

# LEGAL MEMORANDUM

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## The Hawaii Opportunity Probation with Enforcement Project: A Potentially Worthwhile Correctional Reform

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### Abstract

*Probation is a long-standing feature of the criminal justice system and is found in every state. Unfortunately, however, probation has not been as successful as its original proponents hoped that it would be: Approximately one-third of offenders placed on probation wind up in prison or abscond. In 2004, a Hawaii state court judge developed a new way of managing probationers that has shown the promise of reforming offenders and reducing costs borne by the criminal justice system and the public. That project—known as Hawaii Opportunity Probation with Enforcement, or HOPE—uses a fundamentally different approach to traditional probation supervision. The federal and state governments should look to this program as a potentially valuable criminal justice reform.*

Over the past 40 years, America has sent an increasingly large number of offenders to prison.<sup>1</sup> Approximately 95 percent of them will eventually return to the community.<sup>2</sup> Some will be released early via parole, an accumulation of good-time or earned-time credits, or executive clemency.<sup>3</sup> The truly lucky offenders, however, are the ones who are placed on probation, a form of conditional release, in lieu of imprisonment. Probation is a long-standing feature of the criminal justice system and is found in every state.<sup>4</sup> Unfortunately, however, probation has not been as successful as its original proponents hoped that it would be: Approximately one-third of offenders placed on probation wind up in prison or abscond.<sup>5</sup>

In 2004, a Hawaii state court judge developed a new way of managing probationers that has shown the promise of reforming

### KEY POINTS

- Probation has not been as successful as its original proponents hoped that it would be: Approximately one-third of offenders placed on probation wind up in prison or abscond.
- In 2004, a Hawaii state court judge developed a new way of managing probationers that has shown the promise of reforming offenders and reducing costs borne by the criminal justice system and the public.
- This program, known as Hawaii Opportunity Probation with Enforcement, or HOPE, uses a fundamentally different approach to traditional probation supervision. The federal and state governments should look to this program as a potentially valuable criminal justice reform.
- A correctional program that reduces recidivism and long-term incarceration costs benefits everyone involved in the criminal justice system as well as the ultimate beneficiaries of any sound criminal justice policy—the public.

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offenders and reducing costs borne by the criminal justice system and the public. That project—known as Hawaii Opportunity Probation with Enforcement, or HOPE—uses a fundamentally different approach to traditional probation supervision.<sup>6</sup> The federal and state governments should look to this program as a potentially valuable criminal justice reform.

### Traditional Probation

Like a parolee, a probationer lives outside a prison's walls but is technically and legally under the control of the government, subject to numerous restrictions and to the supervision of a probation officer and the sentencing court.<sup>7</sup> Typically, a probationer must avoid any further crimes, must remain employed, must pay any fine (and, today, any restitution), and must meet with his probation officer monthly. If the parolee violates a condition of his release, the probation officer can initiate the revocation process before the judge who placed the offender on probation.<sup>8</sup> The theory was that a probationer would comply with the conditions of his release because he feared having his probation revoked and being sent to prison.<sup>9</sup>

Underfunding of probation departments and overcrowding in prisons, however, have had unfortunate consequences. For example, probation officers have unduly large caseloads, and the work necessary to establish a case for revocation is considerable, which in turn forces officers to delay seeking revocation until a probationer has committed numerous offenses. Probationers who do not show

up for monthly meetings can be arrested, but local police departments treat bench warrants as a very low priority. It also can take three or four weeks before a trial judge holds a hearing on a revocation request. Even then, the judge might decide that the offender should receive another chance to turn his life around or that prisons are too overcrowded to hold an offender for a mere probation violation.

Traditional approaches to probation, therefore, often combine to create a vicious cycle in which probationers violate conditions of their release with impunity, which in turn increases the number of violations each probationer commits as well as the number of probationers who violate conditions of their probation.<sup>10</sup> The failures of the traditional approach to probation may explain why a large number of probationers do not benefit from their opportunity.

### The HOPE Project

In response to his frustration with the traditional approach to probation enforcement, Steven Alm, a state court judge in Honolulu, Hawaii, devised a novel approach to probation accountability. Known as the HOPE project, this new approach sought to address, among other issues, the fact that offenders would face a revocation hearing only after committing multiple probation violations. Alm learned from probation officers that their workload did not allow them to proceed in any other fashion.

Judge Alm decided that the probation system needed to respond with certainty and celerity to

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1. See, e.g., Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 315-18 (2013).
  2. See, e.g., S. REP. NO. 110-397, 110th Cong. 72 (2008) ("According to the U.S. Department of Justice, Bureau of Justice Statistics, an estimated 95 percent of all State prisoners will be released...."); Jeremy Travis, *But They All Come Back* xvii (2005).
  3. See, e.g., Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1 (2013).
  4. See, e.g., the Federal Probation Act, ch. 521, 43 Stat. 1259 (1925) (codified, as amended, at 18 U.S.C. § 3561-66 (2006)); *Burns v. United States*, 287 U.S. 216, 220-21 (1932); *United States v. Murray*, 275 U.S. 347, 357-58 (1928); RONALD L. GOLDFARB & LINDA R. SINGER, *AFTER CONVICTION* 209, 215, 232-40 (1973).
  5. Angela Hawken, *The Message from Hawaii: HOPE for Probation*, PERSPECTIVES: J. OF THE AM. PROBATION & PAROLE ASS'N 36, 36 (Summer 2010).
  6. See Hon. Stephen S. Alm, *A New Continuum for Court Supervision*, 91 OR. L. REV. 1191 (2013). A sample of the literature on the HOPE program is collected in an appendix to this article. To avoid overburdening the reader with references, subsequent footnoting will be kept to a minimum. The discussion of the HOPE program in this Legal Memorandum draws on that literature.
  7. See, e.g., 18 U.S.C. § 3563 (2006) (listing conditions of probation); *Knights v. United States*, 534 U.S. 112 (2001) (the Fourth Amendment permits suspicion-based searches of probationers).
  8. See, e.g., 18 U.S.C. §§ 3564(e) & 3465 (2006) (probation revocation).
  9. That was believed to be particularly true if the judge imposed and suspended a lengthy term of imprisonment in favor of probation. See, e.g., JOAN PETERSILIA, *REFORMING PROBATION AND PAROLE IN THE 21ST CENTURY* 28 (2002).
  10. See, e.g., Mark A. R. Kleiman & Kelsey R. Hollander, *Reducing Crime by Shrinking the Prison Headcount*, 9 OHIO ST. J. CRIM. L. 89 (2011); MARK A. R. KLEIMAN, *Controlling Drug Use and Crime with Testing, Sanctions, and Treatment*, in *DRUG ADDICTION AND DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE* 168, 171-75 (Philip B. Heymann & William N. Brownsberger eds., 2001).

violations rather than sporadically and severely.<sup>11</sup> To do so, he persuaded representatives from the other elements of the probation revocation process—such as probation officers, prosecutors, the public defender’s service, and the local jailers—to follow an abbreviated probation “modification” process.

Because of the high correlation in Hawaii between methamphetamine use and crime,<sup>12</sup> Judge Alm decided to subject a small group of meth users on probation to weekly drug testing, using on-the-spot testing kits to avoid laboratory delay. Every probationer testing positive or failing to appear for drug testing would be taken into custody immediately. The probation officer would complete a standardized form containing the probationer’s name, details about the violation, and, if there was a positive drug test, the drug involved. Shortly afterward, he would hold a probation modification hearing focused on the test results.

Judge Alm would sentence every probationer found to have tested positive to a brief (e.g., 72 hours, seven days) term of confinement in the local jail, after which the probationer would be released and the process started again. Immediate imposition of a moderate penalty on every offender who violated a condition of his release, Judge Alm believed, would have a far greater deterrent effect than random probation revocation would.

The HOPE program was successful.<sup>13</sup> Results at the three- and six-month points showed decreased drug use, missed appointments, rearrests, and probation revocations among the 34 participants. The one-year point saw an 80 percent decrease in positive drug tests among participants. Professors Mark Kleiman

and Angela Hawken conducted a randomized control evaluation of Judge Alm’s HOPE project, which revealed that after one year, HOPE participants were successful in several ways: They were 55 percent less likely to be arrested for a new crime, 72 percent less likely to use drugs, 61 percent less likely to skip appointments with their supervisory officer, and 53 percent less likely to have their probation revoked.

The HOPE program also was cost-effective.<sup>14</sup> The average yearly cost of each party on probation is about \$1,000, while the comparable cost for offenders in the HOPE program is roughly \$2,500, including the costs of treatment. HOPE, however, operates as “behavioral triage.”<sup>15</sup> HOPE costs less than mandatory drug treatment and does not use up slots for offenders who cannot kick their habit without the intensive supervision of in-patient drug treatment or a so-called drug court.

Moreover, the success rate for a HOPE project can save the considerable costs of unnecessary incarceration, costs that have skyrocketed over the past four decades as an ever-larger number of offenders have been imprisoned.<sup>16</sup> And those results do not include the ancillary savings from decreased drug use by offenders: smaller drug markets, individuals spared from becoming victims of crimes committed by drug-seeking offenders, and reduced suffering by the family members of offenders who otherwise would be imprisoned.<sup>17</sup>

## Areas for Reform

How can society capitalize on the success of HOPE? There are old questions that remain to be answered and new ones that need to be asked.

11. The principle that punishment must be imposed swiftly to be effective traces its lineage to CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 55 (2009) (1764). The proposition still has currency today. See, e.g., Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 1026–28 (2013).
12. See Mark A. R. Kleiman & Angela Hawken, *Fixing the Parole System*, ISSUES IN SCIENCE & TECH. (Summer 2008) (“The drug that is most abused by Hawaii’s felony probationers is methamphetamine, with alcohol (often in combination) second; the opiates are rarely encountered.”), available at <http://www.issues.org/24.4/kleiman.html> (last visited Jan. 14, 2014).
13. See, e.g., Angela Hawken & Mark A. R. Kleiman, Nat’l Inst. of Just., *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii’s HOPE*, Doc. No. 229023 34-35, at 35-41 (Dec. 2009) (hereafter Hawken & Kleiman, *Evaluating Hawaii’s HOPE*), available at <http://nicic.gov/Library/024156> (last visited Jan. 14, 2014).
14. See, e.g., Kleiman & Hollander, 9 OHIO ST. J. CRIM. L. at 104.
15. See Angela Hawken, *Behavioral Triage: A New Model for Identifying and Treating Substance-Abusing Offenders*, 3 J. DRUG POL’Y ANALYSIS 1, 4 (2010).
16. See, e.g., Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 764–65 & n.212 (2013); Larkin, 11 GEO. J.L. & PUB. POL’Y at 12–17.
17. Not everyone is a fan of the HOPE approach. See Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism* 14 (Minnesota Legal Studies Research Paper No. 13-51, Sept. 11, 2013) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2329849](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2329849), criticizing HOPE for focusing on reducing recidivism instead of the factors that lead an offender to wind up in court.

Accordingly, more information is needed, particularly with regard to the effectiveness and efficiency of this potentially valuable approach and to continue the discussion that has been underway in the American legal academy.

Additionally, two committees in the House of Representatives have held hearings on the HOPE program. Those are good first steps, but others need to follow. The discussion also needs to include the executive and judicial branches. Below are some recommended questions to investigate as well as potential next steps:

- 1. What is known about the original HOPE project today?** Does it still work in Hawaii? Is it still cost-effective? How far has it been expanded? Has that expansion also been successful? It would be important to know whether HOPE's initial success has proved enduring or has flamed out over time.
- 2. Can other types of probationers benefit from the HOPE project?** The original HOPE project was limited to offenders who also were methamphetamine *users*. One question, therefore, is whether the project can work for probationers whose fundamental problem is that they have a serious methamphetamine *addiction*.<sup>18</sup> The HOPE approach might work for those offenders too, but the issue needs to be explored. Society also needs to determine whether the HOPE program could be used for probationers with other types of substance abuse problems, such as those who abuse alcohol.<sup>19</sup>

Moreover, HOPE projects might also work for probationers who have geographic restrictions as pro-

bation conditions. A GPS monitoring device might enable the probation department to determine whether an offender has spent business hours at his place of employment or has returned to home or a halfway house afterward. Violations of those conditions could be the subject of the same type of probation modification hearings and sanctions that Hawaii has used for its HOPE program.

- 3. Can other states replicate the success of HOPE?** Put the other way, is there a unique feature of the legal system, life, or culture in Hawaii that enabled the original HOPE project to be successful there and would not allow that program to work elsewhere? The U.S. Department of Justice has funded replication projects in Arkansas, Massachusetts, Oregon, and Texas. The Justice Department has predicted that the test results will not be available until 2015. When those results come in, it must be determined whether the HOPE projects worked in those states and whether they can be transplanted to still more jurisdictions. Several states, such as Pennsylvania, are considering or implementing their own HOPE programs.<sup>20</sup> Perhaps they will have results even before 2015.
- 4. Can the federal criminal justice system benefit from adoption of HOPE?** Maybe; maybe not. Most federal criminal prosecutions are for violations of immigration or drug laws. Illegal immigrants may not be drug users and may not be released into the community under geographic restrictions. Drug offenders may be subject to mandatory minimum terms of imprisonment, foreclosing any opportunity for probation. In other words, a HOPE project may not be useful

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18. See Alex Kreit, *The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?*, 2010 U. CHI. LEGAL F. 299, 333-34 (2010).

19. See John Monahan, *A Jurisprudence of Risk Assessment*, 92 VA. L. REV. 391, 422 (2006) (38 percent of parties serving a jail sentence were under the influence of alcohol). Some scholars have estimated that alcohol is the most commonly abused drug. See DAVID A. BOYUM & MARK A. R. KLEIMAN, *Substance Abuse Policy from a Crime-Control Perspective*, in CRIME: PUBLIC POLICIES FOR CRIME CONTROL 331, 333 (James Q. Wilson & Joan Petersilia eds., 2002).

20. More than a dozen states currently have some form of HOPE program underway. See Pat Nolan, "Swift and Certain Probation Sanctions' Expand to 18 States" (May 8, 2013) (email newsletter on file with author). For examples of those projects, see, e.g., TERESA W. CARNS & STEPHANIE MARTIN, ANCHORAGE PACE: PROBATION ACCOUNTABILITY WITH CERTAIN ENFORCEMENT, A PRELIMINARY EVALUATION OF THE ANCHORAGE PILOT PACE PROJECT (SEPT. 2011), available at <http://www.ajc.state.ak.us/reports/pace2011.pdf> (last visited Jan. 14, 2014); Virginia Criminal Sentencing Comm'n, Immediate Sanction Probation Pilot Project: Status Update (Mar. 18, 2013), available at <http://courts.mi.gov/administration/admin/op/problem-solving-courts/pages/swift-and-sure-sanctions-probation-program.aspx> (last visited Jan. 15, 2014).

for most of the offenders and offenses that the federal criminal justice system handles—an issue that Congress should explore. For instance, the Senate and House Judiciary Committees could investigate the subject and hold hearings on what they learn.

**5. What do the Justice Department and federal judiciary think about the HOPE approach?**

Justice and the federal judiciary should be included in any conversations about using HOPE projects in the federal system. Judge Alm did not begin the original HOPE project until after he had persuaded all of the relevant parties to cooperate in its implementation. If Congress believes that this program might be effective for the federal criminal justice system, Congress should enlist the executive and judicial branches in designing pilot projects for the federal system. Specifically, Congress should authorize and fund an analysis of the issue by the Justice Department and the Judicial Conference of the United States.

**6. Will legislatures fund HOPE projects?** If the HOPE projects have the promise of being successful elsewhere, legislatures should devote to them the funds necessary to make them work. To be sure, doing so would require an increase in short-term correctional expenditures, and that would be difficult to accomplish given today's budgetary

challenges and rancorous political climate. But it would be a mistake to refuse to underwrite a successful program because it costs more than the country would like to spend today—regardless of what it will save us tomorrow. The criminal justice system and the public will be here for the long haul; what works for them ought to be the primary concern of policymakers.

**Conclusion**

Over the past decade, Americans have seen the beginnings of a national debate about the substitution of certain, swift, and short confinement penalties in lieu of the sporadic, untimely, and severe sanction of probation revocation. Judge Alm took that theory and ran with it in his Hawaii court. He created an innovative approach to probation supervision—one that has produced valuable results. Several other states now have HOPE projects in place.

The federal government and the states should consider whether that approach works. A correctional program that reduces recidivism and long-term incarceration costs benefits everyone involved in the criminal justice system as well as the ultimate beneficiaries of any sound criminal justice policy—the public.

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## Appendix

The Honest Opportunity Probation with Enforcement (HOPE) Initiative Act of 2009, H.R. 4055, 111th Cong. (Nov. 6, 2009), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr4055ih/pdf/BILLS-111hr4055ih.pdf>.

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