

PERSPECTIVES

the journal of the American Probation and Parole Association



Volume 36

Number 1

Winter 2012

TRIALS

A New Medical Model for Sentencing and Probation

The background features a red DNA double helix on the left and a blue ECG line that runs horizontally across the page, passing through the letters of the title. The title itself is rendered in large, white, distressed block letters.

TRAMA

A New Medical Model for Sentencing



g and Probation

by Steven S. Alm

At the end of 2010, just over four million adults were on probation in the United States, (Glaze and Bonczar 2011) Many of these probationers (approximately 360,000 nationally) will fail on probation and end up in prison. What is the reason for this failure rate? Is it the probation officers (POs) and judges? POs tend to be caring, industrious public servants, as are judges. The problem is not with them. The system itself is broken.

At sentencing, I as a judge have the choice of sending defendants to prison or placing them on probation or deferral to be supervised in the community. And make no mistake, the violent and dangerous or those who won't stop stealing need to be sent to prison, often for many years, to protect the public. Most defendants, I believe, can successfully be supervised in the community.

I typically order defendants on probation to comply with a variety of conditions (e.g., drug testing and treatment, meeting with the PO, etc.), to help the offender stop substance abuse, stay employed, abide by the laws and thus avoid a long prison term. Judges around the country do basically the same thing.

The bad news is that many offenders fail to comply with the conditions of their probation. Defendants on "probation-as-usual" rack up numerous violations by, for example, testing positive for drugs, missing appointments and failing to attend or complete treatment. Typically, the violation results in a scolding from the PO which in the probationer's mind is of no serious consequence. Unfortunately, because the offenders learn that probation is not serious about non-compliance, they will continue to violate the conditions of probation.

Eventually, they will accumulate a substantial number of violations and the PO will finally conclude that they have to be brought before the judge. Finally, at that often much-delayed point, the PO spends hours writing up all of the charges in a violation of probation report. Next, a motion to revoke probation is filed and eventually the probationer is arrested and brought to court, where if found guilty of the violation, he or she may be sentenced to prison for years.

In what I characterize as “probation-as-usual”, the process is delayed and uncertain, and when action by the court is finally taken, it is often overly harsh. The good news is that in Honolulu, we have found a way out of this disastrous situation. It’s not a miracle, but it does require people in the criminal justice system to do that hardest of things: change the way they do business.

HOPE began to accept all types of offenders (regular probation, domestic violence, etc.), always targeting the toughest customers or those most likely to fail.

THE EDUCATION OF A JUDGE

In June of 2004, I was assigned to a felony trial calendar. From the first week, I saw Motions to Revoke Probation listing numerous violations with no real serious interim consequences for the offender. The near-universal recommendation by the PO each time was that probation be revoked and the probationer be sentenced to prison for many years. I thought that this was a crazy way to try to change anybody’s behavior. I asked myself, what would work to effectively supervise offenders on probation? I thought of how my wife and I had raised our son. We told him the rules and if he misbehaved, we gave him a consequence right away. It did not have to be severe, but it did have to be swift and certain. That taught him to tie the consequence to the behavior and learn from the experience. I thought that if we could bring that same type of thinking to the probation system, we might get better results.

I looked at the relevant statutes and talked to my staff. I was fortunate to find a gifted and innovative probation supervisor, Cheryl Inouye and she was happy to work on ways to bring more accountability to the system. We then brought the prosecution and the public defender to the table. I spoke to the jail administrator and to the sheriff.

Everyone recognized that what we were doing was not working effectively for many offenders and all agreed to operate differently. Operating differently meant that from then on, the targeted offenders would be arrested on-the-spot or as soon as possible for any probation violation. They would be held in jail for two days and brought before me for a hearing with both prosecution and defense represented.

I asked the prosecutor to design a new fill-in-the-blanks motion to modify the probation form that the probation officer could fill out in five minutes. The public defender pointed out that while the rules of probation were going to be the same, we were going to be enforcing them much more swiftly. The public defender asked if I could warn the offenders about the change. I thought that made good sense from both a practical and a due process standpoint. The sheriff agreed to swiftly take violators into custody at the probation office six blocks away and bring them to the cellblock at the courthouse for transport to the jail. The jail agreed to expect more short-time offenders and to revise their intake procedures, as they would be seeing some repeat customers.

I then spoke to the United States Marshal and the High Intensity Drug Trafficking Area (HIDTA) director. The Marshal agreed to have his Federal Fugitive Task Force serve the warrants for my courtroom (these were state, not federal probationers), and HIDTA agreed to pay any needed overtime. Based on my years as a federal prosecutor, I had earned the respect and trust of the law enforcement

community. In one of those “Nixon goes to China” situations, they were willing to listen to this new way of doing business and agreed to our proposal to work swiftly to take violating offenders into custody and track down absconders.

TARGETING THE HIGH RISK POPULATION

To get the best bang for our probation dollars, we focused our efforts on those high-risk probationers most likely to fail on probation and those we want to watch the closest. To try to eliminate accusations of cherry-picking at probationers who were likely to succeed, I asked Ms. Inouye to identify all those high-risk offenders under her sections supervision who had originally been sentenced out of my courtroom. The offenders were made up of two groups: 18 sex offenders and 16 others convicted of a variety of felonies (e.g., burglary, assault, drugs, threatening) who had failed at regular probation and were still using drugs and/or alcohol. Rather than being revoked, they had been transferred to Ms. Inouye’s high-risk section. The sex offenders who were given probation were placed under Ms. Inouye’s supervision at sentencing. Where regular probation officers had 150 or more clients, the POs in Ms. Inouye’s section supervised about 100 probationers each.

We started Hawaii’s Opportunity Probation with Enforcement, or HOPE, on October 1, 2004, with the first, newly-created warning hearing. Present were 34 probationers and their attorneys, the prosecutors and POs. It is important to note

that HOPE started with existing resources, no new funding was provided.

I told the assembled offenders that everyone in court wanted them to succeed on probation. I said I respected the fact that they were adults and would make their own choices regarding complying with the conditions of probation and that I could not control what they did. I could, however, control how I would respond, which would be to send them to jail for every probation violation. I said I understood that as human beings, we can all forget things and make bad choices. I said that the length of the jail time I would impose would depend on how they handled any probation violation. If they violated, but turned themselves in right away, the jail time would be a short two- or three-day stay. On the other hand, if they ran away and law enforcement resources were used to arrest them, the jail time would be a lot longer, at least thirty days. And, if they repeatedly ran away, I would send them to prison. I encouraged them all to make good choices and succeed and answered any questions they or their attorneys had.

Given the prevailing positive drug test rate on “probation-as-usual” of over 40 percent, and frequent non-appearance for probation appointments, we braced ourselves for multiple violations. We had three the first week, and two the second. We kept adding offenders from the high-risk section during 2005 and added a drug test hotline to randomize the drug testing (at least once a week and up to six times a month). On-the-

spot drug test kits ensured swift results with laboratory confirmation testing available.

HOPE was subsequently funded by the Hawaii State Legislature in 2006 (\$1.2 million per year, mostly spent on drug treatment), and every year since then. We expanded HOPE to all ten felony judges in Honolulu and all judges got similar good results. HOPE began to accept all types of offenders (regular probation, domestic violence, etc.), always targeting the toughest customers or those most likely to fail. The Honolulu Police Department stepped up and started tracking down many of the absconders, as did the sheriff’s office, supplementing the resources of the U.S. Marshal.

HOW WELL DID HOPE WORK?

To find out if HOPE really worked, we made sure the program was evaluated from the start. The State Attorney General’s Office kept statistics from the first day of HOPE and worked with the POs and the court to get accurate data and report on their findings. From the start their data told us that HOPE dramatically reduced positive drug tests and missed probation appointments.

In 2007, Dr. Angela Hawken, an economist and public policy professor at the School of Public Policy at Pepperdine University in California, received funding from the National Institute of Justice and the Smith Richardson Foundation to study the effectiveness of HOPE. She conducted a randomized controlled trial study (the gold standard of research designs) of more than

500 Honolulu offenders on probation (2/3 placed in HOPE, 1/3 left in “probation-as-usual”). The 507 participants were in their mid-30s, 3/4 male, with an average of 16-17 prior arrests and current felony convictions for drugs (35 percent), property (35 percent) and violence (25 percent).

Dr. Hawken's research produced results exceeded all expectations. HOPE probationers were 72 percent less likely to test positive for drugs (even though they were randomly tested, while those in the “probation-as-usual” group knew up to a month in advance when their next drug test would be), and 61 percent less likely to miss a probation appointment. Those in HOPE were arrested for new crimes 55 percent less often and had their probation revoked 53 percent less often. As a result, they were sentenced to 48 percent fewer days in prison. (Hawken and Kleiman 2009)

Given these outstanding results, and in an effort to provide more efficiency and consistency, I took all of the HOPE cases from my colleagues and had most of my trials transferred to them. This allowed me to focus on HOPE and make it easier for the prosecutors, public defenders and private counsel to staff the HOPE hearings because all of the hearings were now held in one courtroom.

REFINING THE PROCESS

Unlike drug court where the judge sees the offender regularly, I only see the HOPE probationers, after the initial warning hearing

when they are arrested and brought to court for violating a condition of probation. That means virtually no review hearings. The average violation hearing lasts less than eight minutes. Very rarely are hearings contested. As a result, I am able to monitor a large number of HOPE probationers. I currently supervise in HOPE more than 1,950 of the 8,200 felony probationers on Oahu. In addition, the POs email the motion and a violation template report to my court. My court staff hands copies of those out to the attorneys prior to the hearing and the POs don't have to appear in court.

A NEW PARADIGM

HOPE has been fine tuned and is working very well. Where does that leave us now? We now have three choices for supervision: “probation-as-usual”, HOPE, and Drug Court. Experience suggests that these three options each appear to be best suited for different groups of offenders. Based on our experience and using research as our guide, we sought to design a continuum to most effectively supervise offenders in the community and make optimal use of judicial and court resources. In one sense, we have taken a page from the history of courts and corrections in the US and applied it to today's challenges.

Until the “nothing works” and “get tough on crime” philosophies took hold in the US in the late 1970s, American sentencing and correctional philosophies and practices were firmly based on a medical model. We “diagnosed” offenders, evaluating their

backgrounds and behavior and “prescribed” interventions and treatment to address the drivers of their criminal or delinquent behavior. With the proper successful treatment, offenders could be restored to a productive, law-abiding life in the community.

Our new model is based on a medical principle, triage. Medical professionals assess the nature and severity of a patient’s injury or illness and respond with medical treatment based on the patient’s condition. Those with acute, life-threatening conditions are immediately treated and hospitalized, often in intensive or critical care units and remain there until their condition has stabilized or improved. Other patients with less serious, non-life threatening conditions may be treated and released or engaged in a course of treatment on an out-patient basis. The principle is that the nature and extent of medical care is tailored to the needs of the individual patient.

In our new model, we practice triage. Consider the courthouse as a hospital. Offenders or patients who are not sent to prison at sentencing but are placed on probation are triaged into the most appropriate track for them to succeed. Regular probation is the outpatient clinic. Many probationers, especially low risk, can succeed there. Their criminal histories and problems are not so severe. They are motivated to comply and can work with a PO and get referrals to services as appropriate. Many probationers can be placed on regular probation to start. Then, if they start having problems such as positive drug tests, missed

appointments, etc., they can be transferred to a more structured and intensive placement: HOPE Probation.

Some offenders, based on their past problems with supervision or their high-risk status, require more intensive treatment than what the “outpatient” clinic can provide. They will be placed in HOPE by the judge at sentencing.

HOPE Probation is an upgrade in the level of service, akin to the general hospital ward for medical treatment. These offenders require meaningful supervision, with proportionate consequences administered swiftly for probation violations. HOPE includes treatment for those requesting it or who demonstrate it is needed (i.e., those probationers who can’t stop using drugs on their own). The violent offender and many with serious addictions can and do succeed in HOPE. Many of the addicted go to quality residential treatment with step-downs to intensive outpatient and aftercare, with the HOPE structure as a safety net to help them succeed.

The treatment programs in Hawaii love HOPE. They appreciate the emphasis on personal responsibility and the fact that we are only referring to treatment those who can’t stop using drugs or alcohol on their own. The offenders also know they will be sanctioned if they quit going to treatment, so they try harder.

For the chronically addicted offenders, the drug court then becomes the intensive

care unit. Most of the new drug court clients will be those who have tried, and failed, at HOPE, even with the assistance of a judge, a probation officer and a drug treatment program. They will have shown that they are unable to succeed on probation and are headed for prison. Drug court, while certainly more expensive than HOPE, is a much more cost-effective alternative to prison.

Most drug courts are currently not positioned for this role. They are used to working with lower-risk offenders and often use screening criteria to keep out those who need drug court the most. Instead, drug courts should change their focus to higher-risk offenders, including those with prior violent convictions and those on probation for a violent offense. This is clearly what the research advocates – focus supervision and treatment resources on the moderate and high risk offenders. (Andrews and Bonta 2010). Drug courts can be very effective, but should be targeting the right offenders. When drug courts focus on low risk offenders, it is akin to using a Ferrari to run to the grocery store.

After all, if we say someone is too violent for drug court, what are we really saying? Those offenders don't disappear. A judge has already decided that the offender won't be sent to prison. If we exclude them from drug court, then he or she will be sent to probation to work with a single probation officer. Is the offender too dangerous for drug court, but not too dangerous for a single probation officer to supervise? That does not make any sense and it does not comport with the research. You put your resources where the problems are the greatest. That means drug court for the seriously addicted, high risk offender.

I acknowledge this is quite a departure from the business model of most drug courts. Making this shift will take a willingness to change and will require real leadership across the system. I am confident that with the right leadership, the committed professionals in our court systems and our drug courts can make this needed change.

Those in HOPE were arrested for new crimes 55 percent less often and had their probation revoked 53 percent less often.

RESPONDING TO PROBATIONER NEEDS AND BEHAVIOR

This new paradigm provides a real and effective continuum of services for offenders under court supervision. Flexibility will, of course, need to be maintained to allow movement along the continuum when needed. Those offenders who have minimal problems and who are at lower-risk will be placed into regular probation. Those who are showing difficulty complying with “probation-as-usual” or who are at high risk from the start will be placed in HOPE Probation. Often the most criminally-minded and antisocial (who perhaps should have been sent to prison to begin with) are the ones who will frequently fail to comply with the conditions of HOPE probation. They tend to abscond, repeatedly. These offenders will be sent to prison.

Those in HOPE who don’t repeatedly run away but who are still failing, will be referred to drug court. With the intensive, wrap-around services that drug court provides, many should find success. Of course, not all will succeed in drug court and some will end up going to prison. But everyone will know that they had a real shot with many chances to succeed before that happened.

BUT WILL IT WORK?

This triage paradigm requires that a fundamental change be made in the sentencing and probation business models. Some will question the wisdom of this approach, but I am confident that it is the right way to go. How do I know this

continuum of services is possible? Because we are doing it right now in Honolulu. I was assigned to preside over the drug court in March of 2011, in addition to HOPE. At the time, 60 percent of the drug court clients had come from the lower-risk pretrial population and 40 percent came from the higher-risk probation population, but any with a violent crime or violent history were excluded. That meant that we had a lot of broken legs and routine gall bladder surgeries in our ICU. That is now changing.

I am certainly not going to remove the lower-risk, pretrial offenders currently in drug court. They were allowed into the program and will remain. Eventually, however, when they hopefully graduate or fail from drug court, their replacements are predominantly coming from the higher risk probation population. That includes violent offenders. And that almost certainly means they have been in HOPE (the hospital wards), have not totally failed and been sent to prison, but have shown themselves to need a greater level of supervision and intervention. That means the ICU. That means drug court.

With HOPE, we certainly now know whether offenders can succeed on probation. Most will. With drug court then at the most serious end of the addiction/risk continuum, it becomes the last stop before prison. That makes sense from both the research and experience perspectives. The majority of our supervision and treatment resources should be devoted to those offenders who need them most. Each person that succeeds in drug court is one less person going to prison.

This approach is extremely cost-effective. The Judiciary in Hawaii spends less than \$1,000 per regular probationer per year. HOPE costs less than \$2,000 per probationer per year. Drug court, at \$6,000-\$7,000 per probationer per year, is certainly more expensive. However, as drug courts will be dealing with the highest-risk offenders, those who are headed for prison next, then it is a very cost-effective alternative to the \$50,000 it costs to incarcerate a state prisoner for a year in Hawaii.

THE FUTURE

The truly violent, dangerous and chronic offenders need to be sent to prison at sentencing to protect the public. However, those who are sent to prison at sentencing are the minority. The greater majority of offenders can and should be placed on probation and can be supervised effectively in the community under this new system of triage.

By performing triage and supervising offenders at the most appropriate level, we can reduce crime and increase public safety, help offenders and their families and save taxpayers millions of dollars a year. It won't be easy, but with the right leadership, it can be done. >>>

REFERENCES

Andrews, Don A. and James Bonta. (2010). *The Psychology of Criminal Conduct*. 5th ed. New Providence, NJ: Matthew Bender & Co.

Glaze, Lauren E. and Thomas P. Bonczar. (2011). *Probation and Parole in the United States, 2010*. Washington, DC: Bureau of Justice Statistics. <http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus10.pdf>

Hawken, Angela and Mark Kleiman. (2009) *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE*. Report submitted to the National Institute of Justice. <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf>

STEVEN ALM is the First Circuit Court Judge, 2nd Division in Honolulu, Hawaii.