions may be attached to a probation sanction that would place an unreasonable burden on the offender's ability to reintegrate into the law- abiding community.
(10) The court may reduce the severity of probation conditions, or remove conditions previously imposed, at any time. The court shall modify or remove any condition found to be inconsistent with this Section.
(11) The court may increase the severity of probation conditions or add new conditions when there has been a material change of circumstances affecting the risk of criminal behavior by the offender or the offender's treatment needs, after a hearing that comports with the procedural requirements in § 6.15.
(12) The court should consider the use of conditions that offer probationers incentives to reach specified goals, such as successful completion of a rehabilitative program or a defined increment of time without serious violation of sentence conditions. Incentives contemplated by this subsection include shortening of the probation term, removal or lightening of sentence conditions, and full or partial forgiveness of economic sanctions [other than victim restitution].

[12] "The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of an order of probation:

(1) The criminal conduct of the defendant neither caused nor threatened serious harm.
(2) The defendant did not contemplate that his conduct would cause or threaten serious harm.
(3) The defendant acted under a strong provocation.
(4) There were substantial grounds tending to excuse or justify the criminal conduct of the defendant, though failing to establish a defense.

9912, relating to the work of probation officers (primarily regarding searches and seizures), begins: "(a) Officers are in a supervisory relationship with their offenders. The purpose of this supervision is to assist the offenders in their rehabilitation and re-assimilation into the community and to protect the public." In contrast to the dearth of guidance on the purpose of probation, there are detailed legislative mandates for sentencing of specific offenses in Title 42, Chapter 97, Subchapter B, "Sentencing Authority."[13]

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(5) The victim of the criminal conduct of the defendant induced or facilitated its commission.
(6) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained.
(7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime.
(8) The criminal conduct of the defendant was the result of circumstances unlikely to recur.
(9) The character and attitudes of the defendant indicate that he is unlikely to commit another crime.
(10) The defendant is particularly likely to respond affirmatively to probationary treatment.
(11) The confinement of the defendant would entail excessive hardship to him or his dependents.
(12) Such other grounds as indicate the desirability of probation."

[13] Subchapter B. Sentencing Authority
§ 9711. Sentencing procedure for murder of the first degree.
§ 9711.1. Sentencing for certain murders of infant persons.
§ 9712. Sentences for offenses committed with firearms.
§ 9712.1. Sentences for certain drug offenses committed with firearms.
§ 9713. Sentences for offenses committed on public transportation.
§ 9714. Sentences for second and subsequent offenses.
§ 9715. Life imprisonment for homicide.
§ 9716. Two or more mandatory minimum sentences applicable.
§ 9717. Sentences for offenses against elderly persons.
§ 9718. Sentences for offenses against infant persons.
§ 9718.1. Sexual offender treatment.
§ 9718.2. Sentences for sexual offenders.
§ 9718.3. Sentence for failure to comply with registration of sexual offenders (Expired).
§ 9718.4. Sentence for failure to comply with registration of sexual offenders
§ 9718.5. Mandatory period of probation for certain sexual offenders.
§ 9719. Sentences for offenses committed while impersonating a law enforcement officer.
§ 9719.1. Sentences for offenses committed against law enforcement officer.
§ 9720. Sentencing for criminal mischief.
§ 9720.1. Restitution for identity theft (Repealed).
§ 9720.2. Sentencing for trafficking of persons.
§ 9720.3. Sentencing for certain paroled offenders.
§ 9720.4. Sentencing for offenses committed in association with a criminal gang.
§ 9720.5. Sentencing for offenses involving sexual abuse of children.
§ 9720.6. Sentencing for arson offenses.
§ 9720.7. Sentencing for burglary.
§ 9720.8. Sentencing for offenses involving domestic violence in the presence of a minor.

Assessment

Most states prescribe the use of presentence investigations (PSIs), in statute, by court rule, or both. Most also provide broad exceptions, allowing the PSI to be avoided, especially when a plea bargain is adopted. States and localities may struggle to develop useful PSIs that include the results of risk and needs assessment and provide the information quickly enough to inform effective conditions of probation to be imposed by the court at sentencing.

More modern PSI requirements include a reference to the use of assessments and MPC § 6.03 (4) encourages that practice. "When deciding whether to impose probation, the length of a probation term, and what conditions of probation to impose, the court should consult reliable risk- and needs- assessment instruments, when available, and shall apply any relevant sentencing guidelines." (See fn. 11.)

Title 42 of the Pennsylvania consolidated statutes includes Subchapter D (of Chapter 97, Sentencing) titled "Informational Basis of Sentence, 42 Pa.C.S. §§ 9731 et seq." Those statutes were suspended by Pennsylvania Rule of Criminal Procedure No. 1101(6) as being inconsistent with the rules of Chapter 7 relating to post-trial procedures in court cases. The only information required by Rule 702 is "information regarding the circumstances of the offense and the character of the defendant sufficient to assist the judge in determining sentence" and "a victim impact statement as provided by law."

Terms and Conditions

Allowable terms of probation have substantial implications for resources, by affecting supervision workloads and by defining the period of exposure to incarceration with diminished due process. In other words, shorter is better and more cost-effective. Some states authorize probation terms of five to ten years or longer, including instances of "lifetime" supervision.

MPC § 6.03(5) recommends a three-year maximum term for a felony and a one-year maximum term for a misdemeanor and prohibits consecutive terms of probation. (See fn. 11.)

States typically have a long statutory list of permissible conditions of probation supervision, which are adopted in boilerplate orders and routinely, indiscriminately applied. "As measured by standard conditions,

probation systems have broad and at times surprising expectations for those under their control: probationers must be good people, in addition to being law-abiding people."[14] Many jurisdictions include a "be good" condition among their standard conditions of probation; a form of this condition appears in all three states with the largest numbers of people on probation: Georgia, Texas, and California. It also appears in the three states with the greatest percentage of their adults on probation: Georgia, Ohio, and Rhode Island.

MPC § 6.03(8)-(12) provides an example of a fairly long list of allowable conditions. (See fn. 11.)

Pennsylvania law, 42 Pa.C.S. § 9754 Order of probation, permits probation terms up to the maximum sentence under law and provides a long list of potential conditions.[15] An almost identical list exists for CIP in 42 Pa.C.S. § 9763.

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[14] Fiona Doherty, "Obey All Laws and Be Good: Probation and the Meaning of Recidivism," 104 Geo. L.J. 291 (2016), at fn. 33.

[15] "(a) General rule.--In imposing an order of probation the court shall specify at the time of sentencing the length of any term during which the defendant is to be supervised, which term may not exceed the maximum term for which the defendant could be confined, and the authority that shall conduct the supervision.
(b) Conditions generally.--The court shall attach such of the reasonable conditions authorized by subsection (c) of this section as it deems necessary to insure or assist the defendant in leading a law-abiding life.
(c) Specific conditions.--The court may as a condition of its order require the defendant:
(1) To meet his family responsibilities.
(2) To devote himself to a specific occupation or employment.
(2.1) To participate in a public or nonprofit community service program unless the defendant was convicted of murder, rape, aggravated assault, arson, theft by extortion, terroristic threats, robbery or kidnapping.
(3) To undergo available medical or psychiatric treatment and to enter and remain in a specified institution, when required for that purpose.
(4) To pursue a prescribed secular course of study or vocational training.
(5) To attend or reside in a facility established for the instruction, recreation, or residence of persons on probation.
(6) To refrain from frequenting unlawful or disreputable places or consorting with disreputable persons.
(7) To have in his possession no firearm or other dangerous weapon unless granted written permission.
(8) To make restitution of the fruits of his crime or to make reparations, in an amount he can afford to pay, for the loss or damage caused thereby.
(9) To remain within the jurisdiction of the court and to notify the court or the probation officer of any change in his address or his employment.
(10) To report as directed to the court or the probation officer and to permit the probation officer to visit his home.

Supervision

State law often does not describe or mandate the implementation of supervision, although caseload sizes may be specified. To maximize the quality and outcomes of a probation sentence, probation agencies must define a clear mission and effectively incorporate evidence-based practices for community supervision. Using these practices shifts a probation sentence from a mere judicial disposition to a targeted intervention with an outcome of reduced recidivism. Maximizing quality requires probation agencies to employ these practices with fidelity and to have adequate resources from the state or county that funds the department.

The MPC does not speak directly to the administration of probation sentences, where the quality of implementation comes into play, but persuasively makes the case for refining probation law in the comment to Section 6.03:

> Comment: a. Scope. Probation in the United States is a criminal-justice institution with profound challenges and difficulties. As American prison populations have grown over the past four decades, probation has followed suit. While expenditures on prisons have increased dramatically, however, budgets for probation services have not kept pace. Probation agencies today struggle to discharge their duties to offenders and communities, almost everywhere with overlarge caseloads and inadequate resources. At the same time, probation is the most frequently imposed of all criminal penalties. Far more individuals are under probation supervision on any given day than the combined populations in prison and jail and on parole. In a majority of all criminal cases, therefore, probation is the institution relied upon to achieve the goals of American sentencing systems. . . .
>
> *b. Underlying policies.* A series of policy judgments are reflected throughout this provision:

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(11) To pay such fine as has been imposed.

(12) To participate in drug or alcohol treatment programs.

(13) To satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience.

(14) To remain within the premises of his residence during the hours designated by the court.

(d) Sentence following violation of probation.--The sentence to be imposed in the event of the violation of a condition shall not be fixed prior to a finding on the record that a violation has occurred."

> First, it is likely that the resources available to probation services will remain in critically short supply for the foreseeable future. . . .
>
> Second, for individual cases, the Code posits that a primary goal of probation is to reduce or eliminate new criminal behavior by probationers. . . .
>
> Third, the Code recognizes the salience of punishment as a core purpose of probation. In many instances, conditions of supervision aimed at utilitarian goals will carry sufficient punitive force to ensure that probation sentences are not disproportionately lenient. . . .
>
> Fourth, the Code encourages state probation systems to make greater use of positive rewards for compliance, alongside consistently applied penalties for noncompliance. . . .
>
> Fifth, any forward-looking law of community sanctions must seek a just and rational balance between the priorities of control and treatment. . . .
>
> Sixth, the base of research and information about probation strategies and tactics should be substantially increased. . . .”

In Pennsylvania, as noted previously, 42 Pa.C.S. § 9912 begins: “(a) Officers are in a supervisory relationship with their offenders. The purpose of this supervision is to assist the offenders in their rehabilitation and reassimilation into the community and to protect the public.” In the parole laws, 61 Pa. C.S. § 6123 creates a probation advisory committee but does not provide any substantive guidance.

Responses

Many states have adopted more structure regarding probation violation responses by empowering probation officers to trigger arrest and detention for a short period of time, defining “technical” or “compliance” violations, and limiting the potential court (or administrative) response to those types of violations. Many Justice Reinvestment states have attempted to establish a behavior response model that reflects evidence-based components:

- responses that encompass both positive and negative behaviors and tailor rewards and sanctions appropriately;
- responses for violations that include both a sanction and a corrective intervention to support behavior change;

- responses that are swift, certain, and proportionate, in lieu of full revocation; prioritizing revocations for the most serious violations characterized by
    - serious criminal violations, excluding nonviolent misdemeanors;
    - absconding; or
    - escalating, continuing violations for which other sanctioning options have been exhausted.

MPC § 6.15, as described in the Comment, "does not prescribe mandatory or categorical sanctions for rule violations, instead directing agents and courts to impose the least severe consequence needed to address a violation and the risks posed by the offender in the community." The Reporter's Note explains:

> In most jurisdictions, the decision to revoke conditional release remains wholly discretionary, and rightly so. The needs, risks, and life circumstances of individuals under community supervision vary infinitely, and the decision of how to respond to rule violations turns on a wide variety of factors that do not easily yield to quantification or compartmentalization. At the same time, the dangers of arbitrary judgments inherent in discretionary decisionmaking systems have long been acknowledged. In 1962, Sanford Kadish observed that, when it came to correctional decisionmaking around revocation, "deliberate abandonment of the legal norm" had come to be accepted despite its often detrimental outcomes. Sanford H. Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 Harv. L. Rev. 904, 919 (1962). That observation holds true 50 years later. A few jurisdictions have tried to reduce revocation decisions to guidelines, imposing formulaic "graduated sanctions" and predetermined periods of revocation for the most common violations, such as use of controlled substances. Cecelia Klingele, Rethinking the Use of Community Supervision, 103 J. Crim. L. & Criminology 1015 (2013) (discussing several models for revocation guidelines). Although such efforts may increase uniformity and predictability, they may also result in overly harsh or inadequately severe sanctions, depending on the circumstances of any given violation.

Pennsylvania 42 Pa. C.S. § 9771(b) states:

> Revocation.--The court may revoke an order of probation upon proof of the violation of specified conditions of the probation. Upon revocation the sentencing alternatives available to the court shall be the same as were available at the time of initial sentencing, due consideration being given to the time spent serving the order of probation.

A more recent statute, 42 Pa. C.S. § 9771.1 gives authority for a judicial district to "establish a program to impose swift, predictable and immediate sanctions on offenders who violate their probation" and specifies sanctions as follows, but also allows for revocation after a third violation:

> (g) Sanctions
> (1) The court shall impose a term of imprisonment of up to:
> (i) three days for a first violation;
> (ii) seven days for a second violation;
> (iii) fourteen days for a third violation; and
> (iv) twenty-one days for a fourth or subsequent violation of probation.

Termination

Research suggests that using positive incentives for compliance, and not just punitive sanctions for violations, reduces recidivism rates; incentives should be used four times as often as sanctions "to enhance individual motivation toward positive behavior change and reduced recidivism." Effective and common incentives include early termination from supervision, reduced community service hours, and reduced contacts with the officer.[16] Additional "earned" credit toward completion of the probation sentence is another, less common incentive.

MPC § 6.03(6) states that the "court may discharge the defendant from probation at any time if it finds that the purposes of the sentence no longer justify continuation of the probation term," and 6.03(7) provides "For felony offenders, probation sanctions should ordinarily provide for early discharge after successful completion of a minimum term of no more than 12 months." Section 6.03(12) states:

[16] Eric J. Wodahl, 35 Brett Garland, Scott E. Culhane and William P. McCarty, Utilizing Behavioral Interventions to Improve Supervision 36 Outcomes in Community-Based Corrections, 38 Crim. Justice & Beh. 386, 400 (2011) (finding that a four-to-one ratio between rewards and punishments promotes highest success rates on community supervision).

> The court should consider the use of conditions that offer probationers incentives to reach specified goals, such as successful completion of a rehabilitative program or a defined increment of time without serious violation of sentence conditions. Incentives contemplated by this subsection include shortening of the probation term, removal or lightening of sentence conditions, and full or partial forgiveness of economic sanctions [other than victim restitution].

In Pennsylvania, 42 Pa. C.S. § 9771(a) simply states that "The court may at any time terminate continued supervision or lessen or increase the conditions upon which an order of probation has been imposed."

Conclusion

The law of probation in Pennsylvania

1. Does not define the purpose of probation;
2. Provides (by court rule) for PSIs but not risk and needs assessments;
3. Sets out a lengthy list of potential conditions for probation and a nearly identical list for CIP and does not constrain probation terms except by reference to the statutory maximum punishment;
4. Does not establish supervision techniques and strategies at the state level for county-administered programs;
5. Does not employ a statewide incentives and sanctions response system; and
6. Does allow for early termination by the judge.