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LOOKING AT HAWAII'S OPPORTUNITY PROBATION WITH ENFORCEMENT (HOPE) PROGRAM THROUGH A THERAPEUTIC JURISPRUDENCE LENS

LORANA BARTELS*

This article examines Hawaii's Opportunity Probation with Enforcement (HOPE) program through the lens of therapeutic jurisprudence (TJ). The article presents an overview of TJ and solution-focused courts, followed by an overview of HOPE, including findings from four evaluations. It then provides a detailed description of recent observations of HOPE in practice, with particular focus on the warning hearing, sanctions for non-compliance, early termination for good behaviour, and the intersections between TJ, HOPE and procedural justice. The article concludes by arguing that there are a number of misunderstandings about HOPE and that it is best understood when viewed through a TJ lens.

I INTRODUCTION

The Hawaii's Opportunity Probation with Enforcement ('HOPE') program is an intensive supervision program that was conceived of by Judge Steven S Alm in 2004, which he then developed with Probation Section Administrator Cheryl Inouye.[1] Since then, the program has been positively evaluated. It (as discussed below) has also received extensive media attention, including articles in the *New York Times*[2] and *Wall Street Journal*.[3] In addition, it has received a number of awards. For example, the John F Kennedy School of Government at Harvard University included HOPE as one of the 25 programs in its 2013 Innovations in American Government Award competition.[4] The program has been replicated across the United States ('US'), where it is currently operating in 160 jurisdictions. It should be noted that Alm recently retired from judicial office to take on a new role, based in Washington DC, as a legal consultant to the states, US Department of Justice and Congress on the implementation of HOPE.[5] It is

* Lorana Bartels (BA, LLB, LLM (University of NSW), PhD (University of Tasmania), GDLP (College of Law) GCTE (University of Canberra)), Associate Professor and Head, School of Law and Justice, University of Canberra; Honorary Associate Professor, University of Tasmania. Email: lorana.bartels@canberra.edu.au. I am indebted to Steven Alm and Dr Anthony Hopkins for their comments on an earlier version of this article.

[1] See Steven Alm, 'HOPE Probation and the New Drug Court: A Powerful Combination' (2015) 99 *Minnesota Law Review* 1665; Institute for Behavior and Health (IBH), *State of the Art of HOPE Probation* (2015).

[2] Jeffrey Rosen, 'Prisoners of Parole', *New York Times Magazine* (online), 8 January 2010 <http://www.nytimes.com/2010/01/10/magazine/10prisons-t.html>.

[3] Mark Schoofs, 'Scared Straight...by Probation', *Wall Street Journal* (online), 24 July 2008 <http://www.wsj.com/articles/SB121685255149978873>.

[4] The program also received the American Judicature Society's Special Merit Citation Award in 2007 and the Outstanding Criminal Justice Program Award from the National Criminal Justice Association in 2014, while Judge Alm received the McGovern Award from the Institute of Behavioral Health (IBH) for the most promising drug policy idea of the year in 2009 and was named Hawaii Jurist of the Year by Chief Justice Mark Recktenwald in 2010: see Lorana Bartels, 'Swift and Certain Sanctions: Is It time For Australia To Bring Some HOPE into the Criminal Justice System?' (2015) 39 *Criminal Law Journal* 53.

[5] Chad Blair, 'Judge Steve Alm Is Taking His Message Of 'HOPE' To DC', *Honolulu Civil Beat*, 2 September 2016 <http://www.civilbeat.org/2016/09/hawaiis-steve-alm-is-taking-his-message-of-hope-to-dc>.

anticipated that the program in Hawaii will continue as before, with the new judicial officer in charge of the court having received extensive training from Alm before he left the bench.

The model has also sparked interest in Australia, due in part to a visit by Judge Alm in August 2015. This prompted the then Northern Territory Attorney-General to commit to a pilot program modelled on HOPE.[6] The final report of the National Ice Taskforce, released in December 2015, recommended that:

> The Commonwealth Government should work with at least one state or territory government to pilot a Swift and Certain Sanctions programme for ice offenders on probation, drawing on lessons learned from implementing these models in the United States, including the Hawaii Opportunity Probation with Enforcement Project trial in Hawaii.[7]

In response, the Council of Australian Governments agreed that the Northern Territory will 'pilot the Swift, Certain and Fair Sanctions model and share the results with other jurisdictions'[8]. In addition, the Australian Capital Territory Government has established a working group to consider, *inter alia*, the feasibility of adopting a 'swift, certain but fair program', with specific reference to HOPE.[9]

In March 2016, the Victorian Royal Commission into Family Violence handed down its report, which included the recommendation that '[t]he Sentencing Advisory Council report on the desirability of and methods for accommodating "swift and certain justice" approaches to family violence offenders in Victoria's sentencing regime [within 12 months]'.[10] The Victorian Government accepted all of the Royal Commission's recommendations and, in September 2016, the Victorian Attorney-General asked the Sentencing Advisory Council to 'provide him with advice on the desirability of, and methods for accommodating, "swift and certain" approaches to family violence offenders within Victoria's sentencing regime'.[11]

HOPE is currently undertaking a pilot program with family violence offenders, but most of its focus has been on offenders with substance abuse issues. In fact, Webster[12] recently described HOPE as an 'alternative drug court model'. Fisher[13] has also discussed HOPE in the context of drug courts, with a focus on aspects of HOPE that she suggested should be incorporated into

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[6] Katherine Gregory, 'NT Attorney-General Calls For US HOPE Program of Swift and Certain Sanctions to Deter "Knuckleheads" From Reoffending', *ABC News* (online), 17 August 2015 <http://www.abc.net.au/news/2015-08-17/john-elferink-calls-for-us-hope-program-to-deter-offenders/6703492>.

[7] National Ice Taskforce, *Final Report of the National Ice Taskforce* (Commonwealth of Australia, 2015) xiii (Recommendation 30).

[8] Council of Australian Governments, *National Ice Action Strategy* (Commonwealth of Australia, 2015) 25.

[9] The author is a member of this working group.

[10] Royal Commission into Family Violence, *Report and Recommendations* (State of Victoria, 2016) Recommendation 83.

[11] Victorian Sentencing Advisory Council, 'Latest News: Council Receives Terms of Reference for Swift and Certain Approaches to Family Violence Sentencing' (Media Release, 12 September 2016) <https://www.sentencingcouncil.vic.gov.au/news-media/news/council-receives-terms-reference-swift-and-certain-approaches-family-violence>. Although the Royal Commission's recommendation and reference to the Sentencing Advisory Council did not explicitly mention HOPE, it is clear from the Royal Commission's report and informal discussion with the Chair of the Council that HOPE will be considered as part of this research.

[12] Molly Webster, 'Alternative Courts and Drug Treatment: Finding A Rehabilitative Solution for Addicts in a Retributive System' (2015) 84 *Fordham Law Review* 855, 858.

[13] Caitlinrose Fisher, 'Note: Treating the Disease or Punishing the Criminal?: Effectively Using Drug Court Sanctions To Treat Substance Use Disorder and Decrease Criminal Conduct' (2014) 99 *Minnesota Law Review* 747, 760.

drug court processes. There was no discussion, however, on the ways in which HOPE itself adopts features of drug courts or solution-focused courts more generally.

To date, most of the discussion on HOPE has been on its swift, certain and fair sanctions, and the effectiveness of deterrence as a crime prevention tool.[14] However, there has been minimal consideration of HOPE through the lens of therapeutic jurisprudence ('TJ'), or examination of its operation as a solution-focused court. This is particularly surprising, given that Judge Alm was also in charge of the adult drug court in Hawaii's First Circuit from March 2011 to September 2014 (ie, after he established HOPE, but clearly demonstrating his understanding of and commitment to TJ and solution-focused courts). Interestingly, Judge Alm has stated his 'belief that drug courts provide the very best program that the judiciary has to offer in terms of supervision: better than probation-as-usual and better than HOPE Probation'.[15] As will be seen, however, HOPE has the potential to reach far more participants than drug courts.

This article seeks to fill this gap in the literature. First, it will present a brief introduction to TJ and solution-focused courts. It will then provide an overview of how HOPE works, followed by some key evaluation findings. The article then draws on recent court observations and discussions[16] to present a detailed insight into HOPE's operation, with particular attention to the role of Judge Alm in supporting participants' success on HOPE. The article will conclude with some comments on this program, when viewed through a TJ lens.

II TJ AND SOLUTION-FOCUSED COURTS

The concept of TJ 'focuses attention on the…law's considerable impact on emotional life and psychological well-being' and sees the law as 'a social force that can produce therapeutic or anti-therapeutic consequences'.[17] This approach 'directs the judge's attention beyond the specific dispute before the court and toward the needs and circumstances of the individuals involved in the dispute'.[18] In addition, it 'tries to …look carefully at promising literature from psychology, psychiatry, clinical behavioral sciences, criminology and social work to see whether those insights can be incorporated or brought into the legal system'.[19] As Stobbs[20] has observed, there are an increasing number of specialist criminal courts – variously known as problem-solving, problem-oriented or solution-focused courts[21] – that make use of TJ practices. Generally speaking, they seek to facilitate and support participants to act as autonomous change agents in their lives, by helping them deal with the issues that cause them

[14] See, eg, Angela Hawken and Mark Kleiman, *Managing Drug-Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE* (National Institute of Justice, 2009); Daniel Nagin, 'Deterrence in the Twenty-first Century' (2013) 42 *Crime and Justice* 199; Cecelia Klingele, 'What Are We Hoping For? Defining Purpose in Deterrence-Based Correctional Programs' (2015) 99 *Minnesota Law Review* 101. See also Bartels, above n 4.

[15] Alm, above n 1, 1688.

[16] This research has approval from the Human Research Ethics Committee of the University of Canberra (HREC15-264).

[17] Bruce Winick and David Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 7.

[18] David Rottman and Pamela Casey, 'Therapeutic Jurisprudence and the Emergence of Problem-solving Courts' (1999) 240 *National Institute of Justice Journal* 12, 14.

[19] David Wexler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 *Thomas M Cooley Law Review* 125, 127.

[20] Nigel Stobbs, *Mainstreaming Therapeutic Jurisprudences and the Adversarial Paradigm – Incommensurability and the Possibility of a Shared Disciplinary Matrix* (Unpublished PhD Thesis, Bond University, 2013) 2.

[21] For discussion of the implications of different terminologies, see Michael King, *Solution-Focused Judging Bench-book* (Australasian Institute of Judicial Administration, 2009) 3-5.

to offend, in order to reduce the likelihood of re-offending. According to Blagg,[22] these courts act as a 'hub' to connect various 'spokes' – such as drug and alcohol treatment agencies, community-based corrections, probation services and domestic violence agencies – forming a holistic and integrated approach. Although there are differences in how these courts operate, they usually have the following features:

- *case outcomes*—working on tangible outcomes for defendants, victims and society;
- *system change*—seeking to re-engineer how government systems respond to problems, such as drug and alcohol dependence and mental illness;
- *judicial monitoring*—active use of judicial authority to solve problems and change defendants' behaviour;
- *collaboration*—engaging government and non-government partners (eg social service providers and community groups) to reduce the risks of re-offending; and
- *non-traditional roles*—for example, altering aspects of the adversarial court process, as well as ensuring defendants play an active role in the process.[23]

A key aspect of such courts is the rapport the judge establishes with program participants. Indeed, Winick and Wexler suggested that forming a meaningful close personal relationship between drug court participants and the judicial officer is 'more important than the substance of therapies and sanctions', because it creates an 'ethic of care'.[24] This is confirmed by the recent finding that NSW Drug Court participants who formed a closer bond with the judicial officer had lower rates of substance use. This led the authors to conclude that the judge 'appears to be crucial to the … rehabilitation process. The formation of strong interpersonal bonds that appears to underpin this effect is consistent with the therapeutic jurisprudential principles upon which drug courts are based'.[25]

A number of aspects of HOPE point to its solution-focused nature. For example, it involves a non-adversarial and collaborative approach, with monthly meetings between the judicial officer, probation supervisors, and the researchers from the Hawaii Attorney General's Office. Court staff and defence counsel also have frequent communication with local drug treatment providers. In addition, most of the government funding allocated to the program is dedicated to drug treatment. The program also employs judicial authority to help change defendants' behaviour, while defendants are encouraged to speak directly to the court. To date, however, there has been little focus on these aspects of the HOPE program. Instead, the emphasis – both by proponents and critics – has been on its deterrence aspects, namely, the swift, certain and fair sanctions imposed for breaches. This and other features of HOPE will be explained below.

[22] Harry Blagg, *Problem-oriented Courts* (Law Reform Commission of Western Australia, 2008).

[23] See Lorana Bartels, 'Challenges in Mainstreaming Specialty Courts' (Trends and Issues in Crime and Criminal Justice No 383, Australian Institute of Criminology, 2009), citing Greg Berman and John Feinblatt, 'Problem-solving Courts: A Brief Primer' (2001) 23 *Law and Policy* 23 125; Arie Freiberg, 'Problem-oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8; Jelena Popovic, 'Court Processes and Therapeutic Jurisprudence: Have We Thrown the Baby Out with the Bathwater?' (2006) 1 *eLaw Journal (Special Series)* 60; Michael King et al, *Non-Adversarial Justice* (Federation Press, 1st ed, 2009). See also King, above n 21, Chapter 1.

[24] Winick and Wexler, above n 17, 17. See also Brian MacKenzie, 'The Judge Is the Key Component: The Importance of Procedural Fairness in Drug Treatment Courts' (2016) 52 *Court Review* 8.

[25] Craig Jones and Richard Kemp, 'The Strength of the Participant-Judge Relationship Predicts Better Drug Court Outcomes' (2014) 21 *Psychiatry, Psychology and Law* 165, 165.

III WHAT IS HOPE?

One of the principal evaluators of HOPE, Angela Hawken, has described the program as follows:

> [it] relies on swift and certain, but modest, sanctions to improve compliance. The probationers are warned in open court that if they violate probation rules they will immediately go to jail. During this warning hearing, probationers are assigned a color. Probationers are required to call a hotline each weekday morning to hear whether their color is being called for a random drug test that day. Random drug testing occurs at least six times a month for the probationer's first two months in the program (testing frequency is reduced in response to good performance). If probationers test positive, they are arrested immediately. If they fail to appear for the test or violate other terms of probation, an arrest warrant is issued immediately. Violators are sentenced to a short jail term, typically a few days. Repeat offenders are ordered into drug treatment.[26]

It should be noted that although HOPE participants may be ordered into drug treatment, they can also request it themselves.[27] Another crucial aspect is that, unlike in drug courts, participants are only brought back to court in the event of breach. As a result, this model is suitable for supervising large numbers of participants, with a single judge able to supervise around 2000 participants in the program concurrently.

A *The Warning Hearing*

On their first day in the program, the judge gives a 'warning hearing' in open court. This functions as an induction ceremony, with the judge addressing each participant individually and emphasising that he (or she) – and everyone else in the courtroom – is keen to see them succeed on the program.[28] The way the program works is explained in detail and participants are given ample opportunity to clarify any issues. The judge explains that he or she cannot control the participant's actions, but can control his or her own actions, and that participants can accordingly count on a sanction for *every* violation. Expectations for the program are made clear, with the judge explaining the four sanctions currently in operation.

Judge Alm[29] has stressed the importance of the warning hearing in the defendants' success, adding:

> I have had many defendants later tell me that that was the first time that anyone told them that they wanted them to be successful. It also helps to set a positive tone for the warning hearing, which is after all their first day in HOPE Probation, and the start of my relationship with each defendant.

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[26] Angela Hawken, 'Lessons from a Field Experiment Involving Involuntary Subjects 3,000 Miles Away' (2012) 8 *Journal of Experimental Criminology* 227, 228. See also Hawken and Kleiman, above n 14; Bartels, above n 4; Lorana Bartels, 'Swift and Certain Sanctions: Does Australia Have Room for HOPE?', *The Conversation* (online), 17 June 2015 <https://theconversation.com/swift-and-certain-sanctions-does-australia-have-room-for-hope-40158>.

[27] See Bartels, above n 4, for discussion.

[28] IBH, above n 1, 4, 13. A sample warning hearing (as it was then delivered) is available in Hawken and Kleiman, above n 14, 56–58.

[29] Email from Steven Alm to Lorana Bartels, 6 January 2015, cited in Bartels, above n 4, 54.

Warning hearings are conducted in groups of up to 10–12 participants. According to observations by Hawken and Kleiman,[30] 83 per cent of warning hearings took less than 15 minutes. Judge Alm has advised that providing the warning in groups 'makes efficient use of court time. Second, it sends the message to all of the probationers that they are being treated just like their fellow probationers. They are not being singled out and can expect to get consistent treatment in the future'.[31]

B *Consequences of Non-Compliance*

A key – and much discussed – feature of this model is that the consequences of non-compliance are laid out clearly in advance. The following forms of conduct are treated as a violation:

- admitting to drug or where relevant, alcohol use;
- testing positive to drug use; and
- missing a drug test or appointment with a probation officer.

If participants are required to undertake substance abuse treatment, failure to participate satisfactorily will also be treated as a violation. Sex and domestic violence offenders are also required to satisfactorily participate in treatment and sex offenders are not to have contact with their victims.

Where a violation is alleged (for example, for participants who have returned a positive urine test), the judge asks them whether they waive their right to test the evidence. Alternatively, participants have the legal right to contest the motion alleging a breach. In such circumstances, witnesses (for example, a drug tester or probation officer) are called and cross-examined and the judge determines if the prosecution has made out its case. In nearly every case, however, participants do acknowledge they have violated the terms and conditions of their probation and waive their right to test the evidence. This is perhaps unsurprising, given that there is clear evidence of their misconduct (eg, a positive drug test). According to Judge Alm, there were around 30 contested hearings between HOPE's inception and 2015. Furthermore,

> In the thousands of other hearings, the probationers have taken responsibility for their behavior, admitting to the violation of probation and proceeding to sentencing. This has been true even if the probationers will be sent to prison. They know that at that point they have had multiple chances and that it was their own behavior and choices that led to that result.[32]

The sanctions model adopted indicates there is less concern about ongoing drug use than participants' willingness to take responsibility for their actions. The rationale for this is as follows:

> Although every violation of HOPE Probation has a consequence, sanctions are less severe when the offenders take responsibility for their actions. In this way, HOPE Probationers are encouraged to be honest about their behaviors, including, in particular, substance use behaviors.[33]

[30] Hawken and Kleiman, above n 14.
[31] Email from Steven Alm to Lorana Bartels, 6 January 2015, cited in Bartels, above n 4, 54. See also Hawken and Kleiman, above n 14, 36–37.
[32] IBH, above n 1, 14.
[33] Ibid 48.

As set out in the *State of the Art of HOPE Probation* manual compiled in 2015 by Judge Alm, Cheryl Inouye and others, [34] the following sanctions are currently in operation:

- *cell-block sanction* (ie, a few hours in a cell at the court-house): this sanction applies where the participant misses an appointment or drug test, but promptly turns him/herself in and tests negative. It can be deferred to a short time later, to enable participants to make appropriate work and/or childcare arrangements;
- *2-day jail sanctions*: this applies where a participant returns (i) a positive drug test, but admits to use or (ii) misses a drug test or appointment, but turns him/herself in, tests positive and admits use;[35]
- *15-day jail sanctions*: these are imposed in circumstances where the participant misses a probation appointment or drug test and delays reporting (on the basis that it is assumed that they used drugs and are waiting for them to clear out of their system). This sanction also applies where the participant returns a positive drug test (which is subsequently confirmed by further testing), but denies use or fails to provide a urine sample within 30 minutes of attending the testing clinic (which is assumed to be evidence of denial about drug use). The first time this occurs, participants may be permitted to serve this period on five consecutive weekends if they are in regular employment; and
- *30-day jail sanctions* apply where the participant absconds or tampers with the drug-testing procedure.

The sharp escalation in the severity of the response is designed to encourage participants 'to be honest about their behaviors, including, in particular, substance use behaviors'.[36] Again, the judge makes this clear in the warning hearing. It should be noted that the program initially involved increased sentence length for subsequent positive drug tests,[37] but this has now been modified. Accordingly, participants will receive the same response for their first positive (admitted) test as for all subsequent such tests.[38] However, where there are multiple instances of ongoing substance abuse, the probation officer and judge will use this as an opportunity to review the participant's need for and/or level of drug treatment. Importantly, repeatedly returning a positive drug test and/or failing to complete drug treatment does *not* result in the participant being terminated from the program or being sentenced to prison for the entire sentence (which may be 10 or even 20 years long). On the other hand, repeatedly absconding from probation will result in a prison sentence.

On the face of it, the emphasis is clearly on deterrence and the consequences of violation. In practice, however, a more TJ-oriented picture emerges and there is a significant focus on supporting participants through the process of living drug- and crime-free lives.

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[34] Ibid 48–50.

[35] It should be noted that, as the HOPE court only sits from Tuesday to Friday, participants who test positive on Thursday or Friday will be held in custody until the following Tuesday (ie, five or four days respectively, rather than two calendar days for those who test positive on a Monday, Tuesday or Wednesday). This is made clear in the warning hearing.

[36] IBH, above n 1, 48.

[37] See Hawken and Kleiman, above n 14; Angela Hawken et al, *HOPE II: A Follow-up to Hawaii's HOPE Evaluation* (National Institute of Justice, 2016).

[38] IBH, above n 1. An experienced former drug court judge criticised this aspect for its failure to distinguish between 'someone who has been in treatment a week and uses gets the same punishment as someone who has been clean for 6 months'. Nevertheless, she suggested that the program 'does deserve a place on the spectrum–just not instead of drug courts'. Alm would doubtless concur: see text accompanying fn 15.

C *Early Termination*

The possibility of *early termination* was not initially a feature of the program, but now functions as a strong incentive for '[m]any probationers [who] can visualize being fully compliant for two years, enabling them to stick to the terms and conditions of probation and subsequently be released early'.[39] As the judge explains in the warning hearing, probation in Hawaii usually runs for four years. However, if participants can go for two years without any violations (other than cell-block sanctions, which are ignored for this purpose), then they can apply to have their probation terminated. This is not only beneficial to the individual, but has system benefits, as it reduces caseloads and gives probation officers 'more time to work with probationers who are having problems and are in most need of probation supervision'.[40] At present, this approach is not available to sex offenders, due to their longer treatment requirements, but they are able to request early termination upon successful completion of their sex offender treatment. By 2015, more than 100 early terminations had been granted 'and not a single one has been arrested since'.[41] While early termination of probation is available on probation-as-usual, it is rarely used. Although the reasons for this are not clear, this may be because HOPE probationers are more carefully monitored, and so those who are performing well are more easily identified by the defence and/or probation officers.

IV EVALUATIONS OF HOPE

There have been four evaluations of HOPE released and this section presents the key findings from those evaluations.[42]

A *Integrated Community Sanctions Units ('ICSU') Evaluation*

The ICSU evaluation examined a pilot stage of HOPE involving adults supervised by the ICSU, a specialised unit dealing primarily with high-risk offenders on probation. The study examined outcomes for 940 HOPE participants and 77 controls subject to standard probation. Although both groups were intended to be comparable in terms of risk factors, in practice, higher-risk offenders (as measured by a higher baseline level of drug use and missed appointments) were assigned to HOPE. Table 1 sets out the key findings for participants' positive drug tests and missed probation appointments over the three months before the program started and after three months on the program. This indicates significant decreases for HOPE participants, compared with increases for the control groups. After six months, far fewer HOPE participants returned positive drug tests (4% vs 19%) or missed an appointment (1% vs 8%).

Table 1: ICSU evaluation findings – three months before and after program commencement

	HOPE (n=940)	Control (n=77)
Positive drug tests	53% > 9% 82% *decrease*	22% > 33% 50% *increase*
Missed probation appointments	14% > 4% 71% *decrease*	9% > 11% 22% *increase*

[39] IBH, above n 1, 57. See also Hawken et al, above n 37, 41–43.
[40] IBH, above n 1.
[41] Ibid; Alm, above n 1, 1682.
[42] For more detail, see Hawken and Kleiman, above n 14; Bartels, above n 4; Hawken et al, above n 37.

Over the 12 months on HOPE, 61 per cent of participants did not return a single positive drug test, while 20 per cent only returned one positive urine sample. In addition, 70 per cent of participants did not miss a single drug test and 16 per cent missed one appointment. Combining these violations indicated that 52 per cent of participants had no violations and 26 per cent had one or two violations. Furthermore, the proportion of participants who violated their conditions got progressively smaller, suggesting that the experience of short prison sentences can be an effective deterrent in certain circumstances.[43]

The ICSU evaluation also examined revocations and incarceration. This indicated that HOPE participants had a much lower probation revocation rate than the control group (9% vs 31%) and were sentenced to only 37 per cent of the prison time of the control group.

B *RCT Evaluation*

A further evaluation of HOPE was funded by the National Institute of Justice ('NIJ') and the Smith Richardson Foundation, and was also conducted by Hawken and Kleiman.[44] By the time of this evaluation, HOPE was being used for about one-sixth of the Honolulu probation population.

Two-thirds (n=330) were randomly assigned to HOPE and the remainder (the control group, n=163) were placed on probation as usual. After 12 months, participants in the HOPE program, when compared with the control group, spent 48 per cent fewer days in prison (138 vs 267 days). They were also:

- 55 per cent less likely to be arrested for a new crime;
- 53 per cent less likely to have their probation revoked;
- 72 per cent less likely to test positive for illegal drugs; and
- 61 per cent less likely to miss appointments with their probation officers.

C *Process Evaluation*

Hawken and Kleiman[45] also conducted a process evaluation after HOPE had been in operation for over four years. They found that the program was implemented largely as intended and sanctions were delivered swiftly and with certainty. In addition, probation staff, probationers and defence lawyers were enthusiastic about the program. Prosecutors and court employees, by contrast, were less pleased with the program, with court staff reporting increased workloads. Hawken and Kleiman commended the economical use of treatment, noting that the program can therefore handle a large number of clients with limited treatment resources, while delivering intensive treatment to those who need it.

Over 60 per cent of surveyed HOPE probationers felt positively about the program, ranging from 62 per cent for those who had been imprisoned for violations to 76 per cent of ICSU participants (where probation officers had lower caseloads). Surveys also found that participants 'consistently identified the [HOPE] process as fair'.[46] Finally, anonymous surveys conducted with 167 HOPE participants in the community found that 96 per cent responded affirmatively to the question 'Does the regular random drug testing help you avoid drug use?',

[43] See Bartels, above n 4.
[44] Hawken and Kleiman, above n 14.
[45] Ibid.
[46] Ibid 38.

while nearly 90 per cent of participants surveyed in prison (that is, those who had been sanctioned for violating their probation, who might be assumed to be less enthusiastic about it) agreed that the program was helpful in reducing drug use and improved their lives in other ways (for example, family relationships).

D *Long-term Evaluation*

In April 2016, Hawken and others released the long-awaited findings of a further evaluation of HOPE participants.[47] This study followed up the original participants from the ICSU evaluation for 10 years and the participants from the RCT evaluation for over six years (76 months). This study included both data on offenders' performance and probation officers' perceptions.

Although the methodological limitations (including small sample size) of the ICSU follow-up were acknowledged, this study found that HOPE participants had an average of 0.2 new charges after 10 years, compared with an average of 0.8 new charges for the control group. For the RCT groups, the control group had an average of 1.1 charges at follow-up, compared with 0.9 new charges for HOPE participants; the control group was also more likely to have multiple charges (29% vs 21%). In addition, HOPE participants were less than half as likely to have a new drug charge (0.12 vs 0.27) or be returned to prison (13% vs 27%).

The findings of this evaluation led Hawken et al to observe that:

> (1) the better outcomes in HOPE versus [probation as usual] persist to a large degree in some measures, (2) modest sanctions can be effective in a HOPE probation program, and (3) fidelity of implementation can decline once implementation is routine.[48]

V OBSERVATIONS OF HOPE IN PRACTICE

This section draws on my observations of HOPE in January 2016, together with discussions with Judge Alm, court staff, probation officers, drug testing staff, drug treatment providers, defence counsel[49] and a former graduate of the program. These observations demonstrate the extent to which HOPE implements the key concepts of drug courts and solution-focused courts more generally, especially the integral role of the judicial officer. As Burke and Hueston have noted, the 'positive impact that one caring judge can have upon defendants under his or her supervision is remarkable'.[50]

King has explained that 'in solution-focused judging, the judicial officer deliberately seeks to promote two-way communication, a dialogue helpful to both judicial officer and participant'.[51] Overall, I observed over 80 matters in my two days in court and found that Judge Alm consistently demonstrated the kind of judicial communication that is seen as a hallmark of solution-focused courts.[52] In particular, King noted that problem-solving judicial officers commonly praise participants for good performance in relation to some aspect of their

[47] Hawken et al, above n 37.
[48] Ibid 67.
[49] The prosecutor generally assigned to HOPE was on sick leave during my visit.
[50] Jamey Hueston and Kevin Burke, 'Exporting Drug Court Concepts to Traditional Courts: A Roadmap to an Effective Therapeutic Court' (2016) 52 *Court Review* 44, 47.
[51] King, above n 21, 121.
[52] See, eg, ibid, Chapters 5 and 6.

program.[53] There was a very high frequency of remarks such as 'Good work!', 'I'm impressed!', 'Wow, you're doing a really good job!', 'What awesome work', 'You can do this!', and 'I think you're going to go great on this'.

King also pointed to '[i]ndividualised consideration [a]s a hallmark of therapeutic judging in problem-solving courts. The judicial officer takes a keen interest in each participant'.[54] The effort Judge Alm made to develop a personal rapport with each participant emerged clearly.[55] For example, he asked them where they lived and chatted about aspects of their lives (such as favourite sports teams or comments about what they were wearing). There was a genuine interest in and concern for the participants' well-being, including questions about their housing situation, medication, and mental health. In one warning hearing, a participant (who had been led in from custody with two other men) appeared to be transgender. Before proceeding, Judge Alm asked the participant how she would like to be addressed, and called her 'Miss' thereafter, in accordance with her stated preference, although the official record noted her status as male.

In addition, Judge Alm showed an awareness of practical matters impacting on participants' lives. For example, if participants had missed appointments with their probation officer, he asked how they kept track of events (eg, 'so, how are you going to remember that? Do you put it in your phone or in a calendar, or what?'). If they didn't have a good routine, he handed them a pocket diary and had a short discussion about how to get into better habits with keeping records. I observed one participant with brain trauma, to which he attributed missing his appointment. When provided with this information, Judge Alm engaged in detailed discussion about how he could improve managing events in his schedule. Another participant had arrived at court to find that the friend who was going to give him a lift to a drug treatment clinic was not there. The judge explained the bus route he would need to take, telling him, 'it's disappointing when we rely on people and they let us down, but you're here now, so we'll give you a map and two bus tickets, so you can get yourself there and back again. Ok, well, I wish you the best'.

As further evidence of Judge Alm's close relationship with participants in the program, I noticed when I walked with him to lunch near the courthouse that a number of people standing in and near the court precinct greeted him enthusiastically. He responded to each one in a friendly way and confirmed to me that they were HOPE participants. The same thing happened when we visited the Salvation Army drug treatment facility – residents greeted him in the halls and waved to him as we walked past. I was struck by the genuine warmth with which they said 'hi Judge, how's it going?', and the equally warm nature of his engagement with them. The Chief Executive Officer of another drug treatment facility in Hawaii likewise noted recently that when her clients 'see Judge Alm walk through the door, their eyes light up and they all have the same look of pride and accomplishment, each saying, "Look at me, judge. I did it. I'm not going back to jail."'[56]

Judge Alm also workshopped strategies to help participants stay on track. Some examples of this included him asking participants: 'what are you going to do if you run into your old buddies? I would strongly urge you to say "hi guys, bye guys", and just go on your way,

[53] Ibid 179.
[54] Ibid 37.
[55] This approach reflects the strategies proposed by King for developing a rapport with participants: ibid 157–158.
[56] See Abby Paredes, as cited in Blair, above n 5.

because I am pretty sure you can't stay clean if you're around people who are using'. Another common theme was to remind participants, 'remember, it's people, places, things and situations that trigger a relapse, so what's the plan for dealing with them?'[57] or 'so, you're going to get that surfboard and get out in the waves next time you feel that urge to use, huh?'.

Judge Alm showed me a sample of the file notes[58] he kept on each participant, and he used these to refer to past experiences (eg 'last time I saw you, we agreed that you were going to check out the outpatient clinic. So, what happened then?'). This approach is particularly important, given the large number of participants in the program. It also helped to contribute to the sense of rapport Alm developed with participants, even when they failed to abide by the program's rules (eg, 'you're a nice guy, but this is the fourth time we're going through this. I'm kind of getting of sick of seeing you here and I bet you're sick of seeing me, too').

I met with a former HOPE participant during my visit to Hawaii, who credited the program with saving his life. He said: 'before HOPE, I had low self-esteem, but Judge Alm taught me to believe in myself. He believed in me, so I could too'.[59] Significantly, he had been a drug user for several decades prior to participating in HOPE and had served many prison sentences. By the time I spoke to him, he had not used drugs for four years, was completing an undergraduate degree and investigating options for graduate study. He told me:

> [The judge] is like your parent.[60] It's like how I tried to raise my child. He taught me about consequences and rewards…Without HOPE, I think I'd still be using drugs. The monitoring, the calling. Probation had to come first, before family, work, study. I just got my life in order…I don't have any criticism. I think it's a great program. He's really encouraging. I never got praise like this in my life. He makes it really easy for us to get into that mode of success...HOPE is the best…He makes you want to change your behaviour.

Other former HOPE participants have expressed similar sentiments:[61]

> In the beginning it's rough. Every addict, every alcoholic comes with the intention of beating the system. That's just the way we're wired, yeah? And as soon as you get over that, they find out that this program is here to save your life. And it does. It saves your life. I see a person that I'm supposed to have been all this time. Yeah. I see a whole new man. So I'm just gonna keep doing what I'm doing, and, uh, I put 110% behind HOPE program.
>
> They have faith in you. They not only make it harder for you to use because of the hotline but HOPE Probation also gives you a chance to want to get a life. It's the best program in the world. This program is designed to help anybody who wants to help themself [sic]... It saved my life'.
>
> If you cannot love yourself, then the program, or your probation officer, or the judge will love you until you can love yourself. I started to experience that. I really felt that...HOPE helped me. It helped me change. Become more honest. Keep me in check.

It should be noted that although I had read these statements prior to seeing HOPE in action, I found it hard to reconcile them with the literature on the swiftness and certainty of the

[57] See King, above n 21, 167–169, for discussion of goal-setting.
[58] See King, ibid, 140 in relation to judicial officers referring to information from previous court appearances, and the use of file notes to aid with this, 159.
[59] See King, ibid, 164–166, for discussion of how courts can help promote participants' self-efficacy.
[60] See also Paredes, as cited in Blair, above n 5, who described Judge Alm's positive impact on her clients as his 'daddy effect'.
[61] Alm, above n 1, 1674.

sanctions. My observations of HOPE, by contrast, served to highlight its caring nature, and the participants' comments therefore make more sense in this light.

The three features of HOPE discussed above will now be considered in more detail.

A *The Warning Hearing*

At the beginning of the warning hearing, the judge addressed each participant individually and confirmed the pronunciation of their name (eg, 'Good morning Mr X. Is that how you say it?'). He also asked participants how they travelled around Hawaii, and demonstrated an impressive knowledge of the area, commenting on local factors, such as bus routes, real estate prices, landmarks and so on. If participants were unfamiliar with the area, he handed them a map and explained the best way to get around (eg, 'that's right nearby, you can just walk here. You know the car dealership on the corner of X Street? You just turn right there, go a few blocks').

In addition, he asked each participant in turn when they had last used drugs or alcohol and their preferred drug(s) of choice. He then told them that they would be drug tested immediately after the hearing. Statements about recent drug use were delivered without any judgement (eg,'just tell your probation officer what you told me, that you used two days ago, and what you used'), while one participant's statement that she had been sober for 18 days was met with 'good for you!'. If participants are honest about their recent drug use, they are not arrested that day (ie, their first day in the program) if they test positive. As Judge Alm explained to me, this is only fair, as they would not have realised they would be tested on arriving at court. In addition, on probation-as-usual (which many HOPE participants would have experienced previously), there is typically no incarceration sanction for a positive drug test. However, HOPE participants who test positive are not allowed to drive home from the courthouse if they brought their car.

One participant I observed admitted he had smoked marijuana the night before and had medical documentation to support him continuing to do so. Somewhat to my surprise, the judge was unfazed, noting simply, 'maybe you have an old sporting injury or something. Well, if your doctor sends me a letter saying that's the best thing for you, if it helps you, then we'll say that's ok'. In the meantime, he explained that the drug testers would get a baseline level of his use levels, and future tests would be measured against that.

Participants are explicitly told in the warning hearing that everyone wants them to succeed on probation (for example, 'we're trying to help you succeed', 'we just want you to be successful with this'.)[62] They are also encouraged to take responsibility for their actions. This was evidenced by statements such as: 'if you want to succeed on this, you can!' It should be noted that research indicates that positive expectations by someone in authority (eg, teachers, employers) can promote improved performance in those about whom such attitudes are held (eg, students, employees).[63] Other statements in this context included: 'we all screw up some times, but the more honest you are about that, the better', and 'You guys are adults. Think through your choices'. As Schoofs has observed, 'in court, Judge Alm seems less the law-and-order hard-liner than the basketball coach he once was, giving his probationers pep talks'.[64] For example, I observed him telling new participants:

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[62] King, above n 21, 132, has suggested that using 'we' can promote a sense of collaboration and the sense that participants are supported by the court team.
[63] Ibid 163.
[64] Schoofs, above n 3. King, ibid, 30, described the role of solution-focused judges as a 'coach', while mainstream courts seem them as the 'arbiter'.

> Look, I get that this is hard. You might run into your old buddies and start using. You might think 'hey, I've screwed up, I'd better stay away', but that's the worst thing you can do, because then I have to send police officers out looking for you. I would much rather they were patrolling my neighborhood or your neighborhood than serving warrants. If you screw up, but admit it, it's two days [behind bars]. Then you're straight back into the program, you can get back to work with your probation officer on dealing with your issues. If you go on the run and you're wasting our time and not taking responsibility, then its 30 days. If you do it more than once, it might even mean longer, or the whole term of the sentence, which could be five years, 10 years, even longer.

The judge sometimes also added words to the effect of 'some of you may have done probation before and think you know how this works, but this program is different'. In addition, he referred to the research on HOPE, eg 'we've had people look at this program, and what we know is that people who do HOPE, they reoffend less often and they spend less time in prison. We think that's good for everyone'.

The mood in court was warm and friendly, with the occasional joke.[65] Judge Alm paused in his delivery if participants had a question, and encouraged them with comments such as 'good question, Mr Smith', 'I'm glad you asked that, Maria', and 'did anyone else want to check something?'. He also made a point of thanking others, for example, if a family member had driven the participant to court. One participant also held up his hand to speak, stating: 'I just wanted to thank you, thank you for giving me the chance to do this'.

B *Consequences of Non-compliance*

During my time in court, I witnessed several examples of each of the four sanctions currently in operation. When issuing a cell-block sanction, Judge Alm typically said words to the following effect:

> I see that you were late, but you called your probation officer, you came in as soon as you could, and you tested negative. You made a good choice, because you showed us that you weren't using, it was just that your boss wanted you to work late [or your car wasn't working, the bus didn't come etc]. Good job!

Where the participant has returned a positive drug test, the judge presented it as a (relatively) positive event if s/he admitted to use, with comments to the following effect: 'Ok, I can see you used, but you did the right thing. You owned up to it straight away. I get that this is hard, and we all screw up from time to time, but the main thing is that you handled it responsibly', or 'I'm not happy that you used, but you handled it well. Good for you'. If relevant, Judge Alm added a comment such as:

> Wow, you sure handled this differently from last time. Remember, last time, you said you hadn't used and maybe thought it would come back from the lab negative [or we had to go and serve that warrant on you], but this time you just admitted it straight away. Well done!

This model provides encouragement not only for those individuals before the court, but also reaffirms to others in the courtroom that how they deal with relapses is regarded as far more important than the fact of the relapse itself. In particular, statements such as 'it's really hard to quit, we get that' acknowledge that relapse is 'a natural part of the process'.[66]

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[65] See King, above n 21, 132, for discussion of the use of humour to lighten spirits and place a situation into a more human perspective.

[66] King, ibid, 154, 160.

Some of the comments I observed in the context of 15-day sanctions being imposed (ie, where the participant returned a positive drug test and this was then confirmed by laboratory analysis, but the participant had denied use) were: 'look, you're not 18 anymore, you can be honest with yourself' and 'it's magical thinking, that the test is somehow going to turn negative on the way to the lab. If you know you've used, then it's best to own up to that'.

I observed one case where a participant asked for some time in the community to help his partner do some renovations around the house, adding 'I know I owe you guys [some time in custody]. I would be very grateful if you could give me 48 hours to sort out some things. I want to show you I can make adult decisions'. I expected the judge to grant this, but he instead ordered the time to be served immediately, explaining:

> Look, I understand you want to help out at home, but I'm worried you're going to have one last blast – that's human nature. I'm not going to undo all that's happened. I know you're not happy with me about this, but sometimes we don't get what we want. We get what we need.

I also witnessed a number of cases where participants had absconded. In such circumstances, Judge Alm reiterated: 'you can do this, but you've gotta not run when you mess up'. Other comments in such cases included: 'you're trying to run your own show. That is unacceptable', 'I'm a big believer in second chances. But I'm also a believer in accountability', 'I'm not perfect, you're not perfect, but when you run away, you're kind of saying you aren't a good candidate for community supervision', and 'my trust level is down here'. In one instance, Judge Alm told a participant, 'we had to see your handsome face on Hawaii's Most Wanted!' (a program run by Crimestoppers, which features images in the media of people who have absconded from court, including HOPE probationers). The participant hung his head and responded with 'sorry about that. I promise I won't run away again'. In another case, Judge Alm asked, 'what's with the running away?', to which the participant responded, 'I just lost it'. He explained that he had a wife and three children, including a new baby. His wife spoke up from the back of the courtroom, provoking laughter. The judge took this in and said, 'look, we will keep working with people, if you just admit what you've done. Do I have your word you won't run again?'

Judge Alm continued to treat participants with respect even in cases involving repeated absconding. As he advised me, he does not generally 'give up' on HOPE participants (ie, discontinue them from the program) and send them to prison for a multi-year sentence, just because they continue to use drugs, but rather for their failure to take responsibility for their actions, principally by continuing to abscond. One participant had absconded repeatedly and already served several 30-day terms as a consequence. The matter was listed as a motion to revoke probation. The participant made a heartfelt plea to the judge ('If you can just give me another chance, I will come out a better person'). However, the judge explained clearly that they had already been through this, he had warned him on the previous occasion that any further absconding (as opposed to positive drug tests) would result in the participant being required to serve the 'open term' (that is, the full term of the sentence), and so he had no choice but to proceed with that. Accordingly, he ordered the term of 10 years to be put into effect. Again, this was done without fuss: 'It doesn't mean you're a bad guy, but you keep running away. You know that I said last time that if you ran away again, you'd go to prison. When I tell someone something, I follow through with it. Best of luck in the future'. Over the morning recess, the public defender told me he was surprised about this outcome, but acknowledged that the participant had had ample warning on previous occasions.

In another case I observed, a participant begged to be 'given one more chance', adding, 'I will do right by you'. She had been released from custody to attend a treatment clinic, but had instead absconded and used drugs. She cried in court and told the judge that her children were being minded interstate. In spite of this, the judge remained firm. He reiterated that she had made a 'bad choice' by not attending the treatment clinic and that her children would not benefit from her actions. He accordingly ordered her to serve six months in custody, which was presumably the length of the prison sentence which she had originally received.

Judge Alm was also implacable in another case involving a woman in tears, albeit with the opposite result. In that case, the participant begged Judge Alm to 'just give me the open term' (ie, she wanted to serve the full prison sentence for her offences). He observed: 'you're a good talker. We have been through this before', acknowledging that five bench warrants had been issued and 'your probation officer wants to give up on you'. Nevertheless, he decided not to order her to serve the full sentence, and instead relisted the matter for three weeks hence. She was therefore only required to serve the intervening period in custody, and he exhorted her to use this time to reflect on her ongoing substance abuse issues. It might be inferred that Judge Alm considered that requiring this participant to serve the full sentence would be a less effective means of getting her to engage with her ongoing substance abuse issues than continuing to engage her in the program, in spite of her apparent difficulties with it. This and other examples I observed also demonstrate Judge Alm's understanding of research that shows treatment is more effective in the community than in the artificial custody environment.

C *Early Termination*

The potential for participants' probation to be terminated early is not a common feature of the mainstream justice system, but is a very tangible form of one aspect of solution-focused courts, namely, rewards. The behavioural research suggests that change is most consistent when positive behaviour is rewarded.[67] When I visited, Judge Alm indicated that he was granting three or four early terminations a week, and I observed two such cases. As with drug court graduations,[68] there is something of a celebratory note to such events, although Judge Alm conceded the potential to formalise this process and make it more of a special event. Nevertheless, the congratulatory tone was clear to everyone in the courtroom. In one of the early terminations I observed, the judge made a point of reading out some comments from the participant's probation officer, in the following way:

> I just want to tell you what your probation officer said about you. She said you were a model client, compliant, cooperative, and taking responsibility for your past mistakes. This is great! You should really feel good about this! I have to congratulate you. You have done really well!

Interestingly, the other case involved a participant whose early performance on the program had been fairly poor, including several instances of absconding. As Judge Alm noted, 'you really turned things around. You ran away a few times, but then you tried a few things. You're overcoming the challenges in your life'. He commended the participant on his excellent performance at college ('So, you're still maintaining that 4 point GPA? That's great!') and they discussed his plans for the future. The participant explained that, other than studying, he was mostly a home dad. As he joked, his life was now about doing the dishes, doing his study, and

[67] See Hueston and Burke, above n 50.
[68] King, above n 21, 159, 181–182.

getting his kids ready for school (to which Judge Alm responded 'you're being a great role model for your son, you know'). He then said:

> I want to say thank you for this opportunity. It's really changed my life, my outlook on life. My whole way of being. I lived with the philosophy of hiding what I really felt. It's been an amazing two years. It's helped me build my self-esteem and confidence. And I now want to help other people.

D *TJ, Procedural Justice and HOPE*

Tyler's work on procedural justice and judicial legitimacy indicates that compliance with the law increases when people trust the legitimacy of the institutions that enforce the law.[69] Although there has been little explicit consideration of HOPE through a TJ lens, the nexus with procedural justice has been examined in relation to both TJ and HOPE. For example, Kaiser and Holtfreter recently observed that TJ 'places such a strong emphasis on how legal actors can directly influence rehabilitation of offenders that it seems a natural companion to procedural justice and judicial legitimacy'.[70] Alm, in turn, has stated: 'I believe HOPE is procedural justice in action. In HOPE, we strive to be clear, transparent and predictable. Probationers are treated like adults'.[71] He has also asserted that:

> We are also convinced that one of the chief reasons HOPE works as well as it does, is that the probationers feel they are being treated fairly... the rules are being enforced consistently and proportionately, and probationers are thus more likely to buy into the program.[72]

In her recent commentary on HOPE, Klingele considered the issue of procedural justice in some detail.[73] In particular, she questioned this aspect of HOPE, noting that:

> [w]hile HOPE administrators may speak respectfully and impose the same punishment on everyone, if they offer probationers no meaningful opportunity to explain the reasons for their violations—to hear from probationers about the ways in which their life challenges may be affecting their ability to comply with the mountain of conditions to which they are subject—they are unlikely to retain legitimacy in the eyes of those subject to sanction.[74]

Later, she asserted that '[w]hen the only questions relevant to the court are whether a violation occurred and what amount of custody should be imposed as a result, probationers lose the ability to tell their story and have it meaningfully considered by the judge'.[75] This argument is valid, but it appears that Klingele may not have observed HOPE in practice, because

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[69] See, eg, Tom Tyler, *Why People Obey The Law* (Princeton University Press, 2006).

[70] Kimberly Kaiser and Kristy Holtfreter, 'An Integrated Theory of Specialized Court Programs: Using Procedural Justice and Therapeutic Jurisprudence to Promote Offender Compliance and Rehabilitation' (2016) 43 *Criminal Justice and Behavior* 45, 48. See also Gill McIvor, 'Therapeutic Jurisprudence and Procedural Justice in Scottish Drug Courts' (2009) 9 *Criminology and Criminal Justice* 29; King, above n 21, 28–30; Hueston and Burke, above n 50; David Wexler, 'Guiding Conversation Along Pathways Conducive to Rehabilitation: Integrating Procedural Justice and Therapeutic Jurisprudence' (2016) 1 *International Journal of Therapeutic Jurisprudence* 367.

[71] Alm, above n 1, 1681.

[72] Email from Steven Alm to Lorana Bartels, 6 January 2015, cited in Bartels, above n 4, 59.

[73] Klingele, above n 14, 126–130.

[74] Ibid 128. It is beyond the scope of the present article to address Klingele's observations on HOPE and desistance (at 118-121, 126, 133) in detail, but these should also be viewed in the context of the observations of and comments about HOPE set out above. In relation to Klingele's comments about motivational interviewing (at 132), it should be noted that this is a feature of all probation in Hawaii (ie, both probation as usual and HOPE): see Bartels, above n 4, for discussion.

[75] Klingele, above n 14, 130.

participants *are* provided with significant opportunity to speak in court and explain what happened. In fact, Alm has explained that in order for HOPE to work, '[j]udges must first be willing to engage with the probationers in court. Talk to them. Listen to them. Let them know the judge cares about them'.[76] He added: '[i]f a judge is not willing to continually engage with and encourage and talk to the probationers about their thinking, their choices, and the resulting consequences, this is not the right program for that judge'.[77]

In one case I observed, the participant explained his recent drug use in the following way: 'I feel ashamed of myself. I go to work every day, then one day, out of nowhere, it's holidays…I guess it's more about me building sober support. I am trying, Your Honor'. The judge responded: 'This is hard. I know'. He acknowledged the participant's wife and child in the courtroom, and reminded the participant that 'they want you in their life, but they want you sober'. [78] The prosecution opposed the judge's proposed ruling that the participant be given credit for time served, instead calling for the six-month prison sentence to be put into effect. However, the judge did not grant this, telling the participant: 'I listened to the way you're handling it'.[79]

In another instance, a participant explained that he had tried a particular drug rehabilitation program previously and didn't like its approach. The judge then engaged in a discussion about his substance abuse patterns, which programs he had tried previously, which ones he liked or disliked and why, and made his ruling on the basis of this information.

One participant I witnessed in court, who had returned a positive drug test and secured a place in an outpatient drug clinic, freely acknowledged his issues: 'I'm willing to turn myself in. I tell you the truth. I have a drug problem and I'm fighting my addiction every day. I accept my wrongdoing'. Another participant volunteered 'I am an alcoholic' and acknowledged he needed treatment. A discussion then ensued between the participant, the public defender and the judge about what treatment services were available and what would be best in the circumstances. Yet another participant admitted his violation, telling the judge: 'It is what it is. I've got no excuse'.

Klingele has suggested that, '[i]n its best form, [compliance] indicates that a probationer is taking responsibility for his past wrongs and present conduct'.[80] My observations would seem to be examples of this. However, she also suggested that compliance can be because the participant 'has been cowed into submission, [or] is temporarily and superficially acquiescent'.[81] My observations in court – including the warning hearing, which 'identifies the probationer as a morally responsible agent'[82] and the dialogue between participants and the judge – did not appear to point to this. The IBH has also suggested that:

> While HOPE often serves as an external motivator initially ('I don't want to go to jail'), many offenders later experience the rewards of a clean and sober lifestyle, thereby impacting their values and intrinsic motivation. For example, they now find rewards in being good role models

[76] Alm, above n 1, 1676. See generally Hueston and Burke, above n 50, 45.
[77] Alm, above n 1, 1677. See also King, above n 21, Chapter 6.
[78] King, above n 21, 132, has suggested that using 'we' can promote a sense of collaboration and the sense that participants are supported by the court team.
[79] For discussion of judicial listening skills in this context, see King, above n 21.
[80] Klingele, above n 14, 126.
[81] Ibid.
[82] Hawken and Kleiman, above n 14, 36.

> for their children, having stable employment and money in their pockets, and having long-term, meaningful relationships.[83]

In this context, further research is required on participants' perspectives and their reasons for complying (or failing to comply) with HOPE, and the implications of this for long-term desistance.

Klingele also stated that 'HOPE does not accommodate the mentally ill'.[84] By contrast, the *State of the Art of HOPE Probation* manual asserts that the program facilitates participants' referral to mental health treatment and improves their compliance because they understand HOPE's 'clear and fair rules'.[85] Furthermore, it suggested that this model works 'works well for offenders with serious mental illness because it is not based on the offenders agreeing that they have an illness and need treatment but instead insists on compliance with treatment as a condition of their release'.[86]According to Judge Alm, defence lawyers involved with HOPE believe it is very effective with their clients in this context. Further research on this aspect of HOPE would also be beneficial.

VI CONCLUSION

The HOPE program has won significant acclaim across the US and the model is now starting to be adopted in Australia. The evaluation results have been described as 'spectacular'[87] and 'dramatic',[88] while Hawken et al recently observed:

> More than a decade since the launch of HOPE, the 'Alm Effect' that we see is less the widespread adoption of the particular design of HOPE in Hawaii but rather the growing willingness to consider bold innovations to address nagging failures in corrections.[89]

Proponents have touted its swift, certain and fair sanctions model and cited it as evidence of the effectiveness of deterrence.[90] On the other hand, critics such as Cullen, Manchak and Duriez have derided its apparent adherence to a model they perceive as ineffective, and for failing to consider the factors relevant to offending.[91]

This article has sought to add to our understanding of HOPE, and how and why it works, by examining it through a TJ lens. It emerges from my research, however, that there are a number of misconceptions about what HOPE is – and what it is not. In fact, Alm has indicated that proponents' emphasis on the effectiveness of the deterrence model underpinning the program has (perhaps inadvertently) served to obscure its focus on rehabilitation.

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[83] IBH, above n 1, 10.
[84] Klingele, above n 14, 125.
[85] IBH, above n 1, 64.
[86] Ibid.
[87] Mark Kleiman, 'Substituting Effective Community Supervision for Incarceration' (2015) 99 *Minnesota Law Review* 1621, 1627.
[88] Klingele, above n 14, 113.
[89] Hawken et al, above n 37, 71.
[90] See eg Hawken and Kleiman, above n 14; Mark Kleiman, Beau Kilmer and Daniel Fisher, 'Response to Stephanie Duriez, Francis Cullen and Sarah Manchak, 'Theory and Evidence on the Swift-Certain-Fair Approach to Enforcing Conditions of Community Supervision' (2014) 78 *Federal Probation* 71.
[91] See Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism* (Minnesota Legal Studies Research Paper 13-51 (2013); Stephanie Duriez, Francis Cullen and Sarah Manchak, 'Is Project HOPE Creating a False Sense of Hope? A Case Study in Correctional Popularity' (2014) 78 *Federal Probation* 57; Francis Cullen, Sarah Manchak, and Stephanie Duriez, 'Before Adopting Project HOPE, Read the Warning Label: A Rejoinder to Kleiman, Kilmer and Fisher's Comment' 78 *Federal Probation* 75.

My observations indicate that there is significant reason to feel hopeful about this program. Specifically, it exhibits many features of solution-focused courts and adopts most of the key components of drug courts.[92] In addition, Alm displayed the qualities the National Drug Court Institute[93] described as the necessary skills for a drug court judge: he is a leader, communicator, educator, community collaborator and institution builder. Cullen, Manchak and Duriez have expressed their concern about HOPE's popularity and urged policy-makers and judicial officers to 'read the warning label'.[94] However, this article argues that any such label should also make it clear that 'this product is solution-focused and contains therapeutic jurisprudence'.

VII ADDENDUM

A special issue of *Criminology & Public Policy* entitled 'HOPE Collection' was published as this article was going to press. This included the findings of a randomised controlled trial evaluation of a program closely based on HOPE in four sites in the US. This much-anticipated study indicated that the HOPE approach was no more effective than standard probation in terms of reduced recidivism.[95] In addition, the special issue included commentary from Alm,[96] Kleiman,[97] Hawken[98] and Cullen et al.[99] The full implications of these findings and analyses remain to be seen, but they do not detract from the observations in this article. In particular, only one of the papers[100] made any reference to therapeutic jurisprudence.

[92] See Douglas Marlowe and William Meyer (eds), *The Drug Court Judicial Benchbook* (National Drug Court Institute, 2011) 217.
[93] Ibid 48.
[94] Kleiman, Kilmer and Fisher, above n 90.
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