


Winter 2015

Swift, Certain, and Fair Punishment: 24/7 Sobriety and Hope: Creative Approaches to Alcohol- and Illicit Drug-Using Offenders

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Paul J. Larkin Jr., *Swift, Certain, and Fair Punishment: 24/7 Sobriety and Hope: Creative Approaches to Alcohol- and Illicit Drug-Using Offenders*, 105 J. CRIM. L. & CRIMINOLOGY (2015).
<https://scholarlycommons.law.northwestern.edu/jclc/vol105/iss1/2>

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SWIFT, CERTAIN, AND FAIR PUNISHMENT: 24/7 SOBRIETY AND HOPE: CREATIVE APPROACHES TO ALCOHOL- AND ILLICIT DRUG-USING OFFENDERS

PAUL J. LARKIN, JR.*

Criminologists believe that the certain and swift imposition of a mild punishment has a greater deterrent effect than the remote and indefinite application of a severe punishment. Judges in South Dakota and Hawaii independently put that theory to the test and created innovative strategies to deal with substance abuse and crime. Those programs—the 24/7 Sobriety program in South Dakota and Hawaii’s Opportunity Probation with Enforcement—subject probationers to a rigorous alcohol or drug testing regimen backed up by a guaranteed and immediate but modest sentence of confinement for everyone who tests positive. Those programs have proved to be sensible, humane, and effective mechanisms for dealing with substance abuse and crime. A few other states have adopted similar regimens, but most have not. The latter jurisdictions should consider creating their own programs based on the South Dakota and Hawaii models.

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INTRODUCTION

Local and state government officials in South Dakota and Hawaii have found a creative way to address some of the problems stemming from alcohol and drug use. South Dakota's 24/7 Sobriety Program and Hawaii's Opportunity Probation with Enforcement (HOPE) project seek to deal with those problems by combining an old criminological theory with modern technological devices. Criminologists, both old and contemporary, have believed that the certainty and celerity of a punishment are more effective components of deterrence than is the severity of a penalty.¹ In fact, anyone

¹ See, e.g., CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 55 (2009) (1764); FRANCIS T. CULLEN & CHERYL LERO JONSON, CORRECTIONAL THEORY 120–26 (2012); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, in CRIME AND JUSTICE IN AMERICA 205–06 (Michael Tonry ed., 2013) Mark A. R. Kleiman & Kelsey R. Hollander, *Reducing Crime by Shrinking the Prison Headcount*, 9 OHIO ST. J. CRIM. L. 89, 89 (2011) (arguing that the five principles of effective punishment are the “Five C’s”: certainty, celerity, concentration, communication, and credibility). Economic theory teaches that people exponentially discount the value of delayed-receipt goods. See, e.g., George Ainslie, *Derivation of “Rational” Economic Behavior from Hyperbolic Discount Curves*, 81 AM. ECON. REV. 334, 334 (1991). Offenders discount the potential harm of future imprisonment even more than non-offenders do because offenders are more present-oriented than the general public. See, e.g., JAMES Q. WILSON, THINKING ABOUT CRIME 118–19 (rev. ed. 1983); JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE 49–56, 416–21 (1985); John J. DiIulio, Jr., *Help Wanted: Economists, Crime and Public Policy*, 10 J. ECON. PERSP. 3, 16–17 (1996). Discounting is also a common trait among heavy smokers, heavy drinkers, and heroin addicts. See, e.g., Warren K. Bickel & Lisa A. Marsch, *Toward a Behavioral Economic Understanding of Drug Dependence: Delay Discounting Processes*, 96 ADDICTION 73, 76–77 (2001); Kris N. Kirby et al., *Heroin Addicts Have Higher Discount Rates for Delayed Rewards than Non-Drug-Using Controls*, 128 J. EXPERIMENTAL PSYCHOL. 78 (1999);

who has been a parent will tell you that the swift and certain use of a mild or moderate penalty is far more likely to deter unwanted conduct than the threat of an infrequently used severe punishment imposed at some point down the road.²

South Dakota and Hawaii have both developed innovative programs to deal with substance use and noncompliance with the conditions of supervision. Starting from the proposition that certainty and celerity are more important than severity when measuring the effectiveness of punishment and using a rigorous alcohol-testing regimen, South Dakota has made strides toward the reduction of problem drinking and the attendant harms that it can produce.³ Hawaii has independently developed and followed a similar approach to the use of drugs and related crime, subjecting certain offenders to rigorous, random drug urinalysis coupled with the certain imposition of a modest stint in jail for those who fail the required tests. Those creative approaches are worth serious consideration as an effective and humane means of addressing the grim problems that alcohol- and drug-abusers pose for victims, society, and themselves.

Part I sets the stage for analysis of the South Dakota and Hawaii programs. Subpart I.A. summarizes the problems with alcohol abuse and illicit drug use, and subpart I.B. discusses how American society addresses those problems today. Part II then describes how 24/7 Sobriety and HOPE work and how well each one has performed so far. It turns out that, even though each program developed independently, 24/7 Sobriety and HOPE are quite similar in their underlying theory, their mechanics, and their results. The last part, Part III, suggests what next steps the other states and the federal government should take to decide whether those programs are sensible, and identifies some of the questions that governments should address before ditching their traditional systems in favor of a greater focus on these two inventive programs.

Suzanne H. Mitchell, *Measures of Impulsivity in Cigarette Smokers and Non-smokers*, 146 *PSYCHOPHARMACOLOGY* 455 (1999); Rudy E. Vuchinich & Cathy A. Simpson, *Hyperbolic Temporal Discounting in Social Drinkers and Problem Drinkers*, 6 *EXPERIMENTAL & CLINICAL PSYCHOPHARMACOLOGY* 292 (1998). That theory drives the 24/7 Sobriety and HOPE programs. See *infra* Part II.

² See Mark Kleiman & Beau Kilmer, *The Dynamics of Deterrence*, 106 *PROC. NAT'L ACAD. SCI.* 14230, 14230 (2009).

³ See *South Dakota Office of the Attorney General 24/7 Sobriety Program*, SDGOV, <http://apps.sd.gov/atg/dui247/index.htm> (last visited Sep. 29, 2014), archived at <http://perma.cc/6M58-RT5C>. For a short history of drug testing technologies, see AM. SOC'Y OF ADDICTION MED., *DRUG TESTING: A WHITE PAPER OF THE AMERICAN SOCIETY OF ADDICTION MEDICINE* 6–11 (2013) [hereinafter *DRUG TESTING*], available at <http://www.asam.org/docs/default-source/publicity-policy-statements/drug-testing-a-white-paper-by-asam.pdf?sfvrsn=2#search=drug%20testing>, archived at <http://perma.cc/G5W4-QRU6>.

I. ALCOHOL AND ILLICIT DRUG USE

A. THE PROBLEMS THEY CAUSE

Alcohol has a long history of use in western civilization,⁴ and it is widely consumed in America today.⁵ Alcohol abuse, however, has been with us as long as alcohol itself.⁶ Most people can consume alcohol in moderation or intermittently without suffering any adverse long-term effect.⁷ But not all. Some individuals become dependent on alcohol, and years of overuse not only seriously impairs their health but also can prove fatal.⁸ Excessive alcohol consumption today imposes more than \$200 billion on the nation each year in morbidity and mortality costs, as well as various other direct and collateral costs,⁹ expenses that dwarf tax revenues

⁴ See, e.g., *Genesis* 9:20 (Noah planted the first vineyard); *The Iliad* Bk. VI, at 204 (Robert Fagles trans., Penguin Classics Deluxe Ed. 1990) (Hector refuses wine because he was bloody from battle and could not first offer a sacrifice to the gods); *John* 2:1–11 (Jesus changed water into wine at the wedding at Cana); *The Odyssey* Bk. 9, at 119–20 (E.V. Rieu trans., Penguin Classics 2009) (Odysseus got the Cyclops drunk on wine).

⁵ See DAVID BOYUM & PETER REUTER, AN ANALYTIC ASSESSMENT OF U.S. DRUG POLICY 3 (AEI Evaluative Studies 2005); STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 33 (1993). The reasons for alcohol consumption vary. See, e.g., 2 SAMUEL JOHNSON, THE LIVES OF THE MOST EMINENT ENGLISH POETS 399 (1781) (“In the bottle, discontent seeks for comfort, cowardice for courage, and bashfulness for confidence.”).

⁶ See, e.g., *Genesis* 9:20–25 (Noah's drunkenness led to the Curse of Ham); *Isaiah* 5:11 (inveighing against excessive drinking).

⁷ See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NO. NCJ 168632, ALCOHOL AND CRIME: AN ANALYSIS OF NATIONAL DATA ON THE PREVALENCE OF ALCOHOL INVOLVEMENT IN CRIME 1 (rev. Apr. 28, 1998), available at <http://www.bjs.gov/content/pub/pdf/ac.pdf>, archived at <http://perma.cc/F3VW-3NUJ> (noting that 82% of Americans age twelve or older report having used alcohol at least once; “most alcohol consumption does not result in crime: the vast majority of those who consume alcohol do not engage in criminal behavior”). The same is true of most illicit drug use. See *infra* notes 40–43 and accompanying text.

⁸ See, e.g., DUKE & GROSS, *supra* note 5, at 33–37; ROBERT L. DUPONT, THE SELFISH BRAIN: LEARNING FROM ADDICTION 126–30 (rev. ed. 2000).

⁹ See Ellen E. Bouchery et al., *Economic Costs of Excessive Alcohol Consumption in the U.S., 2006*, 5 AM. J. PREVENTIVE MED. 516, 518 (2011) (estimating approximately \$224 billion). Collateral costs of alcohol abuse, like those of drug usage, can include an increase in the transmission of communicable diseases such as HIV and hepatitis, medical care, absenteeism, lost work productivity, higher insurance premiums, legal costs, shortened life spans, homelessness, spousal and child abuse, and the damaged lives of accident survivors. See, e.g., *id.* at 516; BOYUM & REUTER, *supra* note 5, at 30–31. Those estimates have increased considerably over the past two decades. See, e.g., NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, U.S. DEP'T OF HEALTH & HUMAN SERVS., UPDATING ESTIMATES OF THE ECONOMIC COSTS OF ALCOHOL ABUSE IN THE UNITED STATES 1 (2000), available at <http://pubs.niaaa.nih.gov/publications/economic-2000/alcoholcost.PDF>, archived at <http://perma.cc/W4UC-R3KA> (estimating costs in 1992 as \$148 billion and in 1998 as more than \$184

from alcohol sales.¹⁰ Alcohol also may be the most commonly used intoxicant by individuals who break the criminal laws.¹¹

Generally speaking, the nation has sought to prevent alcohol abuse by regulating rather than outlawing the manufacture, distribution, and consumption of alcohol. The states have enjoyed the prerogative to prohibit or limit alcohol use at all times other than during the Prohibition Era (1920–1933), when the Constitution and federal law outlawed the distillation and distribution of alcohol.¹² Different states have exercised that regulatory

billion). The cost numbers may underestimate the actual figures due to the unwillingness of some parties—for example, domestic violence and child abuse victims—to report an offense. See Bouchery et al., *supra*, at 521–23 & tbl.3.

¹⁰ The tax revenue from alcohol sales does not offset the costs alcohol abuse imposes on society. Alcohol's social costs exceed its tax revenues by a factor of ten. See, e.g., KEVIN A. SABET, REEFER SANITY: SEVEN GREAT MYTHS ABOUT MARIJUANA 106, 124 (2013). There is a social benefit from alcohol use, but it is impossible to measure it objectively.

¹¹ See, e.g., David A. Boyum & Mark A. R. Kleiman, *Substance Abuse Policy from a Crime-Control Perspective*, in CRIME: PUBLIC POLICIES FOR CRIME CONTROL 331, 333 (James Q. Wilson & Joan Petersilia eds., 2002); John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 422 (2006) (finding that 38% of parties serving a jail sentence for violent crime were under the influence of alcohol); *infra* notes 21–25.

¹² Beginning in the late nineteenth century, the nation enacted a series of laws prohibiting or regulating conduct deemed a “vice.” With respect to alcohol, the states went first. Between 1900 and 1919, nearly three dozen states had adopted some form of state prohibition law. See, e.g., JEFFREY A. MIRON, DRUG WAR CRIMES: THE CONSEQUENCES OF PROHIBITION 29–32 & tbl.3.1 (2004). Congress helped by prohibiting the shipment of alcohol from “wet” states into “dry” states in violation of the latter states’ laws. See Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified at 27 U.S.C. § 122 (2012)); *Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311 (1917); MIRON, *supra* at 33. The best-known achievement of that reform movement was Prohibition. The Eighteenth Amendment to the Constitution of the United States outlawed the production, transportation, and sale—but not the possession—of alcohol throughout the nation. See U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI; National Prohibition Act, ch. 85, 41 Stat. 305 (1919) (codified at 27 U.S.C.A. § 40 (1919)) (nullified 1933, repealed 1935) (informally known as the Volstead Act and as the Act of Oct. 28, 1919). From 1920 to 1933, federal law sought, however unsuccessfully, to make the nation “dry.” In the latter year, the nation did an about-face. Congress proposed, and the States ratified, the Twenty-First Amendment, U.S. CONST. amend. XXI, which repealed the Eighteenth Amendment, nullified the Volstead Act, and decentralized regulatory power over alcohol by vesting it instead in the states. See, e.g., *United States v. Chambers*, 291 U.S. 217, 222–23 (1934) (holding that the Twenty-First Amendment rendered the Volstead Act inoperative). Once again, federal law left it to the states to choose between remaining “dry” or becoming “wet.” See, e.g., DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION (2010); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 158–59 (2011); Paul Aaron & David Musto, *Temperance and Prohibition in America: A Historical Overview*, in ALCOHOLISM AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 127–81 (Mark Moore & Dean R. Gerstein eds., 1981); Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J.L. & PUB. POL’Y 241, 244 n.19, 245 n.20 (2014). Since Prohibition, Congress has

authority in various ways.¹³ Generally speaking, however, with a few exceptions—for example, laws prohibiting driving under the influence of alcohol or distributing alcohol to minors¹⁴—the states leave the responsibility to police the sensible use of alcohol to the efforts of individuals, family, friends, neighbors, and others.

Unfortunately, common sense and moral suasion do not always work. The problem of drinking and driving provides an example. Alcohol diminishes a person's ability to operate a motor vehicle long before he realizes that his skills have been diminished.¹⁵ Operating an automobile while under the influence of alcohol—known by the acronyms DUI, DWI, or OWI¹⁶—is a hazardous and expensive activity.¹⁷ Motor vehicle accidents involving alcohol-impaired drivers cost the nation more than an estimated \$37 billion annually.¹⁸ In 2012, more than 10,000 people died in such

enacted a few federal laws dealing with alcohol use. *See, e.g.*, 18 U.S.C. §§ 341–43 (2012) (making it a crime to operate a common carrier while under the influence of alcohol or drugs). Generally speaking, however, Congress has left regulation of alcohol to the states.

¹³ Virginia, for example, allows licensed establishments to sell beer and wine, but sells “hard liquor” only through state-run Alcoholic Beverage Control stores. *See* VA. CODE ANN. §§ 4.1-100 to -517 (Supp. 2013); Va. Dep’t of Alcoholic Beverage Control, *History of Virginia ABC*, VIRGINIA.GOV, <http://www.abc.virginia.gov/admin/hist1.htm> (last visited Feb. 26, 2015), *archived at* <http://perma.cc/9XL2-LE65>.

¹⁴ *See, e.g.*, VA. CODE ANN. §§ 4.1-304 to -305 (Supp. 2013) (prohibiting the operation of a motor vehicle under alcohol intoxication); *id.* § 18.2-266 (prohibiting the consumption of alcohol by, and the distribution of alcohol to, minors).

¹⁵ *See, e.g.*, DUKE & GROSS, *supra* note 5, at 37; DUPONT, *supra* note 8, at 134–36. Drug use also can impair driving skills. *See* NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., DOT HS 808 939, MARIJUANA, ALCOHOL AND ACTUAL DRIVING PERFORMANCE (1999).

¹⁶ For simplicity, this Article uses the term DUI to describe offenses that involve operating an automobile with a blood alcohol content above a certain threshold.

¹⁷ A driver is deemed alcohol-impaired if his or her blood alcohol concentration (BAC) is 0.08 grams per deciliter or higher. By 2012, every state and the District of Columbia had made it illegal to drive with a BAC of 0.08 or higher. *See* 23 U.S.C. § 163(a) (2012); *Missouri v. McNeely*, 133 S. Ct. 1552, 1565 n.8 (2013); 23 C.F.R. § 1225.1 (2012); NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., ALCOHOL-IMPAIRED DRIVING, DOT HS 811 870, ALCOHOL-IMPAIRED DRIVING I (2013), *available at* <http://www-nrd.nhtsa.dot.gov/Pubs/811870.pdf>, *archived at* <http://perma.cc/389K-SJ4T>. The risk that alcohol will impair a driver's skills soars as the BAC increases. Moreover, every state uses a BAC standard of zero (or slightly above it) for commercial drivers and for drivers not yet twenty-one years old. *See, e.g.*, 49 C.F.R. § 382.201 (2013) (0.04 BAC for commercial drivers); James C. Fell & Robert B. Voas, *The Effectiveness of Reducing Illegal Blood Alcohol Concentration (BAC) Limits for Driving: Evidence for Lowering the Limit to .05 BAC*, 37 J. SAFETY RES. 233, 233, 239 (2006); Mireille Jacobson, *Drug Testing in the Trucking Industry: The Effect on Highway Safety*, 46 J.L. & ECON. 131, 134–36 (2003).

¹⁸ *See Impaired Driving*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www.nhtsa.gov/Impaired> (last visited Nov. 15, 2014), *archived at* <http://perma.cc/A9R9-532U>.

incidents, or one every 51 minutes.¹⁹ The FBI reports that out of the nearly 12.2 million arrests law enforcement officers made in 2012, 1.3 million were for DUI.²⁰

Moreover, DUI is not the only offense that people commit while inebriated. Alcohol use is involved in nearly 40% of violent crimes.²¹ Numerous studies have confirmed what has been labeled the “alcohol–violence nexus.”²² While the jury may still be out on the question whether alcohol is a “criminogenic” drug—that is, a drug that causes or leads people to break the law²³—there seems little dispute that alcohol is highly associated with crime and that intoxication might serve as a catalyst to violent crimes in some settings.²⁴ As one psychiatrist colorfully put it,

¹⁹ *See id.*

²⁰ *See* FBI, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 2012, at tbl.29, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons-arrested> (last visited Feb. 26, 2015), *archived at* <http://perma.cc/4YM5-DMEB>. There also were half a million arrests for drunkenness. *Id.* 2012 is the latest year for which figures are available.

²¹ *See, e.g.*, BUREAU OF JUSTICE STATISTICS, *supra* note 7, at iii, vi–vii (noting that approximately 40% of violent victimizations involve use of alcohol and that the same number of offenders under criminal justice supervision reported being under the influence of alcohol at the time of their crimes); MARVIN E. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 136 (1958); Harwin L. Voss & John R. Hepburn, *Patterns in Criminal Homicide in Chicago*, 59 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 499, 505 (1968); William F. Wiczorek, *Alcohol, Drugs and Murder: A Study of Convicted Homicide Offenders*, 18 J. CRIM. JUST. 217, 218 (1990) (“Studies of violent offenders have found that they are much heavier drinkers than demographically matched samples of the general population. . . .”); *id.* at 220 (study found that 56% of homicide offenders were under the influence of alcohol or illicit drugs at the time of the crime).

²² Wiczorek, *supra* note 21, at 218.

²³

The weight of evidence suggests that substance use provides a provocative context for violence, but there is limited evidence that alcohol or drugs directly cause violence. . . . To assign a causal role to drugs or alcohol requires that we be certain that the behavior would not have occurred if the user had been sober. That is, comorbidity and causation are often confounded. Much alcohol and drug use is overlapping, for example, with mental health problems, a variety of deviant and illegal acts, and poor outcomes in marriage or employment. Nevertheless, we face the paradox that while there is weak evidence of direct effects of alcohol or drugs pharmacologically, there is a high proportion of violent events of all kinds where alcohol is present among assailant, victim, or both parties.

Jeffrey Fagan, *Interactions Among Drugs, Alcohol, and Violence*, 12 HEALTH AFF. 65, 67–68 (1993); *see also, e.g.*, BUREAU OF JUSTICE STATISTICS, *supra* note 7, at 2; MIRON, *supra*, note 12, at 14–15 & nn.9–10; Wiczorek, *supra* note 21, at 220, 225 (concluding that studies have shown an association between alcohol use and violence, but not necessarily a causal effect). For a summary of the technical difficulties in measuring the causal relationship between substance use and violence, *see, for example*, Fagan, *supra*, at 72–77.

²⁴ A considerable number of articles have discussed this issue. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, ALCOHOL AND CRIME: DATA FROM 2002–2008

“[t]he conscience has been well defined as that part of the mind which is soluble in alcohol.”²⁵

Americans have treated illicit drug use differently from alcohol use.²⁶ Society has accepted drinking in moderation for as long as the nation has

(July 28, 2010), available at http://www.nllea.org/documents/Alcohol_and_Crime.pdf, archived at <http://perma.cc/2L5R-REH2> (noting that 37% of state offenders imprisoned for a violent offense in 2004 reported being under the influence of alcohol at the time of the crime); BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, ALCOHOL AND VIOLENT CRIME: WHAT IS THE CONNECTION? WHAT CAN BE DONE? 6–8 (2006), available at http://www.nllea.org/documents/Alcohol_and_Crime.pdf, archived at <http://perma.cc/UJW3-2ED5>; BOYUM & REUTER, *supra* note 5, at 28 (“[M]ore crimes—and in particular, more violent crimes—are committed under the influence of alcohol than under the influence of all illegal drugs combined . . .”); DUKE & GROSS, *supra* note 5, at 38–42; Trevor Bennett & Richard Wright, *The Relationship Between Alcohol Use and Burglary*, 79 BRIT. J. ADDICTION 431, 432 (1984); Sharon M. Boles & Karen Miotto, *Substance Abuse and Violence: A Review of the Literature*, 8 AGGRESSION & VIOLENT BEHAV. 155, 156–57, 161–63 (2003); *id.* at 161 (“Alcohol is more closely linked to murder, rape, and assault than any other substance . . . [and] has also been found to be a contributing factor in incest, child molestation, spousal abuse, and other family violence . . .”); Marvin P. Dawkins, *Drug Use and Violent Crime Among Adolescents*, 32 ADOLESCENCE 126 (1997); Fagan, *supra* note 23, at 66 (“The associations between substance use and violence are strong, they have endured over many years, and they are consistent for many different types of violent acts. Alcohol and drug use are associated with more than half of all homicides and a disproportionate share of other violent events including sexual assaults, marital aggression, and serious assaults among strangers.”); Ted R. Miller et al., *Costs of Alcohol and Drug-Involved Crime*, 7 PREVENTION SCI. 333, 333 (2006) (“Alcohol abuse precedes or accompanies approximately one-third to two-thirds of the homicides and serious assaults committed.” (citation omitted)); Matti Virkkunen, *Alcohol As a Factor Precipitating Aggression and Conflict Behaviour Leading to Homicide*, 69 BRIT. J. ADDICTION 149, 153 (1974); Wieczorek, *supra* note 21, at 218 (noting that explanations for the “alcohol–violence nexus” have included a direct biochemical impact of alcohol on the brain, alcohol-induced disinhibition, socio-cultural factors fostering aggressive behavior, and alcohol-caused impairment of cognitive functioning). *But cf.* John W. Welte & Brenda A. Miller, *Alcohol Use by Violent and Property Offenders*, 19 DRUG & ALCOHOL DEPENDENCE 313 (1987) (discussing a study that found no material difference between alcohol use by offenders convicted of violent and property crimes).

²⁵ John M. Macdonald, *Alcoholism as a Medicolegal Problem*, 11 CLEV.-MARSHALL L. REV. 39, 41(1962).

²⁶ For a history of federal drug policy, see, for example, RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION* (1999); BOYUM & REUTER, *supra* note 5, at 5–13; H. WAYNE MORGAN, *DRUGS IN AMERICA: A SOCIAL HISTORY, 1800–1980* (2001); DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* (3d ed. 1999); JAMES L. NOLAN, JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 15–38* (2001); SALLY L. SATEL, *DRUG TREATMENT: THE CASE FOR COERCION 3–14* (1999). The debate over the proper approach to drug use has been ongoing for some time and has continued to this day. *See, e.g.*, *DRUG LEGALIZATION: FOR AND AGAINST* (Rod L. Evans & Irwin M. Berent eds., 1992); JOHN KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* (1983); MARK A.R. KLEIMAN, *AGAINST EXCESS: DRUG POLICY FOR RESULTS* (1992); ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES* (2001); SABET, *supra* note 10; James Q. Wilson, *Against the Legalization of Drugs*, 89 COMMENT. 21 (1990).

been in existence, but it never has accepted moderate use of illegal drugs.²⁷ Yet the American attitude toward the proper treatment of illicit drug use has varied over time. Society has endorsed different explanations for the occurrence of addiction and different methods of treating it. Three theories have predominated, however, although their separate influence has waxed and waned: first, addiction is a physical or psychological problem that is best treated by the medical profession; second, addiction is a character weakness best dealt with by reforming the addict's soul; and, third, addiction is a behavioral problem best handled by the criminal justice system.²⁸ The second theory has always had its champions, but their influence has waxed and waned over time without ever predominating. By contrast, the other theories have greatly influenced public policy. The theory that addiction should be treated medically took hold first, only to be replaced by the behavioral theory that is prevalent today.

The medical approach to addiction predominated late in the nineteenth century and early in the twentieth. Drugs such as opium were often used for medicinal purposes in the nineteenth century. Morphine was used during the Civil War to provide pain relief to wounded soldiers, and addicted soldiers were said to be afflicted with the "army disease."²⁹ Addiction did not generate the same societal condemnation that it now does.³⁰ A typical depiction of an addict was that of the genteel, morphine-addicted mother Mary Tyrone in Eugene O'Neill's semiautobiographical play *Long Day's Journey into Night*: someone pitiful or misguided, not evil.³¹

²⁷ See, e.g., MUSTO, *supra* note 26, at 65–68.

²⁸ See, e.g., *id.* at 65–85; NOLAN, *supra* note 26, at 17–38.

²⁹ MORGAN, *supra* note 26, at 108. Societies have found opium an effective medicine for thousands of years. Opium use has been verified as far back as the Bronze Age in the West and for perhaps five thousand years in China. Opium was noted favorably in *The Iliad*, and it was heralded in the Middle Ages as nature's most effective elixir. GENE M. HEYMAN, ADDICTION: A DISORDER OF CHOICE 23–25 (2009).

³⁰ See, e.g., NOLAN, *supra* note 26, at 17–20, 22. Some have speculated that this sympathetic view of opiate addiction was due to the fact that large numbers of addicts were drawn from the ranks of "the middle and upper classes, respectable people . . ." JOHN C. BURNHAM, BAD HABITS 115 (1993); see also, e.g., TROY DUSTER, THE LEGISLATION OF MORALITY 9 (1971).

³¹ See SATEL, *supra* note 26, at 3. Interestingly, this philosophy may be swinging back around, as there is a very small contingent of scientists arguing for treating post-traumatic stress disorder with MDMA, colloquially known as ecstasy, or other psychoactive drugs (in collaboration with psychotherapy). See, e.g., Michael C. Mithoefer et al., *Durability of Improvement in Post-Traumatic Stress Disorder Symptoms and Absence of Harmful Effects or Drug Dependency After 3,4-methylenedioxymethamphetamine-Assisted Psychotherapy: A Prospective Long-Term Follow-Up Study*, 27 J. PSYCHOPHARMACOLOGY 28 (2012). The psychoactive drug therapy model that some scientists tried to use in the 1970s may receive another look.

Society did not begin to fear and condemn opiate use until early in the twentieth century.³² Since then, the nation has followed a path materially different from the one it has used for alcohol. Beginning with the Harrison Narcotics Tax Act of 1914,³³ the emphasis has been on aggressive use of the criminal justice system to deter and punish drug trafficking and use. Society has apparently concluded that drugs such as heroin and crack cocaine are more addictive, debilitating, and dangerous than alcohol and thus are a greater threat to the social fabric than “demon rum.”³⁴ In fact, for some it is not an exaggeration to say that heroin and crack cocaine, like the plagues that Yahweh rained down on the Egyptians,³⁵ have destroyed lives, splintered families, and ravaged communities through their powerful addictive effects. Atop that, the distribution and use of modern-day illicit drugs such as crack cocaine has led to crimes and violence that victimize individuals and communities, particularly in poor, urban, largely African-American neighborhoods already suffering from economic deprivation and social despair.³⁶

³² See, e.g., NOLAN, *supra* note 26, at 20–26.

³³ Ch. 1, 38 Stat. 785 (1914), *invalidated* by *Linder v. United States*, 268 U.S. 5 (1925).

³⁴ Criminologist James Q. Wilson made that point quite poetically. “Tobacco shortens one’s life, cocaine debases it. Nicotine alters one’s habits, cocaine alters one’s soul.” Wilson, *supra* note 26, at 26. Wilson also rejected the argument that drug use is a victimless crime, arguing that the notion “is not only absurd but dangerous.” *Id.* at 24. He continued:

Even ignoring the fetal drug syndrome, crack-dependent people are, like heroin addicts, individuals who regularly victimize their children by neglect, their spouses by improvidence, their employers by lethargy, and their co-workers by carelessness. Society is not and could never be a collection of autonomous individuals. We all have a stake in ensuring that each of us displays a minimal level of dignity, responsibility, and empathy.

Id.; see also LOWINSON AND RUIZ’S SUBSTANCE ABUSE 994 (Pedro Ruiz & Eric C. Strain eds., 5th ed. 2011) (“Consider that 8.3 million children (11.9% of all children) live in the United States with at least one parent who is dependent on, or abuses alcohol or an illicit drug during the past year, with an estimated 70% of child abuse/neglect cases involving parental use of drugs” (citations omitted)); John Kaplan, *Taking Drugs Seriously*, 92 PUB. INT. 32, 36 (1988) (“This is not an issue to be decided by John Stuart Mill’s ‘simple principle’—that is, by letting each person decide for himself. No nation in the world follows his rule regarding self-harming conduct, and the rule is probably unworkable in a complex, industrial society—particularly one that is a welfare state.”).

³⁵ See *Exodus* 7:14–12:32.

³⁶ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 51 (rev. ed. 2012) (“No one should ever attempt to minimize the harm caused by crack cocaine and the related violence. As David Kennedy correctly observes, ‘[c]rack blew through America’s poor black neighborhoods like the Four Horsemen of the Apocalypse,’ leaving behind unspeakable devastation and suffering.” (quoting DAVID M. KENNEDY, *DON’T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA* 10 (2011)); BOYUM & REUTER, *supra* note 5, at 1 (“The tangible costs of the nation’s drug use are largely—but not exclusively—associated with the minority of drug users who are longstanding and heavy users of cocaine, crack, or

Because use of drugs such as heroin is illegal, it is difficult to know the number of users, the amount they consume, and the cost that their use imposes on the nation.³⁷ Policymakers therefore tend to rely on arrest information provided by the FBI³⁸ and on estimates drawn from several surveys.³⁹ The available evidence indicates that a large number of Americans have used illicit drugs at some point, but most such people desist after a few experimental or recreational uses.⁴⁰ A small percentage of drug

heroin. These users, most of whom reside in urban poverty areas, account for the bulk of drug-related crime, illness, and premature death.”); *id.* at 80 (“Open street markets present numerous opportunities for conflict and violence—disputes over turf, disputes over customers, disputes between dealers and police, simple robbery.”); Larkin, *supra* note 12, at 281–85.

³⁷ The Office of National Drug Control Policy contracted the RAND Corporation to estimate the number of chronic and occasional users of heroin, cocaine, methamphetamine, and marijuana, as well as the expenditure and amount consumed. See RAND CORP., WHAT AMERICA’S USERS SPEND ON ILLEGAL DRUGS, 2000–2010 (2014) available at http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/wausid_results_report.pdf, archived at <http://perma.cc/PFG4-Z98N> [hereinafter WHAT AMERICA’S USERS SPEND]. Informal estimates abound. See, e.g., Norval Morris, *Teenage Violence and Drug Use*, 31 VAL. U. L. REV. 547, 549 (1997) (“Each year nicotine kills some 300,000; alcohol kills at least 30,000; the other drugs kill fewer than 3000.”). A related issue is the abuse of lawfully prescribed and possessed prescription drugs—especially opiate painkillers, sedatives and tranquilizers, and stimulants. See ERIN BAGALMAN ET AL., CONG. RESEARCH SERV., R43559, PRESCRIPTION DRUG ABUSE (2014), available at <http://claad.org/wp-content/uploads/2014/05/CRS-Drug-Abuse-Report-5-2014.pdf>, archived at <http://perma.cc/7V2T-FDQG>; EXEC. OFFICE OF THE PRESIDENT OF THE UNITED STATES, EPIDEMIC: RESPONDING TO AMERICA’S PRESCRIPTION DRUG ABUSE CRISIS (2011), available at http://www.whitehouse.gov/sites/default/files/ondcp/issues-content/prescription-drugs/rx_abuse_plan.pdf, archived at <http://perma.cc/4LSB-3KJR>; Robert L. DuPont, *Prescription Drug Abuse: An Epidemic Dilemma*, 42 J. PSYCHOACTIVE DRUGS 127 (2010); Neil Kirschner et al., *Prescription Drug Abuse: Executive Summary of a Policy Position Paper from the American College of Physicians*, 160 ANNALS INTERNAL MED. 198 (2014). It is difficult to estimate the number of people who abuse prescription drugs. Possession of those drugs is legal, and abusers may not become involved with the criminal justice system unless they crash a motor vehicle while intoxicated.

³⁸ In 2012, for example, law enforcement made 1.6 million arrests for “[d]rug abuse violations.” See FBI, *supra* note 20, at tbl. 29.

³⁹ See, e.g., BOYUM & REUTER, *supra* note 5, at 15–20. Each inquiry draws on a different source. The National Survey on Drug Use and Health samples residents age twelve or older from known residences. Monitoring the Future samples high school students. The Drug Abuse Warning Network collects drug-related hospital emergency room admissions and deaths in major cities. *Id.* At one time, the Arrestee Drug Abuse Monitoring program captured arrest drug testing data from various cities, but the federal government has not continuously funded it, and as of this date it no longer exists. See Beau Kilmer & Jonathan Caulkins, *Hard Drugs Demand Solid Understanding*, USA TODAY (Mar. 8, 2014, 6:02 AM), <http://www.usatoday.com/story/opinion/2014/03/08/heroin-abuse-hoffman-research-column/6134337/>, archived at <http://perma.cc/4TVG-6RUE>.

⁴⁰ See MIRON, *supra* note 12, at 67 & tbl.5.1; Steven D. Levitt, *Review of Drug War Heresies by MacCoun and Reuter*, 41 J. ECON. LITERATURE 540, 540 (2003).

users accounts for the vast share of the drugs consumed and the resulting harm.⁴¹ According to one estimate, perhaps 20% of all drug users are responsible for 80% of the total consumed.⁴² Most who continue illicit drug use after a few experiments eventually abandon the practice.⁴³

Marijuana is the most commonly used illicit drug.⁴⁴ Only a minority of users becomes addicted to heroin, cocaine, or crack.⁴⁵ Methadone and Buprenorphine are available pharmacological treatments for a heroin addiction,⁴⁶ but there is as of yet no approved medication for the treatment of an addiction to marijuana, to stimulants such as cocaine or methamphetamine, or to multiple substances.⁴⁷

Studies also have established a strong association between drug use and some crimes other than drug use itself.⁴⁸ It is uncertain whether that relationship is due to the pharmacological properties of different drugs themselves, a user's need for money to continue purchasing drugs, the business practices of the drug trade, some combination of those factors, or other considerations, such as the environment in which drugs are used or in which a drug user lives.⁴⁹ Nevertheless, studies have concluded that

⁴¹ See, e.g., Arthur J. Lurigio & James A. Swartz, *The Nexus Between Drugs and Crime: Theory, Research, and Practice*, 63 FED. PROBATION 67, 67 (1999) ("Much of the harm and costs associated with illicit drug use, such as crime, lost work productivity, medical problems, and the spread of HIV, can be attributed to chronic, high-intensity users (i.e., those who use illicit drugs on a daily basis or multiple times per week during periods of active use).").

⁴² See BOYUM & REUTER, *supra* note 5, at 19.

⁴³ See *id.* at 84.

⁴⁴ An estimated 125 to 200 million people use marijuana each year. See Wayne Hall & Louisa Degenhardt, *Adverse Health Effects of Non-medical Cannabis Use*, 374 LANCET 1383, 1383 (2009) (the UN Office on Drugs and Crime estimated that in 2006 cannabis was used by 166 million adults). Marijuana is the most widely used illegal drug in the United States; approximately 40% of the population has tried it. See R. Andrew Sewell et al., *The Effect of Cannabis Compared with Alcohol on Driving*, 18 AM. J. ON ADDICTIONS 185, 185 (2009).

⁴⁵ See, e.g., BOYUM & REUTER, *supra* note 5, at 14–22.

⁴⁶ See *infra* note 75 and accompanying text.

⁴⁷ See, e.g., EXEC. OFFICE OF THE PRESIDENT OF THE UNITED STATES, NATIONAL DRUG CONTROL STRATEGY 22 (2013), http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/ndcs_2013.pdf, archived at <http://perma.cc/UL3D-ZUMM>; MUSTO, *supra* note 26, at 254.

⁴⁸ For an exhaustive analysis of that relationship and the literature discussing it, see OFFICE OF NAT'L DRUG CONTROL POL'Y, IMPROVING THE MEASUREMENT OF DRUG-RELATED CRIME (2013), available at http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/drug_crime_report_final.pdf, archived at <http://perma.cc/333V-VENW>.

⁴⁹ Paul J. Goldstein articulated that three-part division in *The Drugs/Violence Nexus: A Tripartite Conceptual Framework*, 39 J. DRUG ISSUES 143 (1985). It has become the standard analytical framework since then, see, e.g., Boles & Miotto, *supra* note 24, at 159–60, although it also has been faulted as overly simplifying the issue, see, e.g., Trevor Bennett &

offenders are more likely to use drugs than the law-abiding,⁵⁰ and a large amount of property and violent crime is linked with, even if it is not strictly caused by,⁵¹ drug use.⁵² Different drugs also have different associations

Katy Holloway, *The Causal Connection Between Drug Misuse and Crime*, 49 BRIT. J. CRIMINOLOGY 513, 514, 527–29 (2009). For the argument that illicit drug use is a voluntary, albeit self-destructive, choice, see HEYMAN, *supra* note 29.

⁵⁰ See, e.g., BOYUM & REUTER, *supra* note 5, at 14–15; *id* at 82 (“Persons under the supervision of the criminal justice system account for the lion’s share of cocaine and heroin consumption in volume terms . . .”); Lurigio & Swartz, *supra* note 41, at 67–68; *infra* note 52.

⁵¹

Statistics show that much crime, both property and violent, . . . is associated with drug use, particularly dependence. However, causal attribution is difficult. The behavioral problems of the drug-dependent are often inchoate prior to drug use, and the substantial worsening of these problems that accompanies use is at least partly the consequence of policies that marginalize users and make habits costly to support, and not simply an effect of the drugs themselves.

BOYUM & REUTER, *supra* note 5, at 14–15; see also, e.g., NAT’L INST. OF JUSTICE, TOWARD A DRUGS AND CRIME RESEARCH AGENDA FOR THE 21ST CENTURY 4–5 (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/194616.pdf>, archived at <http://perma.cc/B2GZ-RYLQ>; KAPLAN, *supra* note 26, at 2–57; Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. (forthcoming 2015), available at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2414202, archived at <http://perma.cc/8ZJ8-YPU6> (arguing that no evidence supports the connection between drugs and violent crime); Bruce L. Benson, *Escalating the War on Drugs: Causes and Unintended Consequences*, 20 STAN. L. & POL’Y REV. 293, 350–51 (2009); Boles & Miotto, *supra* note 24, at 156, 165–69; Lurigio & Swartz, *supra* note 41, at 69 (“[T]he evidence that drug use alone inexorably leads to criminal activity is weak.”); Eric J. Workowski, *Criminal Violence and Drug Use*, 37 J. OFFENDER REHABILITATION 109, 118, 120 (2003) (finding “a weak relationship between substance abuse and violence,” but a “solid correlation between poly-drug use and poly-criminality”).

⁵²

Intoxication and addiction can induce violent behavior or otherwise lead to crime by weakening judgment and self-control. Users commit crime to obtain drug money, in part because their habits reduce opportunities for legitimate work. Drug markets—and particularly open drug markets—contribute to homicides and other violent crime, partly as a result of competition among dealers, but also because of gun acquisition related to dealing. Drug selling also involves hurried transactions without documents to back up uncertain memories and has no civil justice system to peacefully resolve the resulting disputes among a population with weak self-control. Lastly, involvement in drug use and drug selling can change people’s lifestyles and social ties in various ways that make criminal activity more likely.

BOYUM & REUTER, *supra* note 5, at 28 (internal citations omitted); see also, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring in part and concurring in the judgment). Here too there is a sizeable body of studies and reports on the subject. See, e.g., NAT’L INST. ON DRUG ABUSE, U.S. DEP’T OF HEALTH & HUMAN SERVS., PRINCIPLES OF DRUG ABUSE TREATMENT FOR CRIMINAL JUSTICE POPULATIONS: A RESEARCH-BASED GUIDE 12 (2014) [hereinafter NIDA DRUG ABUSE GUIDE], available at http://www.drugabuse.gov/sites/default/files/txcriminaljustice_0.pdf, archived at <http://perma.cc/4JFN-G4BK>; Trevor Bennett & Katy Holloway, *The Association Between Multiple Drug Misuse and Crime*, 49 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 63 (2005); Lurigio & Swartz, *supra* note 41, at 69 (“Evidence does . . . support the notion that illegal drug use intensifies

with crime. For example, users of marijuana and heroin are less likely to commit crimes—other than drug use, of course—than are crack cocaine users.⁵³

B. THE CONTEMPORARY RESPONSES

Intoxication, whether induced by alcohol or other drugs, can become an issue in the criminal justice system in several ways. The most basic one is when intoxication itself is a crime. Alcohol- or drug-induced intoxication can constitute or contribute to a crime if a person is intoxicated in public⁵⁴ or drives a motor vehicle,⁵⁵ even if he is a chronic alcoholic or drug addict.⁵⁶ A related issue is whether intoxication can serve as a defense to a crime. The criminal justice system has gone back and forth on the issue of whether voluntary intoxication should serve as a defense to a crime, particularly if the offense requires the state to prove the existence of a mental state that intoxication can defeat. The traditional rule was that intoxication was not a defense—if anything, it aggravated a crime—but the more recent practice is to treat it as a defense to a specific intent crime.⁵⁷

criminal activity among drug-prone individuals.”); Wieczorek, *supra* note 21, at 218 (stating that most drug-related crime is “nonviolent, economic crime performed to gain the money required for survival and to purchase more drugs,” but also noting that “[s]ystemic violence” is associated with “territorial disputes among dealers, retribution for either bad debts or bad drugs, and robberies of dealers”).

⁵³ See, e.g., BOYUM & REUTER, *supra* note 5, at 28; Boles & Miotto, *supra* note 24, at 156, 165–68; Dawkins, *supra* note 24, at 403–04; Levitt, *supra* note 38, at 542. Several explanations have been offered for that assessment. Among them is that marijuana and heroin have pharmacological properties that induce a sense of calm, while cocaine can trigger violence, and that violence is part-and-parcel of the crack and meth trade. See, e.g., BOYUM & REUTER, *supra* note 5, at 28; Boles & Miotto, *supra* note 24, at 165–66. Other drugs, such as phencyclidine (PCP) or hallucinogens can cause psychotic and violent reactions or can aggravate the effects of an underlying pathology. See Boles & Miotto, *supra* note 24, at 168–69.

⁵⁴ See, e.g., VA. CODE ANN. § 4.1-308 (Supp. 2013); *Powell v. Texas*, 392 U.S. 514 (1968) (upholding state public intoxication law over due process challenge).

⁵⁵ See, e.g., VA. CODE ANN. § 18.2-266 (Supp. 2013).

⁵⁶ See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* §10.4.5, at 846–52 (1978); WAYNE R. LAFAVE, *CRIMINAL LAW* § 9.5(i), at 509–11 (5th ed. 2010).

⁵⁷ See, e.g., *United States v. Cornell*, 25 F. Cas. 650, 657–58 (C.C.R.I. 1820) (No. 14,868); *State v. Kale*, 32 S.E. 892 (N.C. 1899); *Rex v. Meakin*, (1836) 173 Eng. Rep. 131 (N.P.) 132; 7 Car. & P. 297; *Pearson’s Case*, (1835) 168 Eng. Rep. 1108 (N.P.) 1108; 2 Lewin 144; 4 WILLIAM BLACKSTONE, *COMMENTARIES* *25–26; 1 MATTHEW HALE, *HISTORY OF THE PLEAS OF THE CROWN* *32–*33 (1736); FRANCIS WHARTON, *A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES* 95 (1932). Over time, some states permitted a defendant to raise intoxication as a defense to a crime requiring proof of specific intent. See Jerome Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045 (1944); Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482 (1997). For a discussion of the difference between “specific

The federal constitution, however, does not require that a state permit voluntary intoxication to be a defense to even a specific intent crime.⁵⁸ The result is that the issue is a matter of statutory or common law and may vary from jurisdiction to jurisdiction.

The state and federal governments approach the problem of illicit drug possession and use differently than alcohol. Federal antidrug programs can be divided into two complementary activities known in the parlance as “supply-side” and “demand-side” measures.⁵⁹ Supply-side measures are designed to make it more difficult to produce, import, or distribute drugs through international eradication efforts, interdiction, and domestic law enforcement. Demand-side measures seek to reduce a person’s desire for and ability to use drugs through prevention and treatment (which sometimes occurs after the person’s arrest). For more than three decades, the majority of funds have been devoted to supply-side programs.⁶⁰

Domestically, the battle plan first put into effect by the Harrison Narcotics Tax Act of 1914 still drives American drug policy today.⁶¹ Current national policy is to treat drug use, unlike alcohol abuse, as a matter better handled by the criminal justice system than by individuals, private organizations, communities, or the medical profession.⁶² Federal law prohibits the distribution or possession of opiates and certain other potentially dangerous drugs except as prescribed by a licensed physician.⁶³

intent” and “general intent” crimes, see, for example, LAFAVE, *supra* note 50, § 5.2(e), at 267–70.

⁵⁸ See *Montana v. Engelhoff*, 518 U.S. 37 (1996) (ruling that a defendant does not have a right under the Due Process Clause to present an intoxication defense even to a crime requiring proof of mens rea).

⁵⁹ See BOYUM & REUTER, *supra* note 5, at 12–13 (explaining the differences between supply-side and demand-side measures).

⁶⁰ See *id.* at 8–9, 36, 45–69.

⁶¹ See generally *Gonzales v. Raich*, 545 U.S. 1, 10–15 (2005) (summarizing the history of federal drug regulation).

⁶² See, e.g., BOYUM & REUTER, *supra* note 5, at 2. The Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242, Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, creates five “schedules” of controlled substances whose manufacture, distribution, or possession is regulated or prohibited. See 21 U.S.C. § 812 (2006); *Touby v. United States*, 500 U.S. 160 (1991). Schedule I controlled substances have a high potential for abuse, no currently accepted domestic medical use, and no accepted safe use. See 21 U.S.C. § 812(b)(1)(A)–(C) (2006). A Schedule II controlled substance is a drug that has a high potential for abuse, has a currently accepted domestic medical use in treatment, and that, if abused, may lead to severe psychological or physical dependence. Heroin is a Schedule I controlled substance, while morphine is listed on Schedule II.

⁶³ The Anti-Drug Abuse Act of 1988 created the Office of National Drug Control Policy (ONDCP) within the Executive Office of the President and instructed the ONDCP Director to design federal policy. The current policy statement can be found at EXEC. OFFICE OF THE PRESIDENT OF THE UNITED STATES, *supra* note 47.

Some drugs, such as heroin, may not be used at all.⁶⁴ Federal law severely punishes trafficking in certain types of drugs. The maximum available penalty in some instances is life imprisonment,⁶⁵ and several laws, such as the ones dealing with drugs like heroin and cocaine, impose stiff mandatory minimum terms of incarceration.⁶⁶ Recently, several members of Congress, as well as sitting and former members of the federal judiciary, have expressed an interest in reexamining the severity of the current mandatory-minimum sentencing scheme.⁶⁷ That incremental change, however, is as far as elected federal officials have been willing to go to date. No one currently on Capitol Hill or in the White House has stepped forward to support a fundamental reexamination and abandonment of current federal drug policy in favor of a strategy of across-the-board decriminalization or legalization.⁶⁸

⁶⁴ See *supra* note 62.

⁶⁵ See, e.g., 21 U.S.C. § 848(b) (2006).

⁶⁶ See, e.g., 21 U.S.C. § 841(b) (2006); *Chapman v. United States*, 500 U.S. 453, 461 (1991); Larkin, *supra* note 12, at 242.

⁶⁷ See, e.g., *United States v. Young*, No. 13-5715, slip op. at 13–19 (6th Cir. Sept. 11, 2014) (Stranch, J., concurring); Paul Cassell, U.S. District Judge, Statement on Behalf of the Judicial Conference of the United States Before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security, in 19 FED. SENT'G REP. 344 (2007); Gerard E. Lynch, *Sentencing Eddie*, 91 J. CRIM. L. & CRIMINOLOGY 547 (2001). Senators Patrick Leahy and Rand Paul introduced the Justice Safety Valve Act of 2013, S. 619, 113th Congress (2013), which would grant district courts authority to sentence below any federal mandatory minimum sentence if the court found that doing so was necessary to avoid an injustice. Senators Dick Durbin and Mike Lee introduced the Smarter Sentencing Act of 2013, S. 1410, 113th Congress (2013), a considerably narrower bill that is limited to federal mandatory minimums imposed only for drug offenses. Neither bill would reduce the maximum penalty authorized by federal law for drug trafficking; they merely grant district courts different amounts of discretion not to impose a mandatory minimum sentence. See EVAN BERNICK & PAUL J. LARKIN, JR., HERITAGE FOUND., LEGAL MEMORANDUM NO. 114: RECONSIDERING MANDATORY MINIMUM SENTENCES: THE ARGUMENTS FOR AND AGAINST POTENTIAL REFORMS (Feb. 10, 2014), available at http://thf_media.s3.amazonaws.com/2014/pdf/LM114.pdf, archived at <http://perma.cc/Z8S6-DRQ5>. The acts did not become law in the 113th Congress, but have been reintroduced in the 114th Congress. See Justice Safety Valve Act of 2015, S. 353, 114th Cong. (2015); the Smarter Sentencing Act of 2015, S. 502, 114th Cong. (2015).

⁶⁸ There are several issues involved here. Some commentators have argued in favor of reconsidering federal drug policy and legalizing or decriminalizing all or some drugs currently treated as controlled substances. See, e.g., DUKE & GROSS, *supra* note 5. A related issue involves the legalized prescription of marijuana for medical use. Eighteen states and the District of Columbia authorize a physician to recommend marijuana to a patient for treatment purposes. See, e.g., SABET, *supra* note 10, at 62. Four states, Alaska, Colorado, Oregon, and Washington, as well as the District of Columbia recently have chosen to decriminalize possession of small amounts of marijuana. See, e.g., TODD GARVEY & BRIAN T. YEH, CONG. RESEARCH SERV., R43034, STATE LEGALIZATION OF RECREATIONAL MARIJUANA: SELECTED LEGAL ISSUES (2014), available at <http://fas.org/sgp/crs/misc/R43034.pdf>, archived at <http://perma.cc/A2FK-E45C>; Dan Merica, *Oregon, Alaska, and*

To date, treatment of addiction has been a part of the federal response to illicit drug use. Shortly after the Harrison Narcotics Tax Act went into effect, the Treasury Department took the position that physicians could not prescribe maintenance doses of opiates for addicts, and the Supreme Court agreed with the government's interpretation of the statute.⁶⁹ Realizing that immediate compulsory desistance would prove impossible for many addicts, the Department of the Treasury began in 1919 to urge Congress to create "federal narcotic farms" where users could be confined and treated.⁷⁰

Washington, D.C. Legalize Marijuana, CNN (Nov. 5, 2014, 2:39 PM), <http://www.cnn.com/2014/11/04/politics/marijuana-2014/index.html>, archived at <http://perma.cc/9ES6-K6V5>. See generally Paul J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 AM. CRIM. L. REV. 453 (2015) (discussing the effects of those initiatives on highway safety). The Justice Department has chosen not to enforce federal law aggressively in such jurisdictions. In 2009, the Justice Department stated that it would not strictly enforce federal law against patients and caregivers, but would continue to prosecute large businesses or individuals using the cover of a marijuana dispensary as a sham for drug trafficking or allied financial crimes, such as money laundering. See, e.g., Memorandum for Selected United States Attorneys from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf>, archived at <http://perma.cc/4AEE-8PL4>; Memorandum for United States Attorneys from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), available at <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf>, archived at <http://perma.cc/XG92-XRW2>; Memorandum for United States Attorneys from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>, archived at <http://perma.cc/GEN8-N9QU>; Memorandum for United States Attorneys from James M. Cole, Deputy Att'y Gen'l, U.S. Dep't of Justice, on Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014), available at [http://www.justice.gov/usao/waw/press/newsblog%20pdfs/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%20%2014%2014%20\(2\).pdf](http://www.justice.gov/usao/waw/press/newsblog%20pdfs/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%20%2014%2014%20(2).pdf), archived at <http://perma.cc/Z4PX-QVME>.

In Section 538 of the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 113th Cong. (2014), Congress made it clear that the Justice Department cannot use federal funds to enforce the Controlled Substances Act of 1970 in a manner that would "prevent" identified states "from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."

⁶⁹ The Harrison Act authorized a physician to prescribe opiates for a patient "in the course of his professional practice . . ." *United States v. Doremus*, 249 U.S. 86, 91 (1919). Beginning in 1919, the Treasury Department cracked down on physicians who dispensed heroin or morphine, arguing that the maintenance of an addict on opiates exceeded the boundaries of professional medical judgment. MUSTO, *supra* note 26, at 64, 121–34. The Supreme Court agreed with the government in *Webb v. United States*, 249 U.S. 96, 99–100 (1919), dismissively stating that "to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required."

⁷⁰ See, e.g., MORGAN, *supra* note 26, at 135 ("By the mid-1920s, narcotics violators were

The Porter Narcotic Farm Act of 1929⁷¹ authorized the establishment of “narcotic farms,” specialized treatment facilities for addicts. The government opened the first center in Lexington, Kentucky in 1935 and the second in Fort Worth, Texas, three years later.⁷² Also known as “narcotics hospitals” or “Public Health Service Hospitals,” these facilities continued in operation into the 1970s.⁷³ They were generally deemed unsuccessful, however, because, rather than serve as treatment facilities, they were “glorified prisons for drug addicts.”⁷⁴ The 1960s witnessed the beginning of heroin treatment using methadone, a synthetic, long-acting opiate that blocked both the euphoric feelings caused by heroin use and the unpleasant withdrawal symptoms caused by its discontinuance.⁷⁵ In the 1970s, the Nixon Administration developed a diversion program called the Treatment Alternatives to Street Crime (TASC) Initiative (now Treatment Alternatives for Safe Communities).⁷⁶ Today, TASC programs primarily serve as

the dominant element in federal penitentiaries”); MUSTO, *supra* note 26, at 151–55, 184, 204–06; SATEL, *supra* note 26, at 5. Fearing that addicts would turn to crime to support their habits, local officials in some large cities established opiate clinics to dispense morphine and heroin. There were forty such clinics by 1920. The federal government then extended its total abstinence policy to those clinics, which disappeared by 1925. *See* MUSTO, *supra* note 26, at 151–82; SATEL, *supra* note 26, at 4.

⁷¹ Act of Jan. 29, 1919, ch. 82, 45 Stat. 1085 (codified at 21 U.S.C. §§ 221–37 (1934)) (repealed 1944).

⁷² *See* NOLAN, *supra* note 26, at 32; SATEL, *supra* note 26, at 5.

⁷³ *See* NOLAN, *supra* note 26, at 32; Note, *Developments in the Law—Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1902 (1998) [hereinafter *Incarceration Alternatives*].

⁷⁴ NOLAN, *supra* note 26, at 32. Approximately 70% of the patients signed out of treatment against medical advice before completing the six-to-twelve month treatment regimen, and 90% had relapsed within a few years. SATEL, *supra* note 26, at 5–6. The state and federal governments made a run at treatment in the 1960s and 1970s following the Supreme Court’s decision in *Robinson v. California*, 370 U.S. 660 (1962). In *Robinson*, the Court held unconstitutional the criminal punishment of drug users for their status as narcotic addicts, but suggested that the state could enroll addicts in compulsory treatment programs. The federal government and states sought to address addiction through civil commitment in lieu of criminal prosecution. *See, e.g.*, Narcotic Addict Rehabilitation Act of 1966, Pub. L. No. 89-793, 80 Stat. 1438. Compulsory civil commitment programs for drug addicts did not prove very effective, however, and the effort was largely abandoned. *See, e.g.*, MUSTO, *supra* note 26, at 239; NOLAN, *supra* note 26, at 36.

⁷⁵ *See, e.g.*, KAPLAN, *supra* note 26, at 213–25; MUSTO, *supra* note 26, at 237–38; SATEL, *supra* note 26, at 10. Additional drug treatments are also available today for opiate addiction. *See* NIDA DRUG ABUSE GUIDE, *supra* note 52, at 24; LESLIE ANN BA & WILLIE TOMPKINS, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., MEDICATION-ASSISTED TREATMENT FOR OPIOID ADDICTION: 2010 STATE PROFILES 5–6 (2011), available at http://dpt.samhsa.gov/pdf/MedicationAssistedTreatmentForOpioidAddiction_2010StateProfiles03.pdf, archived at <http://perma.cc/NQZ4-5HXQ>; THE TREATMENT OF OPIOID DEPENDENCE (Eric C. Strain & Maxine L. Stitzer eds., 2006).

⁷⁶ *See* Drug Addiction and Treatment Act of 2000, tit. XXXV, § 3502, of the Children’s

bridges between the criminal justice system and drug treatment programs.⁷⁷ Finally, federal district courts can require an offender to seek drug treatment as a condition of probation or parole.⁷⁸

More often today, alcohol and illicit drug intoxication have become a dispositional issue because there is disagreement about whether incarceration, treatment, some combination of the two, or something else is the best sentencing option for chronic alcoholics and drug addicts. The traditional approaches to dealing with DUI or drug offenders,⁷⁹ for example, have included use of the criminal justice system to require administration of an alcohol- or drug-blocking substance,⁸⁰ counseling,⁸¹ treatment,⁸² probation,⁸³ and incarceration.⁸⁴ Additional options have included

Health Act of 2000, Pub. L. No. 106-310, 114 Stat. 1101; Narcotic Addict Treatment Act of 1974, Pub. L. No. 93-281, 88 Stat. 124; Drug Abuse Office and Treatment Act, Pub. L. No. 92-255, 86 Stat. 65 (1972) (codified as amended at 21 U.S.C. §§ 1101–94 (1994)); BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, TREATMENT ALTERNATIVES TO STREET CRIME: TASC PROGRAMS 5 (1992), available at <https://www.ncjrs.gov/pdffiles1/Digitization/129759NCJRS.pdf>, archived at <https://perma.cc/BG47-6XPY>; EXEC. OFFICE OF THE PRESIDENT OF THE UNITED STATES, *supra* note 47, at 29–30.

⁷⁷ See *Incarceration Alternatives*, *supra* note 73, at 1903.

⁷⁸ See 18 U.S.C. § 3563(a)(3) & (5) (2012) (requiring an offender to refrain from the possession or use of a controlled substance and to submit to drug testing); *id.* § 3563(b)(9) (authorizing a district court to require an offender to “undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, . . . and remain in a specified institution if required for that purpose”).

⁷⁹ See generally Jonathan P. Caulkins & Robert L. DuPont, Editorial, *Is 24/7 Sobriety a Good Goal for Repeat Driving Under the Influence (DUI) Offenders?*, 105 ADDICTION 575, 575 (2010) (summarizing traditional approaches for DUI).

⁸⁰ The drug Antabuse has been used since 1948 for treatment of alcoholism. Some courts have required DUI offenders to use it in order to keep them from drinking and driving. Antabuse, however, can have a serious effect on anyone who consumes alcohol. Taken once daily, it sickens a person who consumes alcohol and can even result in death. See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., EVALUATING TRANSDERMAL ALCOHOL MEASURING DEVICES 5 (2007), available at <http://www.nhtsa.gov/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/810875.pdf>, archived at <http://perma.cc/SE83-HTEE>; DUPONT, *supra* note 8, at 130–31; Macdonald, *supra* note 25, at 43. Methadone has been used since the 1960s for the treatment of a heroin addiction because it blocks both the euphoric feeling that heroin creates and the pangs of heroin withdrawal. See *supra* note 75 and accompanying text.

⁸¹ See, e.g., CAL. CODE REGS. tit. 9, ch. 3, sub ch. 1–4, §§ 9795–9886 (2014).

⁸² See WHAT AMERICA'S USERS SPEND, *supra* note 37, at 22–28 (estimating drug treatment admissions from 2000–2010).

⁸³ See, e.g., 18 U.S.C. § 3563(b)(9) (2006) (as a discretionary condition of probation, an offender can be required to undergo treatment for alcohol dependency).

⁸⁴ See, e.g., 23 U.S.C. § 164(a) & (b) (2006). Another option is to require offenders to listen to the stories of accident survivors or families of victims killed in substance-related vehicle crashes, known as “victim impact panels.” See Patricia L. Dill & Elisabeth Wells-Parker, *Court-Mandated Treatment for Convicted Drinking Drivers*, 29 ALCOHOL RES. &

mandatory alcohol or drug treatment programs, suspension or revocation of an offender's driver's license, seizure of his or her vehicle, and compulsory use of an alcohol breathalyzer interlock device, which prevents a vehicle from being started if the driver tests positively for alcohol.⁸⁵ The government can impose requirements such as those on an offender as a condition of probation or parole.⁸⁶ The theory underlying probation and parole has been that the fear of having his conditional release revoked and being imprisoned will deter an offender from violating the conditions of his release, a deterrent that was seen as being particularly effective if the offender faced a lengthy term of imprisonment.⁸⁷

Yet all of those options have drawbacks. Alcohol abusers can refuse to take alcohol blockers or can switch to another intoxicant.⁸⁸ Incarceration is expensive⁸⁹ and, contrary to popular assumptions, may not effectively deter repeat DUI offenses.⁹⁰ License suspension or revocation can cost an

HEALTH 41, 42 (2006).

⁸⁵ See, e.g., 23 U.S.C. § 164(a)(4); Caulkins & DuPont, *supra* note 79, at 575. Michigan adopted a "DWI/sobriety court ignition interlock pilot project" in 2011, and the project is still in existence today. See, e.g., MICH. COMP. LAWS § 600.1084 (2014).

⁸⁶ See, e.g., JOAN PETERSILIA, REFORMING PROBATION AND PAROLE IN THE 21ST CENTURY 154–56 (2002); Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 311 n.49 (2013). An offender placed on probation is legally under government control and therefore is subject to numerous restrictions and to the supervision of a probation officer and the sentencing court. See, e.g., *United States v. Knights*, 534 U.S. 112 (2001) (ruling that the Fourth Amendment permits suspicion-based searches of probationers). Similar rules apply to parolees. See, e.g., *Samson v. California*, 547 U.S. 843 (2006) (ruling that the Fourth Amendment permits suspicionless searches of parolees); Larkin, *supra*, at 311–12. The intensity of probation or parole supervision varies from rigorous monitoring to a simple call-in requirement to report the status quo to a probation or parole officer. Violation of a condition of release can lead to revocation of probation or parole. See, e.g., 18 U.S.C. §§ 3564(e) & 3465 (2006) (probation revocation); Larkin, *supra*, at 311–12 (parole revocation).

⁸⁷ See, e.g., PETERSILIA, *supra* note 86, at 28. Another possibility is the use of "DUI courts," which are patterned after "drug courts." See, e.g., Dill & Wells-Parker, *supra* note 84, at 47.

⁸⁸ See DUPONT, *supra* note 8, at 130–31.

⁸⁹ See, e.g., Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1, 12–17 (2013) (discussing nationwide incarceration costs); NAT'L INST. ON DRUG ABUSE, U.S. DEP'T HEALTH & HUMAN SERVS., NO. 12-4180, PRINCIPLES OF DRUG ADDICTION TREATMENT: A RESEARCH-BASED GUIDE 13, available at http://www.drugabuse.gov/sites/default/files/podat_1.pdf, archived at <https://perma.cc/Z7P6-YXXL?type=pdf> ("[T]he average cost for 1 full year of methadone maintenance treatment is approximately \$4,700 per patient, whereas 1 full year of imprisonment costs approximately \$24,000 per person.").

⁹⁰ A study of California cases concluded that the most severe penalty for DUI—incarceration—is ineffective at preventing repeat offenses. See David J. DeYoung, *Research Report: An Evaluation of the Effectiveness of Alcohol Treatment, Driver License Actions and Jail Terms in Reducing Drunk Driving Recidivism in California*, 92 ADDICTION 989, 996

offender his job, which immediately harms his family and the public through lost income and which may, over time, create additional victims if the offender commits new offenses to compensate for lost money. Moreover, license revocation or suspension is an imperfect deterrent because many offenders will take the risk of being arrested for driving without a license rather than lose their job or quit drinking.⁹¹ Substance abuse treatment is not always available.⁹² Where it does exist, treatment (especially on an in-patient basis) can be resource-intensive and costly.⁹³ In

(1997) (“[T]he first offender analyses showed that subjects receiving jail had, on average, almost double the number of DUI reconvictions as those assigned to first offender treatment programs plus license restriction.”).

⁹¹ Email from Robert DuPont, President, Inst. for Behavior & Health, to author (Nov. 15, 2014, 12:14 PM EST) (on file with the *Journal*) (hereinafter DuPont Email).

⁹² See, e.g., OFFICE OF NAT’L DRUG CONTROL POL’Y, FACT SHEET: A 21ST CENTURY DRUG POLICY 2 (2013) [hereinafter ONDCP 2013 FACT SHEET], available at http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/2013_strategy_fact_sheet.pdf (“Of the 21.6 million Americans aged 12 or older who needed treatment for an illicit drug or alcohol use problem in 2011, only 2.3 million (10.8 percent) received it.”), archived at <http://perma.cc/4GCF-U7UK>; NIDA DRUG ABUSE GUIDE, *supra* note 52, at 12 (fewer than 20% of state and federal prisoners needing drug abuse treatment received it); *id.* at 13 (“Not only is there a gap in the availability of these services for offenders, but often there are few choices in the types of services provided.”); BOYUM & REUTER, *supra* note 5, at 63 tbl.3-3, 64; Kaplan, *supra* note 34, at 49 (“In many cities there is a months-long wait for those who want to enter a drug-treatment program; this is a serious problem, considering that the desire to reform is often ephemeral, and disappears if it cannot be acted upon at once.”). Nonetheless, the so-called “treatment gap” is subject to criticism on several grounds: estimates sometimes assume that treatment should be available for everyone who *needs* it, rather than who *seeks* it; most deemed in need of treatment are marijuana users, rather than cocaine, crack, or heroin addicts, which are far more serious problems; and estimates may not distinguish between “a criminally active crack addict and a gainfully employed computer programmer with a marijuana habit.” BOYUM & REUTER, *supra* note 5, at 64.

⁹³ Standard in-patient drug treatment involves a twenty-eight day regimen. Primary treatment can include an intensive, multidisciplinary range of services: psychosocial services designed to assist patients establish abstinence; psychoeducational activities to help them understand their addiction; psychotherapeutic interventions to help them overcome guilt or shame and to accept their situation without minimizing or denying it or attempting to bargain with therapists; and cognitive-behavioral interventions to help them manage their cravings and identify substance-use triggers. Depending on the severity of a patient’s illness and the medical necessity for particular treatment services, substance abuse treatment can be provided in residential inpatient settings, partial hospitalization, intensive outpatient settings, and group self-help programs, such as twelve-step programs. See, e.g., NAT’L INST. ON DRUG ABUSE, NO. 11-5316, PRINCIPLES OF DRUG ABUSE TREATMENT FOR CRIMINAL JUSTICE POPULATIONS (rev. ed. Apr. 2014), available at http://www.drugabuse.gov/sites/default/files/txcriminaljustice_0.pdf, archived at <http://perma.cc/PR2Z-TGZM>; DUPONT, *supra* note 8, at 310–11, 319–21, 328; DRUG TESTING, *supra* note 3, at 50. At one time, insurance companies could refuse to pay for court-ordered substance abuse treatment. See, e.g., Dill & Wells-Parker, *supra* note 84, at 46. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at scattered sections of the U.S. Code), however, characterizes treatment for substance use disorders as an essential health benefit. See Office

any event, treatment is no guarantee of success.⁹⁴ A technological solution like an alcohol interlock device will not work if an offender disables it, persuades someone else to take the test, uses a different vehicle, or switches from alcohol to illicit drugs.⁹⁵

Moreover, some experts believe that technological solutions cannot resolve the root problem. In their view, impaired driving is simply one consequence or manifestation of a person's addiction to alcohol or illegal drugs, an addiction that damages that person—along with his family—whether or not he drives, takes a bus, or walks. Helping someone deal with that addiction and remain clean and sober every hour of every day is a more difficult goal, but it ultimately is one that produces greater personal and societal benefits than merely keeping someone who spent too much time at happy hour from getting behind the wheel.⁹⁶

The practical problems involved in enforcing such conditions, however, are considerable. Probation and parole offices often are woefully underfunded.⁹⁷ As a result, officers have unduly large caseloads, making supervision of any one offender difficult.⁹⁸ Moreover, once-monthly alcohol

of Nat'l Drug Control Pol'y, *Early Intervention and Treatment*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/ondcp/early-intervention> (last visited Nov. 22, 2014), *archived at* <http://perma.cc/3PJF-TEKX>.

⁹⁴ See, e.g., DUPONT, *supra* note 8, at 333–34 (half or more of patients treated for addiction relapse within one or two years); Dill & Wells-Parker, *supra* note 84, at 43 (“[R]esearch has consistently shown that treatment has a modest effect on reducing drinking–driving and alcohol-impaired crashes among offenders who are mandated to attend and who actually receive the intervention.”) The combination of treatment and sanctions, however, may be more effective than either one alone. See *id.* (“Combining treatment with nontreatment sanctions that prevent offenders from drinking and driving (e.g., license revocation and alcohol ignition interlocks . . .) also reduces the public’s risk while offenders are receiving treatment The most effective strategy, which had substantial support from rigorously conducted studies, combined education and treatment.”). The effectiveness of victim impact panels also is uncertain. *Id.* at 44.

⁹⁵ In order to prevent participants from having someone else use the breathalyzer, some devices are connected to a camera that videotapes whoever uses the machine. See Newswire, *South Dakota AG Adds Ignition Interlock to SD 24/7 Program*, AMERICAN CLARION (June 20, 2012, 12:29 PM), <http://www.americanclarion.com/south-dakota-ag-adds-ignition-interlock-device-sd-247-program-9212>, *archived at* <http://perma.cc/A6H3-9YFZ>. The combination breathalyzer-and-camera devices are useless, however, if the offender disables the device or drives a different vehicle lacking the device.

⁹⁶ See, e.g., DUPONT, *supra* note 8.

⁹⁷ See, e.g., PETERSILIA, *supra* note 86, at 3–4; *infra* note 98.

⁹⁸ Ideally, a parole officer should be responsible for no more than thirty-five prisoners. See PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 402 (1968). In fact, however, the average caseload is between sixty-six and eighty, which permits time for only one fifteen-minute in-person meeting every two months. See Alfred Blumstein & Allen J. Beck, *Reentry as a Transient State Between Liberty and Recommitment*, in PRISONER REENTRY AND CRIME IN AMERICA,

or drug testing is close to being useless. The liver will metabolize alcohol over a few hours and most drugs over a few days,⁹⁹ so an offender can “beat” a test simply by refraining from substance use for a brief period before the test. For that reason, scheduled drug testing works better as an IQ test than as a deterrent to substance use. Atop that, the work necessary to prepare for probation or parole revocation proceedings can consume much of an officer’s time; offenders who do not appear for their monthly appointments can be arrested, but the police place a low priority on finding them; and judges often do not revoke an offender’s release until he or she has committed multiple infractions.¹⁰⁰ As the result, “[t]raditional approaches to probation, therefore, often combine to create a vicious cycle in which probationers violate conditions of their release with impunity,” which, once learned by other probationers or parolees, in turn increases the number of them who violate conditions of their own release, as well as the number of infractions they commit.¹⁰¹ At some point the number of infraction-committing offenders can reach a “tipping point” that swamps the enforcement ability of the criminal justice system.¹⁰² The result is that

supra note 97, at 50, 52. Some probation officers have caseloads of 150–200 offenders, with the result being that “‘supervision’ sometimes amounts to no more than once-a-month contact with probationers. In Hawaii, probation officers have caseloads up to 180 offenders. See ROBERT L. DUPONT & STEVEN S. ALM, HOPE PROBATION AND THE NEW PARADIGM: A MODEL FOR ADDRESSING HEROIN TRAFFICKING AND ABUSE 6 (2014) (PowerPoint presentation presented at the HIDTA Regional Heroin Symposium, Jan. 14, 2014). Probation officers also must divide their time between monitoring offenders and preparing presentence reports. See, e.g., FED. R. CRIM. P. 32(c)–(d). The result is that a probation or parole officer ordinarily has more balls in the air than any one person should have to juggle. See, e.g., Kleiman & Hollander, *supra* note 1, at 97–102 (discussing problems with the traditional probation process).

⁹⁹ See, e.g., Nancy P. Barnett et al., *Contingency Management for Alcohol Use Reduction: A Pilot Study Using a Transdermal Alcohol Sensor*, 118 DRUG & ALCOHOL DEPENDENCE 391, 391 (2011); DUPONT, *supra* note 8, at 126, 132; Robert Swift, *Direct Measurement of Alcohol and Its Metabolites*, 98 ADDICTION 73, 75 (2003) (noting that the liver can metabolize about seven grams of alcohol, or one drink, per hour). Some very sophisticated tests allow alcohol to be measured up to seventy-two hours after use. See DRUG TESTING, *supra* note 3, at 34.

¹⁰⁰ See, e.g., PAUL J. LARKIN, JR., HERITAGE FOUND., LEGAL MEMORANDUM NO. 116: THE HAWAII OPPORTUNITY PROBATION WITH ENFORCEMENT PROJECT: A POTENTIALLY WORTHWHILE CORRECTIONAL REFORM 2 (Feb. 28, 2014), available at http://thf_media.s3.amazonaws.com/2014/pdf/LM116.pdf, archived at <http://perma.cc/VE9X-DJEX>.

¹⁰¹ *Id.* (footnote omitted).

¹⁰² See Mark A.R. Kleiman, *Enforcement Swamping: A Positive-Feedback Mechanism in Rates of Illicit Activity*, 17 MATHEMATICAL & COMPUTER MODELING 65 (1993); Joel Schrag, *The Self-Reinforcing Nature of Crime*, 17 INT’L REV. L. & ECON. 325, 327 (1997). The phenomenon is best seen in cases of rioting. Even in economically downtrodden neighborhoods, the phenomenon occurs only when there is a critical mass of parties sufficient to overwhelm the ability of a limited supply of law enforcement officers to enforce

the system winds up so rarely and arbitrarily penalizing probationers and parolees for any one incident of wrongdoing that the likelihood of any one being punished for a particular infraction is no greater than that of being struck by lightning.¹⁰³

A new demand-side program began in 1989. These so-called “drug courts” have received considerable attention.¹⁰⁴ The theory is that many drug users need treatment and that a collaborative effort by the judge, prosecutor, defense counsel, treatment specialists, and others can ensure its delivery. As of June 2012, there were more than two thousand drug court programs operating in the United States.¹⁰⁵ Some parties have credited drug courts with reduced drug use and recidivism,¹⁰⁶ but there are dissenters, too.¹⁰⁷

the law and maintain order. *See* Kleiman, *supra*, at 71–72.

¹⁰³ *Cf.* *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) (using that analogy to describe the likelihood that any one murderer would be executed).

¹⁰⁴ The first drug court opened in 1989 in Dade County, Florida, in response to the epidemic of cocaine use seen in South Florida in the 1980s. Thereafter, numerous other jurisdictions adopted their own drug courts. They now exist in every state and almost half of the nation’s counties. *See* Eric L. Sevigny et al., *Do Drug Courts Reduce the Use of Incarceration? A Meta-analysis*, 41 J. CRIM. JUSTICE 416, 416 (2013). Drugs courts function quite differently from traditional tribunals. The American criminal justice system is built on an adversary system. Counsel for each party (the prosecutor or defense attorney) represents its client (the public or the accused), with a neutral decisionmaker (the judge) presiding over the process. By contrast, drug court judges engage in what has been labeled “therapeutic jurisprudence.” Those judges act in consultation and with the cooperation of the prosecutor and defense counsel to ensure that the defendant receives the best treatment necessary for his or her addiction. For discussions of the history, theory, and operation of drug courts, see, for example, WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT’L DRUG COURT INST., BUREAU OF JUSTICE ASSISTANCE, PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES (2011); BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997); NOLAN, *supra* note 26; SABET, *supra* note 10, at 101; Andrew Armstrong, Comment, *Drug Courts and the De Facto Legalization of Drug Use for Participants in Residential Treatment Facilities*, 94 J. CRIM. L. & CRIMINOLOGY 133 (2003).

¹⁰⁵ *See* EXEC. OFFICE OF THE PRESIDENT OF THE UNITED STATES, *supra* note 47, at 29 (2,734 drug court programs).

¹⁰⁶ *See, e.g.*, HUDDLESTON, *supra* note 104, at 2, 6; SABET, *supra* note 10, at 101 (“Drug courts significantly reduce drug use and crime and are more cost-effective than any other proven criminal justice strategy evaluated in the literature today.”); Douglas B. Marlowe et al., *A National Research Agenda for Drug Courts: Plotting the Course for Second-Generation Scientific Inquiry*, DRUG CT. REV., 1, 4 (2006).

¹⁰⁷ *See, e.g.*, NOLAN, *supra* note 26, at 128–31 (noting that formal studies have shown little difference between the recidivism rates of offenders in drug court programs and the traditional criminal justice process); Sevigny et al., *supra* note 104, at 423 (“[O]ur findings indicate that the typical drug court yields small to moderate reductions in the use of jail and prison incarceration when measured as a discrete sanction, but also that they deliver no significant advantage toward reducing the aggregate number of jail or prison days

Drug courts, however, have not taken a large bite out of drug use.¹⁰⁸ They are limited in number and very resource intensive. Moreover, cocaine, crack, and heroin addicts may be most in need of the type of focused attention that drug courts promise, but may be ineligible for entry into a drug court program because of factors such as long criminal records, histories of violent crime, and mandatory minimum or habitual offender sentences. Many drug court participants also do not complete their therapy.¹⁰⁹ Drug courts, therefore, may not be the long-hoped-for silver bullet for substance abuse treatment. Other, complementary approaches are also necessary.

* * * *

The bottom line is this: the inability of community corrections approaches to tamp down intoxicant use linked to criminal behavior, coupled with the increasing cost of incarcerating large numbers of drug users, creates the opportunity for novel ways to reduce those problems and their associated harms. As explained below, the 24/7 Sobriety and HOPE programs might help address those problems reasonably, effectively, efficiently, and humanely.

II. TWO INNOVATIVE APPROACHES TO ALCOHOL- AND ILLICIT DRUG-USING OFFENDERS

By the 1980s, the criminal justice system had tried several different approaches to address alcohol abuse or illicit drug use and recidivism, all without success. It seemed that the law could not solve those problems and that the only hope was to look elsewhere. Perhaps the medical and pharmaceutical communities could develop a safe, inexpensive, and long-acting drug that would block the effect of alcohol and illicit drugs on the brain, while also forestalling the rather unpleasant physical effects that withdrawal has on someone with a substance dependency. If so, a judge might be able to order an offender to take that drug as part of his sentence or as a condition of pretrial release, probation, or parole. Yet there was no certainty that science could devise a drug with those features. After all, experts originally and mistakenly believed that heroin was relatively safe

incarcerated.”); Eric L. Sevigny et al., *Can Drug Courts Help to Reduce Prison and Jail Populations?*, 647 ANNALS AM. ACAD. POL. & SOC. SCI. 190, 205–08 (2013).

¹⁰⁸ See, e.g., NOLAN, *supra* note 26, at 128–31.

¹⁰⁹ See, e.g., BOYUM & REUTER, *supra* note 5, at 60; Sevigny et al., *supra* note 107, at 193–96.

and could be used to treat a morphine or alcohol addiction.¹¹⁰ Atop that, the involuntary administration of potentially hazardous medication raises some troublesome legal issues that might prohibit its use in a substantial number of cases.¹¹¹ The upshot was considerable uncertainty about whether the scientific community could succeed where the criminal justice system had failed.

Yet two inventive local officials, thousands of miles apart, independently devised a creative way to address substance abuse and recidivism without waiting for the legal or medical community to solve the puzzle for them. Those officials were willing to challenge the orthodoxy that the deterrent effect of punishment rests on its severity, as well as take the risk of publicly failing in their novel efforts. As the result, those officials came up with two parallel, highly promising new programs that have worked in their own jurisdictions and that may be capable of successful replication elsewhere. This section identifies those programs, describes how they work, and highlights their success.

A. THE SOUTH DAKOTA 24/7 SOBRIETY PROGRAM

In 1985, a prosecutor in a rural South Dakota county initiated what has become known as the 24/7 Sobriety program.¹¹² In order to address a serious problem with alcoholism in the county and the state,¹¹³ Larry Long, now a judge, but then the local prosecutor for Bennett County, a rural

¹¹⁰ See, e.g., MUSTO, *supra* note 26, at 5.

¹¹¹ Compare *Sell v. United States*, 539 U.S. 166 (2003) (ruling that the government may involuntarily administer antipsychotic medication to a mentally ill defendant in order to render him competent to stand trial) and *Washington v. Harper*, 494 U.S. 210 (1990) (ruling that the government may involuntarily administer antipsychotic medication to a mentally ill prisoner who was a danger to himself or others), with *Riggins v. Nevada*, 504 U.S. 127 (1992) (ruling that the state had failed to justify involuntarily administering antipsychotic medication to a defendant during trial).

¹¹² See, e.g., STEPHEN K. TALPINS, NAT'L P'SHIP ON ALCOHOL MISUSE AND CRIME, THE 24/7 SOBRIETY PROGRAM EXPANSION PROJECT, available at http://www.colorado.gov/ccjdir/Resources/Committees/DrugTF/Handout/SD24-7SobrietyProgramExpansionProj_0309.pdf (last visited Feb. 27, 2015), archived at <http://perma.cc/XSG5-YAEL>; Caulkins & DuPont, *supra* note 79, at 575; Robert L. DuPont et al., *Leveraging the Criminal Justice System to Reduce Alcohol- and Drug-Related Crime: A Review of Three Promising and Innovative Programs*, PROSECUTOR, Jan.–Feb.–Mar. 2010, at 38, 38–39.

¹¹³ “Two Indian reservations border Bennett County on three sides, and its high unemployment rate was matched only by its staggering level of alcohol consumption.” NAT'L P'SHIP ON ALCOHOL MISUSE AND CRIME, SOUTH DAKOTA 24/7 SOBRIETY PROJECT (2009) [hereinafter NAT'L P'SHIP], available at http://www.alcoholandcrime.org/images/uploads/pdf_tools/sd_program.pdf, archived at <http://perma.cc/95GV-JGT9>. “Quite typically, criminal offenders celebrate their successful completion of alcohol treatment by getting drunk with their acquaintances.” Paul Bachand, *South Dakota's 24/7 Sobriety Program*, BETWEEN THE LINES (Nat'l Traffic Law Ctr., Alexandria, Va.), Winter 2008.

jurisdiction of perhaps 3,400 residents, designed a program to deal with repeated DUI offenders.¹¹⁴ Long persuaded the local judge to order every second or subsequent DUI offender to completely refrain from any alcohol use and to appear at the sheriff's office to undergo twice-daily alcohol breathalyzer testing as a condition of bail.¹¹⁵ A positive test for alcohol use would result in the immediate revocation of bail, while the failure to appear for testing would lead to the immediate issuance of a bench warrant for the bailee's arrest. Long's theory was that rigorous monitoring of program participants through twice-daily testing would communicate a serious commitment to deterring alcohol use by preventing offenders from avoiding detection, while the certain and immediate imposition of a penalty for a positive test result would reinforce the program's commitment to following through on its threat of punishment for any violation.¹¹⁶

It turns out that Long was on to something. The program was successful. As one observer noted, "[h]ardcore alcoholics were able to maintain sobriety and the jail population actually decreased."¹¹⁷

Two decades later, alcohol and drug use remained a problem in South Dakota.¹¹⁸ In the interim, Long had become the state attorney general, and he persuaded state court judges to expand the program, reaching three counties in 2005 and twelve in 2006. The expanded program also proved successful, and the judges involved enlarged it again to include domestic violence and drug cases.¹¹⁹ In 2007, the state legislature authorized

¹¹⁴ There may be a large number of such offenders. According to a 2007 study, estimates from several states recorded that recidivism rates ranged from 21–47%. See Alan A. Cavaola et al., *Characteristics of DUI Recidivists: A 12-Year Follow-Up Study of First Time DUI Offenders*, 32 *ADDICTIVE BEHAV.* 855, 855 (2007).

¹¹⁵ "Breath is the standard matrix for alcohol testing because alcohol is volatile and substantially excreted through the lungs." *DRUG TESTING*, *supra* note 3, at 26. Twice-daily testing is necessary because the liver metabolizes alcohol within just a few hours, and most tests cannot detect alcohol thereafter. See, e.g., *DUPONT*, *supra* note 8, at 126, 132; see *supra* note 99.

¹¹⁶ As Judge Long was wont to say, "If you skip or fail, you go to jail." Beau Kilmer & Keith Humphreys, *Losing Your "License to Drink": The Radical South Dakota Approach to Heavy Drinkers Who Threaten Public Safety*, 20 *BROWN J. WORLD AFF.* 267, 269 (2013). For an early endorsement of the combination of drug testing and swift, certain but moderate sanctions for drug use, see *KLEIMAN*, *supra* note 26; *Kaplan*, *supra* note 34, at 47–49.

¹¹⁷ *Bachand*, *supra* note 113.

¹¹⁸ In 2004, 35% of all felony convictions in South Dakota were for felony DUI (i.e., three or more such offenses within ten years), vehicular homicide, and battery; felony DUI and felony drug offenses constituted approximately 60% of all felony convictions between 1996 and 2007; 15% of the state prison population were DUI offenders; and more than 85% of prisoners suffered from an alcohol or drug dependency. See *NAT'L P'SHIP*, *supra* note 113, at 1.

¹¹⁹ *Bachand*, *supra* note 113. Drug offenders must wear, on the skin for seven days at a time, a patch that measures whether the participant has used marijuana, cocaine, the opiates,

statewide implementation of the 24/7 Sobriety program.¹²⁰ The legislature also expanded its coverage and empowered the state attorney general to promulgate regulations that implement the program.¹²¹

Today, South Dakota law permits its courts to require participation in the 24/7 Sobriety program as a condition of pretrial release, a suspended sentence, probation, or parole.¹²² In cases of abused or neglected children, the courts may require participation in the program as a condition for the return of a parent's children to his or her home.¹²³ The program is being used in sixty-one counties that contain 90% of the state's population.¹²⁴ More than sixty state and local agencies participate in the program.¹²⁵

Frequent testing of participants is still the basic feature of the 24/7 Sobriety program. To determine whether an offender has used alcohol, individuals are typically required to appear twice daily for a period set by the court in order to take a breathalyzer test.¹²⁶ To help defray the testing costs involved, the state charges participants a different fee for each of the different testing options.¹²⁷ The statewide program also has carried forward

amphetamines, and methamphetamines. *Id.* Because alcohol use can trigger domestic violence, see *supra* notes 9 & 21, an alcohol-monitoring device could reduce the incidence of that crime by deterring an abusive partner from drinking.

¹²⁰ See 2007 S.D. SESS. LAWS ch. 4, § 1 (Mar. 5, 2007) (HB 1072) (codified at S.D. CODIFIED LAWS § 1-11-17 (2014)) (“There is hereby established a statewide 24/7 sobriety program to be administered by the Office of the Attorney General. The program shall coordinate efforts among various state and local government entities for the purpose of finding and implementing alternatives to incarceration for certain offenses that involve driving under the influence and other offenses involving alcohol, marijuana, or controlled substances.”).

¹²¹ See, e.g., S.D. CODIFIED LAWS §§ 1-11-18 to 1-11-26 (2014); S.D. ADMIN. R. §§ 2:06:01:01 to 2:06:04:02 (2014) (state administrative rules implementing the 24/7 Sobriety program).

¹²² See S.D. CODIFIED LAWS §§ 1-11-19 to 1-11-21, 1-11-23 (2014); NAT’L P’SHP, *supra* note 113.

¹²³ See S.D. CODIFIED LAWS §§ 1-11-22 (2014); NAT’L P’SHP, *supra* note 113.

¹²⁴ See, e.g., *South Dakota Office of the Attorney General 24/7 Sobriety Program*, SDGOV, <http://apps.sd.gov/atg/dui247/map.htm> (last visited Oct. 21, 2015), *archived at* <http://perma.cc/U79D-HQ3N>; Caulkins & DuPont, *supra* note 79, at 575.

¹²⁵ See SOUTH DAKOTA 24/7 SOBRIETY PROGRAM, *supra* note 3.

¹²⁶ See S.D. ADMIN. R. §§ 2:06:02:04(1) & (2) (2014). A vehicle interlock device also may be required. See *id.* §§ 2:06:02:02:01, 2:06:02:03(5), 2:06:02:04(5), & 2:06:02:06 (2014).

¹²⁷ See S.D. CODIFIED LAWS §§ 1-11-18, 1-11-25 to 1-11-332 (as amended by S.D. SESS. LAWS SB 21 §§ 1-7 (2014)); S.D. ADMIN. R. §§ 2:06:02:01 to 2:06:02:05, 2:06:04:01 to 2:06:04:02 (2014); SOUTH DAKOTA 24/7 SOBRIETY PROGRAM, S.D. OFFICE OF THE ATT’Y GEN., 24/7 SOBRIETY FEES EFFECTIVE 8/1/2012, *available at* <http://apps.sd.gov/atg/dui247/forms/Programfees.pdf>, *archived at* <http://perma.cc/5AQV-TX36>. A person subject to twice-a-day testing must pay a user fee of not more than \$3 per test. A person subject to electronic testing must pay a user fee of not more than \$10 per day and activation and deactivation fees

the use of swift and certain but moderate sanctions for alcohol or drug use, what today has come to be known as “flash incarceration,” which typically consists of a twenty-four- or forty-eight-hour period of confinement.¹²⁸ Offenders may remain in the 24/7 Sobriety program throughout the duration of their probationary period or for shorter but different periods of time, some only 60 days, some for 90 days, and some for more than 140.¹²⁹

Because South Dakota is a rural state, some participants will live forty miles or more from a testing site. The court or a relevant state agency can permit those participants to wear at all times an electronic testing device, known as a transdermal ankle bracelet, which detects and remotely reports alcohol use crossing the skin via perspiration.¹³⁰ If drug testing is also required, offenders can be compelled to report for frequent urine testing or to wear patches that monitor drug use.¹³¹

To date, the 24/7 Sobriety program has produced positive results. The literature analyzing the program and its results is not large, and most of what has been published comes from individuals or organizations with a longstanding interest in dealing with substance abuse.¹³² But the discussions

of not more than \$50. A person wearing a drug patch must pay a fee of \$50 per patch. The state can require a participant who does not pay the required remote device fee to switch to twice-a-day testing. *See* S.D. SESS. LAWS SB 21 §§ 2-7 (2014); S.D. ADMIN. R. §§ 2:06:02:03.

¹²⁸ *See* Email from Stephen K. Talpins, Vice-President, Inst. for Behavior & Health, to Robert L. DuPont, President, Inst. for Behavior & Health (Apr. 12, 2014) (on file with the *Journal*) (hereinafter Talpins Email).

¹²⁹ DuPont Email, *supra* note 91.

¹³⁰ *See* S.D. ADMIN. R. § 2:06:02:03(4) (2014); Bachand, *supra* note 113. One such device is known as a Secure Continuous Remote Alcohol Monitoring anklet, or SCRAM, but there are several devices available, and the literature discussing their use has been positive. *See, e.g.,* Bachand, *supra* note 113; Molly Carney, Note, *Correction Through Omniscience: Electronic Monitoring and the Escalation of Crime Control*, 40 WASH. U. J.L. & POL’Y 279, 280 (2012). SCRAM testing devices also have a benefit not available with twice-daily on-site breathalyzer tests. A SCRAM measures and reports alcohol use every thirty minutes, making it difficult for someone to time his or her drinking in a manner that can avoid detection. *See* Barnett et al., *supra* note 99, at 398.

¹³¹ *See* S.D. ADMIN. R. § 2:06:02:04(3) (2014); Caulkins & DuPont, *supra* note 79, at 575. South Dakota is also starting to use interlock devices in some counties, which are testing the idea of monitoring offenders through twice-daily tests using interlock devices. *See* Talpins Email, *supra* note 128.

¹³² *See, e.g.,* Highway Loss Data Inst., *Alcohol Monitoring Curbs Repeat Arrests for DUI, Domestic Violence*, INS. INST. FOR HIGHWAY SAFETY (Mar. 14, 2013), <http://www.iihs.org/iihs/news/statusreport/article/48/2/4>, archived at <http://perma.cc/7GGM-879E>; SABET, *supra* note 10, at 100; Bachand, *supra* note 113; Caulkins & DuPont, *supra* note 79, at 575–77; DuPont et al., *supra* note 112; Kleiman & Hollander, *supra* note 1, at 104–05; TALPINS, *supra* note 112, at 2–4. The Office of National Drug Control Policy also has noted the success of the 24/7 Sobriety program. *See* OFFICE OF NAT’L DRUG CONTROL POLICY, ALTERNATIVES TO INCARCERATION: A SMART APPROACH TO BREAKING THE CYCLE OF DRUG

have been uniformly favorable.¹³³ Statistics maintained by the South Dakota Attorney General's Office support that optimism. The results indicate that, from January 1, 2005, to October 1, 2015, there have been 38,728 participants in the twice-daily breath-testing program, 8 million tests administered, and a pass rate of 99.1%.¹³⁴ The attorney general's office has concluded that individuals who participate in the program for at least thirty days are nearly 50% less likely to commit another DUI offense over the following two years.¹³⁵

There have been a few analyses of the South Dakota 24/7 Sobriety program. Mountain Plains Evaluation (MPE) has conducted several of them.¹³⁶ MPE first analyzed the data from January 2005 through January 2010. That report concluded that the program had a statistically significant and positive effect of lowering DUI recidivism for program participants who remained in the program for thirty or more consecutive days.¹³⁷ The study reported that the program had the greatest effect on the most

USE AND CRIME 2 (2011), available at http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/alternatives_to_incarceration_policy_brief_8-12-11.pdf, archived at <http://perma.cc/W3QC-2HSQ> (hereinafter ONDCP 2011 FACT SHEET).

¹³³ For example, a 2010 editorial by Jonathan Caulkins & Robert DuPont reported that approximately 67% of DUI offenders subject to twice-daily alcohol tests have never had a positive result or missed a test, while 94% have had but one or two such violations. Seventy-eight percent of participants wearing electronic devices fully complied with the program requirements, and more than ninety percent of parties tested for drug use had negative test results. See Caulkins & DuPont, *supra* note 79, at 575.

¹³⁴ 24/7 Statistics, SDGOV, <http://apps.sd.gov/atg/dui247/247stats.htm> (last visited Oct. 21, 2015), archived at <http://perma.cc/4U6T-5N7M>. The urinalysis testing statistics are similar, though over a shorter time frame: from July 1, 2007 until October 1, 2015, there were 5,871 participants, 146,721 tests administered, and a 96% pass rate. *Id.*

¹³⁵ See ONDCP 2011 FACT SHEET, *supra* note 132, at 4.

¹³⁶ See ROLAND LOUDENBURG ET AL., MOUNTAIN PLAINS EVALUATION, LLC, SOUTH DAKOTA 24/7 SOBRIETY PROGRAM: EVALUATION FINDINGS REPORT (2010) (hereinafter MPE EVALUATION FINDINGS), available at <http://apps.sd.gov/atg/dui247/AnalysisSD24.pdf>, archived at <http://perma.cc/Z8T2-GUP2>; ROLAND LOUDENBURG ET AL., MOUNTAIN PLAINS EVALUATION, LLC, ANALYSES OF PAROLEE SCRAM PARTICIPATION (2012), available at <http://doc.sd.gov/documents/about/publications/AnalysisofParoleeBehavioronSCRAM2.pdf>, archived at <http://perma.cc/5NDV-UGPE>; ROLAND LOUDENBURG ET AL., MOUNTAIN PLAINS EVALUATION, LLC, SOUTH DAKOTA 24/7 SOBRIETY PROGRAM: EVALUATION SUPPLEMENTAL FINDINGS REPORT (2012), available at <http://apps.sd.gov/atg/dui247/AnalysisSupplementalSD24.pdf>, archived at <http://perma.cc/JW9Y-4GET> (hereinafter MPE SUPPLEMENTAL FINDINGS); ROLAND LOUDENBURG ET AL., MOUNTAIN PLAINS EVALUATION, LLC, ANALYSIS OF 24/7 SOBRIETY PROGRAM SCRAM PARTICIPANT DUI OFFENSE RECIDIVISM (2013), available at <http://apps.sd.gov/atg/dui247/2013%20SCRAM%20Analysis.pdf>, archived at <http://perma.cc/56RT-P7V3>.

¹³⁷ See MPE EVALUATION FINDINGS, *supra* note 136, at 2.

recalcitrant individuals—repeat DUI offenders—by changing their lives not only while they are in the program but also afterwards.¹³⁸

In 2013, the RAND Corporation conducted what it described as “a rigorous empirical evaluation” of the 24/7 Sobriety program, published in a peer-reviewed journal, and concluded that it had been successful.¹³⁹ Between 2005 and 2010, the report noted, more than 17,000 state residents had been participants in the program, which included more than 10% of the men between eighteen and forty-years-old in some counties.¹⁴⁰ Program participants passed more than 99% of the approximately 3.7 million scheduled breathalyzer tests during that period.¹⁴¹ Adding to that number the results from the continuous monitoring provided by the 15% of participants who wore electronic monitoring devices resulted in roughly 2.25 million days from 2005 to mid-2012 without a detected alcohol violation.¹⁴² The program has produced a 12% reduction in repeat DUI arrests and a 9% reduction in arrests for domestic violence.¹⁴³ As the RAND report concluded, “[w]e found strong support for the hypothesis that frequent alcohol testing with swift, certain, and modest sanctions can reduce problem drinking and improve public health outcomes.”¹⁴⁴ In particular, the report’s authors wrote that “[o]ur analysis provides strong evidence that the 24/7 program reduced the incidence of repeat DUI and domestic violence arrests, and provides suggestive evidence that it may have reduced reported traffic crashes involving men aged 18 to 40 years.”¹⁴⁵

B. HAWAII’S OPPORTUNITY PROBATION WITH ENFORCEMENT PROGRAM

A state trial court judge in Honolulu, Hawaii, independently came up with the idea to try a similar program, focusing on drug use, in his court. Judge Steven Alm decided to try out for a select group of probationers a program using the same swift, certain, and fair punishment theory that

¹³⁸ See Talpins Email, *supra* note 128.

¹³⁹ See Beau Kilmer et al., *Efficacy of Frequent Monitoring with Swift, Certain, and Modest Sanctions for Violations: Insights from South Dakota’s 24/7 Sobriety Project*, 103 AM. J. PUB. HEALTH e37, e37 (2013); see also RAND CORP., AN INNOVATIVE WAY TO CURB PROBLEM DRINKING: SOUTH DAKOTA’S 24/7 SOBRIETY PROJECT—FACT SHEET (Dec. 12, 2012), available at http://www.rand.org/content/dam/rand/pubs/research_briefs/2012/RAND_RB9692.pdf, archived at <http://perma.cc/H5XB-BYBH>.

¹⁴⁰ Kilmer et al., *supra* note 139, at e37.

¹⁴¹ *Id.*

¹⁴² See Kilmer & Humphreys, *supra* note 116, at 271.

¹⁴³ Kilmer et al., *supra* note 139, at e37.

¹⁴⁴ *Id.* at e42.

¹⁴⁵ *Id.* at e41.

underlies the 24/7 Sobriety program.¹⁴⁶ Judge Alm was concerned that he repeatedly saw offenders appear for a probation revocation hearing only after they had committed multiple probation violations. The sporadic and delayed use of the severe penalty of probation revocation was not deterring offenders from violating the conditions of their release.¹⁴⁷ What probationers were learning was twofold: The first dozen or so probation infractions were “free.” Probationers might or might not be punished for future violations, but whether, and if so when, the court would revoke probation was entirely unpredictable. Given those realities, Judge Alm concluded that the traditional approach to probation enforcement was not working. After having his own Howard Beale moment,¹⁴⁸ Judge Alm went about fixing the system. His answer was Hawaii’s Opportunity Probation with Enforcement, or HOPE, project.

HOPE resembles the medical model of “triaging” offenders, with Judge Alm serving as the director of emergency medicine.¹⁴⁹ In Hawaii,

¹⁴⁶ See MARK A. R. KLEIMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT 34–41 (2010); Steven S. Alm, *A New Continuum for Court Supervision*, 91 OR. L. REV. 1181, 1184–88 (2013); Email from Steven S. Alm, Judge, O’ahu First Circuit, to author (June 4, 2014, 4:44 PM) (on file with the *Journal*) (hereinafter Alm Email). The HOPE program resembles other programs. One is the Physician Health Program for physicians with substance abuse problems that the American Medical Association helped launch forty years ago. A physician who participates in the program agrees that for a five-year period he or she will comply with all program guidelines, including entering substance abuse treatment and agreeing to random drug and alcohol testing. In return, a physician is allowed to continue practicing medicine. See SABET, *supra* note 10, at 100; Robert L. DuPont & Gregory E. Skipper, *Six Lessons from State Physician Health Programs to Promote Long-Term Recovery*, 44 J. PSYCHOACTIVE DRUGS 72, 72 (2012); Robert L. DuPont et al., *How Are Addicted Physicians Treated? A National Survey of Physician Health Programs*, 37 J. SUBSTANCE ABUSE TREATMENT 1, 6 (2009); Robert L. DuPont, et al., *Setting the Standard for Recovery: Physicians’ Health Programs*, 36 J. SUBSTANCE ABUSE TREATMENT 159, 160 (2009). The program has been a “resounding success.” SABET, *supra* note 10, at 100. Another program resembling physician health programs has been successfully used for pilots. See HEYMAN, *supra* note 29, at 86–87. See generally ROBERT H. COOMBS, DRUG-IMPAIRED PROFESSIONALS (2000) (describing treatment programs for different professions). A third program, used in Texas, is the Supervision with Intensive Enforcement, or SWIFT. See BUREAU OF JUSTICE ASSISTANCE, DEP’T OF JUSTICE, SWIFT AND CERTAIN SANCTIONS (SAC)/REPLICATING THE CONCEPTS BEHIND PROJECT HOPE: FY 2014 COMPETITIVE GRANT ANNOUNCEMENT 5 (2014) (hereinafter FY 2014 COMPETITIVE GRANT ANNOUNCEMENT). These programs today are generally known as “Swift, Certain, and Fair Treatment” programs, rather than HOPE. This Article will refer to them generically as HOPE, however, in honor of Judge Alm’s Hawaii program.

¹⁴⁷ See Alm, *supra* note 146, at 1184.

¹⁴⁸ *Network* (Metro-Goldwyn-Mayer 1976).

¹⁴⁹ Alm, *supra* note 146, at 1185; see Angela Hawken, *Behavioral Triage: A New Model for Identifying and Treating Substance-Abusing Offenders*, 3 J. DRUG POL’Y ANALYSIS 1, 1 (2010).

some offenders go to prison; some are placed on the same type of probation-as-usual historically used; some are sent to drug courts; and some join the HOPE project.¹⁵⁰

The first step in dealing with individual offenders in HOPE is to encourage them to succeed and inform them what is expected of them. Instead of letting probationers learn via the offender grapevine how the new system operated, Judge Alm would call every new HOPE probationer into his court and personally tell them how his approach would work.¹⁵¹

Judge Alm also decided to upend the historic approach to probation revocation. Instead of treating imprisonment as the only alternative to continued release for a probation violation, he reserved the right to modify an offender's conditions of release while leaving his probation in effect. Instead of using long-term imprisonment as the only sanction, he would typically impose short terms of confinement in jail for the first infraction, with the severity remaining the same or increasing for a second or subsequent violation. Instead of imposing a sanction randomly and after a long delay, he would remand an offender to jail for an infraction in every case, with the sentence to begin immediately. If the offender had spent time in jail waiting for the hearing, he would be credited with time served. If an offender failed the drug test but immediately took responsibility for his actions, the jail time would be short, just a few days. If an offender absconded, however, the sanction would be at least thirty days in jail.¹⁵² Repeated absconding would result in imprisonment.¹⁵³ Instead of considering only whether a probationer violated any one of the full range of release conditions imposed on him, he would require every offender to be frequently and randomly tested for methamphetamine use (and a few other drugs—opiates, cocaine, marijuana, and PCP), given the high correlation in

¹⁵⁰ In Judge Alm's words:

How do we decide where to place the offender for supervision? In this new model, Hawaii uses the medical concept of triage. The courthouse is thought of as a hospital. Offenders are the patients. Those who are not sent to prison at sentencing are placed on felony probation (or deferral) and triaged into the most appropriate supervision program or track that will allow them to succeed. Probation-as-usual is the outpatient clinic. HOPE Probation is the hospital ward. The Drug Court, now reconstituted to target primarily high-risk offenders, is the Intensive Care Unit (ICU).

Alm, *supra* note 146, at 1182. Offenders in immediate need of detoxification would receive treatment before being permitted to enter HOPE. *See id.* at 1188; Conversation with Robert L. DuPont (Washington, D.C. Apr. 15, 2014).

¹⁵¹ *See* KLEIMAN, *supra* note 146, at 34–41; Alm, *supra* note 146, at 1185.

¹⁵² *See* KLEIMAN, *supra* note 146, at 34–41; Alm, *supra* note 146, at 1185; Alm Email, *supra* note 146.

¹⁵³ Alm Email, *supra* note 146.

Hawaii between methamphetamine use and crime,¹⁵⁴ thereby simplifying and shortening any necessary probation modification hearing. Instead of issuing orders that other criminal justice system participants carried out when it suited them, he enlisted the cooperation of participants in the local criminal justice system—for example, probation officers, public defenders, prosecutors, correctional officials, the United States Marshal’s Service, the sheriffs, and the police—to make enforcement of his new approach a priority. Instead of trying to replace the entire probation system at once, he would select a small group of offenders as a pilot project and expand the size of the program over time if it proved successful.¹⁵⁵

Judge Alm kept his word. He called into his courtroom for the first Warning Hearing the thirty-four probationers chosen for his pilot program; he explained the HOPE program to them and told them that he hoped they would succeed; he instructed them regarding what was required of them and what would happen if they went astray;¹⁵⁶ and he subjected the offenders to frequent, random drug testing, using on-the-spot testing kits to avoid laboratory delay.¹⁵⁷ Every probationer testing positive, or failing to appear for drug testing, was taken into custody immediately or as soon as possible. The probation officer completed a standardized form containing the offender’s name, the details of the violation, and the drug that he had used. Within seventy-two hours, the judge held a brief probation modification hearing, focused only on the test results.¹⁵⁸ And he either sentenced every such probationer to a short term of confinement in the local jail (for example, two or three days), after which the probationer would be released

¹⁵⁴ See ANGELA HAWKEN & MARK A. R. KLEIMAN, NAT’L INST. OF JUST., *MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII’S HOPE*, Doc. No. 229023, at 20 (Dec. 2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf>, (hereinafter *EVALUATING HAWAII’S HOPE*), archived at <https://perma.cc/P52G-UVCY>; Mark A. R. Kleiman & Angela Hawken, *Fixing the Parole System*, *ISSUES IN SCIENCE & TECH.* 5 (Summer 2008) (“The drug that is most abused by Hawaii’s felony probationers is methamphetamine, with alcohol (often in combination) second; the opiates are rarely encountered.”), available at <http://www.issues.org/24.4/kleiman.html>, archived at <http://perma.cc/XJ3R-95LD>.

¹⁵⁵ See KLEIMAN, *supra* note 146, at 39; Alm, *supra* note 146, at 1184–88; Alm Email, *supra* note 146.

¹⁵⁶ Judge Alm prepared a “Bench Book” setting forth the HOPE procedures. KLEIMAN, *supra* note 146, at 39. For a short version of the warning that Judge Alm would give to HOPE participants, see *id.* at 39.

¹⁵⁷ Current devices allow testing to be done at the collection site. Called “point-of-collection” testing, today’s tests provide results for some drugs within minutes, rather than days or weeks, as was the case when samples had to be sent to a laboratory for analysis. See *DRUG TESTING*, *supra* note 3, at 12.

¹⁵⁸ See KLEIMAN, *supra* note 142, at 34–41; Alm, *supra* note 146, at 1185; Alm Email, *supra* note 146.

and the process begun anew, or gave the offender credit for time already served pending the hearing.¹⁵⁹

Judge Alm's program worked.¹⁶⁰ Evaluations conducted three and six months after the program began revealed a decrease in drug use, missed appointments, rearrests, and probation revocations among the participants.

Three years after the judge started the HOPE program, Professors Angela Hawken and Mark Kleiman conducted a randomized control evaluation of the project. The report found that HOPE participants were successful in several ways:

- There was an 80% decrease in positive drug tests among participants;
- Participants were 55% less likely to be arrested for a new crime;
- 72% less likely to use drugs;
- 61% less likely to skip appointments with their supervisory officer; and
- 53% less likely to have their probation revoked.¹⁶¹

¹⁵⁹ See Alm, *supra* note 146, at 1184–87.

¹⁶⁰ See, e.g., EVALUATING HAWAII'S HOPE, *supra* note 154, at 4, 17–36, 33–41. Professors Mark Kleiman and Angela Hawken are nationally recognized experts in the HOPE project. See, e.g., KLEIMAN, *supra* note 26, at 192–96; KLEIMAN, *supra* note 146, at 34–41; Boyum & Kleiman, *supra* note 11, at 331; Angela Hawken, *The Message from Hawaii: HOPE for Probation*, PERSP., Summer 2010, at 36; Mark A.R. Kleiman, *Controlling Drug Use and Crime with Testing, Sanctions, and Treatment*, in DRUG ADDICTION AND DRUG POLICY 168, 174 (Philip B. Heymann & William N. Brownsberger eds., 2001); Mark A.R. Kleiman, *Community Corrections as the Front Line in Crime Control*, 46 UCLA L. REV. 1909 (1999).

¹⁶¹ See FY 2014 COMPETITIVE GRANT ANNOUNCEMENT, *supra* note 146, at 5.

In addition, because Judge Alm sees probationers only for an initial warning or a later violation hearing, he is able to supervise a large number of felony probationers—currently, he supervises 1,900.¹⁶² Various other scholars have also analyzed the HOPE program or similar programs adopted in other jurisdictions,¹⁶³ and they too have touted the model's successes.¹⁶⁴

¹⁶² See Alm Email, *supra* note 146.

¹⁶³ Alaska, Texas, and Seattle, Washington, have pilot programs like HOPE. From 2010 to 2011, Alaska had a Probation Accountability and Certain Enforcement, or PACE, program in Anchorage. Preliminary appraisals of PACE were positive. See FY 2014 COMPETITIVE GRANT ANNOUNCEMENT, *supra* note 146, at 5; TERESA W. CARNS & STEPHANIE MARTIN, ANCHORAGE PACE PROBATION ACCOUNTABILITY WITH CERTAIN ENFORCEMENT (Sept. 2011), <http://www.ajc.state.ak.us/reports/pace2011.pdf>, archived at <http://perma.cc/J7LG-7YDC>; PACE: A Pilot Project for Probation Violators in Anchorage, ALASKA JUST. F. (Justice Ctr., Univ. of Alaska Anchorage), Summer/Fall 2011, at 5, available at <http://justice.uaa.alaska.edu/forum/28/2-3summerfall2011/282.summerfall2011.pdf>, archived at <http://perma.cc/8CXN-UXZQ>; Theresa White Carns, *Two Pilot Projects in the Alaska Court System*, 27 ALASKA JUST. F. 5 (Summer 2010), http://justice.uaa.alaska.edu/forum/27/2summer2010/e_pilotprojects.html, archived at <http://perma.cc/9KXL-4CT7>. Alaska recently adopted legislation making PACE effective statewide. See *infra* note 206.

Texas has a program for probationers called Supervision With Intensive Enforcement, or SWIFT. Like HOPE, SWIFT uses swift, certain, and moderate but progressive sanctions, including community service, additional reporting requirements, fines, and confinement in jail. Relying on an unpublished evaluation of one SWIFT project, the Bureau of Justice Assistance has stated that, when compared to a matched comparison group, subjects in the SWIFT program were significantly less likely to violate the terms of their probation, were half as likely to have had their probation revoked, and were half as likely to be convicted for new crimes. See FY 2014 COMPETITIVE GRANT ANNOUNCEMENT, *supra* note 146, at 5.

Seattle, Washington, established a pilot project in 2010 called the Washington Intensive Supervision Program, or WISP. The program was similar to HOPE with one exception. WISP included so-called “high risk” offenders—*viz.*, offenders with longer and more serious criminal histories than had participated in the HOPE program. Despite that difference, a preliminary analysis of WISP found that participants had dramatically reduced drug use, reduced criminal activity, and reduced incarceration periods. See ANGELA HAWKEN & MARK A.R. KLEIMAN, Draft, WASHINGTON INTENSIVE SUPERVISION PROGRAM: EVALUATION REPORT 3, 27 (Dec. 9, 2011), available at http://www.seattle.gov/council/burgess/attachments/2011wisp_draft_report.pdf, archived at <http://perma.cc/P6CY-XQCT>. That program now is in effect statewide, with 17,000 participating probationers and parolees.

¹⁶⁴ In the decade that the HOPE project has been in effect, several members of the professional and academic correctional communities, as well as some government officials, have found it worthwhile. See, e.g., ROBERT L. DUPONT, INST. FOR BEHAVIOR & HEALTH, HOPE PROBATION: A MODEL THAT CAN BE IMPLEMENTED AT EVERY LEVEL OF GOVERNMENT (2009), available at <http://ibhinc.org/pdfs/HOPEPROBATION2.pdf>, archived at <http://perma.cc/ZEA7-6LA7>; KEVIN McEVROY, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, HOPE: A SWIFT AND CERTAIN PROCESS FOR PROBATIONERS (Mar. 2012), available at <https://www.ncjrs.gov/pdffiles1/nij/237724.pdf>, archived at <https://perma.cc/EG34-8CBT>; NAT'L INST. OF JUSTICE, OFFICE OF JUST. PROGRAMS, U.S. DEP'T OF JUSTICE, HOPE IN HAWAII: SWIFT AND SURE CHANGES IN PROBATION (June 2008), <https://www.ncjrs.gov/pdffiles1/nij/222758.pdf>, archived at <http://perma.cc/D3Q9-SGN4>; NAT'L INST. OF JUSTICE

On the whole, the HOPE program has been cost-effective, even though it is more expensive in the short run than traditional probation.¹⁶⁵ The average yearly cost for someone on probation is approximately \$1,000. The comparable cost for offenders in the HOPE program is higher, roughly \$2,500, which includes the costs of any treatment.¹⁶⁶ As Hawken put it, however, HOPE should be seen as “behavioral triage.”¹⁶⁷ HOPE costs less than mandatory drug treatment and does not use up treatment slots for offenders who can kick their habit without the intensive supervision of inpatient drug care or a drug court.¹⁶⁸ Moreover, the success rate of the HOPE project can save the considerable costs of unnecessary incarceration, which have skyrocketed over the last four decades as an ever-larger number of offenders have been imprisoned.¹⁶⁹ And those results do not include the

& PEW CENTER ON THE STATES, THE IMPACT OF HAWAII’S HOPE PROGRAM ON DRUG USE, CRIME AND RECIDIVISM (Jan. 2010), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/The20Impact20of20HawaiiE28099s20HOPE20Program20on20Drug20Use20Crime20and20Recidivism.pdf, archived at <http://perma.cc/T5JK-25HF>; ONDCP 2013 FACT SHEET, *supra* note 92, at 3; SABET, *supra* note 10, at 97–101; Beth Pearsall, *Replicating HOPE: Can Others Do It as Well as Hawaii?*, NIJ J., Mar. 2014, at 1; “Swift and Certain” Sanctions in Probation Are Highly Effective: Evaluation of the HOPE Program, NAT’L INST. JUST. (Feb. 3, 2012), <http://www.nij.gov/nij/topics/corrections/community/drug-offenders/hawaii-hope.htm>, archived at <http://perma.cc/BW34-2HYC>; see generally Larkin, *supra* note 100, app. (collecting studies). Not everyone, however, finds the HOPE program worthwhile. See Michael Tonry, Legal and Ethical Issues in the Prediction of Recidivism (Sept. 11, 2013) (Minnesota Legal Studies Research Paper No. 13-51, University of Minnesota), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2329849, (describing programs like HOPE as “pernicious” because “[t]hey are concerned only with the offender’s compliance with conditions and do little except offer legal threats of what will happen if conditions are violated rather than attempt to address the circumstances in the offender’s life that brought him or her into court”), archived at <http://perma.cc/ZMK4-3VTN>.

¹⁶⁵ See, e.g., Kleiman & Hollander, *supra* note 1, at 104–05; Alm Email, *supra* note 146.

¹⁶⁶ See Kleiman & Hollander, *supra* note 1, at 104; The Heritage Foundation, 24/7 Sobriety and HOPE: Creative Ways to Address Substance Use and Alcohol Abuse (Aug. 21, 2014) (remarks of Judge Alm), <http://www.heritage.org/events/2014/08/24-7-sobriety-and-hope>, archived at <http://perma.cc/CUR8-7DPW>.

¹⁶⁷ See Hawken, *supra* note 149, at 4.

¹⁶⁸ See Email from Robert L. DuPont, President, Inst. for Behavior & Health, to Paul J. Larkin, Jr. (May 1, 2014) (hereinafter DuPont Email) (on file with the *Journal*). Judge Alm started with just thirty-four participants but now has more than 2,000 of the over 8,000 total Oahu felony probationers in HOPE—all in one courtroom with very little additional staffing. In a drug court, a single judge may have only fifty-to-seventy-five clients. Judge Alm also supervises a drug court. He spends 20% of his time on that enterprise and 80% managing the HOPE program. See DUPONT & ALM, *supra* note 98, at 16; DuPont Email, *supra*; Email from Mark A. R. Kleiman, Professor of Public Policy, UCLA, to author (May 18, 2014, 10:36 PM) (on file with the *Journal*) (hereinafter Kleiman Email).

¹⁶⁹ See, e.g., DUPONT & ALM, *supra* note 98, at 21 (\$46,000 per inmate per year); Larkin, *supra* note 89, at 12–17.

ancillary savings from decreased drug use by offenders: smaller drug markets, individuals spared from becoming victims of crimes committed by drug-seeking criminals, and reduced suffering by the family members of otherwise-imprisoned offenders.

What may be particularly noteworthy about the HOPE program is that, in Judge Alm's words, "HOPE targets the toughest offenders."¹⁷⁰ Participants in the HOPE program have included violent offenders, sex offenders, and offenders with a history of noncompliance with the terms of ordinary probation.¹⁷¹ That is an unusual feature of community corrections programs. Including the "toughest cases, the ones most likely to fail on probation,"¹⁷² would be deemed risky because it likely would reduce the success rate. Drug courts, for example, often exclude such parties from their programs,¹⁷³ which renders them susceptible to the criticism that successful results do not fairly represent the likely outcome of a large-scale implementation of that approach. HOPE also may not work for every offender, but it does appear willing to assume a greater risk of failure than drug courts, and it has a success rate of approximately eighty percent.¹⁷⁴

III. THE NEXT STEPS

A. THE REASONABLENESS OF THE OPTIONS

The 24/7 Sobriety and HOPE programs appear to be reasonable, measured steps toward a sensible solution to the complementary problems of substance abuse and crime. The programs avoid the risks involved in the extreme positions that some advocates propose: either ratcheting up the punishment for drug use to an even more severe level or completely jettisoning the current approach toward drug use by legalizing all or most controlled substances. Those proposals are unsound and unattainable, theoretically and politically.

As a policy matter, neither position would be a wise choice. We increased the penalties for drug crimes nearly three decades ago in the Anti-Drug Abuse Act of 1986;¹⁷⁵ we have built new penitentiaries and outsourced that function to private parties;¹⁷⁶ we have sent thousands of

¹⁷⁰ Alm, *supra* note 146, at 1186.

¹⁷¹ *See id.*; DUPONT & ALM, *supra* note 98, at 8.

¹⁷² Alm, *supra* note 146, at 1187.

¹⁷³ *See id.* at 1188; *supra* text at note 108.

¹⁷⁴ Kleiman Email, *supra* note 153. Offenders who fail in HOPE and need more intensive supervision are referred to drug courts. *See* DUPONT & ALM, *supra* note 98, at 20.

¹⁷⁵ Pub. L. No. 99-570, 100 Stat. 3207 (as amended by Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372).

¹⁷⁶ *See, e.g.,* Larkin, *supra* note 89, at 3-4, 14-17.

offenders to prison for those offenses;¹⁷⁷ and we lack the ability and willingness to underwrite even more punitive sanctioning of drug use than we have witnessed for the last four decades, even assuming that stiffer penalties would make a difference.¹⁷⁸ Atop that, we lack the foresight to confidently predict the consequences for society that could result from the radical change in direction that large-scale decriminalization, to say nothing of across-the-board legalization, could have, especially in a brief period of time, for drugs like heroin or cocaine. Such policies, as Stanford Law Professor John Kaplan argued, could lead to a considerable increase in the number of drug users, perhaps reaching the point at which there could be a “critical mass” of addicts, a total that erodes the economy’s ability to deliver the quality of life that we have come to expect, while also swamping the medical system’s ability to deliver treatment to the new, much higher number of addicts.¹⁷⁹ On the other hand, the American history of alcohol regulation shows that even complete legalization for adults has not eliminated a need for the criminal justice system to police abuse of that substance and its associated crimes.

As a political matter, the federal government is highly unlikely to follow either course. Since the 1980s, the government has heavily invested its money, resources, and prestige in a supply-side approach to the drug problem by relying primarily on interdiction and enforcement efforts to deter drug trafficking and use. That longstanding strategy has created entrenched winners in the battle for public funds and electoral success, winners who will not abandon their victories in the political arena without a fight to the death, a fight that the advocates for stiffer penalties or legalization have shown no willingness to provoke. In any event, there is no reason to expect that we will see any such struggle in the near future because there is no public constituency either for condemning all drug users to lifetime imprisonment or for the immediate and unconditional liberty for

¹⁷⁷ See, e.g., *id.* at 12–14.

¹⁷⁸ See, e.g., H.R. REP. NO. 112-169, at 64 (2011) (“[D]espite a dramatic increase in corrections spending over the past two decades, re-incarceration rates for people released from prison are largely unchanged. This trend is both financially and socially unsustainable”); Memo from Michael Horowitz, Inspector Gen., U.S. Department of Justice, to the Attorney Gen. and Deputy Attorney Gen. Regarding Top Management and Performance Challenges Facing the Department of Justice (reissued Dec. 23, 2013), <http://www.justice.gov/oig/challenges/2013.htm>, archived at <http://perma.cc/CYT6-5T6T> (“The crisis in the federal prison system is two-fold. First, the costs of the federal prison system continue to escalate, consuming an ever-larger share of the Department’s budget with no relief in sight. . . . Second, federal prisons are facing a number of important safety and security issues, including, most significantly, that they have been overcrowded for years and the problem is only getting worse.”).

¹⁷⁹ See KAPLAN, *supra* note 26, at 111–36; Kaplan, *supra* note 34, at 33–35, 38–42.

anyone and everyone who uses any controlled substance, even if accompanied by compulsory drug treatment.¹⁸⁰

Accordingly, unless and until we develop a safe, cheap, easy-to-use, and universally applicable pharmacological means of shielding the brain's pleasure centers from the euphoric effect produced by alcohol and controlled substances, as well as a way to persuade or compel at-risk individuals to accept that treatment in lieu of drug use or prosecution—a solution that raises its own perhaps equally insoluble problems¹⁸¹—we must continue to deal with the substance abuse problem by trying to shape individual behavior within the confines of present medical science and penological theory. The 24/7 Sobriety and HOPE programs seek to do just that by blending the traditional platforms that pretrial diversion and probation affords offenders for the opportunity to avoid incarceration with the ability of modern technological devices to measure a person's compliance with a strict no-substance-use requirement as a condition of release. In addition, the 24/7 Sobriety and HOPE programs work in conjunction with the traditional options of probation or incarceration for persons who do not need to participate in either program, who would not benefit from participation in one or the other, or who have proved their inability or unwillingness to comply with their strict requirements. The result is that if those programs help an offender become and remain clean and sober while also walking the straight and narrow, the states and federal government should consider duplicating those programs in the other states.

¹⁸⁰ See, e.g., EXEC. OFFICE OF THE PRESIDENT OF THE UNITED STATES, *supra* note 47, at 1–2 (“In recent years, the debate about drug policy has lurched between two extremes. One side of the debate suggests that drug legalization is the ‘silver bullet’ solution to drug control. The other side maintains a law enforcement-only ‘War on Drugs’ mentality. Neither of these approaches is humane, effective, or grounded in evidence.”).

¹⁸¹ One of which may be the mistaken assumption that there is a pharmacological solution for addiction.

Methadone will only prevent withdrawal symptoms and the related physiological hunger for heroin. To be sure, a heroin addict who is given this opiate is much more likely to stay engaged in a treatment program, but methadone cannot make up for the psychic deficits that led to addiction, such as deep-seated intolerance of boredom, depression, stress, anger, and loneliness. The addict who began heavy drug use in his teens has not even completed the maturational tasks of adolescence; he has not developed social competence, consolidated a personal identity, or formed a concept of his future. Furthermore, methadone cannot solve the secondary layer of troubles that accumulate over years of drug use: family and relationship problems, educational deficiencies, health problems, economic losses. Consequently, only a small fraction of heroin addicts are able to become fully productive on methadone alone.

Sally Satel, *Is Drug Addiction a Brain Disease?*, in ONE HUNDRED YEARS OF HEROIN 55, 61 (David S. Musto ed., 2002); see also, e.g., DAVID COURTWRIGHT ET AL., ADDICTS WHO SURVIVED 338 (1989) (“The stupidity of thinking that just giving methadone will solve a complicated social problem seems to me beyond comprehension, but it’s still a limiting factor in people’s thinking.”).

Two features of the 24/7 Sobriety and HOPE programs could help persuade those governments to follow South Dakota and Hawaii's lead. One is that 24/7 Sobriety and HOPE do not require the judicial process to replace their existing programs with those two alternatives. A state could combine 24/7 Sobriety and HOPE with whatever combination of punitive and therapeutic options it currently uses. Of course, the government would need to fund at least some of the costs of the 24/7 Sobriety or HOPE programs because user fees may not always completely underwrite the testing expenses, and that need would require the government to divert appropriations from a current use to testing costs or to find a new revenue source. But that is true of any new program regardless of where it fits into the spectrum of services that the government provides the public, whether within or outside of the criminal justice system. Besides, if the 24/7 Sobriety and HOPE programs turn out to be cost effective in the long run by reducing incarceration and crime, the dollars spent up front to adopt those programs will be money well spent.

The other attractive feature of those programs is that they are not "soft on crime." Tarring someone with that epithet has been a commonly used political trope for four decades or more because it resonates with a public concerned about crime. Politicians from both major parties have sought to avoid being labeled as such by creating all manner of new crimes and by ratcheting up the penalties for existing offenses.¹⁸² The 24/7 Sobriety and HOPE programs, however, do not easily lend themselves to serving as another platform for that feared rhetorical practice. The offer to participate in one program or the other is not a "Get Out of Jail Free" card; it is merely an opportunity to avoid incarceration if an offender remains alcohol or drug free. The programs do not immunize a participant from criminal liability for any new offenses he or she may commit while participating, and they do not prevent a judge from invoking the full force of the criminal justice system if he or she finds it necessary because of an offender's recalcitrance or repeated infractions.

In that regard, the 24/7 Sobriety and HOPE programs have an advantage over drug courts: drug courts can be challenged from the right and the left as being either too lenient or too severe a sanction for offenders with a substance abuse problem. Drug courts use a therapeutic approach resembling the rehabilitative philosophy that undergirded the American correctional system for most of the twentieth century.¹⁸³ The so-called "Rehabilitative Ideal" grew out of a Progressive Era philosophy holding

¹⁸² See Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 725–26 (2013).

¹⁸³ See NOLAN, *supra* note 26, at 185–208; Larkin, *supra* note 86, at 309–10.

that modern-day knowledge and treatments could change the attitudes and behavior of offenders and set them on the right path. To implement that theory, the criminal justice system adopted parole, probation, suspended sentences, and juvenile courts as new tools.¹⁸⁴ Critical to the hoped-for success of that approach was the need to individualize the rehabilitative treatment for each offender along the lines of the medical model of patient care. Judges and parole officials therefore had broad discretion to decide exactly how long an offender should be imprisoned in order to ensure that his reformation was complete.¹⁸⁵ Over time, conservatives and liberals criticized those tools and the underlying rehabilitative ideal on the ground that they either coddled or manhandled criminals.¹⁸⁶ The belief took hold that, to be just, punishment must reflect the severity of the crime, rather than the wickedness and incorrigibility of an offender. Eventually, Congress and the states rejected rehabilitation as a theory justifying criminal punishment in favor of retribution, deterrence, and incapacitation.¹⁸⁷ Yet the *raison d'être* of the drug court system is that addiction is a personal disease and must be treated like one for the addict's or offender's own good, rather than a moral or behavioral shortcoming that must be chastised for the benefit of society.¹⁸⁸ It is a mistake to think, however, that the nation has

¹⁸⁴ See NOLAN, *supra* note 26, at 168–69.

¹⁸⁵ See Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, in THE OXFORD HISTORY OF THE PRISON 178 (Norval Morris & David J. Rothman eds., 1998) (“Just as no legislature would tell a doctor when to discharge a patient from a hospital as cured, so no legislature should tell a warden or any other prison official when to discharge an inmate as cured.”).

¹⁸⁶ See NOLAN, *supra* note 26, at 185–208; Larkin, *supra* note 86, at 312–15.

¹⁸⁷ See, e.g., 18 U.S.C. § 3582(a) (2012) (instructing sentencing courts to “recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation”); 28 U.S.C. § 994(k) (2012) (barring the U.S. Sentencing Commission from promulgating Sentencing Guidelines that recommend imprisonment for the purpose of rehabilitation); *Tapia v. United States*, 131 S. Ct. 2382 (2011); *Mistretta v. United States* 488 U.S. 361, 367 (1989). See generally WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011) (describing the transition from a rehabilitative model to today's punitive model and the costs of that shift).

¹⁸⁸

[T]he drug court is not simply a readjustment of existing judicial resources and processes in response to the pressures of escalating expenses and a growing volume of drug offenders. Additionally, it introduces into the adjudication process an entirely new paradigm, one commensurate with therapeutic tendencies in American culture. Drug court judges readily concede that drug courts ‘view drug offenders through a different lens than the standard court system.’ Moreover, they acknowledge that adoption of this new paradigm alters the manner in which the court treats the defendant. ‘In approaching the problem of drug offenders from a therapeutic, medicinal perspective, substance abuse is seen not so much as a moral failure, but as a condition requiring therapeutic remedies.’ Thus, the medical or therapeutic paradigm is embraced as the guiding judicial philosophy.

NOLAN, *supra* note 26, at 49 (footnotes omitted). According to some drug court judges, “a

completely abandoned the just deserts philosophy that it has embraced for more than three decades, even for offenders who also are addicts, or that it would jettison just deserts were drug courts to have greater success than appears to be the case.¹⁸⁹ It also is a mistake to conclude that drug courts are immune from the same type of disparate treatment that helped sink rehabilitation as the system's motivating philosophy.

The 24/7 Sobriety and HOPE programs use the sanctions imposed by the traditional criminal justice system in every case in order to penalize offenders who violate the program's rules. That may help shield advocates for those programs from the political blowback that could occur from being associated with nontraditional disposition philosophies, such as the rehabilitative and therapeutic ideals animating the old discretionary sentencing system and the modern-day drug court system. The 24/7 Sobriety and HOPE programs may or may not work well when they are used in other jurisdictions and scaled up—a subject that I will speak to in the next section of this Article—but they cannot be criticized on the ground that they are designed with therapeutic treatment in mind or necessarily will be applied capriciously.

Finally, the 24/7 Sobriety and HOPE programs may be less costly in the long run than standard probation or drug courts. Those programs are more expensive in the short run than traditional forms of probation, but their success at reducing substance abuse and crime may make them preferable options in many cases.¹⁹⁰ Moreover, while 24/7 Sobriety and HOPE cost \$1,000 and \$500 more per offender than traditional forms of probation, drug courts cost \$3,000 more per offender than 24/7 Sobriety and HOPE.¹⁹¹ The result is that, whether evaluated from a penological or a financial perspective, the 24/7 Sobriety and HOPE programs appear quite reasonable. Accordingly, program supporters should be able persuasively to argue that they are being “smart” and “efficient” on crime, not “soft.”

major part of the problem with the traditional criminal justice system is its antitherapeutic outcomes. Traditional methods keep defendants in denial, lower their self-esteem, and encourage them mentally to suppress issues related to their drug use.” *Id.* at 50.

¹⁸⁹ See *supra* notes 104–09.

¹⁹⁰ The same party may not bear the increased short-run costs and recoup the long-run savings. Counties generally are responsible for the cost of probation, and they will pay more for HOPE than for traditional probation. States generally are responsible for imprisonment, so they will pay less to confine offenders (or could decide to use those savings either to confine more incorrigible offenders or imprison the same amount for longer periods). The problem arises from the fact that most states do not properly align the economic incentives involved in the criminal justice system. This issue, however, is beyond the scope of this article.

¹⁹¹ See Alm Email, *supra* note 146; DuPont Email, *supra* note 168.

B. THE NEED FOR ADDITIONAL STUDY

It would be a mistake to infer from what we know today that the programs will continue to be successful tomorrow and every day afterwards in South Dakota, Hawaii, and any other jurisdiction that adopts its own version. The 24/7 Sobriety and HOPE programs look promising, and the initial studies of their operation and outcomes have to date confirmed the hopes of their originators that a shift in the criminal justice system's orthodox approach of informing, monitoring, and punishing offenders could prove more efficacious than the customary way that the criminal justice system has operated. There are a variety of questions that we should answer, however, before the state and federal governments substitute 24/7 Sobriety and HOPE programs for the traditional diversion, probation, and parole systems that have existed since the beginning of the twentieth century. Taking the time to answer those questions now avoids the risk of wasting scarce resources that could result from a precipitous decision to shift gears immediately and everywhere if some unique feature of geography or society in South Dakota and Hawaii prevents those efforts from being successfully transplanted elsewhere.

The RAND study of the South Dakota 24/7 Sobriety program concluded that it has proved successful in the short time that it has been in effect, but the study recommended that further analysis be conducted. The reason was that it is unclear what effect the program will have in the long run—that is, will the positive effects persist or deteriorate.¹⁹² On the one hand, the positive effects could increase as counties gain more experience with its administration, as the program includes additional parties, and as more and more actual and potential offenders realize that the judges running the program are serious about immediately penalizing everyone who fails an alcohol test. On the other hand, however, the effect of the program on its participants could decrease over time as they become further and further removed from the restraints it imposed on them or if employers prove unwilling to forgive even the brief absences from work that the moderate penalties impose. It also is uncertain whether the program works better for some types of substance abuse offenders than others, whether the program has positive results such as decreased long-term mortality or morbidity, and whether it has benefits beyond DUI and spousal or child abuse offenses.¹⁹³

Moreover, not every jurisdiction may have the personnel or law enforcement resources necessary to make aspects of the programs work

¹⁹² See Kilmer & Humphreys, *supra* note 116, at 272, 276. Hawken and Kleiman also recommended further study of HOPE for the same reason. See EVALUATING HAWAII'S HOPE, *supra* note 154, at 50.

¹⁹³ *Id.*

effectively. One reason that HOPE has worked is that Judge Steven Alm had been a local prosecutor (whose last case was the successful prosecution of the murderer of a police officer) and the U.S. Attorney for Hawaii before he went onto the bench.¹⁹⁴ Having held those positions allowed Judge Alm to draw on contacts and personal resources other judges may not have enjoyed and also enabled him to fend off claims that he was being “soft on crime.”

There also are various logistical problems. One is that probation officers may not have arrest power or the authority to carry firearms in every jurisdiction.¹⁹⁵ Where that is true, the burden of arresting program participants would fall on the local police whenever a participant does not appear for scheduled testing or his or her electronic monitoring device signals alcohol or drug use. The burden of holding arrestees until their hearing is held and transporting them from the holding area to the courthouse and then to jail also may differ from county to county. And the ability of the responsible judges to command the respect of law enforcement officers, or to attract the necessary funds from legislators, could differ from person to person. The result is that a long-run study of these programs is needed to evaluate their overall effectiveness.

Related questions involve the optimal length of the intensive monitoring regimen that each program requires for maximum effectiveness and the likely duration of the beneficial effect that a program has on participants once they leave it behind. Studies have indicated that participation in drug treatment for at least three months can substantially reduce drug use and crime.¹⁹⁶ The 24/7 Sobriety and HOPE programs, however, are not treatment programs; they are, to use Professor Mark’s Kleiman’s phrase, a form of “coerced abstinence.”¹⁹⁷ It is uncertain at present precisely how long an offender must be supervised in those programs in order for one or the other to be effective, and how long the effect of those programs can last once an offender is on his or her own. The 24/7 Sobriety program has no upper limit for program participation, but offenders who have participated for at least ninety consecutive days have the best long-term reduction in DUI arrests, the average participation is approximately one hundred days, and some offenders have participated for well beyond a year.¹⁹⁸ Compliant offenders participating in the HOPE

¹⁹⁴ See KLEIMAN, *supra* note 146, at 35–38; Alm Email, *supra* note 146.

¹⁹⁵ See, e.g., 18 U.S.C. §§ 3603(9) & 3154(13) (2012) (authorizing federal probation officers to carry firearms “[i]f approved by the district court”).

¹⁹⁶ See Lurigio & Swartz, *supra* note 41, at 70.

¹⁹⁷ KLEIMAN, *supra* note 26, at 192–96; cf. Kleiman Email, *supra* note 168 (“coerced desistence”).

¹⁹⁸ See Email from Lawrence E. Long, Judge, South Dakota Second Judicial Circuit, to

program can be released from probation after eighteen or twenty four months, but felons could spend their entire period of probation in HOPE, a period that is typically four years, but could be longer.¹⁹⁹ If a shorter period is equally effective the expenses saved from graduating participants sooner can be used to expand the reach of the current program to include additional substance-abusing offenders or, as noted below, to reach offenders without that problem but who might benefit from the relatively intensive scrutiny that a 24/7 Sobriety or HOPE program affords. What is more, if it is true that some number of heavy alcohol users and heavy drug users desist from substance abuse over time,²⁰⁰ there may be no need for offenders to remain within those programs for the bulk of their lives, which would save funds that could be used to enroll additional offenders in those programs or in treatment. The 24/7 Sobriety and HOPE programs may help an offender along the path to desistance.

The 24/7 Sobriety and HOPE programs are not limited to alcoholics and addicts. The former was designed for repeat DUI offenders, while the latter targeted offenders who typically used methamphetamine or other drugs or typically violated other conditions of probation, whether or not they were addicted.²⁰¹ Another question that should be considered is how well those programs would work for addicts who just happen to become involved in the criminal justice system by virtue of one offense, rather than persons whose primary interaction with that system is through the commission of a number of crimes but who also engage in substance abuse. At least one commentator has questioned whether the 24/7 Sobriety and HOPE programs would work as well for persons who fit into the former category as in the latter.²⁰² That may be true in some cases. Some offenders are better suited for in-patient treatment or for drug courts than for 24/7 Sobriety or HOPE. At the same time, those programs also could be used for an offender as a condition of pretrial release, at the outset or a term of probation or parole, or as the first response to a technical violation of one of those forms of release. Further study could answer those questions.

The RAND study also noted that the 24/7 Sobriety program and the HOPE program were similar and could have implications for other

author (June 4, 2014) (on file with the *Journal*).

¹⁹⁹ See DUPONT & ALM, *supra* note 98, at 9; Alm Email, *supra* note 146; Conversation with Robert L. DuPont (Apr. 15, 2014).

²⁰⁰ See BOYUM & REUTER, *supra* note 5, at 84.

²⁰¹ See DUPONT & ALM, *supra* note 98, at 9; Alm Email, *supra* note 146; Conversation with Robert L. DuPont (Apr. 15, 2014); Kleiman Email, *supra* note 168.

²⁰² See Alex Kreit, *The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?*, 2010 U. CHI. LEGAL F. 299, 333–34 (2010).

limitations imposed on a probationer.²⁰³ That similarity is noteworthy for several reasons. To start with, the similarity in the operations and outcomes of the two programs offers some evidence that the two projects may work in states other than South Dakota and Hawaii, the states of origin. South Dakota and Hawaii are miles apart, geographically and culturally, but the same approach has seemed to work in each locale. If that turns out to be true in the long run, the results of the two programs should offer other states confidence that the theory underlying the 24/7 Sobriety and HOPE programs can be transplanted to their own jurisdictions.²⁰⁴ Of course, time will tell if those programs continue to generate positive results on a long-term basis, but the fact that two very different states have generated favorable results from a focused application of swift, certain, and moderate sanctions should encourage the other forty-plus states that have not yet initiated their own similar programs that it would be worthwhile to launch a few pilot projects of their own.

Finally, the 24/7 Sobriety and HOPE programs could be extended to the current prison population as part of an early release initiative. The federal and state government could select prisoners unlikely to reoffend for an early release as long as they are willing to participate in one of those programs. Moreover, the same theory would justify trying out a similar program for offenders with geographic restrictions by using an anklet with a built-in GPS device that would monitor an offender's location in order to ensure that he shows up for work and avoids places declared out-of-bounds (for example, a bar or, in the case of a sex offender, a school).²⁰⁵

C. THE ROLES FOR THE STATES AND FEDERAL GOVERNMENT

Persuaded by the promise of the 24/7 Sobriety and HOPE programs, several states have decided to adopt their own versions of the South Dakota and Hawaii innovations.²⁰⁶ The initial results of those efforts appear

²⁰³ Others have expressed the same hope. *See, e.g.*, Kleiman & Hollander, *supra* note 1, at 104–05. In Oahu, Hawaii, felony sex and domestic violence offenders are supervised under HOPE. *See* Pearsall, *supra* note 164, at 5.

²⁰⁴ According to Professor Kleiman, preliminary evidence from Washington State is positive that HOPE is working there. *See* Kleiman Email, *supra* note 168.

²⁰⁵ There also is evidence that voucher programs offering positive rewards for abstinence can reduce drug use. *See* HEYMAN, *supra* note 29, at 86, 106–07.

²⁰⁶ *See* Pearsall, *supra* note 164, at 39 (“[Angela Hawken:] We know of at least 40 jurisdictions in 18 states that have implemented similar models.”). Alaska, Montana, North Dakota, and Washington have adopted their own statewide 24/7 Sobriety programs. *See, e.g.*, ALASKA STAT. ANN. § 33.05.020(f) (2014); MONT. CODE ANN. §§ 44-4-1201 to 44-4-1206 (2013); MONT. ADMIN. R. §§ 23.18.301 to 23.18.309 (2013); N.D. CENT. CODE 39-08-01(5)(f) (2013); WASH. REV. CODE §§ 36.28A.310 to 36.28A.390 (2014); *Sobriety Program*

promising. The states that have chosen to use this new approach to dealing with DUI crimes have seen a marked decrease in the number of traffic fatalities. It therefore may well be the case that 24/7 Sobriety programs, like the HOPE projects that several states have adopted, are a sensible way of dealing with the core DUI problem in a straightforward, effective, and cost-efficient manner.

Finally, it may make sense for states to consider combining 24/7 Sobriety and HOPE programs. The two programs are based on the same theory, they use similar substance tests, they have the same rigorous testing protocol, and they penalize infractions in the same manner. Of course, combining alcohol and drug testing may prove more costly at present because there is no one test that captures alcohol and every controlled substance.²⁰⁷ But the benefits of determining whether an offender has used different substances are valuable. Substance abusers commonly use more than one intoxicant,²⁰⁸ and, more often than not, one of them is alcohol.²⁰⁹ Moreover, alcohol and illicit drugs may be substitutionary intoxicants,²¹⁰ so

Guidelines (2013), N.D. ATT'Y GEN'L, available at <http://www.ag.nd.gov/TwentyFourSeven/GUIDELINES.pdf> (last visited Mar. 1, 2015), archived at <http://perma.cc/N3PR-MK5R>; *The 24/7 Sobriety Program*, N.D. ATT'Y GEN'L, <http://www.ag.nd.gov/TwentyFourSeven/> (last visited Mar. 1, 2015), archived at <http://perma.cc/YW3H-WPZW>; *The Montana 24/7 Sobriety Program*, MONTANA DEP'T OF JUSTICE, <https://dojmt.gov/247-sobriety-program/>, archived at <https://perma.cc/SY26-9RAD>. Texas has its own, similar, SWIFT program for probationers. See *supra* note 163 (outlining Texas's SWIFT program). Other states, such as Wyoming, may be considering such a program. See, e.g., *24/7 Sobriety Project*, GOVERNOR'S COUNCIL ON IMPAIRED DRIVING, http://www.wygcid.org/24_7_Sobriety_Project.html (last visited Mar. 1, 2015), archived at <http://perma.cc/3MAD-VDQ2>. 24/7 Sobriety also appears to have made its way "across the pond." The United Kingdom has expressed interest in the program as a means of dealing with alcohol-related violent crime and property damage. See Kilmer & Humphreys, *supra* note 116, at 272–74.

²⁰⁷ See DRUG TESTING, *supra* note 3, at 5 ("Drug tests do not detect drug use 'in general.' Instead, drug tests identify specific drugs or drug classes as well as drug metabolites in biological matrices that are represented in particular test panels.") (footnote omitted); *id.* at 26 ("Today, there are no commercial tests for other drugs [than alcohol] using breath; however, because drugs and drug metabolites are present in breath and the condensate from breath, albeit at very low concentrations, as testing technologies become more sophisticated, breath testing for various drugs will become available in the future.") (footnotes omitted); *id.* at 31 ("Drug testing panels identify the use of only the specific drugs, drug classes, or drug metabolites built into the particular test panel."); *id.* at 14 ("Even an LC-MS/MS analysis screening for 65 (or more) drugs fails to detect many of the literally hundreds of drugs currently used in the United States . . ."); *id.* at 38 ("Breath testing technology, widely used in alcohol testing, is under development for the detection of other drugs.")

²⁰⁸ See, e.g., MIRON, *supra* note 12, at 11; Dill & Wells-Parker, *supra* note 84, at 47.

²⁰⁹ See DUPONT, *supra* note 8, at 228, 233.

²¹⁰ See, e.g., SABET, *supra* note 10, at 95–96.

testing for only one could drive an offender to use the other, eliminating the benefit of testing for the former.²¹¹

If other states do not yet want to strike out on their own to attempt to replicate the 24/7 Sobriety and HOPE projects, there may be additional confirmation of the success or limitations of those programs over the next two years. MPE and RAND have continued to study the 24/7 Sobriety program.²¹² The Department of Justice has funded two-year HOPE replication pilot projects in four jurisdictions,²¹³ and other states are considering or are already implementing their own HOPE programs.²¹⁴ The similarity between that program and 24/7 Sobriety raises the possibility that the results of the pilot projects following in the footsteps of the original HOPE project also will provide some useful conclusions for 24/7 Sobriety programs, or at least give us some avenues of investigation that look promising or futile. The results likely will be available during 2015.²¹⁵ Hopefully, the analyses of the results of those pilot projects will answer at least some of the issues that should be addressed before the states and federal government commit a large portion of their community corrections expenditures to 24/7 Sobriety and HOPE programs.²¹⁶

The question of what role the federal government should play in this regard is a complicated one. There are at least two roles for Congress. Congress has the authority to establish 24/7 Sobriety and HOPE programs as conditions of pretrial release or probation for convicted federal

²¹¹ See Kilmer & Humphreys et al., *supra* note 132, at 6–7.

²¹² See Talpins Email, *supra* note 128.

²¹³ See EXEC. OFFICE OF THE PRESIDENT OF THE UNITED STATES, *supra* note 47, at 28, 32. The jurisdictions are Clackamas County, Oregon; Essex County, Massachusetts; Saline County, Arkansas; and Tarrant County, Texas. See *id.* at 89 n.53. The federal government is seeking to expand the pilot projects even further. In April 2014, the Justice Department Bureau of Justice Assistance solicited applications for additional 24/7 Sobriety and HOPE programs. See FY 2014 COMPETITIVE GRANT ANNOUNCEMENT, *supra* note 146, at 1–2.

²¹⁴ See, e.g., Stuart Greenleaf, *Prison Reform in the Pennsylvania Legislature*, 160 U. PA. L. REV. PENNUMBRA 179 (2011). Eighteen states run HOPE programs or pilot projects in more than 165 locations. See DUPONT & ALM, *supra* note 93, at 19; Alm Email, *supra* note 146.

²¹⁵ Interim evaluations discuss the procedural implementation of the HOPE pilot programs, which seem to be adaptive and working well. See ANGELA HAWKEN, INITIAL FINDINGS FROM THE IMPLEMENTATION OF HOPE/SAC IN WASHINGTON STATE, AM. SOC. OF CRIMINOLOGY ANNUAL MEETING (Nov. 22, 2013); JONATHAN KULICK, CHALLENGES TO IMPLEMENTING HOPE IN DIVERSE JURISDICTIONS, AM. SOC. OF CRIMINOLOGY ANNUAL MEETING (Nov. 22, 2013); PAMELA K. LATTIMORE & DORIS L. MACKENZIE, FINDINGS FROM THE HOPE DEMONSTRATION FIELD EXPERIMENT, AM. SOC. OF CRIMINOLOGY ANNUAL MEETING (Nov. 22, 2013); GARY ZAJAC ET AL., ASSESSING FIDELITY AND LESSONS LEARNED IN HOPE PROGRAMS, AM. SOC. OF CRIMINOLOGY ANNUAL MEETING (Nov. 22, 2013).

²¹⁶ See LARKIN, *supra* note 100, at 4–6 (identifying some of those questions).

offenders.²¹⁷ Congress also may dispense funds to the states for their use in conducting pilot projects or in establishing permanent programs. What is uncertain, however, is whether Congress has the power under the Commerce Clause to require the states to establish 24/7 Sobriety and HOPE projects, even for alcohol- or drug-related offenses committed on roads that are part of the interstate highway system.²¹⁸ The argument would be that interstate highways are an instrumentality of interstate commerce, and Congress may prevent alcohol- or drug-impaired drivers from disrupting the flow of commercial traffic along those lanes.²¹⁹ Numerous nineteenth and twentieth century Supreme Court precedents would appear to support that use of Congress's Commerce Clause power.²²⁰

²¹⁷ See, e.g., 18 U.S.C. §§ 3561–66 (2012). Congress likely also has the power to establish 24/7 Sobriety and HOPE programs for violations of state law in certain instances. The Property Clause of the Constitution, art. IV, § 3, cl. 2, grants Congress the power “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,” while the Necessary and Proper Clause allows Congress to implement its power under provisions like the Property Clause. U.S. CONST. art. IV, § 8, cl. 18. Together those clauses enabled Congress to enact the Assimilative Crimes Act, 18 U.S.C. § 13 (2012), which incorporates state criminal law for federal enclaves. See *United States v. Sharpnack*, 355 U.S. 286 (1958) (relying on Congress’s power under the Property Clause to uphold the constitutionality of the Assimilative Crimes Act). Congress may be able to invoke those two powers to authorize and underwrite 24/7 Sobriety projects for crimes committed on federal property defined by state law. Cf. *United States v. Comstock*, 560 U.S. 126 (2010) (upholding over a Tenth Amendment challenge the constitutionality of a federal civil-commitment statute authorizing the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released).

²¹⁸ The Commerce Clause authorizes Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes . . .” U.S. CONST. art. I, § 8, cl. 3

²¹⁹ Early in the twentieth century, the Supreme Court upheld Congress’s power to prevent interstate commerce from being used to circulate items deemed dangerous or immoral. See, e.g., *Hoke v. United States*, 227 U.S. 308 (1913) (prostitution); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (impure food and drugs); *Champion v. Ames* (The Lottery Case), 188 U.S. 321 (1901) (lottery tickets and prize lists). Later cases, however, have placed a limit on Congress’s ability to justify federal legislation under the Commerce Clause. See *Morrison v. United States*, 529 U.S. 598 (2000) (holding that Congress’s decision to make rape a federal tort exceeded its Commerce Clause power); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress had exceeded its Commerce Clause authority by making it a crime to possess a firearm that had not travelled in interstate commerce in the vicinity of a school). The Court revisited this issue in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), and in a fractured opinion not commanding a majority, five Justices concluded that Congress lacked the power under the Commerce Clause to enact the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). Even the Court’s recent decisions, however, recognized that Congress can regulate the means by which interstate commerce is transacted. See, e.g., *Lopez*, 514 U.S. at 558 (“Congress may regulate the use of the channels of interstate commerce.”).

²²⁰ See, e.g., Larkin, *supra* note 86, at 337–38 (discussing Supreme Court decisions

Yet it is unlikely that Congress could or would seek to impose such a requirement on the states. Historically, states and municipalities have had the authority to license drivers and regulate traffic, and the states also have had the primary responsibility to regulate the manufacture, sale, and use of alcohol.²²¹ The Twenty-First Amendment expressly grants the states the primary authority to regulate that subject.²²² Moreover, directing the states to adopt 24/7 Sobriety programs would amount to an unfunded mandate, and the Unfunded Mandates Reform Act of 1995²²³ would provide a considerable roadblock to any such requirement.²²⁴ Also, over the last two decades the Supreme Court has made it clear not only that there are internal limitations on how far Congress's Commerce Clause authority reaches,²²⁵ but also that state sovereignty is an external limitation on that power, and it prohibits Congress from conscripting the states to enforce federal law, rather than assign that task to an agency of the federal government.²²⁶

expanding Congress's Commerce Clause authority).

²²¹ See *supra* notes 12–14 and accompanying text.

²²² See U.S. CONST. amend. XXI, § 2 (“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”). The Twenty-First Amendment gives rise to the following ironic scenario: Congress may be able to direct the states to adopt 24/7 Sobriety programs for *drug-related offenses* and mishaps committed on the interstate highway system, see *Gonzalez v. Raich*, 545 U.S. 1 (2005) (upholding Congress's Commerce Clause authority to prohibit the local cultivation and use of marijuana in compliance with state law), while lacking the authority to order the states to use such programs for *alcohol-related matters*. For the reasons stated in the text, however, the scenario is most unlikely ever to arise.

²²³ Pub. L. No. 104-4, 109 Stat. 48 (codified at 2 U.S.C. §§ 1501-07 (2006)).

²²⁴ No Congress can bind a future Congress from enacting an inconsistent statute, so the current Congress always could repeal that law for purposes of any specific piece of legislation. See, e.g., *Dorsey v. United States*, 132 S. Ct. 2321, 2331 (2012). The Unfunded Mandates Reform Act of 1995, however, indicates a strong congressional predisposition against a law directing the states to implement 24/7 Sobriety programs without any assistance from the federal government.

²²⁵ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (holding unconstitutional a federal statute making rape an actionable civil claim); *United States v. Lopez*, 514 U.S. 549 (1995) (holding unconstitutional, as exceeding Congress's commerce power, a federal law that made it a crime to possess a firearm in the vicinity of a school).

²²⁶ See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress may not conscript state officials to enforce federal law); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress may not direct the States to adopt a regulatory program); *Coyle v. Smith*, 221 U.S. 559 (1911) (ruling that Congress cannot select for a state the site of its capital). Cf. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (ruling that Congress cannot abrogate a state's Eleventh Amendment immunity by invoking its Commerce Clause powers). The rule is different when Congress invokes its enforcement authority under one or more of the Reconstruction Era Amendments, the Thirteenth, Fourteenth, and Fifteenth Amendments, because they were expressly designed to restrict state sovereignty. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451–56 (1976) (holding that Congress may abrogate a

Finally, forcing one of these programs on an unwilling state is likely to generate nothing but antagonism, hostility, and the refusal to make a good faith effort to see the programs work. Accordingly, the likelihood is virtually nil that Congress will order the states to adopt 24/7 Sobriety or HOPE programs. The criminal justice system will be better off if Congress uses federal funds as a carrot to entice states to adopt those programs than if Congress tries to shove one or both programs down their throats.

As noted, Congress always can nudge the states in that direction by helping them pay for those programs, even if Congress gives participating states only start-up funds necessary to get a program up and running. Congress could establish a grant program that disburses funds to the states and urge the states to use those monies to underwrite 24/7 Sobriety and HOPE programs. But Congress does not need to approach the states with hat in hand. Congress may impose conditions on a state's receipt of federal highway funds even if those conditions limit a state's otherwise plenary regulatory power.

In the 1980s, Congress established a national minimum drinking age of twenty-one for states that receive those monies, and penalized states that decline to comply with that mandate by withholding a small portion of the highways funds that the state otherwise would receive.²²⁷ In 1987 in *South*

state's Eleventh Amendment immunity when legislating pursuant to the authority granted Congress by Section 5 of the Fourteenth Amendment); *South Carolina v. Katzenbach*, 383 U.S. 301, 308–25 (1966) (holding that Congress may limit state sovereignty over voting by virtue of its enforcement authority under Section 2 of the Fifteenth Amendment), *abrogated by* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013)); *Ex parte Virginia*, 100 U.S. 339, 345–48 (1879) (noting that the Fourteenth Amendment limits state sovereignty). It would be extremely difficult, however, to come up with a persuasive argument that Congress can invoke that authority to deal with alcohol or drug use or substance-impaired driving.

²²⁷ Section 158(a) & (b) of Title 23 provides in part as follows:

(a) Withholding of Funds for Noncompliance.—

(1) In general.—

(A) Fiscal years before 2012.— The Secretary shall withhold 10 per centum of the amount required to be apportioned to any State under each of sections 104(b)(1), 104(b)(3), and 104(b)(4) of this title on the first day of each fiscal year after the second fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.

(B) Fiscal year 2012 and thereafter.— For fiscal year 2012 and each fiscal year thereafter, the amount to be withheld under this section shall be an amount equal to 8 percent of the amount apportioned to the noncompliant State, as described in subparagraph (A), under paragraphs (1) and (2) of section 104(b).

(2) State grandfather law as complying.— If, before the later of

(A) October 1, 1986, or

(B) the tenth day following the last day of the first session the legislature of a State convenes after the date of the enactment of this paragraph, such State has in effect a law which makes

Dakota v. Dole,²²⁸ the Supreme Court held that Congress has the Article I authority to condition the receipt of a portion of federal highway funds²²⁹ on a state's compliance with a federal minimum drinking age requirement.²³⁰ The Court expressly rejected the argument that that the mandate was an "unconstitutional condition" on the disbursement of federal funds in violation of the Tenth Amendment.²³¹ The Court also turned aside the claim that the condition violated the states' prerogative under the Twenty-First Amendment to regulate the distribution and use of alcoholic beverages.²³²

The Supreme Court's decision in the *Dole* case likely gives Congress the power to "encourage" the other forty-eight states to follow South Dakota's and Hawaii's lead by conditioning the receipt of their full entitlement to future interstate highway funds on their implementation of a program like the ones in use in those states.²³³ Federal law already penalizes

unlawful the purchase and public possession in such State of any alcoholic beverage by a person who is less than 21 years of age (other than any person who is 18 years of age or older on the day preceding the effective date of such law and at such time could lawfully purchase or publicly possess any alcoholic beverage in such State), such State shall be deemed to be in compliance with paragraph (1) in each fiscal year in which such law is in effect.

(b) Effect of Withholding of Funds.— No funds withheld under this section from apportionment to any State after September 30, 1988, shall be available for apportionment to that State.

(c) Alcoholic Beverage Defined.— As used in this section, the term "alcoholic beverage" means—

(1) beer as defined in section 5052(a) of the Internal Revenue Code of 1986,

(2) wine of not less than one-half of 1 per centum of alcohol by volume, or

(3) distilled spirits as defined in section 5002(a)(8) of such Code.

23 U.S.C. § 158 (2012).

²²⁸ 483 U.S. 203 (1987).

²²⁹ The statute considered in *Dole* imposed a penalty of only 5% of a state's highway funds. *See id.* at 211.

²³⁰ Article I, § 8, cl. 1 of the Constitution grants Congress the power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." The Supreme Court has often held that Congress may impose conditions on the receipt of federal funds. *See Dole*, 483 U.S. at 206–07 (collecting cases); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

²³¹ *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

²³² *See Dole*, 483 U.S. at 208–12.

²³³ To be sure, there are limits on the type and amount of disallowances that Congress may impose for a violation of a condition on the receipt of a federal grant, particularly when Congress tries to alter grant requirements retroactively. *See NFIB v. Sebelius*, 132 S. Ct. 2566, 2601–07 (2012) (holding unconstitutional the withdrawal of all Medicaid funds for a state's refusal to comply with the requirements of the Patient Protection and Affordable Care Act of 2010). The prospective application of an additional, modest penalty similar to the one at issue in *Dole*, however, should fall within the reach of Congress's Article I authority as long as the accumulation of all such penalties does not approach a state's full share of federal

states that do not adequately punish repeat DUI offenders.²³⁴ It would be a small step to revise that provision to authorize states to use 24/7 Sobriety and HOPE programs in lieu of the traditional punitive measures that states have used.

Congress currently has several different criminal justice reform proposals on its plate that would address, among other things, how offenders should be sentenced and when they should be released.²³⁵ A provision in one of those bills would authorize the federal government to run several randomized controlled trials along the lines of the HOPE project.²³⁶ Given the affinities between the HOPE and the 24/7 Sobriety

funds.

²³⁴ Section 164(b) of Title 23 provides as follows:

§ 164. Minimum penalties for repeat offenders for driving while intoxicated or driving under the influence

* * * * *

(b) Transfer of Funds.—

(1) Fiscal years 2001 and 2002.—On October 1, 2000, and October 1, 2001, if a State has not enacted or is not enforcing a repeat intoxicated driver law, the Secretary shall transfer an amount equal to 1 1/2 percent of the funds apportioned to the State on that date under each of paragraphs (1), (3), and (4) of section 104(b) to the apportionment of the State under section 402—

(A) to be used for alcohol-impaired driving countermeasures; or

(B) to be directed to State and local law enforcement agencies for enforcement of laws prohibiting driving while intoxicated or driving under the influence and other related laws (including regulations), including the purchase of equipment, the training of officers, and the use of additional personnel for specific alcohol-impaired driving countermeasures, dedicated to enforcement of the laws (including regulations).

(2) Fiscal year 2012 and thereafter.—

(A) Reservation of funds.—On October 1, 2011, and each October 1 thereafter, if a State has not enacted or is not enforcing a repeat intoxicated driver law, the Secretary shall reserve an amount equal to 2.5 percent of the funds to be apportioned to the State on that date under each of paragraphs (1) and (2) of section 104(b) until the State certifies to the Secretary the means by which the States will use those reserved funds among the uses authorized under subparagraphs (A) and (B) of paragraph (1), and paragraph (3).

23 U.S.C. § 164 (2012).

²³⁵ See Paul J. Larkin, Jr., *Managing Prisons by the Numbers: Using the Good-Time Laws and Risk-Needs Assessments to Manage the Federal Prison Population*, 1 HARV. J.L. & PUB. POL'Y: FEDERALIST 1, 22–24 (2014) (discussing the pending bills).

²³⁶ See *id.* Section 7(c) of the Recidivism Reduction and Public Safety Act of 2014, S. 1675, 113th Cong., would require the Attorney General to consider “a recidivism reduction and recovery enhancement pilot program, premised on high-intensity supervision and the use of swift, predictable, and graduated sanctions for noncompliance with program rules” in selected federal districts. That provision would authorize federal pilot-program versions of the HOPE program currently used in Hawaii. On March 6, 2014, the Senate Judiciary Committee combined the RRPSA and a related Senate bill—the Federal Prison Reform Act of 2013, S. 1783, 113th Cong.—into one bill, which the committee reported as a substitute version of the RRPSA. SENATE JUDICIARY COMM., 113TH CONG., RESULTS OF EXECUTIVE

programs, it might make sense for Congress to consider whether the latter approach should be a part of the federal grant system too.

Of course, funds spent on long-term research compete with funds that could generate short-term, concrete results, and members of Congress might be reluctant to appropriate funds for pilot projects that may not result in practical benefits and cost savings down the road. There also is no guarantee that those pilot projects will prove that 24/7 Sobriety and HOPE programs can and should be replicated across the nation; we could wind up not being able to answer that question until the programs are scaled up in size. The 24/7 Sobriety and HOPE programs, however, appear quite promising, and the additional pilot projects that could establish their nationwide utility likely would cost far less than what the federal and state governments spend on incarceration today. Appropriating funds for additional testing therefore is better seen as an investment than as a gamble and would be money well spent.

CONCLUSION

The similar experiences that South Dakota and Hawaii have witnessed with their independent 24/7 Sobriety and HOPE programs show that a state can effectively serve as the type of laboratory for positive social change that Supreme Court Justice Louis Brandeis touted eighty years ago.²³⁷ Some other states and counties have adopted the same or similar programs, but the vast majority has not done so. The reason may be simple inertia. “It turns out that it is tough to change the old habits of the system. As Adele Herrell said after an evaluation of a drug court, ‘Changing addict behavior is easy. Changing judge behavior is hard.’”²³⁸

Judge Larry Long’s initiative in the Mount Rushmore State, like Judge Steven Alm’s innovative use of probation in the Aloha State, proves four valuable lessons: First, swift and certain periods of confinement, even if short, may more effectively and efficiently reduce crime than sending more and more people to prison for longer and longer terms of incarceration. Second, not every worthwhile new proposal originates in Congress, the

BUSINESS MEETING—MARCH 6, 2014, <http://www.judiciary.senate.gov/download/executive-business-meeting-results-03-06-2014>, archived at <http://perma.cc/B73A-R2MM>. The 113th Congress did not pass that bill, but it was reintroduced in the 114th Congress as the Corrections Oversight, Recidivism Reduction, and Eliminating Costs for Taxpayers In Our National Systems (CORRECTIONS) Act. S. 467, 114th Cong. (2015).

²³⁷ See *New State Ice Co. v. Lieberman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

²³⁸ SABET, *supra* note 10, at 101 (footnote omitted).

academy, or a think tank. Sometimes one person—Larry Long and Steven Alm are just two examples—along with a host of dedicated colleagues, can devise an innovative approach to a longstanding problem that experts have overlooked, refused to credit, or were unwilling to try. Third, one motivated government official with the freedom to try something new and the willingness to take the risk of failing can move the large, entrenched, and generally immobile criminal justice system bureaucracy in a new direction. Fourth, although challenging orthodox approaches to longstanding problems may take years of hard work, resulting only in slow, incremental progress before a novel idea becomes generally recognized as worthwhile, the effort may not be a Sisyphean task.

The 24/7 Sobriety and HOPE programs are two examples of worthwhile ideas. Those programs merit the serious attention of the other states and the federal government because they hold out the prospect of humanely and efficiently reducing the morbidity and mortality resulting from substance abuse and crime, both on our highways and in our communities.