

Federal PROBATION

*a journal of correctional
philosophy and practice*

Volume 71 Number 3

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Published by the Administrative Office of the United States Courts www.uscourts.gov
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Sex Offender Residence Restrictions: Sensible Crime Policy or Flawed Logic?

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SEXUAL VIOLENCE is a social problem that inspires immense fear and wrath in our society. As such, public policies designed to monitor and restrict sex offenders are becoming increasingly popular in the United States. Since 1994, the Jacob Wetterling Act has required convicted sex offenders to register their addresses with law enforcement agents to facilitate better tracking and monitoring of these particular criminals. Megan's Law, enacted in 1996, modified the Jacob Wetterling Act by allowing registry information to be disclosed to the public. These laws were the initial stepping stones and evolved from registration to notification and now include housing restrictions. As a result of this progression, at least 22 states and hundreds of local municipalities in the U.S. have passed laws prohibiting sex offenders from living within close proximity (usually 1,000 to 2,500 feet) to schools, parks, playgrounds, day care centers, and other places where children congregate (National Conference of State Legislatures, 2006; Nieto & Jung, 2006).

The effectiveness of residence restrictions policies on sex crime prevention is largely unknown because empirical investigations of this topic are virtually absent in the literature. While there is wide consensus on the need for improved community safety from sex offenders, there is considerable debate as to whether current criminal justice responses intended to reduce sexual offending are successful (Edwards & Hensley, 2001; Levenson, 2003; Levenson & D'Amora, 2007; Petersilia, 2003; Prentky, 1996; Welchans, 2005; Zgoba, 2004). Hampering the ability of stakeholders to make informed decisions is the complete lack of empirical data on the effects of residence restrictions on rates of sexual offending and recidivism. Yet, sex offender housing laws have enjoyed overwhelming support as they have swept across the United States.

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Twenty-two states now have laws restricting where sex offenders can live, with 1,000 to 2,500-foot exclusionary zones being most common (National Conference of State Legislatures, 2006; Nieto & Jung, 2006). Since a series of highly publicized murders of several young children by convicted sex offenders around the country in 2005, hundreds of cities and towns nationwide have also passed local ordinances, often increasing restricted zones to 2,500 feet. Some of these regulations have allowed a “grandfather clause” for sex offenders who established residency prior to the passage of the law, and some (but not all) waive restrictions for juvenile or statutory offenders. Some localities have made it a crime for landlords to rent to sex offenders, making it more difficult for them to secure rental properties.

When the constitutionality of residence restrictions has been challenged, these laws have generally been upheld (*State v. Seering*, 2005; *Doe v. Miller*, 2005), and the U.S. Supreme Court has declined to rule on the issue. However, the legal status of such laws has not been firmly and consistently established. A Georgia law banning sex offenders from living or working within 1,000 feet of school bus stops (with no grandfather clause) has been granted class action status and a temporary injunction preventing enforcement of the law is in effect (Tewksbury, in press). A judge in California ruled after the overwhelming recent passage of Proposition 83, a comprehensive bill requiring sex offenders to live 2,000 feet from a school or park, that the law could not be retroactive. Two judges in New Jersey have declared township ordinances unconstitutional because they violated the state’s “Megan’s Law,” which prevents sex offender registration status from being used to deny housing or accommodations (*Elwell v. Lower Township*, 2006; *G.H. v. Galloway Township*, 2007). A Kentucky judge ruled that retroactive housing laws applied to those who established residences before the law took effect violate ex post facto protections (*Commonwealth v. Baker, et al.*, 2007). He opined that residence restrictions are clearly punitive and that to argue otherwise is intellectually dishonest. He added that such laws are “minimal at best and completely illusory at worst” (p. 26) and that they “appear to be little more than a political placebo, offering false comfort to pacify the public’s fear” (p. 27).

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Effects on Recidivism

No research has yet been conducted to measure the efficacy of existing residence laws, but one study investigated the potential for sex offender residence restrictions to prevent repeat sex crimes (Minnesota Department of Corrections, 2007). Though no statewide residence law exists in Minnesota, researchers analyzed the patterns of 224 sex offenders released from Minnesota correctional facilities who sexually recidivated between 1990 and 2005. The results showed that not one of the 224 cases likely would have been deterred by residence restrictions. A minority of the 224 offenders initiated contact with their victims in public places. Instead, nearly two-thirds victimized family members or gained access to their victims through another adult, such as a spouse, girlfriend, co-worker, friend, or acquaintance. Only 27 offenders established contact with their victims within one mile of their residence at the time of the offense. Of the 16 juvenile victims with whom contact was established within one mile of the offender’s home, none of these relationships were cultivated near a school, park or playground.

These results indicated that the prevailing factor in sexual recidivism is not residential proximity but rather social or relationship proximity. Even when offenders established direct contact with unknown victims, they were unlikely to do so close to where they lived. Based on these findings, the authors concluded that the potential deterrent effects of a residence restriction law would likely be “marginal” at best because the types of offenses it is designed to prevent are exceptionally rare (Minnesota Department of Corrections, 2007).

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The Relationship between Proximity and Recidivism

In an Arkansas study of 170 sex offenders, it was found that 48 percent of child molesters lived

within 1,000 feet of a school, day care center, or park, compared with 26 percent of perpetrators convicted of sex crimes against adults (Walker, Golden, & VanHouten, 2001). Citing routine activities theory, the authors speculated that child molesters might be motivated to purposely live within close access to potential victims. The study did not track recidivism, however, and did not establish that proximity to schools was correlated with reoffending. In fact, the factors contributing to residence selection could not be clearly identified. Other scholars have argued that sex offenders' housing arrangements are most strongly determined by economic conditions, not because they seek to live near potential victims (Tewksbury & Mustaine, 2006). Rapists who target adult victims have been found to often commit sex crimes within a short radius from where they live (Minnesota Department of Corrections, 2007; Warren, Reboussin, Hazelwood, Cummings, Gibbs, & Trumbetta, 1998).

In Minnesota, an earlier study was undertaken to determine whether residential proximity to schools and parks played a role in recidivism (Minnesota Department of Corrections, 2003). Researchers tracked 329 "level three" sex offenders (those considered to be at highest risk for reoffense) who were released from prison between 1997 and 1999. By March 2002, thirteen (4 percent) of those high-risk offenders had been rearrested for a new sex crime. The circumstances of each recidivism case were then scrutinized to determine whether the offense was related to the offender's residential proximity to a school or park. None of the new crimes occurred on the grounds of a school or was seemingly related to a sex offender living within close proximity to a school. Two of the offenses did take place near parks, but in both cases, the park areas were several miles away from the offenders' homes. The authors concluded that residential proximity to schools and parks appeared to be unrelated to sex offense recidivism, and advised that blanket policies restricting where sex offenders can live are unlikely to benefit community safety. They did suggest that restrictions might be an appropriate supervision strategy when assessing the risks and needs of each individual offender on a case-by-case basis.

In Colorado, 130 sex offenders on probation were tracked for 15 months in order to assess recidivism (Colorado Department of Public Safety, 2004). Fifteen (12 percent) were rearrested for new sex crimes, and all were non-contact offenses (peeping, voyeurism, or indecent exposure). The researchers mapped the sex offenders' proximity to schools and daycare centers, and found that recidivists were randomly located throughout the area and did not live closer to such venues than non-recidivists. They concluded that residence restrictions are unlikely to deter sex offenders from recommitting sex crimes, and that such policies should not be considered a feasible strategy for protecting children. In sum, no evidence exists to support the hypothesis that sex offenders who live within closer proximity to schools, parks, and playgrounds have an increased likelihood of sexually recidivating. There is also no research as yet that establishes residence restrictions as a viable strategy for reducing sex crimes, preventing recidivism, or protecting children.

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Criminal Re-entry, Housing Instability, and Recidivism

Convicted felons returning to communities are confronted with the (often quite daunting) challenge of locating and sustaining affordable housing (La Vigne, Visser, & Castro, 2004; Petersilia, 2003; Travis, 2005). Imprisoned offenders have been separated from their families and communities and consequently, after incarceration, they often find themselves without support systems, fiscal resources, housing, employment opportunities, and transportation. Obstacles to employment can create financial instability, and affordable lodging is often scarce, especially since laws prohibit felons from obtaining subsidized housing (Petersilia, 2003; Travis, 2005). The basic needs of offenders attempting to re-enter society have frequently been ignored, causing some scholars to warn of dire consequences of such neglect: "Housing is the linchpin that holds the reintegration process together. Without a stable residence, continuity in substance abuse and mental health treatment is compromised... in the end, a polity that does not concern itself with the housing needs of returning prisoners finds that it has done so at the expense of its own public safety" (Bradley, Oliver, Richardson, & Slayter, 2001, p. 7).

Housing instability and criminal recidivism are clearly linked, and numerous studies have documented the relationship. Residential instability was found to be a robust predictor of reoffending among Georgia criminals; the likelihood of re-arrest increased by 25 percent each time a parolee moved (Meredith, Speir, Johnson, & Hull, 2003). Released offenders temporarily residing in New York shelters were at increased risk for drug and alcohol abuse, unemployment, and absconding from probation or parole (Nelson, Deess, & Allen, 1999). Unstable living arrangements were identified as the strongest predictor of absconding in a sample of over 4,000 parolees in California (Williams, McShane, & Dolny, 2000), and in a national sample (n = 2,030), probationers who moved multiple times during their period of supervision were almost twice as likely to have had a disciplinary hearing (Schulenberg, 2007). Offenders themselves have identified housing as the most essential factor in their community adjustment and reintegration (La Vigne et al., 2004).

Housing and property ownership lead to the development of social bonds, which facilitate crime desistance through engagement in prosocial activities and self-perception of a non-deviant identity (Laub & Sampson, 2001). Community connections and healthy interpersonal relationships create social and psychological reinforcements to the offender's investment in conformity and crime deterrence. Employment and relationships, especially marriage, are reliable predictors of desistance from crime (Laub & Sampson, 2001). Lifestyle instability has been associated with both general and sexual recidivism (Andrews & Bonta, 2003; Hanson & Harris, 1998) and sex offenders with constructive support systems have fewer violations and new offenses than those who have negative or no support (Colorado Department of Public Safety, 2004). Thus, unstable housing and the ensuing disengagement from family and community appear to increase the likelihood of recidivism for criminal offenders.

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Housing Availability

Residence laws severely limit housing options for sex offenders, especially in major metropolitan areas (Carlson, 2005; Zandbergen & Hart, 2006). Using geographical information system (GIS) mapping technology in Orange County, Florida, researchers found that 95 percent of over 137,000 residences were located within 1,000 feet of schools, parks, daycare centers, or school bus stops, and virtually all housing was within 2,500 feet of such venues. The number of dwellings available for sex offenders outside 1,000-foot buffer zones was 4,233 and only 37 properties existed beyond 2,500-foot buffer zones. When considering the constraint categories individually, bus stops were by far the most restrictive (99.6 percent of properties were within 2,500 feet). Of course, these statistics represent all existing properties and it is likely that only a fraction are available for rent or purchase at any point in time (Zandbergen & Hart, 2006). Furthermore, in Colorado, researchers found that in densely populated areas, residences that are not within 1,000 feet of a school or childcare center are virtually nonexistent (Colorado Department of Public Safety, 2004).

When residence restrictions are enacted, the effects quickly become apparent. Within six months of the implementation of Iowa's 2,000-foot law, thousands of sex offenders became homeless or transient, making them more difficult to track and monitor. The number of registered sex offenders in Iowa who could not be located more than doubled, damaging the reliability and validity of the sex offender registry (Rood, 2006).

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Other Unintended Consequences of Residence Restrictions

A growing body of research indicates that sex offender registration and community notification can interfere in multiple ways with community re-entry and adjustment (Levenson & Cotter, 2005b; Levenson, D'Amora, & Hern, 2007b; Sample & Streveler, 2003; Tewksbury, 2004; Tewksbury, 2005; Tewksbury & Lees, 2006; 2007; Zevitz, 2006a; Zevitz & Farkas, 2000a). Sex offenders surveyed in Florida, Indiana, Connecticut, Wisconsin, Oklahoma, Kansas and Kentucky

reported adverse consequences such as unemployment, relationship loss, denial of housing, threats, harassment, physical assault, or property damage as a result of public disclosure (Levenson & Cotter, 2005b; Levenson et al., 2007b; Tewksbury, 2004; Tewksbury, 2005; Tewksbury & Lees, 2006; 2007; Tewksbury & Mustaine, 2007; Zevitz & Farkas, 2000b). The majority of sex offenders also reported psychological symptoms such as shame, embarrassment, depression, or hopelessness (Levenson & Cotter, 2005b; Levenson et al., 2007b; Tewksbury & Lees, 2007). Though vigilantism is rare, extreme cases such as arson, vandalism, and even murder of sex offenders have been documented (Sample & Streveler, 2003). Because public identification can lead to social exclusion and underemployment for sex offenders, many of them end up living in socially disorganized, economically deprived neighborhoods that have fewer resources for deterring crime and protecting residents (Mustaine, Tewksbury, & Stengel, 2006; Tewksbury & Mustaine, 2006; Zevitz, 2004; 2006b).

The impact of residence restrictions on sex offenders remains largely unknown. Only two studies have been published to date, and two others are forthcoming. Levenson and Cotter (2005a) investigated the impact of Florida's 1,000-foot statewide exclusionary zone on the reintegration of 135 sex offenders. They found that about one quarter of offenders were forced to move from a home that they owned or rented, or were unable to return home following their release from prison. Nearly half (44 percent) reported that they were unable to live with supportive family members due to zoning laws. More than half (57 percent) found it difficult to secure affordable housing, and 60 percent reported emotional distress as a result of housing restrictions. The authors suggested that residence restrictions have the potential to disrupt stability and contribute to psychosocial stressors which can lead to dynamic risk factors (Hanson & Harris, 1998) associated with sex offense recidivism.

Levenson and Cotter (2005a) collected their data in 2004, prior to the passage of scores of city ordinances in Florida that increased restricted zones to 2,500 feet (about one-half mile). Since that time, for example, 26 of the 30 independent cities in Broward County, FL (the greater Fort Lauderdale metropolitan area) have passed local sex offender zoning laws. A more recent study of 109 sex offenders in Broward found that 39 percent reported becoming homeless or living with someone else for two or more days, and 22 percent said they were forced to relocate more than two times (Levenson, in press). Almost half reported that a landlord refused to rent to them, and 13 percent said they had spent time in jail due to a residence violation. Age was inversely correlated with an increase in adverse consequences, and larger buffer zones were associated with transience, homelessness, and reduced employment opportunities.

In Oklahoma and Kansas, 62 percent of a sample of registered sex offenders has moved since registering, with 54 percent of those subject to a residence restriction law being forced to move (Tewksbury & Mustaine, 2007). When sex offenders move it is typically to neighborhoods with higher levels of social disorganization (Mustaine et al., 2006). In Indiana, 26 percent of sex offenders surveyed were unable to return to their homes after being released from prison, 37 percent were unable to live with family, and almost one-third reported that a landlord refused to rent to them or to renew a lease (Levenson & Hern, 2007). Many (38 percent) said that affordable housing was less accessible as a result of restrictions on where they could live, and that they were forced farther away from employment, social services, and mental health treatment. Young adults were particularly affected, and age was significantly inversely correlated with being unable to live with family and having difficulties securing affordable housing (Levenson & Hern, 2007).

Iowa prosecutors and victim advocates took proactive steps and publicly denounced residence restrictions, asserting that they create more problems than they solve (Iowa County Attorneys Association, 2006; NAESV, 2006). Prosecutors observed that the number of plea bargains dropped, causing some cases to go unadjudicated, leaving victims at risk and perpetrators without treatment or punishment (Iowa County Attorneys Association, 2006). Victim advocates cautioned that residential transience makes it more difficult to track the whereabouts of sex offenders and to supervise their activities.

Social stability and support increase the likelihood of successful reintegration for criminal

offenders, and public policies that create obstacles to community re-entry may compromise public safety (Petersilia, 2003). It has been found that sex offenders who had a positive support system had significantly lower recidivism and fewer rule violations than those who had negative or no support (Colorado Department of Public Safety, 2004). Sex offenders who maintained social bonds to communities through stable employment and family relationships had lower recidivism rates than those without jobs or significant others (Kruttschnitt, Uggen, & Shelton, 2000). It is well established that the stigma of felony conviction can impede the ability to engage in prosocial roles across domains such as employment, education, parenting, and property ownership (Tewksbury & Lees, 2007; Uggen, Manza, & Behrens, 2004). Uggen et al. (2004) underscored that self-concept, civic participation, and social resources are essential to an offender's identity as a conforming citizen and therefore to his or her desistance from crime. Policies such as residence restrictions can disrupt the stability of sex offenders and interfere with the potential to develop social bonds, secure employment, and engage in positive activities, raising concerns that such laws might be ultimately counter-productive (Levenson, 2006; Tewksbury & Lees, 2006).

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Premises Underlying Sex Offender Residence Policies

Sex offender policies have not often incorporated empirical data into their development and implementation (Levenson & D'Amora, 2007; Zgoba, 2004). Despite the lack of evidence linking sex offense recidivism with residential proximity to schools, zoning restrictions are widely popular, partly due to the (unsupported) popular belief that sex offenders have extraordinarily high recidivism rates (Levenson, 2006; Levenson, Brannon, Fortney, & Baker, 2007a; Quinn, Forsyth, & Mullen-Quinn, 2004; Sample & Bray, 2006). Extensive media attention to sexually motivated abductions of children creates a perception that violent sex crimes are on the rise, even in an era of consistently declining trends. According to child protection data, police reports, and victim surveys, sexual assault rates for both adults and children have dropped substantially since the early 1990s (Finkelhor & Jones, 2004; Maguire & Pastore, 2003).

Residence restrictions are intended to prevent recidivistic predatory offenses, yet in practice they target only a fraction of sex crimes. The assumption that children are at great risk posed by sex offenders lurking in schoolyards or playgrounds is not supported by data (Zgoba, 2004). Most sexually abused children are victimized by someone they know and trust, and only about 7 percent of sex crimes against minors are perpetrated by strangers (Bureau of Justice Statistics, 2002a). According to the vast majority of empirical research, most child sexual abuse is perpetrated by family members or close acquaintances. About 40 percent of sexual assaults take place in a victim's own home, and 20 percent take place in the home of a friend, neighbor or relative (Bureau of Justice Statistics, 1997).

Another assumption fueling sex offender laws is that rehabilitation is futile and that sex offenders cannot be cured. Of course, the goal of treatment for those diagnosed with disorders like pedophilia is not to "cure" them but to assist them to learn to change their thinking and control their behavior. While it is not realistic to expect any medical or mental health treatment to be 100 percent effective for all patients, research has shown that many sex offenders benefit from psychological interventions. A meta-analysis involving 9,454 sex offenders determined that treated offenders had a lower recidivism rate (10 percent) than untreated offenders (17 percent) (Hanson, Gordon, Harris, Marques, Murphy, Quinsey, & Seto, 2002). A separate study also found a 40 percent reduction in recidivism following treatment (Losel & Schmucker, 2005). Treatment failure has been correlated with increased recidivism (Hanson & Bussiere, 1998). Other studies have not shown significantly lower rates for offenders who participated in treatment programs (Hanson, Broom, & Stephenson, 2004; Marques, Wiederanders, Day, Nelson, & van Ommeren, 2005; Zgoba & Simon, 2005), but Marques et al. did conclude that those who successfully completed therapy goals reoffended less often than those who did not "get it" (p. 97).

Residential restriction laws are typically predicated on the perception that a vast proportion of

sex offenders will repeat their crimes. However, recidivism rates are much lower than commonly believed (Bureau of Justice Statistics, 2003; Hanson & Bussiere, 1998; Hanson & Morton-Bourgon, 2005; Sample & Bray, 2003). The Bureau of Justice Statistics found that of 9,691 sex offenders released from prison in 1994, 5.3 percent were rearrested for a new sex crime within a 3-year follow-up period. Other researchers found, in a series of international studies involving nearly 30,000 sex offenders, that 14 percent of all sex offenders, 13 percent of child molesters, and 20 percent of rapists were rearrested for a new sex crime within 4 to 6 years (Hanson & Bussiere, 1998; Hanson & Morton-Bourgon, 2005). Though official recidivism rates are likely to underestimate true crime rates, it is clear that the majority of sex offenders do not go on to be rearrested for new sex crimes and their rates are quite lower than non-sexual recidivism rates. Harris and Hanson (2004) concluded: "After 15 years, 73 percent of sexual offenders had not been charged with, or convicted of, another sexual offence. The sample was sufficiently large that very strong contradictory evidence is necessary to substantially change these recidivism estimates" (p. 17).

Another belief on which residential restriction laws are based is that sex offenders are more likely to reoffend than other types of criminals. In fact, sex offenders are rearrested for ongoing criminal behavior much less often than non-sex offenders (Hanson, Scott, & Steffy, 1995; Sample & Bray, 2003; 2006). The U.S. Department of Justice found much higher rates of recidivism for crimes such as burglary (74 percent), larceny (75 percent), auto theft (70 percent), and drunk driving (51 percent) (Bureau of Justice Statistics, 2002b). Other studies have demonstrated that sex offenders are rearrested at lower rates for their crime of choice than other types of criminals (Sample & Bray, 2003). In other words, robbers are more likely to be rearrested for robbery, burglars are more likely to repeat crimes of burglary, and those who have committed nonsexual assault are more likely to do so again (Sample & Bray, 2003). Although sex offenders may be more likely than other criminals to "specialize," offenders with no prior convictions for sexual assault were responsible for 87 percent of new sex crimes committed by released felons (Bureau of Justice Statistics, 2003). Since the majority of sex offenders do not go on to be rearrested for new sex crimes (Hanson & Bussiere, 1998; Hanson & Morton-Bourgon, 2005; Harris & Hanson, 2004), assessing risk and applying restrictive policies to those offenders most likely to pose a threat would be more efficient and becomes of paramount importance.

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Risk Assessment

Indisputably, some sex offenders are quite dangerous and pose a threat to reoffend. In reality, sex offenders demonstrate a wide range of offense patterns and re-offense risk. Follow-up studies have found that pedophiles who molest boys and rapists of adult women are the most likely sex offenders to recidivate (Harris & Hanson, 2004; Prentky, Lee, Knight, & Cerce, 1997). It should be noted that the majority of persons convicted of a sex crime are not diagnosed with pedophilia (Kingston, Firestone, Moulden, & Bradford, 2007; Maletzky & Steinhauser, 2002; Seto & Lalumière, 2001). Risk varies depending on the extent of sexual deviance, offender age, criminal history, and victim preferences (Hanson & Bussiere, 1998; Hanson & Morton-Bourgon, 2005; Harris & Hanson, 2004; Quinsey, Harris, Rice, & Cormier, 1998). Sex offenders with multiple arrests are more likely to reoffend than those who have committed only one sex crime (Hanson, 1997; Hanson & Bussiere, 1998; Hanson & Thornton, 1999). Those who comply with probation and treatment have lower reoffense rates than those who violate the conditions of their release (Hanson & Harris, 1998; Hanson & Morton-Bourgon, 2004). Sex offenders who target strangers are more dangerous than those with victims inside their own family (Hanson & Bussiere, 1998; Hanson & Thornton, 1999; Harris & Hanson, 2004). Sex offense recidivism appears to decline with age (Hanson, 2002), and the longer that offenders remain offense-free in the community, the less likely they are to re-offend sexually (Harris & Hanson, 2004).

Factors correlated with recidivism have been used to develop actuarial risk assessment instruments that estimate the probability of sexual reoffense based on the actual recidivism rates of other convicted sex offenders with similar characteristics (Epperson, Kaul, Huot, Hesselton, Alexander, & Goldman, 1999; Hanson, 1997; Hanson & Thornton, 1999; Quinsey et al., 1998).

Though they cannot predict with certainty that an individual offender will act in a specific way, risk assessment instruments estimate, with moderate accuracy, the likelihood of reoffending, and are therefore useful for screening offenders into relative risk categories (Barbaree, Seto, Langton, & Peacock, 2001; Hanson, 1997; Hanson & Thornton, 1999; Harris, Rice, Quinsey, Lalumiere, Boer, & Lang, 2003; Quinsey et al., 1998). These procedures are similar to the ways in which insurance companies assess risk and assign premiums, and how doctors evaluate a patient's risk for developing a medical illness. Similar methods are also used in making classification decisions in prisons and parole or release decisions. Risk assessment allows us to identify the sex offenders most likely to reoffend, and to apply the most intensive interventions to those who need the greatest level of supervision, treatment, and restriction. Unfortunately, most policy initiatives have not incorporated risk assessment strategies into their implementation, instead being applied broadly to all sex offenders.

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Summary

In sum, the empirical research on sex offender residence restrictions is extremely limited. Only one study (Minnesota Department of Corrections, 2007) has specifically examined the empirical relationship between residence restrictions and recidivism, and that study was prospective because no such law was in place. No true empirical evaluations of existing residence laws have been completed to date. There is a growing body of evidence, however, that residence restrictions create unintended consequences for sex offenders and communities. These adverse effects include: homelessness; transience; inaccessibility to social support, employment, and rehabilitative services; registry invalidity; and clustering of sex offenders in poor, rural, or socially disorganized neighborhoods. Residence laws are often predicated on erroneous assumptions of high recidivism rates and "stranger danger," and they have infrequently incorporated empirically derived risk assessment. As a result, the community reintegration of lower-risk, non-violent, and statutory offenders may be unnecessarily impeded. So, in the absence of evidence that residence restrictions are effective in achieving goals of improved community safety, their unintended effects may outweigh their benefits. Therefore, it is crucial to determine whether these laws are indeed efficacious methods for controlling sex offense recidivism and preventing sexual violence.

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Implications for Practice and Policy

The benefits of residence restrictions to community safety have yet to be empirically established. Residence restrictions and their consequences are apt to challenge the coping skills of many sex offenders when they face transience and instability as a result of these laws. Precarious living arrangements have the potential to exacerbate dynamic risk factors associated with reoffense, such as lifestyle instability, substance abuse, negative moods, and lack of social support (Hanson & Harris, 1998; 2001). Probation officers and community corrections officials should be cognizant of the stressors created by housing problems and be prepared to assist offenders with case management services. Officers should also collaborate closely with clinical treatment providers when possible in order to coordinate treatment and supervision plans that identify offense patterns, mitigate risk factors, and accommodate psychosocial needs. Attention to dynamic risk factors, which may be aggravated by negative environmental conditions, should be an integral part of ongoing assessment, management, and service planning.

Crime policies that interfere with successful re-entry are unlikely to be in the public's best interest. The stigma of felony conviction creates challenges for all criminal offenders, but in particular, registered sex offenders face tremendous discrimination even when they are behaving in a law-abiding and productive fashion (Levenson & Cotter, 2005b; Levenson et al., 2007b; Tewksbury, 2004; Tewksbury, 2005; Tewksbury & Lees, 2006; 2007; Zevitz & Farkas, 2000b). Sanctions that disrupt stability are contrary to what we might define as "best practice" according to decades of empirical research identifying factors associated with crime desistance (Laub &

Sampson, 2001; Maruna, 2001). Most prisoners seek shelter with family members after their release (Travis, 2005), but residence restrictions can eliminate many housing options for sex offenders. Prohibitions on where they can live can increase transience, disrupt stability and social support, and exacerbate the conditions correlated with reoffending (Andrews & Bonta, 2003; Hanson & Harris, 1998). By ostracizing, segregating, and stigmatizing criminal offenders, we leave them with few opportunities to conform to mainstream values and affiliate with law-abiding citizens (Braithwaite, 1989; Sherman, 1993; Uggen, Manza, & Behrens, 2004). As Maruna et al. pointed out, “if society is unwilling to take a chance on an individual who is trying to make an effort toward desistance, then these obstacles might lead to further recidivism” (Maruna, LeBel, Mitchell, & Naples, 2004, p. 2).

Politicians and neighborhood residents are unlikely to be sympathetic to the challenges these restrictions create for sex offenders. Some sex offenders do indeed pose a serious threat, and communities have a legitimate interest in protecting children from sexual abuse. From a public safety standpoint, however, it is more efficient to establish policies that do not inadvertently contribute, even indirectly, to the risk for reoffense or barriers to reintegration. Policymakers are encouraged to consider a range of available options for building safer communities and to endorse those that are most likely to achieve their stated goals without creating undue obstacles to offender re-entry. For instance, sex offender policies should incorporate empirically derived risk assessment and apply the most intensive and restrictive management strategies to high-risk offenders. Treatment should be part of any comprehensive strategy for preventing repeat sexual violence. Polygraph examination should be enlisted as a method for assessing the past patterns of sex offenders and verifying their compliance with supervision and treatment plans. Collaborative approaches such as containment models (English, Jones, Patrick, & Pasini-Hill, 2003), in which treatment providers, supervising officers, and polygraph examiners work together to manage the risk of registered sex offenders, should be emphasized as a paradigm for community protection.

Criminal justice policy should be grounded in empirical evidence, but sex offender policies in particular have not incorporated available research into their formation and implementation (Levenson & D'Amora, 2007; Zgoba, 2004). Social scientists and criminal justice professionals have a responsibility to assist lawmakers to respond effectively to the problem of sexual violence. It is crucial that sex offender legislation be informed by scientific data and designed to maximize the potential for community safety, while minimizing collateral consequences for offenders and communities.

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A Protocol for Comprehensive Hostage Negotiation Training Within Correctional Institutions ¹

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THERE ARE MANY repercussions when a hostage-taking incident takes place, even if it reaches a successful conclusion. Regardless of a peaceful outcome, there undoubtedly is residual trauma to the victim(s)—if not physical, certainly emotional/mental. The hostage-taker is taking chances with his/her own life because impaired judgment or the wrong decision overall could result in his/ her own death. Consequently it is essential to have a well-trained negotiator, carefully attuned to the “curves” he/she encounters when dealing with a hostage-taker.

Add to the explosive nature of a hostagetaking incident by having it occur in a correctional institution, and the risks/pitfalls are seriously multiplied. It is a volatile environment at best. Inmates often have a “What do I have to lose?” mentality and need little excuse to act out. Regardless of how well-run the facility, a hostage-taking incident can easily initiate a domino effect, threatening the lives and welfare of inmates and staff, as well as property.

One of the most interesting dimensions of a hostage-taking incident occurring in a correctional facility is the fact that the hostage taker (HT)—whether an inmate or staff—is often very knowledgeable about the environment and routine. In other words, it is not like an incident that has erupted in an unfamiliar locale. This makes the element of surprise less effective, as the hostage-taker will be more edgy and reactive to any unexpected movement or event.

Comprehensive training of negotiating staff is key. There is little room for error or for heated exchanges. Emotions need to be kept cool and the strategies employed should be as effective and thorough as humanly possible.

Enter what is proving to be the extremely effective utilization of specially trained actors performing the role of hostage-taker during the negotiator training process. Carefully versed in

personality disorders and skillfully adapting the role, the actors are then able to provide instant feedback to the negotiator trainees in how effectively they are communicating so that the incident reaches a successful and peaceful conclusion. (A successful conclusion is one that ends with no or minimal injury or loss of life or property.)

This methodology has proven to be successful beyond even our most optimistic expectations. Training negotiators for their crucial role of resolving a hostage-taking incident has been significantly enhanced by the use of trained actors taking the role of the HTs with personality disorders.

The scenario usually plays out in its entirety and is rarely interrupted by others, further enhancing the effect of simulating a true incident. The actor significantly contributes to the evaluation process by reacting in character and giving feedback upon conclusion of the event. Of course it is the instructor/ supervisor who ultimately evaluates the participants, but for anyone to interrupt or attempt to direct the scenario while it's taking place would take away from the element of realism that is crucial to its effectiveness.

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A Case Study of the Complexity of Hostage Negotiation

Inmate Ronald Smith—a 28-year-old man diagnosed with a delusional disorder on *Diagnostics and Statistical Manual-IV* Axis I and Personality Disorder Not Otherwise Specified (Sadistic Personality Disorder) on Axis II—has a long history of violence against women.

His mental health records note that he has exhibited behavior that is synonymous with Erotomania. The records also note that when Mr. Smith is spurned by a woman whom he attempts to engage in conversation, he becomes enraged and acts out in a violent and sadistic manner. His criminal history notes several instances where he has kidnapped women who spurned his attempts to engage them.

Inmate Smith is currently not taking any psychotropic medication but is involved in psychotherapy twice a week.

Mr. Smith's regular housing unit officer (a male) is currently on vacation. During the past six months, he has had no problems with correctional staff or any of the other male inmates housed in his unit. However, a female housing unit officer has taken over the unit while the regular officer is on vacation.

From the moment the female officer begins to work in his housing unit, Smith attempts to engage her in conversation. As time goes on, he passes her "love notes" and continues to verbally engage her.

The female officer maintains a very professional demeanor with Inmate Smith and instructs him to stop passing her "love notes" and to stop the unwanted sexual conversation. Smith persists to the point where the female officer lodges a disciplinary complaint against him.

When Inmate Smith is notified of the complaint, he explains to the investigating officer that he loves the officer and she loves him. Upon hearing this, correctional staff transfers him to a housing unit with enhanced supervision.

During a visit to the inmate clinic for his regularly scheduled psychotherapy session, Smith sees the female officer. He calls out to her and says he would like to talk to her in private. Publicly responding in front of several others—including fellow inmates—she replies: "You need to stop kidding yourself and go about your business." She then walks away.

The inmates present laugh at Smith. He becomes enraged, runs down the hallway, violently grabs the female officer, and throws her against a wall. He grabs her again and places her in a headlock, producing a razor blade he had hidden in his mouth. He uses it to make a one-inch

incision across her right cheek, telling her: “All you whores are alike.”

Maintaining his hold on the officer, Smith backs into a small windowless office just off the hallway and tells the male civilian staff member there to “get out”—a demand which the staff member obeys—leaving him and the officer alone in the room.

When security staff respond, Inmate Smith turns the lights out in the closed office and says: “I’m not going to kill her unless you try to come in or throw gas in here. If you do that, I’ll cut her from ear to ear.”

Security staff call in to be sure the female officer is all right. Smith responds: “Well she got a cut on her face and the bitch is bleeding but she’s okay.” They then request that he come out and talk to them, to which Smith replies: “No. Me and the young lady have some talking to do and as long as she don’t get stupid with me, I won’t carve her face up.”

Shortly thereafter, the Hostage Negotiation Unit (HNU) arrives on the scene. James Thomas is the only officer available who has been trained to act as hostage negotiator. He is the newest member of the team and has never been involved in a real hostage incident.

Officer Thomas has received 32 hours of classroom training and role play with other uniformed staff. Given the complexity of this hostage situation and the risk to the female officer taken hostage, there is a clear need to ask whether he is adequately trained to perform this difficult negotiation.

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Garden Variety Hostage Negotiator Training

Most police and correctional organizations have an in-house academy with staff specifically trained to provide classroom instruction on a very wide variety of topics germane to law enforcement. The lion’s share of this instruction is in the classroom. A small portion is allocated to in-class role-play using other law enforcement officers who do not have any specialized training in acting.

Overall, classroom instruction provides law enforcement officers with basic to specific information on a given topic and any additional training usually takes place on the job. This training is sufficient for the day-to-day duties of law enforcement and correctional operations. For example, police correction administration, supervision, police patrol function, investigation, management, correctional operation, and court procedure are well-suited for on-the-job training. These areas can be safely approached during on-the-job training with little threat to the staff member or the operation of the command.

Hostage negotiation training operates—for the most part—in the same manner. During the in-class training, staff learn the theory and practice of the various aspects of hostage negotiation. Usually after the theory and practice aspects of the training, there will be a series of role plays during which uniformed staff will play the roll of hostage taker and hostage negotiator. There are two problems with these scenarios:

First, uniformed law enforcement are not professional actors and role-play activities are often overly outlandish or campy. In and of itself, this reduces the usefulness of the role play.

Second, law enforcement officers are programmed to win. Accordingly, both the hostage taker and the hostage negotiator—who, in spite of their assignments in the role plays, are still law enforcement officers first and foremost—will be trying to outdo one another, instead of using the natural give and take between hostage taker and negotiator as part of the exchange.

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A Protocol for Comprehensive Hostage Negotiation Training

To address deficiencies of the “garden variety hostage negotiation training” that exists in many cities, states, and municipalities, I propose that a comprehensive hostage negotiation training practicum be employed to better prepare the negotiator and serve the law enforcement agency. This proposed training protocol would consist of:

- Pre-training Day (Friday before the Beginning of the Training Protocol: 8 Hours)
- Abnormal Psychology for Law Enforcement and Emergency Service Personnel (First Week/40 Hours)
- Applied Issues in Criminal Psychology and Clinical Criminology (Second Week/40 Hours)
- Hostage Negotiation Incident Practicum with Actors/Trainers (Third Week/40 Hours)
- Post-Training Seminar: The Uniformed Hostage Taker (8 Hours)

[Table 1](#) outlines the depth and breadth of this program.

Comprehensive training and continuous dynamics skills maintenance—that is, the emotional skills needed for effective hostage negotiation—assist the hostage negotiator in staying up-to-date on both theoretical concepts and pragmatic skills. The ongoing addition of the current findings and techniques on effective hostage negotiation to core training concepts/methods not only assures increased success; it also safeguards the negotiator against using outdated approaches that may be inadequate for nuances in the hostage situation, or worse, that may put the negotiator at increased risk.

The benefits here are obvious. One must never take for granted that every scenario will have the same outcome if “followed to the letter.” There must be an ongoing openness and willingness of all participants to be in the moment when real-life situations demand their concentration and negotiation skills. Skills maintenance will help them do this.

Accordingly, it is up to the administration and training team to add current concepts and methods to the existing training program(s). Since both the hostage situation and the methods used by the hostage takers are likely to change over time, it is essential to keep the negotiators informed and prepared.

Pre-training Day (The Friday Before the Training Protocol Begins): The Friday prior to the start of the three-week training protocol will involve two major activities:

1. First, a pre-training meeting where the negotiators-in-training meet the senior negotiators. The goal is to build a sense of esprit de corps, in order to facilitate communication and non-verbal learning.
2. Second, a review of the requirements for the next three weeks of training, especially the case law (*Downs v. The United States*) that is the basis of hostage negotiating.

Abnormal Psychology for Law Enforcement & Emergency Service Personnel (First Week):

This advanced in-service course provides a practical and comprehensive examination of personality disorders and mental illness relevant to the work of the hostage negotiator. The goal is to enable the hostage negotiator to recognize the various personality disorders and mental illnesses and how to best negotiate with the various typologies.

Negotiator trainees will become familiar with the differing diagnostic criteria, symptoms and features of specific mental disorders, as well as with verbal and nonverbal strategies for hostage negotiation across the personality disorders and forms of mental illness found among ill inmates.

Applied Issues in Criminal Psychology & Clinical Criminology (Second Week): This advanced in-service course will provide the student with practice-based, applied instruction and training—as opposed to theory—on hostage negotiation.

The basic concept and overall goal at this point is to utilize the more theoretical and diagnostic material covered during the first week of this training and to actually apply this new knowledge in practice situations within a controlled, classroom setting.

Hardware (e.g., the situation board—a written outline of pertinent information) and technology (the digital “throw phone”—a direct phone line to the hostage) will be utilized in class and negotiator trainees will learn how to set up and use them both.

Hostage Negotiation Incident Practicum with Actors/Trainers (Third Week): This advanced in-service practicum will use actors/trainers to give the negotiator trainee simulated real-time incidents to practice hostage negotiation skills in close-to-actual conditions. The training will take place within various areas of a correctional institution (e.g., cell block, clinic, law library, mess hall, etc.). The goal is to allow negotiator trainees to experience a “real, live” hostage situation with actors who are trained specifically to interact appropriately in the staged circumstances.

While it is impossible to train a negotiator in thoroughly predictable certainty as to how things will evolve during a hostage crisis, this method will be as real as it gets. Debriefing (review of the events and actions) will take place after each major incident has ended.

Post-Training Seminar: The Uniformed Hostage Taker: Clearly, the most difficult hostage situations to negotiate are those in which frustrated uniformed members of service become the hostage takers. They know the tactical protocol and facility layouts, they have weapons, know the strengths and weaknesses of their fellow staff members, and have strong interpersonal connections—both positive and negative— with the very same peers with whom they are negotiating. This is radically different from the non-staff hostage taker, to whom the negotiator is a stranger, because here negotiator and hostage taker are peers. In effect, the uniformed member of service has the upper hand when negotiating as a hostage taker.

The challenge for the hostage negotiator is to suspend his or her own personal feelings and to negotiate without personal feeling for the hostage taker, who may be known to him or her.

Cross Training for Hostage Negotiation and Tactical Teams: Both the Tactical Team and the Hostage Negotiation Team are equally important during a hostage-taking incident. (Depending on the agency, the Tactical Team may be known as CERT—Correctional Emergency Response Team; ERU—Emergency Response Unit; SWAT—Special Weapons and Tactics, or a similar name.)

This concept is paramount to the efficient and effective functioning of both the Hostage and Tactical Teams and has been clearly addressed by Mullins & McMains (2006), who state:

It is helpful to think of the tactical team and negotiating team as two legs of a crisis response unit (the third leg being the command element). Negotiators and tactical teams do not operate separately. It requires both to resolve a crisis situation. Negotiators like to think they can resolve a crisis incident without the use or assistance of the tactical element. Likewise, tactical officers like to think they can resolve an incident without the use of negotiators. This type of thinking is linear, in that it is all or nothing. A crisis situation can be resolved through negotiations or through the application of force.

The reality is that the successful resolution of a crisis situation requires the parallel application of resources. The tactical team and negotiation team have to work together, applying their assets from both sides of the actor, “squeezing him in a vise” between the two units (page 508).

The failure of the tactical and hostage teams to completely and thoroughly understand each other and their modes of operation may result in a conflict or reduced effectiveness. Vecchi (2002) notes:

...conflict between law enforcement tactical teams, such as special weapons and tactics (SWAT) and crisis negotiation teams (CNT), occurs seemingly as a result of competing paradigms on how best to handle hostage situations (page 1).

One very effective vehicle for reducing conflict between the hostage and tactical teams is cross-training, which allows both teams to gain intimate knowledge of what the other does. This will reduce the conflict through understanding.

Prior to cross-training, new members of each team need to be trained and highly proficient in their area of expertise. Once they have gained proficiency in their area of specialization, cross-training should begin.

Because of the unpredictable nature of a hostage-taking scenario, it is likely that teams will not always have the same staff member configuration that was present during training sessions. This is one of the main reasons why cross-training is a vital component of the process; it gives participants the opportunity to experience and expand new avenues they may not have previously considered. In the long run, this can only enhance the learning experience for all and the proper supervision of an actual hostage-taking incident can help each team member evolve into a more well-rounded negotiator with an improved technique and approach.

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Scenario-Based Improvisation Using Specially-Trained Professional Actors

The most significant and pertinent aspect of this training protocol is the use of professional actors who have trained specifically in the art/practice/technique of hostage negotiation and the dynamics of correctional institutions.

Because the actors have been trained in the nuts and bolts of hostage negotiation as well as in the behavior of inmates incarcerated in a correctional institution, they can determine what makes for an effective response from the negotiators during a roleplay practicum.

The actors are trained on several different levels:

First, via classroom instruction: The actors receive a scenario from which they will then improvise during the role-play sessions.

Second, using the *Diagnostic and Statistical Manual for Mental Disorders (DSM)*, the actors are instructed and coached on the mental disorder of the hostage taker. The instruction and coaching are conducted by a licensed mental health professional.

Third, the actor receives a detailed overview of the key aspects of hostage negotiation, with a strong emphasis on the relationship between the hostage taker and hostage negotiator. This enables the actor to help evaluate—during an improvised role-play practicum—when the negotiator is being effective.

Further, the actor is trained to respond to effective negotiating on the part of the hostage negotiator.

The use of improvisation—the act of making something up as it is performed—is based on a scenario, as opposed to a detailed script. This is paramount to the effective training of the negotiator, because the actor (the hostage taker) is reacting in real time to the negotiator's interventions. When the negotiation is not effective, responses (or lack thereof) from the HT will reflect this, giving the trainee a good approximation of the uncertainties and stresses of the actual hostage situation. The hostage negotiator thus experiences the effects of his or her interaction with the HT and can modify the negotiation technique to garner more cooperation from the hostage taker.

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The Benefits of Utilizing Actors

Utilizing professional actors in these scenarios ensures the best replication of a hostage situation. The exchange becomes more similar to what negotiators are likely to experience in hostage

situations—one-on-one with a troubled hostage-taking stranger who can be profiled but is likely to be highly unpredictable.

In an article on the role of actors in police work, Parascondola (2004) interviewed Dr. Raymond Pitt, Professor Emeritus at John Jay and training director for the program. Dr. Pitt explained how the actors approach their roles and that researching the behaviors of mentally stressed hostage-takers helps the scenarios take on a reality that allows law enforcement personnel to best address these often volatile situations.

Pitt believes that the skilled actor is an essential part of this training process and that if errors in judgment are made, this is the time to make them—and not when encountering a true hostage-taking incident. *Most important, the hostage-taker wants to be validated on some level, to be taken seriously, and treated with respect.* It is with this in mind and a thorough understanding of his/her potential reactions and behaviors through the role play concept that this program greatly reduces the risk of casualties during a hostage-taking incident.

The medical profession has been enlisting the aid of actors to help train doctors for about 20 years—a practice that has become so effective that now 95 percent of accredited medical schools have developed similar “standardized patient education” programs.

By having the opportunity to examine the complete person—the complex individual with mental/emotional issues who is likely at the end of his rope, feeling so desperate that he has taken hostages—the negotiator is able to feel out the personality/behaviors and full range of responses he or she might expect from a “real” hostage taker.

An actor who has become completely familiarized with the behaviors of such a complex individual is of greater benefit in the training experience than a peer operating with a very different mind and skill set, since law enforcement personnel are programmed more to be in control at all times and are either more rigid or more over-the-top in negotiating scenarios than the true hostage taker is likely to be.

For example, the newly-created \$4 million Clinical Skills Center (CSC) at Stony Brook University Medical Center was created to provide “real time, interactive clinical experiences to facilitate the development and measurement of clinical skills and professional competencies for students and practitioners of the healing arts.” It is a 6,000 square foot state-of-the-art medical facility that is also equipped with a computer station in each of its 10 examining rooms, through which the actor/patient critiques a student’s performance. The rooms also contain an audio/visual monitoring system for postexam review and analysis.

Richard N. Fine, M.D., Dean of Stony Brook University School of Medicine calls this protocol the best way for medical students to gain valuable insight into the importance of patient-centered care. And the program’s coordinator Pat Bley believes one of the greatest advantages of the program is the likelihood of receiving “immediate feedback from actors ... evaluat[ing] them on things that patients look for in their doctor, such as good eye contact, empathy, care taken during physical examination, and the ability to answer questions.”

As it has similarly benefited the medical community, utilizing actors in training hostage negotiators will also elicit an immediate result but variable response from the actor who puts himself in the shoes of a disturbed hostage taker. In addition, the actor can lucidly provide a critique of the negotiator and enhance the training experience overall.

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Continuous Dynamic Skills Maintenance

Hostage negotiation is a skill. After initial comprehensive hostage negotiation training, negotiators should receive bi-weekly (16-hour) training, as outlined in [Illustration 1](#) , so that both junior and senior negotiators can build, enhance, and sharpen their skills.

The first half of this bi-weekly ongoing training should involve updates on practical aspects of hostage negotiation, during which selected topics can be discussed in a relaxed classroom environment. The second half should involve live scenario-based improvisation (role play), using specially trained professional actors within an actual correctional institution.

The concept of Continuous Dynamic Skills maintenance is very similar to that of professional athletes, who train and practice regularly and continuously to hone their skills. Similarly, negotiators need to practice their skills in live role-play scenarios with professional actors who have been specially trained to act as hostage-takers.

Different drugs, reactions to those drugs— whether they be prescribed, recreational or a combination of both—other forms of impairment or intoxication, and so on, all play an integral part when dealing with the damaged personality. The only way one can hope to keep up with the complicated mind and behaviors of the hostage taker is to continue to play out scenarios that include as many combinations of elements as one can fathom.

While it would be impossible to thoroughly portray every single complicated event that may occur, at least the participating staff and negotiators can be trained as well as possible to think on their feet and function cohesively in the most exhausting of circumstances.

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Constant Practice of Negotiation Skills

By virtue of its emotional components and all the personalities involved, hostage-taking incidents are simply not an environment in which the negotiator and his/her staff should be cavalier or stubborn or practice rote behaviors. No two incidents will ever be exactly alike and although similar characteristics may be included and certain techniques considered “tried and true,” all staff members must be ready, willing, and able to evolve and “stay teachable.” This certainly helps when addressing the most unpredictable, combustible hostage-taking incidents and allows for fluidity of all the staff utilized to end them.

As a relatively new technique, hostage negotiating is an art that continues to evolve. Training sessions and seminars exploring “the fine art of negotiating” are necessary to keep staff fresh and help them examine the behaviors exhibited by hostage-takers, always keeping the primary mission of no loss of life as its highest priority.

With a regular comprehensive training protocol in place, junior negotiators expeditiously become seasoned and accomplished negotiators. A key outcome is the development of strong and effective communication skills that also prove helpful in non-hostage correctional situations involving both staff and inmates, as the negotiator learns to be open and outgrow rigidity.

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Utilization of Negotiation Skills in Non-Hostage Inmate/Prisoner-Related Correctional Situations

The deinstitutionalization movement has left many mentally ill persons without treatment and housing (The Sentencing Project, 2002).

Due to their pathology, many of these mentally ill people have turned to crime as a means of survival, leading to increased numbers being arrested and incarcerated within jails and prisons throughout the United States (The Correctional Association of New York, 2004; Frontline, 2005; Human Rights Watch, 2003; Frontline, 2005; CBS News, 2004; Butterfield, 2003; and Commission on Safety and Abuse, 2006).

Clearly, because of the deinstitutionalization of patients of the state mental hospitals throughout various areas of the United States, correctional institutions in many areas have now become their primary means of both housing and treatment. As the research documents, some are at risk for

engaging in hostage taking, as outlined below.

Based on testimony presented at the U.S. House Subcommittee on Crime (Sharfstein, 2000) and reported by Nicholls et al. (200x):

In 1999 the Department of Justice reported that as much as 16 percent of the population of state jails and prisons, that is more than 250,000 individuals, suffer from severe mental illnesses. With 3,500 and 2,800 mentally ill inmates respectively, the Los Angeles County jail and New York Riker's Island jail are currently the two largest psychiatric inpatient treatment facilities in the country (p 13).

One of the byproducts of their psychopathology is inappropriate and sometimes violent behavior when under stress.

There are many instances when an inmate may become "stressed," including—but not limited to—the death or serious injury of a loved one, being placed in a Special Housing Unit (such as administrative or punitive segregation, medical or mental health unit, medical isolation, detoxification unit, or the communicable disease unit), being a first-time offender, getting disturbing/bad information from home, or being placed in a Close Custody Housing Unit from a General Population Housing Unit.

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Utilization of Negotiation Skills in Non-Hostage Staff-Related Correctional Situations

There are also many sources of job-related stressors in correctional institutions. Poor supervision, absence of career development opportunities, excessive paperwork, poor institutional policy, unfavorable court decisions, role conflict, varying shift work, crisis situations, extraordinary responsibilities, peer/supervisory incompetence, and constant exposure to danger are just some of the stressors that correctional staff members encounter regularly and are likely to surface at some point as a form of behavioral pathology. Such behaviors can manifest as:

- Spousal or domestic partner abuse
- Extreme bouts of anxiety, anger, depression, and/or low self-esteem
- Disciplinary problems on the job
- Medical problems
- Suicide risk
- Threats to staff members and/or inmates

As trained crisis interviewers, members of the Hostage Negotiation Unit (HNU) can effectively intervene with such behavioral emergencies as well as other staff-related issues that are not hostage-related. Techniques at their disposal include:

- *Ventilation*: Allowing the subject to freely discuss and explain thoughts and behaviors, as well as what provokes negative attitudes/reactions.
- *Addressing anger*: Anger can be an understandable reaction in many of the above situations, but the issue becomes how to address the anger; HNU members can assist in helping subjects process the anger before (further) situations and volatility arise
- *Talking to the inmates*: Interacting on a humane one-to-one level can go a long way toward gaining the respect and confidence of inmates as well as fellow staff members.
- *Listening to the inmate*: Everyone needs to feel accepted, understood and validated—even when belligerence or aloofness seem to contradict such need(s); something as simple as listening to an inmate or staff member share a passing concern or frustration regarding an issue or daily routine can prevent the build-up of issues leading to a volatile situation.
- *Generating and conveying empathy*: By active listening and reinforcing the validity of the staff member's issues, problems and reactions to stressors, HNU members can facilitate a more favorable and less hostile outcome to a potentially volatile situation.
- *The use of suggestion*: Especially when the subject is resistant to direction, the negotiating HNU member may suggest certain approaches or behaviors to a problem presented by the

subject, or plant ideas using phraseology such as “Well what I [would] do in that situation...”

- *Advice and guidance*: Sometimes advice and guidance are needed and welcome because the subject cannot focus on the issues in an objective manner. He/she may have lacked reliable direction from authority/parental figures and may be at a loss as to how to process the matter at hand. In such cases, gentle advice/guidance from the HNU negotiating member can be helpful.
- *Reassurance*: When in doubt about the direction of one’s life, it is helpful to have feedback from others that one is moving in the right direction.
- *Explicit direction*: Some people are unable to take action without direct and explicit instructions as to how to proceed. This approach will prove especially helpful with this personality type.
- *Controlling affects and impulses*: Certainly a subject who is prone to extreme behaviors and reactions needs to get a handle on knee-jerk responses to stressful situations. When the subject is clearly beginning to exhibit negative behaviors as a response to stress, helping him/her contradict effects or reactions with positive/nondestructive actions is one of the best moves toward behavioral modification. For example, someone is stressed and tends to move toward alcohol abuse and volatility. In the world outside the prison, dinner and a movie or a workout and a cup of coffee aided by socialization can change the dynamic drastically. Certainly if the subject is alcoholic or drug addicted, immediately going to a 12-step meeting or therapy session can work wonders in countering an attraction towards negative behavior.
- *Reinforcement of desirable behaviors*: Behavioral modification is a huge part of any effort to reverse negative reactions to stressors. The concept of being rewarded or rewarding oneself when demonstrating desirable behavior was one of the concepts produced in the “Pavlov’s Dog” experiment (a dog was rewarded with treats for certain desired behaviors to the point that he would salivate at the completion of the desired behavior because he knew a treat was imminent). The reinforcement can be a continuation of controlling affects and impulses, the end result being a “reward” of sorts for having learned to control the negative impulses or behaviors.
- *Cognitive restructuring*: If a person is truly trying to work through negative behaviors and not react to stressors in a negative or destructive manner, he/she will try to quash the negativity at first inkling. So at first recognition of a tendency towards negativity, the enlightened subject will be open to both suggestion and self-instruction to alter a potentially negative or self-destructive behavior. That is “turning the negative to a positive.” This can prove to be an almost immeasurably empowering experience for any individual, but needs constant work and positive reinforcement in order for it to be successful to the point that it becomes effortless. It is most helpful when the subject is highly committed to evolving.

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Stress Inoculation via Exposure to a Simulated Stressor

The main purpose of this article is to outline a protocol for training hostage negotiators who work primarily in secure correctional facilities (e.g., jails, prisons, detention centers), but it seems generalizable to secure mental health institutions as well as to police and other law enforcement agencies.

The secondary purpose is to demonstrate the value of using specially-trained professional actors to both simulate the actual hostage situation and inoculate the negotiator trainees against stress.

The practicum aspect of simulated hostage taking as described in this article allows the trainee to get as close as possible to negotiating a real hostage situation. The practicums are based on scenarios but are otherwise unscripted. Further, the hostage takers are professional actors—not uniformed staff instructed to role play—trained in the behavior of various criminal personalities (psychopathology) and the process of hostage negotiation. As such, the actors accurately portray criminal behaviors reflecting Axis I/ II mental disorder(s).

Having been trained in the process of hostage negotiation, the actors can discern when the trainee is being effective and respond accordingly. These improvised/ simulated scenarios generate stress within the trainee. During debriefings, several trainees have reported they actually forgot that they were in a training session and began to experience what could best be described as *Generalized Anxiety Disorder* (described by APA-DSM-IV-TR as *anxiety; somatic complaints*—headaches, muscular pain, restlessness; *autonomic hyperactivity*—shortness of breath, palpitations, sweating; *hyperarousal/increased startle response; persistent irritability*).

As noted earlier, stress inoculation is an important part of the training process for trainees. According to *Webster's II New Riverside Dictionary* (1996), the word “inoculate” is defined as “introducing a disease or other causative agents into (a person) so as to immunize (make resistant or unaffected and unresponsive).” Given the extreme stress encountered during hostage-taking situations, stress inoculation and debriefing should be a part of all such practicums.

Meichenbaum (1976) described stress inoculation as a way of building tolerance for stressful situations—i.e., graduated levels of exposure to stress eventually make higher-stress scenarios more tolerable and elevate the negotiator's level of functioning within those situations. The average person experiencing a hostage-taking scenario may be overwhelmed and nearly catatonic or immobilized once the event is over. Someone who has successfully been exposed to stress inoculation protocol may need a good night's sleep but is ready to face whatever comes his or her way the next day.

Although the goal of this training protocol is to help train new hostage negotiators, the process and content clearly “inoculate” the training participant against further stress that is generated from an actual hostage situation. The stress inoculation process built into the training protocol consists of didactic instruction, stress inoculation and debriefing.

[Table 2](#) focuses on the many issues that take place during a hostage-taking incident. Although one can learn via didactic instruction and manuals about the heightened emotional aspects and reactions of all the players (i.e., hostage-taker, hostages, negotiator), to actively participate in an event that is well-simulated will place trainees directly in the event and help them react in the best way possible without actually endangering themselves or others. Placing the trainees in a simulated event evokes many—perhaps all—of the emotions that come forward when a true hostage situation takes place.

Stress inoculation will place trainees in a position of increased strength and awareness when encountering “the real thing.” Of course, each situation is unique and not completely predictable, but there are simply right versus wrong things to do during a hostage incident—virtual absolutes that one can learn and rehearse beforehand.

The *debriefing* aspect serves to make participants aware of how these events can go more smoothly even in the tensest of situations. It is a time and place for all participants to assess trainee response and to provide corrective input.

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Conclusion

Ours is a complicated society with many stressors— internal, external, familial and societal. When political factors such as deinstitutionalization of the mentally ill and financial desperation become part of the formula, they only further agitate the “*What have I got to lose?*” mentality. That level of desperation added to feelings of abandonment, paranoia, and fear brewing in the mind of one suffering from personality disorder(s) can lead to extremely volatile hostage-taking incidents.

Prospects for successful resolution are seriously compromised by each of these factors, requiring greater focus and understanding by the negotiator and his/her staff. Hostage-taking incidents concluding peacefully with no loss of life or property require many components that work

together synergistically, with an openness to quick change in strategy as needed.

The tactic of utilizing actors trained as hostage takers has been a proven asset to the training process for negotiator trainees. This protocol advocates the use of actors trained to be HTs with personality disorders. This provides the valuable training benefit of simulating real-life interaction with hostage takers during a hostage situation. When the value of debriefing is added to this paradigm, this protocol is likely to significantly improve the outcomes of hostage negotiations, especially because each event will also be reviewed and studied by the training team. This can be tested statistically as pre- and post-hostage outcome data become available.

Although this paper has focused upon hostage-taking incidents in the correctional environment, there is a serious need for much of this methodology to be employed in other contexts. Inmates are often treated in a particular way and are rarely appreciated for their uniqueness and individuality. Staff members are expected to be authoritative, if not outright forceful, and generally not considered to be compassionate.

Having said this, each person is unique and needs to be considered on a deeper level—appreciated and respected for who he/ she is as a human being with certain basic emotional needs. It follows that the methodologies and practices described within this article (e.g., ventilation, listening, reassurance, reinforcement, controlling affects, and impulses, etc.) could benefit individuals in their daily interactions with others and possibly prevent an incident from reaching the point of desperation that makes it a hostagetaking event.

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Appendix: Case Law & Hostage Negotiation

The importance of hostage negotiation training is seriously underscored by United States case law.

The 1975 case of *Downs v. United States* is the basis for hostage negotiation techniques in the U.S.

In this landmark case, the FBI interceded when a small plane hijacked in Tennessee landed in Jacksonville, Florida for refueling on its way to the Bahamas.

There were two crewmembers, two hijackers, and the estranged wife of one of the hijackers onboard.

The copilot and one of the hijackers left the plane separately to negotiate for more fuel and did not return to the plane.

A car was positioned to block the plane. An FBI special agent approached the plane, identified himself, ordered evacuation (without response), shot at the right rear tire, and ordered more gunfire to disable the engine. Once aboard, he found two dead hostages and a mortally wounded hijacker.

While the district court ruled the FBI to have acted appropriately, the appeals court ruled there was “a better-suited alternative” for protecting the hostages.

Allowing the co-pilot and second hijacker to exit the plane separately and not return showed a willingness to negotiate by the armed hijacker and as such, negotiation was ruled to be the preferred alternative to force or escape in such situations.

The appeals court believed that “playing the waiting game” would have been appropriate and warranted in this situation and that when the special agent hastened force, there was unnecessary loss of life.

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Acknowledgements

Special thanks to Martin F. Horn, Commissioner of the New York City Department of Correction (NYC DOC), for his ongoing support of the NYC DOC Hostage Negotiation Unit.

Thanks also to Lieutenant Jack J. Cambria of the New York City Police Department Hostage Negotiation Team for unconditionally sharing his wealth of information and his time. His willingness to give of himself and his overall generosity has humbled all of us.

Thanks to Detective James T. Shanahan of the New York City Police Department Training Academy for his assistance and expertise as an actor and trainer. He worked closely with us to fulfill the primary mission of the unit—to train team participants to be wellrounded and compassionate negotiators.

We also thank Retired Deputy Warden William Hecker of the NYC DOC for his dedication and devotion to the development and growth of the Negotiation Unit.

Finally, a very special posthumous thanks to the late Lydia Martinez (New York City Police Department Detective, First Grade), who worked very closely with us during hostage negotiator training. Her vast knowledge of hostage negotiations and commitment to innovative training can never be replaced or equaled.

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Table 1: Initial Hostage Negotiation Training Protocol

Pretraining Day

Case Law Pertaining to Hostage Negotiation: *Downs v. the United States*

Week 1

Abnormal Psychology for Law Enforcement & Emergency Service Personnel

Day 1

Defining Mental Illness

Paranoia

Signs & Symptoms of Psychosis

Day 2

Schizoid Personality Disorder

Schizotypal Personality Disorder

Schizophrenia

Day 3

Conduct Disorder

Antisocial Personality Disorder

Psychopathy

Day 4

Borderline Personality Disorder

Obsessive-Compulsive Personality Disorder

Other Personality Disorders

Day 5

Mood Disorders

Substance-Related Disorders

Intermittent Explosive Disorder

Week 2

Applied Issues in Criminal Psychology & Clinical Criminology

Day 6: Hostage Negotiation: A Detailed Comprehensive Overview

Day 7: Stockholm Syndrome & Active Listening

Day 8: Hostage Incident Management

Day 9: Intelligence Gathering & Situation Boards

Day 10: Hostage Negotiation Technology

Week 3

Hostage Negotiation Incident Practicum (with Actors/Trainers)

Day 11: Professional Communications for Law Enforcement

Days 12-15: Hostage Negotiation Incident Practicum (Improvised Role Play, w/Actors/Trainers); Includes Debriefing after Each Practicum

Post-Training Day

- The Uniformed Hostage Taker
- Discussion & Closing
- Presentation of Certificates

Illustration 1: Continuous Dynamic Skills Maintenance

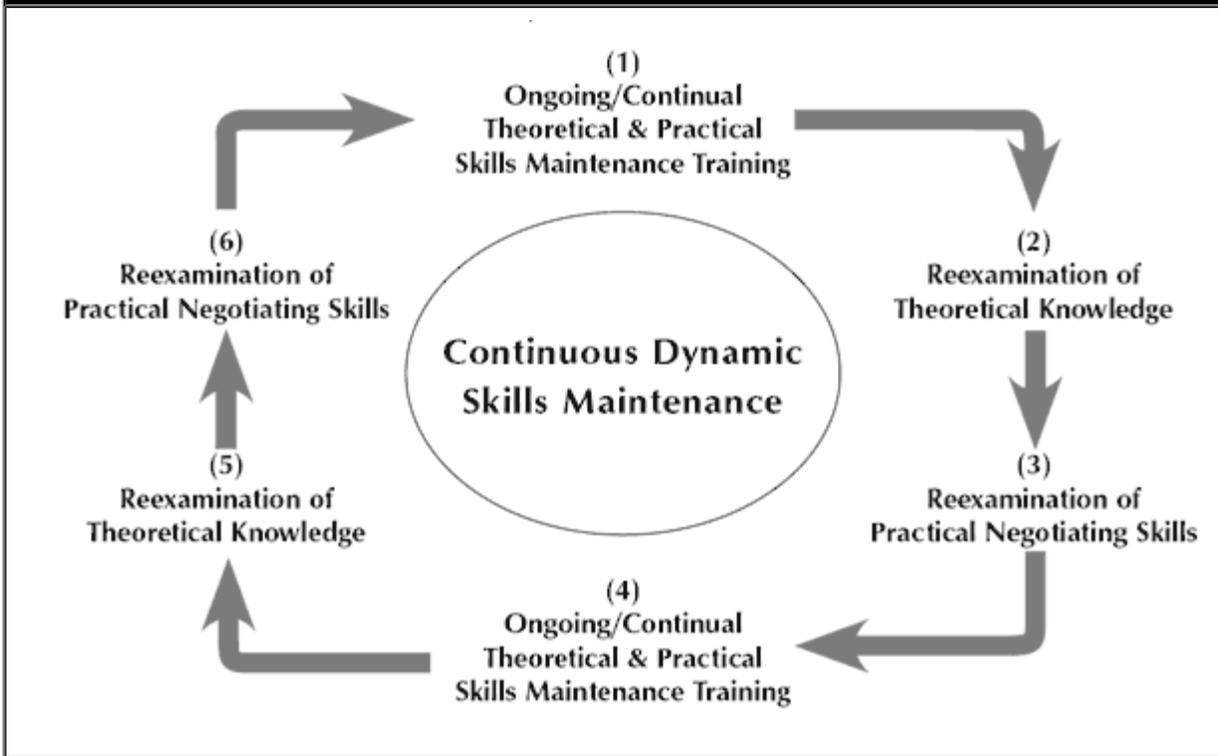
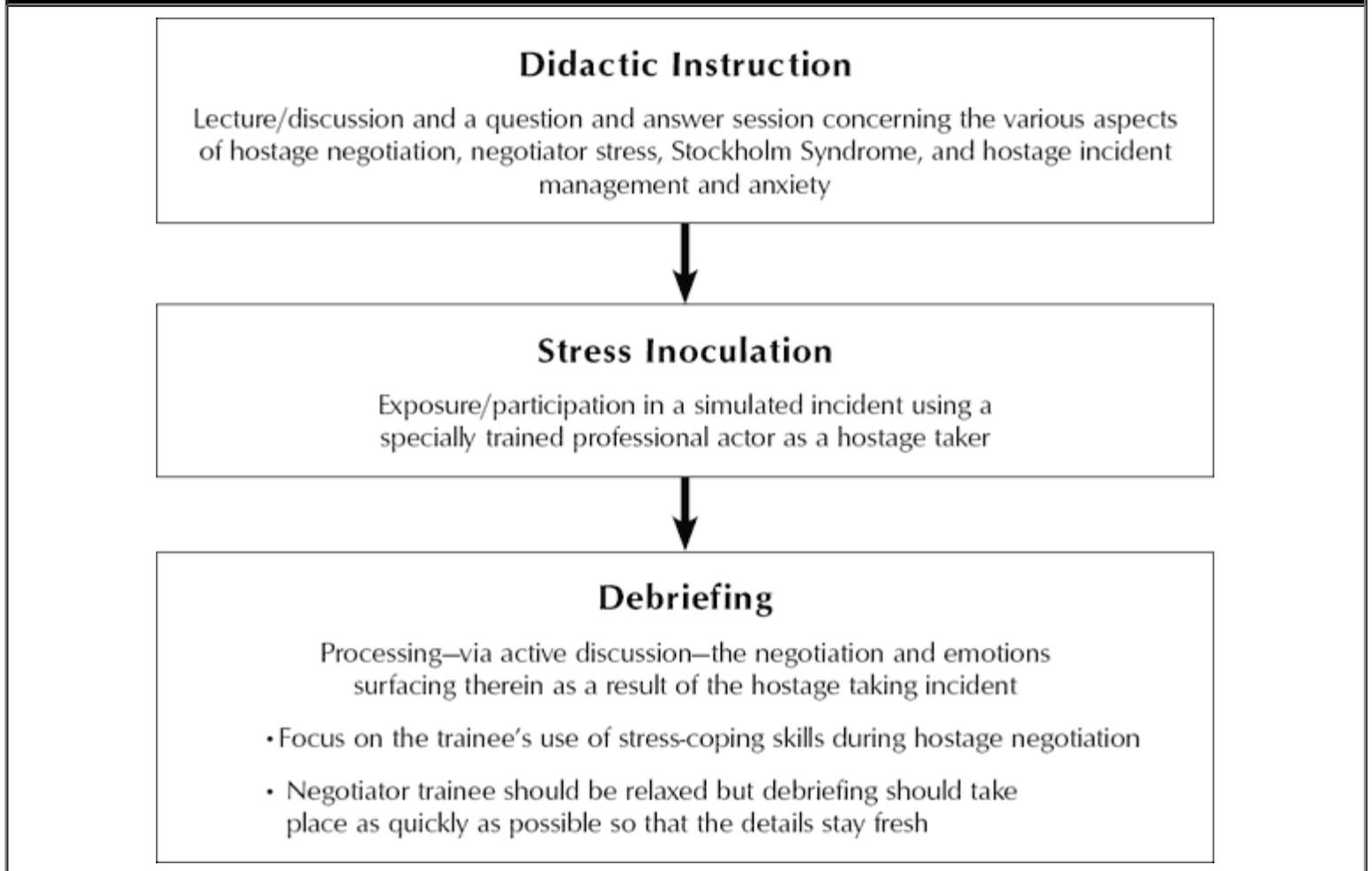


Table 2: Stress Inoculation via Participation In a Simulated Hostage Incident as a Hostage Negotiator



Pono Kaulike: A Hawaii Criminal Court Provides Restorative Justice Practices for Healing Relationships

Lorenn Walker and Leslie A. Hayashi

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[Solution-Focused Brief Therapy Approach](#)
[Restorative Justice for Family and Intimate Violence Cases](#)
[Pono Kaulike Program](#)
[Three Restorative Models Offered](#)
[Implementation of the Pono Kaulike Program](#)
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[Program Evaluation](#)
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SITTING NEXT to his adult sister, Frank whispers something to her. She turns toward him, glaring, and yells, “You’re crazy!” He looks down, shuffles his dirty feet, shakes his head of long stringy hair covering his face, mumbles something, gets up and leaves his chair. A moment later, she turns to the two women sitting in her living room and says, with anguish and frustration, “He’s gonna kill someone!”

The two women she pleads with are facilitators for the Pono Kaulike Restorative Justice program, a pilot project with a misdemeanor-level Hawaii state criminal court. Frank, his mother, sister and the facilitators, have been sitting in a circle in the family’s home, located in a rural area outside of Honolulu, participating in a Restorative Conference for 45 minutes.

Frank is 31 years old and has been using crystal methamphetamine since he was in high school. He has a wife and two young children from whom he is estranged. Several years ago, he began hearing voices, and his body began twitching uncontrollably. He is homeless and lives in an old car belonging to his mother. He often comes to his mother’s home, where his sister and her children also live, begging for money. They used to give him money, but now refuse. He has threatened them and they are afraid. His mother finally called the police and obtained a temporary restraining order (TRO) forbidding Frank from contacting the family. He violated the TRO soon after it was issued and was arrested. He spent a few days in jail before he appeared in Hawaii state district court. He pled guilty to the charge. His mother was present and spoke at his sentencing.

“He is my son. I don’t want him on the streets like this, and I don’t want him in jail. He’s sick and needs help. He needs to be in a mental hospital, but he won’t go,” she told the judge with tears in her eyes.

The judge explains the Pono Kaulike program to Frank and his mother. She tells them it is voluntary and trained facilitators can assist their family to discuss how they have been affected by Frank’s behavior, including his drug use, and what might be done to repair the harm it has

caused. Frank agrees to participate, along with his mother, and later his sister.

The facilitators schedule a Restorative Conference with the family on a day, time, and place most convenient for all of them. The mother and sister work full-time, and the mother has a two-hour daily commute. The Conference is held at 4:00 p.m. during the week at the family's home. Before his sister's passionate plea to the facilitators, Frank, his mother and sister spent 45 minutes discussing the situation, and signed a *Restorative Conference Agreement*, demonstrating their collective decision that:

- Frank will go to a [mental health facility] by tomorrow, Thursday, August 16, 2005 and tell them he is afraid that he might hurt himself or somebody else, to be admitted;
- If Frank does not check into a hospital tomorrow, Annabel [his mother] will get a TRO and call the police for the car. After his sister's plea, however, the facilitators realize that Frank and his family cannot wait for tomorrow. Immediate help is needed and addressing people's needs is a primary focus of restorative justice. ¹

Frank has a dual diagnosis: he suffers from both mental illness and drug abuse. It is estimated that nationally, approximately one half of the people with severe mental disorders also abuse drugs; 53 percent of all drug abusers have a mental illness. ² Working effectively with clients who have been dual diagnosed with mental illness and substance abuse is a complex task, and one that courts and correctional institutions are more frequently faced with.

The pilot restorative justice program offers important lessons and promising possibilities for the criminal justice system dealing with *family violence* and *intimate violence* cases. Family violence as used in this paper describes "violence between [unmarried] family members" while *intimate violence* and *domestic violence* are used to describe violence "by someone who is, was, or wishes to be involved in an intimate or dating relationship [including marriage]" with another person. ³

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Benefits and Development of Restorative Justice

Restorative justice addresses both physical and emotional needs, including the need to repair relationships and build positive connections after wrongdoing. Three basic questions are addressed by restorative practices: 1: Who has been affected by the wrongdoing? 2: How have they been affected? 3: What can be done to repair the harm? ⁴ Answering these questions in a restorative process promotes coping skills and healing. ⁵

While "a great deal of the initiative for restorative justice programs has come from professionals within the criminal justice system" ⁶ today, it is recognized that the definition and application of restorative justice is expansive:

Restorative justice is a broad term, which encompasses a growing social movement to institutionalize peaceful approaches to harm, problem solving and violations of legal and human rights. These range from international peacemaking tribunals such as the Truth and Reconciliation Commission of South Africa to innovations within our criminal justice system, schools, social services and communities. Rather than privileging the law, professionals and the state, restorative resolutions engage those who are harmed, wrongdoers and their affected communities in search of solutions that promote repair, reconciliation and the rebuilding of relationships. Restorative justice seeks to build partnerships to reestablish mutual responsibility for constructive responses to wrongdoing within our communities. ⁷

The concept of restorative justice is ancient, and not restricted to Western legal justice systems. The modern restorative justice movement was "rekindled in the West from the establishment of an experimental victim-offender reconciliation program in 1974 in Kitchener, Ontario" but there is evidence that "restorative justice has been the dominant model of criminal justice throughout most of human history for perhaps all the world's peoples." ⁸ While some academics question

this assertion, ^[9] it is clear that many indigenous cultures, including Hawaiians and other Pacific Islanders, have never stopped using restorative practices. ^[10]

Restorative justice recognizes the interconnectedness of people. ^[11] “Above all, restorative justice is an invitation to join in a conversation so that we may support and learn from each other. It is a reminder that all of us are indeed interconnected.” ^[12]

According to psychologist and author Daniel Goleman, restorative practices help people to increase social intelligence, “a shorthand term for being intelligent not just about our relationships but also in them” (emphasis in the original). ^[13] Social intelligence concerns developing self-awareness, and applying that awareness in interacting with others, something restorative practices encourage. Goleman says: “The emotional subtext of restorative justice urges offenders to change their perception of their victims from It to You—to awaken empathy.” ^[14]

Research measuring empathy development shows it can prevent aggression and violence. ^[15] Most people who commit crimes, especially violent acts, put their own interests and desires before others. Providing processes for offenders that can shift their selfishness to empathy and concern for others is a violence prevention measure.

Restorative processes offer offenders perspectives away from their self-centeredness to consideration of others. Instead of focusing on what the offender’s motivations were for engaging in harmful behavior, and furthering self-centeredness, solutions are sought by asking, “*what can be done to repair the harm?*”

Alan Jenkins’ work with violent offenders in Australia suggests that professionals asking why questions may tend to discourage taking responsibility for behavior, while questions about how their behavior has affected relationships, and how they can maintain good behavior, encourages taking responsibility and changing behavior. ^[16] Jenkins’ work with violent offenders shows that elimination of language asking for external causal explanations for bad behavior, and instead asking for “Explanations based on a theory of restraint tend to promote helpful solutions in the form of responsible actions.” ^[17] This is not saying that offenders who desist from crime do not have excuses and rationalizations for their past offenses, i.e. challenging childhoods, poverty, etc., but rather desisting offenders have taken responsibility for their behavior and their feelings, and are focusing on how to restrain themselves from such behavior in the future. The idea is consistent with what Shadd Maruna says is important for understanding the theory of desistance: how people who make the decision to not commit crimes “maintain their resolve against short term temptations.” ^[18] Canadian research applying Jenkins’ theory to non-offenders verifies that *how questions are asked* positively affects perceptions of responsibility and future performance.” ^[19]

Restorative practices redirect the focus from the offender’s motivations to the harm caused the victim. Because the focus is on the harm, and how it might be repaired, restorative practices offer the possibility of a healthy shift to empathy and caring from self-centered thinking and behavior.

In Frank’s case, instead of asking, “Why do you use drugs and threaten your family for money?” and other questions about his motivations, he and his family were asked how his behavior affected others, and what they needed “to repair the harm.” The family came up with a positive solution, one that the courts and criminal justice system could not have accomplished.

The facilitators heard the sister’s plea and were able to address the immediacy of the family’s needs. The facilitators asked Frank:

“Instead of you having to drive all the way into town and going to the hospital all alone, let us give you a ride right now, okay?”

Frank balks at the idea, “No. I can go tomorrow.”

His mother says, “But your car has no gas. You have no money. It’s a good idea. Get a ride with them. I’ll keep the car for you and give it to you when you come back, okay?”

After about ten more minutes of coaxing, Frank finally agrees to go to the hospital with the facilitators.

Frank’s probation officer believes the Pono Kaulike program can do what the current judicial system cannot: “Because the meetings are held in the families’ homes, and conducted by an agency outside of the court, the needs of the clients are more likely to be met. [The program] can help the defendants get the help they need.”

The Pono Kaulike program also provides an opportunity to identify and solve potential problems between the parties that may again arise without some type of intervention. Victims are often subpoenaed to testify in court against defendants. Especially in cases where witnesses are in an intimate or family relationship with the accused, they may be reluctant to appear, subjecting the cases to dismissal and themselves to potential bench warrants, and no one gets help. When the complaining witness does appear, cases are generally treated as isolated or specific offenses; the underlying relationship or emotional issues between a defendant and the complaining witness are left unaddressed.

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Solution-Focused Brief Therapy Approach

Pono Kaulike uses the solution-focused brief therapy approach, which carefully uses language, and appreciates the importance of relationships in assisting troubled people to find their own solutions to problems. ²⁰ Steve de Shazer, Insoo Kim Berg, and their colleagues at the Brief Family Therapy Center in Milwaukee, Wisconsin developed the solution- focused approach over 20 years ago. ²¹

Insoo Kim Berg provided assistance on applying the solution-focused (SF) approach to the Pono Kaulike program shortly after its inception. Both the facilitators met with Berg and learned how to apply the approach. One facilitator had extensive contacts with Berg, meeting with her numerous times, and became a trainer on the SF approach.

The SF approach has been compared with motivational interviewing (MI), as the two are quite similar. “Because both SF and MI emerged in response and in contrast with prevailing medical/disease problem-focused models, they can be said to represent nonpathological and salutary or health-promoting therapeutic ventures. An interest in and a curiosity about clients’ abilities, strength, and competencies, characterize both SF and MI counselors.” ²²

Both SF and MI use language skills to assist clients in determining and creating positive lives, and both “emerged in response to and in contrast with prevailing medical/disease and problem-focused models.” ²³ Both have been successfully used with substance abuse ²⁴ and violence cases. ²⁵ Both SF and MI are considered “best practices” and are “evidence-based treatment interventions.” ²⁶

The key difference between the SF approach and MI is that SF views behavior as mainly “social construction through language,” and suggests that, “language is reality.” On the other hand, MI is anchored heavily in the “stages of change model” where counselors try to identify and assess what stage a client is at for desiring change. Once the MI counselor determines the client’s stage, language skills are used to assist the client in achieving the desired change. ²⁷

Problem-solving courts have used the MI approach successfully. ²⁸ Problem-solving courts were “established to look outside the traditional framework of legal proceedings for solutions,” and offer a holistic approach, including restorative justice, as one answer to the increasingly difficult cases entering the criminal justice system. ²⁹



Restorative justice programs have successfully used the SF approach for child welfare, ^[30] schools, ^[31] and prisons. ^[32] The Pono Kaulike program is the first court-centered program reportedly using restorative justice combined with the solution-focused approach.

During the ride to the hospital with Frank, the facilitators speak cheerfully and calmly to him using solution-focused language, which focuses on his strengths and positive qualities.

“Your family really loves you. What did you do to get them to want to help you so much?” He smiles, and is relaxed during the 15-minute car ride.

At the hospital the facilitators wait with Frank. “This is a nice quiet place. You’re gonna get a good night’s sleep here,” they tell him.

“Yeah, it’s good,” Frank says, with a smile, running his hand along the top of a nearby table.

After an hour of waiting at the hospital, Frank is assessed and determined to be a danger to himself and others. Two hours after his sister’s desperate plea, the hospital transports Frank to a nearby mental health facility where he is admitted and stays for over a month.

A year and a half after Frank’s stay at the mental health facility, he is living in a long-term residential drug treatment program. He has lived there for a year and is expected to stay for at least another year. His mother participates in a weekly support group for families of residents in the treatment program.

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Restorative Justice for Family and Intimate Violence Cases

Restorative justice is more effective in preventing repeat criminal behavior in serious offenses compared to other criminal justice interventions. ^[33] Just as important, victims and others affected by crime are more satisfied with restorative justice practices compared to other interventions. ^[34] Restorative justice has also been shown to reduce post-traumatic stress and the “desire for violent revenge,” ^[35] something that is especially important in family violence cases.

Family Group Conferencing, a restorative practice that began in New Zealand and spread to the United States in the 1990s, ^[36] has a long history of dealing with domestic and family violence in child welfare cases. ^[37]

New York University professor Linda Mills has described in detail the advantages of using a restorative approach in domestic violence cases and the failings of our criminal justice system to address this serious problem. ^[38] Mills argues that restorative justice should be used because it helps victims heal by meeting their need to actively participate in addressing the effects of crime. ^[39] However, some claim that restorative justice for domestic violence cases may re-victimize victims (because of power imbalances between men and women) and that it is “cheap justice” or a “soft option” indicating that society is not taking these offenses seriously enough. ^[40]

The arguments against using restorative justice have successfully blocked application of it worldwide in domestic violence cases, resulting in a “paucity of evidence to confirm or discount the critics’ or proponents’ claims.” ^[41] Despite the fears that a power imbalance between men and women outweighs the benefits from any meetings between domestic violence offenders and victims, some public health and family therapy professionals advocate for couples treatment interventions based on positive research results. ^[42] Today, Mills is conducting research into the use of restorative justice in domestic and intimate violence criminal cases, and for couples who voluntarily seek services before police intervention. ^[43] Eventually, there will be more than a “paucity of evidence” on whether it is more effective than our current system.

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Pono Kaulike Program

Pono kaulike translates from Hawaiian to mean “equal rights and justice for all.”⁴⁴ The program began in 2003 and is named after a resolution enacted by the Hawaii State judiciary in 2000 for “Restorative Justice and Pono Kaulike.” The resolution states that the “Hawaii State Judiciary shall continue to act in accordance with the principles of Restorative Justice and the concept of Pono Kaulike, signifying a dedication to Equal Rights and Justice for All and shall, in conformity with governing law, attempt to deliver services and resolve disputes in a balanced manner that provides attention to all the participants in the justice system including parties, attorneys, witnesses, jurors, and other community members who are active participants in the justice system.”⁴⁵

The pilot program was conceived and provided by Hawai‘i Friends of Civic and Law Related Education (Hawai‘i Friends), a small non-profit organization that has assisted organizations to develop, implement and evaluate restorative justice programs since 1996.⁴⁶ In September 2002 Hawai‘i Friends collaborated with the District Court of the First Circuit in Honolulu, State of Hawai‘i, to develop and implement the Pono Kaulike pilot restorative justice program. Start up grants from The Wallace Alexander Gerbode Foundation and the Hawaii Justice Foundation funded the pilot project.

Initially it was anticipated that the program would provide only restorative conferences for defendants, victims and their respective family and friends. This face-to-face meeting between an offender and a victim, with supporters for each party, has been considered a requirement for a “fully restorative” program.⁴⁷ However, such meetings were not always possible, because defendants pled at arraignment, a proceeding at which victims were not present and some victims were not willing to participate. Thus, modifications to the model were made.

“Partially restorative” programs effectively address people’s needs but do not require meetings between victims, offenders and their supporters.⁴⁸ These partially restorative justice practices allow people affected by wrongdoing the opportunity to address their harms, and benefit from a restorative approach, when they frequently cannot engage in face-to-face meetings. The practices can assist them in dealing with the pain and hardship crime creates, without ever meeting together.⁴⁹

Additionally, in situations where groups have suffered hardship due to social justice problems, i.e., youth in the foster care system and homeless youth, there are no identifiable offenders to meet with. A partially restorative practice in social justice cases can provide victims with positive benefits.⁵⁰

Most criminal cases do not result in an offender ever being identified sufficiently for arrest and prosecution. Nationally, in 2005 law enforcement agencies identified offenders in 45.5 percent of all violent crimes and only 12.7 percent of property crimes reported.⁵¹ Further, approximately 47 percent of crime victims do not want to meet with offenders, when offered restorative justice meetings.⁵² Restorative justice in these cases, therefore, cannot include meetings between offenders and victims. Yet victims and offenders can successfully participate individually in restorative processes.

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Three Restorative Models Offered

Pono Kaulike evolved to provide three distinct types of restorative justice meetings: *Restorative Conferences*, *Restorative Dialogues* and *Restorative Sessions*.⁵³

1. A *Restorative Conference* occurs when the defendant, victim, and supporters of both parties meet in a group. The group discusses how each member has been affected by the wrongdoing and how the harm may be repaired. The parties enter into a written *Restorative Conference Agreement*. The program has provided eight Restorative Conferences, including five family violence and three intimate violence cases.

2. A *Restorative Dialogue* occurs when the defendant and victim meet without family or friends. The victim and defendant enter into a *Restorative Dialogue Agreement*. Often victims simply want to know that the offender is remorseful for their harmful behavior. Ten Restorative Dialogues have been held, including three for family violence, six for intimate violence, and one for a neighbor conflict over animal nuisance.
3. A *Restorative Session* occurs when the parties are unwilling to meet with each other. The victim and or the defendant meet with the facilitators separately, and are encouraged to bring supporters to prepare a *Restorative Plan*. The Plans outline self-improvement goals developed during the Restorative Session. The Plans also include how the defendant intends to reconcile with the victim, if that has not already occurred. The defendant may also indicate her or his willingness to meet with the victim, if the victim ever wants to meet. Participants are encouraged to bring supporters.

Twenty-five Restorative sessions were held for eight intimate violence cases (seven offenders—one offender had two sessions and two victims had sessions; both victims brought supporters and four offenders brought supporters); six for family violence cases (two offenders brought supporters), four for neighbor, two for friend, and one for each of the following cases: roommate, cab passenger, bar fight, road rage, and negligent homicide.

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Implementation of the Pono Kaulike Program

The pilot program began providing services in April 2003. It was originally planned that only adjudicated cases where the defendant pled guilty to charges, and both the victim and defendant agreed to participate, would be referred to the program. It was assumed that the complaining witness would be in court when the defendant entered the plea. If both parties wanted to participate, the case would then be continued for sentencing to allow time for a Restorative Conference so that any terms the parties agreed to, such as substance abuse assessment and treatment, anger management or apologizing to the victim, could be incorporated at the sentencing.

However, the complaining witness was not always present at the court hearing, especially if the defendant pled at the arraignment stage. It was also discovered that defendants and victims benefited from participating in a restorative process even without the other's presence. As a result, it was decided that the defendant, with his or her permission, could be ordered into the program after pleading and sentenced at that time, even if the complaining witness was not present. This also allowed the facilitator time to contact the complaining witness to explain the process and arrange a restorative meeting if she or he wanted to participate.

The Restorative Conference Agreements, Restorative Dialogue Agreements and Restorative Session Plans are provided to the court and defendants' probation officers. Isaac Lawton, an adult probation officer who has had several clients participate in the program, says that he likes it because: "When the defendant meets with the victim, the parties have an opportunity to address underlying issues and work out a solution." Lawton also sees value for defendants to participate in a Restorative Session when the victims do not. "Preparing a Restorative Plan makes the defendant accountable for his actions and future behaviors. It's like a 'behavioral plan' or a 'relapse prevention plan,' which addresses specific events and what the defendant will do. I like it," says Lawton.

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Pono Kaulike Cases

It became evident early on that the best types of cases for the Pono Kaulike program were those involving parties with an ongoing relationship, such as relatives, neighbors, friends, spouses, or those with an intimate relationship. The charges have included disorderly conduct, harassment, assault, terroristic threatening, negligent vehicular homicide, criminal property damage, and animal nuisance, i.e., barking dogs.

To date 42 cases have been referred to the program. Of the cases referred, only two did not receive services. One case involved a homeless defendant who never contacted the facilitators, and the other case was dismissed before the defendant received services. Out of the 40 cases provided services, a total of 46 restorative meetings were held for 96 individuals, including nine children. In one case the defendant met with facilitators for three restorative meetings. In three cases, separate meetings were held for both victims and offenders. In another case a restorative dialogue was held, and later a restorative conference was held with more members of the defendant's family participating.

Forty of the restorative meetings involved violence or threatened violence. Eighteen were intimate violence cases between boyfriends and girlfriends, including several lesbian relationships; 13 cases were family violence; three cases were between strangers, including a road rage case, a fight between two women in a bar, and a fight between a cab driver and his passenger. Four more cases involving violence were between friends (one was a female defendant against her former female friend who began a romantic relationship with her boyfriend), roommates, and neighbors. Two cases involved non-violent conflicts between neighbors (barking dogs and property damage), and there was one negligent homicide when a driver struck and killed a pedestrian.

In three of the cases that received restorative services, the defendants denied responsibility for the crime. One woman said, "It was the other lady that started the fight. She hit me. I was covering my head. We all got arrested. The cops believed her, but I never did it." She agreed to participate in the restorative program because she felt she wanted reconciliation for herself. It was an opportunity for her to address the false accusation.

Two other defendants, who were found guilty after trial and ordered by the court to participate in the Pono Kaulike program reported positive results. Both said the Restorative Sessions they participated in were "very positive." One said what he found most useful about the process was: "Reinforcing the positive things in my life." The other defendant, who was in the military, said that the process "Kept me in a optimistic view," and that he would recommend it to his "soldiers."

To date, twenty-two individuals, three victims and nineteen offenders, along with thirteen of their supporters, have participated in Restorative Sessions provided by the Pono Kaulike program.

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Program Evaluation

The program has not yet been evaluated to determine whether it reduces crime, but it is expected that an evaluation will begin in early 2008. While we are hopeful the evaluation will show the program has prevented crime, we believe the measure of success for restorative programs includes more than a reduction in recidivism.

Positive cognitive processes underlie a healthy adaptation to trauma, ⁵⁴ which is something restorative practices can accomplish. ⁵⁵ Simply allowing people a voice in determining what they need to heal can be healing in itself.

Sixty-one of the eighty-seven adults who received restorative justice services completed written evaluations of the program. This survey consists of six statements with possible rankings from "very positive," "positive," "mixed," "negative," to "very negative." The statements are: "I believe the Restorative process was..."; "I believe the Agreement made is..."; "I believe justice was served by the Restorative process"; "I feel the participants' needs were met during the Restorative process"; "Compared to court, the Restorative process was"; and "I think the facilitator did good work with the Restorative process."

Sixty participants reported the process was very positive or positive. Only one participant reported any aspect of the process was negative, and only three others said any part of their

experience was mixed. The person who said the restorative justice experience was negative was a defendant who had threatened his parents and engaged in a Restorative Dialogue with them. He indicated that the process did not serve justice because: “A pastor familiar to the spiritual problems in our family” did not come. However, he also said the process “was somewhat useful in the attempts to open communication.”

The three participants who said aspects of the process were mixed included an offender’s supporter, who found the process mixed for serving justice. She attended a Restorative Session for her friend who pled guilty to a charge of negligent vehicular homicide. The victim’s family did not want to meet with the offender, while her friend wanted them to attend. The other two participants who found aspects mixed were an offender who threatened a taxicab driver and felt the process did not serve justice. He also wanted the victim to attend, but the victim refused. Finally, the wife of a man who was intoxicated and threatening his son, before being pushed and seriously injured from falling backwards, found the Restorative Conference agreement was mixed because her husband would not agree to quit drinking.

Twenty-two participants specifically mentioned that the restorative meeting was effective because it allowed communication between the parties. One mother who was the victim of a violent offense by her son said the meeting was useful because: “I could tell my son how I really feel and pray that he will respect me for what I did by pressing charges.”

Another mother, who was the victim of an intimate violence offense committed by her child’s father, said: “I think this program is better for families like ours and so much better for the kids because they get emotional a lot and they have been in enough already.” This woman participated in a Restorative Session with her current boyfriend and her child. During the Session she said what she wanted the offender to do to repair the harm, which included his participation in drug treatment and anger management. When the offender learned what the victim wanted at the Restorative Session he attended, he readily agreed. The victim’s requests were presented to the sentencing court by the offender, and the court ordered him to comply with them.

A woman who was assaulted by her nephew stated that she found that “being able to apologize to my nephew” was the most useful thing about the Conference. When her nephew was arrested, she was also intoxicated and felt partly responsible for their fighting and his arrest. Both she and her nephew agreed to attend substance abuse treatment programs in their Restorative Conference Agreement. In most of the agreements between victims and offenders, the victims agreed to many aspects of selfimprovement, something that the current system cannot accomplish.

Twelve participants specifically mentioned that the restorative program was effective because it allowed them to say how they felt. A father who was seriously injured by his son thought that the best thing about the Conference was “to clean everything up and for forgiveness.”

Participants also indicated that they preferred the restorative process to court. One defendant stated: “When I was in court, I felt scared and not comfortable. The conference is different because I can show and tell them how I felt.” A mother who attended a Restorative Session with her son said: “It’s better because we can speak openly. It’s private.” Another defendant said compared to court the conferencing process was “more in depth about relationship and communication.”

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The Future

When the Pono Kaulike program was initiated in 2002 as a pilot it was hoped it would become institutionalized by the Hawaii state judiciary. Since 2005, it has continued mainly through pro bono efforts. A legislative mandate with state funding is probably necessary to institutionalize the program. Seeking a legislative mandate might be a worthwhile strategy because the 2007 Hawaii legislature mandated a pilot project providing Restorative Circles for prison inmates and their loved ones. [56](#)

“Restorative justice is by no means an answer to all situations. Nor is it clear that it should replace the legal system, even in an ideal world,” ⁵⁷ but addressing family and intimate violence the way Pono Kaulike does is a step toward healing, which is something that our justice system should be concerned with, because if it were, that could influence offenders to be concerned with healing as well.

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The Predictive Validity of the LSI-R on a Sample of Offenders Drawn from the Records of the Iowa Department of Corrections Data Management System

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OFFENDER ASSESSMENT and classification have become common practice throughout correctional programming over the past two decades. In particular, one risk/ needs assessment tool, the Level of Service Inventory-Revised (LSI-R), has gained widespread popularity in correctional settings. While multiple studies have demonstrated the predictive validity of the LSI-R in various correctional settings and populations, research continues to stress the importance of examining the predictive validity of the LSI-R (Andrews, 1982; Andrews & Bonta, 1995; Bonta & Andrews, 1993). As posited by Gottfredson and Moriarty (2006), examining the predictive validity of a risk/needs assessment is paramount since the samples used in the development of a risk tool should be representative of the population that the instrument is intended to be used upon. Further, they suggest that findings generated from similar samples should be cautiously interpreted due to the possibility of overestimating the tool's validity in predicting recidivism. Given this warning, agencies should consider examining the predictive validity of their targeted populations in order to determine the instrument's reliability and validity with their offender base. The current study attempts to demonstrate the utility of such a practice by examining the predictive validity of the LSI-R on a sample of probationers and parolees in Iowa.

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Overview of risk assessment development and predictive validity

History of risk assessment

Previously, risk assessment involved a professional, or clinical, judgment concerning an individual's risk to recidivate. Typically, this was measured by the intuition or "gut feelings" of the practitioner from an offender's self-report or through a file review of official records (Bonta, 1996; Gottfredson, Moriarty, 2006; Latessa, 2003-2004). Unlike actuarial risk assessments, these early predictions of risk were potentially based on subjective biases, rather than on standardized objective risk measures, and were ultimately difficult to replicate (Bonta, 1996, 2000). Given these associated problems, this form of assessment has failed to demonstrate its ability to effectively measure an individual's likelihood for future offending. Hence, there is little research support for the predictive validity and reliability of clinical judgments (Bonta, 2000;

Lowenkamp, Holsinger, & Latessa, 2001).

Predictive measures found in first generation instruments, such as the Burgess Scale, are primarily static risk factors. While these factors are at least based on objective and easy-to-replicate measures that do demonstrate some reliability, there are noted disadvantages to such tools (Latessa, 2003- 2004). First, they do not incorporate dynamic risk factors, which could be targeted for change. Second, reassessment would be futile, and could only register increases of risk levels (Latessa, 2003-2004).

Second generation instruments, such as the Salient Factor Score or the Wisconsin Client Management Classification System, are empirically supported, but the risk measures are not necessarily grounded in theory and, similar to the Burgess scale, most of the measures are static (Andrews, Bonta & Wormith, 2006). Third generation instruments, such as the LSI-R, are not only empirically supported, but also include dynamic risk factors that are theoretically derived (Andrews et al., 2006). These dynamic risk factors, also known as criminogenic needs, comprise the areas to target for change in the offender.

Developers of the third-generation risk assessments noted the importance of testing the reliability and validity of their instruments. In order to do this, samples of offending populations were needed to examine the predictive validity of these tools. Baseline measures for recidivism were generated to determine the targeted population's recidivism rate. With these data, the predictive validity of the instrument was then evaluated for the specified offending group. As previously stated, tests of predictive validity should be repeated, even for similar offending groups, as slight variations from one sample to the next can potentially overestimate the tool's reliability (Gottfredson & Moriarty, 2006).

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Predictive validity of the LSI-R

The LSI-R is a standardized actuarial instrument that contains 54 items and produces a summary risk score that can be categorized into five risk levels. Based on the Multi Health Systems (MHS) cutoff scores, ranges have been designated that indicate an individual's risk category. Specifically, the risk categories are: 1) Low, which ranges from a 0 to 13 overall risk score; 2) Low/Moderate, which ranges from 14 to 23 overall risk score; 3) Moderate, which ranges from 24 to 33 overall risk score; 4) Moderate/High, which ranges from 34-40 overall risk score; and 5) High, which ranges from 41 to 54. Higher risk levels reflect an increase in the propensity to commit future criminal acts. These 54 static and dynamic items are divided into 10 domains. The 10 criminogenic domains include criminal history, education/employment, financial, familial relationships, accommodations, leisure and recreation, companions, alcohol and drug use, emotional health and attitudes, and orientations (Andrews & Bonta, 1995). Information to score the LSI-R is primarily gathered through offender self-report during a structured interview and available collateral information, such as official court records.

Based on the principles of effective correctional intervention, and specifically the risk principle, offenders should be separated by their risk level (Andrews, Bonta & Hoge, 1990). Further, multiple studies and meta-analyses have repeatedly shown that the intensity and dosage of programming, supervision and services should be related to the offender's risk level (Andrews et al., 1990; Andrews & Dowden, 1999, 2006; Dowden & Andrews, 1999a, 1999b, 2000; Lipsey & Wilson, 1998; Lowenkamp, Latessa, & Holsinger, 2006). Simply put, offenders that demonstrate a higher risk should receive the majority of services. Likewise, lower-risk offenders should be diverted from programming that includes a higher-risk population. Several studies have revealed that the lower-risk group's recidivism rate is likely to increase under these circumstances (Andrews, Zinger, Hoge, Bonta, Gendreau & Cullen, 1990; Andrews & Dowden, 1999; Dowden & Andrews, 1999a, 1999b; Lipsey & Wilson, 1998; Lowenkamp & Latessa, 2005). Specifically, programming designed for the high-risk offending populations, such as residential treatment, should not be provided to the low-risk offender. These programs have been found to increase the associated recidivism rates of their lower-risk clients (Lowenkamp & Latessa, 2005).

Numerous studies have established support for the validity of the LSI-R in various correctional settings and populations. Specifically, in a review of validation studies, Andrews and Bonta (1995) reported that the instrument was a valid predictor of offending outcomes for incarcerated populations as well as offenders in community and residential settings. In one recent study examining an incarcerated population, Simourd (2004) evaluated the predictive ability of the LSI-R on a sample of Canadian offenders to assess whether the instrument was valid for inmates serving lengthier incarcerations. He found that the LSI-R was an effective tool for predicting both general ($r = .44$) and violent recidivism ($r = .26$). Similarly, in a study examining the predictive validity of the LSI-R on jail inmates, Holsinger, Lowenkamp and Latessa (2004) found a positive correlation between the total risk score and recidivism ($r = .40$). Finally, meta-analytic reviews have also suggested that the LSI-R is a valid predictor of future recidivism for offending populations (Gendreau, Little & Goggin, 1996; Gendreau, Goggin & Smith, 2002).

Support for the predictive validity of the LSI-R has also been noted for samples comparing ethnicities, sex, and age (Andrews & Bonta, 1995). ¹ In one empirical test examining the predictive validity of the LSI-R on the sex of the offender, Lowenkamp et al. (2001) found it was a valid assessment for males ($r = .22$) and performed equally as well, and in some instances, better for females ($r = .37$).

As indicated, multiple evaluations have demonstrated the predictive ability of the LSI-R. However, one study sought to address a gap in research concerning practitioner training and adherence to the guidelines concerning the administration of the LSI-R (Whiteacre, 2004). Flores and colleagues (2006) explored the predictive validity of the LSI-R, focusing on the “implementation integrity” and how this may impact the tool’s ability to produce valid results on their targeted population. Specifically, they found a significant positive correlation ($r = .21$) between the total LSI-R score and future recidivism for practitioners trained on the LSI-R. This correlation increased to $r = .25$ when the instrument had been in use at that agency for at least three years. In contrast, the correlation between the LSI-R score and recidivism for untrained practitioners revealed an insignificant correlation ($r = .08$).

The current research explores the relevance of examining the predictive validity of the LSI-R on a sample of probationers and parolees from Iowa. This process is more commonly referred to as norming the tool on the targeted population in order to demonstrate that the LSI-R has predictive validity for this sample. In particular, this study will profile the offenders who have been assessed on the LSI-R to determine if this risk and needs instrument was able to predict recidivism for these two distinct groups. It should be noted that individuals on parole may have a higher criminogenic risk to recidivate than those who have been placed on community supervision. As such, the analyses for these groups will be conducted separately and the reported findings will be presented with the total sample and then both samples individually.

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Method

Sample

This sample of offenders is comprised of probationers and parolees from the State of Iowa. Initial LSI-R assessments were completed between the dates of May 12, 2003 and November 21, 2003, leaving a total sample size of 1,145 cases. Specifically, the total sample included 902 initial probation assessments and 243 parole assessments.

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Measures

Six primary independent variables were used to predict recidivism within the multivariate analyses for the total sample, as well as both the probation and parole samples separately. Demographic variables that were included in the current study were sex, race, age, and marital status. With the exception of age, which remained as a metric level of measurement, sex, race

and marital status were coded dichotomously. Specifically, for the variable labeled sex, 0 = male and 1 = female. Race was coded as 0 = white and 1 = nonwhite, and for the offender's marital status, 0 = married and 1 = single. Two additional independent continuous variables included time at risk and the total risk score of the offender based on the initial assessment of the LSI-R. Time at risk was measured as the number of days from the start of supervision until the end of the follow-up period. Finally, the offender's total LSI-R was measured as a limited metric ranging from 0 to 54. In order to provide further descriptive information regarding the offenders, these data included two continuous variables that examined the time to failure, which was measured in the number of days before a violation, and the days to recidivism, which was measured as the days until re-arrest for a felony or indictable misdemeanor. While each of these variables applies to the total sample as well as to the separate probation and supervision samples, an additional independent variable labeled as supervision status was included in the multivariate analysis for the total sample. Specifically, this dichotomous measure was coded as 0 = probation and 1 = parole.

Only one dependent variable, recidivism, was considered in the current study. This measure examined whether or not an offender was re-arrested based on a felony charge or an indictable misdemeanor. In particular, this variable was coded as 0 = no felony charge or indictable misdemeanor and 1 = yes, the offender experienced a felony charge or indictable misdemeanor.

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Analysis

As described above, each analysis will report the findings for the entire sample as well as treating the probation and parole groups separately. This is done in an effort to assess the predictive validity of the LSI-R on both groups, which rather expectedly may have varying risk factors and scores attributed to receiving different sentencing or supervision status types. There are three components for this analysis. The first section will describe the offenders based on demographic data as well as profiling the offenders from their LSI-R scores. Within the first section of the analysis, the descriptive statistics for each of the independent demographic variables as well as the dependent variable are presented. The second section of this report will focus on the validation of the LSI-R tool in predicting future criminal behavior among the probation and parole samples. Both bivariate and multivariate analyses were conducted to determine how well the LSI-R performed in predicting future criminal behavior of probationers and parolees. In addition, a receiver operating characteristic analysis was conducted in order to address any potential bias that may have impacted the strength of the correlation coefficients from the bivariate analysis.

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Results

Demographics

[Table 1](#) describes the demographic characteristics for the total sample, and both supervision status types. While the majority of offenders were single, white males, with an average moderate LSI-R risk score of 25, it is interesting to note some of the differences between the probation and parole groups. [2](#) At the start of supervision, probationers averaged 30 years of age, while the parolees were slightly over 33 years of age. The range for probationers' ages was 16 to 66 years, while the parolees' ages ranged from 19 to 60 years. In addition, the modal value for the probationers' ages was 19, yet the parolees were most likely to be 23 years of age. This may not be surprising, since these ages may reflect that the more youthful group would initially receive probationary sentences, while those who have received prison sentences already are much more likely to be older and perhaps of higher risk due to establishing a prior offense history. [3](#)

Out of the total sample (N= 1,145), 428 (33.2 percent) offenders were found to have recidivated during the follow-up period. Based on supervision status, nearly 31 percent of the probationers recidivated, in comparison to almost 43 percent of the parolees. A comparison of these findings

with the days-to-recidivism measure found that the probationers do fail faster than the parolees, but a higher percentage of parolees recidivated in comparison to the probationers.

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Validation of the LSI-R

Three separate analyses contributed to examining the predictive validity of the LSI-R on this sample. First, for the purposes of setting up the multivariate models, bivariate correlations were calculated for both the probation and parole groups examining recidivism by total LSI-R score. Second, a receiver operating characteristic (ROC) analysis was also conducted, since this statistic is not biased by a sample's selection ratio or base rates (Mossman, 1994). The correlation coefficient, as produced by the bivariate correlation analysis, can be impacted from two sources: 1) the selection ratio, which is the percentage of recidivists as determined by the risk/ needs assessment and 2) the base rate, which reflects the actual recidivists in the sample (Flores, Lowenkamp, Smith & Latessa, 2006, p. 47). Finally, the multivariate models were constructed to identify if the LSI-R overall score was a significant predictor of recidivism while controlling for other variables.

[Table 2](#) depicts the results of the bivariate correlations, which indicate that the LSI-R is a significant predictor of recidivism. With the exception of female parolees and non-white parolees, the total LSI-R score was significantly correlated with recidivism, for both the total sample ($r = .245, p < .01$) as well as probation ($r = .233, p < .01$) and parole ($r = .254, p < .01$). [4](#)

The ROC analysis produced a curve for this sample of Iowa offenders that represents the ratio of true positives (those who actually recidivated) to false positives (those who did not recidivate). For the probation sample, the ROC analysis found a ratio of 276:626 offenders. This resulted in an area under the curve of .644 ($p < .01$). Regarding the parolees, the ROC analysis ratio produced was 104:139. This resulted in an area under the curve of .652 ($p < .01$). As described by Rice and Harris (1995), these values under the curve can be treated as percentages, since the value is based on a ratio. Therefore, for the probationers, there was a 64.4 percent chance that a randomly selected recidivist earned a higher LSI-R score than a randomly selected nonrecidivist. Similarly, this value would be 65.2 percent for the parolees.

Both the bivariate and ROC analyses have revealed that the LSI-R is a valid predictor of recidivism for a sample of probationers and parolees in Iowa. This final analysis will examine the predictive ability of the LSI-R while considering the effect of sex, race, age, marital status, supervision status, and time at risk. Table 3 illustrates the results from the multivariate logistical regression models. Regarding the entire sample, results from [Table 3](#) reveal that sex, race, age, supervision status type, and total LSI-R score are significant predictors of recidivism. Parolees were more likely to experience recidivism than probationers. Finally, for the total LSI-R score, the higher the total risk score, the more likely that a case would result in recidivism. Similar significant results were noted when examining the model for probationers. However, the findings were not consistently demonstrated for the parole group model. Both sex and age became insignificant predictors of recidivism for the parole sample. Yet, race and total LSI-R score remained statistically significant predictors of recidivism and the coefficients remained in the expected direction.

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Discussion

Overall, the sample is comprised of offenders who are of moderate risk based on the MHS cutoffs. Regarding the validation of the LSI-R for these two groups, all of the analyses, both bivariate and multivariate, as well as the ROC analysis, suggest that the total LSI-R score is significantly related to predicting future criminal activity. As such, this risk/needs assessment is a valid and valuable tool for both supervision status types.

There are several practical purposes for programs and facilities to norm and validate the

instrument on their specific population. First, agencies can use the instrument to designate supervision levels for their clients. Second, upon an initial assessment, case managers can create individualized case plans for the offender that targets their specific criminogenic needs or risk factors. Third, and specific to the current study, agencies can develop appropriate cutoff scores with which to manage their offending population and provide appropriate and beneficial service delivery. Fourth, offenders can be reassessed during their supervision as well as at the conclusion to determine if the assigned treatment and services reduced a client's risk factors associated with recidivism.

Ultimately, programs are more likely to demonstrate their efficacy when utilizing a standardized and objective risk measure, such as the LSI-R, which identifies an individual's risk level as well as his or her criminogenic needs. Actuarial assessment practices are clearly relevant and needed within the current correctional climate. With proper implementation and interpretation, correctional programs will have the ability to appropriately allocate funding and resources that may increase appropriate placement and treatment effectiveness and potentially enhance public safety (Flores et al., 2006; Latessa & Lowenkamp, 2005).

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Table 1: Descriptives for the Sample (N= 1,145)

<i>Continuous Variables</i>	Total Sample Mean		Probation Mean		Parole Mean	
Age	30.8		30.1		33.4	
Time at Risk	761.29		760.67		763.60	
Time to Failure	619.55		624.27		602.02	
Days to Recidivism	334.55		315.60		384.85	
Total LSI-R Score	24.96		24.42		26.97	
<i>Categorical Variables</i>	N	%	N	%	N	%
<i>Sex</i>						
Male	892	77.9	675	74.8	217	89.3
Female	253	22.1	227	25.2	26	10.7
<i>Race</i>						
White	970	84.7	780	86.5	190	78.2
Nonwhite	175	15.3	122	13.5	53	21.8
<i>Marital*</i>						
Married	252	22.0	186	20.6	66	27.5
Single	814	71.1	640	71.0	174	72.5
<i>Recidivism</i>						
No	765	66.8	276	30.6	104	42.8
Yes	380	33.2	626	69.4	139	57.2
*N's may be slightly smaller than total N due to missing data.						

Table 2: Bivariate correlations predicting recidivism by total LSI-R score (N= 1,145)

Group	N	r	95% Confidence Intervals	
			Lower	Upper
<i>Total Sample</i>	1145	.245*	.190	.298
Males	892	.247*	.185	.307
Females	253	.205*	.084	.320
Whites	970	.219*	.159	.278
Non-whites	175	.242*	.098	.376
<i>Total Probation</i>	902	.233*	.171	.293
Males	675	.231*	.159	.301
Females	227	.219*	.092	.339
Whites	780	.199*	.131	.265
Non-whites	122	.292*	.121	.446
<i>Total parole</i>	243	.254*	.133	.368
Males	217	.271*	.143	.390
Females	26	.05w9	-.336	.436
Whites	190	.275*	.139	.401
Non-whites	53	.100	-.175	.360

* p< .01=

Table 3: Logistic regression predicting recidivism for the Sample (N=1145)

<i>Variables</i>	<i>Total Sample^a</i>		<i>Probationers</i>		<i>Parolees</i>	
Group	B	SE	B	SE	B	SE
<i>Sex</i>	-.408 **	.180	-.381 **	.194	-.575	.475
<i>Race</i>	.789 *	.181	.757 *	.216	.852 **	.334
<i>Marital</i>	-.210	.175	-.226	.212	-.192	.315
<i>Age</i>	-.034 *	.008	-.037 *	.009	-.024	.016
<i>Supervision Status</i>	.458 *	.164	N/A	N/A	N/A	N/A
<i>Time at Risk</i>	.001	.003	.003	.003	-.001	.005
<i>Total Score</i>	.059 *	.008	.058 *	.009	.066 *	.019
<i>Constant</i>	-2.369	1.958	-3.038	2.282	-.297	3.865

^a Chi-Square: 121.022, p < .001, -2 Log Likelihood: 1231.358, Cox and Snell: .107, Nagelkerke: .149

^b Chi-Square: 82.577, p < .001, -2 Log Likelihood: 928.596, Cox and Snell: .095, Nagelkerke: .135

^c Chi-Square: 26.450, p < .001, -2 Log Likelihood: 301.428, Cox and Snell: .104, Nagelkerke: .140

* p < .001

** p < .05

Probation and Parole Officers Speak Out—Caseload and Workload Allocation

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COMMUNITY CORRECTIONS populations have experienced tremendous growth for the past two decades. The Bureau of Justice Statistics Correctional Survey (<http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm>) reveals that probation and parole populations have grown unabated since 1980. This growth has serious implications for probation and parole agencies regarding how to make caseload and workload decisions. It is important to consider differences between caseload, which is the number of offenders supervised by an officer, and workload, which is the amount of time needed to complete various tasks. While caseload size will grow as offender populations increase, workload per officer is a more stagnant figure, as there are only so many working hours available in each day, week, month, or year for each officer.

These issues related to workload allocation are further complicated by two additional trends in community corrections. Probation was once assigned almost exclusively to relatively low-level offenders who posed little threat to public safety and were mostly in need of pro-social steering (Petersilia, 1998). In an attempt to alleviate jail and prison crowding, however, probation caseloads are being populated with offenders who potentially pose greater community safety threats. This is a point made by Taxman, Shephardson, and Byrne (2004: 3) in *Tools of the Trade*, in which they mention that “probation rolls increasingly mirror the prison population.” Taxman and her colleagues add that “more than half of probationers today are convicted felons.” These offenders have more criminogenic needs, as they may be gang members, sex offenders, or domestic violence offenders. As a result, these offenders will require more officer time to provide adequate supervision, treatment, and enforcement of conditions, and hopefully behavior change.

A second trend facing probation and parole agencies is the growth in conditions of supervision. These conditions are often instituted by non-community corrections professionals such as judges,

releasing authorities, and legislators. What is often a “one-size-fits all” decision-making style has the potential to foster rather standard conditions being applied to offenders, with little consideration of individual offender characteristics. For instance, in many jurisdictions, regardless of an offender’s substance abuse history, he or she must submit to periodic drug tests. This type of sanction, while perhaps noble in its attempt to prevent drug use, may not be realistic, relevant, or based on research, something Carl Wicklund (2004), Executive Director of the American Probation and Parole Association (APPA), referred to as the three Rs of community supervision. Karol Lucken (1997: 367) points out the potential unanticipated consequences of increased failures due to what she refers to as the “piling up of sanctions” as they expose “offenders to a number of punitive and rehabilitative controls, which often leads to violations and returns to the correctional system.”

The fact that an external body—whether judge or releasing authority—has much discretion in establishing supervision conditions may not be problematic in and of itself. It becomes potentially problematic, however, when such decisions are made with little input from presentence investigation reports or risk assessments, and otherwise in isolation from research evidence supporting effective community corrections strategies. The use of research to identify effective programs is not a new idea. Rather, the medical field and several other areas of human services are beginning to see the value in evaluating the effectiveness of specific strategies with certain categories of people to more widely adopt strategies and policies that have been shown to work and to eliminate those that do not work.

To date, there is little research offering information from probation and parole officers to assist policymakers and administrators in confronting workload allocation issues. To fill this void, this study considers how probation and parole officers describe concerns related to workloads. Addressing how workers define their workloads provides a framework for understanding how these recent trends of growth in caseloads and standardization of probation/parole conditions have altered the probation/parole experience for officers and offenders.

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Community Corrections Goals in Practice

Community corrections agencies work with stakeholders in their jurisdictions to establish clearly defined organizational goals and an overall strategy to achieve, evaluate, and adjust such strategies. These goals are to be jurisdictionally appropriate and therefore rooted in local contextual conditions, not necessarily global national standards. However, it does seem to be generally accepted that probation and parole agencies are in the business of community safety through instituting a balanced approach of surveillance, treatment, and enforcement (see Taxman et al., 2004). This tripartite focus is rooted in evidence-based practices that begin with assessing an individual offender’s level of risk as an indication of his or her probability to re-offend. Of course, community corrections officers are not singly responsible for achieving the goal of public safety; rather, probation and parole outcomes are embedded in a larger multi-organizational justice system that incorporates law enforcement, institutional corrections, and courts, as well as non-justice agencies including victims of crime, treatment providers, and others.

Once probation and parole agencies define a locally acceptable goal, it is important to institute a strategy to accomplish their organizational goal. This strategy no doubt involves incorporating the many interested stakeholders involved in the justice system process through in-depth collaboration. Through collaboration and an overall strategy aimed at public safety, former New Jersey Parole Board Chair Mario Paparozzi (2007) suggests that probation and parole can “own their outcomes.” By “owning outcomes,” Paparozzi is identifying the importance for probation and parole administrators to establish clearly defined goals related to public safety and the community, state these goals, and institute policies and practices to achieve such outcomes. Expected outcomes may not always follow. As Paparozzi notes, “If I ended up on the 11 o’clock news, you know something went wrong.” It is expected that from time to time things will go wrong, offenders will re-offend, there will be highprofile cases receiving much media attention to exploit the faults of probation or parole agencies. What is important, however, is for probation

and parole agencies to work to diminish recidivism by utilizing scientific or “state-of-the-art” procedures to bring about offender behavior change (Taxman et al., 2004). Judy Sachwald (2004), Director of Maryland Probation and Parole, promotes a similar argument by incorporating a model of supervision rooted in scientific exploration and knowledge of offender behavior. She suggests that probation and parole agencies should “do it, tell it, and sell it,” with the “it” referring to shaping policies, operations, and professional development within agencies around scientific principles related to evidence-based practices.

There is no doubt that evidence-based practices designed to reduce risk of re-offending are infusing the community corrections field with more scientific approaches. These approaches rely on risk assessments to allow probation and parole agencies to differentiate and typologize offenders based upon their relative level of risk to re-offend. This strategy allows for addressing criminogenic needs—anti-social behavior, anti-social personality, anti-social values and attitudes, criminal peer groups, substance abuse, and dysfunctional family relations—through an integrated approach of surveillance, treatment, and enforcement. Although community corrections officers have numerous challenges to overcome, there are few issues more central to the organization and function of probation and parole practice and success than workload allocation issues. These issues form the base from which all other supervisory functions flow.

To gain a better understanding of how workload and caseload issues are viewed by probation and parole officers, this study focuses on how a group of probation and parole officials describe their concerns about workload. Focusing on the workload allocation concerns of probation and parole officials is important for at least four reasons. First, because they have experiences that others may not have had, probation and parole officers are in a position to provide insight into the way that broader influences have shaped workload allocation issues. Researchers and policy makers could use conjecture to understand these workload allocation issues, but such conjecture could be misleading and potentially ignore real concerns of probation and parole officials.

Second, probation and parole officials are in positions that have evolved a great deal over the past two decades. Much of the criminal justice overcrowding research has focused on the occurrence of prison overcrowding. However, this prison overcrowding research should lead naturally to research on the expanded use of community-based corrections. Ignoring the perceptions and experiences of probation and parole officials has resulted in shifting the overcrowding problem, rather than addressing it. By considering how these efforts to offset overcrowding have influenced probation and parole, a more complete picture of strategies to deal with overcrowding will appear.

Third, and on a related point, the growth in community-based corrections requires that policy makers and researchers determine how this growth is perceived by probation and parole officials. Identifying the most cost-effective community corrections supervision strategies is essential to U.S. justice system policy and practice. Despite the relative lack of research into community corrections effectiveness, the U.S. justice system depends, more than ever, upon well executed and fiscally constrained community supervision strategies. Since the 1980s, correctional populations have grown about threefold, with nearly 7 million adults (about 3.2 percent of the adult population) under community supervision or incarcerated (BJS, 2004a). This growth places a significant burden on government budgets, as local, state, and federal direct expenditures for corrections totaled \$36 billion in 1982 and climbed to \$167 billion by 2001 (BJS, 2004b). One area of the justice system especially affected by this 366 percent growth is community corrections services.

Fourth, asking probation and parole officers about their perceptions gives them a voice in the research and policy-making process. Providing individual voices in the policy-making process will give a sense of empowerment to those who have chosen to use their voices to effect change. In turn, those who feel empowered will be more likely to work towards organizational goals. Indeed, the community corrections field must inform the judiciary and releasing authorities as well as policymakers of the effect of growing caseloads of higher-risk offenders with more imposed conditions.

Methods

A web-based survey of the APPA membership was conducted. Several specific steps were taken to develop the sample of probation and parole officers used in this article. The survey was linked to the bi-weekly electronic distribution of APPA's newsletter, CC Headlines. CC Headlines is distributed via email to approximately 1,500 individuals and agencies combined. There is space in this newsletter to include a link to a web-based survey.

Approximately one week before disseminating the survey, a pre-notice was emailed to the CC Headlines mailing list. The pre-notice described the importance of the topic and the need for APPA to receive information on workload allocation. After the first survey distribution, 130 completed questionnaires were returned. Two subsequent requests produced a total of 240 responses. After eliminating responses due to errors (e.g., missing information, duplicate submissions), the total number of responses was 228 (for more information on Internet survey methods, see Schaefer & Dillman, 1998). The survey was divided into three sections (demographics, workload and caseload allocation, and sex offender and other high-risk supervision). The quantitative data is reported on elsewhere (see DeMichele, Paparozzi, & Payne, unpublished manuscript).

Sample

This survey was intended to gather exploratory data about current community corrections practices. As [Table 1](#) reveals, respondents were predominantly affiliated with probation departments, accounting for 56 percent (n = 129) of all respondents. Nearly one-third (n = 70) of respondents indicated working in combined agencies serving probation and parole functions, five percent (n = 12) were in parole agencies, and seven percent (n = 17) worked in an "other" type of agency. These descriptive items revealed that the bulk of respondents worked in rather large jurisdictions, with nearly half of respondents (n = 110) serving jurisdictions of 300,000 or more. Twenty-nine percent of respondents (n = 68) work in jurisdictions with between 75,000 and 300,000 residents. Other respondents indicated serving smaller jurisdictions with 10 percent (n = 24) serving populations between 30,000 and 75,000, and 12 percent of respondents (n = 26) work in jurisdictions with less than 10,000 to 30,000 people.

There was little difference in geographic regions in which respondents were employed. In fact, there is a nearly symmetrical distribution of respondents in rural (n = 60, 26 percent), suburban (n = 61, 27 percent), urban (n = 62, 27 percent), and "other" jurisdictions (n = 44, 19 percent). The over-representation of respondents serving larger jurisdictions could be related to the web-based nature of the survey, as agencies in smaller jurisdictions may lack computer resources. The number of full-time officers in the agency in which the respondent worked revealed that most agencies were relatively small. Forty percent (n = 91) of respondents worked in agencies with 25 or fewer full-time officers, 16 percent (n = 36) worked in agencies with between 26 and 50 officers, and 14 percent (n = 31) of respondents worked in agencies with between 51 and 100 officers. Nearly a quarter of respondents worked in agencies with a large number of full-time officers, with 19 percent (n = 43) of respondents indicating that their department has more than 200 officers and 8 percent (n = 19) serving in departments with between 101 and 200 fulltime officers (see [table 1](#)).

Findings

The open-ended comments were content analyzed to consider general themes that emerged from the probation and parole officials' comments. This involved reading all of their comments and inductively developing themes that surfaced consistently across respondents. From this analysis, three themes arose: 1) goal ambiguity, 2) concerns about funding, and 3) evidence-based principles. Each of these themes is addressed below.

Goal Ambiguity

It is often argued that rehabilitation and punishment are opposing justice system goals. One goal, rehabilitation, seeks to alter offender cognition (thought patterns) to bring about a concomitant shift in behavior (toward pro-sociality) (Andrews et al., 1990). The other goal, punishment, has been described as rooted in a more emotional desire to inflict pain or bring about some sort of discomfort for the offender in an attempt to rebalance the scales of justice (see Christie, 2000; Garland, 1990). This tension between rehabilitation, punishment, and providing victim and community safety is further elaborated by respondents in open-ended items. One respondent states (italics added) that “community safety, victim safety, and offender accountability have become focus points...but the resources to accomplish these changes is an ongoing process of adaptation to the demands placed upon supervision.”

This statement captures the interaction between these goals as well as the officer’s strain fostered by a context of limited resources and bloated workloads. A different respondent summarized the view in his or her agency as “We view ourselves as the front line between high-risk offenders and the community we live in.” Another respondent claimed that their department “has become more punitive, acting as police, rather than rehabilitative.” These responses potentially indicate a sense of moving toward community safety and crime reduction as central organizational goals, and a need to consider more fully the fiscal concerns emerging from steering community corrections’ function in such a way.

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Concerns about Funding

More clarity can be gained from respondents’ open-ended answers, in which they commented about caseload size and workload allocation methods. One respondent indicated that in his or her agency “caseloads have doubled...Our ability to meet the needs of these offenders has been difficult with very limited community resources, limited budgets, and a lack of support from the top and the bench.” This respondent’s frustration is an example of how community corrections agencies and officers are expected to supervise more offenders, with fewer resources, feeding employee strain and burn-out.

Another respondent simply stated that “More officers are needed to provide the level of expectations that each offender should receive.” Funding issues are tied to most decisions made by organizations—whether community corrections or for-profit industries—and they determine the possibility of such things as trainings, equipment purchases, and personnel hires. One respondent commented on the relationship between these items and how they come together to shape the ability to offer effective community interventions.

Training is minimal and equipment is sparse. [STATE NAME] has adopted a resource brokerage type of supervision. On the occasions when [officers] do venture out into the field to check up on probationers, [officers] are too poorly equipped and trained to do much more than a quick drive by of residence. Unfortunately, [STATE NAME] has disregarded officer safety even after some recent high profile assaults on probation officers who attempted home visits. Thus, furthering the belief that probation supervision is best conducted from the office.

Obviously, this respondent feels strongly about the potential ramifications for underfunding probation training and ensuring that officers have the appropriate equipment. However, this provides little advice on what administrators and policymakers should be doing to change this situation. Another respondent did suggest that “a resolution would be caseload caps, more equipment, and streamlining several processes.” No doubt such suggestions come easily when merely placed on paper, but are much more difficult to implement. Nevertheless, these respondents’ comments identify a certain uneasiness regarding the growth in caseloads of more high-risk offenders and the (fiscal) impact this has on most organizational operations.

Evidence-Based Practices

Contextualizing the above answers, one respondent bluntly stated that “we are trying to do supervision that works. We believe in the evidence based practices approach, but carrying them out can be difficult.” Another respondent mentioned that “we are in the process of instituting evidence-based practices and redistributing caseloads to focus more resources on higher risk offenders and better target our interventions.” These respondents focus on the need for developing effective strategies to intervene in offenders’ lives, which is not easy. Indeed, it can be “difficult” to say the least. One respondent emphasized further the movement in community corrections to evidence-based practices decision making when he or she commented that “recent implementations of new assessment tools, with incorporation of motivational interviewing, cognitive restructuring, and case planning has emphasized targeting high-risk offenders.”

The point here is that if evidence-based practices are going to amount to more than another catch phrase, then appropriate funding and personnel decisions are necessary preconditions. It seems that community corrections agencies, at least judging from the respondents to this survey, are seriously incorporating the notions advanced in the evidence-based practices literature. While agencies are interested in evidence-based practices, it appears that the lack of funding for fully implementing such changes fosters a half-hearted attempt.

Central to evidence-based practices is the use of specialized caseloads. Interventions should be targeted at an individual’s risks and needs, with little intervention planned for low-risk offenders and more directed (even intense) supervision for higher risk offenders. Respondents also commented on the trend toward developing specialized units for high-risk offenders, such as sex offenders. “Our department,” according to one respondent, “has more specialized and high-risk officers and casebooks than basic or general casebooks.” They go on to state that “this has become a trend.” Consider another respondent’s comment: “The proliferation and use of GPS with sex offenders has significantly increased our workloads and thus has altered our resource allocations.”

Anyone familiar with contemporary crime and justice issues is aware of the increased use of GPS to track offenders. For the most part, there has been little critical attention to using this tool as part of community supervision, especially from a pragmatic view of how these technologies affect workload. Consider one respondent’s view: “The proliferation and use of GPS with sex offenders has significantly increased our workloads and thus altered our resource allocation.”

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Discussion

Community supervision of offenders is one of the fastest growing justice system practices. Comments from the probation and parole officials in this study showed a concern about goal ambiguity, funding, and evidence-based practices. Based on the feedback from this sample of respondents, attention can be given to the way that these three themes can be addressed.

A growing area of emphasis for probation administrators is how to supervise more efficiently nonviolent offenders presenting relatively low levels of risk to the community (Dedel-Johnson, Austin, and Davies, 2002). Probation administrators are responsible for providing adequate levels of supervision and intervention to offenders, based upon individual risks and criminogenic needs (see Andrews et al., 1990). The potential exists for probation to over-supervise some offenders (i.e., the low risk) and divert resources—both time and funds—from the offenders presenting the greatest risk (i.e., repeat violent offenders).

Probation is routinely criticized for being soft on criminals. Over a three-year period, Langan (1994) analyzed survey data from 12,370 State probationers convicted of a felony during their probation supervision. Few probation departments adequately enforced conditions, as 69 percent of probationers did not pay supervision fees, 40 percent failed to pay restitution, and 32 percent never received ordered drug treatment. Many offenders do not complete the terms of their community supervision, with the best national figures estimating that about two-thirds of

parolees are rearrested within three years, and about 40 percent of probationers are unsuccessful (BJS, 2004a). ¹

Confronting the soft-on-crime image, and encompassing the bulk of research on probation effectiveness, some probation departments have created intensive supervision programs (ISP) for high-risk offenders. These programs are expected to provide more officer-offender interaction and be “more stringent and punitive than traditional probation but less expensive and coercive than incarceration” (Petersilia and Turner, 1991: 611). ISPs were initially met with optimism for their ability to reduce officer caseload size and increase the intensity of supervision to control high-risk offenders more effectively and better protect the public. ² However, little consideration was given to the high costs of ISPs for probation departments and their potential inability to supervise offenders in high-risk categories.

An analysis of three ISPs in California did not find them more effective than routine probation in reducing recidivism, despite having significantly more contact with offenders. Petersilia and Turner (1991) found that ISP probationers had higher failure rates than regular probationers. The authors suggest four reasons for this: 1) higher-risk candidates were placed in the ISPs (about 80 percent were high risk), 2) specialized units tend to enforce all technical violations strictly, 3) conditions and increased sanctions failed to deter probationers from reoffending, and 4) supervision without substantive treatment has little effect on underlying criminal behavior (Petersilia and Turner, 1991: 650). Petersilia and Turner (1991: 657) found that probationers completing counseling, employed, and paying restitution had lower recidivism rates. This suggests that probation interventions that focus on diminishing behaviors associated with criminality may be more important to encourage social conformity than multiplying contacts between officer and offender without focusing on the specific goals of these contacts (see Gottfredson and Hirschi, 1990).

In terms of evidence-based probation and parole practices, this study shows that community corrections officials are receptive to using research to inform community-based corrections policies and practices. Researchers should be sensitive to the problem of goal ambiguity, as well as to other trends that are influencing community corrections. With regard to goal ambiguity, researchers must recognize that probationer success can be evaluated in numerous ways. Probation conditions may require offenders to perform an assortment of duties (e.g., community service, pay restitution, fines), to undergo treatment (e.g., substance abuse, anger management), to maintain employment or other structured activities, and to avoid committing new offenses. This complexity places many administrators in the difficult position of determining what constitutes successful completion. Is an offender successful if he/ she is not rearrested? Should new convictions be most important? Should probation success be evaluated by the level of compliance with court orders (technical violations)? For these reasons, researchers should track several forms of probationer success and failure, including treatment completion (e.g., substance abuse, mental health), court order compliance (e.g., paying fines, restitution), and the more traditional recidivism concept (e.g., new arrests, convictions, and revocations).

Furthering the use of evidence-based principles in community corrections will require more rigorous research than has been conducted in the past. To date, no research analyzes the differences among low- and medium-risk offenders using an experimental design. Future research should focus on high-risk offenders by randomly assigning nonviolent, low- and medium-risk offenders to one of five probation supervision strategies to determine if differences in offender performance and cost-effectiveness exist among the five types of supervision included. In addition, justice system researchers need to collaborate with practitioner organizations to develop innovative research strategies to identify cost-effective supervision practices (Gist, 2000; Lane, Turner, and Flores, 2004).

Community corrections services offer ways to alleviate jail and prison crowding, deliver serious punishment, and contribute to rehabilitating offenders. Probation performs several functions to properly supervise offenders (e.g., home contacts; surveillance; drug testing; collection of restitution, fines, and fees; community work service; monitoring of curfews and travel restrictions; intermediate sanctions; and revocation) and offers offenders adequate treatment

options (e.g., assessment and treatment referrals, motivational interviewing, employment and educational assistance, and support and mentoring) (Paparozzi, 2003).

A shift away from rehabilitation to a more punitive model has emerged in tandem with public opinion favoring more punitive strategies (e.g., capital punishment, three-strikes laws, mandatory minimums) (Beckett, 1997; Pratt, 2000). Cullen, Fisher, and Applegate (2000: 79) highlight the strange coupling of get-tough and transformative policies, as more of the public wants “the correctional system to achieve the diverse missions of doing justice, protecting public safety, and reforming the wayward” (also, see Applegate, 2001; Bouley and Wells, 2001). No other branch of the criminal justice system is more affected by this bifurcated crime control policy shift than community corrections agencies. Public scrutiny and diminishing resources require community corrections agencies to maximize potential positive outcomes of offender programs. They must invest resources in the most cost-effective methods to decrease the potential for sanction stacking and ensure that the conditions of supervision are reasonable, realistic, and research based.

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[Publishing Information](#)

Table 1: Descriptive Agency Information

Agency Type	Number	Percent
Probation	129	56
Parole	12	5
Combined	70	31
Other	17	7
Jurisdiction Size		
<10k	2	1
10-30	24	11
30-50k	11	5
50-75k	13	5
75-150k	35	15
150-300k	33	14
>300k	110	48
Jurisdiction Type		
Rural	60	26
Suburban	61	27
Urban	62	27
Other	44	19
# Full-Time Officers		
1-25	91	40
26-50	36	16
51-100	31	14
101-200	19	8
201+	43	19
N = 220		
Agency shift		
Decreased	43	19
# Officers Reduced		
Maximum	55	
Minimum	1	
Mean	9	
Unionization		

Yes	133	58
No	95	42
Years Experience		
1-5	26	11
6-10	47	21
11-20	67	29
20+	89	39
Mean Years = 17.68		

Thacher, Augustus, and Hill—The Path to Statutory Probation in the United States and England

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[Judge Peter Oxenbridge Thacher](#)
[The Labors of John Augustus](#)
[Matthew Davenport Hill](#)

IF ONE WERE TO ASK an American criminal justice student/professional to name the “father of probation,” the answer would virtually always be John Augustus. Similarly, almost every probation textbook written in the United States labels Augustus as the architect of probation. Abadinsky (2006:96) describes Augustus as the “nation’s first probation officer.” Champion (2002:2) notes that “Probation in the United States was conceived in 1841 by a successful cobbler and philanthropist, John Augustus ...” It is stated that the work of Augustus “led to the statutory creation of probation services in Massachusetts” (Silverman and Vega, 1996:495).

However, a number of writings both in the United States and England also note the contribution of Matthew Davenport Hill to the development of probation. Hill, a lawyer in England, held the judicial post of recorder in the City of Birmingham. While his work did not as closely parallel modern-day probation as did that of Augustus, it clearly contributed to the development of the practice.

While not seeking to significantly diminish the contributions of Augustus, a number of criminologists question whether the beginnings of probation should be attributed in so substantial a degree to Augustus. Tappan (1960:545) associates the importance credited to Augustus to the “... ethnocentric inclination of American Criminologists to date the beginnings of probation from the work of Augustus in 1841.”

Dressler (1969:22), while contending that Augustus deserves the title “father of probation,” nevertheless recognizes the importance to probation of English common law antecedents. He further credits Matthew Davenport Hill for initiating practices similar to what would eventually evolve into probation. Walker (1998:94) agrees that while Augustus contributed greatly to the birth of probation, his role was somewhat exaggerated. Accordingly, he writes that:

The colorful story of John Augustus as the inventor of probation has been told too many times. He did not invent probation any more than the police or the prison appeared out of thin air. Long before his time, criminal court judges found ways to mitigate punishment and allow convicted offenders to remain in the community under some restrictions.

Coincidentally, both Augustus and Hill initiated their work in the same year. In 1841, the first sustained services resembling modern-day probation were provided in Boston and in Birmingham, England. Remarkably, both men did not begin their work on behalf of offenders until they were relatively advanced in age; Augustus was 57 when he began bailing offenders out while Hill was 49 years of age.

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Judge Peter Oxenbridge Thacher

In addition to the contributions of Augustus and Hill, we also note the earlier judicial sentencing practices of Judge Peter Oxenbridge Thacher, who, instead of incarcerating many juvenile offenders, released them on condition of good behavior. Bowker (1982:322) is of the opinion that:

Like most other innovative behaviors, the path-breaking work of Augustus builds on earlier practices. Augustus might not have started his private probation program in Boston had it not been for the earlier policy of ... Thacher, who began to allow convicted offenders to go free on what was essentially unsupervised probation shortly after he took office.

Thacher released the defendants on recognizance, which was a legal procedure that enabled a judge to liberate a defendant between conviction and sentencing. Jones (2004:63) notes that:

Courts use recognizance today to allow defendants to be free between their initial court appearance and trial. During the 1830s in Massachusetts, recognizance was used, illegally in fact, as a means of allowing young or first-time offenders the chance to avoid a criminal conviction and the harsh punishment that might accompany it.

Thacher used recognizance with great frequency in his years on the bench (1823-1843) in the Municipal Court of Boston, "... and the practices developed by him were of particular significance in the later evolution of probation in Massachusetts" (Carter and Wilkins, 1976:84). Thacher further broadened the application of recognizance by continuing to defer trial pending the good behavior of the juvenile and minor offender. In effect this practice unofficially broadened the law. However, this system would later be copied in modern methods for diverting first offenders from the full penalties of the criminal justice system (Johnson and Wolfe, 1996:141).

Recognizance is an obligation on the part of the defendant, who either promises to do something or to refrain from engaging in certain behavior over a definite time period, and to show up in court on a given date for either his trial, or the disposition of his case. Recognizance is also known as "binding over" (Dressler, 1969:18).

Dressler (1969:19, 23) notes that recognizance, as used by Thacher, had a number of elements similar to today's probation. These include freedom in the community as an alternative to incarceration; the suspension of sentence; court-established conditions of behavior; and the threat of incarceration should there be a violation of the court-ordered conditions. A key component of today's probation not present in recognizance, however, was the supervision of the defendant. Accordingly, the defendant received neither rehabilitative services nor court supervision. It is believed that the first recorded use of recognizance in this country was in 1830 by Judge Thacher in the case of *Commonwealth v. Chase* in the Boston Municipal Court. In this case Jerusha Chase pleaded guilty to the charges, but was not sentenced, as Judge Thacher yielded to the pleas of her friends with the consent of the prosecutor. The court allowed her to return home under recognizance, with the understanding that she would return to court when so requested. This was subsequently done in other cases in which no sentence would be pronounced against the defendant if he did not again violate the law. It is believed that the extended use of recognizance, especially with young defendants, was subsequently practiced by other judges as a

way of lessening the punitiveness of the criminal justice system. Subsequently, by 1836, legislation was passed in Massachusetts that statutorily permitted the release of minor offenders upon their recognizance at any stage of the proceedings, with the understanding that the defendant would exhibit future good behavior. The statute further provided for the posting of one of numerous types of surety, including cash, property, a bond, or a promise by another person who was considered to be reliable (Allen, et al., 1985:40). Accordingly, it served as an early path towards what would eventually become a probation system.

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The Labors of John Augustus

Augustus' contribution to the creation of probation was so enormous and significant that it is readily understandable why he is considered by many as the "father of probation." So much has been written about Augustus, in both books and academic journals, that repetition would serve little purpose. Accordingly we will only provide a brief sketch of his career, and a review of his specific and direct contributions to the creation of probation.

Augustus was born in Burlington, Massachusetts (then part of Woburn) in 1785 (Cromwell, Alarid, and del Carmen, 2005:78). In his early twenties he moved to Lexington, Massachusetts and opened a highly successful bootmaking shop, which at one time had four or five employees. In 1827 he moved to Boston. The prosperity achieved in his business enabled him to live comfortably.

From 1811 to 1829 he lived in the Jonathan Harrington House, situated at the north end of Lexington Green. (The house is of rich historical significance in that "its namesake, Jonathan Harrington was shot and killed ... by British Regulars on the first day of the Revolutionary War." The house has since been renovated and restored (Cromwell, Alarid, and del Carmen, 2005:78).)

Over the years Augustus worked with men and women, and even young children. A good deal of his time was spent in attempting to reform alcoholics, and he generally used the pledge to refrain from alcoholic beverages as a tool in his efforts at rehabilitation.

Neither a police officer nor a social worker by profession, he served without financial compensation, unattached to any agency, and holding no official position. Jones (2004:63) observed that "Augustus, a very religious man, believed that alcohol was an evil agent that devastated people's souls as well as their bodies. His motivation ... was based on strong Christian beliefs in the possible redemption of people's souls"

Often neglecting his own livelihood and business by aiding, both day and night, those in need of help, Augustus (1972:7) wrote of the stress which dominated his life stating that: "Scarcely an hour in the day elapsed, but someone would call at my house or my shop and tell their tale of sorrow." Not surprisingly, he so generously gave of his time, that upon his death on June 21th, 1859 he was financially impoverished.

Augustus initiated his voluntary probation work in 1841 when he requested a judge to defer the sentencing for three weeks of a man found guilty of being a common drunkard. He requested that the defendant be placed in his custody during this time period and with the consent of the judge, Augustus bailed him out of court. Augustus had the defendant sign the pledge of sobriety. At the end of three weeks, Augustus accompanied the defendant back to court for sentencing, and the success of his supervision was dramatic. As described by Augustus (1972:6):

... his whole appearance was changed and no one, not even the scrutinizing officers, could have believed that he was the same person ... The Judge expressed himself much pleased ... and instead of the usual penalty—imprisonment in the House of Correction,—he fined him one cent and costs ... The man continued industrious and sober, and without doubt has been ... saved from a drunkard's grave.

Heartened by this initial success and its humanitarian value, Augustus continued this voluntary work, extending his social work assistance to women and children. His work with children was especially heart-wrenching as there was no juvenile court, or legal aid attorneys available, and when incarcerated there was little difference between their treatment and that of adults.

It is understandable that Augustus is considered by many to be the “father of probation,” because many of the practices he created, often with slight changes, continue to survive and are at the heart of today’s probation. Illustrative is today’s pre-sentence investigation, which is a report to the court designed to assist in determining an appropriate sentence. Although current reports may be more inclusive, better structured, and written rather than delivered verbally, the inherent underlying purpose remains the same. Then as now, an interview of the defendant and the collection of relevant materials serve to help the court determine sentence. Required today prior to the passing of sentence in many courts, it remains one of the major components of probation practice.

Augustus did not recommend everyone for probation. He carefully screened prospective candidates through interviews, checks of their background, and social histories. For the most part, the offenders he sponsored were low-risk, nonviolent criminals. One of the most important components of his work was supervision of the offender. Not content to merely bail out the offender, Augustus sought to improve his behavior and keep him crime free. To this end, he continued his contacts with the probationer, not only to monitor his conduct, but to bring about change by meeting his social needs. Accordingly, Augustus assisted probationers in securing employment, housing, and schooling, and helped resolve personal problems. In many cases he employed the defendant in his shop for several weeks, to enable the offender the opportunity to learn an employment skill.

The pledge was another tool he used in his supervision of alcoholic offenders. Glueck (1939:XX1) wrote that according to Augustus’ account it seemed:

... to have had a more magical effect upon chronic alcoholics than a similar ceremony has today. Inducing the defendant to take the pledge or “promise not to drink liquor” is still a favorite and easy method of probation work in certain courts.

As part of the supervision process, he would allow homeless offenders to temporarily reside in his own home. It is stated that Augustus “...often had as many as fifteen of his proteges living in his house at any one time” (Glueck, 1939:X1). In contrast to the intensive supervision provided by Augustus, Glueck (1939:22) characterized many latterday officers as only providing “perfunctory, sporadic office check-ups” and token supervision. Another essential aspect of Augustus’ supervision, which continues today and is recognized as a key feature of the probation service, was the record keeping of his labors. Although it was extraordinarily time consuming, he recognized its value and kept records of all his cases. Augustus (1972:96) wrote that “For my own gratification I have caused the name of nearly every person whom I have bailed, to be placed on a docket or roll.”

Another major contribution of Augustus was in providing the name “probation.” His use of the term in his book is frequent. Abadinsky (2006:96) writes that “The concept of probation, from the Latin *probatio*—period of proving—evolved out of the practice of judicial reprieve, used in English courts to serve as a temporary suspension of sentence to allow a defendant to appeal to the crown for a pardon.” Its meaning relates to a period of proving oneself and subsequent forgiveness.

Augustus was assisted by several other volunteers, some of whom continued Augustus’ work after his demise. Their work helped create a path leading to statutory probation.

Special recognition must also be given to Augustus because he was able to accomplish these goals despite frequent vicious attacks verbally, in writing, and occasionally even with physical abuse (Cromwell, Alarid, and del Carmen, 2005:79). Court officers in particular viewed

Augustus as an interloper with no official standing, and resented their loss of the fees at that time paid to them when a defendant was incarcerated. Many people also attacked him for mollycoddling wrong-doers by substituting treatment for punishment.

Augustus was also accused of taking money from the persons that he aided as well as contributions from charitable organizations and excessive donations from individual philanthropists. In refuting these allegations he noted that those that he “helped seldom offered him any financial reward in return” (Jones, 2004:65). Not surprisingly, despite a great deal of subsequent scrutiny by researchers no major wrongdoing was found (Jones, 2004:66).

Reporting on the negative treatment which he found commonplace, Augustus (1972:15-16) wrote that:

Often when I attempted to enter the courtroom, I was rudely repulsed by the officers and told that I could not go in... I subsequently took a seat, but was soon rudely expelled without the least cause.

Similarly, he describes his frustration at constantly being denied visitation with a confined defendant. Augustus (1972:38) paints a picture of dejection, noting how the officers took great pleasure in denying his request.

In addition, Augustus was frequently subjected to attacks in the local newspapers. These comments, both positive and negative, are quoted in his book, but it should be noted that the negative comments were often particularly vicious. Illustrative is a letter simply signed M.A.O. and published in 1847 in the *Chronotype*, and quoted in Augustus (1972:71):

Mr. Augustus is undermining the foundations of the church, as well as the state. ... What is to be done? I will suggest ... that some of my aristocratic friends, go in a body to Mr. Augustus's house after night-fall (he lives at 65 Chamber St.), and throw some bottles of coal tar through his parlor windows. If that don't fix him, I don't know what will.

Augustus, however, also had numerous supporters, one of whom was the highly respected Horace Mann, who wrote that: “Your labors favor all classes; they tend to reform the prisoner. You seem to me to be entitled to the aid and encouragement of all.”

Augustus died on June 21, 1859 at his residence after a long and protracted illness. He is buried in the Old Lexington Cemetery in Lexington, Massachusetts, and a bronze tablet is affixed to the Boston City Hall Annex which is where the old courthouse stood in which Augustus first undertook his humanitarian mission in life (Chute and Bell, 1956:50). In 1878, just 19 years after the death of Augustus, Massachusetts became the first state to pass a probation statute. The law required the Mayor of Boston to appoint a suitable person to attend the sessions of the courts of criminal jurisdiction, to investigate the cases of persons charged with or convicted of crimes and misdemeanors, and to recommend to such courts the placing on probation of such persons as might reasonably be expected to be reformed without punishment.

Interestingly, “the dual role of probation, a concept unique to probation and parole and continuing as a *raison d'être* of the services today, was established in that the law provided both for the rehabilitative assistance of offenders and for controls upon their behavior” (Lindner, 1994:63).

In separating punishment out of the rehabilitative role of probation, the statute required that “such persons as may reasonably be expected to be reformed without punishment” should be chosen for probation supervision. In discussing the importance of this statute, it was stated that:

... of equal significance is the fact that the statute does not restrict the application of probation to any particular class of offenders (first offenders, young offenders, etc.), or to any particular class of offenses, but postulates the likelihood of the individual offenders being reformed without punishment, as the only criterion for

the selection of offenders to be released on probation (Carter and Wilkins, 1976:91).

An important statute contributing to the growth of probation was passed in 1880 and extended the right to appoint probation officers to all cities and towns in Massachusetts. Its weakness, however, was that it was merely permissive. Unfortunately, to save money, only a relatively small number of cities or towns took advantage of the law. In addition, it is likely that few had knowledge of the probation system at the time, and it may be that those who did, viewed it as undercutting the punishment of criminals.

Once initiated in Massachusetts, the concept of probation services spread to other states, although, admittedly, services were usually underfunded and understaffed, often lacking direction or centralized controls, and more typically located in large cities rather than in suburban and rural areas (Lindner, 1994:64). The growth of probation, although comparatively slow, was greatly helped by the creation of the Chicago Juvenile Court in 1899, as the public was more receptive to probation for juveniles. Today, probation stands as an integral part of the criminal justice system, with more offenders under supervision than either paroled, or in prisons or jails. Could Augustus ever have imagined the growth of his probation work?

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Matthew Davenport Hill

As John Augustus is often credited with being the “father of probation” in the United States, so is Matthew Davenport Hill generally believed to have laid the foundation of probation in England. As stated by Barry, “Hill ... is due much of the credit for the introduction of the probation system” (1958:189). Similarly, it is noted that “... the credit for founding probation is reserved for John Augustus ... and Matthew Davenport Hill, an English lawyer who held the judicial position of recorder of Birmingham” (Cromwell, del Carmen, and Alarid, 2002:31). Unlike Augustus, Hill did not refer to his work as probation. He did, however, provide services for young offenders, using many components of today’s probation work.

Hill was born in Birmingham, England, on August 6th, 1792, the oldest of eight children. Their father was the Rev. Thomas Wright Hill, and “In the aggregate, the family members were liberals, social reformers, active in politics and talented in many areas” (Davenport-Hill, 1878:2).

As an innovator, Reverend Hill developed a form of shorthand, forged a plan for minority representation in Parliament, and created a program for patent royalties. Other family members were similarly successful. One of Matthew’s younger brothers, Roland, invented a rotary printing press and conceived the penny postage stamp. The youngest of the brothers, Frederic, was active in the movement for Parliamentary reform, was an appointed inspector of prisons both in Scotland and England, and wrote a book on the causes of crime (Hill, 1975:V). Another brother, Arthur, was headmaster of an experimental school at Bruce Castle (Davenport-Hill, 1878:112).

Matthew is said to have suffered a nearly fatal fever in infancy, which caused health problems during the rest of his life. His daughters note that their father suffered from frequent illnesses throughout his life. They relate, for example, that comparatively early in life he was offered employment with various newspapers ... “but the invitations were declined-probably owing ... to the feeble state of his health” (Davenport-Hill, 1878:9,17).

Due to a lack of funds and the illness of his father, Matthew and his siblings served as instructors at Hill Top, an experimental school near Birmingham founded by his father. It is reported that Matthew was only twelve when his own education ended and he began teaching (Davenport-Hill, 1878:2,6,7). Drawing upon his encounters in the school and his disagreement with current educational practices, Hill would later author a book that would become a powerful influence on educational reform. Essentially he took issue with authoritarianism in education and instead supported an increase in student democratic government and the right of pupils to control their own educational goals (Hill, 1975:V1).

Matthew's strong interest in public affairs, fair play, and legal equality was demonstrated early in his life and continued thereafter. While in his teens he began the practice of expressing his liberal views by writing letters to the newspapers; a practice that he would continue throughout his life.

Hill held a number of political posts. This included his election as one of Liberal members of Parliament for Kingston-upon-Hull in 1832. His daughters note that among his goals in Parliament was to better the life of the poor:

to seek the amelioration of their lot in the extension of education, in the improvement of their material position, and in the spread of political knowledge. To give them legal equality with the rich and the powerful, in fact, as they already had it in theory ... (Davenport-Hill, 1878:121).

One of his most determined efforts in Parliament was a reform of the jury system in felony cases. At that time, defense counsel in England and Ireland (unlike Scotland, the British Colonies or the United States) could not address the jury in a felony case, although it was permissible in a misdemeanor trial. Attempts to revise the statutes in the 1820s and early 1830s were repeatedly rejected, but over the years Hill continued to work with others in support of its modification, although he did not live to see the change. In giving testimony before one committee he stated "that advocacy on both sides is the best method of arriving at the truth, and therefore, the most likely to ensure that justice be done." Through the continual efforts of Hill and others, the bill finally became law in 1936 (Davenport-Hill, 1878:121-123).

While in Parliament and thereafter, Hill strongly advocated for social reform and equality of all persons. Those of the Jewish religion, for example, suffered from civil disabilities, including restrictions on admission to Universities, the right to hold political office, and other constraints. Hill argued in Parliament that "I think it a disgrace to the country that every remnant of the laws against the religious liberty of the subject has not long since been swept away" (Davenport-Hill, 1878:125-126). It wasn't until 1858 that those of the Jewish faith were freed from most disabilities. Similarly, Hill argued for the abolition of slavery. Another cause Hill supported was the repeal of the Stamp Duties on newspapers. He believed that this form of taxation served to limit the circulation of newspapers. In 1835 the Newspaper Stamp Duty was reduced to one penny, and in 1855 completely ended (Davenport-Hill, 1878:130-131).

One of the primary areas of reform shared by many, including Alexander Maconochie and Hill, during the early years of the 19th century was to end transportation as a sentence. It was a particularly harsh sentence, with many dying on the boats transporting them to the land of their confinement. Moreover, many transported were juveniles or minor offenders. Hill continually fought to terminate this sentence.

Hill also opposed the death penalty. Despite his liberal thinking and his vehement opposition to the barbarity of the English penal system, Hill was not impractical or quixotic in relation to the criminal justice system. He was very much concerned about the safety of the community and their protection from criminal acts. For criminals sentenced to life in prison, he argued that the protection of the public required these prisoners to be sent to a jail specially erected to receive them, from which escape should be made absolutely impossible, and discharge so difficult that it could rarely occur (Davenport- Hill, 1878:213).

He also believed that certain serious criminals should be incarcerated in irons, arguing that certain prisoners:

...who have deprived a fellow-creature of life, or diminished his comfort and enjoyment by the infliction of grave injury, should, I think, for a period more or less considerable, be placed in irons, heavy at first - as heavy, indeed, as nature can support; yet be promptly lightened by good conduct, until at last, they are reduced to one ring, and even one may eventually be withdrawn (Davenport- Hill, 1878:215).

Hill's philosophy of penal reform can be seen in a quotation from a presentation he made at a gathering honoring Captain Alexander Maconochie. He and Maconochie were not only personally close, but shared similar ideas regarding the harshness of the criminal justice system. Hill (as quoted in Barry, 1958:1) stated "that ... there must be a well-devised discipline; by which our gaols may cease to be schools of crime, as they too frequently are, ... and may become worthy to be called hospitals for the cure of moral disease."

Hill failed in his reelection bid in 1834, but that same year he was appointed to the rank of Queen's Counsel, and in 1839 he became Recorder of Birmingham, a position which he held for some 26 years. Barry (1958:188) notes that "his charges to the grand juries of Birmingham had great influence in bringing about reforms in the criminal law."

He was appointed Commissioner of Bankruptcy for the Bristol District in 1851. He held this position for 18 years, until the abolition of the provincial bankruptcy courts. During his life he was associated and worked with many liberals, including Americans such as Dr. Enoch Wines, a prison reformer. Through his contact with Dr. Wines, Hill submitted a paper on punishment in 1870 at the first meeting of the National Prison Association in the United States. During his lifetime, and despite his political activities, he managed to publish a number of books. It is believed that his "publicly aired opinions ... were the means of introducing many important reforms in the methods of dealing with crime" (Wikipedia: 2006). Over the years, Hill met with, and in many instances was close friends with some of the most prominent individuals of the day. These included the Duke of Wellington, Lafayette, Sir Robert Peel, Jeremy Bentham, and Captain Alexander Maconochie.

His contribution to helping develop a probation system may have evolved from his early experiences as a lawyer, during which time he witnessed a number of cases in which young offenders were sentenced to a term of imprisonment of only one day: "... on condition that the youngster return to the care of his parent or master, to be more carefully watched and supervised in the future" (Tappan, 1960:542). This diminution of sentencing for young offenders who had committed minor crimes was started as early as 1820 by certain magistrates of the Warwickshire Quarter Sessions. As was true of the benefit of clergy, judicial reprieve, release on recognizance, and other forms of suspending sentence, it was designed to mitigate the harshness of punishments under English law (Tappan, 1960 542).

Influenced by his earlier observations of the actions of magistrates, Hill adopted a similar procedure upon obtaining the position of Recorder of Birmingham. If the crime was minor, the juvenile was not viewed as congenitally amoral, and there was hope for rehabilitation, Hill would use the one-day sentence of incarceration. However, he also required that there be persons willing to act as guardians of the young offender. In addition, Hill used one of the techniques that would become a component of today's probation: the supervision of the offender. Special court-appointed police officers would at times call upon the guardians of the juvenile to monitor the youth's behavior. A record was generally kept of the guardian's report on the juvenile's behavior.

Hill believed that his early release and supervision of juvenile offenders was an especially successful practice. He noted that one of the key elements of his methodology was keeping a register as to the success or failure of each juvenile. Hill had inquiries made of the conduct of the youngsters and the information was then recorded (Hill, 1975:242-243). After a period of slightly over 12 years he reported that:

The total number of prisoners during that period consigned to their friends is 417. Of these only 80 are known to have been reconvicted. Of the remainder, 94 bear a respectable character; after long years of probation. Of 143, the best we can say is that they are not known to have been in custody since they were so given up to their friends.

The remainder were not accounted for as some had not been in custody since being given to their friends, some had moved away, others died, and others could not be found (Hill, 1975:352).

Interestingly, Hill recognized a problem that continues to be faced by today's probation officers: the return of the offender to the same neighborhood, friends, and similar circumstances that may have contributed to the criminal act. Far advanced in his thinking at the time, Hill looked with dismay on the return of the offender to the same neighborhood. Under such circumstances:

... it is difficult to keep him aloof from the same companions; and thus, while he is too often exposed to the scorn and reproach of persons whose ill opinion he most dreads, he has the far greater misfortune of being open to the seductions of those whom his former errors have armed with a pernicious influence over his action (1975:352).

It should be noted that Hill supported the concept of supervision of certain offenders while in the community, a key component of today's probation. In favor of the ticket-of-leave discharge he argued, however, that merely reporting on a monthly basis was insufficient. He wanted the ticket-of-leave offender to report to the police monthly, and most importantly, for the police to have the power to enforce the reporting process. Moreover, he asserted that the offender who served his entire sentence in jail is even more in need of supervision than the ticket-of-leave man, because he:

... passes at once from the earlier stages of imprisonment to unbridled freedom ... Thus it is almost hopeless to expect that he will conduct himself, when at large, as an honest and industrious member of society. I therefore, propose that a convict should remain under supervision for a term certain—say twelve or eighteen months, beyond the date of his discharge from prison. (Davenport-Hill, 1878:204-205)

Moreover, he viewed supervision as consisting not merely of law enforcement monitoring the behavior of the offender, but also as providing social service assistance. Hill insisted that incarceration, regardless of how well conducted, cannot permanently change the behavior of the offender. He believed that unofficial agencies, staffed by volunteers, should serve to improve the miserable conditions of the prisons, and secondly, after the prisoner has become a free man: "... to acquire such knowledge of their characters, and influence over their dispositions, as should guide their benefactors in seeking employment for them, and otherwise befriending them after discharge" (Davenport-Hill, 1878:208).

Hill died in 1872, in his eightieth year, at Stapleton, near Bristol. Among his final projects at the time of his demise were proposals for better treatment of pauper children, who were boarded out, and his work on behalf of the International Prison Congress (Barry, 1958:189).

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Looking at the Law—Probation Officers' Authority to Require Drug Testing

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Probation Officers' Authority to Require Drug Testing

This article addresses the anomalous jurisprudence concerning three statutory bases for probation officers' authority to direct offenders to submit to drug testing: 1) implied authority under 18 U.S.C. '3603 ("Duties of probation officers"); 2) delegated drug testing authority in a court-imposed drug or alcohol (collectively "drug") treatment special condition under 18 U.S.C. '3603(b)(9) and 3583(d); and 3) delegated authority in a mandatory drug testing condition imposed under '3603(a)(5) and 3583(d).

A fair reading of these three statutory bases for drug testing discloses no irreconcilable conflicts that would preclude officers from continuing to direct offenders to submit to testing under '3603 due to exigent circumstances, to exercise delegated authority under a special condition requiring drug treatment, or to determine the extent of testing required by a mandatory drug testing condition. Notwithstanding that these provisions can be read harmoniously, some circuit courts have held that 1) district judges cannot delegate authority to a probation officer in a mandatory condition, 2) enactment of legislation creating the mandatory condition pre-empted probation officers' authority under '3603, and 3) the exclusive basis for determining the propriety of delegated authority to administer testing pursuant to a treatment condition is to apply the language of the statute authorizing mandatory testing conditions. This article reminds officers of the constraints imposed by these questionable holdings and identifies flawed reasoning running through the jurisprudence.

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I. Officers' Authority Under 18 U.S.C. '3603 to Require Drug Testing

Long before Congress specifically authorized courts to impose conditions requiring drug testing based on a mandatory or special condition, courts recognized that officers had authority under 18

U.S.C. '3655 (the Federal Probation Act provision specifying officers' duties) and its Sentencing Reform Act of 1984 ("SRA") successor, '3603 to direct offenders to submit to testing to ensure compliance with the standard condition to obey all laws. This was so notwithstanding that the Federal Probation Act, like the SRA, only allowed courts to impose conditions of supervision. Until 1994, no court questioned probation officers' authority to require offenders to submit to drug testing as one method for carrying out officers' general duties to: 1) "keep informed, to the degree required by the conditions specified by the sentencing court, as to the conduct and condition of . . . a person on supervised release, who is under . . . supervision"; 2) "use all suitable methods, not inconsistent with the conditions specified by the court, to aid . . . a person on supervised release who is under . . . supervision, and to bring about improvements in his conduct and condition"; and 3) "keep informed concerning the conduct, condition, and compliance with any condition of probation . . . of each probationer under his supervision." Courts recognized that drug testing was simply a "suitable method" for keeping informed of an offender's conduct and compliance with other conditions imposed by the court.

The most thorough discussion of officers' authority to require drug testing as a means of carrying out these general statutory responsibilities is found in *United States v. Duff*, in which the Ninth Circuit held that a probation officer's duties under '3655 were sufficient justification for requiring an offender to accede to drug testing in the absence of a drug testing special condition. The court endorsed the supervising officer's requirement that the offender submit to drug testing because testing was a "suitable method[] not inconsistent with" the court-imposed condition that the offender comply with all laws. Because the officer had not petitioned the court to revoke probation until the offender had failed three drug tests over the course of three months and had admitted using illegal drugs, the Duff panel interpreted the testing requirement as an intended deterrent against continued drug use. Had this deterrent been successful, it would have improved the offender's condition and conduct, one of a probation officer's primary duties under '3655 and '3603.

The Ninth Circuit rejected the offender's claim that he had been denied due process (as embodied in Federal Rule of Criminal Procedure 32.1) because the officer had not sought a modification of conditions to include drug testing. The court deemed this a desirable formality under most circumstances, but one that inevitably notifies an offender when testing would begin. The Ninth Circuit held that notice of the court's condition against violating the law, which the officer had advised the offender prohibited the use of illegal drugs, was sufficient notice to satisfy the due process requirement of giving fair warning of acts that may lead to a loss of liberty. The court noted that "[d]ue process does not require that prior notice be given of the techniques through which noncompliance will be detected."

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II. Officers' Authority to Administer Drug Testing as a Component of Drug Treatment

Whether they imposed them as a component of drug treatment or as a stand-alone condition, courts traditionally have had authority to impose special drug-testing conditions if they furthered the dual goals of supervision: rehabilitating the offender and protecting the community. Section 212 of the SRA created the first specific statutory authority for imposing special conditions prohibiting drug use and requiring drug treatment. This discretionary treatment authority is codified at 18 U.S.C. '3563(d)(9) as a discretionary condition of probation, which '3583(d) incorporates as a potential condition of supervised release. With one recent exception, circuit courts have held that district courts are authorized to impose a treatment condition that includes a delegation to probation officers of the responsibility for determining where, when, and how the condition will be satisfied (including the number and frequency of drug tests).

In *United States v. Stephens*, the Ninth Circuit considered the propriety of imposing a drug treatment condition that included an unspecified number of drug tests. The condition ordered the offender to "participate in a drug and alcohol abuse treatment and counseling program, including urinalysis testing, as directed by the Probation Officer," as well as a "program of mental health

treatment as directed by the probation officer.”¹¹ The Stephens court observed that, unlike its approach when drafting the mandatory drug testing provision in ’3583(d), Congress did not require courts to micro-manage drug treatment programs by setting a maximum number of in-treatment tests:

The requirement of ’3563(b)(9), incorporated by reference into ’3583(d), that the drug treatment be specified “by the court,” does not require the district court itself to specify the details of the treatment. As we stated in the context of psychological treatment for a sex offender, “the court cannot be expected to design the particularities of a treatment program. That the court allowed a therapist to do so does not mean the court delegated its authority to impose conditions of release.”¹²

The statutory analysis of ’3563(d)(9) underlying the Ninth Circuit’s holding is consistent with prior cases acknowledging that probation officers, in consultation with treatment providers, may administer the details of a treatment condition, but only the court may determine whether the condition applies to an offender.¹³

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III. The Mandatory Testing Condition and Judicial Perceptions that it Conflicts with ’3603 Authority

Ten years after the SRA amended ’3603(b) and 3583(d) to create specific statutory authority for imposing special conditions prohibiting drug use and requiring drug treatment, section 204¹⁴ of the Violent Crime Control and Law Enforcement Act of 1994 (“VCCA”)¹⁴ established a mandatory drug testing condition at 18 U.S.C. ’3603(a)(5) and 3583(d) distinct from district courts’ pre-existing general authority to order drug testing of offenders as a part of drug treatment.¹⁵ Within a few years of enactment, offenders challenged district courts’ practice of imposing the mandatory condition with a minimum number of tests, but delegating the determination of what additional tests would be needed to probation officers. In addition to challenging the delegation of additional testing under the mandatory condition, offenders contended that, by enacting the VCCA mandatory condition, Congress had eliminated probation officers’ authority to require testing under ’3603 in favor of making courts the sole authority for requiring drug tests.

The first published opinion addressing these issues was authored by District Judge Myron H. Thompson in *United States v. Smith*.¹⁶ In *Smith*, the district court held that: 1) a probation officer’s authority under ’3603 corresponds to that described in repealed ’3655; 2) the authority under ’3603 is independent of any authority to require testing under a mandatory testing condition; and 3) courts, after requiring a minimum of at least three drug tests as required by statute, could delegate to probation officers the authority to determine the maximum number of drug tests appropriate for an offender bound by the court’s mandatory testing condition. The district court held that delegation regarding the maximum number of tests was lawful because the VCCA requirement of one drug test fifteen days after supervised release commences and at least two more thereafter “(as determined by the court)” simply “provides the court with discretion to alter the minimum or total number of drug tests. It does not preclude a court from setting only a minimum number of tests.”¹⁷

In addition to holding that courts could delegate the determination of the maximum number of tests needed to the probation officer under a mandatory testing condition, the court held that Congress’s recodification of ’3655 as ’3603 preserved the authorizing language in ’3655 that the Ninth Circuit in *Duff* had relied upon when it held that probation officers had significant discretion in the means they used to enforce and monitor compliance with a court-imposed condition that offenders comply with all laws. The district court noted that when Congress enacted the VCCA in 1994, it presumably was aware that probation officers had considerable discretion under ’3603 and its predecessor ’3655 to require drug testing. Nonetheless, Congress did not amend ’3603, or enact any other statutory language, to alter this existing practice. Instead, Congress retained language authorizing officers to use “all suitable methods, not

inconsistent with the conditions specified by the court, to aid . . . a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition.”¹⁸ The district court therefore found that the VCCA’s mandatory drug testing condition did not preclude officers from requiring offenders to submit to more than the minimum of three or more tests ordered by the court. In any event, the court held, officers retained their pre-existing ’3603 authority to require testing independent of the mandatory condition.

Undeterred by the plain language of the 1994 mandatory testing conditions added to ’3603(a) and 3583(d), three courts of appeals have construed the amendment as confining probation officers’ authority. In *United States v. Bonanno*,¹⁹ the Seventh Circuit reversed a mandatory drug-testing condition of supervised release imposed under ’3583(d) because the district court had ordered the two offenders to submit to one test within fifteen days “and random testing thereafter at the direction and discretion of the probation officer.” The Seventh Circuit did not analyze the language of the 1994 amendment. Instead, it relied upon the reasoning of its holding in *United States v. Boula*²⁰ that 18 U.S.C. ’3663 precluded district courts from delegating the setting of a schedule for fine and restitution payments to a probation officer.²¹ *Bonanno* did not explain why a prior case construing the language of a restitution statute should determine the outcome of a case involving a different statute whose plain language would not preclude probation officers from determining the maximum number of drug tests.

Deeming the *Boula* holding as conclusive was questionable because the restitution statute, unlike the mandatory testing statute, clearly precluded delegation. Unlike the mandatory drug testing provisions in ’3603(a)(5) and 3583(d), the restitution statute in *Boula* required district courts to order payment of restitution “within a specified period or in specified installments,” and stated that “[i]f not otherwise provided by the court” the offender had to pay restitution immediately.²² Contrary to this unambiguous statutory mandate, the district court in *Boula* had stated simply that the offenders had to pay restitution if they generated income, thereby thrusting the determination of a future payment obligation onto the probation officer, contrary to ’3663. The *Bonanno* panel’s reliance on *Boula* as determinative of the legality of delegation under ’3583(d), a statute whose language the Seventh Circuit did not analyze in *Bonanno*, is problematic.

Although it did not analyze the language regarding the mandatory testing condition required by ’3583(d), *Bonanno* held that the mandatory drug testing provision required district courts to specify the number of random drug tests. *Bonanno* did not suggest that its holding regarding non-delegation of drug testing authority under ’3583(d) precluded probation officers from continuing to require drug tests pursuant to ’3603 or as a component of a drug treatment condition imposed by a court at sentencing. In *United States v. Guy*,²³ the court subsequently clarified *Bonanno* by holding that a district court may establish a range for testing (for example, “not to exceed 104 tests per year”) instead of a specific maximum, and allow a probation officer to exercise discretion to determine the number of tests to be performed within the range.

Following the Seventh Circuit’s lead in *Bonanno*, the First Circuit in *United States v. Melendez-Santana*²⁴ distinguished between delegation of testing authority as part of a drug treatment condition and delegation of authority to establish the number of tests required by a non-treatment mandatory testing condition. As to the former, the court held that the district court had improperly delegated to the probation officer the judicial responsibility of deciding whether treatment was required, but that the officer had authority to determine the details of the treatment (which would include the number of drug tests required).²⁵ With regard to the mandatory condition, however, the First Circuit was confronted with the government’s secondary argument that probation officers had independent authority to require testing under ’3603, and therefore were not prevented from requiring additional testing under a ’3583(d) mandatory testing condition.

The First Circuit acknowledged that ’3603 authorized probation officers to require drug testing in the absence of a court-imposed condition, but the court held that Congress had superseded this authority in 1994 when it enacted the VCCA mandatory drug testing provisions.²⁶ The court concluded that Congress intended to alter the existing practice because the VCCA amendments

included the parenthetical phrase “(as determined by the court),” which the First Circuit interpreted as unambiguous congressional intent to require district judges to prescribe the number of tests, or a range, in all circumstances other than drug treatment. ²⁷ The court stated that Congress knew that probation officers traditionally had broad discretion to require testing without any directive from a district court, yet Congress “refused” to include probation officers in the ’3583(d) parenthetical. ²⁸ According to the First Circuit, this meant that Congress thereby “manifest[ed] its intent to alter the existing practice.” ²⁹

As it sounded the death knell for probation officer authority to require drug testing under ’3603 and the mandatory testing condition, the First Circuit emphatically criticized the Smith court’s contrary conclusion, stating, “We frankly find Smith’s reading of the statutory language difficult to follow.” ³⁰ The analysis in Smith, however, was a model of clarity and careful reasoning compared with the Melendez-Santana panel’s flawed interpretation. The district court in Smith had held that the plain language of the statute would allow a district judge to set a minimum greater than three tests and order that a probation officer determine whether more tests should be required depending on the offender’s performance during supervision. ³¹ The district court ruled that Congress’ requirement of a minimum number of drug tests in most cases under a mandatory condition did not preclude officers from determining the maximum number of tests needed in the course of supervision either under a ’3583(d) mandatory testing condition or under ’3603.

The First Circuit’s difficulty in understanding the district court may be attributable to its own erroneous rendition of the Smith analysis. The Melendez-Santana panel stated that the district court in Smith had construed ’3583(d) as requiring a minimum of three tests and a grant of “discretion to reduce the minimum number of drug tests below three without requiring courts to set the maximum number of tests.” ³² Nothing in the Smith opinion, however, supports the First Circuit’s contention that the district court had interpreted the statute as granting district judges discretion to require fewer than three tests. Thus, it is unlikely that some flaw in the Smith opinion was the source of the Melendez-Santana panel’s discomfiture. Although neither the VCCA nor its legislative history evinced a congressional intent to usurp probation officers’ pre-existing authority, the First Circuit held that the VCCA superseded the more general statutory authority in ’3603. ³³

The First Circuit premised its holding that the VCCA abolished probation officers’ authority to direct offenders to drug testing on a questionable application of a rule of statutory construction. The Melendez-Santana panel stated that this rule required the “most recent and more specific Congressional pronouncement [to] prevail over a prior, more generalized statute.” ³⁴ Critical limitations on the rule not mentioned in Melendez-Santana are that: 1) it may be applied only when a court is confronted with two “irreconcilably conflicting statutes”; 2) repeals by implication are not favored; and 3) the intent to repeal must be clear and manifest. ³⁵ Sections 3583(d) and 3603, however, are not two irreconcilably conflicting statutes. In addition, nowhere in the VCCA did Congress suggest, let alone express a “clear and manifest” intent, that the amendment to ’3583(d) was designed to 1) repeal ’3603, 2) alter judicial interpretation of that provision, or 3) preclude officers from invoking their ’3603 authority to require testing in addition to that required by the district court’s mandatory testing condition. The Melendez-Santana panel did not mention, and could not have satisfied, these stringent prerequisites. Instead of making the necessary findings of irreconcilable conflict and “clear and manifest” congressional intent to repeal, the court relied exclusively on an unsupported “conclu[sion] that Congress’s refusal to include probation officers in the section of the 1994 Act that became 18 U.S.C. ’3583(d) manifests its intent to alter the existing practice.” ³⁶ The Melendez-Santana panel mentioned neither the contrary holding in Duff (notwithstanding that Duff was discussed at great length by the district court in Smith) nor that its holding created a circuit split with the Ninth Circuit’s Duff holding.

Of course, Melendez-Santana could not undermine Duff as binding precedent in the Ninth Circuit. Dicta in the majority and dissenting opinions in *United States v. Stephens*, ³⁷ however, indicated that the Ninth Circuit had doubts about Duff’s continuing viability. Stephens addressed the propriety of conditions of supervised release that delegated the district court’s authority to specify the number of drug tests under a ’3583(d) mandatory condition and as a

component of a special condition requiring drug treatment. The Stephens majority agreed with the First and Seventh Circuits' holdings in Melendez- Santana and Bonanno, respectively, that district courts, and not probation officers, must determine either the maximum number of drug tests under '3583(d) or a range within which a probation officer would have discretion to test. As in Melendez Santana, determining whether a probation officer may determine the extent of mandatory drug testing above the court-imposed minimum implicated officers' traditional independent authority to require testing under '3603. ³⁸ If '3603's authority endured, it should not matter if an officer must rely upon her own authority rather than judicial delegation contained in a mandatory condition. Nonetheless, the majority gave only fleeting mention of the issue to deflect the dissenter's concerns.

The Stephens dissenter contended that the majority's holding implied that probation officers were precluded from requiring further drug testing under '3603 to supplement the '3583(d) mandatory minimum of three tests. The dissent noted that Duff had established probation officers' authority under provisions in '3655 that were indistinguishable from its successor '3603, and that this independent authority for testing should have allowed continued testing after the three '3583(d) tests had occurred. ³⁹ The dissenter stated that, by refusing to address this probation officer prerogative established by Duff, the majority opinion suggested, but refused to forthrightly hold, that "the authority that we held [in Duff that] probation officers possess under '3655—authority that is preserved under '3603—was stripped from probation officers by the enactment of '3583." ⁴⁰

As the dissent noted in Stephens, and the district court had observed in Smith, nothing in the VCCA suggests that Congress designed the '3583(d) mandatory drug testing provision to confine or eliminate pre-existing authorities for drug testing. The better view expressed by the district court in Smith and the dissenter in Stephens is that Congress enacted a mandatory testing provision to insure that testing occurs more frequently, particularly when offenders begin their term of supervision. Rather than address the dissent's contention that the majority had implied that the '3583(d) mandatory drug testing condition had repealed Duff, the majority avoided the issue as one not directly raised on appeal. By abstaining from careful analysis of the implied repeal issue, the majority ignored the full implications of its statement that there were only two bases for drug testing: the '3583(d) mandatory condition and testing as a component of treatment. The majority refused to address whether the '3583(d) mandatory drug testing requirement supplanted the pre-existing general authority for drug testing implicit in '3655 (and its successor '3603) that had been endorsed by Duff. Rather, the majority declared that this preexisting authority derived from "an entirely different statute" than '3583(d). ⁴¹

By passing on this issue, the majority may have intended to defer it to a future panel. The most likely consequence in the Ninth Circuit, however, is that probation officers will forego exercising their authority to require drug testing under '3603 when they suspect an offender is using drugs. Alternatively, they will rarely direct an offender to submit to testing, and will abandon the requirement in individual cases whenever the offender balks. Under either scenario, however, officers increasingly will petition courts to impose special conditions requiring drug testing or courts will authorize an excessive number of drug tests at sentencing for all '3583(d) mandatory conditions. Abandoning the '3603 authority results in an uneconomical use of judicial resources and paradoxically will expose offenders to more drug testing. This conflict between Duff and Stephens will likely remain unresolved as officers and courts opt to forego '3603 authority in favor of drug testing required by special and mandatory conditions authorizing a greater number of tests. ⁴²

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IV. The Seventh Circuit Applies the Mandatory Condition Standard to a Special Treatment Condition

In *United States v. Tejada*, ⁴³ the Seventh Circuit became the first court to apply the case law restrictions regarding delegation under a '3583(d) mandatory condition to special drug treatment conditions. The court thereby created a circuit split with the Ninth Circuit's Stephens holding,

and effectively eliminated probation officers' discretion to determine the number of tests that may occur during treatment for offenders within the supervision jurisdiction of a district court in the Seventh Circuit. Pursuant to '3563(b)(9), as incorporated by '3583(d), two district judges in separate cases had imposed special conditions of supervised release requiring the offenders (Jose Tejada and Daniel Dropik) to "participate in a program of testing and residential or outpatient treatment for drug and alcohol abuse, as approved by the supervising probation officer." ⁴⁴ The special condition imposed no limit on the number of drug tests that could be required incidental to treatment. Neither defendant objected to the conditions when they were imposed at sentencing.

On appeal, the offenders relied upon *United States v. Bonanno*, ⁴⁵ and argued that district courts are obliged to set a maximum number of drug tests that are incidental to a special drug treatment condition. The government noted in its brief that the offenders' reliance on *Bonanno* was inappropriate because it only applied to mandatory drug testing conditions, and not to special treatment conditions where delegation of the administrative details of the treatment program to probation officers has been approved by every court to consider the matter. In addition, the *Bonanno* opinion never suggested that '3583(d) was the exclusive authority for all drug testing.

The Tejada panel nonetheless accepted the offenders' position, thereby becoming the first court to hold that the case law requiring that district courts set a maximum number of drug tests when imposing a mandatory drug testing condition also requires district courts to specify all details of drug testing when it is a component of a drug treatment special condition. ⁴⁶ In its analysis, the Tejada panel quoted the statutory language for the '3583(d) mandatory drug testing condition as the exclusive authority for ordering an offender to submit to drug testing. ⁴⁷ The Seventh Circuit relied on the '3583(d) statutory language regarding the mandatory condition notwithstanding that drug testing is also generally required as a component of drug treatment special conditions, and is independently authorized by '3563(b)(9) (as incorporated by '3583(d)), and U.S.S.G. '5D1.3(d)(4). ⁴⁸

The Tejada court also did not mention the Ninth Circuit's holding in *United States v. Stephens* ⁴⁹ that district courts must establish a maximum number of mandatory drug tests, but probation officers are authorized to make such administrative determinations if testing is required as part of a special drug treatment condition. The Stephens panel noted that, unlike its approach when drafting the '3583(d) mandatory drug testing provision, Congress did not require courts to micro-manage drug treatment programs by setting a maximum number of in-treatment tests. ⁵⁰ While the Seventh Circuit did not discuss Stephens and its common-sense analysis of treatment conditions, the Tejada panel did equivocate when it stated:

Bonanno aside, it is not necessarily a foregone conclusion that every hint of discretion given to a probation officer constitutes error. It may be that in a proper case we would agree with the Court of Appeals for the Ninth Circuit that if a defendant is ordered into a treatment program, it would not be error to grant the probation officer discretion to designate testing which is incidental to the program. *United States v. Maciel-Vasquez*, 458 F.3d 994 (9th Cir. 2006). In the cases before us, however, the condition regarding drug testing seems to be boilerplate language, which grants too much discretion to the probation agent. ⁵¹

The Seventh Circuit did not state why the conditions in Tejada "seem[ed] to be boilerplate." Nor did it propose language or procedural changes that might properly give a "hint of discretion" to a probation officer. Although the Seventh Circuit suggested that some special conditions giving minimal discretion to probation officers could pass muster, the special condition that was approved in Stephens, ⁵² which is typical of drug treatment conditions imposed by every district court, is virtually identical to the special condition characterized as impermissible boilerplate in Tejada.

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V. Implications for Drug Testing in the First, Seventh, and Ninth Circuits

Officers supervising offenders in the First, Seventh, and Ninth Circuits have no or limited authority to direct offenders to submit to drug testing absent a court-imposed condition. Officers outside those circuits may ignore those questionable holdings interpreting the statutes as authorizing the mandatory condition, the drug treatment special condition, and the '3603 authority to require drug testing. Instead, they should rely upon the plain language of the statutes and their courts' direction. The plain language of the 1994 amendment to '3603(b)(5) and 3583(d) adding the mandatory testing condition does not diminish a probation officer's authority under '3603. Instead, it requires a district court to impose a minimal testing regimen in every case unless waiver of the condition is appropriate because the offender has a low risk of future substance abuse. The mandatory testing provision also does not require a court to impose a maximum number of drug tests. ⁵⁴ Instead, the amendment specifies a presumptive minimum number of three drug tests for defendants on supervised release. The parenthetical "(as determined by the court)" is best understood as allowing a sentencing court to exercise discretion by varying the minimum number of drug tests ordered so long as it is more than three. This statutory language ensures that more offenders receive drug testing while on supervised release, but it does not alter probation officers' independent authority to administer additional tests under '3603 or to determine the number of tests required as a component of a drug treatment condition. Although the plain language of '3583(d) is unambiguous (which thereby precludes any reference to legislative history), the congressional record is bereft of evidence that Congress intended that its amendment to '3583(d) diminish probation officers' traditional discretion and authority. ⁵⁵

Melendez-Santana and its First Circuit lineage require that: 1) district courts determine the maximum number of drug tests under a mandatory testing condition and forego delegation of this function to a probation officer; 2) officers confine testing to the statutory default minimum of three mandatory tests if the court failed to set a maximum number or a range of permissible tests; 3) probation officers decide the number of tests to be performed within a range set by the district court; and 4) officers relinquish the pre-existing general authority for drug testing implicit in '3603, which was trumped by the specific authority for district courts to require mandatory drug testing.

Officers supervising offenders within the Ninth Circuit may continue to rely upon Duff and '3603 as authorities for drug testing in the absence of a condition, subject to the caveat that doing so will invite challenges to such a testing requirement and petitions for revocation based on positive test results. As in the First and Seventh Circuits, a district court's failure to specify a maximum or range of mandatory tests will limit officers to requiring the statutory limit of three. If the court did not establish a maximum number of tests or a range at sentencing, the best option if more than the default of three tests is needed is to discern if the offender will agree to a modification pursuant to Federal Rule of Criminal Procedure 32.1(c) and either '3583(e)(2) (supervised release) or '3563(c) (probation) and waive a hearing. If the offender declines to waive a hearing, an officer may request that the court modify the mandatory drug testing condition to establish a maximum number or a range of tests after a hearing. Officers may require testing within the range established by the court. Alternatively, officers could petition the court to add a special condition requiring drug testing. ⁵⁶

Unless a future Seventh Circuit decision rectifies the Tejada panel's contention that district courts err if they delegate the selection of the number of tests needed for a drug treatment special condition, officers in the Seventh Circuit should recommend that courts impose a specific number or a range of drug tests incidental to a drug treatment special condition for all offenders in accordance with the Tejada panel's reading of '3583(d). While Tejada addressed only the '3583(d) special drug treatment condition, the holding applies equally to special drug treatment conditions imposed on probationers under 18 U.S.C. '3563(a)(9). If a special condition requiring testing was imposed prior to Tejada that did not include a maximum or a range, no action is required if the offender failed to object when the condition was imposed or he objected but failed to file a timely appeal. This is so because the Seventh Circuit in Tejada held that such forfeited errors do not affect an offender's substantial rights and therefore are not plain errors that must be remedied. ⁵⁷ By holding that the plain error rule does not apply when a district judge delegates too much authority to a probation officer in the context of a drug treatment condition, the

Seventh Circuit established that such errors are too inconsequential to be considered in future appeals if the offender neglected to object before the district court.

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The articles and reviews that appear in *Federal Probation* express the points of view of the persons who wrote them and not necessarily the points of view of the agencies and organizations with which these persons are affiliated. Moreover, *Federal Probation's* publication of the articles and reviews is not to be taken as an endorsement of the material by the editors, the Administrative Office of the U.S. Courts, or the Federal Probation and Pretrial Services System. Published by the Administrative Office of the United States Courts www.uscourts.gov
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Juvenile Focus

By Alvin W. Cohn, D.Crim.
President, Administration of Justice Services, Inc.

Teen Sexual Activity

Teen birthrates continued their 15-year decline in 2005 as adolescents increasingly used condoms during sexual intercourse, according to the National Center for Health Statistics. Since the late 1990s, however, the number of children born to unmarried women in their 20s rose significantly, resulting in an overall increase in the birthrates of unmarried women. According to researchers, one of the most dramatic increases involved condom use by high school students—with 63 percent reporting using that protection during their last sexual encounter, compared with 46 percent in 1991. During that same time, the percentage of girls who said they used birth control pills remained about the same. About 47 percent of high school students— 4.6 million teens— reported having had sexual intercourse in 2005, down from 54 percent in 1991.

Other data:

- More young people were arrested for serious violent crime in 2005 than in each of the previous three years. The arrest rate of 17 crimes per 1,000 juveniles, however, remained significantly below the peak rate of 52 per 1,000 in 1993.
- More young people are completing high school—88 percent in 2005, compared with 84 percent in 1980.
- The percentage of children covered by health insurance decreased slightly from 90 percent in 2004 to 89 percent in 2005.
- The percentage of infants born weighing less than five pounds, eight ounces increased from 8.1 percent in 2004 to 8.2 percent in 2005.

Fatal Injuries Among Children

The U.S. Department of Health and Human Services' Centers for Disease Control and Prevention (CDC) has published the report "*Fatal Injuries Among Children by Race and Ethnicity—United States, 1999–2002.*" The report analyzes data for fatal injuries among children by race and ethnicity and compares disparities in rates by race during 1999-2002 with disparities in the 1980s and 1990s. See http://www.cdc.gov/ncipc/duip/disparities_childhood_injury.htm.

Fitness for Kids Resources

bam.gov This child-g geared health Web site from the Centers for Disease Control and Prevention lets kids play games, take quizzes, and make their own fitness calendars.

kidnetic.com Find game ideas, recipes, and advice for parents and kids on living a healthy life style.

kidshealth.org Browse nutrition- and health-related articles and tips for parents. Special sections for kids and teens teach them about their bodies through interactive games.

my-gym.com Find locations for this kids' gym chain offering specialized classes by age group, from 3 to 13.

verbnow.com Aimed at getting tweens to play outside, the site offers jokes and videos to promote health.

ymca.net Locate the nearest YMCA to find a variety of kids' fitness classes.

Trying Youth as Adults

A recent report from the Justice Policy Institute discusses the consequences of widespread policies that place increasing numbers of minors in the adult justice system. According to the report, *The Consequences Aren't Minor: The Impact of Trying Youths as Adults and Strategies for Reform*, an estimated 200,000 youth enter the adult criminal justice system each year. The trend to move more juvenile cases into adult court is attributable to policies enacted over the past few decades in response to fears of a coming juvenile crime wave. Although the predicted wave of "superpredators" never materialized, most of these new policies that facilitated transfer to adult court remain in place. Most states now place the decision to transfer a case to adult court in the hands of the prosecutor, rather than the judge. Other states lowered the age of juvenile court jurisdiction to 17, 16, or even 15. Most states allow, or even require, juveniles charged as adults to be held in adult jails while awaiting trial. It is estimated that more than 2,000 minors are being held in adult jails on any given day. See www.campaig4youthjustice.org.

According to the National Council on Crime and Delinquency, by more than a 15-to-1 margin (92 percent to six percent), those polled agree that the decision to transfer youth to adult court should be made on a case-by-case basis by a judge, rather than by a blanket policy requiring transfer. See www.nccdcrc.org/nccd/pubs/zogby_feb07.pdf.

Sick Infants

Thousands of sickly newborns could be saved each year if officials closed some of the nation's smaller neonatal intensive care units, as reported in the *New England Journal of Medicine*. The study suggests that larger hospitals are better able to treat these infants. Extremely premature babies were up to twice as likely to survive when treated at a busy, advanced-care center instead of one of the many community hospitals that have opened ICUs in recent years. Even among the most advanced centers, those that handled the most babies had the best survival records. Earlier studies found conflicting results when reviewing the relationship between newborn deaths and number of infants treated by hospital. The study reviewed nearly 48,000 premature births and fetal deaths in California from 1991 through 2000, using birth and death certificates and hospital records.

Preventing Child Abuse

The Centers for Disease Control and Prevention has published "*Preventing Child Sexual Abuse Within Youth-serving Organizations: Getting Started on Policies and Procedures*." Designed to assist youth service organizations in adopting strategies to prevent child sexual abuse, this guide identifies six key components of child abuse prevention and describes goals and strategies for each. See <http://www.cdc.gov/ncipc/dvp/PreventingChildSexualAbuse.pdf>.

Missing and Exploited Children

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) announces the availability of "*Federal Resources on Missing and Exploited Children: A Directory for Law Enforcement and Other Public and Private Agencies*." Developed by the Federal Agency Task Force for Missing and Exploited Children, the directory, currently in its fifth edition, describes federal services, programs, publications, and training sessions that address child sexual exploitation issues, child

pornography, child abduction, Internet crime, and missing children cases. See <http://ojjdp.ncjrs.gov/publications/PubAbstract.asp?pubi=238478>.

For descriptions of these and other publications pertaining to missing and exploited children, including links to full-text files, visit ojjdp.ncjrs.org/publications/PubSearch.asp. Unless otherwise noted, all publications may also be ordered from the Juvenile Justice Clearinghouse at 800-638-8736, 410-792-4358 (fax), and online at puborder.ncjrs.org.

Abducted Children

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) announces the availability of *“What About Me? Coping With the Abduction of a Brother or Sister.”* Written by siblings of abducted children, this guide contains information to help children of all ages when their brother or sister has been kidnapped. Written in child-friendly language, it provides such children with insights into what they might expect to feel following the abduction, related events that may ensue, and steps that they may take to cope with their feelings. See (NCJ 217714) <http://ojjdp.ncjrs.gov/publications/PubAbstract.asp?pubi=239397>.

APPA Community Service Project Renamed in Honor of Dennis Maloney

In February, 2007 the community corrections family lost a leader in the field of community justice with the passing of Dennis Maloney. Dennis’ gentle but firm persuasiveness led us to embrace the restoration of the community via victim services and offender programming. To honor his legacy, the American Probation and Parole Association has renamed their community service project the Dennis Maloney Community Service Project. At each APPA Winter and Annual Training Institute, APPA works with local volunteers to help a charity in the host city. This is APPA’s way of giving something back to the community and giving national recognition to some of the wonderful community outreach work being done locally.

From SAMHSA

Girls Enter Treatment Younger, Use Different Drugs—Teenage girls tend to enter addiction treatment at a younger age than boys and are more likely to be primary users of alcohol or inhalants, whereas boys are most likely to report that marijuana is their favorite drug.

Crystal methamphetamine

Use of crystal meth among young adults in the United States is considerably higher than previous surveys indicated, according to new research funded by the National Institute on Drug Abuse (NIDA), part of the National Institutes of Health (NIH). The study, published in a recent issue of the journal *Addiction*, found 2.8 percent of young adults (ages 18-26) reported the use of crystal methamphetamine in the past year during 2001-2002. This is higher than the annual prevalence of crystal methamphetamine use by young adults (ages 19-28) of 1.4 percent reported by NIDA’s 2002 Monitoring the Future Survey. Previous national surveys indicate that methamphetamine prevalence is highest among young adults, but until now, few scientific papers have looked at the characteristics and behaviors associated with its use in this age group. Using nationally representative data, and examining the age group most prone to methamphetamine use (ages 18-26), the study found that young adult users are disproportionately white and male and live in the West, and that the odds of use for Native Americans were 4.2 times higher than that for whites. Users also tend to have lower social economic status and use other substances, such as alcohol, marijuana, and cocaine; the male users are more likely to have had incarcerated fathers. “This new information gives us a clearer picture of use among young adults, and also raises new concerns,” said NIH Director Dr. Elias A. Zerhouni. “Use of crystal methamphetamine is associated with multiple health and social risks, including a negative impact on families as well as straining emergency departments and law enforcement resources.” “The study showed not only greater use of crystal methamphetamine, it also suggests the drug is associated with risky and antisocial behaviors, including other illicit drug use,” said NIDA Director Dr. Nora D. Volkow. “By examining these connections, we hope to identify new avenues for treatment and prevention.”

The study authors based their findings on data from the National Longitudinal Study of Adolescent Health (Add Health), which asked respondents about their use of crystal methamphetamine in the past year and past 30 days. They examined certain characteristics of crystal methamphetamine users, such as their use of other substances, sociodemographics, and novelty-seeking behavior. They also looked at what was unique about crystal methamphetamine users compared to other drug users, and the associations between past-year crystal methamphetamine use and antisocial or risk behaviors, such as crime/violence and risky sexual behavior. To maintain confidentiality, Add Health administered questionnaires via laptop computer using computer-assisted self-interviewing (CASI) technology.

Methamphetamine

The California Department of Alcohol and Drugs has just published an 84-page methamphetamine treatment guide available online in pdf format. It includes a section on special populations. See <http://www.adp.ca.gov/Meth/pdf/MethTreatmentGuide.pdf>.

Motivating Offenders to Change: A Guide for Probation and Parole

This publication provides probation and parole officers and other correctional professionals with both a solid grounding in the principles behind MI [motivational interviewing] and a practical guide for applying these principles in their everyday dealings with offenders. Seven chapters are contained in this guide: how MI fits in with evidence based practice; how and why people change; the motivational interviewing style; preparing for change; building motivation for change; navigating through tough times—working with deception, violations, and sanctions; and from start to finish—putting MI into practice. See NCJRS/National Institute of Corrections Accession Number: 022253.

Mental Health Screens for Corrections

...reports on two projects to create and validate mental health screening instruments that corrections staff can use during intake. The researchers created short questionnaires that accurately identify inmates who require mental health interventions. One mental health screen was found to be effective for men and is being adapted for women; the other has effective versions for both men and women. The screening instruments are reproduced in the appendices. Full text of the Report: Adobe Acrobat Files.

Statistical Briefing Book (SBB)

This online publication has been designed to help readers easily find basic statistical information on juvenile offending, victimization of juveniles, and involvement of youth in the juvenile justice system. The SBB offers:

- More ways to access information: by topical area (left menu) and type of information (top menu).
- Links to National Data Sets and Other Resources.
- The latest edition of *Juvenile Offenders and Victims: 2006 National Report* is now available online. The 260-page report offers comprehensive statistics on juvenile offending, victimization of juveniles, and the justice system's response to these problems. It presents data in easy-to-read tables, graphs, and maps, narrated by clear, non-technical analysis.
- Enhanced access to online statistical publications from OJJDP.

Recent Updates in SBB:

- New Frequently Asked Questions about Juvenile Suicides have been added to the Juveniles as Victims section.
- A new Data Analysis Tool has been added! Easy Access to the Census of Juveniles in Residential Placement provides access to national data on the characteristics of youth held in residential placement facilities, including detailed information about the youth's age,

sex, race/ethnicity, placement status, length of stay, and most serious offense. This application includes data from 1997 to 2003. (March 2007)

- Updates to Frequently Asked Questions have been made to several sections of this site. Law Enforcement and Juvenile Crime has been updated to 2005, Juveniles in Court has been updated to 2004, and Juveniles on Probation has been updated to 2004. (March 2007)
- Easy Access to Juvenile Court Statistics provides access to data on juvenile court processing of more than 30 million delinquency cases, including information on the age, sex, and race of juveniles involved, and the use of detention, adjudication and disposition. This application has been updated to include data from 1985 to 2004. (March 2007)

Underage Drinking Laws

This section of the APIS Web site provides state-by-state summaries of laws and regulations related to underage drinking and access to alcohol. For each state, summaries are provided for 11 policy topics that are particularly relevant to underage drinking. To view the summary for a given jurisdiction, click on the appropriate part of the map or select a jurisdiction from the drop-down menu. The APIS Policy Topics section of this Web site presents additional detailed information on these and other policy topics. Each policy topic provides a description, a summary of relevant federal law, interactive comparison tables showing policies in effect on a user-specified date or changes over time, explanatory notes and limitations, and definitions and selected references as appropriate. The APIS Highlight on Underage Drinking provides an overview of underage drinking policy in the United States and other material that may be helpful in understanding the policy topics presented in these state profiles. In addition, maps and charts for all of these policy topics are collected on a single page to provide a more comprehensive graphical overview of underage policies.

Law Enforcement View of Juvenile Crime

For most delinquents, law enforcement is the doorway to the juvenile justice system. Law enforcement agencies track the characteristics and volume of crimes and use this information to monitor changing levels of crime. “*Juvenile Offenders and Victims 2006 National Report*” provides an overview of juvenile crime from law enforcement’s perspective. See <http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/chapter5.pdf>. or <http://ojjdp.ncjrs.gov/publications/PubAbstract.asp?pubi=234394>.

Conditions of Supervision and Workload Allocation

Probation agencies are experiencing a rather challenging predicament regarding how best to contribute to community safety by supervising offenders in the community. How can probation officer time be spent most efficiently to reduce recidivism? A significant issue in making such decisions is understanding how caseloads (i.e., number of offenders supervised per officer) translate into workload (i.e., the amount of time required to supervise offenders). Follow this link to read the APPA report, *Probation’s Growing Caseloads and Workload Allocation: Strategies for Managerial Decision Making* funded by a grant from the Bureau of Justice Assistance (2006-DD-BX-K023).

Missing and Exploited Children

This directory of law enforcement agencies and the Federal Agency Task Force for Missing and Exploited Children describes the federal services, programs, publications, and training sessions that address child sexual exploitation issues, child pornography, child abduction, Internet crime, and missing children cases (NCJ 216857). The development of this directory was coordinated by the Federal Agency Task Force for Missing and Exploited Children, which was established in 1995 to serve as an advocate for children, to coordinate federal services and resources, and to promote cooperation and collaboration. The Task Force includes representatives from 16 federal agencies and two private agencies that work directly with cases that involve missing, abducted, and exploited children and their families.

Childhood Injuries

Xbox finger and childhood obesity may be the risks of couch surfing one's indoor childhood away, but boys (and girls) still do manage to do some damage to themselves, according to the National Center for Injury Prevention and Control. ([Table 1.](#))

Child Support 2006 Statistics

- \$24 billion in child support collections (4 percent increase over FY 2005)
- 1.7 million paternities established or acknowledged (3.8 percent increase over FY 2005 caseload had orders established (1.2 million child support orders were established)
- 9.66 million cases had orders being processed (excluding arrears-only cases)
- 7.04 million contained medical support orders
- 1.9 million cases in which medical support was ordered and provided. See www.acf.hhs.gov/programs/cse/pubs.

Additionally, the Office of Child Support Enforcement (OCSE) has published three new reports in its *Story Behind Numbers series*, including *The Impact of Nonmarital Birth Data on the Child Support Enforcement Program's Performance*; *Impact of Modification Thresholds on Review and Adjustment of Child Support Orders*; and *Effects of Child Support Order Amounts on Payments by Low-Income Parents*. See www.acf.hhs.gov/programs/cse—then click on Information Memoranda (IM-07-04).

Newborn Defects

Prospective mothers can lower the risk of heart defects in their babies by getting rubella and flu shots, taking vitamins, and being tested for diabetes before they are pregnant, the American Heart Association said in new guidelines. Once pregnant, a woman should continue taking a vitamin containing folic acid every day, advise her doctor about all of the medications she takes, and avoid people with the flu and other fever-related illnesses. The guidelines are the first to suggest that a woman's lifestyle both before and during pregnancy affect whether a baby is born with congenital heart defects, which occur in nine out of 1,000 U.S. babies.

Firstborns and IQs

Researchers have debated for a century whether, as IQ scores suggest, firstborn and only children are really smarter than those who come along later, but a study from Norway now indicates that what matters is not so much being born first as growing up the senior child—at least for boys. Researchers report that what counts is what they call social rank in the family. The highest scores were racked up by the senior child—the firstborn or, if the firstborn had died in infancy, the next oldest. The findings were based on IQ test results of 241,310 Norwegian men drafted into the armed forces between 1967 and 1976. All were 18 or 19 years old at the time.

Newborns and Fungal Infections

Babies born prematurely often develop yeastlike fungal infections in part because their immune systems are not fully developed. In a study that randomly assigned 322 pre-term babies, weighing 3.3 pounds or less, they were given either fluconazole or a placebo until they were about one month old. During this time, lab cultures confirmed the development of fungal colonies in about 9 percent of the babies given the drug and 29 percent of the others. Full-fledged fungal infections were diagnoses in about three percent of the babies taking the drug and 13 percent of the others. See www.marchofdimmes.com or www.kidshealth.org (click “parents” and then search for “premature.”)

Underweight Babies

University of Michigan researchers tracked 12,874 people born between 1951 and 1975 for as long as 40 years; eight percent of them weighed less than 5.5 pounds at birth. The study showed that a large part of an individual's struggle for health and wealth is decided in the womb, or

even earlier. While previous studies have shown a link between low birth weight and difficulties later in life, this is the first comprehensive study to control for genetic factors other than those affecting birth weight. Underweight babies consistently reported poorer health and less financial success than their normal-weight siblings. Low birth weight has been tied to delays in cognitive development, possibly explaining later problems.

Teen Pressure

Twenty-one percent of mothers are concerned that their kids are being pushed by peers to do poorly in school. But, in fact, that's true for only two percent of kids. Sixty percent of kids actually are being encouraged by their peers to do well in school. Other data: More teens report pressure to engage in risky behavior than tweens: ([table 2](#)).

Kid Data—

- 6 percent of tweens, which translates into more than 100,000, have their own blog.
- 38 percent of girls 13 to 17 have a blog, versus only 17 percent of boys.
- Only 20 percent of all kids who went online went there for schoolwork.
- prefer talking to someone, especially parents, face-to-face.
- 34 percent of kids wish their parents wouldn't get mad at them so much.
- 19 percent of kids fear they will be beaten or attacked.
- 73 percent of kids say they are happy almost all or most of the time.
- 79 percent of kids were happy in school last year.
- Less than 10 percent of kids say their teachers are the best part of school.

Home Schooling

25 years ago it was illegal in many states for parents without teaching licenses to educate their children at home. But the number has grown as state regulations have eased. More than one million students—about two percent of the school-age population—were home-schooled in 2003, according to the Education Department. In 1994, there were 35,000 home-schooled and in 1999, the number approached 80,000.

U.S. Prison Population

U.S. prisons and jails added more than 42,000 inmates last year, the largest increase since 2000, the Bureau of Justice statistics reported. The total number of people incarcerated by federal or state authorities in the year ending June 30, 2006 was roughly 1.6 million, up 2.8 percent from 2005. The increase was attributed to people being put in prison at a faster rate than those being released. When local jail populations are included, the total number of people jailed is about 2.2 million. Nearly six out of 10 incarcerated were black or Hispanic.

Teen Drivers

According to the Children's Hospital of Philadelphia and State Farm, teen drivers responsible for paying at least some:

Gas	53 Percent
Driving/Parking Tickets	41 Percent
Vehicle Damage/Repairs	29 Percent
Vehicle Maintenance	27 Percent
Car Insurance	20 Percent

Part-Time Students

Thirty-five percent of undergraduates attended college exclusively part-time in 2003-04 and they are more likely to be older and female, come from minority or low-income backgrounds, be less

prepared academically, and attend community college or non-degree programs, reports the Department of Education. The report finds that undergraduates who attend college full-time exclusively are more likely to attain degrees.

Student Debt

According to the College Board, bachelor's degree recipients from for-profit schools had the highest median student-debt levels. Median level of debt by degree and institution in 2003-04:

Associate for-profit school	\$16,100
Associate public school	\$6,100
Bachelor for-profit school	\$24,600
Bachelor 4-year public	\$15,500
Bachelor, 4-year, private, non-profit	\$19,500
Median debt of bachelor degree recipients	\$19,300

Status Offender DVD

Recently, OJJDP, in conjunction with the American Bar Association's Commission on Youth at Risk and the U.S. Department of Health and Human Services' Family and Youth Services Bureau, aired the national videoconference "Addressing the Needs of Juvenile Status Offenders and Their Families." Now available on DVD, the videoconference (NCJ 216888) highlights programs, practices, and policies that have shown promise in intervening with status offenders to prevent further offending, support their families, and guide them towards a positive future. DVDs of this videoconference may be ordered at <http://ncjrs.gov/App/Publications/AlphaList.aspx>. For quick access, search by the NCJ number indicated above.

Mothers and Antidepressants—Women who become pregnant while taking antidepressants must balance the risk to themselves if they stop the medication against potential harm to their babies if they don't. A study, reported in the *New England Journal of Medicine*, involved 15,709 infants, 9,849 of them born with a birth defect. Overall, a baby was no more likely to have been born with an abnormality (such as a heart defect, abdominal protrusion, or premature skull fusion) if during early pregnancy the mother had taken antidepressants (specifically SSRIs, selective serotonin-reuptake inhibitors) than if she had not. Further analysis found that the use of certain SSRIs was associated with some increase in the risk of specific rare birth defects, but the number of cases was minimal. See www.marchofdimes.com and www.cdc.gov/ncbddd.

Breakthrough Schools

Research has demonstrated that schools have to change to align with current realities. This can be done, according to the National Association of Secondary School Principals, by taking a closer look at what's happening in institutions that researchers have called "Breakthrough Schools." These are schools serving high minority student populations, with high numbers of students receiving free and reduced-price lunches. Led by reform-minded leadership, they have been successful in fostering high expectations and student achievement. And, most notably, a remarkable number of their students are not only graduating but also furthering their education beyond high school. These schools have in common:

- Strong leadership and vision by the school principal
- Focus on student achievement and academic rigor
- Articulated high expectations including "college for all"
- Relevance and personalization so students visualize continuing their education
- Emphasis on reading, writing, literacy, inquiry, and collaboration
- In-school academic support along with a safe and caring environment
- Flexibility and extra time (beyond four years) to master course work

- Strong home-school connections
- Opportunities to earn tuition-free college credits

See *Breaking Ranks II: Strategies for Leading High School Reform* at www.nassp.org.

Status Offender DVD

OJJDP, the American Bar Association Youth at Risk Commission, the ABA Center on Children and the Law, the Family and Youth Services Bureau, Administration for Children and Families (ACYF), and the Department of Health and Human Services sponsored a video conference on status offenders. The program was aimed at policy-makers and juvenile justice, child welfare, social service, and other youth-serving agencies. DVD copies of *Addressing the Needs of Juvenile Status Offenders and Their Families* can be found at <http://www.ncjrs.gov/app/publications/alphaList.aspx>. Search by document number 216888.

Juvenile Court Case Flow

Law enforcement agencies refer approximately two-thirds of all arrested youth to a court with juvenile jurisdiction for further processing. *Juvenile Offenders and Victims 2006 National Report* describes the flow of cases through the juvenile court system. See <http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/chapter6.pdf>.

Trauma Among Youth

The National Center for Mental Health and Juvenile Justice has published "*Trauma Among Youth in the Juvenile Justice System: Critical Issues and New Directions*." This research and program brief provides an overview of trauma among youth in the juvenile justice system, including its scope and impact; and reviews tools, curricula and approaches for addressing trauma among justice-involved youth. Issues related to implementing trauma services within the juvenile justice system context are also discussed. See http://www.ncmhjj.com/pdfs/Trauma_and_Youth.pdf.

Summer Jobs

Most U.S. teenagers were not working nor were they looking for jobs this past summer for the first time on record, suggesting that teens are forgoing traditional summertime jobs, according to the Department of Labor. Only 48.8 percent of teens ages 16 to 19 were looking for work this past June, down from 51.6 percent in June 2006 and below the 60.2 percent in the labor force in June 2000. Labor force participation among teens in June peaked in 1978, when 67.7 percent of Americans ages 16 to 19 were working or looking for work. It has been suggested that the reasons why teens are bypassing work is to spend more time studying, even during the summer: 37.6 percent of teens ages 16 to 19 were enrolled in school in July 2006, up from 36.5 percent a year earlier and more than three times the share enrolled two decades ago. Other factors include 1) family household incomes are up significantly, 2) kids who seek work are finding heavy competition for the "good jobs," 3) there is increasing competition for jobs by immigrants and older workers, and 4) many students opt for low-interest loans rather than working when in college.

Math and Science

In the global competition to educate students in math and science, Americans are losing ground. Out of 32 countries ranked between 2000 and 2003, the U.S. dropped five places to 20th in undergraduate science degrees earned, and slipped six spots to 26th in undergraduate math degrees earned. The National Math and Science Initiative is a non-profit organization created to improve math and science education in American schools by scaling-up proven programs to the national level. The goal is to provide 15,000 new teachers in math and science by the year 2020 as well as help to upgrade math and science programs in hundreds of school districts nationwide. See www.nationalmathandscience.org.

Drug Addiction and Behavior

The Science of Addiction has been released by the National Institute on Drug Abuse (NIDA). It is a 30-page booklet that explains how science has revolutionized the understanding of drug addiction as a brain disease that affects behavior. The booklet is available free of charge. See www.drugabuse.gov/scienceofaddiction or call 1-800-729-6686.

Risk Assessments

The U.S. Department of Justice recently published a report entitled *Evaluating and Improving Risk Assessment Schemes for Sexual Recidivism*. See <http://www.ncjrs.gov/pdffiles1/nij/grants/217618.pdf>.

Indicators of Children's Well-Being— The Federal Interagency Forum on Child and Family Statistics has released *America's Children: Key National Indicators of Well-Being, 2007*. Each year since 1997, the Forum has published this report, which includes detailed information on the welfare of children and families. The Forum alternates publishing a comprehensive report, as is the case this year, with a condensed version that highlights selected indicators. The report addresses such topics as family and social environment, economic circumstances, health care, physical environment and safety, behavior, education, and health. See (NCJ 219130) <http://www.childstats.gov/americaschildren/index.asp>.

Youth-Related Grants

The U.S. Department of Labor (DOL) has awarded more than \$41 million in grants that enhance the education and career skills of troubled youth. Part of DOL's ongoing response to the 2003 White House Task Force Report on Disadvantaged Youth, the grants will help at-risk youth access valuable education and skills training intended to put them on a path to job success. See <http://www.dol.gov/opa/media/press/eta/eta20070976.htm>. Additional information about DOL youth programs is available at http://www.doleta.gov/youth_services.

Enhanced SMART System

OJJDP has launched an enhanced version of its Socioeconomic Mapping and Resource Topography (SMART) System. SMART is a geographic information system and Webbased mapping application that pinpoints local geographic areas of crime and delinquency and nearby governmental and community resources to prevent and control it. This tool was developed to assist federal, state, and local decision makers in targeting areas of greatest need and allocating resources accordingly. Along with maps, SMART creates tables and graphs to chart a wide array of socioeconomic data, such as population, crime, housing, health, and mortality. Data sources include the U.S. Census Bureau and OJJDP's Statistical Briefing Book. Recent enhancements include the addition of:

- the ability to upload address files from an Excel spreadsheet, Access database, or comma delineated text files to be geocoded and entered into the system for the user's analysis
- public schools with contact information (National Center for Education Statistics)
- public juvenile residential placement facilities (Juvenile Residential Facility Census)
- Uniform Crime Report data (1994–2004), enabling the user to conduct trend analysis. See <http://smart.gismapping.info>.

Enforcing Underage Drinking Laws

The Department of Justice's Office of Justice Programs recently announced block awards of more than \$17 million to 50 states and the District of Columbia to enforce state and local underage drinking laws. The awards are made through the Enforcing Underage Drinking Laws program, which supports activities in law enforcement, public education programs, and innovative methods for reaching youth. Enforcing Underage Drinking Laws is the only federal initiative directed exclusively toward preventing underage drinking. The program is a \$25 million initiative consisting of block grants to each state and the District of Columbia, and discretionary

awards to selected states to fund the best and most promising activities and research at the local level. Each state and the District of Columbia received at least \$350,000 in the form of block grants. The awards support a wide range of activities, including a strong emphasis on compliance checks of retail alcohol outlets to reduce sales to minors, crackdowns on false identification, programs to reduce the incidence of older youth or adults providing alcohol to minors, “party patrols” to prevent access to alcohol at large youth gatherings, and “cops in shops” to deter minors’ attempts to purchase alcohol.

OVC News

Downloadable Curriculum: OVC’s Sexual Assault Advocate/Counselor Training (SAACT) downloadable curriculum is now available. SAACT teaches advocates how to provide effective crisis intervention services to victims and survivors of sexual assault. Visit the OVC Training Center to browse this and other new trainings now available to the field.

Training Schedule for Victim Service Providers: OVC is offering a series of fall/winter training workshops to enhance the capacity of service providers to serve crime victims and increase their professional skills. See the Professional Development Institute.

OVC Victim Assistance Academy: The 2007 National Victim Assistance Academy will be held December 9-14 2007, in the Baltimore Metropolitan Area, Maryland. Visit OVC’s Training Center for more information and apply online for the 2007 Academy.

Smart Baby Videos

Sitting infants down in front of videos may actually set very young children back, according to the *Journal of Pediatrics*, which reports that for every hour spent watching, infants understand fewer words than those who didn’t watch. Researchers used random telephone surveys of more than 1,000 parents, asking how many words from a list of 90 or so their child understood. For older kids, parents said how many their child used. For babies aged eight to 16 months, every hour each day spent watching videos marketed for brain-building translated into six to eight fewer words understood, compared with kids who didn’t watch. For kids from one and a half to two years old, the smart-baby videos showed no effect.

Status Offenders—The American Bar Association (ABA) Center on Children and the Law has published “Families in Need of Critical Assistance: Legislation and Policy Aiding Youth Who Engage in Noncriminal Misbehavior.” The publication focuses on addressing the needs of juvenile status offenders (i.e., youth who run away, are ungovernable or truant) and their families. It provides a context for and explanation of the need to better serve families in crisis, reviews the causes and contexts within which youth engage in non-criminal misbehaviors, and suggests legislative and policy strategies to intervene early and divert juvenile status offenders from court systems. It is available in hardcopy only for purchase from the ABA Service Center, which may be reached, toll free, at 800-285-2221. See <http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5490443>.

Disproportionate Minority Contact

The National Disproportionate Minority Contact (DMC) Databook is designed to give users an understanding of the Relative Rate Index (RRI) and an assessment of the levels of disproportionate minority contact at various stages of juvenile justice system processing at the national level. New users should review the sections entitled “What is an RRI?” and “Constructing an RRI Matrix.” The first briefly discusses the benefits in using an RRI Matrix to investigate disproportionate minority contact within a jurisdiction. The second discusses how an RRI Matrix can be prepared using available information and the compromises that at times need to occur. For a more detailed discussion of these topics, users are encouraged to review Chapter One of the online Disproportionate Minority Contact Technical Assistance Manual, 3rd Edition. See http://www.ncjrs.gov/html/ojjdp/dmc_ta_manual/dmcch1.pdf].

In the National DMC Databook, users can review the raw counts and rates that characterize the

processing of delinquency cases by the juvenile justice system and then study the RRI Matrix that helps to pinpoint and quantify the levels of racial disparity introduced at various decision points within the system. For those who need assistance, some possible interpretations of the most current RRI Matrices are given, as are interpretations of the trends in the level of disparity for each decision point. It is hoped that users can develop a better understanding of the RRIs from these interpretations and can apply this understanding when studying the many other RRIs that are available for review in this data dissemination tool or the RRIs developed locally to capture the nature of disproportionate minority contact in their own communities.

Mom’s Diabetes, Kid Obesity Linked—A mother’s blood-sugar level during pregnancy may be a powerful—but easily controllable— contributor to childhood obesity, according to a large new study by researchers with Kaiser Permanente’s Center for Health Research (CHR). The study, published in the September issue of *Diabetes Care*, found that mothers with untreated gestational diabetes—a form of the disease that occurs only during pregnancy— were nearly twice as likely to bear overweight children, compared with healthy moms. And the data showed that some mothers with “normal” blood-sugar readings were at risk as well: pregnant women with blood-sugar levels at the highest end of the currently accepted normal range were at least 22 percent more likely to have heavy children than women in the lowest quartile.

Researchers analyzed medical information on 9,439 mother-child pairs who received health care through Kaiser Permanente in the Pacific Northwest and Hawaii. All women gave birth between 1995 and 2000, and none had pre-existing diabetes. The women were screened for hyperglycemia, or high blood sugar, and gestational diabetes; their children were measured for weight between the ages of 5 and 7—what researchers call the adiposity- rebound period, during which excessive weight gain usually predicts adult obesity. Regardless of factors like race or ethnicity, birth weight and maternal weight gain or age, researchers found that the risk of a child becoming overweight rose in step with the mother’s blood-sugar level during pregnancy.

Women whose blood-sugar tests indicated gestational diabetes were 89 percent more likely than other women to have overweight children, and 82 percent more likely to have obese kids. Women whose blood-sugar readings were at the upper end of normal (122 mg/dl to 140 mg/dl) were still 22 percent more likely to have overweight children than women at the low end of normal (with bloodsugar levels between 43 mg/dl and 94 mg/dl), and 28 percent more likely to bear children who become obese.

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Top causes for injury in 2005 for boys ages 5-13:

Cause of Injury	Number of Injuries	Percentage of all Injuries
Overall injuries	2,128,567	100%
Falls	656,332	30.8
Hit by person or object	525,899	24.7
Bike or tricycle accident	140,836	6.6
Cut or piercing injury	138,654	6.5
Motor vehicle accident	59,363	2.8
<i>Top causes for injury in 2005 for girls ages 5-13:</i>		
Overall injuries	1,472,785	100%
Falls	494,970	33.6
Hit by person or object	290,464	19.7
Overexertion	131,920	9.0
Cut or piercing injury	89,377	6.1
Motor vehicle accident	74,161	5.0
Bike or tricycle accident	63,097	4.3

More teens report pressure to engage in risky behavior than tweens:

	<i>TWEENS</i>	<i>TEENS</i>
To drink alcohol	4%	23%
To do drugs	5%	19%
To smoke cigarettes	6%	17%
Girls v. boys who is worried about what		
	<i>GIRLS</i>	<i>BOYS</i>
Getting good grades	54%	44%
How they look	49%	30%
Their weight	48%	22%
Problems with friends	42%	24%
Problems with parents	29%	21%
Pressured to have sex	11%	3%

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Published by the Administrative Office of the United States Courts www.uscourts.gov
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Federal PROBATION

*a journal of correctional
philosophy and practice*

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PUBLISHED BY

The Administrative Office of the United States Courts

James C. Duff, *Director*

John M. Hughes, *Assistant Director*
Office of Probation and Pretrial Services

Federal Probation ISSN 0014-9128 is dedicated to informing its readers about current thought, research, and practice in corrections and criminal justice. The journal welcomes the contributions of persons who work with or study juvenile and adult offenders and invites authors to submit articles describing experience or significant findings regarding the prevention and control of delinquency and crime. A style sheet is available from the editor.

Federal Probation is published three times a year, in June, September (on a special topic), and December. Permission to quote is granted on the condition that appropriate credit is given the author and *Federal Probation*. For information about reprinting articles, please contact the editor.

Subscriptions to *Federal Probation* are available from the Superintendent of Documents at an annual rate of \$16.50 (\$22.40 foreign). Please see the subscription order form on the last page of this issue for more information.

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The Predictive Validity of the LSI-R on a Sample of Offenders Drawn from the Records of the Iowa Department of Corrections Data Management System

¹ The predictive validity of the LSI-R by race and ethnicity has been mixed and is still requiring additional research. However, studies have reported modest predictive validity by ethnicity (Holsinger, Lowenkamp & Latessa, 2006) and low predictive validity by race (Schlager & Simourd, 2007).

² A t-test, comparing the difference in means, or average LSI-R total scores, found that there was a significant difference in the actual total scores between probation and parole. However, based on the MHS cutoffs, both supervision status types would still be categorized as a moderate risk level.

³ The average score on the Criminal History domain for the Parole Group was 6.70 and the average score on the Criminal History domain for the Probation Group was 3.94. A t-test indicated that there was a significant difference between these two risk scores ($p < .001$).

⁴ The smaller sample size of female parolees ($N=26$) and non-white parolees ($N=53$), may account for the lack of significance with these correlations.

Probation and Parole Officers Speak Out—Caseload and Workload Allocation

¹ This lack of certainty of punishment is contrary to traditional conceptions of deterrence theories, which are predicated on the notion of offenders perceiving that criminal behaviors and technical violations will be met with punishment. Many jurisdictions are finding it difficult to respond adequately to noncompliant probationer behaviors due to overcrowding and funding issues, with some courts actually informally requesting that only the most serious probation violators be brought back to court.

² See Warchol (2000) and Bonta, Wallace- Capretta, and Rooney (2000) for a more complete historical development of ISPs. On the effects of caseload size, see Worrall, Schram, Hays, and Newman (2004)

Thacher, Augustus, and Hill—The Path to Statutory Probation in the United States and England

¹ The author is grateful to Professors Andrew Karmen and John Kleinig of John Jay College of Criminal Justice for their helpful comments

Looking at the Law—Probation Officers' Authority to Require Drug Testing

¹ In 1984, Congress replaced the Federal Probation Act with provisions in the SRA that repealed the chapter in Title 18 that contained the Federal Probation Act (except for '3656, which was renumbered '3672), effective November 1, 1987. While new '3603 applied only to offenses committed after November 1, 1987, the following language in '3655, construed by courts to authorize officers to require drug tests, was carried over to new '3603: '3655. Duties of probation officers. The probation officer shall furnish to each probationer under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. He shall keep informed concerning the conduct and condition of each probationer under his supervision and shall report thereon to the court placing such person on probation. He shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid probationers and to bring about improvements in their conduct and condition. 18 U.S.C. '3655 (1984) (repealed).

² See *United States v. Stephens*, 424 F. 3d 876, 885 (9th Cir. 2005) (Clifton, J., concurring in

part, dissenting in part); *United States v. Melendez-Santana*, 353 F. 3d 93, 105-06 (1st Cir. 2003) (recognizing that drug testing was authorized under ‘ 3603, but holding that it had been superseded by the mandatory drug testing provisions implemented by the VCCA), partially overruled on other grounds by *United States v. Padilla*, 415 F. 3d 211 (1st Cir. 2005) (en banc) (unlawful delegation of judicial discretion to determine the maximum number of drug tests to a probation officer is not subject to plain error review); *United States v. Duff*, 831 F. 2d 176, 178-79 (9th Cir. 1987) (holding that a probation officer has the power to order a defendant to submit to drug testing under 18 U.S.C. ‘3655 (the predecessor to ‘3603) even when the court had not explicitly imposed such a condition); *United States v. Smith*, 45 F. Supp. 2d 914, 919 (M.D. Ala. 1999) (holding that a probation officer’s authority under ‘3603, which took effect in 1987, was identical to that described in its predecessor, ‘3655).

³ Pub. L. No. 98-473, 98 Stat. 1987 (1984) (currently codified at 18 U.S.C. ‘3563(b)(9) and 18 U.S.C. ‘3583(d)).

⁴ 18 U.S.C. ‘ 3603(2), (3) & (7).

⁵ 831 F. 2d 176 (9th Cir. 1987).

⁶ *Id.* at 178-79.

⁷ *Id.* at 179 (emphasis added).

⁸ See *United States v. Morey*, 120 F. 3d 142, 143 (8th Cir. 1997) (probation officer authorized to require drug testing in furtherance of a special condition requiring participation “as instructed by the probation office” in drug treatment; “[g]iving the probation officer authority to require additional drug treatment [and testing] . . . is an appropriate discretionary condition that goes beyond the drug testing mandated by ‘3583(d)); *United States v. Schoenrock*, 868 F. 2d 289, 291 (8th Cir. 1989) (same); *United States v. Williams*, 787 F. 2d 1182, 1185 (7th Cir. 1985) (per curiam) (requirement to submit to random drug testing was narrowly tailored to prevent future drug use); *United States v. Consuelo-Gonzalez*, 521 F. 2d 259, 265-66 (9th Cir. 1975) (“The only limitation [imposed on a sentencing judge’s power to impose conditions] is that the conditions have a reasonable relationship to the treatment of the accused and the protection of the public.”). See also 18 U.S.C. ‘ 3583(d) (in addition to specified discretionary conditions, a court may impose “any other condition it considers to be appropriate”).

⁹ Two years after Congress created the discretionary drug treatment conditions, Section 1861(b)(1) of the Anti-Drug Abuse Act of 1986 authorized the Director of the Administrative Office of the United States Courts to contract and pay for testing and treatment. Pub. L. No. 99-570, 100 Stat. 3207 (1986).

¹⁰ 424 F. 3d 876 (9th Cir. 2005).

¹¹ *Id.* at 882.

¹² *Id.* at 883 (quoting *United States v. Fellows* 157 F. 3d 1197, 1204 (9th Cir. 1998)).

¹³ See *United States v. Heath*, 419 F. 3d 1312, 1315 (11th Cir. 2005) (delegating the ultimate decision of whether an offender must participate in mental health treatment program, in contrast to permissible delegation of administrative details regarding the type of program, was an unconstitutional delegation of sentencing authority); *United States v. Pruden*, 398 F. 3d 241, 251 (3d Cir. 2005) (condition of supervised release was an unconstitutional delegation of authority because it allowed probation officer to determine need for mental health treatment); *United States v. Melendez-Santana*, 353 F. 3d 93, 101 (1st Cir. 2003) (“Rather than simply vesting the probation officer with the responsibility for managing the administrative details of drug treatment, the court granted the probation officer the authority to decide whether Melendez would have to undergo treatment after testing positive for drugs. That treatment decision must be

made by the court[.]”); *United States v. Allen*, 312 F. 3d 512 (1st Cir. 2002) (affirming condition giving probation officer discretion to determine the details of the offender’s mental health treatment sessions; condition not an improper delegation of judicial sentencing authority because the court decided whether the defendant received treatment, and the probation officer only determined the type of mental health program); *United States v. Sines*, 303 F. 3d 793, 799 (7th Cir. 2002) (“[A] district court . . . must itself impose the actual condition requiring participation in a sex offender treatment program.”); *United States v. Peterson*, 248 F. 3d 79, 84-85 (2d Cir. 2001) (lawful delegation to probation officer regarding scheduling and selection of mental health treatment); *United States v. Kent*, 209 F. 3d 1073 (8th Cir. 2000) (unlawful delegation of judicial authority where probation officer authorized to determine if person sentenced must attend a psychological/ psychiatric counseling program).

¹⁴ Pub. L. No. 103-322, 108 Stat. 1796, 1830-31 (1994) (currently codified at 18 U. S. C. ’3563(a) (5) (probation), ’3583(d) (supervised release), and 4209(a) (parole)).

¹⁵ Section 3583(a)(5) provides: [F]or a felony, a misdemeanor, or an infraction, that the defendant refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant’s presentence report or other reliable sentencing information indicates a low risk of future substance abuse by the defendant. 18 U.S.C. ’3583(a)(5). Section 3583(d) was amended to require a court to “order, as an explicit condition of supervised release, that the Defendant refrain from any unlawful use of a controlled substance and submit to a drug test within fifteen days of release . . . and at least two periodic drug tests thereafter (as determined by the Court).” 18 U.S.C. ’3583(d).

¹⁶ 45 F. Supp. 2d 914 (M.D. Ala. 1999).

¹⁷ *Id.* at 918 (emphasis added).

¹⁸ *Id.* at 918-19 (quoting 18 U.S.C. ’3603(3)).

¹⁹ 146 F. 3d 502 (7th Cir. 1998).

²⁰ 997 F. 2d 263 (7th Cir. 1993).

²¹ *Bonanno*, 146 F. 3d at 511.

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²⁴ 353 F. 3d 93, 105-06 (1st Cir. 2003), partially overruled on other grounds by *United States v. Padilla*, 415 F. 3d 211 (1st Cir. 2005) (en banc) (unlawful delegation of judicial discretion to determine the maximum number of drug tests to a probation officer is not subject to plain error review).

²⁵ *Id.* at 101 & n. 6.

²⁶ *Id.* at 104.

²⁷ *Id.* at 106.

²⁸ *Id.* at 105.

²⁹ *Id.* at 105.

³⁰ Id.

³¹ The Smith court stated: The amendment uses the phrase “at least” to describe the number of tests the court must impose. It does not state that three drug tests should be the maximum unless otherwise specified by the court. Clearly then, the purpose of the amendment is to set a minimum number of drug tests that a court must impose, not a maximum. Smith, 45 F. Supp. 2d at 918.

³² Melendez Santana, 353 F. 3d at 103-04.

³³ Id. at 105. The First Circuit overturned similar conditions imposed upon defendants convicted of illegal reentry in *United States v. Tulloch*, 380 F. 3d 8, 10-11 (1st Cir. 2004) (“the sentencing court essentially ‘vest[ed] the probation officer with the discretion to order an unlimited number of tests,’ which it could not do”) (quoting Melendez-Santana, 353 F. 3d at 103).

³⁴ Id. (quoting *Natural Resources Defense Council, Inc. v. EPA*, 824 F. 2d 1258, 1278 (1st Cir. 1987)).

³⁵ *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). In *Watt*, the Supreme Court observed the strong presumption against the sort of “repeal by implication” that the First Circuit found in Melendez Santana: [W]e decline to read . . . statutes as being in irreconcilable conflict without seeking to ascertain the actual intent of Congress. Our examination of the legislative history is guided by another maxim: “ ‘repeals by implication are not favored.’ ” . . . “The intention of the legislature to repeal must be ‘clear and manifest.’ ” . . . We must read the statutes to give effect to each if we can do so while preserving their sense and purpose. Id. (citations omitted).

³⁶ Melendez Santana, 353 F. 3d at 105.

³⁷ 424 F. 3d 876 (9th Cir. 2005).

³⁸ The issue was also implicated by the Bonanno holding, but the Seventh Circuit did not have occasion to address it in its opinion.

³⁹ Id. at 886 (Clifton, C. J. dissenting).

⁴⁰ Id.

⁴¹ The majority attempted to forestall any attempt to reconcile its holding with Duff by characterizing Duff as irrelevant to the drug-testing authority at issue in Stephens: The dissent claims our resolution ignores the binding precedent of Duff, that a probation officer has the authority to require drug testing even where never ordered by the district court. However, Duff is easily distinguished. The case considered the question of whether the probation officer had the power under 18 U.S.C. ‘ 3655 (1982 & Supp. III 1985), repealed by Pub. L. No. 98-473 (now codified at 18 U.S.C. ‘ 3603), to order Duff to submit to nontreatment drug testing. Here, we construe an entirely different statute, ‘ 3583(d), which specifically sets forth the obligation of the district judge to determine the number of drug tests. Id. at 884 n. 4.

⁴² While Stephens addressed only the ‘3583(d) mandatory testing condition, section 204143 of the VCCA imposed identical mandatory testing provisions for probationers in 18 U.S.C. ‘3563(a)(5) (as a condition of probation) and for parolees in 18 U.S.C. ‘4209 (as a condition of parole) (repealed). Under ‘3563(a)(5), the court must determine the maximum number of drug tests for probationers. Section 4209 required the Parole Commission to do the same when imposing parole conditions. Because ‘3563(a) (5), like ‘3583(d), requires that the district court determine the maximum number of mandatory drug tests, the Office of General Counsel and the Office of Probation and Pretrial Services advised that Stephens applies equally to drug testing of probationers. The same observation applies in the First and Seventh Circuits. By contrast, the

mandatory drug testing provision under ‘4209 requires the Parole Commission, and not the court, to determine the maximum number of mandatory tests. The delegation of Article III judicial power at issue in Stephens is not implicated when a probation officer determines the number of drug tests for parolees. In addition, 28 C.F.R. ‘2.38 authorizes probation officers to provide such parole services as the Commission may request. Stephens therefore did not require officers in the Ninth Circuit (or officers elsewhere conducting courtesy supervision of offenders within the jurisdiction of a Ninth Circuit district court) to alter their practices regarding mandatory drug testing of parolees if the Parole Commission had imposed a condition authorizing a probation officer to determine the number of drug tests for a parolee under supervision.

⁴³ 476 F. 3d 471 (7th Cir. 2007).

⁴⁴ *Id.* at 472. In addition to his special treatment condition, Dropik was subject to a mandatory testing condition. As the government noted in its brief and as Dropik’s judgment reveals, however, the district judge only required Dropik to submit to the statutory minimum of three mandatory tests, and the court delegated no authority to the probation officer to require additional testing under the mandatory condition. Thus, the only delegation issue before the Tejada panel was delegation to probation officers in the drug treatment special conditions.

⁴⁵ 146 F. 3d 502 (7th Cir. 1998).

⁴⁶ Tejada was the first published case erroneously applying the requirements of the ‘3583(d) mandatory condition to drug testing pursuant to a drug treatment special condition. The Seventh Circuit had previously issued at least one unpublished opinion that also misapplied the mandatory drug testing provision to a drug treatment special condition, however. See *United States v. Sam*, Nos. 05-2190 & 05-2418, 2006 WL 1586010 (7th Cir. 2006).

⁴⁷ Tejada, 476 F. 3d at 473 (“The authority to order drug testing comes from 18 U. S. C. ‘3583(d), which sets out conditions of supervised release. . . .”).

⁴⁸ Section 5D1. 3(d)(4) recommends: If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol ‘a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol. U.S.S.G. ‘5D1. 3(d)(4) (emphasis added).

⁴⁹ 424 F. 3d 876 (9th Cir. 2005).

⁵⁰ *Id.* at 882.

⁵¹ Tejada, 476 F. 3d at 473-74. The Ninth Circuit case cited by the Tejada panel, *United States v. Maciel-Vasquez*, 458 F. 3d 994 (9th Cir. 2006), discussed Stephens and observed that district courts may authorize probation officers to designate drug and alcohol testing if it is incidental to a treatment program, but are precluded from delegating if testing is required pursuant to a ‘3584(d) mandatory condition. The condition in *Maciel-Vasquez* was deemed “somewhat ambiguous” because it was unclear whether the district court had authorized the officer to require testing as a part of treatment or pursuant to a mandatory testing condition. The same cannot be said for the special condition in Tejada, which clearly required testing only as a component of treatment.

⁵² In Stephens, the Ninth Circuit affirmed a treatment and testing special condition that required the offender to “participate in a drug and alcohol abuse treatment and counseling program, including urinalysis testing, as directed by the Probation Officer.” Stephens, 424 F. 3d at 879. The special condition allegedly endowing probation officers with too much discretion in Tejada likewise required the offender to “participate in a program of testing and residential or outpatient treatment for drug and alcohol abuse, as approved by the supervising probation officer, until such time as he is released from such program.” Tejada, 476 F. 3d at 472-73.

⁵³ Discussion of case law constraints on officers supervising offenders within any specified circuit includes officers outside those circuits who are conducting courtesy supervision of offenders within the supervision jurisdiction of a district court located in the First, Seventh, or Ninth Circuits.

⁵⁴ See *Guy*, 174 F. 3d at 862.

⁵⁵ See *Smith*, 45 F. Supp. 2d at 918-19 (citing H.R. Conf. Rep. 103-711 (1994), reprinted in, 1994 U.S.C.C.A.N. 1839 & H.R. Conf. Rep. 103- 694 (1994)).

⁵⁶ The district court for the Southern District of California took a novel approach to pre-Stephens failures to specify a maximum number or range of mandatory tests. The court entered a general order on September 21, 2005, stating that all persons who had been required to submit to drug testing as a mandatory condition of supervised release or probation would be required to submit to no more than four drug tests a month. See *In the Matter of Frequency of Drug Testing Ordered as a Condition of Probation or Other Supervised Release*, General Order No. 547, S. D. Cal. September 21, 2005); see also *United States v. Toson*, No. 94-1136GT, 2007 WL 1114052 (S.D.Cal. April 4, 2007) (“General Order #547 cured any Stephens problems concerning penological drug testing.”).

⁵⁷ *Tejeda*, 476 F. 3d at 475.

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