

# Smart Justice for DWI Offenders: Cost Effective Solutions that Reduce Recidivism and Promote Public Safety

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## Introduction

In 1980, Mothers Against Drunk Driving (MADD) put a face on the drunk driving epidemic forcing the nation to aggressively confront the problem for the first time. Since then, “tough on crime” state and federal legislatures have passed over 1,000 laws and spent billions of dollars enforcing them. These efforts have helped reduce the number of alcohol-impaired motor vehicle fatalities. Still, driving while impaired (DWI) remains the most frequently committed violent crime in America; in 2008, 11,773 people were killed in crashes where at least one driver had a blood alcohol concentration (BAC) above the 0.08 illegal limit.<sup>1</sup> These numbers are unacceptable and speak to the need for additional measures.

In the century since New York became the first state to criminalize impaired driving we have learned that incarceration is not the solution. Jail and prison are extremely expensive and overcrowding is reaching a crisis point.<sup>2</sup> Further, while incarceration provides the most effective way to incapacitate offenders, vis-à-vis the public during their stay, it has little impact on long term behavior<sup>3</sup> and almost all offenders are released back into their communities. Consequently, our nation cannot “incarcerate our way out of the DWI problem.”

A growing body of research shows that recidivism can be reduced by addressing offenders’ underlying criminogenic behaviors and deterring additional misconduct in the community. Recently,

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several new and cost-effective model community based programs have been developed that reduce recidivism and incarceration rates for DWI and other offenders. This article provides an overview of the programs and suggests ways to achieve the twin goals of reducing crime and reducing costs, what we call “Smart Justice.”

There are almost 2.2 million offenders behind bars in the United States, while approximately 4.6 million people are on probation and over 800,000 on parole.<sup>4</sup> The key to a more efficacious and cost-effective future for corrections is better performing community supervision. How to accomplish that is the focus of this article.

## Model Programs

Three national models employing Smart Justice strategies have emerged over the last two decades. Drug Courts (and the DWI Courts that apply the methods to alcohol offenders) pioneered the concepts of involving the court in the

be scalable to the entire justice population. Their success is instructive.

## DWI Courts

In 1989, Chief Judge Gerald Wetherington, Judge Herbert Klein, State Attorney Janet Reno, and Public Defender Bennett Brummer created the nation’s first formal Drug Court in Miami-Dade County, Florida in response to cocaine-fueled crime. The program was designed to rehabilitate non-violent felony offenders with drug problems. Today, there are well over 2,000 drug courts meeting the needs of a variety of offenders who abuse drugs. Their effectiveness is well documented.<sup>5</sup> A much more recent innovation, and an example of the expanding range of the original drug court model tailored to a specific offender population is, DWI Courts.

DWI Court participants are required to abstain from using illegal drugs and alcohol. They also are required to participate in a rigorous treatment supported

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## *We can learn a great deal from the successful pilot programs implemented in Hawaii and South Dakota*

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rehabilitative process, adopting a team approach to case management, supervising abstinence extensively and mandating treatment. They have been extremely successful but are more expensive than other programs and are focused on offenders with demonstrable substance misuse issues. Two other models, Hawaii’s Opportunity Probation with Enforcement (HOPE) and South Dakota’s 24/7 Sobriety Project, employ an intensive supervision concept at lower cost to the criminal justice system and appear to

by frequent random alcohol and drug testing to monitor compliance. Most of these courts charge offenders a participation fee. Although judge-driven, DWI Courts employ a team approach to address a broad range of offender needs. They are far less adversarial than traditional criminal courts. The National Association of Drug Court Professional (NADCP), which supports these programs, has developed a series of Guiding

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Principles for DWI and Drug Courts. Nonetheless, program quality varies significantly in part because many labeled “DWI Courts” fail to conform to NADCP standards.

Several studies on DWI Courts have come up with varied findings. The courts that maintain close fidelity to the NADCP model by providing quality treatment services, vigorously monitoring offenders and addressing violations appropriately have achieved excellent results, reducing recidivism by over 60%.<sup>6</sup> For more information, visit the National Center for DWI Courts (NCDC) at <http://www.dwicourts.org/ncdc-home/>.

***Hawaii’s Opportunity Probation with Enforcement (HOPE)***

Judge Steven S. Alm, a former United States Attorney in Hawaii, developed HOPE probation shortly after taking the

who test positive are incarcerated immediately. Within 72 hours they appear in court and are provided an opportunity to admit or contest the violation. Those found in violation are sentenced to a short jail term, often for time served and usually for only a few days. Those who repeatedly test positive serve increasing jail sentences and are required to enter treatment programs. Thus, offenders’ own behavior “controls their destiny” in HOPE. Treatment decisions are based on what Angela Hawken, Ph.D., the program’s independent evaluator, refers to as “Behavioral Triage.” For more information on Judge Alm’s program, see the Friends of HOPE site at <http://www.hopeprobation.org/> and the Pew Charitable Trusts Pew Center on the States at [http://www.pewcenteronthestates.org/report\\_detail.aspx?id=56841](http://www.pewcenteronthestates.org/report_detail.aspx?id=56841).

Researchers recently compared HOPE probationers with a randomly assigned control group. The first year results showed that HOPE participants

Sobriety Project in 2005 to address DWI offenders. Program participants are required to refrain from using alcohol and illegal drugs. Local sheriffs monitor the majority of offenders for alcohol use through twice-daily breath testing and for drug use by urine testing. In rural jurisdictions where offenders have limited access to local law enforcement, sheriffs monitor them with transdermal alcohol bracelets and drug patches. Offenders who violate the no-use standard are incarcerated immediately and subject to short jail sentences. Although treatment is not a formal part of the program, offenders who are convicted of DWI receive alcohol and/or drug treatment. Uniquely, the 24/7 Sobriety Project is primarily funded by the offenders themselves who must pay for their participation. Despite some initial skepticism, justice officials quickly recognized its value and began referring other alcohol misusing offenders to the program. For more information on the 24-7 Sobriety Project, visit South Dakota Attorney General Marty Jackley’s site at <http://www.state.sd.us/attorney/DUI247/index.htm> and the National Partnership on Alcohol Misuse and Crime at <http://www.alcoholandcrime.org/npamc/solutions/programs/programs-sd-sobriety>.

Program administrators regularly review participant performance.

- 99.3% of twice-daily tested participants arrive on time to testing sites and test negative for alcohol on any given day; 66% are fully compliant the entire time
- Approximately 78% of participants monitored by bracelet are compliant and test negative throughout their participation
- 96.5% of urinalyses are negative
- 86.7% of sweat patch tests are negative<sup>8</sup>

Researchers are conducting an ongoing study of the 24/7 Sobriety Project, comparing participants to offenders arrested for DWI prior to the program’s existence. Preliminary data involving participants who were subjected to twice-daily breath testing shows that program participants recidivated approximately 45% less frequently than controls each year for years

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***HOPE participants tested positive for drug use at a much lower rate than the control group—less than a third as many positive tests were recorded among program participants***

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bench in 2004. He developed the program to specifically address sex offenders because they had high recidivism rates. Most were not substance abusers. Judge Alm expanded the program to include other offenders after seeing how successful it was. While most of the drug-abusing offenders in HOPE report methamphetamine as their primary drug of choice, the program has been applied to all types of substance abusers.

HOPE participants are required to abstain from consuming alcohol or illegal drugs. Upon entering the program, participants are warned that they will be jailed if they violate any program rules including any use of alcohol or other drugs. They also are provided an opportunity to participate in a substance abuse treatment program, but unlike DWI or Drug Courts, are not required to do so. All HOPE probationers are tested regularly and randomly for drug use. Those

tested positive for illegal drugs far less frequently than the controls (13% versus 46%). This allowed Judge Alm to focus the majority of the treatment budget on those who needed it most: offenders who would not or could not respond to sanctions that most rationale people would respond to. The lower rate of drug use also translated into lower rates of recidivism and reduced the burden on the state’s prison system: compared to the controls, HOPE probationers were re-arrested half as often (21% versus 47%) and ultimately served much less time in custody (138 days on average versus 267 days on average) during the study.<sup>7</sup>

***South Dakota 24-7 Sobriety Project***

Former South Dakota Attorney General Larry Long started the statewide 24/7

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one through three (not cumulative). Because the average person participates in the program for four months or less, this suggests that participation favorably impacts behavior long after participation including monitoring has ended.<sup>9</sup>

These impressive statistics may not, however, tell the whole story. Since the program's inception, the number of people killed in South Dakota in alcohol impaired driving fatalities has dropped by more than 50%, an unrivaled improvement. At the same time, the once growing jail and prison populations have stabilized. Although it is impossible to ascribe that gain to any one solution, nobody questions that the 24/7 Sobriety Project has made a major contribution.

### Smart Sanctioning Through Community Supervision

While the model programs described above vary, they share a common Smart Justice strategy with three distinguishing features. First, they directly address the offenders' substance use behaviors by establishing a no-use standard prohibiting the offenders from consuming any alcohol or illegal drugs. Second, they enforce the zero-tolerance standard through vigorous monitoring with certain and immediate consequences involving short jail sentences ("flash incarceration") for all violations. Third, they directly or indirectly provide opportunities for participants to obtain substance abuse treatment. Their success rates challenge not only the "tough on crime" community's belief that incarceration is a cure-all, but the belief of many in the treatment communities that relapse is an inevitable and unvarying part of substance use disorders. Instead, these experiences suggests that, for a significant portion of offenders with substance abuse disorders, the rate of relapse is determined more by the environment in which the decision to use or not use is made, rather than by their biology. When that environment involves strict testing coupled with swift, certain and meaningful consequences for alcohol or drug use, most offenders will stop using. The common strategy of enforcing conditions of

probation with swift and certain but brief incarceration is applicable to all offenders on supervised release, including pre-trial release, probation and parole, even those with no substance abuse problems.

Each of these models has unique features. For example, the HOPE program, which is widely used for drug offenders, monitors drug use much more closely than the 24/7 Sobriety Project and many DWI Courts. However, the 24/7 Sobriety Project, which began as a DWI countermeasure, monitors alcohol use far more extensively than HOPE. The DWI Courts are distinguished by a more comprehensive, aggressive and expensive model that requires treatment for all participants from the beginning of their involvement with the program. Drug courts, in contrast to either HOPE or 24/7 Sobriety, have been extended widely

Monitoring technology influenced the development and effectiveness of these programs and will continue to do so. Practitioners benefit from leveraging the rapidly improving technology to protect in an efficacious and cost-effective manner. The remainder of this paper focuses on the importance of the no-use standard for DWI offenders and ways to enforce it.

### The "No Use" Standard

Offenders on supervised release should not be permitted to use alcohol or illegal drugs. This is especially true for DWI offenders who have endangered the public by their inability or unwillingness to control their drinking or drugging. However, most offenders will not stop using alcohol or drugs simply because a judge

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***None of these programs are "finished." They all continue to evolve and improve.***

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in the United States and abroad and have been evaluated by dozens of studies.

HOPE-style drug testing is scalable to the entire justice population, while the 24/7 Sobriety Project is scalable to the universe of DWI offenders and others who misuse alcohol, especially if offenders are required to contribute to the costs of monitoring as in 24/7 Sobriety. In contrast, Drug Courts are targeted to a subset of these populations as defined by the NADCP and individual courts.

None of these programs are "finished;" they all continue to evolve. Practitioners and researchers continue to evaluate them and encourage further innovation. There are advantages to combining these programs in cost-effective ways that take advantage of their respective strengths. One South Dakota Judge, Lori Wilbur, has partnered with local probation officers, prosecutors and defense attorneys to create a DWI Court with 24/7 Sobriety Project-style monitoring. See [http://www.alcoholandcrime.org/images/uploads/pdf\\_articles/theVoiceSDSTOPDUI.pdf](http://www.alcoholandcrime.org/images/uploads/pdf_articles/theVoiceSDSTOPDUI.pdf) for details. Similarly, Judge Alm routinely refers offenders who need more intensive court intervention and treatment to the Honolulu Drug Court.

orders them to do so. The only way to effectively change their behavior is through vigorous supervision supported by appropriate sanctioning of violations.

### Behavior Change Through Effective Supervision and Smart Sentencing

Criminologists have long recognized that offenders can be deterred from engaging in unwanted behaviors if they face swift, certain, meaningful, and fair consequences. In other words, offenders respond when they know they will be held accountable for their actions.

The justice system historically does a poor job of holding people accountable, particularly those on community supervision. The traditional practice in community corrections is a combination of lax monitoring of alcohol and other drug use, delayed and unpredictable responses to violations and, eventually long-term and expensive incarceration. This is the opposite of tight monitoring to detect any alcohol or other drug use linked to swift,

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certain but severe consequences for every single violation.

Most community corrections agencies are woefully underfunded and understaffed. Testing is typically infrequent and only performed during scheduled visits with parole and probation officers. Too often testing is not observed properly and the range of drugs tested for is small. As a result, offenders frequently violate the terms of their release and often evade detection for long periods of time. When action on violations is initiated – often after a dozen or more violations – hearings may not occur for weeks or months. Even then, sanctioning is uncertain, particularly when an offender fails a test for alcohol or illegal drugs. Many judges, overwhelmed by their own burgeoning court dockets and concerned about the high rate of parole and probation violations, ignore these so-called “technical violations.” Eventually, when sanctions are finally imposed they are often unnecessarily long and costly jail or prison sentences. This confluence of circumstances undermines deterrence and leads many, erroneously, to conclude that community corrections is ineffective and “soft on crime.” It also destroys officer morale.

Modern forensic methods and technology allow program officials to detect alcohol and drug use far more effectively and inexpensively than they could just ten years ago. Determining whether an offender uses illegal drugs is relatively easy. Urine testing allows officials to reliably identify drug use within the one to three days prior to urine collection although for some heavy users

drug tests can be positive for longer periods of time. Alcohol use, however, is a different story. Alcohol metabolizes within a few hours of stopping drinking so that breath, blood and urine tests are likely to be negative within 12 hours or less after drinking stops. In recent years, testing for metabolites of alcohol in the urine has extended alcohol testing to time periods similar to the time periods covered by urine drug testing. Alcohol testing has expanded to include continuous monitoring devices that are worn day and night for weeks, months or years. These permit identification of virtually any drinking. Drug tests have adopted alternative matrices permitting testing of saliva (oral fluids) and hair as well as sweat patch testing that detects drug use during the few weeks a patch is worn.

Drug and alcohol testing uses the highest level of modern biotechnology and is rapidly evolving to improve sensitivity and reliability and to lower costs. The details of testing technology is beyond the scope of this article but is widely available. For further information, visit the Drug and Alcohol Testing Industry Association (DATIA) at [www.datia.org](http://www.datia.org).

When designing programs or determining which methods should be used, courts should consider the problems they seek to solve, the dangerousness and needs of each offender, and the resources the courts have available to them. The best programs, like the models discussed here, leverage the varying technologies in ways that allow them to take their programs to scale and accommodate whole classes of offenders in an effective and affordable manner.

## Conclusion

Jail and prison, while important components of a comprehensive approach to crime reduction, are of limited value for changing long-term behavior. The future of corrections is in less but better focused use of incarceration. “Smart Justice” finds less expensive and ultimately more effective solutions through community supervision, making use of modern forensic testing coupled with swift, certain and meaningful sanctions and providing treatment as needed, a much more cost-effective way to reduce DWI and offender recidivism and promote public safety.

## Endnotes

<sup>1</sup> See “Fatalities and Fatality Rates in Alcohol-Impaired Driving Crashes by State, 2007-2008,” Traffic Safety Facts 3 (NHTSA December 2009).

<sup>2</sup> H. West and B. Sabol, “Prisoners in 2007,” Bureau of Justice Statistics Bulletin at 7 (December 2008).

<sup>3</sup> See e.g. R. Chandler, B. Fletcher and N. Volkow, “Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety,” 301 JAMA 183 (January 14, 2009).

<sup>4</sup> Pew Center on the States, “One in 31: The Long Reach of American Corrections” (Washington, DC: The Pew Charitable Trusts, March 2009).

<sup>5</sup> See e.g. National Drug Court Institute. (n.d.). Research Findings. Retrieved December 30, 2009 from <http://www.ndci.org/research>

<sup>6</sup> B. Fuller, S. Carey and K. Kissick, “Michigan DUI Courts Outcome Evaluation Final Report,” NPC Research (October 2007).

<sup>7</sup> A. Hawken and M. Kleiman, “Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii’s HOPE,” December 2009 <http://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf>.

<sup>8</sup> See the South Dakota Attorney General’s Office site on the 24/7 Sobriety Project, <http://apps.sd.gov/atg/dui247/247stats.htm> (Retrieved August 21, 2010).

<sup>9</sup> Information provided by South Dakota Attorney General Marty Jackley (July 2010). ■



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