

Federal PROBATION

*a journal of correctional
philosophy and practice*

Volume 75 Number 1

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Published by the Administrative Office of the United States Courts www.uscourts.gov
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Beyond the Prison Bubble¹

Joan Petersilia

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THE ANNOUNCEMENT last summer that in 2009 the number of Americans behind bars had increased for the 37th year in a row provoked a fresh round of national soul-searching. With its prisons and jails now holding some 2.4 million inmates—roughly one in every 100 adults—the United States has the highest incarceration rate of any free nation. As a proportion of its population, the United States incarcerates five times more people than Britain, nine times more than Germany, and 12 times more than Japan. “No other rich country is nearly as punitive as the Land of the Free,” The *Economist* has declared.

But a highly significant fact went largely unremarked amid the hubbub: The population of the nation’s state prisons, which house all but a relative handful of convicted felons, decreased by nearly 3,000. Although the drop was slight in percentage terms, it was the first since 1972. (State prisons held 1.4 million inmates at the end of 2009 and federal prisons more than 200,000, while the number held in local jails, mostly for minor crimes, averaged about 770,000 over the course of the year, and the majority had yet to face trial.) In California, which has the nation’s largest state prison system, with nearly 170,000 men and women behind bars, the prison population fell for the first time in 38 years. The national prison population—including those held in federal facilities—grew by less than one percent, the slowest rate in the last decade. These changes mean it is very likely that we are seeing the beginning of the end of America’s long commitment to what some critics call “mass incarceration.”

If that shift does occur, it will not be because the United States has solved its crime problem. In fact, if there were a close correlation between crime rates and incarceration, the prisons would have begun emptying out in the late 1990s, when crime in most of its forms began to decrease.

How did we get here? Soaring crime rates, especially in the inner cities, are the most obvious part of the explanation. From 1960 to 1990, the overall U.S. crime rate increased more than fivefold, the frequency of violent crime nearly quadrupled, and the murder rate doubled. Drug use increased. The upsurge was widely blamed on lenient punishment, particularly for violent repeat offenders. Legislatures responded by passing “get tough” measures, including sentencing guidelines (which required prison sentences for some offenders who in the past might have been put on probation), so-called three-strikes-and-you’re-out laws (which mandated prison terms for repeat offenders), mandatory minimum sentences (forcing judges to impose fixed sentences regardless of mitigating factors), and truth-in-sentencing measures (requiring inmates to serve a greater proportion of their imposed sentence before becoming eligible for parole).

These policy changes increased both the probability of going to prison if convicted and the length of prison terms.

Many liberal critics, pointing out that two-thirds of those imprisoned in federal and state facilities are African Americans and Hispanics, contended that “mass incarceration” is little more than a reworked form of racial and social domination—“the new Jim Crow,” as Michelle Alexander, a law professor at Ohio State University, put it in the title of her recent book.

But virtually all those who study the matter now agree that imprisonment has reached often counterproductive levels, particularly in the case of drug possession and other nonviolent crimes. The prominent conservative scholar James Q. Wilson, whose book *Thinking About Crime* (1975) set the national crime control agenda during the 1980s, recently wrote, “This country imprisons too many people on drug charges with little observable effect.” In my travels around the country I have conducted an unscientific survey of prison administrators, and nearly all of them say that 10 to 15 percent of their inmates could be safely released.

What we are seeing today is a growing recognition that our approach to dealing with convicted criminals is simply too costly. Not only is the price too high, but the benefits are too low. The states now spend an estimated \$50 billion on corrections annually, and the growth of these outlays over the past 20 years has outpaced budget increases for nearly all other essential government services, including transportation, higher education, and public assistance.

California, where I was involved in the corrections system in various capacities under reform-minded governor Arnold Schwarzenegger, pours 10 percent of its massive state budget into correctional facilities. Between 1985 and 2005, it built 21 new prisons—more than one a year. The state’s prison population surged, and so did costs: The state spent nearly \$10 billion on corrections last year, or about \$50,000 per prisoner. (The national average is \$23,000.) Now that California is grappling with a budget crisis, it is clear that it cannot continue on this course. The evidence for the rest of the country may be less dramatic, but it is no less clear.

These vast sums are not buying as much as many people think. Mass imprisonment has helped reduce crime rates, but most specialists agree that the effects have been considerably smaller than proponents claim and that we are now well past the point of diminishing returns. Confinement behind bars accounted for at most about a quarter of the substantial decline in crime that occurred during the 1990s (mainly, most researchers believe, by preventing imprisoned offenders from committing fresh crimes against the general public rather than by promoting a deterrent effect).

More important, that decline may well be reversed if we don’t do a better job of planning for the reentry of prisoners who have finished their sentences. There is a very simple and immutable “iron law” of imprisonment: Almost everyone who goes to prison ultimately returns home—about 93 percent of all offenders. (A relative handful die in jail; the rest have life sentences or are on death row.) Although the average offender now spends 2.5 years behind bars, many terms are shorter, with the result that 44 percent of all those now housed in state prisons are expected to be released within the year. This year, some 750,000 men and women will go home. Many—if not most—will be no better equipped to make successful, law-abiding lives for themselves than they were before they landed in prison.

Today’s offenders are different from those of the past. They are still overwhelmingly male (though the female proportion of the population has climbed to nine percent), African American or Hispanic, and unskilled. But the offenders leaving prison now are more likely to have fairly long criminal records, lengthy histories of alcohol and drug abuse, significant periods of unemployment and homelessness, and a physical or mental disability. Their records are more likely to include gang activities and drug dealing. In short, the average offender today leaves prison at a greater disadvantage (and more primed for trouble) than his predecessors did. Yet fewer participate in prison rehabilitation and work programs than a decade ago. When I was co-chair of California’s Expert Panel on Rehabilitation in 2007, the panel found that California spent

less than \$3,000 per year, per inmate, on rehabilitation programs, and that 50 percent of all prisoners released the year before had not participated in a single program.

Even as the states were cutting back in-house prison programs most severely, in the decade from 1985 to 1995, Congress and state legislatures were passing dozens of laws closing off many job opportunities to ex-offenders and restricting their access to welfare benefits and housing subsidies. Former inmates are now commonly barred from working in some of the economy's fastest-growing fields, including education, childcare, private security, and nursing and home health care. Such legal barriers sometimes protect us from dangerous felons, but they also make it hard for men and women who want to go straight to get their feet on the ground.

It should not come as a surprise to learn that we have a corrections system that does not correct. The U.S. Bureau of Justice Statistics reports that two-thirds of released prisoners are rearrested for at least one serious new crime, and more than half are re-incarcerated within three years of release. The two-thirds rearrest rate has remained virtually unchanged since the first recidivism study was conducted more than 40 years ago. Former prisoners account for an estimated 15 to 20 percent of all arrests among adults. That means that thousands of Americans are being victimized every year by criminals who have already done time without experiencing "correction."

At the same time, we are beginning to recognize that our overreliance on locking people up has an especially malign effect on poor urban neighborhoods, where up to 20 percent of the adult male population may be behind bars at any given time. Not only do the men come home with diminished prospects that hurt the whole community, but as criminologist Todd Clear shows in *Imprisoning Communities* (2007), their absence weakens the family and social networks they need when they come home and hurts those left behind. It is no accident that the sons and brothers of men who go to prison are more likely to follow the same path. These trends help cause crime rather than prevent it.

Prison is where some people belong, many for long periods of time. But we need policies that do not produce more crime in the long run.

Budget cutters may rejoice at the chance to gut corrections budgets, and liberal critics of "mass incarceration" may celebrate any policy that shrinks the prison population, but cutting corrections budgets will prove hugely counterproductive if we act without giving serious thought to how we will deal with the offenders who are released. Until recently, for example, Kansas was a model of forward-thinking prison policy. In 2007 the state legislature funded a range of programs—involving education, drug treatment, and subsidized housing—to help former inmates reintegrate. The approach appeared to work: The number of ex-offenders returning to prison dropped by 16 percent between 2007 and 2009. But then came the economic crisis and cutbacks. According to state legislator Pat Colloton, recidivism rates quickly spiked. Kansas is back where it was in 2007.

To avoid throwing away much of the progress we have made in reducing crime, it is more imperative than ever that we pursue alternatives to prison and new ways to ease inmates' reentry into civilian life. The good news is that after decades of false starts, researchers have finally begun to zero in on the things that can make a difference in at least some cases. The news was good enough to help persuade the conservative Bush administration to push through the \$330 million Second Chance Act in 2007, giving government agencies and nonprofits the tools to get some of these efforts off the ground. The money was to be doled out over time. The bad news is that amid today's intensified financial strains, Congress may be reluctant to continue funding this effort to enhance prisoner reentry programs.

Rehabilitation programs reduce recidivism if they incorporate proven principles and are targeted to specific offenders. Research demonstrates that offenders who earn a high school equivalency diploma while behind bars are more likely to get jobs after release. Those who receive vocational skills training are more likely to get jobs and higher wages after release. And those who go through intensive drug treatment programs in prison are less likely to relapse

outside of it. If we could implement effective programs, we could expect to reduce recidivism by 15 to 20 percent. To put it in concrete terms: About 495,000 of the 750,000 prisoners who will be released this year are likely to be rearrested within three years. With effective programs, we could reduce the number of repeat offenders by nearly 100,000. We could do even better if these efforts were linked to improved services in the community upon release. Such efforts would pay for themselves by reducing future criminal justice and corrections costs. Economist Mark A. Cohen and criminologist Alex Piquero found in a recent study that a high-risk youth who becomes a chronic offender costs society between \$4.2 and \$7.2 million, principally in police and court outlays, property losses, and medical care. We either pay now or pay later—and we pay a lot more later.

Advocates of rehabilitation constantly struggle against the widespread view that “nothing works.” In part, this view grows out of an experience that began in the 1980s, when horrendous prison crowding in southern prisons, economic woes, and court rulings spurred some unusual experiments. When federal courts ordered states either to build new facilities or find some other way to punish offenders, the states began experimenting with alternative sanctions. Georgia, for example, developed an intensive supervision program (ISP) for probationers that yielded some evidence that it reduced recidivism rates—and also appeared to save the state the cost of building two new prisons. By the mid-1990s, virtually every state had passed some kind of legislation for intermediate sanctions.

Probation and parole departments across the country implemented a variety of ISP programs, including boot camps, day reporting centers, and electronic monitoring. The hope was that some offenders who normally would have been bound for prison could be “diverted” from expensive prison cells to intensive community programs that could keep a closer watch on them and offer more support services. Other offenders could be released early into community programs. But as I discovered when I was co-director of the RAND Corporation’s national evaluation of ISPs in the early 1990s, despite all the good intentions, most of the ISP dollars wound up being used to fund more drug testing, parole agent contacts, and electronic monitoring rather than enhanced social services. The main result was that offenders who violated court conditions by using drugs, for example, were identified more quickly and sent into custody.

Within a decade, ISPs went from being “the future of American corrections,” as one probation officer enthused to a Washington Post reporter in 1985, to what seemed to be a failed social experiment. Most of the programs were dismantled by the late 1990s. Some advocates of the prison buildup pronounced that alternatives to prison had been tried and did not work. But the RAND study found that in places where efforts were actually implemented according to the original design, they were rather effective. Offenders who participated in drug or alcohol treatment, community service, and employment programs had recidivism rates 10 to 20 percent below those of nonparticipating offenders.

Today, we have even more refined knowledge of what works. The most popular approach involves using something akin to a medical technique, focusing on individual cases. Called the risk-need-responsivity (RNR) model, it uses risk assessment tools to size up each person and match him or her to the right program. The treatment efforts are behavioral in nature (with rewards and punishments) and geared to place the sharpest focus on higher-risk offenders. There is a heavy emphasis on cognitive behavioral and “social learning” techniques—ranging from anger management training to sessions devoted to weaning offenders away from their negative and antisocial attitudes. All of these efforts use peers and family members to reinforce their messages. And, as several studies show, they work. Criminologist Edward J. Latessa of the University of Cincinnati studied the results of RNR efforts in Ohio’s 38 halfway house programs and found that they cut the recidivism of high-risk offenders by as much as 20 percent. Several states, including Maine, Illinois, and Oregon, are now using the RNR model.

Community partnerships are another approach that holds great promise. An excellent example is the Boston Reentry Initiative, a city interagency program that brings together law enforcement, social service agencies, and religious institutions to start working with inmates while they are still incarcerated. On the day the prison doors swing open, a family member or

mentor is on hand to meet each released prisoner, and social service agencies are prepared to begin working to help the former inmate get a fresh start. The initiative focuses only on the highest-risk offenders leaving prison. They are offered opportunities for work and treatment, but for those who fail to take advantage of them and slip back into crime, the program calls for swift arrest and fast-track prosecution. In a sense, the Boston Reentry Initiative is the ISP experiment all over again—but this time backed with treatment resources, mentorship, and community collaboration. The results have been impressive. Harvard researchers found that participants had a rearrest rate 30 percent lower than that of a matched comparison group.

It is no longer justifiable to say that nothing works. There is scientific evidence that prison and parole programs can reduce recidivism. It is not easy and it is not inexpensive, but it is possible. To retreat now would be to pull the rug out from under hundreds of programs that are contributing to the decades-long war against crime, which, whatever its shortcomings, has been one of the nation's great success stories, vastly improving the lives of ordinary citizens and the vitality of cities. One of the surest ways we know to keep crime down is to prevent those who have committed crimes in the past from doing so again.

That is not to say that criminality is a problem that can always be solved. People go to prison for a reason, and in many cases there is very little or nothing that anyone can do to change the choices they will make in the future. Rehabilitation programs are not for every prisoner, and we should not waste money on those who lack motivation. But it would be foolish not to help those who wish to change. Effective rehabilitation and reentry programs that help offenders go home to stay are good for them, and good for the rest of us, too.

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Organizational Readiness in Corrections

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IMPROVING OFFENDER REENTRY has become a primary concern of many correctional agencies due to the growing size and cost of incarcerating individuals. Over the last 3 decades, the criminal justice system has grown to control one in thirty-one adults (Pew Foundation, 2009). This amounts to approximately 7.3 million adults either incarcerated or on some type of community supervision (Bureau of Justice Statistics, 2010). The increase has been reflected in the increasing corrections budget, estimated at 68 billion dollars, outgrowing the spending on any other government service (Pew Foundation, 2009). Furthermore, Langan and Levin (2002) examined 1994 recidivism data from 15 states and found that approximately 68 percent of individuals were re-arrested within three years. The same data revealed that a little over half of those released were re-incarcerated for either a new sentence or a technical violation within the following 3 years. As a means of addressing these rising numbers, many correctional agencies are pursuing the use of evidence-based practices in reentry to increase public safety and the opportunities for individuals to succeed once released. However, implementation of these practices is often met with resistance and challenge. This article examines the impact of a continuous on-site training model to advance the implementation of evidence-based practices in correctional settings.

Organizational Readiness for Change

Implementing change in any organization is a difficult process. However, the readiness of an organization to change can greatly impact the ability for an innovation to take hold. This readiness of an organization is “reflected in organizational members’ beliefs, attitudes, and intentions regarding the extent to which changes are needed and the organization’s capacity to successfully make those changes” (Armenakis, Harris, & Mossholder, 1993, p. 681). A few of the organizational factors associated with readiness for change are organizational climate, commitment to the organization, and resource availability. Measuring the readiness of an organization is highly important to understanding why an innovation may or may not be successfully implemented. These measurements also enable administrators or researchers who are implementing change to adapt their change strategies to address challenges such as resistance from staff. Implementing new practices often fails due to insufficient understanding of the

organization's readiness for change and preparing the organization's staff members for the change process (Schein, 2004; Jones, Jimmieson, & Griffiths, 2005).

Research demonstrates how improved measures of organizational readiness influence outcomes of clients as well as innovation adoption. Lehman, Greener, & Simpson (2002) found that treatment units with better communication, autonomy, and change orientation had clients with greater treatment satisfaction. Treatment units with better mission clarity, autonomy, cohesion, communication, and change orientation had clients who reported better rapport with their counselors. In a study examining Australian state government adoption of an automated computing system, Jones, Jimmieson, & Griffiths (2005) found readiness for change mediated the relationship between culture of an organization and the actual usage of the system post-training.

Studies using the National Criminal Justice Treatment Practices Survey (NCJTPS) demonstrate several organizational factors associated with evidence-based practice implementation. Friedmann, Taxman, & Henderson (2007) found that correctional programs that had a performance-oriented and open learning environment, less punitive beliefs, and an administrator with a human services background were more likely to use evidence-based practices (EBPs). Using the survey of wardens/directors of adult prisons and jails, Oser, Staton-Tindall, & Leukfeld (2007) examined the factors influencing adoption of HIV testing. Organizations without centralized power and more professional development and training opportunities, greater resources, more full-time staff, and those not as interconnected with judiciaries were more likely to adopt HIV testing. Grella and colleagues (2007) used surveys of program-level administrators of correctional and community agencies to determine staff perceptions of community treatment. These surveys revealed that staff members perceived community treatment as important and the ability to influence treatment improvement was associated with an organizational focus on cognitive-behavioral therapy.

Resistance to Change in Corrections

Adopting evidence-based practices that involve changing the environment of corrections presents a case where measuring and learning from measurements of organizational readiness is especially important. The environment of corrections is primarily a command and control, punishment-oriented culture (Duffee, 1974; Kruttschnitt, Gartner, & Miller, 2000). In this environment, rehabilitation is often a periphery goal, if it is supported at all. Therefore, when implementing evidence-based practices that support a pro-social, rehabilitative environment within corrections, resistance to implementation is an anticipated challenge due to the perceived misalignment of these practices (Lehman, Greener, & Simpson, 2002). Resistance can be displayed in passive or active behaviors that sabotage implementation. An example of passive resistance would be for staff to continuously claim lack of knowledge about the program and purposely fail to cooperate in using the new skills. Active resistance would be staff acknowledging the implementation of the new program, but stating the old way is better and sabotaging even other colleagues' use of the skills (Hodson, 1995; Martin & Meyerson, 1998). Resistance to change, while sometimes limited to a few individuals, is most likely to arise from an organizational culture that prefers the traditional way of doing things.

Measuring organizational readiness for change can offer insight to an organization about steps that can be taken to head off or counter resistance to the innovation being implemented. For instance, if a correctional agency recognizes that climate measures (e.g., understanding of future directions for the organization and perceptions of staff development opportunities) are low among staff, then there are steps that can be taken to make improvements as implementation occurs. The agency could hold town hall meetings between staff and decision-makers as well as distribute answers to frequently asked questions about the change (Lerch, James-Andrews, Eley, & Taxman, 2009).

Implementing Change

To advance implementation, coaches and external facilitators have been recommended to help staff use material learned in training sessions (Fixsen et al., 2002). Continuous on-site training is a tool that includes intensive coaching combined with coaching staff after the training. Continuous on-site training could be offered and supported by administration to ensure that staff have the time to learn the desired new skills in the place where they work (Lerch, James-Andrews, Eley, & Taxman, 2009). These types of strategies counter resistance by addressing climate discrepancies between existing values and beliefs and new innovations being implemented. Most important, these types of approaches promote change in more effective bottom-up strategies within an organization (Zeffane, 1996).

Using a continuous training model, this article examines the impact of implementing change in a corrections environment on organizational readiness measurements as well as communication strategies used by staff. The continuous training model includes initial communications training of staff, followed by on-site booster sessions by an expert trainer. The following research questions will be addressed: 1) does implementing a continuous training model on communication between staff and offenders improve communication strategies used within the reentry facility? and 2) does the change process improve organizational readiness for change within a reentry facility?

Methods

Prison-Based Work Release Center

The Prison-Based Work Release Center (PWRC) is a work release center located in an urban area (Lerch, James-Andrews, Eley, & Taxman, 2009). This facility is operated by the state Department of Corrections. PWRC is an all male facility that typically employs 35 correctional officers and five case managers. The average age of the staff is 40 years old, while on average, staff members have been employed by the department for approximately 11 years. During the first two years of data collection, an average of 72 percent of the staff was female, but by the third year the percentage declined to 60 percent. Approximately 89 percent of staff is African-American, and 69 percent of staff has at least a high school diploma.

Change Process

As part of a larger agency initiative to adopt evidence-based practices, the PWRC has undertaken an organizational change process that focuses on altering the culture and climate of the facility. The goal of this change is to create a pro-social learning environment that best supports the outcomes of the offenders serving time at PWRC. As part of this change process, a continuous training model was implemented as well as an evaluation of organizational change.

The change process began with a two-day communications training focused on building the skills of staff to communicate effectively with offenders. This process identified in-house change agents who have acted as peer trainers to assist in enhancing the learning environment for communication skills. The purpose of these change agents is to create sustainable change, where the agents become the models and advocates for other staff members of the skills being taught (Rogers, 2003; Armenakis, Harris, & Mossholder, 1993). A professional skills trainer provided on-site coaching and assistance to staff in the time following the intensive training. Through this continuous training model, the goal is to create a more open team learning environment and to improve communication in order to increase safety and improve the outcomes of the offenders. For more information on the model used please see Taxman (2008) and Lerch, James-Andrews, Eley & Taxman (2009).

Sample and Measurements

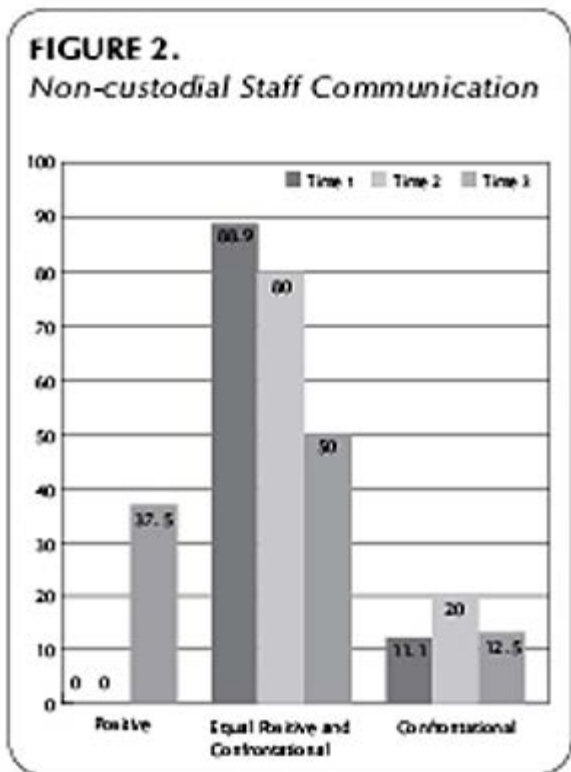
FIGURE 1.

Organizational Readiness for Change Measures

- **Organizational commitment** indicates the extent to which staff feel committed and attached to their employer (Caldwell, Chatman, & O'Reilly, 1990). This eight-item scale had an average alpha of .62.
- **Organizational staffing** and funding needs reflects the extent that staff feel there is sufficient staffing and funding for the organization (adapted from Lehman, Greener, & Simpson, 2002). This six-item scale had an average alpha of .57.
- **Organizational climate** measures the degree to which employees feel their organization is open to change and supportive of new ideas (adapted from Scott & Bruce, 1994; Orthner, Cook, Sabah, & Rosenfeld, 2004; Taxman, Young, Tesluk, et al., 2007). This eighteen-item scale had an average alpha of .97.
- **Cynicism for change** measures the extent to which employees are pessimistic about the organization's ability to change procedures or improve (Tesluk, Farr, Mathieu, & Vance, 1995). This five-item scale had an average alpha of .85.
- **Support for case planning** measures the priority that management and supervisors place on case planning (Young, 2009). This six-item scale had an average alpha of .90.

organizational survey was administered at PWRC at three time points: baseline (prior to intensive training sessions), one-year follow-up, and two-year follow-up. There were 28 staff members who took the survey at all three collection points. A total of 73 staff members took the survey, but 45 were either transferred to another facility or were no longer employed. The surveys were administered on-site by a member of the research team. The average response rate across the waves was 93 percent.

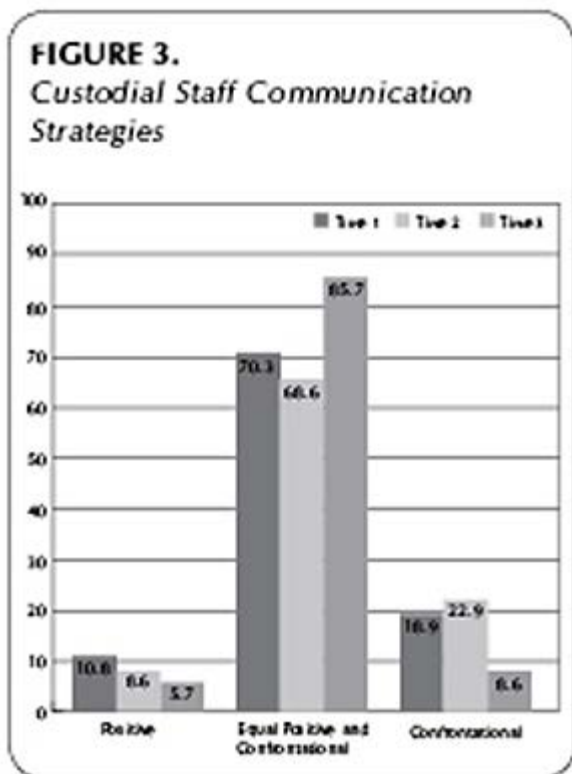
The organizational readiness for change measures were organizational commitment, organizational staffing and funding needs, the organizational climate, the level of cynicism about organizational change, and the support for case planning (Figure 1). All of these measurements ranged from 1 (strongly disagree) to 5 (strongly agree) on a likert scale.



Additionally, measures were taken on the *communication strategies* used by staff. These measure the use of both positive and confrontational communication skills when interacting with offenders (Young, 2009). Positive communication reflects the use of motivational interviewing techniques such as open ended questions, affirmations, reflective listening, and summary (e.g., “Summarize what the inmate said to allow him/her to hear his/her own ideas”). Confrontational communication reflects the use of more directive, commanding language when interacting with offenders (e.g., “Tell the inmate that he/she needs to change his/her behavior or else receive a charge”). This eighteen-item scale ranged from 1 (very uncomfortable) to 5 (very comfortable). The ten items measuring positive communication had an average alpha of .96, while the eight items measuring confrontational communication had an average alpha of .92.

Findings

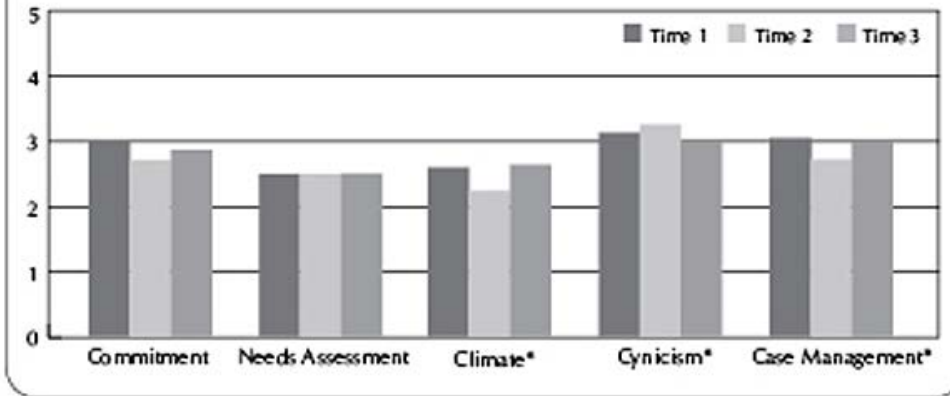
Overall, the use of positive and confrontational communication strategies did not significantly change across the waves of survey collection. Further examining these scales, the individual differences between responses to the positive and confrontational communication scales by collection time point and staff position (non-custodial versus custodial) were calculated. Custodial staff includes all ranks of correctional officers, while non-custodial includes case management, maintenance, dietary, nursing, and support staff. Evident among both non-custodial and custodial staff was a strong reliance on confrontational communication strategies, despite the continuous training targeting communication strategies and this being a reentry environment. As seen in Figure 2, at baseline 11.1 percent of non-custodial staff reported primarily using confrontational strategies, which increased to 20 percent at year one follow-up and then decreased to 12.5 percent at the second year follow-up. None of the non-custodial staff demonstrated primarily using positive communication strategies at both baseline and the one year follow-up. Then, at the two-year follow-up, there is a drastic shift toward greater use of positive communication strategies (37.5 percent). This increase in positive communication largely shifted people away from equal use of confrontational and positive communication strategies, while some individuals also reduced their primary use of confrontational communication. Among non-custodial staff, 88.9 percent reported equal use of positive and confrontational communication strategies at baseline, 80 percent at year one follow-up, and 50 percent at year two follow-up. However, these findings are statistically insignificant, most likely due to the very small number of non-custodial staff in the sample across all three time points.



The use of mostly confrontational communication strategies was reported by 18.9 percent of custodial staff at baseline, 22.9 percent at first-year follow-up, and 8.6 percent at second-year follow-up. There is a decline in the primary use of positive communication strategies reported over time, with 10.8 percent at baseline, 8.6 percent at year-one follow-up, and 5.7 percent at year-two follow-up. The decrease in both positive and confrontational communication strategies by the second-year follow-up resulted in an increased percentage of those reporting equal use of positive and confrontational. For the custodial staff, 70.3 percent reported equal use of positive and confrontational communication strategies at baseline, 68.6 percent at year-one follow-up, and 85.7 percent at year-two follow-up (Figure 3). These changes were also statistically insignificant.

Over the three years, no significant changes were found for the commitment individuals felt toward the organization or for any of the needs assessment subscales (staff, retention, training, physical facilities, integration, and community). However, there were significant changes for organizational climate, cynicism, and case management measurements. Between baseline and the one-year follow-up, perceptions of the organizational climate declined, but then improved between year-one and year-two follow-up ($F(2, 54) = 6.614, P=.003$). The extent of cynicism expressed declined between the first and second-year follow-ups ($F(2, x) = 3.294, P=.045$). Similar to the climate measure, the perceptions of the priority that management and supervisors place on case planning (case management) declined between baseline and year-one follow-up; however, these perceptions improved between the first and second-year follow-ups ($F(2, 54) = 5.108, P=.009$).

FIGURE 4.
Organizational Readiness



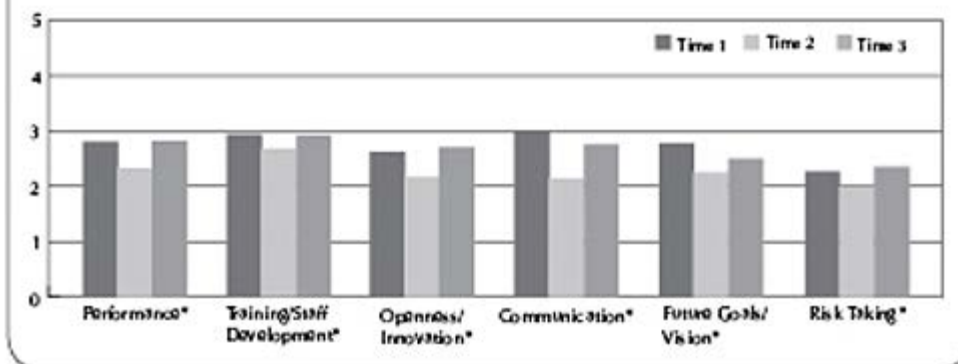
closer at

organizational climate, each subscale contributes to the significant change of the overall climate (Figure 5). These subscale measurements include: the extent to which management focuses on performance and outcomes of staff (*performance*), awareness of the future direction of the organization (*future*), extent to which management supports staff development (*training*), degree of support for innovation and openness for new ideas (*openness*), flow of information within the organization (*intra-communication*), and willingness of staff to take risks in performing their job (*risk-taking*). Between baseline and the first-year follow-up, the perceptions of performance ($F(2, 54) = 3.201, P=.049$), intra-communication ($F(2, 54) = 11.042, P=.000$), and future ($F(2, 54) = 4.765, P=.012$) declined. However, the perceptions of staff on the measures of future ($F(2, 54) = 4.765, P=.012$), training ($F(1.45, 39.414) = 2.872, P=.084$), openness ($F(1.646, 44.429) = 5.007, P=.015$), intra-communication ($F(2, 54) = 11.042, P=.000$), and risk taking ($F(2, 54) = 3.484, P=.038$) improved between the first- and second-year follow-ups.

Conclusions

The change process in this facility relied on a continuous training approach aimed at the communication strategies used by staff. Implementation research identifies this form of training, which incorporates intensive training and on-site booster follow-up, as key to changing the behavior of staff (Fixsen, Blase, Naom, & Wallace, 2009; Sholomskas et al., 2005). This continuous training approach to change is designed to help staff use the tools in everyday practice. By using the tools within their actual work environment and receiving real-time feedback, staff members become more confident in integrating the tools into their job duties. Booster training in combination with the intensive training increases the likelihood that the trained skills will become part of the staff’s everyday arsenal of tools.

FIGURE 5.
Organizational Climate



The findings of this study reveal areas where the

continuous communications training has had the greatest impact as well as where further work is

needed. The shift by non-custodial staff to the use of positive communication strategies by the second-year follow-up demonstrates how staff can be impacted by change initiatives, but also indicates that the change process does not occur overnight. Efforts to shift organizations need to be persistent and consistent over time. One-time, brief training sessions are not effective in achieving lasting changes in culture (Baer et al., 2004; Baldwin & Ford, 1988; Fixsen et al., 2002; Joyce and Showers, 2002; Miller and Mount, 2001; Miller et al., 2004). Given this finding and the importance of addressing culture in the implementation of new innovations, organizations need to expect and account for the time needed to change the practices of an organization. Formal policy changes only go so far in changing the actual behavior of the line staff within organizations, especially if those changes counter the traditional culture of the organization (Meyer & Rowan, 1977; Feldman, 2003). A continuous training and modeling approach is necessary to actively create this type of change.

The minimal change in communication strategy found among custodial staff also suggests the difficulty in generating change and the time investment needed to change the more status quo use of confrontational communication in this environment. This could be due to the subculture among correctional officers, which differentiates them from the non-custodial staff within the organization. Research conducted by Duffee (1974) found that the subculture of correctional officers viewed change and the social climate much differently from not only the inmates they supervised, but from management as well. Correctional officers in Duffee's (1974) study opposed the implementation of the new innovation, therefore requiring change to occur within the subculture to effectively implement change. The findings presented here offer insight into how a continuous change model that impacts resistance among non-custodial staff can have relatively minor effects on custodial staff. More research is needed to explore how training models are implemented among mixed groups of staff members in a correctional environment.

The organizational readiness measures, especially organizational climate, provide a glimpse of what can be expected during a change process such as this. For most of the measures, there was a decline in perceptions at the first-year follow-up, some of which were significant. However, by the second year most of the measures improved nearly to baseline, with some going above. This may visually demonstrate the resistance to change experienced by the organization, with a better climate arising by the second-year follow-up. Unfortunately, missing from this is the answer to the question of how the implementation of the change process led to these results. The qualitative follow-up currently being conducted will provide some insight into this, but perhaps the continuous training model is what enabled resistance to be overcome, and not given into.

Further examination is needed to understand the connection of organizational commitment to the climate of the organization. Why did climate and cynicism improve, but organizational commitment did not experience a significant change? Organizational commitment has been found to have both direct and mediating effects on organizational change. Examining change processes in a hospital setting, Iverson (1996) found that organizational commitment mediated the impact of staff satisfaction and motivation as well as environmental factors on the change process. Perhaps more attention needs to be focused on improving organizational commitment to see a greater change in communication strategies within the organization.

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Examining Prevailing Beliefs About People with Serious Mental Illness in the Criminal Justice System

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THIS ARTICLE EXAMINES many of the prevailing beliefs about the presence of the mentally ill in the criminal justice system. I begin by providing a backdrop for the longstanding problem of people with serious mental illness (PSMI) being processed through the criminal justice instead of the mental health system. I explore the notion of criminalization and what that term means with respect to current practices related to PSMI in the criminal justice system. I argue that true criminalization is a relic of past police practices and is no longer the primary conduit that brings PSMI into courts, jails, or prisons. I then discuss the policy of deinstitutionalization, which is associated historically with the growing number of PSMI in jails and prisons across the United States. I contend that the disproportionate representation of PSMI in the criminal justice system is largely the result of punitive crime control policies and the war on drugs.

I briefly describe programs that have been implemented to serve PSMI under the authority of law enforcement, courts, and corrections. I note that the criminal justice system has made serious attempts to care for PSMI. Further, I explore the special problems that complicate the lives of PSMI and contribute to the challenges of working with them at every step in the criminal justice process. I indicate that mental illness is only one of a host of problems that plague criminally involved PSMI.

The Prevailing Beliefs About PSMI in the Criminal Justice System

Belief 1: People with Serious Mental Illnesses Have Been Criminalized

The Notion of Criminalization

Nearly 40 years ago, scholars first observed that PSMI were becoming criminalized (i.e., they were being processed through the criminal justice system instead of the mental health system) (Abramson, 1972). Criminalization occurs when people with no criminal intent are placed under arrest and detained for minor crimes or ordinance violations. These behaviors, known as public disorder or nuisance offenses, can be unnerving, threatening, or even frightening to bystanders. If someone's behavior disturbs customers in a restaurant, store, or mall, or interferes with the flow of traffic on a major thoroughfare, the police are frequently called to the scene to restore order.

In the 1980s, several studies found that PSMI were being arrested when a mental health

alternative would have been preferable but was unavailable (Lurigio, Snowden, & Watson, 2006). A ground-breaking observational study suggested that, *ceteris paribus*, PSMI suspected of minor crimes were more likely to be taken into police custody after a street encounter than were people who showed no signs of mental illness but were suspected of the same crimes (Teplin, 1983). The early literature on criminalization is replete with cases in which PSMI were arrested for expressing symptoms of mental illness. Such incidents often escalated into more serious acts of law-breaking (e.g., assaulting a police officer) (Teplin, 2000). No evidence gained from these studies ever indicated that the police were biased against PSMI or deliberately treated them inhumanely or abusively.

To the contrary, the police sometimes resorted to arrest in order to obtain services for PSMI (Teplin, 1983). So-called “mercy bookings” were undertaken to ensure that arrestees would obtain “three hots and a cot” (i.e., warm meals and a place to sleep, particularly in extreme weather conditions) (Teplin & Pruett, 1992). In many jurisdictions, PSMI were arrested so that they would be in a safe environment while they waited for a treatment bed to become available (Torrey, et al., 1992). This type of action constitutes thoughtful police service, not the criminalization of PSMI.

A significant proportion of police contacts with PSMI (who are not suffering from co-occurring substance use disorders) involve no criminal activity (although if improperly managed, such contacts can devolve into situations that do result in an arrest) (Council of State Governments, 2002). Most PSMI who are arrested, charged, and convicted of felonies are handled through the criminal justice system, not because they are being criminalized, but because they have behaved criminally. General discussions about the criminalization of the mentally ill rarely acknowledge that degrees of criminality and mental illness co-exist in the same individuals (Fichtner & Cavanaugh, 2006). Such discussions often homogenize the mentally ill in terms of their disease and their criminality. Similarly, PSMI commit crimes for a variety of reasons, at different rates and different times, as do people without serious mental illness.

The Notion of Homogeneity

One study found that PSMI could be grouped into three categories according to their criminal histories (Lurigio & Lewis, 1987). The first group was arrested largely for public order violations and fit the characterization of the criminalized mentally ill; they were arrested for simply displaying the signs and symptoms of mental illness in public. The second group was arrested for committing petty or survival crimes, such as prostitution, shoplifting, and minor drug sales, or for committing crimes to supplement the meager income that they received from panhandling or entitlement programs. The third group was indistinguishable from offenders with no mental illness. Their criminal histories contained an assortment of street crimes, including robbery, burglary, and battery.

Other researchers have suggested additional typologies of criminal behavior among PSMI. For example, a study of the recidivistic patterns of parolees with mental illness found that the vast majority of those who committed crimes (90 percent) did so because of problems with anger and impulsivity; 5 percent committed crimes that were attributable to their symptoms, and 2 percent committed crimes to survive on the streets (Peterson, Skeem, Hart, & Vidal, 2009). Another set of groupings includes PSMI who commit low-level (non-violent) crimes to survive; those with co-occurring substance use and Axis II diagnoses (character disorders) who commit serious crimes; and those who commit violent crimes as a consequence of their symptoms and thus fit the pernicious stereotype of the violent mentally ill (Hiday, 1997). Based on these characterizations, researchers and practitioners should investigate more vigorously the parallel and intersecting trajectories of mental illness and criminality among PSMI in order to understand the relationship between symptoms and crimes as well as to identify the particular service needs of PSMI at each step in the criminal justice process.

The presumed homogeneity of criminally involved PSMI coincides with a belief in mutual exclusivity—someone is either “mentally ill” or a “criminal,” but not both. This belief is perhaps related to the legal principle of intent and explicitly linked to the insanity defense, which is an

affirmative defense that requires proof that those accused were unable to control their behavior or distinguish between “right and wrong” at the time the crime was committed. The public’s conflation or confusion of insanity and mental illness perpetuates the distinction between “mad and bad” (Erickson & Erickson, 2008).

In practice, forensic cases are tried using different procedural guidelines, housed in different facilities, and subjected to different release mechanisms; they have been appropriately excluded from the debate about criminalization. Hence, PSMI convicted of felonies have been deemed “criminal”; they are thus held responsible by the law and in court, and therefore, cannot be “criminalized.” In such instances, the term “criminalization” is a misnomer. Fewer than 1 percent of criminal defendants proffer the insanity defense, and only a small percentage are successful—found “not guilty” by reason of insanity—and then placed in special facilities (Fersch, 2005). Thus, most PSMI in prisons and jails have been judged by the courts as legally culpable.

In the context of the above considerations, the traditional notion of “criminalization” is antiquated and should be replaced with a more comprehensive view of the factors that relate to the processing of PSMI through the criminal justice system (Fisher, Silver, & Wolff, 2006; Lurigio, 2004; Lurigio & Rodriguez, 2004; Rotter, et al., 1999). Whether police are called to defuse a psychiatric crisis, respond to a relatively minor “public order” offense, or arrest a suspect with mental illness on a felony charge, the essential question remains the same: How can the mental health and criminal justice systems respond effectively to the complicated needs of criminally involved PSMI?

Research on Criminalization

Using evidence stemming from three primary sources (police reports, incarcerations, and the relative arrest rates of the mentally ill), a review of the literature on the criminalization of PSMI concludes that studies of police contacts and arrests at best present only inconclusive support for the criminalization of PSMI (Teplin, 1991). Investigations of the topic have employed mostly post-hoc strategies of data collection that are fraught with interpretation problems – for example, asking police officers after the fact to explain their decisions about handling PSMI. Such approaches produce biased data. Further, small samples, the lack of baseline comparisons, and invalid, inconsistent, and nonstandard assessment procedures also limit the usefulness of data on the prevalence of PSMI in jails and prisons.

The absence of longitudinal research precludes definitive conclusions about the causal relationship between policy changes and the criminalization of PSMI (Lamb & Weinberger, 1998, 2005; Teplin, 1991; Teplin & Voit, 1996). PSMI who have been granted due process and are found guilty and sentenced for crimes are not being criminalized in the strict sense of the term. If properly administered, police-, court-, and jail-operated diversionary strategies are designed to minimize the criminalization of PSMI. For more than 20 years, jails and prisons have been overcrowded and underfunded. Hence, people charged with low-level crimes, especially public-order offenses, are today unlikely to be detained, much less incarcerated.

Belief 2: Deinstitutionalization Is the Cause of Criminalization

According to the prevailing wisdom, a sea change in mental health policy, known as deinstitutionalization, shifted the focus of care for PSMI in psychiatric hospitals to local community mental health centers and became the single largest contributing factor to the criminalization of the mentally ill (Borzecki & Wormith, 1985; Grob, 1991; Lurigio & Swartz, 2000; Whitmer, 1980). The deinstitutionalization movement was fueled by journalistic exposés of patient abuse, effective new medications to treat severe mental illness, federal entitlement programs that paid for community-based mental health services and the availability of insurance coverage for inpatient psychiatric care in general hospitals (Sharfstein, 2000). Despite its lofty intentions, the policy of deinstitutionalization was never properly implemented. Although it achieved its goal of reducing the use of state hospitals, it never succeeded in providing adequate, appropriate, or well-coordinated outpatient treatment for large percentages of PSMI, above all

those with the most severe and chronic mental disorders (Shadish, 1989).

Tragically, this unsuccessful transition to community mental health care took its greatest toll on those patients who were least capable of handling the basic tasks of independent daily living. Many became unwanted charges of the criminal justice system because of the dearth of treatment and social services (Grob, 1991; Torrey, Steiber, Ezekiel, Wolfe, Sharfstein, Noble, Flynn, 1992). Although purported innumerable times and in diverse literatures, the causal link between deinstitutionalization and criminalization has never been rigorously tested.

The Hydraulic Hypothesis

The increase of PSMI in the nation's jail and prison populations supposedly occurred in part because of the decline in the size of the state mental hospital population, supporting Penrose's (1939) theory that a relatively stable population in industrialized societies is permanently confined (i.e., as the census of one institution of social control—the mental hospital—goes down, the census of another—the prison—goes up). Also known as the “hydraulic hypothesis,” Penrose's theory posits that a constant number of people with psychiatric disorders in industrialized or Western societies will always require institutional care.

If psychiatric hospitals are unavailable or unwilling to treat PSMI, then these patients will have to be housed elsewhere (e.g., prisons and jails). Part of the increase in the number and proportion of incarcerated PSMI is thus certainly attributable to deinstitutionalization and its corollaries. For example, if PSMI are arrested for public order offenses and accumulate a criminal history, they might be more likely in the long run to be sentenced to jail or prison. Nevertheless, deinstitutionalization only partially explains the large number of PSMI now in prisons (Jemelka, Trupin, & Chiles, 1989). For example, the 2 percent increase in the proportion of men with previous psychiatric hospitalizations sentenced to prison between 1968 and 1978 is much too small to account for all of the men who were released from psychiatric hospitals and who later committed crimes during that same time period (Jemelka et al., 1989). In addition, the census in state psychiatric facilities has remained relatively flat, while the prison population has been increasing since 1990 at a rate of 6 percent annually (Frank & Gilard, 2006).

One study examined evidence for the inverse correlation between the number of PSMI in jails and prisons and those in psychiatric hospitals, using census data collected from those three institution types between 1904 and 1987 (Palermo, Smith, & Liska, 1991). The data supported the conclusion that jails and prisons have become convenient repositories for PSMI. Another study that measured the aggregate institutionalization rate in the United States (state hospitals and prisons) found that the rate was essentially unchanged from 1955 (when the hospitalized psychiatric population was at its highest) to 2002 (when the prison population was at its highest to date). These findings suggest evidence that the population under the umbrella of social control simply shifted from patients to inmates (who would have been patients 50 years earlier) (Harcourt, 2006).

A review of several studies on the imprisonment of PSMI, however, found no conclusive support for the hydraulic hypothesis (Teplin & Voit, 1996). Similarly, an examination of imprisonment data in six states, which compared the number of prisoners with prior psychiatric hospitalizations in 1968 and 1978, failed to show a purported shift of PSMI from state hospitals to prisons (Steadman, Monahan, Duffee, Hartstone, & Robbins, 1984). What, then, does explain the continually large numbers of PSMI entering jails and prisons?

The belief that deinstitutionalization caused an influx of PSMI into the criminal justice system is based in part on the correlational fallacy and rests on untenable assumptions. The emptying of state hospitals began a decade before the precipitous increase of crime and the politicization of the crime problem in the 1960s, and 25 years before the implementation of the policy of mass incarceration. Nevertheless, major policy changes in mental health care and crime control have run parallel for several decades, suggesting concomitance but not causality. If the population of the hospital simply shifted to the prison, then the populations of “patients” and “criminals” would have to overlap substantially in their composition.

Indeed, research suggests that the population of state hospitals changed in the 1970s, resulting in an increase in the rate of arrests for released patients because of the “changing clientele of state hospital[s],” that is, the growing number of patients with previous offense histories (Cocozza, Steadman, & Melick, 1978). This intersection between the two populations is attributable to shared demographic characteristics and not to the increased risk of criminality among former patients attributable to mental illness. A review of 200 studies on the relationship between crime and mental disorders concluded that [the association] “can be accounted for largely by demographic and historical characteristics that the two groups share. When appropriate statistical controls are applied for factors, such as age, gender, race, social class, and previous institutionalization, whatever relations between crime and mental disorder are reported, tend to disappear” (Monahan & Steadman, 1983, p. 152). A much more recent investigation found that the rise in the percentage of incarcerated PSMI from 1950 to 2000 has been modest and is predictable in light of the overall increase in the number of people incarcerated during that time period. Specifically, while the proportion of PSMI in psychiatric institutions fell by 23 percent, the percentage of incarcerated PSMI increased only 4 percent in the last half of the last century (Frank & Glied, 2006).

Poverty and Mental Illness

PSMI often reside in highly criminogenic and impoverished environments that exert pressures on them to become engaged in criminal behavior. The factors that characterize these environments also affect poor people with no serious mental illness (e.g., joblessness, gang influences, failed educational systems, and residential instability) (Silver, Mulvey, & Swanson, 2002). PSMI have many types of problems because of the poor and disadvantaged communities in which they typically live (Draine, Salzer, Culhane, & Hadley, 2002). Homelessness, crime, under-education, and unemployment are endemic to these neighborhoods. A large percentage of poor people experience these difficulties—whether they have mental illness or not—rendering them more susceptible to criminal activity and victimization (Lamberti, 2007). The risk factors that predict crime among PSMI are the same factors that predict crime among people with no serious mental illness (Bonta, Law, & Hanson, 1998; Skeem, Eno Loudon, Manchak, Vidal, & Haddad, 2008).

Since the earliest epidemiological studies of mental illness, researchers have found a correlation between poverty and serious mental illness; people of lower socioeconomic status are more likely than those of higher socioeconomic status to be diagnosed with a serious mental disorder (U.S. Surgeon General, 1999). The unrelenting stress of poverty increases the risk of mental illness (Eaton & Muntaner, 1999). Mental illness can also pull a person downwards into poverty because the symptoms of mental illness can interfere with going to school and finding and maintaining employment. In addition, most poor people have no or limited insurance coverage for primary mental health care. Therefore, their symptoms go untreated, producing irreversible clinical deterioration and recurrence of more severe episodes of psychiatric disease.

Poor communities with high levels of social disorganization and weak informal social control mechanisms also have a higher tolerance for deviant behaviors and are more welcoming to PSMI who can find affordable places to live in communities where crime is rampant and police presence is elevated. A large-scale, seven-year study of the relationship between socioeconomic status and mental illness suggested that poverty, acting through economic stressors, such as unemployment and lack of affordable housing, is more likely to be a precursor to, than a sequela of, serious mental illness (Hudson, 2005). Thus, the correlates of crime are also the correlates of serious mental illness (Fischer, Silver, & Wolff, 2006).

The Prison Explosion and the War on Drugs

The prison population in the United States quadrupled from 1980 to 2000 and has exceeded the 1 million mark every year since 1995. The rate of incarceration per 100,000 Americans climbed from 139 in 1980 to 478 in 2000—a 243 percent increase (Bureau of Justice Statistics, 2002a). By mid-year 2009, the number of incarcerated adults had grown to 2.3 million (Bureau of Justice Statistics, 2010). The United States now has the highest documented incarceration rate in the world (714 per 100,000 persons) and the highest documented prison and jail populations in

the world, followed by Russia and South Africa (Walmsley, 2006, 2009).

Since the 1980s, an overwhelming emphasis on law enforcement strategies to combat illegal drug use and sales has resulted in dramatic increases in the nation's arrest and incarceration rates. Rates of arrest and incarceration for drug offenses have continued at a record pace into the 21st century, although general population surveys did report declines in illegal drug use in the United States during the 1990s (Tonry, 1995, 1999). Drug offenses have been among the largest categories of arrests since the 1980s. From 1980 to 2000, for example, arrests for drug offenses more than doubled. In 2000 alone, more than 1.5 million persons were arrested for drug offenses—more than four-fifths for drug possession (Bureau of Justice Statistics, 2002b). PSMI who live in poor neighborhoods have easy access to illicit substances, which are more likely to be sold on the street in those communities, and they are likely to be arrested for possession because of the increased police presence in underclass areas.

Offenders convicted of drug possession and sales (and who also have high rates of drug use) have been incarcerated with greater frequency and for longer prison terms than previously and have constituted one of the fastest-rising subgroups in the nation's prison and probation populations since the onset of the current imprisonment binge (Beck, 2000). A fairly large proportion of these individuals have co-occurring psychiatric disorders, thus adding to the number of mentally ill offenders in the nation's criminal justice system (Lurigio, 2004; Swartz & Lurigio, 1999). Like dolphins among tuna, many mentally ill, drug-using persons are caught in the net of rigorous drug enforcement policies (Lurigio & Swartz, 2000).

PSMI who use illicit drugs are more prone to violence and thus more likely to be arrested and incarcerated than those who do not use illicit drugs (Clear, Byrne, & Dvoskin, 1993; Swanson, Estroff, Swartz, Borum, Lachicotte, Zimmer, & Wagner, 1997; Swartz, Swanson, Hiday, Borum, Wagner, & Burns, 1998). One study of a sample of PSMI in jail found that substance use disorders have a greater effect on criminal behavior than mental illness does (Junginger, Claypoole, Laygo, & Crisanti, 2006). Numerous studies have also demonstrated that people with comorbid psychiatric and substance use disorders are more likely than people with mental illness alone to engage in violent behavior (Harris & Lurigio, 2007).

The current war on drugs and the high rate of comorbidity between drug use and psychiatric disorders accounts partially for the large numbers of PSMI in our nation's jails and prisons. Fragmented drug and psychiatric treatment systems fail to afford fully integrated care for persons with such co-occurring disorders, compounding their problems in both areas of concern and elevating their risk for arrest and incarceration (Lurigio & Swartz, 2000). PSMI share many of the socioeconomic and other characteristics of criminally involved people (youth, unemployment, poverty, lack of education, substance use) and live in the same criminogenic neighborhoods where the presence of police and the likelihood of arrest are high, presenting an expansive gateway for PSMI to enter the criminal justice system.

Belief 3: The Number of PSMI Continues to Grow

The percentage of PSMI in correctional populations has presumably grown and will continue to grow. Evidence suggests that rates of serious mental illness in the prison population rose substantially during the 1990s. For example, in a 2001 national survey, 25 of the 29 state prison systems with longitudinal healthcare data reported that the proportion of inmates with PSMI increased measurably between 1990 and 2000 (Thigpen, Hunter, & Ortiz, 2001). These estimates were based on self-reported perceptions of growth and beg the question of whether the actual rates of inmates with mental illness have actually risen, or if sensitivity to the problem among prison administrators has simply increased, and similarly (and more likely), whether more and better screening procedures for mental illness were implemented in the 1990s, thereby uncovering more cases of incarcerated PSMI than earlier.

Various studies have measured the prevalence of mental illness in jails and prisons for more than three decades. Except for a handful of investigations (e.g., Teplin, 1990), the prevalence of psychiatric disorders has been established using weak methodologies and

epidemiological imprecision (e.g., Ditton, 1999). Moreover, psychiatric prevalence rates in correctional institutions are difficult to capture because they fluctuate with changes in law enforcement and sentencing practices, rates of psychiatric morbidity in the community, and the structure and financing of the community mental health system. In addition, many crime control policies that have fueled the exponential growth in the incarceration rate—for example, intensive street-level drug enforcement and crackdowns on “quality of life” or public order offenses—have disproportionately affected PSMI. Therefore, prevalence estimates that rely on studies from the 1980s or the early 1990s have little usefulness in the planning and delivery of mental health services to current jail detainees and prison inmates (Harris & Lurigio, 2007).

The calculation of comparable prevalence rates among different settings or studies has been hampered by variations in sampling techniques, data collection procedures, and operational definitions of mental illness. Varying definitions of what constitutes a “mental disorder” can significantly affect the results of psychiatric prevalence studies in correctional settings (Pinta, 1999). Specifically, a “narrow” definition of mental disorders that encompasses only serious mental illness, such as bipolar disorder, major depression, and schizophrenia, would lead to a much lower prevalence of serious mental illness than would a “broad” definition of mental disorders that encompasses a wide range of other diagnoses, such as paraphilias, substance use disorders, and Axis II (personality) disorders (Pinta, 1999).

Most studies of PSMI in jails and prisons have been performed in single jurisdictions because large-scale, epidemiological research has been precluded by limitations in investigator resources and restrictions in their access to multiple correctional facilities (Lamb & Weinberger, 2005; Pinta, 1999; Veysey & Bichler-Robertson, 2002). However, recent attention to the increasing number of PSMI in prisons has prompted the implementation of cross-jurisdictional, epidemiological studies of incarcerated populations, such as the National Commission on Correctional Health Care Study, and a meta-analysis of more than 60 prevalence studies of prisoners with mental illness (Fazel & Danesh, 2002). The bottom line from this research is that “we know little about the true prevalence of mental illness among offenders throughout all stages of the criminal justice system, or about the extent to which the needs of mentally ill offenders are going unmet” (Mears, 2004, pp. 257-258). More prevalence research must be conducted to specify the need for treatment and to generate precise baseline indicators of the nature and severity of mental illness, which can be used in studies to determine program effectiveness.

Belief 4: Treating PSMI Will Lower Recidivism

The prevention of recidivism is a practical motivation for providing services to PSMI in jails and prisons and also to those on probation and parole supervision. However, no pathogenesis between mental illness and crime has ever been established. The untreated symptoms of the three most serious mental illnesses (schizophrenia, bipolar disorder, and major depression) suggest either no or a weak causal pathway. No theoretical model explains or predicts a precise relationship between serious mental illness and criminal behavior (Mears, 2004). Hence, major mental illness, in and of itself, would seem to present no added risk of criminal activity.

No studies have shown that the alleviation of psychiatric symptoms alone affects recidivism among criminally involved PSMI (Skeem, Manchak, Vidal, & Hart, 2009; Steadman, Dupius, & Morris, 2009). In fact, treating only mental illness among those who are criminally involved, without implementing any other interventions aimed at criminogenic factors, could arguably increase, not decrease, the risk of crime. For example, treated depression enhances vitality and energy among criminals and noncriminals alike, which is not to suggest that PSMI in the criminal justice system be deprived of treatment. Instead, it is important to recognize that psychiatric treatment might have no effect on reducing crime. In contrast, research suggests overwhelmingly that the co-occurrence of substance use disorders and other Axis I diagnoses accelerate criminal activities, especially among people with criminal intent and inclinations. Evidence for the relationship between violence and alcohol misuse, abuse, or dependence is also abundant and unequivocal (Lurigio & Swartz, 2000).

Treating mental illness could have an indirect effect on recidivism. In other words, relieving symptoms could help PSMI become sober and employed, find and retain stable housing, develop better self-control, return to school, mend relationships with family, and follow the designated rules of supervision, thereby avoiding probation and parole violations. Further, relieving the symptoms of major mental illness can make PSMI more amenable to interventions that will have a positive effect on crime, such as cognitive behavioral therapy that can change criminal thinking (Bonta et al., 1998). Even with no effect of treatment on criminality, jails and prisons still have a moral, ethical, and legal obligation to handle PSMI with compassion and to provide them with empirically supported services and interventions.

Serious mental illness alone rarely leads people to commit crimes and, therefore, the treatment of mental illness alone is unlikely to prevent or reduce crime or recidivism. PSMI can benefit from the same evidence-based cognitive behavioral therapies that affect criminal thinking among people with no mental illness. Most important, integrated treatment for co-occurring psychiatric and substance use disorders is critical in helping PSMI manage their symptoms and change their potential criminal trajectories (Lurigio, 2009).

Belief 5: The Criminal Justice System Is Ill Equipped to Handle PSMI

The notable presence of the mentally ill in the criminal justice system has also created significant demands on system resources and clarion calls for specialized, cross-disciplinary approaches to serve their diverse needs. Mental health practitioners have more recently been enlisted to play central roles in police departments, jails, prisons, and probation and parole agencies. By the same token, criminal justice professionals now are learning new ways to case manage offenders with psychiatric and behavioral disorders (Council of State Governments, 2002).

Jails and prisons have become the largest de facto treatment settings for the mentally ill, and correctional mental health care providers often contend with inadequate services and impossibly heavy caseloads. Specialized programs for PSMI, such as mental health courts, hold great promise for diverting PSMI from the criminal justice system and ensuring that they receive proper interventions (Bernstein & Seltzer, 2004; Watson, Hanrahan, Luchins, & Lurigio, 2001). Nonetheless, current resources for psychiatric treatment and other services rarely meet the demand for such care. However, criminal justice agencies are continually striving to do so (Council of State Governments, 2002).

With respect to programs and services, the criminal justice system has created interventions at each point of interception with PSMI. The literature abounds in instances of such initiatives (Council of State Governments, 2002). For example, to bridge both the mental health and criminal justice systems, in 1988, the Memphis Police Department created and implemented the first Crisis Intervention Team program in the United States (Compton, Bahora, Watson, & Oliva, 2008; Memphis Crisis Intervention Team., n.d.).

Operating at both the pre-and post-adjudication levels, specialized mental health courts hold great promise for diverting PSMI from the criminal justice system and ensuring that they receive psychiatric treatment and other services (Bazelon Center for Mental Health Law, 2004). Pioneering MHC initiatives were thus implemented in response to three critical problems: the perceived public health risk posed by offenders with serious mental illness, the challenges and costs of housing PSMI in crowded jails, and the pervasive inability of the criminal justice system to respond effectively and humanely to PSMI (Goldkamp & Irons-Guynn, 2000). The first jurisdictions to establish MHCs were Broward County, Florida; King County, Washington; and Anchorage, Alaska. More than 300 mental health courts now operate across the country (Justice Center, Council of State Governments, 2011).

Jail diversion initiatives are another major strategy for reducing the presence of PSMI in the criminal justice system. Such programs offer treatment-based alternatives to criminal justice processing for PSMI who have come into contact with law enforcement agencies or the courts (Lattimore, Broner, Sherman, Frisman, & Shafer, 2003). Several types of diversion models are

operating in the United States, and they vary in their structures and procedures and function at different points in the criminal justice process (Boccaccini, Christy, Poythress, & Kershaw, 2005). Nevertheless, most serve PSMI at early stages in the process (at or following arrest, booking, or initial court appearance), and all are premised on the notion that PSMI should be handled through the mental health system, not the criminal justice system (Schneider, Bloom, & Heerema, 2007).

Post-booking jail diversion programs are intended to benefit both targeted participants and the systems they enter. Individuals who are so diverted are expected to gain greater access to immediate treatment and other interventions, leading to putative reductions in arrests, hospitalizations, and the ongoing need for services from the criminal justice and emergency mental health systems (Cosden, Ellens, Schnell, Yamini-Diouf, & Wolfe, 2003; Naples & Steadman, 2003). Other community-based programs for PSMI include specialty probation and parole units as well as jail and prison re-entry programs (Sacks, Sacks, McKendrick, Banks, & Stommel, 2004; Skeem, et al., 2009).

Jails process nearly one million newly admitted detainees with serious mental illness each year (Naples & Steadman, 2003). In many cases, jails and prisons are the final stop on the “institutional circuit” that includes homeless shelters, psychiatric institutions, and substance abuse residences (Bernstein & Seltzer, 2004). Following initial screening and assessment, jails and prisons are mostly well-equipped to implement crisis intervention and suicide prevention—especially crucial services in jail settings—as well as psychiatric interventions at different levels of care: acute (in suicide prevention cells), in-patient (in specialized psychiatric units), and outpatient (in the general population). Although practice standards have been developed for these areas, the quality and level of mental health services still varies considerably in the nation’s jails and prisons (Human Rights Watch, 2003). Many correctional institutions modified their mental health care services only after litigation compelled them to do so (Lurigio & Snowden, 2008).

Major national efforts, such as the federally funded GAINS Center, the Criminal Justice/Mental Health Consensus Project, and the Council of State Government’s Justice Center have launched an ambitious research and service agenda and facilitated the sharing of evidence-based practices among different jurisdictions at the federal, state, and local levels. In addition, important federal legislation (e.g., the Law Enforcement Mental Health Project Act 2000 and the Mentally Ill Treatment and Crime Reduction Act of 2004) has created an impetus for more and better collaboration between the criminal and mental health systems and brought much-needed attention to PSMI in the criminal justice system.

The criminal justice system has competently managed to meet the challenge of handling PSMI at every stage in the process. The criminal justice and the mental health system are built on different foundations. They adhere to different philosophies, possess different capabilities, and satisfy different institutional imperatives. Even so, the former has done much of the work that was exclusively placed in the hands of the latter: providing mental health care for poor PSMI, who have a passel of other problems, such substance use disorders, homelessness, and unemployment.

Conclusions

Serious mental illness is a disease that should be treated like any other disease in correctional institutions, which are compelled to deliver mental health care on legal (e.g., *Ruiz v. Estelle*) and moral grounds (Mears, 2004). Sophisticated technologies that visualize the living brain have revealed aberrations in brain structure and processing among PSMI; the differences establish the biological, and possibly the genetic, underpinnings of serious mental illness and might suggest effective breakthroughs in medical interventions (Kramer, 2009). For the reasons I discussed throughout this article, a disproportionate percentage of PSMI are processed through the criminal justice system and will continue to be as long as punitive crime and drug control policies remain in place.

The effective provision of mental health care is obligatory and should be the expectation of

care for PSMI in jails, prisons, and community corrections programs. In institutional settings, psychiatric medications should be prescribed along with other types of care in a safe, specialized environment to alleviate symptoms, not for the purpose of controlling the population with sedating drugs (Human Rights Watch, 2003). Budgets for psychiatric services and staffing should be increased to meet clinical needs, which will be consistently greater than those in the general population because of the shared demographic and illicit drug use profiles of PSMI and criminally involved people. Many studies suggest that mental health care is woefully underfunded in correctional institutions and fails to meet inmates' psychiatric needs (Human Rights Watch, 2003; James & Glaze, 2006). Such inadequacies leave in their wake much needless suffering among the most vulnerable members of the community.

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Published by the Administrative Office of the United States Courts www.uscourts.gov
[Publishing Information](#)

Exploring The Moderating Effects of Mental Illness on Parole Release Decisions¹

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PAROLE RELEASE DECISIONS take into consideration an inmate's risk for recidivism (Bonta, 2002; Heilbrun, 1997). Factors associated with criminal involvement are divided into static and dynamic risk factors, the latter of which are termed criminogenic needs (Andrews & Bonta, 2003). Static risk factors include past behaviors like criminal history and as such are immutable. Criminogenic needs include education and antisocial cognitions, values, and behaviors and are considered areas that can be targeted for intervention. Research on risk assessment for criminal recidivism has identified a set of "central eight" risk factors that predict criminal involvement most reliably (see Table 1; Andrews & Bonta, 2006; Andrews, Bonta, & Wormith, 2006). The criminality of persons with mental illness is influenced by the same central risk factors that influence criminal behavior among persons without mental illness (Bonta, Law, & Hanson, 1998; Hodgins & Janson, 2002).

TABLE 1.
Criminal Risk Factors

	Factor	Risk
The “Central Eight” Risk Factors	Family and/or marital	Two key elements are nurturance and/or caring and monitoring and/or supervision.
	School and/or work	Low levels of performance and satisfactions in school and/or work
	Leisure and/or recreation	Low levels of involvement and satisfaction in anticriminal leisure pursuits
	Antisocial cognition	Attitudes, values, beliefs, and rationalizations supportive of crime; cognitive emotional states of anger, resentment, and defiance; criminal versus reformed identity; criminal versus anticriminal identity
	Antisocial associates	Close association with criminal others and relative isolation from anticriminal others; immediate social support for crime
	Antisocial personality pattern	Adventurous pleasure seeking, alienation, restlessly aggressive
	History of antisocial behavior	Early and continuing involvement in a number and variety of antisocial acts in a variety of settings
	Substance abuse	Abuse of alcohol and/or other drugs
Examples of Minor Risk Factors	Major mental disorder	
	Physical health issues	
	Seriousness of current offence	

Notes: From: Andrews, Bonta, & Wormith, (2006).

Mental illness is not one of the central eight risk factors and, in itself, has been found to have little relation to long-term criminal recidivism (Bonta, et al., 1998; Gendreau, Little, & Goggin, 1996; Quinsey, Harris, Rice, & Cormier, 1998). However, mentally-ill inmates tend to fare worse in risk assessments (Carroll, Weiner, Coates, Galegher, & Alibrio, 1982; Hannah-Moffat, 2004) and are less likely to be paroled than non-mentally ill inmates (Feder, 1994; Hannah-Moffat, 2004), extending their time behind bars (Ditton, 1999; Porporino & Motiuk, 1995). In one notable study, inmates without a history of psychiatric hospitalization while incarcerated were 30 times more likely to be granted parole than inmates with a history of psychiatric hospitalization (Feder, 1994). This large effect was observed even after controlling for a number of factors, including race, prison infractions, prior imprisonments, and violence of offense and lead the author to attribute higher rates of parole denial to “differential treatment” of mentally ill inmates in the parole release process (Feder, 1994, p. 408). While Feder controlled for a number of factors known at the time to influence release decisions or to be associated with recidivism, she did not take into consideration factors that we know today do a good job of predicting criminal behavior (i.e., the central eight risk factors) and are thus, likely to be considered in the release decision-making process.

Differential treatment in parole decisions can be examined in a number of ways. Previous research on the impact of mental illness on parole release decisions has examined either the direct effect of mental illness on release decisions (Feder, 1994; Hannah-Moffat, 2004) or the indirect effect of mental illness on release decisions through association among mental illness and criminal risk or other factors (Carroll, et al., 1982; Matejkowski, Caplan, & Cullen, 2010). However, exploring the moderating effects of mental illness on the relationships among risk factors and release decisions can provide another way of examining differential treatment of mentally ill inmates in the parole decision-making process. That is, it is possible that a parole board may not utilize the same risk factors, or apply these factors similarly in contemplating release decisions among inmates based upon an inmate’s mental health status. This possibility has not previously been tested in the literature.

There are a number of reasons why a parole board may apply risk factors differently in release decisions based upon an inmate's mental health status. Given that inmates with mental illness may, as a result of discrimination in the community, be assessed more negatively in regards to such criminal risk factors as a lack of attachment to employment (Manning & White, 1995; Scheid, 1999; Stuart, 2006) and education (Becker, Martin, Wajeeh, Ward, & Shern, 2002; Martin, Pescosolido, Olafsdottir, & McLeod, 2007), parole boards might grant inmates with mental illness some leniency on these factors. On the other hand, it is well-known that substance abuse (another criminal risk factor; Andrews & Bonta, 2006) among individuals with mental illness is a strong contributor to violent behavior (Fulwiler, Grossman, Forbes, & Ruthazer, 1997; Steadman, et al., 1998; Swanson, et al., 2002; Swartz, et al., 1998). As such parole boards may consider inmates with co-occurring mental illness and substance use disorders as more of a risk for parole than inmates with solely a substance use disorder. However, these hypotheticals ignore the substantial evidence that both substance abuse and lack of attachment to education are associated with criminal behavior regardless of mental health status (Bonta, et al., 1998; Gendreau, et al., 1996).

Differential treatment towards inmates with mental illness can be exhibited through inconsistent application of risk factors in parole release decisions. If one set of factors strongly predicts release decisions for inmates with mental illness and a different set of factors strongly predicts release decisions for inmates without mental illness, it indicates that a double standard is being applied in release decisions based upon the presence of a mental illness. While the reasons may differ among inmates with and without mental illness for their presence or levels of criminal risk factors, the ability of these risk factors to predict criminal behavior does not differ between the two groups. Thus, findings that support a moderating effect of mental illness on risk factors in release decisions would not only suggest differential treatment of inmates with mental illness, they may also indicate parole decision practices not in the interest of public safety.

This study explored differential application, based upon mental health status, of risk factors for criminal recidivism (Andrews & Bonta, 2006) that are considered in parole release decisions ("Factors considered at parole hearings; adult inmates," 2005). An exploratory approach was used to assess potential differential application of risk factors by inmate mental health status. This exploration began with an examination of whether or not the factors that primarily influenced release decisions were similar for inmates with and without mental illness. In models that contained explanatory variables for both groups, the strength of their predictive ability was compared using chi-square for difference tests (Allison, 1999). Significant differences indicate that the strength of the risk factor in predicting release decision varies by an inmate's psychiatric status and addresses the question: Do the central eight risk factors predict release decisions for offenders with and without mental illness similarly or, alternatively, to what extent does mental illness moderate the relationships among the central eight risk factors and release decision?

Methods

Sampling Strategy

The current study utilized data collected in a previous study of the relationship between severe mental illness and parole release decisions (Matejkowski, et al., 2010). The sampling frame was extracted from the New Jersey State Parole Board's Information System (PBIS). PBIS provided a list of the population of all New Jersey inmates who had parole release decisions in 2007. These 11,181 cases were assigned a unique random number and this sampling frame was sorted in ascending order based upon this unique random number. Inmate case files were then screened sequentially, as listed in this randomly sorted sampling frame, in order to identify parolees with and without severe mental illnesses for the previous study (SMI; a major mood or psychotic disorder for a previous study). The resulting study sample included the first 198 inmates who screened positive for SMI and the first 205 inmates who screened negative for SMI. The current study recoded these 403 cases for the presence of any Axis I disorder (excluding substance use disorders) to create two groups of inmates based upon the presence ($n = 219$) or absence ($n = 184$) of mental illness.

Data Sources

Data were collected from inmate case files and New Jersey State Parole Board and Department of Corrections administrative databases. The Parole Board's information system (PBIS) is their central database for tracking all parole-related information for State and county inmates, and for all offenders released to State Parole Board supervision. PBIS provides data access for virtually every function of the State Parole Board (New Jersey State Parole Board, 2008, p. 4). iTag is an inmate management system utilized by the Department of Corrections and the State Parole Board that holds and processes all inmate security, classification, housing/movement, release, sentencing, and transportation information. Inmate case files often contain printouts from these databases in addition to summary sheets that consolidate information the parole board is most concerned with as well as presentence investigation reports, risk assessment results, documents indicating previous parole decisions, and psychiatric evaluations.

Study Variables

Mental Illness. The Mental Health Parole Evaluation (MHPE) is completed by a trained mental health clinician (i.e., a psychologist, social worker, physician, etc.) with every inmate, typically within the month or two prior to his or her parole release hearing. The evaluation includes assessments of an inmate's current mental health status; level of community support; risk for reoffending; and summaries of substance abuse, mental health, and history of compliance with community supervision. Included in the MHPE are multi-axial diagnoses for parolees with mental illness. Results of the MHPE are included in all inmates' case files, regardless of mental health status. In addition, the most recent copy of the inmate's Electronic Medical Record (EMR) from the New Jersey Department of Corrections provides a list of all medical problems with accompanying ICD or DSM codes, medications currently prescribed, medical directives (e.g., orders to be seen monthly in a chronic care clinic), and work restrictions. The EMR is included in all inmates' case files and is also updated within the month or two prior to the release hearing. The presence in either the MHPE or EMR of a current or historical diagnosis of any adjustment, mood, anxiety, psychotic, impulse control, attention-deficit, or cognitive disorder was used to identify inmates with mental illness. All other inmates served as the comparison group. A substance-related disorder alone was not sufficient for inclusion in the group containing inmates with mental illness.¹

Employing sample weights, 17.5 percent of parole-eligible inmates met the criteria employed here for identifying mental illness. Mood disorders were the most frequent Axis I diagnoses (10.0 percent) followed by anxiety (4.1 percent), psychotic (2.8 percent), adjustment (2.6 percent), and then impulse-control disorders (1.8 percent). Half of inmates with mental illness and a quarter of non-mentally ill inmates were diagnosed with personality disorders, the bulk of which were antisocial.

Family/Marital Supports. Each inmate's MHPE provided clinician evaluations of an inmate's sources of support in the community. These assessments identified people (such as family members and friends) that the inmate could rely upon for support in transitioning back to the community. The author and another researcher performed independent content analyses of these comments to categorize whether each offender had family support (other than a spouse or partner), spouse or partner support, and other support (such as AA sponsor or friends). Results were compared (with over 95 percent initial agreement on all three categories) and discrepancies were reconciled through an open discussion process to make the final determination of a specific type of community support. The presence of non-spousal family support, spousal support, and other support is reported through three dichotomous variables (1 = absence and 0 = presence of support).

Educational Attainment. Education level was provided by the Mental Health Parole Evaluation and dichotomized as less than a high school graduate (1) and high school graduate (including GED) or higher (0).

Employment History. Employment history measures consisted of three questions from the

Level of Service Inventory-Revised (LSI-R, Andrews & Bonta, 1995). The New Jersey State Parole Board utilizes the LSI-R to assess risk for recidivism among all potential parolees. The LSI-R is completed by the same trained clinicians who complete the MHPE and scores individuals' risk on the central eight risk factors, including criminal history, leisure/recreation, and alcohol/drug problems. The instrument contains three items that were used to assess employment history. Each of these items was coded as either a 1 (indicating a problem/risk) or a 0 (indicating no problem/risk). These items were summed, providing scores that range from 0 to 3 and then dichotomized, with values greater than or equal to 2 indicating significant lack of attachment to employment (i.e., coded as 1 = community work problems and 0 = no community work problems).

Incarceration Length, Program and Work Participation while Incarcerated. Length of incarceration was calculated from data provided by PBIS and defined as the time between the dates an inmate began serving time for the offense(s) for which he or she is being considered for parole and his or her identified (2007) parole hearing date. Program participation data, from iTag, included referral date, start date, and completion status. Total number of programs referred to, started, and completed annually were calculated by summing all programs that an inmate was referred to, had started, and had completed and then dividing each value by their length of incarceration, in years. As all inmates were "employed" during the inmate's length of incarceration (according to New Jersey Department of Corrections protocol), "unemployment" rates could not be analyzed. Analysis was limited to the annual rate of job turnover as indicated by the number of job details an inmate had during his or her length of incarceration divided by number of years incarcerated prior to release hearing. These annual rates control for an inmate's time served in prison.

Prosocial Leisure/Recreation Activities.

Prosocial leisure/recreation measures consisted of two items from the LSI-R that were coded similarly to employment history. These values were then summed, providing scores that ranged from 0 to 2 and then dichotomized, with values equal to 2 indicating significant lack of attachment to prosocial leisure/recreation activities (i.e., coded as 1 = lacks prosocial leisure/recreation activities and 0 = does not lack prosocial leisure/recreation activities).

Antisocial Personality. Diagnoses located in the MHPE or EMR indicating a current or historical antisocial personality disorder were used to identify inmates with antisocial personality (1 = presence of antisocial personality and 0 = absence of antisocial personality).

Antisocial Cognitions. Data on antisocial cognitions were collected from four items contained within the LSI-R, coded similarly to employment history and then dichotomized with values greater than or equal to 3 indicating the presence of substantial antisocial cognitions (1 = presence of antisocial cognitions and 0 = absence of antisocial cognitions).

Antisocial Associates. The iTAG system provided a no/yes (coded as 0/1) indicator of whether or not the inmate has a history of gang involvement. In addition, data on antisocial associates were collected from four items contained within the LSI-R and coded similarly to employment history. These five items were summed, providing scores that ranged from 0 to 5 and then dichotomized with values greater than or equal to 4 indicating the presence of substantial antisocial associates (1 = presence of antisocial associates and 0 = absence of antisocial associates).

Criminal History. Criminal history data were collected via NJDOC's iTag system and the State Parole Board's Case Summary Sheets. The iTag system provided dichotomous indicators of whether or not the inmate had a history of a sex offense or escape from custody (1 = yes and 0 = no). Case summary sheets provided a count of prior adult convictions and a count of juvenile adjudications.

Disciplinary Infractions. Disciplinary infractions are categorized by the NJDOC as either "asterisk" or "non-asterisk" charges and further, within asterisk charges, as either violent or non-violent asterisk charges. Asterisk charges are considered more severe than non-asterisk charges

and include offenses like escape, use of drugs, assault, or threatening with bodily harm; the last two of which are examples of violent asterisk charges. Non-asterisk charges include offenses like smoking where prohibited, refusing a work assignment, or tattooing. Counts of total disciplinary charges, which includes non-asterisk, asterisk, and violent asterisk charges while incarcerated, as well as counts of asterisk, and counts of violent asterisk charges separately were divided by an inmate's length of incarceration prior to his or her release hearing in order to provide annual infraction rates.

Substance Abuse. The presence in either the MHPE or EMR of a current diagnosis or history of a substance abuse or dependency disorder was used to identify inmates with substance abuse problems (1 = yes and 0 = no).

Control Variables

Current Offense Information. Information on inmates' current offense(s) was collected from PBIS and Presentence Investigation Reports (PSI). PBIS provides the offense name; counts of the offense; and offense degree, categorized one through five, with first-degree offenses the most serious. Severity of offense was dichotomized as less severe than a second-degree offense (0) and either a first or second degree offense (1). Crimes were categorized as non-violent (0) or violent (1). Violent offenses included crimes and attempted crimes that involved an assault (e.g., manslaughter, rape, simple assault) or threatened assault (e.g., terroristic threats, armed robbery, carjacking). Information from the offender's PSI was used to identify whether any crime for which the inmate was currently incarcerated was perpetrated upon a victim (1) or not (0; e.g., a drug or vice crime) and data from PBIS was used to identify whether the current offense(s) was committed while under community supervision (for example, a VOP or parole violation; 1 = yes and 0 = no).

Prior Release Hearings. PBIS provided the number (if any) of parole release hearings that have occurred prior to the release decision that served to include the inmate in the study's sampling frame.

Demographics. Age at time of hearing, gender, and race were provided through PBIS. The presence of a physical disability was also reported. Inmates' EMR reports all medical conditions for which the inmate was receiving treatment. These data were coded by three persons who have experience identifying physical disabilities from medical records in order to identify the presence of a physical condition that could impede work and program participation. The author coded the presence (1) or absence (0) of physical disability. Two other researchers coded a unique 10 percent of the inmates (i.e., 20 percent of cases were checked for reliability). Results were compared with the author's coding decision with over 93 percent agreement with the other coders' identification of the presence/absence of a physical disability.

Bivariate analyses were conducted to compare inmates with and without mental illness along all study and control variables. These bivariate comparisons used t-tests for continuous variables and chi-square tests for categorical variables, as appropriate to the data. Analyses indicated that inmates with mental illness (MI) did not differ from inmates without mental illness on many control variables (see Table 2). The percentage of inmates with MI released to parole was not significantly different from the percentage of inmates without a MI who received a favorable parole release decision (44 percent and 51 percent respectively). Inmates with MI were significantly older, more likely to be female, White, and had a higher average number of prior parole hearings than inmates without mental illness.

Multivariate analyses

Two stepwise logistic regression models were constructed, with release decision as the dependent variable; one for inmates with mental illness and one for inmates without mental illness. With control variables forced into the models, study variables were allowed to enter each group's model via a forward stepwise method, identifying those variables that are most predictive of parole release for each group of inmates. Resultant models that identify different variables as

predictive of parole release decisions indicate that the parole board considers risk factors differently in their decision-making process for each group. All variables that entered the stepwise models of each group of offenders were then combined and logistic regressions were again conducted for both groups. All control variables were “forced” into this second pair of models along with all risk factor variables that were predictive of release for either of the two groups in the stepwise models. Corresponding coefficients from these models were then compared to test the equality of regression coefficients using the chi-square for difference tests (Allison, 1999). This analysis is similar to estimating a single model, where a mental illness interaction is specified for every covariate. The chi-square for difference test is the square of the common z-test for testing equality of coefficients (Clogg, Petkova, & Haritou, 1995; Paternoster, Brame, Mazerolle, & Piquero, 1998). The formula for this test is:

$$X^2 = (\beta_1 - \beta_2)^2 / [se(\beta_1)]^2 + [se(\beta_2)]^2$$

where $se\beta$ is the standard error of the coefficient being tested. An absolute value of X^2 that is greater than 3.84 indicates a statistically significant difference of the variable between the two models at an $\alpha \leq .05$. This test will indicate if factors carry the same weight in release decisions for both groups.

TABLE 2.
Control variables and parole release decision among persons with and without mental illness

	MI	Non-MI	χ^2	df	p
Parole release decision					
Parole granted	43.7	50.6	1.12,	1,	.288
Age, gender, race/ethnicity					
Age at hearing	35.48 (8.56)	32.78 (9.16)	-2.28(t),	401,	.023
Male	78.9	94.6	19.19,	1,	<.001
Black	48.6	60.8	3.59,	1,	.058
Hispanic	14.1	24.4	3.56,	1,	.059
White	38.0	13.6	23.88,	1,	<.001
Debilitating medical condition	25.7	19.0	1.63,	1,	.201
Current offense					
Number of offenses	3.01 (3.23)	2.49 (2.00)	-1.73(t),	401,	.084
Violent offense	25.4	19.0	1.48,	1,	.224
Violation of parole or probation	36.6	30.4	1.04,	1,	.308
First or second degree offense	22.5	25.0	0.19,	1,	.661
Victim present	54.4	43.5	2.73,	1,	.099
Number of prior hearings	0.59 (1.05)	0.38 (0.70)	-2.15(t),	401,	.032
Length of incarceration					
Years incarcerated at hearing	2.57 (4.76)	2.34 (4.00)	-0.42(t),	401,	.676

Notes. MI = mental illness. Values are weighted percentages for dichotomous variables and means with standard deviations in parentheses for continuous variables. N varied between 391 and 403 for all tests.

Multicollinearity was tested in a model that included all study and control variables. Variance inflation factor scores of the independent variables were all below four, well below the value of ten suggested to indicate problems of multicollinearity (Cohen, Cohen, West, & Aiken, 2003).

Results

Bivariate analyses indicated that inmates with mental illness (MI) differed from inmates without MI on a few study variables (see Table 3). A higher percentage of inmates with MI than inmates without MI needed housing placement upon release from prison and had an antisocial personality. The rate of substance abuse among mentally ill inmates was more than twice that of

non-mentally ill inmates. Inmates with MI had a higher average number of prior adult convictions and annual rates of violent asterisk charges while incarcerated, but a lower average number of prior juvenile adjudications. In areas where there were no differences between the two groups, risk factors were present in high percentages of inmates. Fifty percent of inmates lacked a high school education and over 40 percent of inmates possessed antisocial associates. Over half of mentally ill inmates lacked prosocial leisure and recreation activities and more than a third possessed antisocial cognitions.

Moderating Effects

The results from two stepwise models are presented in the left side of Table 4 (under “Stepwise”). Among inmates with mental illness, having obtained less than a high school education significantly reduced their chance of receiving a favorable parole release decision. Having less than a high school education also predicted parole denial among inmates without mental illness. In addition, several indicators of history of criminal behavior were negatively related to parole denial among non-mentally-ill inmates. Lacking family support was also a significant predictor of release for this group of inmates. While there was some overlap in the risk factors that were predictive of release decisions for both groups (such as lacking a high school education), non-mentally ill inmates had substantially more risk factors identified as impacting the release decision making process. The stepwise models predicted approximately 38 percent of the variance in release decisions for inmates with mental illness and 28 percent of the variance for non-mentally ill inmates.

TABLE 3.*Risk Factor Variables Among Persons With and Without Mental Illness*

	MI ^a	Non-MI ^a	χ^2 ,	df,	p
Community support					
Lacks family support	13.0	10.6	.35,	1,	.555
Lacks spouse/partner support	76.8	71.3	0.85,	1,	.357
Lacks supportive others	85.5	85.4	<0.01,	1,	.982
Needs placement	31.0	15.7	9.16,	1,	.002
Education					
Less than high school graduate	50.0	50.2	<0.01,	1,	.981
Community work problems					
Score > 1	38.6	49.2	2.63,	1,	.105
Institutional programs					
Annual rate of program referrals	2.62 (4.26)	3.23 (4.88)	0.96(t),	401,	.336
Annual rate of program starts	0.98 (2.08)	1.83 (3.84)	1.80(t),	401,	.072
Annual rate of program completes	0.29 (1.03)	0.66 (1.90)	1.56(t),	401,	.120
Institutional work					
Jobs worked per year	8.14 (7.83)	9.15 (11.75)	0.51(t),	401,	.612
Prosocial leisure and recreation					
Lacks prosocial activities	54.3	43.5	2.73,	1,	.099
Antisocial cognitions					
Score > 2	37.1	28.7	1.93,	1,	.165
Antisocial personality	37.1	23.8	5.34,	1,	.021
Antisocial associates					
Score > 3	41.4	41.9	0.01,	1,	.943
Substance Abuse					
Has a substance use disorder	81.4	35.2	50.24	1,	<.001
Criminal history					
Number of prior adult convictions	9.79 (8.84)	6.32 (6.28)	-3.59(t),	400,	<.001
Number of prior adjudications	1.54 (2.66)	2.36 (3.04)	2.08(t),	399,	.039
Prior sex offense	15.5	8.1	3.71,	1,	.054
History of escape	15.5	12.0	0.64,	1,	.423
Institutional charges					
Annual rate of all charges	0.33 (.76)	0.38 (1.67)	0.21,	401,	.833
Annual rate of asterisk charges	0.13 (.41)	0.13 (.34)	-0.03,	401,	.979
Annual rate of violent charges	0.09 (.38)	0.03 (.13)	-2.28,	401,	.023

Notes. ^aValues are weighted percentages for dichotomous variables and means with standard deviations in parentheses for continuous variables. N varied between 390 and 403 for all tests.

Next, all control variables were “forced” into models along with risk factor variables that were predictive of release for either of the two groups in the stepwise models. The results are presented in the left side of Table 4 (under “Enter”). Chi-square tests for difference were then conducted to assess whether the relationships among these variables and release decisions differed by mental health status of the inmate (see far right of Table 4). Difference tests indicated that, among control variables, the influence of being a male on parole release decisions differed between the two groups. Male inmates with mental illness were significantly less likely to be granted parole than inmates with mental illness who were female. Gender had no significant effect on release decisions among non-mentally ill inmates. Possessing a debilitating medical condition was a negative predictor of release for inmates without a mental illness but, among inmates with mental illness, the relationship was not significant, resulting in a significant difference test. Among risk factors, difference tests indicated that mental illness did not moderate the relationships among any indicator of risk and release decision.

Discussion

Comparisons Among the Two Groups

Bivariate analyses indicated that inmates with mental illness differed from inmates without mental illness on a few study variables. In areas where there were no differences between the two groups, risk factors were present in high percentages of inmates. Over 80 percent of inmates with mental illness had a substance abuse disorder and half lacked a high school education. The higher rate of substance abuse among inmates with mental illness found in the current study supports prior research that non-incarcerated individuals with mental illness (Cuffel, 1996; Kessler, et al., 1994; Regier, et al., 1990) and inmates with mental illness (Ditton, 1999) tend to have higher rates of substance problems than people without mental illness.

The established relationship between substance abuse and criminal behavior among persons with and without mental illness (Bonta, et al., 1998; Gendreau, et al., 1996) indicates that, if corrections is to have any meaningful impact on reducing the current high levels of return to incarceration, it must address substance use problems among inmates. As the current study's findings indicate, addressing educational deficits as well may also reduce prison populations through early parole release. While inmates were referred to approximately three programs annually, they started many fewer and completed even fewer (about 10 percent of programs started by mentally ill inmates and about 20 percent by non-mentally ill inmates annually). These findings are troubling and represent a missed opportunity for providing inmates with the skills and tools necessary to improve their chances at successful community reintegration. The findings also indicate some presence of programming but the inability of programs to enroll and retain inmates. Corrections should examine how institutional programming can be tailored to address the inmates' unique needs (i.e. the "responsivity principle"; Andrews & Bonta, 2006). Such tailoring may increase participation in programming and promote recovery and educational attainment conducive to parole release and successful community reentry. Parole services can assist with continuation, or in the absence of corrections' initiation, assist with linkages to programs to address these needs in the community.

Mental Illness as a Moderator

The lack of any moderating effects of mental illness on the risk factors explored in this study suggests that an inmate's mental illness does not play much of a role in release decisions. Stepwise models identified different risk factor variables that predicted release decisions for each group of inmates. However, chi-square for difference tests did not indicate these risk factors affected release decisions differently based upon the presence of a mental illness. This finding, along with the similar rates of parole release across the two groups, suggests that inmates with mental illness are not treated differently in the parole release decision-making process based upon their psychiatric status. However, results may reflect insufficient sample size to detect moderating effects. Several of the differences between the two groups appeared substantial (for example, the relationship between first or second degree offense and release decision differed considerably based upon the presence of a mental illness) and would likely be significant given a larger sample. Results can be used to identify potential areas for testing in a more fully powered study.

Mental illness itself has little relation to criminal recidivism (Bonta, et al., 1998) and, thus, its apparent lack of influence on release decisions could reflect an evidence-based approach in release decisions by the parole board. However, it is important to point out that of the central eight risk factors (Andrews & Bonta, 2006) tested for their relationships with release decisions, only three were influential (lack of attachment to family support, lack of attachment to education, and antisocial behavior). In addition, none of the models tested accounted for a majority of variance in release decisions, suggesting that parole board members are exercising considerable discretion in their release decisions above and beyond consideration of criminal risk factors alone.

The New Jersey parole hearing process allows for in-person as well as video conference hearings that provide hearing officers the opportunity to be influenced by the inmate's appearance and presentation. Perceptions by parole board members of an inmate's honesty in response to queries during the hearing can influence release decisions (Ruback, 1981; Ruback & Hopper, 1986). While it may seem reasonable to doubt an inmate's appropriateness for parole

based upon an assessment of his or her honesty, visual cues that are often relied upon to assess dishonesty (gaze aversion, postural shifting, response latency) do not function as valid indicators of honest responses (Davis, Markus, & Walters, 2006; DePaulo, et al., 2003). For inmates with mental illness, such social behaviors may reflect manifestations of medications or psychiatric symptoms, bringing into question further the validity of impressions based upon these cues.

TABLE 4.

Stepwise and Logistic Regression Results: Factors Associated with Parole Release

	Stepwise		Enter		Chi-Square for Difference ^a
	non-MI (n = 170)	MI (n = 201)	non-MI (n = 172)	MI (n = 203)	
	AOR, CI, (p)	AOR, CI, (p)	AOR, CI, (p)	AOR, CI, (p)	χ^2 (p)
Control variables					
Male	1.08, .27-4.36 (.907)	0.13, .03-.65, (.013)	1.89, .53-6.69, (.324)	0.15, .03-.78, (.025)	5.70 (.017)
White	1.38, .60-3.21, (.451)	0.75, .19-2.92, (.680)	1.29, .56-2.98, (.547)	0.57, .13-2.46, (.453)	0.90 (.342)
Age at time of hearing	0.99, .96-1.03, (.744)	0.95, .87-1.04 (.298)	0.99, .96-1.03, (.810)	0.96, .86-1.06, (.386)	0.55 (.456)
Debilitating medical condition	0.46, .23-.90, (.024)	3.15, .67-14.86 (.146)	0.45, .23-.89, (.022)	2.92, .59-14.45, (.190)	4.45 (.035)
Years incarcerated	1.06, .94-1.19, (.374)	1.12, .90-1.40, (.321)	1.05, .95-1.17, (.333)	1.09, .86-1.38, (.464)	0.07 (.795)
Number prior hearings	1.49, .89-2.51, (.130)	1.24, .49-3.15, (.651)	1.16, .74-1.81, (.518)	1.21, .48-3.05, (.693)	0.01 (.941)
Number of offenses	0.75, .64-.89, (.001)	0.70, .48-1.03 (.074)	0.75, .64-.89, (.001)	0.73, .50-1.09, (.121)	0.02 (.901)
Violent offense	0.32, .13-.83, (.019)	0.43, .07-2.58, (.357)	0.32, .13-.83, (.019)	0.54, .09-3.21, (.496)	0.24 (.622)
Victim present	1.39, .72-2.68 (.331)	1.18, .27-5.15, (.830)	1.42, .74-2.73, (.299)	1.07, .23-5.02, (.933)	0.11 (.742)
First or second degree offense	1.58, .76-3.30 (.223)	0.36, .06-2.24, (.273)	1.58, .76-3.28, (.223)	0.25, .04-1.67, (.153)	3.14 (.076)
Violation of parole or probation	0.78, .44-1.38 (.387)	0.76, .19-3.15, (.710)	0.78, .44-1.39, (.400)	0.82, .18-3.65, (.789)	0.01 (.958)
Risk factors					
Community support					
Lacks family support	2.67, 1.04-6.89, (.042)		2.67, 1.04-6.88, (.042)	1.55, .18-13.21, (.690)	0.21 (.648)
Education					
Less than high school graduate	0.46, .27-.81, (.006)	0.11, .03-.44, (.002)	0.44, .25-.76, (.003)	0.10, .02-.42, (.002)	3.54 (.060)
Criminal history					
Number of prior adult convictions	0.91, .85-.96, (.001)		0.91, .85-.96, (.002)	0.96, .86-1.06, (.376)	0.69 (.406)
Number of prior adjudications	0.89, .81-.98, (.016)		0.89, .81-.98 (.019)	0.87, .65-1.16, (.338)	0.04 (.851)
Institutional misconduct					
Annual asterisk charges	0.34, .12-.93, (.036)		0.39, .14-1.03, (.058)	1.09, .26-4.68, (.906)	1.35 (.246)
Nagelkerke R ²	.277	.382	.273	.407	

^adf = 1

The utility of parole release hearings is questionable. Ample research indicates actuarial risk assessment as superior to clinical assessment in predicting violence and criminal behavior (Bonta,

2002; Bonta, et al., 1998; Dolan & Doyle, 2000; Grove & Meehl, 1996). Moreover, impressions gathered during a parole hearing may actually reduce a hearing officer's ability to predict criminal recidivism compared to a prediction based on case file information alone (Ruback & Hopper, 1986). This suggests that substantial time and resources could be saved without increasing risk to the public by reducing or eliminating parole release hearings. Indeed, Campbell (2008), in *Comprehensive Framework for Paroling Authorities in an Era of Evidence-based Practices*, states that,

To date there is little research on the value of an in-person parole board hearing. Given the significance of resources that are required to hold in-person hearings, research about the value of such hearings in decision-making is desperately needed.

However, while a possibility, it is unclear to what extent impressions gleaned from release hearings influenced release decisions in the current study.

Results may indicate that the operationalization of risk factors used in the current study did not adequately reflect the operationalizations used by board members. While every effort was made to measure risk factors using documents and databases that are commonly accessed by board members, it is possible that members utilized information the researcher was not aware of or to which he was not granted access in order to assess risk in appropriate domains. Future research is planned that will survey board members as to how they operationalize risk in their decision-making processes. In addition, observational studies of parole release hearings and discussions may be a more objective way to identify issues and behaviors that influence release decisions. Such information would allow for more accurate appraisal of the proportions of release decisions that are based upon empirically identified risk factors and interview factors.

¹ This research was supported by Grant H133-B03-1109 for the University of Pennsylvania Collaborative on Community Integration of Individuals with Psychiatric Disabilities (RRTC) from the National Institute on Disability and Rehabilitation Research (Salzer, principal investigator).

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Published by the Administrative Office of the United States Courts www.uscourts.gov
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Prosecution by Military Commission versus Federal Criminal Court: A Comparative Analysis

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ON SUNDAY, OCTOBER 31, 2010, Omar Ahmed Khadr was sentenced to eight years confinement after pleading guilty six days earlier to murder and other war crimes during military commission proceedings at Guantanamo Bay, Cuba. Khadr had been charged with offenses he committed while acting as an “alien unprivileged enemy belligerent” during Operation Enduring Freedom in Afghanistan. A Canadian national and Al Qaida associate, Khadr had been detained at Guantanamo since shortly after his capture in July, 2002, at the age of fifteen.

This article will present an overview of how the United States utilizes military commissions to prosecute suspected war criminals such as Omar Khadr, using this proceeding to explain how this process differs from criminal prosecution in U.S. District Court. The information that follows has been drawn from three major sources. The Military Commissions Act of 2009 (hereafter referred to as the “MCA 2009”), and a companion publication, the Manual for Military Commissions, United States, 2010 Edition (hereafter referred to as the “Manual”), were invaluable in providing the legal basis for the military commission system and the rules that govern their day-to-day procedures and operation. Specifics regarding the Khadr case were obtained by reviewing available court records, supplemented by my personal observations during four days in the military commission courtroom where Khadr’s sentencing hearing was held. The last primary source of information regarding the military commissions was a one-hour interview conducted with Navy Captain David C. Iglesias, JAGC, on October 28, 2010 at Guantanamo Bay. Captain Iglesias has served since 2008 with the Office of Military Commissions as a team leader, prosecutor, and spokesman. Iglesias is a member of the Navy Judge Advocate General’s Corps, and he served as the U.S. Attorney for the District of New Mexico from 2001 to 2007. Follow-up questions concerning the military commissions were answered by Captain Iglesias during several subsequent emails. Additional resources used in preparing this article were Title 18 of the United States Code, including the Federal Rules of Criminal Procedure, and my working knowledge of the U.S. Courts, acquired in serving as a U.S. probation officer in the Middle District of Florida from 1987 to 2007.

Military Commission Legislation

The use of military commissions to prosecute suspected war criminals dates to the Civil War, and was also utilized during World War II. The current practice was resumed in November 2004, under a Military Order signed by President Bush two days after the attacks of September 11, 2001. The Military Commissions Act of 2006 (MCA 2006) was approved by Congress under Chapter 47A of Title 10, U.S.C. after the Supreme Court ruled that military commissions could not be conducted

under the Uniform Code of Military Justice (UCMJ). The Military Commissions Act of 2009 (MCA 2009), enacted by Congress under President Obama, contains a number of reforms to MCA 2006 and is the current law authorizing the use of military commissions to prosecute persons for war crimes. The rules and procedures for military commissions are based upon, and are very similar to, those under the UCMJ.

Jurisdiction

According to MCA 2009, any alien unprivileged enemy belligerent is subject to trial by military commission. This includes aliens not belonging to one of the eight categories listed in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War, who 1) have engaged in hostilities against the United States or its coalition partners; 2) have purposefully and materially supported hostilities against the United States or its coalition partners; or 3) were a part of al Qaeda at the time of the alleged offense under Chapter 47A of Title 10, U.S.C. A military commission has no jurisdiction over U.S. citizens.

Despite the fact that Omar Khadr was 15 years old at the time he committed his offenses, his prosecution was authorized under MCA 2009, as there are no provisions in MCA 2009 prohibiting the filing of criminal charges against minors. Captain Iglesias explained that historical precedent in this area was established following World War II, when the allied powers prosecuted underage Nazis for war crimes committed while the Nazis were in power. While the prosecution of juveniles in federal criminal court is not common, Title 18 U.S.C. §§5031-42 contains provisions for the treatment of juveniles who have violated federal law.

Referral of Charges

Whereas defendants in federal criminal court are charged by way of indictment or information, MCA 2009 requires that charges against unprivileged enemy belligerents (as they are designated in MCA 2009) be filed by way of a charges and specifications document, similar to the method by which members of the U.S. military are charged in court-martial proceedings. The charges and specifications document must contain at least one of the 32 chargeable offenses listed in MCA 2009. (These offenses include the typical war crimes of Using Protected Persons as a Shield, Pillaging, Taking Hostages, and Improperly Using a Flag of Truce.) By comparison, a defendant in the federal criminal court system is subject to being charged with any of over 4000 federal crimes, most of which are enumerated in Title 18 of the U.S. Code. In addition to listing the offense or offenses, the Manual on Military Commissions requires that the charges and specifications also include a narrative that clearly states the facts constituting any offense charged. As is also required with an indictment or information in federal court, every element of the charged offense must be alleged in the charges and specifications document. Any person may report an offense that is subject to trial by military commission, but formal charges must be signed under oath by a member of the U.S. military. The individual signing the charges must have personal knowledge of or reason to believe the matters set forth in the charges and specifications and must swear that such matters are true to the best of the signer's knowledge and belief. The accuser's belief may be based upon the reports of others, and is not restricted to first-hand knowledge. As soon as practicable following the swearing of the charges and specifications, the accused shall be informed of the charges and specifications.

The specifications and charges in the Khadr case contained the following offenses:

CHARGE I: VIOLATION OF 10 U.S.C. §950v(b)(15), MURDER IN VIOLATION OF THE LAW OF WAR

CHARGE II: VIOLATION OF 10 U.S.C. §950t, ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

CHARGE III: VIOLATION OF 10 U.S.C. §950v(b)(28), CONSPIRACY

CHARGE IV: VIOLATION OF 10 U.S.C. §950v(b)(25), PROVIDING MATERIAL SUPPORT FOR TERRORISM

CHARGE V: VIOLATION OF 10 U.S.C. §950v(b)(27), SPYING

A summary of the specifications for the above charges alleges that Khadr, on or about July 27, 2002, murdered U.S. Army Sergeant First Class Christopher Speer by throwing a hand grenade at U.S. forces; that he attempted to commit murder by converting land mines into improvised explosive devices and planting them in the ground with the intent to kill U.S. or coalition forces; that he conspired with Usama Bin Laden and other members of al Qaeda, that he joined al Qaeda and that he received training from al Qaeda in the use of various weapons and explosives; that he provided material support to al Qaeda, a terrorist organization; and that he, at the direction of al Qaeda, conducted surveillance of a U.S. military convoy in preparation for targeting U.S. forces.

According to Captain Iglesias, captured enemy fighters being detained at Guantanamo have no right to immediate freedom and may be held under the law of war, potentially until hostilities have ended, without ever being charged. Once the decision is made to charge a detainee, the rules established by the Secretary of Defense require arraignment within 30 days of being charged, and trial within 120 days of charging. The military judge may grant delays in these deadlines to either side. These rules are less restrictive than the speedy trial provisions found at 18 U.S.C. §3161, which require the filing of charges within 30 days of arrest and the commencement of trial within 70 days from the filing of charges or the date of first appearance, whichever is later.

The Convening Authority

Under MCA 2009, once charges and specifications against an accused are sworn to, they are forwarded to the convening authority. The convening authority is a designee of the Secretary of the Department of Defense whose sole responsibility is to oversee and manage the military commissions process. This position is currently held by Retired Navy Vice-Admiral Bruce E. MacDonald, who previously served as the Judge Advocate General of the Navy. After reviewing the charges and specifications, the convening authority, acting on the advice of a legal advisor, can dismiss the charges and specifications, forward them to another authority for disposition, or refer them for trial to a military commission. The Manual instructs that a charge should be dismissed if it fails to state a covered offense, when harm to national security may result, or when there is a lack of evidence to support the charge and meet the probable cause standard of proof. There is no comparable review of filed charges in U.S. District Court.

Composition of a Military Commission

After a set of charges and specifications has been approved for prosecution, the convening authority is responsible for putting together a military commission to hear the case. As mandated by MCA 2009, a military commission is composed of a military judge (also denoted as the presiding officer) and at least twelve “members,” who are the equivalent of “jurors” in federal court. If qualifying circumstances prevent the designation of twelve members for a capital military commission, the convening authority may designate a lesser number of members, but no fewer than nine. A military commission in a non-capital case is composed of a military judge and at least five members. The Commission members must be active duty commissioned officers from any military branch. By comparison, a typical federal criminal jury, for both capital and non-capital offenses, has twelve members.

The seven panel members in the Khadr commission included a Navy Commander, a Marine Colonel, and an Army Lt. Col. Under a Protective Order issued by the military judge, the identities of the four male and three female officers were ordered not to be reported or otherwise disclosed without the prior approval of the military judge. The panel members were identified only by a number displayed at each of their seats, and the courtroom sketch artist was prohibited from drawing their faces.

The members of a military commission are voting members who are detailed for this service by the convening authority after having been deemed best qualified by the convening authority for this duty, based on their age, education, training, experience, length of service, and judicial temperament. The military judge, who is also detailed by the convening authority, is prohibited from voting with the members of the commission and is barred from communicating with the commission

members outside of the courtroom. In addition to the judge and the commission members, military counsel for the prosecution and defense are also designated and detailed for the case by the chief prosecutor and chief defense counsel, respectively. Being foreign nationals, the accused are permitted to have attorneys from their home countries as legal advisors. These advisors may confer with the accused and are seated at the defense table during all court proceedings. Since they are not attorneys of record, they are prohibited from addressing the Court. Captain Iglesias views these foreign legal advisors not as an impediment to the judicial process, but as facilitators due to their influence with the accused, particularly during plea negotiations.

Whenever court proceedings in a military commission matter are convened, the military judge, the commission members and the attorneys, along with any victims, witnesses, and ancillary court support personnel are flown by military charter from Andrews Air Force Base in Maryland to the U.S. Naval Station at Guantanamo Bay, Cuba, where hearings are conducted in one of two courtrooms specifically designated for this purpose. Members of the media as well as prisoner advocates, such as representatives of non-governmental organizations (NGOs) such as Amnesty International, the American Civil Liberties Union, and Human Rights Watch are also given the opportunity to travel to Guantanamo at their own expense, to observe military commission hearings.

Due to widespread interest throughout Canada in the Khadr case because of his Canadian citizenship, the contingent of approximately 30 observers who attended the Khadr proceedings in October 2010 were primarily members of the Canadian press. Among the Canadian journalists present was Michelle Shephard, the Toronto Star's national security reporter, who authored the 2008 book on Omar Khadr, Guantanamo's Child. Alex Neve, the Secretary General of Amnesty International Canada, was also among the observers in the courtroom. The majority of the journalists who were present viewed the proceedings via a closed-circuit television feed in the nearby media center, thereby allowing them to immediately file their print, radio, and television reports without having to wait for scheduled breaks in the hearing.

Due Process Rights

MCA 2009 provides the accused in a military commission with many of the due process rights afforded to criminal defendants in federal court. The accused in a military commission enjoys a presumption of innocence until proven guilty beyond a reasonable doubt. Trials by military commission must be publicly held, except when access may be limited by location, physical security requirements, the size of the facility, and concerns of national security. The accused has the right to be present at his trial, the privilege against self-incrimination, and the right not to testify at trial. The accused can present evidence in his own defense and cross-examine prosecution witnesses. The right to appointed counsel at no charge is also provided. MCA 2009 specifically prohibits the introduction of any statements made by the accused that were elicited by torture or cruel, inhuman, or degrading treatment. Protection against double jeopardy is also afforded the accused. In a military commission, the accused may subpoena witnesses who are under U.S. jurisdiction.

Rules of Evidence

The rules of evidence in a military commission, according to Captain Iglesias, are similar to those in federal criminal court, but they are not as comprehensive. The rules for hearsay evidence are less restrictive than those in federal court. Hearsay that would not be admissible in federal court may be admitted in a military commission trial only if the opposing party is given proper notice as well as the particulars of the evidence and how it was obtained, and only if the military judge permits it after evaluating its indicia of reliability and considering a number of other factors outlined in MCA 2009. At the discretion of the military judge, this exception to the normal hearsay rule allows the introduction of reliable statements from persons in war zones in foreign countries who cannot testify in person for any number of reasons. Captain Iglesias noted that while critics of the military commissions are not happy with this relaxed policy regarding hearsay, he defended the practice by stating, "We can't issue a subpoena to a goat herder in Pakistan."

The Administration of Oaths

All witnesses in a military commission hearing are sworn prior to their testimony by a member of the military prosecution team. This practice differs from that in federal criminal court, where oaths are customarily administered by the courtroom deputy clerk.

In addition to the oath taken by witnesses to testify truthfully, MCA 2009 specifies that the military judge, members of the military commission, the court reporter and interpreter, and all counsel must also take an oath to faithfully perform their duties. If trial counsel testifies as a witness, the oath is administered by the military judge.

Disclosure of Classified Information

Classified information in a military commission is privileged and is protected from disclosure if disclosure would be harmful to national security. As provided for in MCA 2009, a protective order may be issued by the military judge to limit the disclosure or distribution of classified evidence to the defense. As a remedy, the military judge shall order that the classified information be deleted from documents made available to the defense and substituted with a portion or summary of the information and a statement of the facts that the classified information would tend to prove. Federal criminal courts deal with classified information in a comparable manner through the issuance of protective orders and the provisions of the Classified Information Procedures Act (CIPA), as promulgated in 18 U.S.C. App III Sections 1-16. Such provisions were utilized to protect classified information in the federal criminal case of Ahmed Khalfan Ghailani, the first former Guantanamo detainee to be tried in a civilian court.

Pretrial Agreements

Just as a defendant in federal criminal court may be afforded the opportunity to enter into a plea agreement with the government, Rule 705 of MCA 2009 contains provisions for the accused in a military commission proceeding to enter into a pretrial agreement with the military commission prosecutors, subject to the approval of the convening authority. A pretrial agreement may include a promise by the convening authority to refer a capital offense as non-capital; a promise to withdraw one or more charges or specifications; an agreement to take specified action on a sentence adjudged by the commission; and/or a commitment to approve no sentence in excess of a specified maximum or outside a specified and agreed-upon range. The convening authority may also promise through a pretrial agreement to suspend all or part of a sentence.

Omar Khadr pled guilty under a pretrial agreement approved by the convening authority. The key elements of Khadr's binding pretrial agreement include a description of the charges to which he agreed to plead guilty; a Stipulation of Fact as to those offenses; a waiver of his right to appeal his conviction, sentence, and/or detention; an agreement not to engage in or support hostilities against the U.S. or its coalition partners; an agreement, while in U.S. custody, to submit to interviews by U.S. law enforcement officials, intelligence authorities, and prosecutors; a sentence of confinement of no greater than eight years; and an agreement to support his transfer from the custody of the U.S. to the custody of Canada after serving one year. Khadr's plea hearing, which lasted about an hour, was similar to, and contained the essential elements of a typical change of plea hearing in federal criminal court. While the provisions in Khadr's pretrial agreement regarding waiving his rights to appeal and cooperating with authorities are commonly found in plea agreements in federal criminal court, binding plea agreements with a negotiated cap on the sentence and an agreement to a prisoner transfer to another country are not typically found.

Whether or not a pretrial agreement with a specified maximum sentence may be in place, sentencing procedures in a military commission are conducted in much the same manner.

Role of the Commission Members during the Trial and Deliberations

In commission cases that are scheduled for trial, the commission members, like federal jurors, are responsible for hearing the evidence in the case and rendering a verdict as to the guilt or innocence

of the accused. The Manual directs that the commission member holding the highest military rank is designated as the president (known as the foreperson in federal court) of the panel. Whereas jurors in U.S. District Court are prohibited from posing questions to trial witnesses, the members of a military commission are permitted to question witnesses after they have testified. The questions are reduced to writing and then reviewed by counsel on both sides, before being delivered to the judge, who then reads the questions to the witness. At the discretion of the judge, a member's question for a witness may be excluded and not read to the witness when an objection has been raised to the question. The rules also permit the members to recall a witness who has previously testified.

At the conclusion of the trial, the members are given instructions by the judge that they will utilize in their deliberations and their findings. According to the Manual, these instructions include a statement of the issues in the case and an explanation of the legal standards and procedural requirements by which the members will determine their findings. The judge describes to the members the elements of each offense charged, as well as the elements of each lesser included offense. The members are instructed that the accused is presumed to be innocent unless the evidence that was presented to the commission establishes his or her guilt beyond a reasonable doubt.

After receiving these instructions, the members retire to commence their closed session deliberations and secret ballot voting. A conviction requires a finding of guilty by at least two thirds of the members present. A unanimous vote by a panel of at least twelve members is required in a case where the death penalty is mandatory. (By comparison, unanimous verdicts are required in all cases tried in federal criminal courts.) Once a verdict has been reached, the military commission is opened and the panel president informs the judge that a verdict has been reached. The judge then has the opportunity to review the verdict before it is pronounced in open court by the president. Except in limited circumstances, the polling of the members regarding their voting is prohibited. Conversely, in federal criminal court, the polling of jurors by counsel or the court is permitted by Rule 31 of the Federal Rules of Criminal Procedure.

Sentencing Hearings

In some respects, a sentencing hearing in a military commission is much like its counterpart in federal criminal court. The prosecution is permitted to call witnesses in aggravation, and the defense is allowed to present evidence in mitigation. Both sides are then given the opportunity to present argument.

In the Khadr case, prosecution witnesses included a forensic psychiatrist, who testified as to Khadr's risk of dangerousness as a violent jihadist, and several FBI agents, one of whom showed the court a confiscated videotape of Khadr and others converting land mines to improvised explosive devices. An Army officer whose identity was withheld for security reasons also testified via video teleconference from Afghanistan as to his previous interactions with Khadr at the Guantanamo detention camp. Other witnesses for the prosecution were a retired soldier who lost an eye during the firefight in which Khadr was captured and the widow of the Army sergeant that Khadr admitted killing with a hand grenade. The defense called a Canadian associate professor with whom Khadr had been corresponding, who testified that Khadr had expressed an interest in enrolling at the university where she taught. Khadr himself took the witness stand, and through an unsworn statement that did not subject him to cross examination, delivered an apology to the widow of the soldier that he killed.

This is where the similarity between sentencing in federal criminal court and sentencing in a military commission ends. Perhaps the primary distinction between criminal proceedings in U.S. District Court and those in a military commission is the fact that while sentencing in district court is strictly a function of the judicial officer, the responsibility for determining the sentence in a military commission is delegated to the panel members who also serve as jurors. While this practice is alien to federal criminal court, it is an option available to military service members under the UCMJ, along with the alternative of having the judge determine guilt and impose sentence.

Sentencing Instructions

The military judge is required to provide the panel members with sentencing instructions before they undertake the task of sentencing. These instructions are individualized for each military commission, but have four minimum requirements under Rule 1005 of the Manual. Sentencing instructions must include a statement of the maximum authorized punishment that may be adjudged and the mandatory punishment, if any; a statement of the procedures for deliberation and voting on the sentence; a statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority; and a statement that the members should consider all matters in extenuation, mitigation, and aggravation, including evidence of prior convictions of the accused that may have been introduced by the prosecution. The judge explains to the members that they must determine a total sentence that provides punishment for all of the offenses of conviction. Unlike in federal criminal court, there are no provisions for concurrent and consecutive sentences on individual counts.

While the punishments that a military commission may lawfully impose include confinement, a fine (with no set maximum), and death (when authorized), confinement is the only punishment that has been imposed on any of the Guantanamo detainees sentenced thus far. MCA 2009 also provides for a sentence of probation. Perhaps fortunately, this sentencing option has yet to be exercised, as the law does not address the issues of where supervision would be provided and which branch of the military would assume such supervision. According to Captain Iglesias, should a convicted detainee be sent to another country for service of a probationary sentence, that country's probation laws would control. The members have the discretion to set the term of confinement at the maximum term or at any lesser term, including a sentence of no punishment.

In U.S. v. Khadr, the members were instructed to consider the nearly eight-year length of Khadr's pretrial detention and his conduct while in detention in determining his sentence, because there are no provisions in the military commission system that allow the accused to otherwise receive credit for time served. In fashioning their sentence, the members in the Khadr case were also instructed to consider the societal interests of rehabilitation, punishment, protection of society, and deterrence. Other factors that the members in the Khadr case were instructed to consider when making their determination of the sentence were the nature of the offense or offenses of conviction and Khadr's personal characteristics and background.

Notably, the commission members are instructed to consider many of the factors delineated in 18 U.S.C. §3553 upon which an Article III judge would also rely in determining a just and appropriate sentence. However, the members are unable to rely on a presentence investigation report or a sentencing guideline range for guidance, as neither of these federal criminal court requirements of Fed. R. Crim. P. 32 and 18 U.S.C. §3552 are provided for in the military commission system. Even if a presentence investigation were authorized under the rules, it would be very challenging to obtain prior record and personal background information on foreign nationals who have never lived in the United States. As explained by Captain Iglesias, the duty of informing the commission members as to the personal background of the accused lies with defense counsel, who has the opportunity to introduce such information during mitigation arguments and through witness testimony.

Procedure for Determining the Sentence

Any member of the commission panel may propose a sentence, which is done in writing. The junior member collects the proposed sentences and submits them to the president for voting by the entire panel. All panel members are required to vote by secret ballot on each proposed sentence, even if they had previously voted not to convict the accused. The members vote first on the least severe sentence, continuing as necessary with the next least severe, until a sentence receives sufficient votes for adoption. The process of proposing sentences and voting on them is repeated as necessary. A sentence of death requires an affirmative vote by all members present and cannot be imposed without the approval of the President of the United States. A sentence of confinement of more than 10 years and up to life cannot be adopted unless at least three-fourths of the members present vote in favor of such a sentence. Any sentence that does not exceed 10 years confinement requires a vote by at least two-thirds of the members present.

After the members have adopted a sentence, the military commission is opened and the military judge is advised by the president that a sentence has been reached. The president then announces the sentence in open court. If the members cannot agree on a sentence, a mistrial may be declared as to the sentence and the case is returned to the convening authority, who may order a rehearing on only the sentence. As an alternative, a sentence of no punishment may be ordered.

Impact of a Pretrial Agreement on the Panel Members' Sentence

In the event the accused has a pretrial agreement reflecting a maximum sentence, such an agreement would not be made known to the panel members until after the panel reached its own sentence and announced it in open court. If the sentence determined by the panel members exceeds the sentence contained in a pretrial agreement (as the accused would expect), the lesser sentence specified in the pretrial agreement would control. If the panel members adopt a sentence that is less than that which is contained in a pretrial agreement, the lesser sentence determined by the panel members would prevail. Under either scenario, the accused would receive the benefit of the lesser sentence.

In U.S. v. Khadr, the panel reached a sentence of forty years confinement. That forty year sentence was trumped by Khadr's pretrial agreement, which specified a sentence not to exceed eight years. Captain Iglesias cautioned that Khadr's sentence could revert to the higher sentence determined by the commission members in the event that Khadr violated the terms of his pretrial agreement.

Appeals and Post Sentencing Issues

As is typical for a defendant in federal criminal court, an accused convicted by military commission has the right to appeal both his conviction and sentence. In fact, an appeal is automatic under MCA 2009. The initial level of review is the convening authority. The convening authority has the responsibility of reviewing the proceedings of the military commissions, including any agreements between the parties, as well as the sentence. The convening authority has the authority to suspend or reduce any sentence imposed. The convening authority may not, however, increase the punishment previously imposed. Appeals from the decision of the convening authority are initially heard by the U.S. Court of Military Commission Review, and can then be taken to the United States Court of Appeals for the District of Columbia Circuit, and ultimately to the U.S. Supreme Court, if needed.

Unlike in federal criminal court, where the Bureau of Prisons assumes custody of a prisoner for service of his or her sentence, those convicted by a military commission remain in the custody of the Joint Task Force, Guantanamo (JTF-GTMO), which is a military unit comprised of members from each branch of the military. JTF-GTMO operates the detention camps at Guantanamo and is responsible for the custody of all sentenced prisoners as well as detainees. Exceptions to this may occur when, as in Khadr's case, there is a prisoner transfer agreement with the prisoner's country of origin, allowing the prisoner to serve all or a portion of his sentence in his native country. MCA 2009 also allows a prisoner to serve his sentence at any U.S. military or federal prison. To date, this option has not been exercised.

Notwithstanding the fact that detainees and prisoners in Guantanamo are under the custody and control of JTF-GTMO, Captain Iglesias noted that the military has mobilized a number of reservists for duty at the Guantanamo detention camps who are also employed by the Federal Bureau of Prisons as correctional officers. For this reason, some of the military personnel providing custody and supervision of those held at Guantanamo have prior experience in corrections from their work supervising inmates at federal prisons. Sentenced prisoners at Guantanamo are housed separately from the detainees, and are afforded fewer privileges than those who have not been convicted. Prisoners at Guantanamo are not eligible to receive the good time credits that inmates in the Bureau of Prisons receive.

Conclusion

The prosecution of Guantanamo detainees by the military follows a strict set of guidelines under the Military Commissions Act of 2009. Although these prosecutions vary in numerous respects from

prosecutions in federal criminal court, they are similar in large part to how the military prosecutes its own members under the UCMJ. While Captain Iglesias acknowledges that there are critics of the military commissions, he enthusiastically supports them. When asked how the military commission system might be improved, he responded, “The Military Commissions Act represents the state of the art in military commissions law...” Iglesias commented that it would be helpful if the military commissions had both a formalized substantial assistance policy and a witness security program, both of which have proved useful in federal criminal prosecutions.

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Published by the Administrative Office of the United States Courts www.uscourts.gov
[Publishing Information](#)

Looking at the Law: An Updated Look at the Privilege Against Self-Incrimination in Post-Conviction Supervision

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THE FIFTH AMENDMENT of the United States Constitution provides that no person “shall be compelled in any criminal case to be a witness against himself.” In 1999, David N. Adair, Jr., then Assistant General Counsel of the Administrative Office of the United States Courts, wrote an article in *Federal Probation* describing the Fifth Amendment self-incrimination questions that arise in the context of offender supervision. (See David N. Adair, Jr., *The Privilege Against Self-Incrimination and Supervision*, 63 *Fed. Probation* 73 (June 1999). As Adair noted, offenders sometimes refuse to answer questions posed by officers or do not cooperate in treatment sessions, which leads to uncertainty about the best course of action in these situations. Because there was at that time virtually no federal circuit case law relating to the Fifth Amendment and offender supervision, Adair based his analysis and advice for officers on a variety of state court cases and the United States Supreme Court’s decision in *Minnesota v. Murphy*, 465 U.S. 420 (1984).

Over the past decade, there have been numerous federal circuit cases clarifying the Fifth Amendment privilege against self-incrimination in the context of post-conviction supervision. Although these cases involve challenges to conditions requiring polygraph examinations of sex offenders, their findings and reasoning apply to ordinary interviews by officers regardless of whether a polygraph condition is imposed. The cases demonstrate that, despite the offender’s obligation to answer truthfully all inquiries and follow the officer’s instructions, there may be some limits to what an officer can require of an offender if there is a possibility of self-incrimination. This article provides guidance for officers to consider to ensure that offenders’ Fifth Amendment rights are not violated and that any evidence obtained during interviews of offenders is not later excluded by the court. The first section summarizes the Supreme Court’s *Murphy* decision. The next section provides a circuit-by-circuit description of the relevant federal cases since Adair’s article in 1999. The final section offers specific guidance for officers to consider while conducting interviews in the post-conviction supervision setting.

Minnesota v. Murphy

The Supreme Court’s *Murphy* decision remains the starting point for any discussion of the Fifth Amendment privilege in the context of post-conviction supervision. In *Murphy*, the defendant was placed on probation for a sex-related crime and ordered to be truthful with his probation officer in all matters. As a result of admitting to the officer a past crime, *Murphy* was later

convicted of murder. He challenged his conviction on the grounds that his admission to the probation officer should not have been admitted into evidence because he was forced to make the admission in violation of his right against self-incrimination. The Supreme Court held that, while a probationer does not lose his Fifth Amendment privilege simply because he has been convicted of an offense, a state may require a probationer to appear and truthfully discuss matters that affect his or her probationary status. If a probationer has a valid privilege against self-incrimination, the probationer must assert the privilege, and the probation officer is not required to give *Miranda* warnings when asking the offender questions.

The Supreme Court noted, however, that there could be a Fifth Amendment violation in situations in which the probation officer threatens the imposition of a “substantial penalty” for refusal to answer an incriminating question. 465 U.S. at 435. This would violate the Fifth Amendment even if the probationer did not assert his Fifth Amendment privilege. As the Court explained, if a state “either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation,”¹ with the result that the failure to assert the privilege would be excused and the probationer’s answers would be deemed inadmissible in a later criminal prosecution. *Id.* The Court continued:

[W]hether or not the answer to a question about [a condition of probation] is compelled by the threat of revocation, there can be no valid claim of the privilege on the ground that the information sought can be used in a revocation proceeding... [M]oreover,...a state may validly insist on answers to even incriminating questions and hence sensibly administer its probation system as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination...

[N]othing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition or from using the probationer’s silence as one of a number of factors to be considered by a finder of fact in deciding whether other conditions of probation have been violated.

Murphy, 465 U.S. at 435-6 & n.7.

According to Adair’s 1999 analysis of Murphy, a federal offender on probation or supervised release may clearly be required to answer a question regarding compliance with a condition of supervision. If noncompliance might result in revocation but not in a criminal prosecution, the offender may not validly invoke his Fifth Amendment right.² However, an offender retains a right against self-incrimination with respect to information that might result in criminal prosecution. If the invocation of the privilege is legitimate, the state may not penalize the offender by revoking supervision for that exercise of his or her Fifth Amendment right.

Adair further noted that if the offender does not attempt to invoke his or her right against self-incrimination and instead provides incriminating answers, such answers may be used against the offender in a criminal proceeding. In other words, the probation officer may *ask* an incriminating question and any answer may be used in a subsequent prosecution, but the officer may not require an offender to answer the question (by threatening revocation). Moreover, Murphy clearly indicates that, in the context of an ordinary interview with a probation officer (not in police custody), the officer is not required to give *Miranda* warnings to the offender.

Adair concluded that there is little the probation officer can do to force an offender to answer questions if the offender asserts a Fifth Amendment privilege. If the questions involve the offense of conviction, any other offense of which the offender has been convicted and sentenced, or violations of the conditions of supervision that do not constitute new criminal offenses, the officer may consider reporting the apparent violation to the court. If the question for which the offender asserts a Fifth Amendment privilege might elicit information about new offenses, the assertion of the right is very possibly legitimate. The officer might still refer the matter to the court for resolution, particularly if there is any doubt about whether the question calls for incriminating information, but it is more likely that, in this case, the court will uphold the assertion of the right.

Federal Case Law on Self-Incrimination and Offender Supervision

While Murphy clarified that officers are not required to give *Miranda* warnings to offenders in the context of post-conviction supervision (assuming they are not in some type of police custody), it left a number of issues unresolved. Over the past decade, federal case law has developed on self-incrimination and post-conviction supervision in the context of sex offender polygraph testing, which may shed light on some of these issues. Each circuit that has considered the issue has upheld the constitutionality of polygraph testing as a special condition of supervision for sex offenders. As discussed below, the courts have found that an offender interview with a polygraph does not differ in any constitutionally important way from an ordinary interview without a polygraph. Therefore, the findings and analyses in the cases below apply to all interviews by officers in the post-conviction setting.

In *United States v. York*, 357 F.3d 14 (1st Cir. 2004), the First Circuit held that the order requiring the defendant to submit to periodic polygraph testing did not violate his right against self-incrimination. The special condition at issue in *York* stated:

The defendant is to participate in a sex offender specific treatment program at the direction of the Probation Office. The defendant shall be required to submit to periodic polygraph testing as a means to insure that he is in compliance with the requirements of his therapeutic program. No violation proceedings will arise based solely on a defendant's failure to "pass" the polygraph. Such an event could, however, generate a separate investigation. When submitting to a polygraph exam, the defendant does not give up his Fifth Amendment rights.

York, 357 F.3d at 18.

York argued that the mandatory polygraph testing condition was invalid because it would compel him to incriminate himself in violation of the Fifth Amendment. He contended that in the course of his treatment program he would inevitably be asked incriminating questions and that he would be compelled to answer due to the severe consequences of revocation. Relying on *Minnesota v. Murphy*, 465 U.S. 429 (1984), the court noted that nothing in the Fifth Amendment mitigates the general obligation on probationers to appear and answer questions truthfully, and probation officers may demand honest answers to their questions. *Id.* at 24. Furthermore, because revocation proceedings are not criminal proceedings, *York* would not be entitled to refuse to answer questions solely on the ground that his replies might lead to revocation of his supervised release. *Id.* While he would have a valid Fifth Amendment claim if his probation officers asked, and compelled him to answer over his assertion of privilege, a particular question implicating him in a crime other than that for which he had been convicted, *York* could not mount a generalized Fifth Amendment attack on the conditions of his supervised release on the ground that he would be required to answer the probation officer's questions truthfully. *Id.*

Noting that the caveat included in the special condition of supervised release that "the defendant does not give up his Fifth Amendment rights" was ambiguous, the court concluded that the most sensible interpretation of it was that *York*'s supervised release would not be revoked based on his refusal to answer polygraph questions on valid Fifth Amendment grounds.³ Under *Murphy*, if *York* could assert his Fifth Amendment privilege without risking revocation, he would not face a "classic penalty situation," 465 U.S. at 435 & n. 7, and his answers would not be considered "compelled" within the meaning of the Fifth Amendment unless he were forced to answer over his valid assertion of privilege. *Id.* at 25. This interpretation of the order would also guarantee that if *York* and his probation officers disputed whether he refused to answer a question on valid Fifth Amendment grounds, *York* would be entitled to a hearing before a court before any penalty could be imposed. *Id.* Therefore, construing the order to provide that *York*'s supervised release would not be revoked based on his valid assertion of Fifth Amendment privilege during a polygraph examination, the First Circuit upheld the constitutionality of the polygraph condition. *Id.* See also *United States v. Roy*, 438 F.3d 140 (1st Cir. 2006) (upholding special condition of supervised release requiring offender to submit to polygraph examination to answer specific questions regarding his contact with girlfriend's children because there was no argument that truthful answers would implicate offender in any new and separate crime).

In *United States v. Johnson*, 446 F.3d 272 (2d Cir. 2006), the Second Circuit upheld a supervised release condition requiring sex offender treatment using polygraph testing. The special condition of supervised release limited the scope of polygraph examinations to “information necessary for supervision, case monitoring, and treatment,” and made clear that (though Johnson would be compelled to answer) “if a truthful answer would expose him to a prosecution for a crime different from the one on which he was already convicted,” he would preserve his “right to challenge in a court of law the use of such statements as violations of his Fifth Amendment rights” or, “[i]n other words, [Johnson] must answer the questions posed to him, but, by answering, he will not be waiving his Fifth Amendment rights with respect to any criminal prosecution unrelated to the conviction for which he is now on supervised release.” *Johnson*, 446 F.3d at 275.

The Second Circuit based its holding in *Johnson* on precedent allowing the revocation of supervised release of an offender who fails to answer questions even if they are self-incriminating. In *Asherman v. Meachum*, 957 F.2d 978 (2d Cir. 1992) (*en banc*), supervised release was revoked when the offender refused to answer questions about a crime for which the court assumed he might have been prosecuted. *Id.* at 980-81. The court rejected Asherman’s Fifth Amendment challenge, reasoning that revocation is an administrative decision that may be made based on a refusal to answer relevant questions, so long as the administrator does nothing to impair the later invocation of the privilege. *Id.* at 982-83. The court explained that the probation administrator stayed well within his authority by conducting a relevant inquiry and then taking appropriate adverse action, not for the offender’s invocation of his constitutional rights but for his failure to answer a relevant inquiry. *Id.* at 983.⁴ The *Johnson Court* concluded that, because the only distinction between *Asherman* and *Johnson* was the polygraph, which had “no impact on Fifth Amendment considerations,” *Asherman* applied, and the polygraph condition at issue conformed to *Asherman* by preserving Johnson’s “right to challenge in a court of law the use of [incriminating] statements as violations of his Fifth Amendment rights.” *Johnson*, 446 F.3d at 280.

In *United States v. Lee*, 315 F.3d 206 (3d Cir. 2003), the Third Circuit held that a condition of supervised release requiring the defendant to submit to random polygraph examinations did not violate his Fifth Amendment privilege against self-incrimination. The court rejected Lee’s argument that his situation was distinguished from the facts in *Murphy* due to the added element of the polygraph condition, which increases the coercive nature of the probation interview by physically restraining him. The coercive element of the polygraph, Lee argued, would require him to choose between making incriminating statements and jeopardizing his liberty by refusing to answer the questions. *Lee*, 315 F.3d at 212. The court did not find this factor to bring Lee’s sentence to the level where it is likely to compel him to be a witness against himself. *Id.* It reasoned that Lee can choose to terminate the interview and exit the room while being questioned by having the machine detached from him. The court was not persuaded that Lee’s feeling of an obligation to stay through the end of the interview differs in any significant way from an ordinary probation interview without a polygraph.

The court also found that the polygraph condition did not violate Lee’s Fifth Amendment right because it did not require him to answer incriminating questions. The government in *Lee* indicated that the types of conduct that could result in revocation and a return to prison were failure to comply with the conditions of release or failure to submit to a polygraph test or to answer questions (other than those within the scope of the privilege against self-incrimination) truthfully. Thus, the court concluded, if Lee were asked a question during the polygraph examination that called for an answer that would incriminate him in a future criminal proceeding, he would retain the right to invoke his Fifth Amendment privilege and remain silent. *Id.* See also *United States v. Kosteniuk*, 251 Fed. Appx. 7 (3d Cir. 2007) (unpublished) (condition requiring defendant to submit to polygraph testing was warranted).

In *United States v. Dotson*, 324 F.3d 256 (4th Cir. 2003), the Fourth Circuit upheld a condition of supervised release requiring the offender’s participation in a sex offender treatment program, “at the discretion of the probation officer,” that “may include physiological testing such

as the polygraph,” the results of which “shall not be made public.” *Dotson*, 324 F.3d at 258. The court noted that the use of the polygraph was “not aimed at gathering evidence to inculcate or exculpate” the offender but was “contemplated as a potential treatment tool upon Dotson’s release from prison as witnessed by the district court’s direction that the results of any polygraph testing not be made public.” *Id.* at 259. In *United States v. Locke*, 482 F.3d 764 (5th Cir. 2007), the Fifth Circuit held that a probation condition requiring mandatory participation in polygraph testing did not violate the defendant’s Fifth Amendment rights. Though Locke did not invoke the Fifth Amendment privilege, he argued that the mandatory polygraph testing condition created the “classic penalty situation” envisioned by *Minnesota v. Murphy*, 465 U.S. at 435-36, because he had no choice but to submit to the polygraph test and provide answers that incriminated him. Locke focused on questions during the polygraph test that attempted to ascertain whether he had viewed pornography. The court determined that the Fifth Amendment was not infringed upon because the questions attempted to ascertain whether Locke had violated conditions of probation, and his answers could not serve as a basis for a future criminal prosecution. *Locke*, 482 F.3d at 767. The court also noted that “[t]he fact that the questions were asked to Locke in the context of a polygraph test does not convert the question-and-answer session into a Fifth Amendment Violation.” *Id.*

In *United States v. Zinn*, 321 F.3d 1084 (7th Cir. 2003), the Seventh Circuit upheld the constitutionality of a special condition of supervised release that required the offender to participate in a treatment program, including polygraph testing, but stipulated that “[t]he results of the polygraph examination may not be used as evidence in court to prove that a violation of community supervision has occurred, but may be considered in a hearing to modify release conditions.” *Zinn*, 321 F.3d at 1085. In *United States v. Stoterau*, 524 F.3d 988 (9th Cir. 2008), the Ninth Circuit upheld a condition of supervised release that required the defendant to participate in a sex offender treatment program as directed by the probation officer and to abide by all requirements of the program, including polygraph testing. *Stoterau*, 524 F.3d at 1003. The court held that the condition did not infringe on Stoterau’s Fifth Amendment rights, because he retained the right to refuse to answer incriminating questions during the polygraph exams. *Id.* at 1004. The court also rejected Stoterau’s argument that the polygraph condition is akin to custodial interrogation requiring *Miranda* warnings before the exam.

In *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005), the Ninth Circuit held that a provision of supervised release requiring the offender to successfully complete a sexual abuse treatment program that used random polygraph examinations and required full disclosure of past crimes violated his right against self-incrimination. This case involved a unique set of facts, because the offender’s supervision (probation and supervised release) was repeatedly revoked and incarceration was imposed for a valid invocation of his Fifth Amendment rights. The treatment program at issue required that Antelope complete a sexual history autobiography assignment and “full disclosure polygraph” verifying his “full sexual history.” The treatment counselor testified in the district court that he explained to Antelope that any past criminal offenses he revealed in the course of the program could be released to the authorities and that he was under a legal obligation to turn over information regarding offenses involving victims under eighteen years old to the authorities. When Antelope repeatedly refused to cooperate with the autobiography and full disclosure polygraph without immunity from future prosecution, his supervision was revoked and he was incarcerated on several occasions. *United States v. Antelope*, 395 F.3d at 1131.

The court concluded that the first prong of the Fifth Amendment analysis--that the information sought carried the risk of incrimination--was satisfied. As the court explained:

The...program required Antelope to reveal his full sexual history, including all past sexual criminal offenses. Any attempt to withhold information about past offenses would be stymied by the required complete autobiography and “full disclosure” polygraph examination. Based on the nature of this requirement and Antelope’s steadfast refusal to comply, it seems only fair to infer that his sexual autobiography would, in fact, reveal past sex crimes. Such an inference would be consistent with the belief of [the] counselor, who suspects Antelope of having committed prior sex offenses. The treatment condition placed Antelope at a crossroads--comply and incriminate himself or invoke his right against

self-incrimination and be sent to prison. We therefore conclude that Antelope's successful participation in [the program] triggered a real danger of self-incrimination, not simply a remote or speculative threat... We have no doubt that any admissions of past crimes would likely make their way into the hands of prosecutors. [The counselor] made clear that he would turn over evidence of past sex crimes to the authorities. The... release form, which Antelope signed, specifically authorizes [the counselor] to make such reports. And, were Antelope to reveal any crimes involving minors, Montana law would *require* [the counselor] to report to law enforcement... In sum, the evidence shows that, setting the privilege aside, Antelope would have to reveal past sex crimes to the... counselor; the counselor would likely report the incidents to the authorities, who could then use Antelope's admissions to prosecute and convict him of the additional crimes. Viewed in this light, very little stands between Antelope's participation in [the program] and future prosecution. (emphasis in original).

Id. at 1139.

The Ninth Circuit found that the second component of the self-incrimination inquiry – that the penalty suffered amounted to compulsion – was satisfied as well. When probation and supervised release terms are at issue, a court must determine whether the alleged Fifth Amendment problem truly implicates conditional liberty and is more than hypothetical. To illustrate, the Ninth Circuit discussed *United States v. Lee*, 315 F.3d 206, 212 (3d Cir. 2003), where the Third Circuit rejected a challenge to a supervised release condition because the offender offered “no evidence that [his] ability to remain on probation is conditional on his waiving the Fifth Amendment privilege with respect to future criminal prosecution.” In *Lee*, the prosecutor had stipulated that Lee's failure to pass a polygraph examination, in and of itself, likely would not result in a finding of a supervised release violation. Without the real risk of revocation, the polygraph's effect on Lee could not amount to compulsion. In *Antelope*, however, because the offender “has already suffered repeated revocation of his conditional liberty as a result of invoking his Fifth Amendment right,” the court had no doubt that Antelope's loss of liberty was a substantial penalty. *Id.* Ultimately, the district court revoked Antelope's supervised release as a result of his refusal to disclose his sexual history without receiving immunity from prosecution. Because the government and district court consistently refused to recognize that the required answers could not be used in a criminal proceeding against Antelope, the court held that the revocation of his probation and supervised release violated his Fifth Amendment right against self-incrimination. *Id.* at 1139.

In *United States v. Taylor*, 338 F.3d 1280 (11th Cir. 2003), the Eleventh Circuit upheld a special condition of supervised release ordering the offender to participate in a mental health program specializing in sexual offender treatment approved by the probation officer and to abide by the requirements of the program, “including submitting to polygraph testing to aid in the treatment and supervision process.” *Taylor*, 338 F.3d at 1284. While the offender argued that the polygraph testing would violate his Fifth Amendment privilege against self-incrimination, the court held that his injury is “entirely speculative because no incriminating questions have been asked,” and thus, it could only address the constitutionality of polygraph testing generally. *Id.*

Specific Guidance for Federal Probation Officers

As discussed above, each circuit that has considered the issue has upheld the constitutionality of polygraph testing as a special condition of supervision for sex offenders, because offenders retain their Fifth Amendment right against self-incrimination during polygraph examinations. Indeed, three circuits specifically recognized that the polygraph test itself has “no impact on Fifth Amendment consideration,” *Johnson*, 446 F.3d at 280; does not differ “in any significant way from an ordinary probation interview without a polygraph,” *Lee*, 315 F.3d at 212; and “does not convert the question-and-answer session into a Fifth Amendment violation,” *Locke*, 482 F.3d at 767. Therefore, the guidance provided in the cases above should assist probation officers when conducting ordinary interviews of offenders, regardless of whether a polygraph condition is imposed.

Officers in search of specific guidance about what they may or may not require of offenders may also wish to consider the guidelines in a sex offender management procedures manual that has been newly endorsed by the Criminal Law Committee of the Judicial Conference

of the United States. The manual was developed by a working group of federal probation officers and staff from the Administrative Office of the United States Courts to assist officers in implementing a new sex offender management policy. Based in large part on the case law discussed above, the procedures manual includes safeguards to ensure that officers do not violate the Fifth Amendment rights of offenders on post-conviction supervision. While each district court may of course establish its own procedures, the guidelines from the procedures manual are listed below to assist officers when conducting interviews of all types of offenders in the post-conviction supervision context:

- A probation officer is permitted to ask an incriminating question of an offender on post-conviction supervision. A question is “incriminating” if a truthful answer poses a realistic threat of incrimination (new criminal prosecution for newly discovered offense conduct in a separate criminal proceeding).
- Probation officers are not required to warn offenders that they have the right to remain silent and not answer a question. In other words, they are not required to read offenders their “*Miranda* rights.” (If the offender is in some type of police custody, *Miranda* rights are required.)
- While a probation officer is permitted to ask an incriminating question, the officer may not compel an offender to incriminate himself.
 - An offender is “compelled” to incriminate himself if he is forced to choose between answering an incriminating question and having his supervision revoked for failing to answer the incriminating question.
 - A question is “incriminating” if a truthful answer poses a realistic threat of incrimination (new criminal prosecution for newly discovered offense conduct in a separate criminal proceeding).
- A probation officer may not:
 - Compel (by threatening to revoke supervision) an offender to answer a question that poses a realistic threat of incrimination in a separate criminal proceeding; or
 - Initiate the revocation of supervision for a refusal to answer a question that poses a realistic threat of incrimination in a separate criminal proceeding.
- An offender may be required to truthfully answer non-incriminating questions, such as those relevant to his supervision status or treatment or those that relate to a crime for which he has already been convicted. Revocation proceedings can be initiated for failure to answer non-incriminating questions.
 - For example, an offender may be prohibited from using pornography. His use of pornography might result in revocation, but would not result in a new criminal prosecution. He could therefore be required to truthfully answer a question regarding his use of pornography or have his supervision revoked.
- There is little the probation officer can do to force an offender to answer questions.
 - If the questions involve the offense of conviction, any other offense of which the offender has been convicted and sentenced, or violations of the conditions of supervision that do not constitute new criminal offenses, the officer may consider reporting the apparent violation to the court.
 - If the refusals are questions that might elicit information about new offenses, the assertion of the right is very possibly legitimate. The officer might still refer the matter to the court for resolution, particularly if there is any doubt about the assertion that the question calls for incriminating information.
- Guidelines Relating to Use of a Polygraph
 - A deceptive polygraph result can be used to:
 - Increase supervision;
 - Modify treatment plans;
 - Generate a separate investigation.
 - Modification of Conditions of Supervision Based on a Polygraph Result
 - Without a Hearing: If the offender waives his right to a hearing under Federal Rule of Criminal Procedure 32.1(c)(2)(A), a deceptive polygraph result may be used as the sole basis to modify conditions of supervision.

- With a Hearing: A deceptive polygraph result may not be used as the sole basis to modify conditions of supervision.
- Revocation of Supervision Based on a Polygraph Result
 - A deceptive polygraph result may not be used as the sole basis to revoke supervision.

¹The term "penalty situation" stems from a set of "so-called 'penalty' cases [before the Supreme Court where] the state not only compelled an individual to appear and testify, but also sought to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanction 'capable of forcing the self-incrimination which the Amendment forbids.'" 465 U.S. at 434 (citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 806). These cases hold that a state may not impose substantial penalties because a witness elects to exercise Fifth Amendment rights. These cases recognize that the misconduct that the Fifth Amendment is designed to prevent may be accomplished as easily by imposing a penalty upon the exercise of the privilege against self-incrimination as by directly forcing the person to testify against himself.

²For example, a supervised releasee may be prohibited from using pornography. His use of pornography might result in revocation, but would not result in a new criminal prosecution. He could, therefore, be required to truthfully answer a question regarding his use of pornography on pain of revocation.

³The court noted that the caveat that "the defendant does not give up his Fifth Amendment rights" could have three meanings: (1) that York's supervised release will not be revoked based on his refusal to answer polygraph questions on valid Fifth Amendment grounds; (2) that York must answer every question during his polygraph exams on pain of revocation, but that his answers will not be used against him in any future prosecution; or simply (3) that York will be entitled, in any future prosecution, to seek exclusion of his answers on the grounds that the polygraph procedure forced him to incriminate himself. *York*, 357 F.3d at 25.

⁴The *Asherman* case relied on the assertion in *Murphy* that "a state may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination." 465 U.S. at 435 n.7.

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Juvenile Focus

BY ALVIN W. COHN, D.CRIM.

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Juvenile Justice and Child Welfare

The Georgetown University Center for Juvenile Justice Reform (CJJR) is seeking applicants for its 2011 Juvenile Justice and Child Welfare: Multi-System Integration Certificate Program for Public Sector Leaders. The program is designed to advance cooperation across systems to improve outcomes for youth involved in the juvenile justice and child welfare systems. Participants attend a week-long program in Washington, DC, where they are taught by expert faculty on topics including multi-system integration, developing collaborative leadership skills, the effective use of communication strategies, reducing disproportionality in the child welfare and juvenile justice systems, and more. For more information and to apply, please visit CJJR and click on "Certificate Programs" or email CJJRreform@georgetown.edu.

Amber Alert

Too often, juvenile justice is characterized as a system for punishing "bad kids." The Office of Justice Programs' (OJP) OJJDP supports state, local, and tribal programs to prevent delinquent behavior, provide appropriate interventions for juvenile offenders, and protect youth from crime and violence.

As part of their effort to protect children, OJP recently announced a partnership between the National Center for Missing & Exploited Children and Facebook to expand the distribution of AMBER Alert postings. AMBER Alerts are named for Amber Hagerman, who was abducted and murdered 15 years ago. They are issued by law enforcement in serious child abduction cases that meet specific criteria. AMBER Alerts involve the entire community in the search for, and safe recovery of, a missing child.

OJP coordinates the National AMBER Alert program, assisting state and local officials with developing and enhancing AMBER Alert plans and promoting regional coordination. The new partnership with Facebook will enable users to receive AMBER Alerts directly on Facebook.

Defending Childhood

Last September, Attorney General Eric Holder launched the Defending Childhood initiative, which is harnessing resources from across the federal government to prevent children's exposure to violence, mitigate the negative impact of exposure to violence, and develop knowledge and raise awareness about this issue. As part of Defending Childhood, OJP launched a multiyear demonstration program in 2010. Currently, eight community-based demonstration sites throughout the country are building partnerships and creating strategic plans to address children's exposure to violence. In January, grantees from all eight sites convened in Washington, D.C., to share preliminary plans and collaborate with their peers and federal experts. The sites

provide a unique opportunity to simultaneously pilot and evaluate diverse programs to protect children.

Gang Research

Over the past half-century, gangs and the violence they cause have grown and evolved to the point that all 50 states and the District of Columbia now report gang problems. Despite the steady growth in the number and size of gangs in the United States, little is known about the dynamics that drive them and how best to combat their growth. OJJDP recently published a bulletin summarizing the existing research—*Gang Prevention: An Overview of Research and Programs*. The bulletin presents a compilation of current research on gangs, including research findings on the state of gang problems in the United States, why youth join gangs, the risk factors and attractions that increase youth's propensity to join gangs, and how gangs form. The author examines how communities can begin to assess their gang problems and provide necessary enhancements to prevention and intervention activities. The bulletin also describes a number of effective and promising programs that may help prevent youth delinquency and gang violence.

Gang Reduction Program

A new bulletin presents findings of an independent evaluation of OJJDP's Gang Reduction Program (GRP), a \$10 million, multiyear initiative to reduce crime associated with youth street gangs in Los Angeles, California; Milwaukee, Wisconsin; North Miami Beach, Florida; and Richmond, Virginia.

Findings from the Evaluation of OJJDP's "Gang Reduction Program" focus on program implementation and outcomes in each of the four sites. The implementation component of the evaluation assesses the progress of GRP in each site, from the initiative's launch in the spring of 2003 through mid-2008. The outcomes component considers the effects of the initiative on each site from implementation through early 2008 and examines whether each site experienced significant changes in gang-related crime, serious crime, and other measures associated with the goals of GRP. Researchers found evidence that GRP was associated with generally positive changes in the levels of crime and gang-related incidents in three of the four demonstration areas, although the strength of the evidence varied. Each site experienced significant success in building partnerships to address local gang and crime issues and raising awareness of such issues.

Substance Use

OJJDP released a bulletin detailing the link between adolescent substance use and serious offending. The authors found that substance use and offending at one age is a consistent predictor of continued serious offending at a later age. They also noted that substance use and serious offending fluctuate in similar patterns over time and that both decrease in late adolescence. This study provides the most comprehensive data available about serious juvenile offenders and their lives in late adolescence and early adulthood. It is based on findings from a longitudinal study, *Pathways to Desistance: A Prospective Study of Delinquent Offenders*, which was sponsored by OJJDP.

Funding Opportunities—OJP's website includes a complete listing of all open solicitations. Just click on Funding at the top of the site to review all funding opportunities. Check the website regularly for updates.

Victim Services

The Office for Victims of Crime (OVC) is pleased to introduce the Vision 21: Transforming Victim Services initiative, an exciting and innovative effort to chart a course for the future of the victim services field in the United States. Five organizations will collectively analyze the current state of the crime victims field in the United States. Four of the organizations will conduct a thorough literature review on one of the following issue areas:

- The role of the crime victims field in the overall response to crime and delinquency in the United States.
- Building capacity in the crime victims field to better serve victims of crime.
- Enduring challenges in the crime victims field that still are being addressed.
- Emerging challenges the crime victims field has yet to address.

Each organization will also convene a two-day forum of 30-40 stakeholders, including crime victims

and representatives from federal, national, state, local, and tribal organizations and agencies. Based on information gathered from the literature review, forum discussions, and other modes of information gathering, project staff will develop thematic reports addressing their broad-based issue area.

The fifth organization will analyze the information from the four reports and develop a final synthesis document, assessing the current state of victim services in the United States, making recommendations, and drawing a blueprint for a national demonstration project (or multiple demonstration projects) to implement those recommendations. This final report will also address ways to overcome the political, policy, and philosophical challenges in the field; describe actions federal, national, state, local, and tribal entities will need to take to address the recommendations; and spell out OVC's role in helping implement the recommendations.

Anti-Bullying Policies

U.S. Secretary of Education Arne Duncan has released a technical assistance memo that outlines key components of bullying laws and policies in 29 states. The memo was provided in response to a number of recent bullying-related suicides that prompted a surge in requests for anti-bullying legislation and assistance. The memo also describes ongoing work by the U.S. Department of Education and partners to prevent bullying in schools. Information may be used as a reference for states and communities currently developing anti-bullying legislation. See <http://www2.ed.gov/policy/gen/guid/secletter/101215.html>. For more information about preventing and responding to bullying in schools, See www.bullyinginfo.org.

Anti-Bullying Video

The Department of Justice's Civil Rights Division has released a video that focuses on stopping bullying and harassment of lesbian, gay, bisexual, and transgender (LGBT) youth, as well as other youth who do not conform to traditional expectations about gender roles or appearance. The video is part of the Division's "It Gets Better" project, in which LGBT adults and straight allies share experiences to show youth that life gets better after high school. The video features DOJ employees, who share stories of their own experiences with bullying and harassment and provide personal messages of support to youth. It emphasizes that DOJ is committed to ending bullying and harassment in schools, and highlights the Department's authority to enforce laws that protect students from bullying because of sexual orientation or gender stereotyping. See blogs.usdoj.gov/blog/.

Substance Use and Serious Offending

OJJDP has published "Substance Use and Delinquent Behavior Among Serious Adolescent Offenders." This bulletin presents results from the Pathways to Desistance study, which interviewed more than 1,300 juvenile offenders for the 7 years after their conviction to determine what leads them to persist in or desist from serious offending. It focuses on understanding the connection between substance use and serious offending, including how these behaviors affect one another in adolescence and how they change in early adulthood, particularly when one behavior ceases. See "Substance Use and Delinquent Behavior Among Serious Adolescent Offenders" (NCJ 232790) at www.ojjdp.gov/publications/PubAbstract.asp?pubi=254883. Print copies can be ordered online from the National Criminal Justice Reference Service.

Probation and Parole

The number of adults under correctional supervision in the United States declined by less than one percent during 2009, dropping to 7,225,800 (or 48,800 fewer offenders than at year-end 2008), the Bureau of Justice Statistics (BJS) announced today. This was the first measured decline in the total number of adults under correctional supervision since BJS began reporting these populations in 1980.

Youth in Residential Placement

A new bulletin from OJJDP provides recommendations for reducing recidivism based on data gleaned from a survey of youth in custody. Youth's Characteristics and Backgrounds also includes details about the kinds of offenders in custody, which can inform policy and program development. The bulletin is the fourth in a

series that presents findings from OJJDP's Survey of Youth in Residential Placement (SYRP). This bulletin focuses on the youth's demographic characteristics, current and prior offenses, current disposition, family and educational backgrounds, and expectations for the future. SYRP is the only current national survey that obtains comprehensive information about youth in custody by directly asking the youth themselves.

School Crime and Safety

According to a report completed by OJP's Bureau of Justice Statistics (BJS) in partnership with the National Center for Education Statistics, student victimization at school decreased between 2007 and 2008. For instance, the total crime victimization rate of students ages 12 to 18 at school declined from 57 victimizations per 1,000 students in 2007 to 47 victimizations per 1,000 students in 2008. In 2008, among students ages 12–18, there were about 1.2 million victims of nonfatal crimes at school, including 619,000 thefts and 629,800 violent crimes (simple assault and serious violent crime). During the school year 2007–08, there were 1,701 homicides among school age youth ages 5–18. Additionally, in 2009, in 9–12 grade, 31 percent of students reported they had been in a physical fight at least one time during the previous 12 months anywhere, and 11 percent said they had been in a fight on school property during the previous 12 months.

The report, *Indicators of School Crime and Safety: 2010*, provides the most current statistical information on the nature of, and responses to, crime in schools and school environments. Data are drawn from several federally funded collections, including the National Crime Victimization Survey, Youth Risk Behavior Survey, School Survey on Crime and Safety, and the Schools and Staffing Survey. This report is part of BJS's Indicators of School Crime and Safety Series. More information is available online.

TA Needs Assessment - OJJDP's National Training and Technical Assistance Center (NTTAC) has released *National Needs Assessment of Juvenile Justice Professionals: 2010*, a report that provides the most comprehensive and detailed picture to date of the needs of agencies and organizations serving the juvenile justice field. More than 1,600 juvenile justice professionals from throughout the nation completed the survey. The primary populations that respondents serve are at-risk youth and youth on parole, probation, or under community supervision

School Crime and Victimization

The Office of Justice Programs' Bureau of Justice Statistics, in collaboration with the National Center for Education Statistics, has published the report, "Indicators of School Crime and Safety: 2010." The report draws on federally funded studies to present detailed statistical information about the crime that occurs in school and on the way to and from school. It presents data from the perspectives of students, teachers, and principals. Topics addressed include bullying, victimization, fights, weapons, drug and alcohol use by students, school conditions, and student perceptions of personal safety. See "Indicators of School Crime and Safety: 2010" at bjs.ojp.usdoj.gov/content/pub/pdf/iscs10.pdf

Needs of Juvenile Justice Professionals

The Office of Juvenile Justice and Delinquency Prevention's (OJJDP) National Training and Technical Assistance Center (NTTAC) has released *National Needs Assessment of Juvenile Justice Professionals: 2010*, a report that provides the most comprehensive and detailed picture to date of the needs of agencies and organizations serving the juvenile justice field. More than 1,600 juvenile justice professionals from across the country completed the survey. The primary populations served by respondents are at-risk youth and youth on parole, probation, or under community supervision. Survey participants were asked to rate their needs in five categories: program operations, information technology, sustainability, working with youth, and topics of interest. Respondents rated their needs using a five-point scale—from "1 (no assistance needed)" to "5 (a great deal of assistance needed)." The following items were identified by respondents as areas of greatest need:

Program Operations

- Implementing evidence-based practices.
- Performance measurement.
- Program evaluation.

Information Technology

- Information sharing within and among agencies.
- Juvenile record systems/data collection.
- Obtaining/using technological equipment.
- Staff training on technology.

Sustainability

- Planning for future sustainability.
- Generating buy-in at the federal, state, and local levels.
- Institutionalizing mental health initiatives.
- Leveraging and managing funds and other resources.
- Incorporating evaluation results into sustainability planning.

Working with Youth

- Evidence-based practices for working with mentally ill youth.
- Evidence-based practices for working with substance-using or -abusing youth.
- Involving youth in the planning, development, and implementation of programs.
- Training staff to effectively interact with youth.
- Approaches for dealing with gang-involved youth, violent offenders, and chronic offenders.

Other Topics of Interest

- Evidence-based practices and programs.
- Emerging trends in juvenile justice research.
- Intervention services, programs, and strategies.
- Problem-solving courts (e.g., drug courts, gun courts, teen courts, and mental health courts).

Survey participants were asked to select the types of assistance that would be helpful. The majority of respondents cited peer-to-peer learning, conference-style training, and training of trainers as the most effective forms of assistance. The survey also requested information about the greatest challenges to providing effective services. Nearly three-quarters (73 percent) of the respondents cited a lack of adequate funding and resources as the primary challenge. Other barriers to effective services included a lack of support for prevention efforts and a lack of adequate training and technical assistance for staff members. Sixty-four percent of the respondents intended to use the information learned from OJJDP-sponsored training to implement evidence-based programming; 57 percent planned to improve outreach, treatment, and supervision of their target populations; and 51 percent cited securing funding as a primary application of the OJJDP training they receive.

Top 10 Unmet Training Needs

Following are the areas most often cited by respondents as having unmet training needs:

- Funding, resources, and grant writing.
- Partnerships and collaboration.
- Evidence-based practices and programs.
- Staff development.
- Mental health.
- Sustainability.
- Cultural competency.
- Program evaluation.
- Information technology.
- Working with the community.

Top 10 Emerging Trends and Issues

The survey participants also offered their perspectives on the most important emerging trends and issues in the juvenile justice field. The top 10 issues cited by survey participants were—

- Disproportionate minority contact.
- Substance abuse.
- Lack of programs and services.
- Mental health.
- Prevention and early intervention.
- Issues related to parents and family of youth.
- Evidence-based programs and practices.
- Gender.
- Alternatives to detention and incarceration.
- Reentry and rehabilitation.

Youth in Placement

OJJDP has published “Youth’s Characteristics and Backgrounds: Findings From the Survey of Youth in Residential Placement.” The bulletin, part of OJJDP’s Survey of Youth in Residential Placement series, describes the characteristics, family and educational backgrounds, offense histories, and expectations of youth in residential placement. See www.ojjdp.gov/publications/PubAbstract.asp?pubi=249737. Print copies can be ordered online from the National Criminal Justice Reference Service. For further information about the Survey of Youth in Residential Placement, visit www.syrp.org.

Gang Reentry

The American Probation & Parole Association is pleased to announce the availability of a new CD-ROM entitled Guidelines to Gang Reentry. This CD was funded by the Bureau of Justice Assistance and was prepared in cooperation with the Association of State Correctional Administrators and the Institute for Intergovernmental Research. The Guidelines to Gang Reentry CD-ROM provides guidelines and resources specific to working with gang-involved offenders during the three main phases of reentry:

- *The Institutional Phase of Reentry*: focuses on what needs to occur with gang-involved offenders/defendants from jail or prison intake to release from secure custody;
- *The Structured Reentry Phase*: focuses on how to enhance collaboration among institutional and community corrections staff to transition gang-involved offenders and defendants to the community; and
- *The Community Reintegration Phase*: focuses on how community corrections professionals (i.e., parole/probation staff) can assess, prepare case plans, and supervise gang-involved offenders/defendants more effectively. The CD is free; however, a fee of \$5 will be assessed to cover shipping/handling costs.

High School Dropout and Completion Rates

The National Center for Education Statistics has published a report that provides high school dropout and completion rates in the United States between 1972 and 2008. Data also present students’ age, sex, and race/ethnicity, and the rates of on-time graduation from high school. Findings show that approximately 3 million 16–24 year-olds were not enrolled in high school or had not earned a high school diploma or alternative credential by October 2008. View the full report, “Trends in High School Dropout and Completion Rates in the United States: 1972–2008” at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2011012>.

Parents in Prison

The U.S. Bureau of Justice Statistics (BJS) estimated that by 2007, more than half (53 percent) of the 1.5 million prisoners in the U.S. were parents of minor children – translating into more than 1.7 million children with an incarcerated parent. This represents an increase of 80 percent since 1991.

Nearly one quarter of these children are age four or younger, and more than a third will become adults while their parent remains behind bars. Parental imprisonment is associated with:

- Three times the odds that children will engage in antisocial or delinquent behavior (violence or drug abuse).
- Negative outcomes as children and adults (school failure and unemployment).
- Twice the odds of developing serious mental health problems.

Data compiled at BJS show that the acute problem of racial disparity behind bars is also reflected among the children of incarcerated parents, with black children seven and a half times more likely than white children to have a parent in prison. While only one in 25 white children born in 1990 had a parent who was imprisoned, one in four black children born that year had a parent imprisoned. See mattnelsoncoc@gmail.com, or (414) 721-6630.

Recidivism

The Justice Department's Bureau of Justice Statistics has released the first in a series of data analysis tools that will enable the public to explore the recidivism patterns of persons involved with the criminal justice system: Prisoner Recidivism Analysis Tool. Recidivism rates may be generated for the entire sample of released prisoners or for released prisoners with specific demographic, criminal history, and sentence attributes. The tool uses data collected by BJS on a sample of persons released from state prisons in 1994 and followed for a 3-year period. These are the most recent recidivism data available until a new BJS study on the recidivism of state prisoners released in 2005 is published in 2012.

The tool defines recidivism in a variety of ways and allows users to choose the measure that best fits their needs or to compare the various measures of recidivism for the same group of releases. It can be found at <http://bjs.ojp.usdoj.gov/index.cfm?ty=datool&surl=/recidivism/index.cfm>

Prison Rape Elimination Act Standards

The U.S. Department of Justice (DOJ) published the proposed "National Standards to Prevent, Detect, and Respond to Prison Rape" in the Federal Register. These guidelines are based on draft sexual assault prevention standards issued by the National Prison Rape Elimination Commission (NPREC) in 2009. The Attorney General has modified the Commission's proposed standards and issued this draft final rule that incorporates feedback received last year in response to the Department's call for comment. These proposed standards include guidelines for adult prisons/jails, lockups, juvenile facilities, and community confinement facilities. See <http://www.regulations.gov/#!documentDetail;D=DOJ-OAG-2011-0002-0001>.

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Federal PROBATION

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PUBLISHED BY

The Administrative Office of the United States Courts

James C. Duff, *Director*

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

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

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

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

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Exploring The Moderating Effects of Mental Illness on Parole Release Decisions

This broad definition of mental illness groups together many psychiatric disorders that differ in clinical course and severity. However, these considerations may be beyond the clinical purview of parole board members, who are not clinicians. For example, severe mental illness is a clinical term with which parole boards may not be familiar. Indeed, a study of release decisions in New Jersey found no significant association between an inmate having a current or historical psychiatric diagnosis indicating severe mental illness (SMI) and parole release decisions (Matejkowski, et al., 2010). It is possible that decision-makers do not differentiate between a diagnosis of SMI and some other psychiatric disorder (e.g., anxiety, impulse-control disorders) and treat individuals with all Axis I diagnoses similarly. It is likely that, to overcome this potential limitation, prior research on the impact of mental illness on parole release decisions has used similarly broad indicators of mental illness that were readily available to decision-makers and that did not require clinical expertise to conclude that the inmate under consideration possessed some form of psychiatric disability (Carroll, et al., 1982; Feder, 1994; Hannah-Moffat, 2004). As such, the current definition allows for comparison across studies and likely provides a valid indicator of mental illness utilized by parole board members.

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