

## Essay

# What Are We Hoping For? Defining Purpose in Deterrence-Based Correctional Programs

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## INTRODUCTION

Probation has long offered individuals convicted of crime a way to avoid the deleterious effects of incarceration and remain in the community, bound by conditions designed to help them develop the routines and skills essential to a law-abiding life. The ultimate goal of probation is to promote desistance, the process by which a person formerly engaged in criminal offending moves to a place of “long-term abstinence from crime.”<sup>1</sup> This process of “making good” is often difficult, requiring a probationer to abandon the habits and influences that have enabled criminal behavior and to develop law-abiding norms and prosocial relationships.<sup>2</sup>

Although probation historically involved close mentoring and monitoring by probation officers,<sup>3</sup> growing caseloads and resource constraints often result in lax supervision and uneven enforcement of the conditions of supervision.<sup>4</sup> As a result, in

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1. SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES 26 (2001).

2. *Id.*

3. See, e.g., Anne Meis Knupfer, *Professionalizing Probation Work in Chicago, 1900–1935*, 73 SOC. SERV. REV. 478 (1999).

4. See Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 150 (1997) (“As a result of inadequate funding, probation often means freedom from supervision. Offenders in large urban areas are often assigned to

many jurisdictions it is not uncommon for probationers to violate conditions of release with impunity for extended periods of time before facing any consequence.<sup>5</sup> When a consequence is imposed, it is often revocation—the termination of probation and the imposition of an often lengthy prison sentence.<sup>6</sup>

When Judge Steven Alm launched the Hawaii Opportunity Probation with Enforcement (HOPE) program, he was not trying to innovate. Quite the opposite: he was reacting against a model of probation that struck him as being at odds with common sense and common experience.<sup>7</sup> As he later explained to Congress, from his first week on the bench as a state felony trial judge in Honolulu,

I could tell that the current probation system was broken. Probation officers had caseloads of up to 180, and the dynamic was that offenders would repeatedly break the rules of supervision—by using drugs, skipping probation appointments and failing treatment—because there were no real consequences. After the offender racked up 20, 30 or more violations, the probation officer would feel they had a “good” case for bringing a Motion for Revocation of Probation . . . and [would] almost invariably recommend I sentence the offender to the underlying 5, 10 or 20 years in prison.

I saw this dynamic . . . and I thought to myself, “this is a crazy way to operate. A crazy way to try to change anybody’s behavior.”

I thought to myself, “What did I do as a parent when my child misbehaved?” I would repeat the rules and warn him that if it happened again, I would give him a specific consequence right away. And he learned to connect the bad behavior with the consequence, and the bad behavior stopped.

I thought if we could reorganize this creaky old probation system to be swift, certain and proportionate for each and every violation, we could more effectively supervise probationers.

And HOPE probation was born.<sup>8</sup>

Judge Alm’s intuitions were supported by a substantial body of research on the factors that deter people from engaging in prohibited behavior (whether that means committing new crimes or violating conditions of supervision). Key to deterrence is a

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100-plus caseloads, in which meetings occur at most once a month, and employment or treatment progress is seldom monitored.”).

5. *Id.*

6. For a more complete discussion of the dynamics of probation and revocation, see generally Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015 (2013).

7. *Hawaii’s Opportunity Probation with Enforcement: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary* [hereinafter Statement of Hon. Steven Alm], 111th Cong. (2010) (statement of Hon. Steven Alm, Circuit Court Judge), available at [http://judiciary.house.gov/\\_files/hearings/pdf/Alm100511.pdf](http://judiciary.house.gov/_files/hearings/pdf/Alm100511.pdf).

8. *Id.*

belief on the part of the person being deterred (1) that prohibited behavior will be detected and (2) that an immediate, negative consequence is certain to accompany any detected violation.<sup>9</sup>

Applying that logic to probation supervision meant increasing surveillance of people under supervision to detect more violations, and building the capacity of the probation agency and the court to respond quickly to those violations. Judge Alm did just that, creating a new intensive supervision program for probationers identified as being at high risk of revocation.<sup>10</sup> The program made use of law enforcement officers who more closely monitored and apprehended those probationers who missed meetings or failed drug tests, and brought them quickly before the court for custodial sanctions usually ranging from several days to several weeks.<sup>11</sup>

After a successful pilot program, Judge Alm persuaded his colleagues on the bench to adopt HOPE in their courtrooms, too.<sup>12</sup> According to studies the Honolulu court later commissioned from outside researchers, the program worked spectacularly well: participants increased compliance with rules of supervision, and served less time in prison than people placed on traditional probation caseloads.<sup>13</sup>

The news traveled fast. Media outlets loved the idea of an effective, tough-love approach to probation,<sup>14</sup> and publicized

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9. See generally Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 206 (2013) (discussing theories of deterrence and their implications for public policy).

10. Statement of Hon. Steven Alm, *supra* note 7.

11. See Mark A. R. Kleiman & Kelsey R. Hollander, *Reducing Crime by Shrinking the Prison Headcount*, 9 OHIO ST. J. CRIM. L. 89, 102–03 (2011); Statement of Hon. Steven Alm, *supra* note 7.

12. See Steven S. Alm, *HOPE for Your Probationers*, 50 JUDGES' J. 18, 20 (2011) (reporting that over a six-year period, all felony judges in the Honolulu District Court began using HOPE with some probationers).

13. See ANGELA HAWKEN & MARK KLEIMAN, NAT'L INST. OF JUSTICE, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII'S HOPE (2012) [hereinafter HAWKEN & KLEIMAN, MANAGING], available at <http://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf>; ANGELA HAWKEN & MARK KLEIMAN, RESEARCH BRIEF: EVALUATION OF HOPE PROBATION (2008), available at [http://www.colorado.gov/ccjdir/Resources/Committees/DrugTF/Handout/HOPE-ProbationEval\\_ResearchBrief\\_HawkenANDKleiman08.pdf](http://www.colorado.gov/ccjdir/Resources/Committees/DrugTF/Handout/HOPE-ProbationEval_ResearchBrief_HawkenANDKleiman08.pdf).

14. See Stephanie A. Duriez et al., *Is Project HOPE Creating a False Sense of Hope? A Case Study in Correctional Popularity*, 78 FED. PROBATION 57, 61 (2014) ("The tough-love approach towards offenders is popular not just with lawmakers but also with the American public. . . . [I]n a survey completed by the Pew Research Center, [seventy-two] percent of the 1,284 adults who completed the telephone interview either mostly or completely agreed with the

HOPE's success in a number of major domestic newspapers and magazines.<sup>15</sup> By 2012, the National Institute of Justice (NIJ) and the United States Department of Justice's Bureau of Justice Assistance had launched field experiments to replicate HOPE in four jurisdictions around the country.<sup>16</sup> Others followed, some funded through the NIJ and others arising out of grassroots efforts in counties across the country.<sup>17</sup> Although HOPE replications and derivative programs vary in their specifics, all rely on the core insight that responding swiftly and unfailingly to any violation of a condition of supervision is essential in order to change behavior.<sup>18</sup>

There is much about HOPE that deserves to be celebrated. It shows the power of local officials to bring about change and teaches that engagement in the lives of probationers can significantly affect their behavior. This Essay is neither an attack on HOPE's claims of success, nor is it an attempt to wholly undermine the role of deterrence-based correctional interventions in enforcing the conditions of community supervision. It is instead an attempt to engage with the questions HOPE does not ask, to show that, at times, the conditions that promote deterrence are in tension with the principles of desistance—and sometimes with justice itself. When such a tension exists, it is necessary to ask why we wish to deter and whether other values—such as proportionality, concern for human dignity, and an appreciation of the dynamics of desistance—should trump the very certainty and predictability that deterrence-based models demand.

Following this Introduction, Part I reviews the basics of probation supervision and compares standard probation to deterrence-based programs like HOPE. Part II examines the difference between the deterrence that programs like HOPE pro-

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statement that, "The criminal justice system should try to rehabilitate criminals, not just punish them." (citation omitted)).

15. See, e.g., Bill Keller, *America on Probation*, N.Y. TIMES, Jan. 27, 2014, at A19; Sam Kornell, *Probation that Works*, SLATE (June 5, 2013, 6:45 AM), [http://www.slate.com/articles/health\\_and\\_science/science/2013/06/hawaii\\_hope\\_probation\\_program\\_reduces\\_crime\\_drug\\_use\\_and\\_time\\_in\\_prison.html](http://www.slate.com/articles/health_and_science/science/2013/06/hawaii_hope_probation_program_reduces_crime_drug_use_and_time_in_prison.html); Jeffrey Rosen, *Prisoners of Parole*, N.Y. TIMES MAG., Jan. 8, 2010, at 36.

16. See Kevin McEvoy, *HOPE: A Swift and Certain Process for Probationers*, 269 NAT'L INST. JUST. J. 16, 17 (Mar. 2012). The initial sites selected were Clackamas County, Oregon; Essex County, Massachusetts; Saline County, Arkansas; and Tarrant County, Texas. *Id.*

17. See Duriez et al., *supra* note 14, at 57 (citing Beth Pearsall, *Replicating HOPE: Can Others Do as Well as Hawaii?*, 273 NAT'L INST. JUST. J. 27, 29 (2014)).

18. See Statement of Hon. Steven Alm, *supra* note 7.

mote and long-term desistance from crime, which is the ultimate goal of probation. This Part also explores the unintended ways in which elements of deterrence-based correctional programs may find themselves in tension with the requirements of procedural justice. Part III concludes with a call to use deterrence-based correctional programs with greater attention to the ways in which they advance or interfere with legitimacy and desistance. For all of their promise, these programs (and the compliance they promote) should not become ends unto themselves. Instead, like any criminal justice intervention, deterrence-based correctional programs should be used as tools to advance the larger goal of empowering probationers to desist from crime—to trade criminality and addiction for more mature, prosocial modes of living. When the requirements of deterrence impede the larger and more fundamental goal of promoting desistance, helping probationers make lasting change should trump training them to be compliant.

## I. HOW HOPE WORKS

HOPE was a response to the failure of what it often called “probation as usual.”<sup>19</sup> To understand how HOPE works, it is first necessary to understand the basic features of probation in America today. Although there are widespread differences in the structure and functioning of American probation agencies, all share common features. This Part first reviews the fundamentals of probation, and then explains how HOPE operates differently from typical probation, and to what effect.

### A. PROBATION BASICS

Probation sentences are designed to offer courts a way of holding people accountable for criminal behavior without removing them from the community. Traditionally, probation has been seen as a way to rehabilitate minor, young, first-time, and high-needs defendants, who—with the right kind of intervention and redirection—might reform their lives.<sup>20</sup> For that reason, early advocates of probation praised it as “one of the highest forms of social work.”<sup>21</sup>

Probation is the most common disposition imposed by

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19. See generally Statement of Hon. Steven Alm, *supra* note 7 (describing the origins of HOPE).

20. Klingele, *supra* note 6, at 1022–25.

21. Charles Evans Hughes, Jr., *Probation Progress*, 23 CRIM. L. & CRIMINOLOGY 915, 920 (1933).

American courts in criminal cases.<sup>22</sup> Although there are variations in the way probation is configured in jurisdictions throughout the country (in some jurisdictions probation is treated as an alternative to a formal sentence; in others it is treated as a sentence in its own right<sup>23</sup>), it always includes a defined period of conditional release in the community, sometimes preceded by a short jail stay.<sup>24</sup> To successfully complete a term of probation, a convicted person must comply with a host of court-imposed conditions of supervision that usually include regularly reporting to a probation officer; avoiding new criminal conduct, including the consumption of prohibited substances; attending work, classes, or treatment programs; abstaining from alcohol; complying with a court-imposed curfew; avoiding other individuals under supervision or with criminal records; paying restitution and monthly supervision fees; and additional restrictions designed to promote rehabilitation and contain risk.<sup>25</sup> In some jurisdictions, the probation department is authorized to add additional rules to those imposed by the court.<sup>26</sup>

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22. In 2001, sixty percent of those under correctional supervision were serving terms of probation. Wayne A. Logan, *The Importance of Purpose in Probation Decision Making*, 7 BUFF. CRIM. L. REV. 171, 191 (2003). Of the 6,937,600 adults under the control of U.S. correctional agencies (jails, prisons, and community supervision departments) at the end of 2012, 3,942,800 were on probation. LAUREN E. GLAZE & ERINN J. HERBERMAN, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 3 (2013), available at <http://www.bjs.gov/content/pub/pdf/cpus12.pdf>.

23. *Compare* People v. Daniels, 130 Cal. Rptr. 2d 887, 891 (Ct. App. 2003) (“Although courts sometimes refer to it as a ‘sentence,’ probation is not a sentence even if it includes a term in the county jail as a condition. In granting probation, the court suspends imposition or execution of sentence and issues a revocable and conditional release as an act of clemency.” (citation omitted)), *with* State v. Hamlin, 950 P.2d 336, 339 (Or. Ct. App. 1997) (“With the passage of the sentencing guidelines, . . . [p]robation is no longer the suspension of a sentence; probation is the sentence.”).

24. Using jail in combination with probation is a practice often referred to as a split sentence. A 1997 study found that split sentences were used in approximately a quarter of felony cases. Joan Petersilia, *Probation in the United States*, PERSPECTIVES, Spring 1998, at 30, 35.

25. See, e.g., 18 U.S.C. § 3563 (2012); OR. REV. STAT. § 137.540(1) (2013); N.H. SUPER. CT. R. 107 (2014); see also KELLY LYN MITCHELL ET AL., ROBINA INST. CRIM. LAW & CRIM. JUSTICE, PROFILES IN PROBATION REVOCATION (2014), available at <http://www.robainstitute.org/up-content/uploads/Robina-Report-2015-WEB.pdf> (summarizing probation conditions in twenty-one different states).

26. See, e.g., ARIZ. CODE OF JUD. ADMIN. § 6-207 (2010) (when supervising probationers through interstate compact, “[p]robation departments may add additional conditions”); IDAHO CODE ANN. § 20-533(3) (2014) (“As authorized by court order, probation officers may establish additional reasonable conditions of probation with which the juvenile offender must comply.”); WIS.

The laws governing release conditions are broadly permissive; there are very few constitutional restrictions on the kind of conditions that may be imposed on probationers, primarily because courts treat most probation conditions as inherently less punitive than the period of confinement the court is otherwise authorized to impose.<sup>27</sup> In many jurisdictions, probationary sentences include a stock set of basic conditions to which all offenders are subject.<sup>28</sup> Those basic conditions are often enhanced for specific categories of offenders, including those convicted of sex crimes, crimes of domestic violence, and operating a motor vehicle while intoxicated.<sup>29</sup> In addition, courts are authorized to impose additional conditions of supervision at their discretion.<sup>30</sup> These “special conditions” have included a wide range of requirements, from ordering defendants to write apology letters to holding signs in public proclaiming their crimes, to attaching bumper stickers to their cars.<sup>31</sup>

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ADMIN. CODE § DOC 328.04(3)(s) (2013) (“Comply with any additional rules that may be established by an agent. The rules may be modified at any time as appropriate.”).

27. See Jasmine S. Wynton, Note, *MySpace, YourSpace, But Not TheirSpace: The Constitutionality of Banning Sex Offenders from Social Networking Sites*, 60 DUKE L.J. 1859, 1886 (2011) (“Offenders on probation, parole, or supervised release have diminished constitutional rights and thus receive less constitutional protection than those who are no longer under state supervision.”); see also *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 202–07 (1967).

28. Heather Barklage et al., *Probation Conditions vs. Probation Officer Directives: Where the Twain Shall Meet*, 70 FED. PROBATION 37, 37 (2006) (“Currently, both federal and state probation and parole systems utilize what are known as ‘standard conditions of supervision.’ These ‘standard’ conditions routinely require the offender to: 1) avoid commission of any new offenses; 2) notify the supervising agency prior to leaving the district of supervision; 3) notify the supervising agency of any change in residence; 4) maintain stable employment; 5) report any new arrests without delay to the supervising agency; 6) report regularly to the supervising agency; and 7) to comply with any directives or instructions from the supervising corrections agent.”).

29. See, e.g., 18 U.S.C. § 3563(a)(4) (2012) (imposing special conditions on domestic violence offenders); *Id.* § 3563(a)(8) (imposing special conditions for sex offenders).

30. See, e.g., *id.* § 3563(b) (listing twenty-two discretionary conditions, and authorizing “such other conditions as the court may impose”). A study of individuals on conditional release in Wisconsin revealed an average of thirty conditions per offender, approximately half of which were discretionary. KIT VAN STELLE & JANA GOODRICH, THE 2008/2009 STUDY OF PROBATION AND PAROLE REVOCATION 158 (2009), available at <https://uwphi.pophealth.wisc.edu/about/staff/van-stelle-kit/2008-2009-study-of-probation-and-parole-revocation.pdf>.

31. See, e.g., Ross E. Milloy, *Texas Judge Orders Notices Warning of Sex Offenders: Car and Home Signs Elicit Praise and Shock*, N.Y. TIMES, May 29,

Many commonly imposed conditions of probation target behaviors that are closely tied to probationers' risk of criminal re-offending. These include prohibitions on weapon possession for violent offenders and on drug or alcohol use for those with substance abuse related convictions.<sup>32</sup> Many other conditions, however, govern aspects of life that are not directly relevant to criminal behavior. Curfews, blanket prohibitions on alcohol use, and requirements that probationers complete school may sound like a good idea to the judges imposing conditions and to the probation officers administering a probation sentence—the rationale being that life circumstances, such as unemployment, poverty, and lack of education increase the risk of harm to the community—but they are restrictions on liberty that do not closely correspond to the particular risk of criminal harm posed by most people under supervision.

The cumulative effect of these conditions is undeniably punitive. The requirements of probation can be daunting, particularly for those with limited means. Probationers must come up with extra money for monthly supervision fees and program co-pays while still paying child support, restitution, and ordinary bills; find stable housing; retain a job or attend school while never missing court-ordered treatment programs and meetings; find timely and reliable transportation to and from court appointments, office visits, and counseling sessions; avoid socializing with others under supervision or convicted of felony offenses (a group that may include family members, former associates, and neighbors); kick drug or alcohol addictions; ask permission before traveling; avoid alcohol (including at weddings and other special gatherings); report home by curfew—and all the while remain polite to the probation and court officials who have the power to revoke probation.<sup>33</sup> With so many obligations present in any given

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2001, at A10 (discussing the requirement that sex offenders post signs on homes and vehicles); Dan Slater, *The Judge Says: Don't Get Pregnant. A Lapsed Law Now Sees New Life*, WALL ST. J., Sept. 25, 2008, at A18, available at <http://www.wsj.com/articles/SB122230566090673847> (last visited Apr. 2, 2015) (discussing the requirement that defendant avoid getting pregnant); Cary Spivak & Dan Bice, *Front-Seat Ban Adds to Odd Legacy of Judge Schellinger*, MILWAUKEE J. SENTINEL, Apr. 18, 2003, at 1B (discussing the ban prohibiting probationers from sitting in the front seat of a car).

32. One 1995 study of probationers found that “[m]ore than two out of five probationers were required to enroll in substance abuse treatment . . . . Nearly a third of all probationers were subject to mandatory drug testing . . . .” THOMAS P. BONZCAR, U.S. DEP’T OF JUSTICE, CHARACTERISTICS OF ADULTS ON PROBATION, 1995, at 7 (1997).

33. See Klingele, *supra* note 6, at 1034–35.



case, it is not surprising that violations are common. As one experienced probation officer observed, “[I]f you can’t write up a report, and cite at least a technical violation, you’re not really struggling very hard, because there are so many conditions. There’s got to be something that the guy didn’t do right, right?”<sup>34</sup>

Although conditions often seem reasonable when considered individually, in the aggregate the sheer number of requirements makes compliance with all of them nearly impossible for many probationers, especially those whose ability to follow directions is already compromised by learning difficulties, mental health challenges, and poor education.<sup>35</sup> It is for this reason that studies have repeatedly shown that many individuals experienced with the criminal justice system would prefer a short term of incarceration to a longer period of probation.<sup>36</sup>

While probation is intended to be an alternative to incarceration, it is a disposition that frequently ends in imprisonment. Recent estimates suggest that more than one-third of probationers in the United States either stop reporting to their probation agents (abscond) or are terminated (revoked) from probation and sent to prison for violating their probation conditions.<sup>37</sup> Approximately half of the people in U.S. jails, and more than one-third of those entering prison, have been incarcerated as a result of revocation from either probation or parole.<sup>38</sup> Although probation revocation rates vary tremendously from one jurisdiction to another and are not perfectly recorded, it is clear that in many jurisdictions the failure of community supervision accounts for a dramatic portion of new prison

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34. *Id.* at 1035.

35. *See infra*, Part II.B.

36. *See* DAVID C. MAY & PETER B. WOOD, RANKING CORRECTIONAL PUNISHMENTS: VIEWS FROM OFFENDERS, PRACTITIONERS, AND THE PUBLIC 43–46 (2010).

37. Angela Hawken, *The Message from Hawaii: HOPE for Probation*, PERSPECTIVES, Summer 2010, at 36, 37.

38. PEW CTR. ON THE STATES, WHEN OFFENDERS BREAK THE RULES: SMART RESPONSES TO PAROLE AND PROBATION VIOLATIONS 3 (2007) (“[S]hifts in practices with respect to parole release and reincarceration for parole violations accounted for 60 percent of the increase in the nation’s prison population between 1992 and 2001.”). Parole is a form of post-carceral community supervision similar to probation in its requirements. *See also* Alfred Blumstein & Allen J. Beck, *Reentry As a Transient State Between Liberty and Recommitment*, in PRISONER REENTRY AND CRIME IN AMERICA 50, 56 (Jeremy Travis & Christy Visher eds., 2005).

admissions.<sup>39</sup>

Why is the probation failure rate so high? Many factors, both cultural and legal, drive revocation rates.<sup>40</sup> Cultural influences include risk aversion—in a time when crime makes the headlines, many probation agencies have little tolerance for any infraction.<sup>41</sup> Others lack meaningful alternative sanctions to revocation, such as day community-based programs and short-term detention options.<sup>42</sup> Some agencies (and the courts and district attorney’s offices with whom they partner) simply hold fast to the conviction that probation is a “second chance” and that probationers don’t deserve a third if they are unwilling or unable to comply with the conditions of their release.<sup>43</sup>

The legal authority to revoke probation arises whenever a probationer violates a condition of supervision. Such violations are rampant, in large part because the number and breadth of conditions imposed make slip-ups nearly unavoidable. Yet despite the frequency with which probationers violate the conditions of their release—or perhaps because of it—not every

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39. E. ANN CARSON, U.S. DEP’T OF JUSTICE, PRISONERS IN 2013, at 10 (2014), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

40. See generally Klingele, *supra* note 6, at 1045–47.

41. Although there are many examples of cases in which people under community supervision have committed crimes that drew public attention, the most cited case is that of Willie Horton, a prisoner on furlough who brutally murdered a Massachusetts couple. See Robert S. Blanco, *Mixing Politics and Crime*, 59 FED. PROBATION 91, 92 (1995). Public outrage about his crime has been repeatedly blamed for costing Michael Dukakis the presidency in 1988. *Id.*

42. For a description of meaningful intermediate sanctions, see generally NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM (1990) (advocating for increased use of intermediate punishments instead of the extremes of prison and probation).

43. The rhetoric of “second chances” abounds in case transcripts. See, e.g., Brief of Respondent at 29, *Graham v. Florida*, 560 U.S. 48 (2007) (No. 08-7412) (“[Defendant] was given a second chance by having adjudication withheld, serving one year in county jail, and being placed on probation.”); Answer Brief of Appellee at 4, *Smith v. Florida*, 143 So.3d 1023 (2014) (Nos. 4D12-3812, 4D12-3813, 4D12-3814, and 4D12-4174), (“He has had a second chance when he should have been sentenced, in theory, to prison initially.”); Government’s Response to Defendant’s Objections to Presentence Report, *United States v. Vargas-Aguirre*, 2007 WL 2973622 (D. Ariz.) (No. CR 06-430-TUC-DCB) (“[Y]ou were on probation . . . when you did this . . . . You asked for a second chance . . . . You don’t get a second chance from me, or a third chance from me.”). It has also been echoed in numerous interviews of probation and prosecution officials conducted by the author as part of the University of Minnesota Robina Institute’s Probation Revocation Project. For more information on that project, see <http://www.robinainstitute.org/probation-revocation-project>.

violation leads to formal sanction.<sup>44</sup>

Since probation officers are not omnipresent, many violations go undetected.<sup>45</sup> Others, while detected, seem minor enough that officers may overlook them.<sup>46</sup> Often, the paperwork required to file for revocation is sufficiently time-consuming that officers are loathe to bring a probationer before the court unless he or she has committed a significant offense or accrued a laundry list of technical violations.<sup>47</sup>

Such was the case in Honolulu when Judge Alm began presiding over criminal cases. Probation officers, overloaded with large caseloads and with few sanctioning options short of revocation, would allow violations to accrue for months or more before finally filing petitions to revoke and to send the violators to prison, often for lengthy periods of time.<sup>48</sup> HOPE arose out of Judge Alm's efforts to increase compliance with conditions of supervision while simultaneously reducing the number of probation cases ending in revocation.

#### B. WHAT HOPE DOES DIFFERENTLY

The idea that predictable punishment decreases crime is inherent in the ordering of most civilized systems of governance. It was first articulated in modern terms by Cesare Beccaria, who denounced the overly punitive criminal justice practices of his day, in which minor crimes often resulted in capital sentences, and advocated instead for less severe punishments imposed with certainty and immediacy.<sup>49</sup> Those same principles have been affirmed by modern students of deterrence.<sup>50</sup> Studies have repeatedly shown that people tend not to be deterred by harsh punishments, but can be deterred by the reasonable expectation of detection, even when accompanied by the anticipation of only modest punishment.<sup>51</sup>

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44. See, e.g., Hawken, *supra* note 37, at 40.

45. *Id.*

46. *Id.*

47. *Id.* ("Because violation rates were high . . . no probation officer had the time to write up every violation, and no judge would have had the time to hear all those cases had they been filed.")

48. See Alm, *supra* note 12, at 18.

49. See generally CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (5th ed. 2009) (1764) (advocating for reform of mid-eight century criminal justice).

50. See generally Paul Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003) (questioning the effectiveness of current deterrence strategies).

51. See, e.g., Harold G. Grasmick & George J. Bryjak, *The Deterrent Effect of Perceived Severity of Punishment*, 59 SOC. FORCES 471 (1980) (finding that

Intuitively conscious of those principles, Judge Alm reorganized the way probation was operating for those at highest risk of revocation.<sup>52</sup> For those individuals—and only for those individuals—he devised a system that would provide a rapid response to all detected violations (which were predominately missed appointments and failed drug tests) and ensure a speedy hearing and immediate sanction short of revocation.<sup>53</sup> It was his hope that by getting the word out that rule violations were taken seriously in his courtroom, probationers would start taking rules seriously and would begin to comply with them.<sup>54</sup> Doing so would not only prevent lengthy prison sentences upon revocation, he conjectured, but would also improve the legitimacy of the larger system.<sup>55</sup>

Eager to put the program to testing by outside experts, Alm sought evaluation. In 2007, Angela Hawken from Pepperdine University and Mark Kleiman from UCLA obtained grants from the National Institute of Justice and the Smith-Richardson Foundation to perform a randomized controlled study of the effects of HOPE.<sup>56</sup> Their study yielded dramatic results: they found that probationers who participated in HOPE served the same amount of jail time (in the form of pre-revocation sanctions) as their “probation-as-usual” counterparts but were only sentenced to approximately one-third the

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perceived severity of punishment deterred only when combined with high levels of perceived certainty in punishment); AM. CORR. ASS'N, RECLAIMING OFFENDER ACCOUNTABILITY: INTERMEDIATE SANCTIONS FOR PROBATION AND PAROLE VIOLATORS (Edward E. Rhine ed., 1993) (concluding that intermediate sanctions can help ease overcrowding problems in U.S. prisons).

52. The best deterrence-based correctional programs avoid using high intensity supervision for all probationers, but only for those whose behavior places them at highest risk of revocation and re-offense. Studies have shown that providing intensive services and supervision to low risk individuals tends to increase their overall risk by exposing them to higher risk offenders (in programs and at probation offices) and by detecting minor violations unlikely to escalate and that do not otherwise warrant a formal response. *See, e.g.*, ALISON LAWRENCE & DONNA LYONS, NAT'L CONFERENCE OF STATE LEGISLATURES, PRINCIPLES OF EFFECTIVE STATE SENTENCING AND CORRECTIONS 11 (2011), available at <http://www.ncsl.org/documents/cj/pew/WGprinciplesreport.pdf> (advocating for tailored supervision of parolees); Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, 2004 TOPICS IN CMTY. CORRECTIONS 3, available at [http://www.uc.edu/content/dam/uc/ccjr/docs/articles/ticc04\\_final\\_complete.pdf](http://www.uc.edu/content/dam/uc/ccjr/docs/articles/ticc04_final_complete.pdf) (discussing risk principle and its implications in the corrections context).

53. *See* Statement of Hon. Steven Alm, *supra* note 7.

54. *Id.*

55. Alm, *supra* note 12, at 18.

56. *Id.* at 20.

amount of prison time as the control group.<sup>57</sup> In other words, more immediate jail sanctions during the period of probation led to fewer probation failures overall.

Soon policy institutes, government agencies, and local jurisdictions were clamoring for more HOPE, both in Hawaii and on the mainland. The Kennedy School of Government at Harvard University named HOPE one of the top twenty-five innovations in government in 2013,<sup>58</sup> and the Institute for Behavior and Health dramatically asserted that “HOPE holds the promise of significantly reducing the demand for illegal drugs, crime, and prison populations across the U.S.”<sup>59</sup> In addition to acclaim, the project has drawn committed interest from jurisdictions across the country who have tried to replicate it, in full or in part. According to Professor Hawken, there are “at least 40 jurisdictions in 18 states that have implemented similar models.”<sup>60</sup>

Some scholars have expressed skepticism about the dramatic reductions in violations HOPE claims to effect. These critics have challenged the reliability of the research design used to obtain the favorable evaluation results and questioned the degree to which Hawaii’s experiment with HOPE is exportable to other jurisdictions with different probation populations and local dynamics.<sup>61</sup> Even if critics are right, however, and the results of programs like HOPE are less dramatic than current reports suggest, it appears that HOPE does at least reduce the violations of supervision for which it monitors probationers, and thereby reduces to some degree the risk of revocation for those under supervision.

But how? One of the most important aspects of deterrence to which HOPE has been attentive is the need to target for intervention individuals who are at risk of being revoked.<sup>62</sup> From the beginning of the program, the probationers selected for the

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57. See HAWKEN & KLEIMAN, *MANAGING*, *supra* note 13, at 4.

58. See Kornell, *supra* note 15.

59. ROBERT L. DUPONT, HOPE PROBATION: A MODEL THAT CAN BE IMPLEMENTED AT EVERY LEVEL OF GOVERNMENT 1 (2008), *available* at <http://ibhinc.org/pdfs/HOPEPROBATION2.pdf>.

60. Duriez et al., *supra* note 14, at 57.

61. See *generally id.* (arguing that Project HOPE may not be as effective in other jurisdictions as it is in Hawaii); see also Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?* in 10 *CRIMINOLOGY & PUB. POL’Y* 13, 39 (2011) (questioning whether there is sufficient evidence to suggest that “Project Hope can be extrapolated to the rest of the United States”).

62. Alm, *supra* note 12, at 18–19.

program were those in danger of being revoked to prison because of repeated violations of the conditions of their release.<sup>63</sup> This seemingly small detail matters: insofar as a goal of HOPE and related programs is to prevent the harsh sanction of probation revocation, the individuals targeted for close monitoring should be those who, without such intervention, would be likely to end up incarcerated rather than those whose behavior would not otherwise warrant formal sanction and whose probation is likely to terminate successfully. The reason for this is simple: as discussed above, minor violations of supervision conditions are nearly unavoidable. If watched closely enough, any probationer could come to the attention of officials for failing to return home before curfew, filing a late reporting statement, or being caught having a beer at a ballgame. If one of the goals of programs like HOPE is to prevent revocation and imprisonment, then it is essential not to widen the net of governmental social control or impose intensive supervision on individuals who would not otherwise be prison-bound.

Once the right people have been targeted, it is necessary to create a system for reliably detecting violations. While that may sound challenging given the limited number of probation officers and the relative freedom probationers have to go about the community unobserved, many common violations are easily detected. Probation officers routinely track new arrests, missed visits with probation officers, missed and failed drug tests, failure to file financial reporting statements, and failure to pay restitution and supervision fees.<sup>64</sup> For HOPE to meet its goal of deterring violations of these conditions, officers must keep close tabs on probationers' compliance and act quickly when non-compliance is discovered.<sup>65</sup> Other violations are more difficult to

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63. Notably, this requirement arose at first from mere expedience: Judge Alm and his probation staff recognized that they did not have the capacity to respond in a timely way to violations by all probationers. See Hawken, *supra* note 37, at 41. Consequently, for the purpose of minimizing paperwork, HOPE began only with those probationers who were likely to face revocation if their behavior did not change. *Id.*

64. Importantly, these easily detected violations may not be those most important to advancing public safety or promoting desistance. Familial violence, fraud, unauthorized contact with vulnerable individuals, and changes in employment status can be more difficult violations to detect and often have far greater bearing on how well a probationer is moving toward desistance than whether he paid a monthly fee or had a beer—particularly if he is poor and is not an alcoholic.

65. That often means streamlining case management systems and encouraging probation officers to be as on top of their own paperwork as the officers require probationers to be. See MARK A.R. KLEIMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT 34–37 (2009)

detect but often become apparent when agents engage in more intense supervision and have frequent contact with probationers, particularly in their homes or in other locations in the community. Mothers, girlfriends, and other personal contacts often reveal information to officers about violations of probation upon which the agents can—and, if deterrence is the goal, *should*—act.<sup>66</sup>

Punishment deters best when it swiftly follows an infraction.<sup>67</sup> Consequently, when violations come to the attention of probation officers, programs like HOPE require officers to respond with a near-immediate sanction. To make this possible, courts must create opportunities for regular status hearings on violations so that probationers who are apprehended can receive quick punishment. Ordinarily, hearings are held within seventy-two hours after a violation has been detected.<sup>68</sup> At that time, a sanction is imposed, which usually consists of several days' incarceration, though the length of custody may increase with repeated violations.<sup>69</sup>

Consistent, unwavering punishment is an essential feature of any program based on a deterrence model. The reason for this is twofold. First, consistency in punishment lends legitimacy to the system.<sup>70</sup> Consistent punishment sends the message to both probationers and members of the public that all probationers are held to the same standard and will be treated equally when they fail to meet expectations.<sup>71</sup> Judge Alm has ex-

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(describing Hawaii probation officers' concerns about the time demands swift reporting placed on them).

66. There is a danger in this kind of surveillance. While it may bring to light violations that probation officers need to sanction if they wish to obtain maximum deterrence, it can simultaneously fracture important relationships in probationers' lives, turning formerly trusted confidants and allies into state informants. Cf. ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* (2014) (describing the roles played by women in informing on men under supervision and the detrimental effects of those roles on men's connections to their families).

67. See Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765 (2010) (discussing deterrence of crime through sanctions).

68. See HAWKEN & KLEIMAN, *MANAGING*, *supra* note 13, at 13. During the time between detection and the violation hearing, probationers are usually held in custody. Some modification on this practice may be made when the probationer contests the violation. In those cases, probationers are provided with counsel and given a later court date. In many jurisdictions employing the HOPE model, probationers who contest their violation and are found guilty are given harsher sanctions than those who confess guilt at the outset.

69. Hawken, *supra* note 37, at 37.

70. See *id.* at 38.

71. *Id.*

plained, “When the system isn’t consistent and predictable, when people are punished randomly, they think, My probation officer doesn’t like me, or, Someone’s prejudiced against me . . . rather than seeing that everyone who breaks a rule is treated equally, in precisely the same way.”<sup>72</sup>

The second reason why punishment is mandated in every case is that deterrence occurs only when probationers have reason to believe that pain will follow any breach of the rules. Simply put, HOPE seeks to condition probationers to avoid rule violations and to engage in required activities.<sup>73</sup> The more predictable the punishment, the more likely the probationer will be conditioned to avoid it.<sup>74</sup>

Because the behavioral training on which the HOPE model relies requires absolute predictability, there can be no deviation from the pre-ordained punishment; to do so would necessarily compromise the model’s deterrent effect.<sup>75</sup> That means that individual characteristics of probationers, or the life circumstances that led to violating any particular rule of supervision on any given occasion, cannot be considered by the court when sanctioning.<sup>76</sup> An appointment that is forgotten or missed due to a late bus must be punished the same as an appointment that is willfully ignored. Drug use that follows the death of a loved one is not distinguished from drug use that follows a night of partying with friends. The goal of deterrence-based correctional programs is to prevent future violations, and punishment teaches probationers to order their lives in ways that avoid violations, whether that means keeping a better calendar, catching an earlier bus, or finding new ways to cope with grief.<sup>77</sup> Conditioning only works if there is pain that outweighs the pleasure of the activity being deterred.

This insensitivity to personal characteristics or circumstances has benefits beyond its deterrent effect: it is quick and relatively cheap. HOPE violation hearings average seven minutes.<sup>78</sup> Expensive drug treatment is not ordered for all participants. Though treatment may be requested by anyone who desires it, treatment is mandated only for individuals who re-

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72. Rosen, *supra* note 15, at 38.

73. See Hawken, *supra* note 37, at 40.

74. See B. F. SKINNER, SCIENCE AND HUMAN BEHAVIOR 67–70, 173 (1953).

75. See Hawken, *supra* note 37, at 40–41.

76. See HAWKEN & KLEIMAN, MANAGING, *supra* note 13, at 9.

77. See *id.* at 57.

78. See *id.* at 30.



peatedly fail drug tests.<sup>79</sup>

Although deterrence theory mandates punishment for all violations, it does not prescribe what punishment is needed to ensure that a probationer will be optimally deterred. Programs that have utilized the “swift and certain” sanctioning model adopted by HOPE vary considerably in the kinds of sanctions they impose for minor, routine violations. When HOPE began, sanctions for a missed appointment or failed drug test ranged from several days (served on the weekend) to several weeks.<sup>80</sup> Other programs following the HOPE model have imposed sanctions ranging from a day to a month in jail, depending on the severity and frequency of violations.<sup>81</sup> These periods of detention are sometimes referred to as “micro-sanctions” or “micro-punishment”<sup>82</sup>—terms that distinguish the shorter periods of detention imposed for rule violations from the much lengthier periods of imprisonment that would otherwise be imposed upon revocation.

So: detection, quick response, and modest but unwavering

79. *Id.* at 27; see KLEIMAN, *supra* note 65, at 4.

80. Hawken, *supra* note 37, at 38, 42; Kleiman & Hollander, *supra* note 11, at 102.

81. See, e.g., MICH. STATE COURT ADMIN. OFFICE, DEVELOPING AND IMPLEMENTING A SWIFT AND SURE SANCTIONS PROBATION PROGRAM IN MICHIGAN app. A (2014), available at <http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/Specialty/SSSPManual.pdf> (reporting sanctions of 3–30 days); MEREDITH FARRAR-OWENS, VA. CRIMINAL SENTENCING COMM’N, IMMEDIATE SANCTION PROBATION PILOT PROGRAM (2012), available at [http://hac.virginia.gov/committee/files/2013/09-16-13/Immediate\\_Sanction\\_Probation\\_Pilot\\_Project.pdf](http://hac.virginia.gov/committee/files/2013/09-16-13/Immediate_Sanction_Probation_Pilot_Project.pdf) (listing sanctions of 3–10 days); Paul Suarez, *Probation Violations Will Result in ‘Swift and Certain’ Penalties*, COLUMBIAN (May 22, 2012), <http://www.columbian.com/news/2012/may/22/swift-and-certain-penalties-officials-hope-short-i> (“In the past, corrections officers had few options when dealing with violations. Now state law says minor violations—including failing drug tests, not reporting to officers or not going to treatment—will send offenders to jail for one to three days.”).

82. See, e.g., Keller, *supra* note 15 (“A few jurisdictions have tried to make parole and probation less of a revolving door back to prison, with some encouraging results. . . . They employ a disciplinary approach called ‘swift and certain,’ which responds promptly with a punishment for missing an interview or failing a drug test. The punishments start small, then escalate until the offender gets the message and changes his behavior—preferably before he has to be sent back to prison.”); Josh Marquis, Op-Ed., *Bergin Best Bet for Sheriff*, DAILY ASTORIAN (Mar. 6, 2012), <http://www.dailyastorian.com/20120306/guest-column-bergin-best-bet-for-sheriff> (“Right now it is not uncommon for someone to test dirty several times before there is any consequence. And I’m not talking about sending someone who keeps using meth to prison for three years. That doesn’t happen. I’m talking about a ‘micro-sanction’ of maybe five to 10 days.”).

punishment are the three features of HOPE most responsible for its deterrent effects.

## II. WHAT IS THE COST OF DETERRENCE?

Probation does many things, but most fundamentally it offers people convicted of crimes the opportunity to be held accountable for their past criminal conduct while taking steps to create and sustain a law-abiding future. With that goal in mind, it is helpful to review what we know about how human behavioral change occurs and to compare that to the dynamics of deterrence-based correctional programs like HOPE.

### A. THE DIFFERENCE BETWEEN DETERRENCE AND DESISTANCE

Deterrence is a strategy that seeks to prevent misconduct through punishment for prohibited behavior.<sup>83</sup> Desistance is the process by which people move from active criminal offending to a life that does not involve crime.<sup>84</sup> Deterrence is focused on the here-and-now: if I make the near-immediate consequences unpleasant enough, I can stop you from engaging in criminal behavior. Successful deterrence is measured by whether you commit any crime.<sup>85</sup> Desistance takes a longer view. Efforts that promote desistance anticipate that moving from a life in which crime is common to one in which it is nonexistent takes time and requires the development of a new prosocial identity with attendant prosocial relationships.<sup>86</sup> Successful desistance is demonstrated by improvement in the frequency and severity of criminal offending.<sup>87</sup>

Insofar as the end of the desistance process is the absence of criminal offending, deterrence and desistance can overlap. Strategies that promote deterrence are intended by the state to promote or hasten desistance on the part of individuals who

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83. Robinson & Darley, *supra* note 50, at 950 (“Lawmakers have sought to optimize the control of crime by devising a penalty-setting system that assigns criminal punishments of a magnitude sufficient to deter a thinking individual from committing a crime.”).

84. MARUNA, *supra* note 1, at 17 (“Desistance from crime is an unusual dependent variable for criminologists because it is not an event that happens, rather it is the sustained *absence* of a certain type of event (in this case, crime).”); John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 1, 8 (2001).

85. See Robinson & Darley, *supra* note 50, at 953–56.

86. See MARUNA, *supra* note 1, at 34.

87. See Laub & Sampson, *supra* note 84, at 8–9. See generally MARUNA, *supra* note 1, at 19–35 (discussing different definitions and explanations for desistance).

engage in criminal behavior—preferably sooner rather than later. Deterrence-based correctional programs, like HOPE, seek to skip the “process” part of desistance, and by design they try to move an offender from offending to law-abiding with no intermediate transition.<sup>88</sup> Such a plan may work well for individuals whose involvement in the criminal justice system is minor or fleeting and for whom crime is an aberration. However, for those with lengthy criminal records, and for those whose criminal offending behavior is tied to addiction, mental illness, or past trauma, “quitting crime” tends not to be the result of a single encounter with punishment.<sup>89</sup>

How does desistance work, then? Research into the causes of desistance suggests that much like breaking any bad habit, giving up a life of crime is a process that happens in fits and starts.<sup>90</sup> Repeat offenders do not usually turn into Boy Scouts overnight; instead, people who “go straight” gradually increase intervals between offending behaviors, which also tend to decrease in severity over time.<sup>91</sup> A key factor in this change includes the development of strong bonds of informal social control, primarily through acquisition of stable employment or marriage.<sup>92</sup> In many cases, change also requires an individual to develop a new self-narrative that allows him to make sense of his past while taking ownership of his present and future. In the context of drug addiction, for example,

[b]reaking away from the drug and the addict world—both symbolically and literally—is a crucial part of the desistance process. At the same time, addicts need to forge new relationships, new interests, and new investments in order to maintain cessation from drugs. The result of this process is an identity transformation.<sup>93</sup>

Research on desistance echoes many of the principles that the psychological community has identified as essential to recovery for those suffering from both addiction and mental illness. In 2005, the United States Substance Abuse and Mental Health Services Administration (SAMHSA) convened a “National Summit on Recovery” to gather experts in the field of ad-

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88. See generally MARUNA, *supra* note 1, at 19–37 (discussing the desistance process).

89. *Id.* at 17.

90. *Id.* at 26–27.

91. *Id.* at 19–35.

92. See generally ROBERT J. SAMPSON & JOHN H. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE (1993) (providing a general perspective that advocates examination of intra-individual change across the life-course).

93. Laub & Sampson, *supra* note 84, at 34–35 (citing PATRICK BIERNACKI, PATHWAYS FROM HEROIN ADDICTION RECOVERY WITHOUT TREATMENT (1986)).

diction and mental illness to identify “guiding principles of recovery.”<sup>94</sup> Among the twelve principles identified were many relevant to desistance, including the following:

Recovery is self-directed and empowering.

Recovery involves a personal recognition of the need for change and transformation.

Recovery is holistic.

Recovery has cultural dimensions.

Recovery exists on a continuum of improved health and wellness.

Recovery emerges from hope and gratitude.

Recovery involves a process of healing and self-redefinition.

Recovery involves addressing discrimination and transcending shame and stigma.

Recovery is supported by peers and allies.

Recovery involves (re)joining and (re)building a life in the community.<sup>95</sup>

What is striking about both recovery principles and desistance narratives is the degree to which they are personal. An individual’s ability to redefine himself as a person who lives a law-abiding life is an endeavor that requires reflection, healing from past trauma, and patience with the process (or “continuum”) of becoming well.<sup>96</sup> It also requires a great amount of self-reflection and self-initiative, a fact that has led some scholars to question whether a probation program that functions solely on conditioning can have any lasting effect:

[S]wift-and-certain theory says little about why offenders will obey the law once they are off probation and no longer subject to any sanctions, swift or otherwise. It is possible that swift-and-certain probation will interrupt offenders’ involvement in crime long enough that the extinction of the behavior will occur, making post-probation punishment unnecessary. But psychological research also would predict that the effects of punitive sanctions will attenuate once surveillance is no longer omnipresent and the sanctions are rarely imposed.<sup>97</sup>

When the characteristics of individuals at risk of revoca-

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94. CORI KAUTZ SHEEDY & MELANIE WHITTER, U.S. DEP’T OF HEALTH & HUMAN SERVS., GUIDING PRINCIPLES AND ELEMENTS OF RECOVERY-ORIENTED SYSTEMS OF CARE: WHAT DO WE KNOW FROM THE RESEARCH? 1 (2009), available at [http://www.naadac.org/assets/1959/sheedyckwhitterm2009\\_guiding\\_principles\\_and\\_elements.pdf](http://www.naadac.org/assets/1959/sheedyckwhitterm2009_guiding_principles_and_elements.pdf).

95. *Id.* at 1–2.

96. *Id.*

97. Francis T. Cullen et al., *Before Adopting Project Hope, Read the Warning Label: A Rejoinder to Kleiman, Kilmer, and Fisher’s Comment*, 78 FED. PROBATION 75, 76 (2014).

tion are closely examined, concerns that the effects of deterrence-based programs will not persist are amplified. For that reason, the following subsection reviews what we know about the people at whom HOPE is targeted: those on their way to prison.

#### B. CHARACTERISTICS OF THOSE BEING DETERRED

Although the HOPE model does not alter sanctions based on the individual characteristics of probationers, the identity of those under supervision matters in ways relevant to desistance, if not to deterrence theory itself. Criminal-justice-involved individuals are disadvantaged in a number of significant and overlapping ways, some well-documented and others less so. Most obviously, they are poor.<sup>98</sup> They are also disproportionately black and brown.<sup>99</sup>

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98. Estimates suggest that more than eighty percent of felony defendants are indigent, though with no reliable national statistics on the question, it is difficult to know for certain. See generally Erica J. Hashimoto, *Class Matters*, 101 J. CRIM. L. & CRIMINOLOGY 31, 60 (2011) (“[A]vailable data indicate that almost eighty percent of felony defendants in state courts in the seventy-five largest counties have court-appointed representation. . . . In other words, less than a fifth of the population was charged with seventy-eight percent of the felonies in criminal cases across the country.”). What is clear is that public defenders represent millions of indigent people in criminal cases every year. See OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, INDIGENT DEFENSE FACT SHEET (2011), available at [http://ojp.gov/newsroom/factsheets/ojpfis\\_indigentdefense.html](http://ojp.gov/newsroom/factsheets/ojpfis_indigentdefense.html). Indigence reflects more than conventional poverty; while standards vary from one jurisdiction to the next, people who qualify as indigent for appointment of counsel must usually fall at or close to the federal poverty line—an amount that reflects the minimum income needed to avoid malnutrition, not the amount needed to pay a lawyer to offer meaningful representation in a criminal case. Benjamin Hoorn Barton, *Measuring Poverty: A New Approach*, 94 MICH. L. REV. 1993, 1995 (1996) (book review).

99. See Sharon L. Davies, *Study Habits: Probing Modern Attempts To Assess Minority Offender Disproportionality*, 66 LAW & CONTEMP. PROBS., Summer 2003, at 17. Nationally, the rate of incarceration is nearly six times higher for African American men, three times higher for Native American men, and two times higher for Latino men than it is for white men. See JOHN PAWASARAT & LOIS M. QUINN, EMP’T & TRAINING INST. UNIV. OF WIS.-MILWAUKEE, WISCONSIN’S MASS INCARCERATION OF AFRICAN AMERICAN MALES: WORKFORCE CHALLENGES FOR 2013, at 2 (2013), available at <http://www4.uwm.edu/eti/2013/BlackImprisonment.pdf>. Among women, “black females were imprisoned at more than twice the rate of white females” in 2013. CARSON, *supra* note 39, at 8. Disparities are particularly pronounced for African Americans. Although only 13.6% of the population is African American, almost 40% of the prison population is black. See *id.* at 15; SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 3 (2011); see also Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 2 (2008) (“Blacks constitute 12.8 percent of the general population in 2005 but nearly half of prison inmates and 42 percent of Death Row residents.”).

But there are other, less obvious ways in which individuals who end up incarcerated are disadvantaged that matter to their prospects for both short-term deterrence and long-term desistance. According to the Bureau of Justice Statistics, sixty-eight percent of state prisoners have less than a high-school education.<sup>100</sup> The reasons for this vary, and include not only educational disruptions due to criminal behavior, but also instability in families and homes, the need to secure income for or provide labor assistance to families, and unmet learning needs.<sup>101</sup> Among those without a high school diploma, 59% suffered from a diagnosed speech disability, 66% had a diagnosed learning disability, and 37% had additional disabilities.<sup>102</sup>

Closely related to learning and language deficits are impulsivity and deficits in attention. Studies have consistently found higher rates of Attention Deficit Hyperactivity Disorder (ADHD) among prisoners than those found in the general population.<sup>103</sup> Those with ADHD struggle with impulse control and problem-solving, and are, consequently, at heightened risk for involvement with the justice system.<sup>104</sup>

Importantly, mental illness is dramatically more prevalent among prisoners than it is in the general population,<sup>105</sup> with

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100. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), available at <http://www.bjs.gov/content/pub/pdf/ecp.pdf>. More specifically, “[a]bout 75% of State prison inmates, almost 59% of Federal inmates, and 69% of jail inmates did not complete high school.” *Id.* at 3. In 2004, the average North Carolinian entering prison had an eleventh grade education, read at the ninth grade level, and completed math problems at the seventh grade level. OFFICE OF RESEARCH & PLANNING, N.C. DEP'T OF CORR., EDUCATIONAL ATTAINMENT OF INMATES ENTERING NORTH CAROLINA'S PRISONS 1 (2005).

101. According to a Bureau of Justice Statistics report: “Over a third of jail inmates and a sixth of the general population said the main reason they quit school was because of academic problems, behavior problems, or lost interest. About a fifth of jail inmates and two-fifths of the general population gave economic reasons for leaving school, primarily going to work, joining the military, or needing money.” HARLOW, *supra* note 100, at 3.

102. *Id.* at 1. Striking as these statistics are, they are highly conservative estimations, since most prisons do not routinely test for learning and communicative deficits.

103. See Amelia M. Usher et al., *Attention Deficit Hyperactivity Disorder in a Canadian Prison Population*, 36 INT'L J.L. & PSYCHIATRY 311 (2013) (“While there is a wide range of rates estimated for ADHD in adult forensic populations, most are considerably higher than among non-offender populations . . .”).

104. See generally Jason Fletcher & Barbara Wolfe, *Long-Term Consequences of Childhood ADHD on Criminal Activities*, 12 J. MENTAL HEALTH POL'Y ECON. 119 (2009).

105. Jeffrey L. Metzner et al., *Treatment in Jails and Prisons, in TREATMENT OF OFFENDERS WITH MENTAL DISORDERS* 211 (Robert M.

significant mental illness estimated to run at a rate three to four times higher in the prison population than in the general population.<sup>106</sup> Approximately 15% of state prisoners reported symptoms consistent with a psychotic disorder, along with 24% of jail inmates.<sup>107</sup> A total of 56.2% of state prisoners reported one or more mental health problems—a figure far greater than the 11% of people in the general population who suffer from similar mental health problems.<sup>108</sup>

The prevalence of educational deficits, learning and language disabilities, and mental illness among potential probationers has important implications for correctional supervision. In this respect, many of the challenges that arise in a correctional setting are clearly analogous to those faced by probationers:

Prison order and discipline is built on oral communications and expectations of compliance and self-regulation. If one has difficulty in that realm, the troubles cascade and build on each other. This cannot be easily explained or understood by the inmate who has likely had a lifetime of misunderstanding. In the correctional setting, the deficit may reveal itself in more “tickets” and other sanctions. This can create an official perception that the inmate is irresponsible, needs to learn to be accountable, or does not want to learn and conform to the discipline system.<sup>109</sup>

Similarly, probationers who struggle to order, comprehend, and retain information are more likely to struggle with following multiple directives simultaneously, which they must do if they are to comply with the conditions of their supervision.<sup>110</sup>

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Wittstein ed., 1998) (“[S]tudies and clinical experience indicate that 8–19% of prisoners have significant psychiatric or functional disabilities and another 15–20% will require some form of psychiatric intervention during their incarceration.”).

106. Risdon N. Slate et al., *Training Federal Probation Officers As Mental Health Specialists*, 68 FED. PROBATION 9 (2004). Studies that rely on prisoners’ self-reporting of symptoms yield grimmer results. A 2005 study by the Bureau of Justice Statistics found that 43% of state prisoners and 54% of jail inmates met the diagnostic criteria for mania, while “23% of state prisoners and 30% of jail inmates reported symptoms of major depression.” DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, *MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1* (2006), available at <http://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

107. JAMES & GLAZE, *supra* note 106, at 1.

108. *Id.* at 3. These rates were even higher for female prisoners, with approximately three-quarters of both state prisoners and jail inmates reporting symptoms of one or more mental illnesses. *Id.* at 2.

109. Michele LaVigne & Gregory J. Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters*, 15 U.C. DAVIS J. JUV. L. & POL’Y 37, 98 (2011).

110. *See id.* at 59–60 (“Research has consistently shown ‘a strikingly high

While probationers with language deficits struggle to understand all that is required of them, those with ADHD may have difficulty following through on their obligations due to poor impulse control.<sup>111</sup> The mentally ill similarly struggle with compliance on the street and in prison environments, where they

are limited in their ability to cope with the environmental and social stressors . . . and to adhere to the highly regimented routine demanded by prisons. This inability to adapt is often a function and symptom of mental illness: certain mental disorders are defined by breaks with reality and limitations in one's ability to control emotions and behavior.<sup>112</sup>

Many of the same challenges exist for mentally ill probationers. In fact, because probationers lack the staffing and close supervision found in the prison environment, some may struggle even more to comply with lengthy lists of conditions.<sup>113</sup> Complying with probation orders means having the capacity to plan ahead to avoid conflicts with work, meet child care obligations, attend mandatory programs and court appointments, and budget to meet basic costs of living, all while making restitution payments and paying mandatory supervision fees. Many of these requirements are difficult to accomplish in the singular—in the aggregate they quickly overwhelm those probationers who are already disadvantaged by illness or other disability. The degree to which individuals in prison are disadvantaged may elicit sympathy, but for proponents of deterrence-based programs, it is also likely to elicit the fundamental question “so what?” HOPE does not accommodate the mentally ill or adjust punishment to reflect the relative ability of each probationer to

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[though] less than perfect comorbidity of language and learning disabilities with a range of behavioral and emotional disturbances' such as anxiety, depression, hyperactivity, frustration, impulsivity and conduct disorders.” (citation omitted)).

111. In this context, too, the experience of prisoners is instructive: “[o]ffenders with ADHD may have more trouble adjusting to the constraints of incarceration as well as increased difficulty following the rules of the institution and managing relationships with other offenders.” Amelia M. Usher et al., *Attention Deficit Hyperactivity Disorder in a Canadian Prison Population*, 36 INT'L J.L. & PSYCHIATRY 311, 312 (2013). One study found that prisoners with high levels of ADHD symptoms were “2.5 times more likely to incur an institutional charge during their sentence although even moderate levels of ADHD symptoms predicted poorer institutional behavior.” *Id.* at 314.

112. E. Lea Johnston, *Vulnerability and Just Desert*, 103 J. CRIM. L. & CRIMINOLOGY 147, 170–71 (2013).

113. For a discussion of some of the ways in which probation agencies are responding to the needs of mentally ill probationers through specialty case-loads, see generally Sarah M. Manchak et al., *High-Fidelity Specialty Mental Health Probation Improves Officer Practices, Treatment Access, and Rule Compliance*, 38 LAW & HUM. BEHAV. 450 (2014).



comply with the court's expectations. And yet, even without those modifications, the program has been shown to improve overall compliance by probationers.<sup>114</sup> Moreover, the relative success of program participants suggests that most HOPE probationers get the message that punishment should be avoided. Despite all their deficits, these successful probationers seem to "pull it together" enough to avoid repeating violations that are likely to get them sanctioned. That is a victory in the eyes of HOPE supporters because it shows that a substantial number of probationers can be forced to stay on the straight and narrow without expensive interventions like mental health counseling or close case management. And given the resource constraints courts and correctional agencies face,<sup>115</sup> that is sure to be welcome news to criminal justice administrators.

As well taken as those defenses may be, the vulnerabilities and deficits of probationers matter to more than just deterrence. Compliance can signal many things. In its best form, it indicates that a probationer is taking responsibility for his past wrongs and present conduct, is ordering his life in a way that is not directed to crime, and is submitting to the legitimate authority of the state. But it can also mean that a probationer has been cowed into submission, is temporarily and superficially acquiescent, or has grown content to let others order the details of his days.

Many of the factors that influence desistance from crime bear little connection to the conditions imposed by sentences of community supervision. Some of these factors are outright inhibited by the strict, formulaic enforcement of rules required by programs like HOPE. When probationers are subject to rules that needlessly restrict their freedom, they are infantilized and disempowered. And even when rules promote desistance on their face (by prohibiting drug use or requiring periodic meetings with a probation officer), punishing their violation without accounting for the context in which they were violated is a lost opportunity for identifying the challenges—whether material or psychological—that must be overcome in order to advance the process of desistance.

While custodial sanctions are sometimes warranted, reflexively imposing jail time for all violations, however minor or un-

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114. Hawken, *supra* note 37, at 37.

115. See, e.g., JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE (2011), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/system\\_overload\\_final.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf) (describing the overburdened public defender system).

derstandable, interferes with probationers' ability to forge longer-term supports in the community by maintaining employment and engaging meaningfully with family members—something they cannot do while locked in a jail cell.<sup>116</sup> Probation does not last forever, and a primary goal of supervision must be to “connect with and activate internal values within wrongdoers with the goal of encouraging self-regulatory law-related behavior in the future.”<sup>117</sup> To the degree that pure deterrence conflicts with that goal, its primacy should be questioned.

### C. THE ROLE OF PROCEDURAL JUSTICE

Although many aspects of desistance relate directly to the environment and personal narrative of the individual offender, there is another aspect of desistance that is more outwardly focused. When people trust the legitimacy of the institutions that enforce the law, their rates of compliance with the law increase.<sup>118</sup> When people “experience the criminal justice system and its authorities as acting justly,” research indicates that they will follow the law willingly, without need for threat of sanction.<sup>119</sup> Consequently, it is important for courts and probation agencies to pay attention to the factors that promote a sense of legitimacy if they wish to promote sustained desistance.

HOPE advocates have long been aware of the importance of procedural justice and have suggested that the consistency of HOPE's response to violations makes people feel treated fairly because all probationers' violations are sanctioned in the same way.<sup>120</sup> While advocates are right that perceptions about fairness matter, research in procedural justice suggests those perceptions are shaped by factors for which HOPE does not adequately account.<sup>121</sup>

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116. See Nagin, *supra* note 9, at 200 (stating that there is “little evidence of a specific deterrent effect arising from the experience of imprisonment compared with the experience of noncustodial sanctions”).

117. Tom R. Tyler, *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, 62 J. SOC. ISSUES 307, 307 (2006).

118. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 4–56 (2006).

119. Tyler, *supra* note 117, at 309.

120. See Hawken, *supra* note 37, at 41 (“The *consistent* application of a behavioral contract improves compliance.”).

121. See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. REV. RES. 283, 286 (2003) (“[While officials] can and often do compel obedience through the threat or use of force, they can also gain the cooperation of the people with whom they deal. Cooperation and consent—‘buy in’—are important because they facilitate immediate acceptance and long-term compliance. People are more likely to adhere to agreements and

Perhaps counterintuitively, people's judgments about legitimacy have little to do with the outcome of past contacts with the legal system.<sup>122</sup> Instead, their judgments turn on several key factors, including the perceived impartiality and fairness of the decisionmaker and their opportunity to tell their stories and have their explanations meaningfully considered by the decisionmaker before judgment is imposed.<sup>123</sup> Closely related is the degree to which they feel they have been treated with dignity.<sup>124</sup>

While HOPE administrators may speak respectfully and impose the same punishment on everyone, if they offer probationers no meaningful opportunity to explain the reasons for their violations—to hear from probationers about the ways in which their life challenges may be affecting their ability to comply with the mountain of conditions to which they are subject—they are unlikely to retain legitimacy in the eyes of those subject to sanction. And if the sanctioning process reduces perceptions of fairness, then regardless whether HOPE promotes compliance during the term of supervision, it will reduce the odds that the probationer will internalize the law's legitimacy and thereby decrease the probationer's odds of long-term compliance with the law.

To make this problem more concrete, consider a form of disadvantage probationers experience that has not previously been discussed. For those involved in deterrence-based correctional programs, life experiences of trauma—often at the hands of authority figures—are nearly universal. Whether that trauma involved direct physical or sexual abuse or the first-hand observation of extreme violence (murders, rapes, etc.) as an innocent bystander, people who have been incarcerated (who closely resemble the high-risk probationers who are most likely to participate in deterrence-based correctional programs) have almost all been exposed to traumatic events, often repeatedly.<sup>125</sup>

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follow rules over time when they 'buy into' the decisions and directives of legal authorities.”).

122. TYLER, *supra* note 118, at 163–64.

123. *See id.* (describing the meaning of procedural justice).

124. *See id.*; Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 44 (1999) (explaining that the subject's involvement in the legal process affects perceptions of those processes by the subject).

125. Studies of prisoners reveal devastatingly high rates of trauma. *See, e.g.*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., DEP'T HEALTH & HUMAN SERVS., ESSENTIAL COMPONENTS OF TRAUMA-INFORMED JUDICIAL PRACTICE 2 (2013), available at [http://www.nasmhpd.org/docs/NCTIC/JudgesEssential\\_5%201%202013finaldraft.pdf](http://www.nasmhpd.org/docs/NCTIC/JudgesEssential_5%201%202013finaldraft.pdf) (discussing studies on trauma);

For some, this exposure will lead to post-traumatic stress disorder (PTSD), a serious mental illness, characterized by flashbacks to traumatic events, memory gaps, avoidant behaviors, and sometimes violent outbursts.<sup>126</sup> Even for those without PTSD, trauma can leave lasting effects. When trauma is experienced in youth, it can affect the developing brain, leaving trauma survivors with impaired activity in the areas of the brain that regulate “emotion, memory and behavior.”<sup>127</sup> These early experiences of trauma can increase the presence of stress hormones and affect the brain’s ability to regulate stress and engage logical problem-solving skills.<sup>128</sup> Experiences of trauma have been closely correlated with substance abuse,<sup>129</sup> problems sustaining interpersonal relationships,<sup>130</sup> and difficulty sustaining attention.<sup>131</sup>

For those with past experiences of trauma, many basic features of the criminal justice system can cause traumatic responses by reviving memories—and sometimes even physical

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JUSTICE POLICY INST., HEALING INVISIBLE WOUNDS: WHY INVESTING IN TRAUMA-INFORMED CARE FOR CHILDREN MAKES SENSE 5 (2010), available at [http://www.justicepolicy.org/images/upload/10-07\\_REP\\_HealingInvisibleWounds\\_jj-ps.pdf](http://www.justicepolicy.org/images/upload/10-07_REP_HealingInvisibleWounds_jj-ps.pdf) (“Studies . . . report that between 75–93 percent of youth entering the juvenile justice system annually are estimated to have experienced some degree of traumatic victimization.”); JESSICA REICHERT & LINDSAY BOSTWICK, ILL. CRIMINAL JUSTICE INFO. AUTH., POST-TRAUMATIC STRESS DISORDER AND VICTIMIZATION AMONG FEMALE PRISONERS IN ILLINOIS 8 (2010), available at [http://www.icjia.state.il.us/public/pdf/ResearchReports/PTSD\\_Female\\_Prisoners\\_Report\\_1110.pdf](http://www.icjia.state.il.us/public/pdf/ResearchReports/PTSD_Female_Prisoners_Report_1110.pdf) (finding among women in an Illinois prison that 98% had suffered physical abuse and 75% had been sexually abused); CARON ZLOTNICK, TREATMENT OF INCARCERATED WOMEN WITH SUBSTANCE ABUSE AND POSTTRAUMATIC STRESS DISORDER, FINAL REPORT 3 (2002), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/195165.pdf> (reporting “that 78 to 85% of incarcerated women have experienced at least one traumatic event”).

126. See, e.g., REICHERT & BOSTWICK, *supra* note 125, at 11 (finding that sixty percent of female prisoners interviewed qualified for a PTSD diagnosis).  
127. See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 125, at 2 (describing the effects of childhood trauma).  
128. *Id.*  
129. See Kathleen T. Brady et al., *Substance Abuse and Posttraumatic Stress Disorder*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 206, 206 (2004) (reporting that 36–50% of people who seek treatment for substance abuse disorders meet the diagnostic criteria for PTSD).  
130. See generally Melanie Randall & Lori Haskell, *Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping*, 36 DALHOUSIE L.J. 501 (2013) (describing the importance of understanding trauma in the legal context).  
131. See generally NAT’L CHILD TRAUMATIC STRESS NETWORK, EFFECTS OF COMPLEX TRAUMA, available at [http://www.nctsn.org/sites/default/files/assets/pdfs/impact\\_of\\_complex\\_trauma\\_final.pdf](http://www.nctsn.org/sites/default/files/assets/pdfs/impact_of_complex_trauma_final.pdf) (describing the impact of complex trauma).

sensations—associated with past harm.<sup>132</sup>

Re-traumatization refers to the psychological and physiological experience of being “triggered,” perhaps by a smell, a sound, or a sensation, that recreates or recalls the original abuse. Triggers for re-traumatization may include strip searches, room searches that involve inspecting personal items, cuffs or restraints, isolation, sudden room changes, yelling, and insults . . . . All these experiences keep old wounds open and may invoke habitual, self-protective responses, including violent outbursts and withdrawal from treatment.<sup>133</sup>

For these individuals—particularly those whose trauma was rooted in physical abuse—fair process takes on heightened importance, since many of the routine aspects of sanctioning (such as forcible arrest and confinement) may be re-traumatizing to a degree that not only exceeds the bounds of proportional punishment, but that also creates obstacles to the individual’s long-term behavioral and emotional health.

When the only questions relevant to the court are whether a violation occurred and what amount of custody should be imposed as a result, probationers lose the ability to tell their story and have it meaningfully considered by the judge. While in many cases, the explanations probationers will offer will not justify deviation from the usual punishment—taking personal responsibility for decisions is an important component of a distance narrative, after all<sup>134</sup>—in other cases, the violation will be mitigated by life circumstances that matter in terms of culpability. A relapse triggered by contact with a former assailant or by a fresh assault is qualitatively different from a relapse precipitated by a night of partying with friends. Similarly, the probationer who misses an appointment because of a sick child or mandatory overtime at work should be entitled to explain her situation to the court. Prohibiting the court from considering the circumstances of a violation and factoring those circumstances into a decision about whether or how much to punish decreases confidence in the fundamental fairness of probation. Justice in this context matters intrinsically, of course. But it also matters instrumentally. While such sanctioning may deter immediate violations of the conditions of probation, it does so at the cost of decreasing probationers’ long-term prospects for compliance with the law.

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132. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 125, at 5.

133. *Id.* at 2.

134. See MARUNA, *supra* note 1, at 148–51 (explaining the role of “T” in redemption narratives).

## CONCLUSION: PURPOSE MATTERS

HOPE was one judge's response to a probation system that was broken: before HOPE, rules of supervision were ignored with impunity until they reached a sudden tipping point, when the punishment became the sudden and severe sanction of full revocation.<sup>135</sup> In the face of that broken system, Judge Alm devised an innovative way to improve the effectiveness of probation. That kind of robust innovation should be lauded by academics and policymakers alike.

But all innovations can easily become routine conventions. Soon enough, HOPE will be "probation as usual" in many jurisdictions around the country. And therein lies potential danger, not just for HOPE but for any innovation. Having justified the need for a new model of probation and having persuaded ourselves that it is better than what existed before, it is easy to stop asking whether the program best advances the ultimate purpose of probation: assisting people in becoming productive, law-abiding citizens, not only during the period of supervision, but afterward. HOPE may well be the best program on the market for deterring probationers from violating conditions of supervision. But complying perfectly with rules is not the highest good we should be seeking to promote. Probation is not fundamentally about human conditioning; it is about engaging with autonomous moral agents in the process of behavioral change. Doing so requires considering the context of violations when selecting punishment, and imposing sanctions that are proportional to the infraction that has occurred. In many cases, HOPE achieves that result, but in others it does not.

Like Judge Alm, advocates of HOPE often analogize the practices of deterrence-based programs to good parenting, where consistency is key. But there are differences between parenting and HOPE that matter. Good parents always consider context when responding to rule violations, and when they impose consequences on their children, they never use cages. While the role of the state can never mirror wholly the role of a benign parent, it can go further in fairly and parsimoniously sanctioning rule violations. Our courts must leave room for understanding why violations occur and for responding in ways that are proportional to the culpability of the violator, as well as the severity of the infraction.

Moreover, while custody is in some cases appropriate, we

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135. See KLEIMAN, *supra* note 65, at 4 (explaining how the U.S. criminal justice system could avoid unnecessary incarcerations).

must do better to develop noncustodial penalties that hold probationers accountable without impeding probationers' ability to stay connected to the informal and prosocial influences of employment, family, and community that lead to long-term desistance from crime. The idea that incarceration is the quantum and kind of punishment required in order to achieve accountability is a uniquely American phenomenon, driven in all likelihood by our confusion about scale. Our criminal justice system punishes so harshly and so often that jail seems like a "micro-sanction" simply because it is so much less punitive than the revocation sentences to which we have become accustomed.<sup>136</sup> It is important to recognize that the ways in which we are executing punishment may be doing significant harm even if they also increase probationers' compliance with the conditions of supervision.

Creating a more responsive system does not require costly new programs or unrealistic expansion of the current criminal justice infrastructure. In places that use deterrence-based correctional programs, probation officers already spend time meeting with higher-risk probationers and bringing them before the court for sanctioning. Adding to those meetings a conversation about how the probationer is doing and why he is having difficulty complying with certain conditions does not take much time and can yield valuable insights into the root causes of offending for a particular individual, opening up possibilities for new ways of engaging the probationer and connecting him to prosocial influences in the community. In fact, many probation agencies across the country are already training their agents to engage in just such conversations through the use of motivational interviewing and counseling techniques designed to increase probationers' motivation to change and take ownership of the solutions to their own problems.<sup>137</sup>

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136. See generally ROBERT A. FERGUSON, *INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT* (2014) (discussing the harsh sanctioning unique to the American penal system). As an example of a way in which our sanctioning defies what we know of human behavior, consider that psychological research has repeatedly confirmed that people are more motivated to change more by praise than by condemnation from those who have power over them. See, e.g., Judy Cameron et al., *Achievement-Based Rewards and Intrinsic Motivation: A Test of Cognitive Mediators*, 97 J. EDUC. PSYCHOL. 641 (2005). Even so, HOPE utilizes no positive rewards other than decreases in frequency of drug testing over time.

137. See, e.g., SCOTT T. WALTERS ET AL., *MOTIVATING OFFENDERS TO CHANGE: A GUIDE FOR PROBATION AND PAROLE* 1–9 (2007), available at <https://s3.amazonaws.com/static.nicic.gov/Library/022253.pdf> (explaining the benefits of motivational interviews).

Leaving room to consider context when sanctioning does not mean abandoning accountability. Probation officers can respond to violations themselves or ask courts to impose sanctions that reflect the genuine variation in individual culpability for offending. A relapse occasioned by abuse can result in a referral for trauma counseling; missing an appointment can be sanctioned by the imposition of community service hours or a temporary increase in the frequency of reporting. Failure to pay restitution can be sanctioned by an increase in the monthly payment if the failure was willful, or it can be addressed by a decrease in the monthly obligation if the failure is due to genuine poverty. Imposing proportional, sensible sanctions is a task that requires little more than imagination and good sense. We do no less for our children and employees, and expect no less for ourselves from our superiors. To say that less is warranted in the context of correctional supervision, where probationers' needs are high and the requirements placed upon them significant, is to sanction potential injustice in the name of efficiency.

For all of their promise, programs like HOPE (and the compliance they promote) cannot become ends unto themselves. Instead, like any criminal justice intervention, deterrence-based correctional programs must be used as tools to advance the larger goal of empowering probationers to desist from crime—to trade criminality and addiction for more mature, prosocial modes of living. And when the requirements of deterrence impede the larger goal of promoting desistance, promoting desistance should trump deterrence.