Jail Break

How smarter parole and probation can cut the nation's incarceration rate.

By Mark A. R. Kleiman

In 2004, Judge Steven Alm was assigned to the felony trial court for the island of Oahu, Hawaii. Alm quickly realized that he had a problem. Probation officers for his court were overwhelmed with clients who kept using methamphetamine, Hawaii's number-one problem drug. It wasn't exactly difficult to pass the drug tests, which were scheduled weeks in advance. But on any given day 10 percent of the probationers scheduled to come in didn't arrive for testing, and 20 percent of those who did show up tested "dirty." By the time probationers were sent to Alm's court for a revocation hearing, they had already racked up multiple breaches of the rules.

Hawaii's felony probationers have lengthy sentences hanging over their heads. An offender whose probation is revoked can be sent to prison for the rest of his term—anywhere from five to twenty years. To Alm and his fellow judges, this seemed an unnecessarily draconian response to a missed or "dirty" drug test. It was also impractical in light of Hawaii's prison-overcrowding problem. (Not only are Hawaii's own prisons full; the state also pays heavily to send thousands of its prisoners to for-profit prisons on the mainland.)

As a former career prosecutor and U.S. attorney, Alm had more than a little political clout and was accustomed to getting results. Why, he asked the probation officers, was he only hearing about drug problems when they spiraled out of control? If this was the tenth violation, what happened the first nine times?

The probation officers explained that each one of them had responsibility for at least eighty-five felons. (That was for those with "high-risk" caseloads; the other probation officers had caseloads twice that size.) Most of those offenders sporadically fell afoul of the rules. The officers couldn't possibly spend two hours writing a report every time a probationer failed a test or skipped drug treatment or anger-management class—there would be no time for anything else. As the officers saw it, their job was to harangue those clients who would listen to get back into line, and refer those who wouldn't listen back to court after they had accumulated enough offenses to justify sending them away.

Alm could see the logic of the system, but he didn't think it was the right kind of logic. "You wouldn't raise a child that way," he told the officers. "You wouldn't train a puppy that way. You'd establish clear rules and have immediate consequences for breaking them."

So Alm devised a new plan. He asked the probation officers to select a group of seemingly incorrigible scofflaws, probationers just one slipup shy of a revocation hearing. Every time one of them missed or flunked a drug test (or

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broke any other probation rule) he would land in court—and in jail—right away. Alm enlisted the help of prosecutors and public defenders to ensure that a hearing could be held within forty-eight hours of a violation. He corralled the federal fugitive task force to chase down anyone who refused to come into court. To cut down on paperwork, he eliminated the long report, documenting a long history of misconduct, that had previously been required from a probation officer before a revocation hearing. In its place, he substituted a two-page fill-in-the-blanks form, which dealt with only a single missed or dirty test or other violation.

Then, instead of "revoking" probation and condemning the offender to years in prison, Alm would "modify" probation, sending the offender to jail for a few days and then releasing him back to probation supervision. Alm reasoned that a brief stint behind bars would make the probationer more cooperative when he returned to his officer's caseload.

The probation officers feared that Alm's proposal would be impossibly burdensome, but they agreed to give it a try. Alm held a contest among the officers to name the program, and the winning entry was "Hawaii's Opportunity Probation with Enforcement," or HOPE.

HOPE started with thirty-four chronic violators. On the advice of the public defender, Alm brought them into court for what he called a "warning hearing," with the defense counsel and the prosecutor present. He explained that, for them, the era of warnings was over. "If you fail a drug test, if you fail to meet with your probation officer when you are supposed to, or you fail with other terms of your probation ... you will go to jail," runs Alm's script for such proceedings. "All of your actions in life have consequences, good or bad." Later, Alm added a new twist to the program: random drug testing, with each probationer required to call in to a hotline every weekday morning to learn whether that was his day to be tested.

Everyone braced for a flood of missed and failed tests and the consequent sanctions hearings. But then something strange happened: in the first two weeks, only five of the thirty-four broke the rules. The overall rate of missed and failed drug tests dropped by more than 80 percent. Before the program started, the HOPE group had more than twice the noncompliance rate of the comparison group; that's how they were chosen. HOPE reversed that picture, with program participants testing positive at less than one-quarter the rate of the comparison group. The high level of compliance made the workload perfectly manageable for everyone involved, and Alm was able to expand HOPE to 135 probationers without hiring more people.

Despite tighter monitoring and "zero-tolerance" sanctioning, HOPE participants averaged about the same number of days in jail as the comparison group: about twenty days over the course of a year. But they had only a third as many revocations and were sentenced to only a third as much prison time: on average, 110 days per probationer, as compared to 300 days.

Then Hawaii expanded the program, and it kept working. Angela Hawken—a professor at Pepperdine University's public-policy school who did much of the evaluation work on California's much-less-successful Proposition 36 diversion program—and I have been studying both the original program and its expansion; for the expansion, Hawken managed to persuade the authorities in Hawaii to run a full randomized controlled trial, where otherwise similar probationers were chosen by lot either to be assigned to HOPE or to go on probation as usual. The picture remained the same: the HOPE group had much less drug use and spent much less time behind bars. The program worked as well in the hands of other judges as it did with Judge Alm's original group. Some judges were more severe than average, others less so, but the success rates among their probationers were all about equal. It turns out that two days behind bars works as well as six weeks, as long as the two days are imposed quickly and consistently.

The program hasn't been big enough for long enough to have made a dent in the city's crime statistics or the size of the citywide meth market. But HOPE probationers get arrested less than half as often, and for less serious crimes, than those under traditional probation. The reason may be that the HOPE participants are getting off drugs, which makes them less likely to steal to support their habits and more likely to get and keep jobs. Or it may be simply that they are leading more structured lives. In any event, it's clear that HOPE reduces crime among those assigned to it.

Judge Steven Alm was accustomed to getting results. Why, he asked the probation officers, was he only hearing about felony probationers' drug problems when they spiraled out of control? If this was the tenth violation, what happened the first nine times?

In addition, HOPE has achieved something rare in the American criminal justice system, proving that it is actually possible to enforce the conditions of "community corrections" programs: probation and its cousin, parole. (Probationers are offenders who have been placed under supervision instead of being sent to prison; parol-

ees are monitored in the community after serving part of their prison term.) This discovery has major policy implications. After twenty-five years of "tough on crime" orthodoxy, American politicians are urgently searching for workable alternatives to mass incarceration. The fiscal crisis has state governments scrambling to pay for prison systems that take a bigger share of state budgets than anything but health care and education. Senator Jim Webb is seeking to enact major criminal-justice reforms, reasoning that a system that holds one in 100 adults behind bars and has a 60 percent recidivism rate could probably be improved. Yet while mass incarceration has been under criticism, scant attention has been devoted to the inadequacies of the alternatives, probation and parole. In every state those systems are woefully underfunded and overburdened, unable to enforce their own rules or to prevent most of their clients from sliding back into criminal life. All of the other "community corrections" options—drug diversion programs, treatment courts, community service, home detention—depend on the probation system for their enforcement. As long as probation remains ineffective, any requirement imposed on an offender by the court is, in reality, no more than a helpful hint.

When Alm's program began, everyone braced for the worst. But then something strange happened: in the first two weeks, only five of the thirty-four probationers broke the rules. The overall rate of missed and failed drug tests fell by 80 percent.

Without a functioning community-corrections system, the current enthusiasm for prison reform is likely to wither and fade. That's what makes Judge Alm's Hawaiian experiment so important. The biggest and cheapest opportunity to lower both incarceration and crime rates is to transform probation from a minor nuisance to the probationer into a real system of "outpatient corrections," capable of monitoring and reforming the behavior of vast numbers of offenders.

A solid body of social science and criminological research dating back to the eighteenth century tells us that behavior can be changed by punishment that is certain and swift even if it is not severe. Conversely, if punishments for wrongdoing are sporadic and delayed, increasing severity has only modest impact. That's why quintupling the prison and jail population has failed to get us back to the crime rates of the early 1960s. (Averaged across major crime categories, current rates are about 250 percent of 1962 rates.) The importance of swift and predictable consequences is plain common sense, understood by every parent. But that lesson has not been incorporated into our corrections system.

Part of the problem is scarce resources. For all the attention prison growth has received, the largest area of expansion in American corrections is the sentenced population that is not in prison or jail. There are currently around four million people on probation in the United States, twice as many as the number behind bars. However, the probation system receives only 13 percent of the total corrections budget, and while prison spending has increased year by year, spending on parole and probation has remained stagnant. With only one probation officer for about 150 clients in large cities, the enforcement of alternative punishments is usually nominal at best. Probationers always have the option of ignoring the rules: not doing assigned community service, not paying fines, dropping out of drug treatment. In California, more than 75 percent of people who opt for drug treatment instead of incarceration under Proposition 36 never start treatment at all or drop out early, without facing any consequences. Over the years, there have been many attempts to address these failings with innovative programs, drug courts being one of the best known. But participation in drug courts is voluntary, and in most jurisdictions is restricted to offenders with no history of violent crime. And a system that requires drug treatment for every participant, plus regular meetings between the client, the judge, the prosecutor, the defense counsel, the probation officer, and the treatment provider, doesn't come cheap. Two decades after the introduction of drug courts, they cover fewer than 100,000 people at any given time. Expansion is limited by the supply of drug court judges and drug treatment services, and by the sheer expense; on average, a drug court costs nearly $4,000 per participant per year, about four times as much as routine probation supervision, and about twice as much as HOPE.

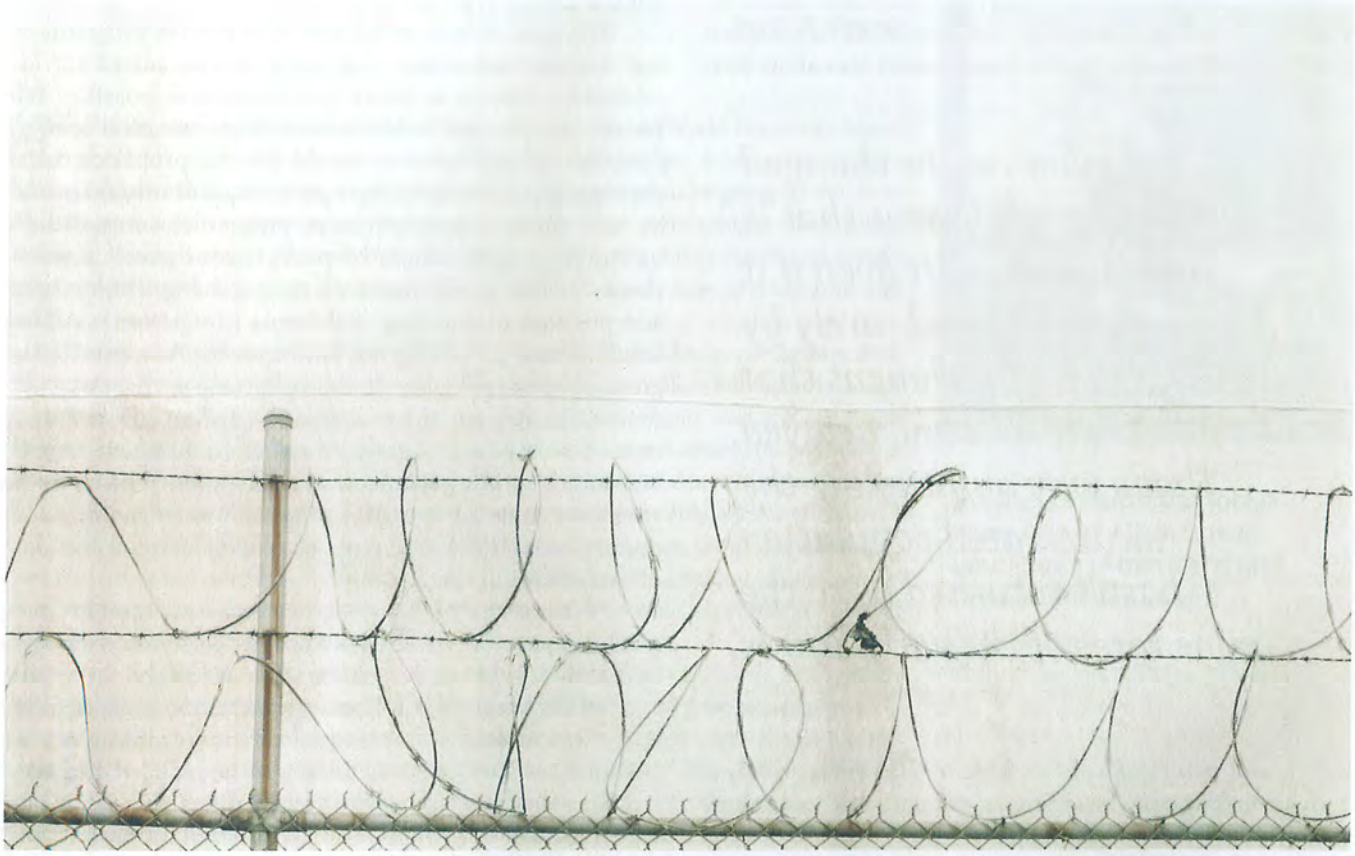
The HOPE program works on opposite principles. It is mandatory, not voluntary. It targets the most challenging offenders and is open to any probationer whatever his previous criminal record. Where drug court aims to get the offender into treatment, HOPE's punishments and rewards are all designed around the objective of actually stopping offenders from using illegal drugs.

HOPE participants are only ordered into treatment if several stints in jail have failed to work. This has several benefits. By then, the probationer knows he needs the treatment program, because he has been unable to stop using even under the threat of instant jail time. And he

knows he needs to succeed, because if he fails he faces prison. This process—which Angela Hawken calls "behavioral triage"—keeps the number of treatment clients down to a level at which each one can receive intensive help. In California, seven out of eight Proposition 36 clients are sent to outpatient drug therapy, the least intensive (and therefore cheapest, in the very short run) but also the least effective treatment approach. (Even those Prop 36 clients who complete treatment—about one in four—commit new crimes at about the same rate as comparable offenders in California did before Prop 36 became law.) Only about 10 percent of HOPE probationers are required to undergo treatment, but they usually wind up either in far more intensive and effective outpatient programs or in residential programs.

This targeted use of resources means that HOPE could be expanded to mass scale. HOPE is economical with hearings as well: they happen only when a client fails or misses a test or violates some other probation rule. Those hearings, because they focus on a single, simple, recent event—a missed appointment or positive drug test—are almost always uncontested and therefore quick: the median hearing time is just under seven and half minutes. HOPE has expanded to include more than 1,250 felony probationers on Oahu—about one out of six—from all ten felony courtrooms on the island, without hiring any new judges or clerks or building any new courtrooms. The total annual cost of the expansion was $1.2 million, about $1,000 per probationer per year, which was spent on hiring additional drug testers and paying for treatment services.

Perhaps the most striking finding of the evaluation is the enthusiasm of the probation officers, the defense lawyers, and the probationers themselves. Probation officers, once highly skeptical, have become fervent fans as they've discovered the exhilaration of being able to exercise in practice the authority over their clients that they possess in theory. The probationers, too—even those interviewed in jail while serving sanctions time—appreciate the program's clarity and transparent fairness. The language the HOPE clients use when they talk about the process is striking: instead of concentrating on what was done to them by the probation officer or the judge, they concentrate on their own actions. "Judge Alm is strict, but he's fair," one prisoner told me. "You know exactly where you stand." Another probationer, interviewed in jail while serving a short stay for a positive drug test, said, "I'm going to try to make my first mistake my last."



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If we want to end the era of mass incarceration and replace it with a regime of less punishment and less crime, drug testing is only one of the ways to apply the cen-

tral lesson of HOPE: that clearly communicated threats of swift, certain punishment really can change behavior, even when the punishment is modest. By thinking creatively, we could transform the entire range of community-based punishments into effective alternatives to incarceration. That would have a profound impact on offenders' lives, on the number of people behind bars, and on the crime rate.

Imagine, for instance, if a probationer or parolee were issued with an anklet fitted with a miniature GPS receiver and cell phone transmitter, with a sensor to detect if the anklet had been removed or tampered with. That device could report continuously on its—and therefore the offender's—location. That would make it significantly harder for probationers or parolees to get away with any new offenses, since the record of where they had been could be matched against crime reports. Such a device would also allow probation and parole officers to impose, and enforce, terms such as curfews, stay-away orders, or requirements to show up to work on time, in the same way that Alm enforces the no-drug-use rule in Hawaii.

Behavior can be changed by punishment that is certain and swift even if it is not severe, and rarely by harsher punishment that is sporadic and delayed. That's why quintupling the incarcerated population hasn't returned us to the crime rates of the early 1960s.

HOPE plus position monitoring could provide much of the deterrence and incapacitation of a prison cell at a small fraction of the cost in money and suffering. For $3,000 per year, a HOPE-style mix of probation, drug testing, sanctions, and treatment only as needed, plus GPS monitoring, could deliver something like 80 percent of the crime-prevention benefits of a prison cell that costs ten times as much. With such a system in place, judges would have a real alternative to incarceration. And so would the governors who are thinking about letting prisoners out to save money. Today, two-thirds of those who leave prison will be back within three years; the exit from a prison is a revolving door. For felony probationers, the incarceration rate within three years is about 50 percent. If the "outpatient prison" could do for recidivism among parolees what HOPE did for new crimes by probationers, five years from now we could have many fewer people in prison than we do today, and half as much crime.

We could also greatly improve economic opportunities for those with criminal records. One of the reasons people return to a life of crime is that it's hard for them to find jobs. Many employers think, not unreasonably, that ex-offenders are often unreliable workers, and that their lawbreaking may not be a thing of the past. A scheme that offered drug testing, position monitoring, and immediate consequences for breaking the rules could change that calculation for employers, much to the benefit of former offenders trying to go straight.

The next step is to try out HOPE-style programs—not slavish imitations, but adaptations suited to local conditions—in as many jurisdictions as possible. It's far too soon to get locked into a single program design. Some of the new efforts should involve probation, others should deal with current parolees, still others should be tied to early-prison-release programs. Some should be run by judges, others by probation or parole departments. Some should focus on drug testing while others add position monitoring. California Congressman Adam Schiff is now preparing legislation to create a grant program for that purpose. If the programs work, they will more than pay for themselves by reducing prison headcounts, so the federal government shouldn't have to provide anything but guidance and seed money. The key is to get states committed to plowing prison savings into community-corrections programs that keep citizens safe and offenders out of the slammer.

Perhaps the biggest potential obstacle to the successful expansion of HOPE is impatience. Some years ago, Maryland tried a similar effort, called Break the Cycle, and started the program at full scale, with 17,000 probationers. There was no formal warning for offenders and no buy-in from judges. Random drug testing alone reduced drug use, but the sanctions part of the system never worked. When a probationer who had seventy-two violations but had never been sanctioned killed a cop, the program crashed and burned.

So Alm has two words of advice for other judges who want to imitate HOPE: "Start small!" It isn't hard to expand a successful program. What's hard is fixing a program once it's gotten off to an unsuccessful start and its threats have lost credibility among offenders. We all want to get up to speed, but you need to learn to walk before you start to run. WM

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