

U.S. Department of Justice
National Institute of Justice



National Institute of Justice

*Issues and
Practices*

Identifying Drug Users and Monitoring Them During Conditional Release

114730 .

About the National Institute of Justice

The National Institute of Justice is a research branch of the U.S. Department of Justice. The Institute's mission is to develop knowledge about crime, its causes and control. Priority is given to policy-relevant research that can yield approaches and information that State and local agencies can use in preventing and reducing crime. The decisions made by criminal justice practitioners and policymakers affect millions of citizens, and crime affects almost all our public institutions and the private sector as well. Targeting resources, assuring their effective allocation, and developing new means of cooperation between the public and private sector are some of the emerging issues in law enforcement and criminal justice that research can help illuminate.

Carrying out the mandate assigned by Congress in the Justice Assistance Act of 1984, the National Institute of Justice:

- Sponsors research and development to improve and strengthen the criminal justice system and related civil aspects, with a balanced program of basic and applied research.
- Evaluates the effectiveness of justice improvement programs and identifies programs that promise to be successful if continued or repeated.
- Tests and demonstrates new and improved approaches to strengthen the justice system, and recommends actions that can be taken by Federal, State, and local governments and private organizations and individuals to achieve this goal.
- Disseminates information from research, demonstrations, evaluations, and special programs to Federal, State, and local governments, and serves as an international clearinghouse of justice information.
- Trains criminal justice practitioners in research and evaluation findings, and assists practitioners and researchers through fellowships and special seminars.

Authority for administering the Institute and awarding grants, contracts, and cooperative agreements is vested in the NIJ Director. In establishing its research agenda, the Institute is guided by the priorities of the Attorney General and the needs of the criminal justice field. The Institute actively solicits the views of police, courts, and corrections practitioners as well as the private sector to identify the most critical problems and to plan research that can help solve them.

James K. Stewart

Director

114730

U.S. Department of Justice
National Institute of Justice
Office of Communication and Research Utilization

Identifying Drug Users and Monitoring Them During Conditional Release

by
Eric D. Wish
Mary A. Toborg
and
John P. Bellasai

NCJRS

February 1988

JAN 10 Rec'd

NCJ 108560- 114730

ACQUISITIONS

Issues and Practices in Criminal Justice is a publication of the National Institute of Justice. Designed for the criminal justice professional, each *Issues and Practices* report presents the program options and management issues in a topic area, based on a review of research and evaluation findings, operational experience, and expert opinion in the subject. The intent is to provide criminal justice managers and administrators with the information to make informed choices in planning, implementing and improving programs and practice.

Prepared for the National Institute of Justice, U.S. Department of Justice, by Abt Associates Inc. under contract number OJP-86-C-002. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice. Authors are Eric D. Wish of the National Institute of Justice, Washington, DC, and Narcotics and Drug Research Inc., New York City; Mary A. Toborg of Toborg Associates, Washington, DC; and John P. Bellasai of Toborg Associates, Washington, DC.

National Institute of Justice

James K. Stewart

Director

114730

**U.S. Department of Justice
National Institute of Justice**

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this ~~copyrighted~~ material has been granted by

Public Domain/NIJ
~~U.S. Department of Justice~~

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the ~~copyright~~ owner.

Program Monitor

Jonathan Budd

National Institute of Justice

Washington, D.C.

The Assistant Attorney General, Office of Justice Programs, coordinates the activities of the following program Offices and Bureaus: National Institute of Justice, Bureau of Justice Statistics, Bureau of Justice Assistance, Office of Juvenile Justice and Delinquency Prevention, and Office for Victims of Crime.

Contents

Introduction 1

Identifying the drug abuser 3

Reasons for focusing attention upon the drug abuser
Techniques for identifying the drug abuser
Types of persons to be tested
Organizations that can administer the urine tests
Conclusions

Monitoring the criminally involved drug abuser 9

Background
Early efforts at monitoring: the 1970s
Pretrial monitoring: the Washington, D.C. experience
Post-conviction monitoring
Conclusions

Notes 19

References 23

Introduction

Concern over the disproportionate amount of crime committed by drug-abusing offenders, coupled with increased crowding in the nation's prisons and jails, has led to renewed interest in the use of conditional release alternatives — with provisions to protect community safety — for criminally involved drug abusers. Although a variety of interventions have been developed for use with this population, these individuals first must be *identified* before such interventions can be applied.

This paper analyzes techniques for identifying drug abusers involved in the criminal justice system and reviews promising strategies for monitoring and reducing these persons' drug abuse and crime. Various methods of identifying criminally involved drug abusers are compared and the different stages in criminal justice processing when identification may be appropriate are reviewed. The types of agencies that could operate an identification program are also discussed. Finally, several major approaches that have been implemented for monitoring and intervening with drug abusers — in both the pretrial and post-conviction periods — are discussed.

Identifying the drug abuser

Reasons for focusing attention upon the drug abuser

Offender drug abuse has been found to be one of the best indicators of high-rate criminal activity.¹ Drug-abusing criminals tend to commit many drug and non-drug related crimes. By identifying the drug abusing offender and instituting effective interventions, crime may be reduced. Other reasons for identifying drug abusing offenders are an ability to monitor the availability of illicit drugs in the community, to track drug epidemics, and to diagnose health-related problems such as AIDS.²

Techniques for identifying the drug abuser

Criteria for assessing alternative methods

The following criteria may be used to compare the benefits of different methods of identifying drug abusers: 1) cost; 2) drugs capable of being detected; 3) ability to differentiate casual use from chronic use; 4) time span of use that can be detected; and 5) accuracy.

Alternative methods of screening for drug use

Three methods that can be used to screen large numbers of offenders for recent drug use are: 1) self-reports; 2) official records; and 3) urine tests. Each of these methods has different strengths and weaknesses that are summarized in Table 1, below. Self-reports are a poor technique for mass screening for drug use because few detainees readily will talk about their recent drug use when there exists the slightest perception on their part that the information could be used against them. Only about one-half of arrestees in Washington, D.C. and New York City who since 1984 have tested positive for drugs admitted to recent drug use in cell block interviews. On the other hand, self-reports provide one of the best methods for diagnosing the extent of drug abuse, once a person admits to it. Official records about drug use are generally incomplete and based on subjective judgments. Urinalysis provides an objective and efficient large-scale tool for rapidly screening large criminal justice populations for recent drug use. Its power to detect drug usage, however, is limited to the time it takes the body to metabolize and eliminate the drugs from the system, generally 2-3 days for such drugs as narcotics or cocaine.

In addition to the above methods, which are now widely available, another approach is also being explored that may offer some potential advantages — hair analysis. Drug molecules in the circulating blood are absorbed within the structure of the growing hair and are retained permanently. As the hair grows, it records a pattern of the periods of use and non-use. Since hair on the head grows at an average of about one-half inch a month, a 2-3 inch strand contains a record of about the last 4-6 months of drug usage. An NIJ study is now exploring how a relatively new analytic technique using radioimmunoassay of hair (RIAH) compares to standard urinalysis procedures in monitoring parole/probation populations.

Table 1

Comparison of three techniques for identifying drug using offenders*

Characteristics	Self-reports	Official CJS records	Urine tests
Types of drugs detected	All drugs.	Limited to drugs causing attention by bizarre behavior/sale/treatment.	All commonly abused drugs.
Accuracy/validity	Poor in criminal justice settings; good in neutral settings or if person wants to talk.	Poor; often missing from records and consists of anecdotes.	Depends on test; EMIT better than TLC. GC/MS is preferred confirmation.
Cost	Depends on whether new staff are needed to conduct interviews.	Low, if maintained by existing staff in available data systems.	EMIT: \$1 — \$5/drug TLC: \$2 for a multidrug screen.
Period of use detected	Current and lifetime.	Depending on record detail, could include recent and lifetime.	Varies by drug; heroin/cocaine last 24-72 hours. PCP, marijuana, up to 1 month.
Differentiate user from abuser?	Yes	Yes, if details have been recorded.	Only by repeated testings.
Comments	Poor technique for mass screening for drug use. Is best method for diagnosing abuse, once use is known.	Records on drug involvement are too incomplete to be useful. Large potential value exists if recording is improved.	Best technique for mass screening. Can only indicate one-time use. Confirmation by retest or other data sources needed to verify abuse.

*Source: Urine testing of offenders: A guide for practitioners, Wish, 1986

As a test medium, hair may offer several potential advantages for drug detection and monitoring which are complimentary to the properties of urine. These include: a) extending the period of time over which drug usage can be detected, b) abilities to reveal periods of usage and abstention by analysis of successive sections at different distances from the root, c) options to take an additional sample for confirmation of a test result, or if a prior sample is suspected as being switched or contaminated, d) not being vulnerable to attempted evasion by "flushing" by high intake of fluids or temporary abstention, and e) minimizing the social and privacy objections associated with obtaining observed urine samples.³ Hair analysis techniques and standards, however, are still relatively undeveloped and the cost and turn-around time of the RIAH test limit its present applicability to large-scale screening and monitoring. NIJ is currently funding research to evaluate the comparative merits of this technique for potential criminal justice applications.

Benefits of urine-testing

At the present time, urinalysis appears to be the most accurate and cost-effective method available for screening large numbers of persons quickly. However, to reduce the possibility of test error, initial positive results do need to be confirmed by repeated testing of the person over time and/or by retesting the same specimen.

While Enzyme Multiplied Immunoassay Technique (EMIT) has been the most common method used for testing persons detained by the criminal justice system, other popular techniques include radioimmunoassay (RIA) and thin layer chromatography (TLC). The type of test used is critical to the accuracy of the results. For example, thin layer chromatography (TLC) general screens have been found to be less effective for detecting recent use of illicit drugs (opiates, cocaine, methadone) than are EMIT tests. And some immunoassay tests cross-react with licit substances, such as over-the-counter drugs, to produce positive test results.

Confirmation of challenged urine-test results by gas chromatography/mass spectrometry (GC/MS) has been recommended by the National Institute on Drug Abuse as the best way of identifying false-positive results stemming from other types of tests (see "*Mandatory Guidelines for Federal Workplace Drug Testing Programs - Final Guideline*," *Federal Register*, April 11, 1988). The specific provision of these guidelines, however, do not apply to testing of persons under the jurisdictions of the military services or the criminal justice system. NIJ is currently undertaking a study comparing GC/MS to the most commonly used urine-testing techniques to determine the rates of testing error in an offender population; testing techniques to be studied include EMIT, RIA and Fluorescence Polarization Immunoassay (also known as "TDX").

Chain-of-custody procedures and other precautions need to be adopted to prevent persons from invalidating the test results. Because a urine test can only indicate one time use, urine tests should be repeated over time and/or their results integrated with other information available about the person's drug abuse habits

when attempting to identify chronic drug abusers. The recent National Institute on Drug Abuse handbook on urine testing elaborates on many of the issues in this area.⁴

Types of persons to be tested

Arrestees

By testing new arrestees shortly after arrest, one can screen for drug abusers in the largest and most diverse criminal justice population. It enables the widest screen to be implemented, compared with a program that intervenes only with some of these persons who have penetrated the system further and/or have been convicted enough times to be placed on probation or parole. On the other hand, there are special legal concerns regarding testing and monitoring of persons at the pretrial stage, before a determination of guilt or innocence has been made. The best way to address these legal concerns will depend on the local statutory environment and the way in which urine test results are to be used. Washington, D.C. at present has the only fully operational systematic pretrial drug testing program in the country that tests virtually all arrestees. The number of jurisdictions considering testing at arrest appears to be growing, however, with at least three new efforts initiated in late 1987.

To learn more about the levels and types of drug use among arrestees, the National Institute of Justice (NIJ), in cooperation with the Bureau of Justice Assistance (BJA), began, in 1987, a Drug Use Forecasting (DUF) program. DUF provides for periodic urine-testing of samples of arrestees in selected cities. Operational in 12 of the nation's largest cities by the end of 1987, it will be expanded to up to 25 cities during 1988. In each pilot city, a new sample of arrestees is selected every three months and asked to provide voluntary, anonymous urine specimens for analysis.⁵ Although this information will be used for research and epidemiological purposes only and will not be used to develop interventions for sampled drug abusers, it will provide considerable insight about the extent and type of drug use among arrestees as well as changes in street-level drug use patterns over time.

Probationers and parolees

A recent study has shown that even probation officers in intensive supervision probation programs cannot identify which of their probationers are currently abusing drugs, in the absence of urine-testing.⁶ Probation and parole are suitable times for screening for drug use, primarily because abstinence from illicit drugs is typically a condition of post-conviction release. The authority to order urine tests is available to the probation or parole officer. Testing should be implemented, however, only in programs that have manageable caseloads so that the test results can be used constructively with the person as part of a comprehensive treatment plan. Adequate resources must be available for treating and monitoring persons who test positive. Probation and parole may be good prospects for monitoring through hair analysis, when it is available, to complement present urinalysis techniques.

Juveniles

Numerous studies have indicated that offenders tend to begin their illicit drug use as youths. There is hope that by intervening early with juvenile detainees who are smoking marijuana or PCP, or who are snorting/smoking cocaine, it may be possible to prevent their progression to injection of harder drugs. Projects in Washington, D.C. and Tampa, Florida are testing juvenile detainees for recent drug use by urinalysis. The Tampa program has found that youths who test positive for marijuana are more likely to have had prior non-drug felony detentions than youths who tested negative.⁷

Organizations that can administer the urine tests

Criminal justice agencies

For pretrial testing when the test results must be ready quickly at the person's initial court appearance (i.e., bail-setting hearing), some type of on-site testing laboratory is recommended. For example, pretrial release agency staff could collect urine specimens and analyze them in laboratory on-site at the courthouse, as is done in the District of Columbia. One advantage of such an operation is that the information is easily incorporated in the pretrial release recommendation procedures and in the agency's management information system. A disadvantage is that such a program may have little control over the arrestee's behavior if the person is subsequently referred to an independent local treatment agency, unless there is structured and timely feedback between the two agencies. For testing probationers and parolees, when immediate test results may not be necessary, it is feasible for the criminal justice agency to contract out the laboratory work. Some probation and parole officers believe, however, that an on-site laboratory may allow them to provide more immediate feedback to a person who tests positive.

Treatment agencies

In some cities, the drug abuse treatment agency operates a testing laboratory for monitoring continued drug use by program clients. Testing for criminal justice referrals could be conducted by the appropriate governmental treatment agency in such cities. An advantage of having the treatment agency administer the drug testing program is that referral and diagnosis of persons who test positive may be expedited. In addition, the confidentiality of urine test results may be protected by keeping the information from being entered into a person's criminal record. A corresponding disadvantage may be a lessening of feedback and coordination with the criminal justice system, which might benefit from a knowledge of the person's ongoing drug use, if any.

Commercial laboratories

Contracting out for services with a reputable private laboratory may be a suitable alternative for sites that cannot set up their own laboratory. In view of reports of large variations in the quality of laboratory services,⁸ quality control methods must be established for verifying accuracy and the chain-of-custody of the specimens, however.

Need for standardization of procedures

There is currently no national program for monitoring the accuracy of urine test results, although some labs voluntarily enroll in private proficiency testing programs. Each site must establish defensible methods for ensuring the accuracy of their tests. At minimum, specimens should be split periodically and sent to another laboratory for analysis.

Conclusions

- Urine tests, when carefully administered, provide the most cost-effective and accurate means currently available for screening large numbers of persons coming through the criminal justice system for recent drug use.
- Careful consideration must be given to the type of urine tests to be used and the means used to organize and file the information.
- If it can be legally implemented, pretrial drug testing of all arrestees would provide the best method for testing the largest and most diverse criminal justice population, at the earliest point.
- Urine tests identify recent *users* of drugs, but all of these individuals are not necessarily drug *abusers*. To identify drug *abusers* requires further assessment, which may include continued urine-testing and/or diagnostic interviews.
- Testing of probationers and parolees will enable probation and parole officers to identify potential drug abusers for referral to treatment and/or monitoring, assuming adequate treatment resources are available.
- Testing and treatment of juvenile detainees may provide an unusual opportunity for preventing youths from progressing to injection of hard drugs.
- On-site urine testing (at a courthouse or criminal justice agency) is preferable for testing arrestees. Depending upon local conditions, an off-site laboratory also may be workable.
- A system for ensuring the accuracy and integrity of the urine testing and reporting systems for urine test results must be maintained.

Monitoring the criminally involved drug user

Background

Early efforts at monitoring: the 1970s

As part of the nation's response to the heroin epidemic of the late 1960s and early 1970s, new approaches to monitoring criminally involved drug users in the community were developed. These approaches were designed to interrupt the cycle of drug-use/crime/drug-use and to end the "revolving door" syndrome of drug-using offenders, who often passed through the criminal justice system repeatedly.

During this time, many cities established Treatment Alternatives to Street Crime (TASC) programs to identify criminally involved drug abusers and refer them to treatment.⁹ In some instances, formal diversion programs were established, and criminal charges were dropped against those drug users who completed the programs successfully. In other instances, the drug users' performance in treatment was simply viewed as a factor to consider when deciding whether continued liberty (i.e., non-incarceration) should be granted. Many of these programs to deal with drug users became institutionalized as key features of local criminal justice systems, although — as national attention to the problem of drug abuse waned in the late 1970s — others were discontinued.

Increased jail and prison crowding

In recent years, most urban jurisdictions have experienced sharply increased levels of detention and incarceration, which have resulted in crowded jail and prison facilities. Most of these jurisdictions are both building (or planning to build) additional jails and prisons *and* are seeking additional, safe, effective ways to release individuals who are now detained or incarcerated. Moreover, many jurisdictions are under court orders to improve jail and prison conditions; in many instances a court-imposed cap exists on the number of inmates that a given facility can house. Because of these caps, some jurisdictions have been unable to accept new prisoners or detainees, and others have been forced to release certain previously incarcerated individuals in order to comply with court orders.

The renewed search for safe, effective conditional release alternatives

Jail and prison crowding has spawned a renewed search for ways to release inmates while preserving community safety. As a result, many jurisdictions have established — or are considering establishing — intensive supervised release programs, electronic monitoring programs that monitor compliance with *home* detention, work release programs, etc.¹⁰ Because of the high release risk posed

by drug users, in comparison with non-users, some jurisdictions are making special efforts to develop programs that facilitate the safe release of drug users, both pretrial and post-conviction.

Distinguishing features of pretrial versus post-conviction stages of criminal justice processing

The pretrial stage of criminal justice processing varies from the post-conviction stage in several major respects. Most importantly, the pretrial stage deals with defendants who have been *accused* of committing criminal acts, rather than with offenders who have been found guilty of the charges against them. This constrains the actions that the criminal justice system can take to reduce the release risk posed by defendants awaiting trial, even after a probable cause finding has occurred at initial court appearance.

Further, release decisions at the pretrial stage must typically be made very quickly after arrest and, hence, must be based on very limited information. This is in sharp contrast to the information available at later stages of the criminal process, such as sentencing to probation or parole release, when several weeks may be spent developing a comprehensive profile of an offender as well as other data needed for key criminal justice decisions before the offender is released to the community.

Pretrial monitoring: the Washington, D.C. experience

Description of program operations

The D.C. Pretrial Services Agency (PSA) assesses defendants' pretrial release risks and makes recommendations to the local trial court regarding appropriate conditions of pretrial release in each case. As part of its mandate, the Agency now collects urine specimens from virtually all local arrestees, shortly after they are arrested, and tests those specimens for the presence of five drugs (opiates, cocaine, phencyclidine or PCP, amphetamines and methadone). Defendants who are identified at the bail-setting stage as drug users, either by urinalysis or self-reports, are usually released non-financially to await trial, *conditioned on* entering treatment or entering PSA's program of periodic urine-testing before trial. If defendants violate their conditions of pretrial release — e.g., by continuing to use drugs — PSA reports this to the court, which may hold a defendant in contempt of court or otherwise impose sanctions for the violation. PSA's adult testing program, initiated in March 1984 under a grant from NIJ, is now funded by the D.C. Government. The program is being evaluated by Toborg Associates, under a separate grant from NIJ.¹¹

Program outcomes

Since PSA's pretrial drug detection program for adult defendants began in March 1984, more than one-half of all tested arrestees have been identified as drug users. Indeed, during the first half of 1987 approximately *two-thirds* of tested

arrestees were found to be active drug users, with cocaine, PCP, and opiates the major drugs of abuse.¹² These drugs were often used in combination.

One issue concerning urine-testing is whether the results, obtained shortly after arrest, could be used to improve the classification of defendants with regard to the comparative risk of pretrial rearrest and/or failure-to-appear (FTA) that each defendant poses. Preliminary analyses of this issue suggest that urine-test results do provide an improvement in risk classification of defendants.¹³ Planned analyses will further assess the strength of urine-test information for classifying defendants as to pretrial misconduct risk.

As stated previously, certain D.C. defendants who were released before trial were ordered to report to PSA for periodic pretrial urine-testing. The defendants who complied with the program requirements (defined for the purposes of the analysis as appearing as scheduled for four or more consecutive tests) had much lower rates of pretrial rearrest and FTA than defendants who did not comply — that is, the dropouts. Indeed, rates of pretrial rearrest and FTA for those who *complied* with the program — about two-thirds of all persons ordered into the program — were about one-half the rates of the defendants who did not comply. For example, the pretrial rearrest rate for the defendants who complied was 16 percent, as compared to 33 percent for the dropouts. Failure-to-appear rates for the two groups were 17 percent and 33 percent, respectively. These differences in the rates of pretrial misconduct exist *after* controlling for other factors that might affect pretrial misconduct, such as prior record, charge, age, and so on.¹⁴

Thus, compliance with urine-testing separated defendants into two groups, with large differences in expected pretrial misconduct rates. This suggests that the pretrial urine-testing program serves as a signaling device: by continuing to appear for urine-testing, defendants signal that they pose relatively low risks of pretrial misconduct if released — despite the fact that they were identified at the time of arrest as drug users and, hence, as members of a group that poses a higher-than-average risk of pretrial misconduct.¹⁵

Practitioners' perspectives

The urine-testing program that PSA operates for arrestees and drug-using defendants who are released before trial has been very popular with officials of the local criminal justice system — particularly with judges, who are charged with the responsibility of setting appropriate conditions of pretrial release and wish to have information provided about defendants' risk factors as aids in making those decisions. Many judges have commented that they are now willing to "take a risk" on releasing a drug user before trial, conditioned on participation in PSA's urine-testing program, because they know that PSA will monitor the defendant and promptly report any continued drug use to the court.¹⁶ This practice is confirmed by statistics indicating that rates of non-financial pretrial release *increased* after the urine-testing program began.¹⁷

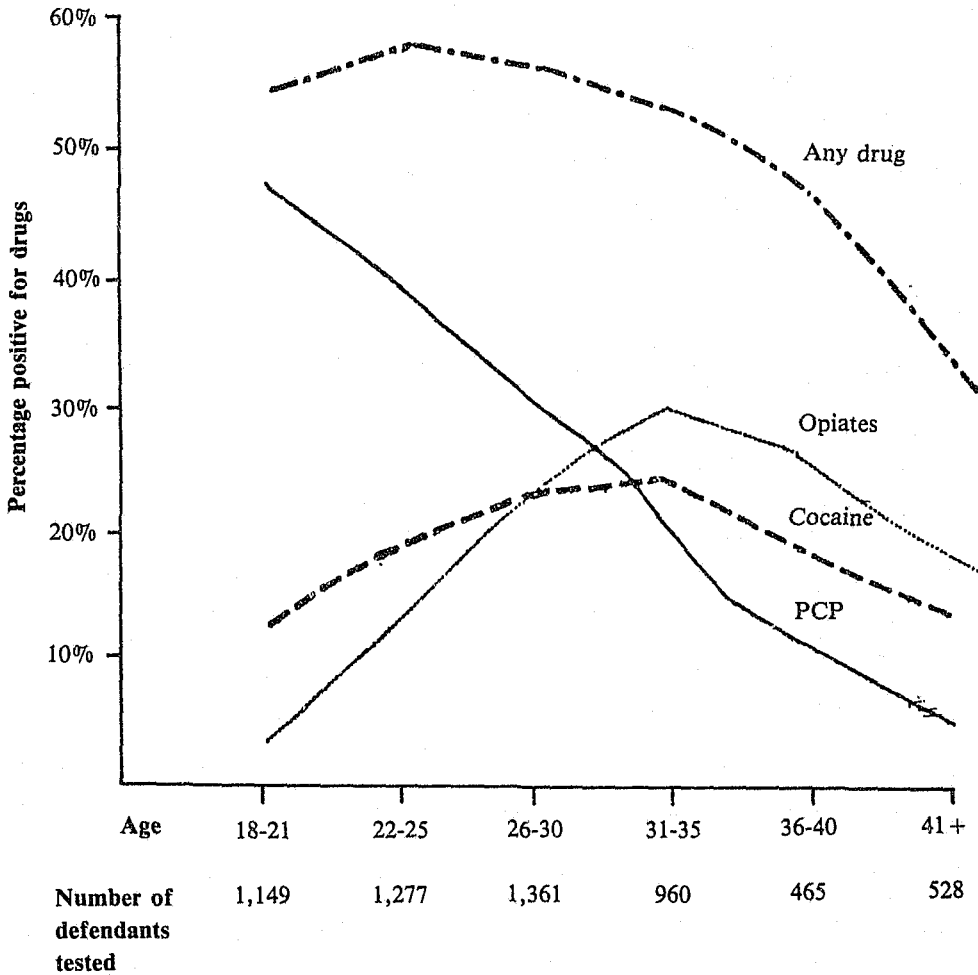
Shortly after PSA's drug detection program for adult defendants became operational, judges and other local practitioners began to comment on the need for a similar program for *juveniles* facing criminal charges. This concern was prompted by the high rates of drug use found among young adult defendants, ages 18-21, as shown in Figure 1. Subsequently, in October 1986, an NIJ-funded *juvenile* urine-testing program became operational in the District of Columbia, also operated by PSA.

Keys to program acceptance

There are a number of reasons for the success of PSA's pretrial urine-testing program. These include the following:

- High-level criminal justice officials have been supportive of PSA's program. They were familiar with the ways in which urine-test results could be used, because widespread urinalysis screening of arrestees had been done in the District of Columbia, off and on, since 1971. However, no previous program was as systematic, comprehensive or responsive to the needs of the court as is PSA's.
- PSA's program was *carefully planned and implemented*. Considerable attention was given to developing rigorous chain-of-custody procedures, determining the proper uses of urine-test results in criminal justice proceedings and acting to preclude other uses of them, training and educating PSA staff as well as other criminal justice practitioners about the program, and so on.
- Urine-test results obtained at the time of arrest are used in D.C. solely *to determine conditions of pretrial release*. By the terms of PSA's implementing legislation, they cannot be used to determine guilt or innocence on the instant charge or as evidence of probation or parole violation in another case. Similarly, urine-test results for defendants who are tested periodically as a condition of pretrial release can be used only *to monitor compliance with release conditions*; they cannot be used for other purposes. These limitations have obviated a variety of legal problems. The *carefully constrained uses of the urine-test results* from PSA's program has been a critical factor affecting the widespread acceptance of the program.
- The urinalysis technology used by PSA — the EMIT (enzyme multiplied immunoassay technique) system — has been objectively rated as having a high level of accuracy; moreover, the equipment does not require toxicologists to operate it. As a result, PSA staff were able to learn to use the equipment after only a short training period, and they consistently have provided the court with reliable test results.

Figure 1
Washington, DC Arrestees
with positive urine tests, by age and drug
(June 1984 – January 1985)



Special legal concerns

There have been few legal challenges to the PSA pretrial testing program since it began, and to date no major feature of the program has been challenged successfully.¹⁸ This is largely due to the careful attention that was given to legal concerns and defendants' rights during the planning stages of the program. Although there is little case law with regard to urine-testing in the District of Columbia, there has been litigation in other jurisdictions. As a general rule, to survive legal challenges, drug testing of defendants must be reasonably related to a legitimate state interest; must not discriminate against suspected classifications of persons tested (e.g., must not discriminate by age, race, sex); and the intrusion that results must be balanced against the defendants' valid privacy interests and the right to be free from unreasonable searches and seizures.¹⁹ Thus, whether pretrial drug testing of arrestees is constitutionally permissible in a given situation depends directly on how it is applied — that is, what purposes it is expected to serve and what procedural protections are present to insure against violations of defendants' rights.

Replication and expansion efforts

BJA is sponsoring development of pretrial urine-testing programs similar to the one PSA operates in the District of Columbia. New programs began operation late in calendar year 1987.

Post-conviction monitoring

Routine Probation and Parole Urine-Testing and/or Referral to Treatment

A variety of release conditions can be imposed on any probationer or parolee to try to protect community safety. These restrictions on the behavior of a convicted offender may include complying with a curfew, staying away from certain individuals or neighborhoods, obtaining or maintaining a job, etc., as well as routine reporting in person to a probation or parole officer. In addition, special conditions of probation or parole may be imposed on drug users or offenders with a history of drug use; these may include entering a treatment program for drug abuse or participating in a urine-testing program to demonstrate that no drugs have been used.

Additionally, some jurisdictions now provide for intensive supervision programs (ISPs), where high-risk offenders released into the community are monitored more closely; probation and parole officers' caseloads in these programs are much smaller than the norm. In spite of their small caseloads, ISP probation officers in Brooklyn typically did not know, in the absence of urine-testing, that the probationers they were supervising were using drugs.²⁰

The impact of probation and parole supervision varies considerably across jurisdictions. Factors affecting impact include the quality of treatment available

to drug abusers and the consistency with which sanctions are imposed when offenders violate conditions of probation and parole.

The California civil addict program

Although a variety of civil commitment programs for heroin addicts have been implemented over the years — including well-publicized programs in New York state and at the federal level — the California Civil Addict Program has received the most extensive evaluation. The seven-year program consisted of a period of incarceration, followed by parole or monitored release — including frequent urine-testing — in the community.²¹ Violation of program or parole regulations could result in reincarceration.

One of the major studies of this program considered the impact of different types of supervision on parolees' behavior.²² It found that intensive supervision, combined with urine-testing, was more effective in reducing parolees' drug use and criminality than either regular supervision without urine-testing or no supervision.

Another aspect of this evaluation compared addicts admitted to the program and subsequently released to the community under supervision with addicts admitted to the program and subsequently discharged after a short time because of legal errors in the commitment proceedings. During the first five years after commitment the program group reduced its daily narcotics use and criminality by considerably more than did the discharged group. The reduction in criminal activity, for example, was 19 percent for the program group and 7 percent for the discharged group. Other analyses²³ have also confirmed the finding that the program was generally effective in reducing heroin use and associated criminality.

TASC referrals

Treatment Alternatives to Street Crime (TASC) programs serve as a bridge between the criminal justice system and the treatment community by identifying drug abusers who are involved with the criminal justice system, referring them to treatment and monitoring their progress while in treatment.²⁴ Typically, this monitoring consists of following up on drug users' performance in treatment and reporting on this performance back to the appropriate criminal justice authorities. Some TASC programs also conduct periodic urine-testing as an additional way of monitoring offenders' compliance with probation or parole requirements to remain drug-free.

Although no comprehensive evaluation of the TASC program has been conducted, several studies have provided partial assessments of TASC's impact.²⁵ The Treatment Outcome Prospective Study (TOPS) found that TASC clients under legal coercion remained in both residential and outpatient drug free treatment longer than other clients.²⁶ Because length of time in treatment is usually associated with better outcomes, this finding suggests that TASC may be having a positive impact on client behavior.²⁷

Other approaches

Because of the strong relationship repeatedly found between drug use and crime, and because of the repeated finding that drug users have lower rates of criminal activity when they are in treatment than when they are not, some researchers and practitioners have proposed that "compulsory treatment" be more widely adopted for certain drug users as a technique for reducing their criminal activity.²⁸ Interest in the concept of compulsory treatment has also spawned a resurgence of interest in civil commitment of drug users, particularly users of such hard drugs as heroin and cocaine. Although there is little recent data available to assess the potential effectiveness of such an approach with *today's* users of various drugs, further consideration of it — and experimental efforts to determine its utility — would seem appropriate.

Conclusions

Several major conclusions suggest themselves with regard to monitoring criminally involved drug abusers. These include the following:

- A number of monitoring approaches have been implemented, with varied success, to try to reduce the criminality of abusers of different types of drugs. Some of the more effective strategies are those in which the criminal justice system and the treatment community work together. These two systems need to promote more frequent and regular interaction in order to plan and implement such effective strategies.
- One monitoring approach, which has been used extensively with defendants awaiting trial in Washington, D.C., is periodic urine-testing during the pretrial release period. Preliminary findings indicate that defendants who participated satisfactorily in this program had sharply reduced rates of pretrial rearrest and failure-to-appear for court.
- Urine-testing may also be successfully applied to offenders who have been convicted. For example, the California Civil Addict Program found that heroin-using parolees who participated in a program of urine-testing along with supervision had lower rates of criminality than otherwise similar parolees who received supervision without testing or no supervision.
- While urine-testing alone may be an effective intervention for some drug abusers, others will require more extensive interventions, perhaps including compulsory treatment. Unfortunately, for certain drugs, such as cocaine, whose use is widespread among offender populations, treatment methods are not as well-developed as for heroin. Moreover, in some communities even heroin treatment availability is limited. And treatment itself, even when available, will not be effective for all drug

abusers. Hence, treatment — like urine-testing — must be viewed as an approach to reducing drug use and crime that will be effective for some, but not all, offenders. More research is needed to determine the particular types of interventions that are most effective with particular types of offenders.

- Any monitoring program, particularly if it includes a potentially controversial urine-testing component, must be carefully planned before it is implemented and subjected to continuing evaluation after it becomes operational. Particular consideration must be given to the actions that will be taken if a drug user fails to comply with program requirements and whether the jurisdiction has the appropriate resources (e.g., treatment slots, jail space) to enforce those actions.
- Although it is still in the developmental stage, hair analysis may become an option in the future in situations, such as parole and probation, where there is a tradeoff between the value of the recency of information on an offender's drug usage and the desire for continuous coverage over a period of several days or weeks. For such applications it may become possible to use hair tests to complement urine tests without loss of information on drug usage for the intervals between the tests.

Notes

1. A. Blumstein, *et al.*, *Criminal Careers and "Career Criminals"* (Washington, DC: National Academy Press, 1986).
2. E.D. Wish, "Urine Testing of Offenders: A Guide for Practitioners," paper presented at the National Academy of Sciences Workshop on Drug Use and Crime, Atlanta, GA, December 1986.
3. Gropper, B.A. "Drug Testing: Developing New Approaches for Criminal Justice Questions," Presented at Academy of Criminal Justice Sciences Meeting, San Francisco, CA, April 7, 1988.
4. R.L. Hawks and C.N. Chiang, *Urine Testing for Drugs of Abuse* (Rockville, MD: National Institute on Drug Abuse, 1986).
5. "Drug Use Forecasting System Will Help Assess Extent of Drug Use among Offenders," *NIJ Reports* (Washington, DC: National Institute of Justice, March/April 1987).
6. E.D. Wish, *et al.*, "Estimates of Drug Use in Intensive Supervision of Probationers: Results of a Pilot Study," *Federal Probation* (Washington, DC: Administrative Office of the US Courts, December 1986).
7. R.M. Dembo, *et al.*, "Heavy Marijuana Use and Crime among Youths Entering a Juvenile Detention Center," *Journal of Psychoactive Drugs* (in press).
8. H.J. Hansen, *et al.*, "Crisis in Drug Testing: Results of CDC Blind Study," *Journal of the American Medical Association*, 253 (1985): 2382-2387.
9. M.A. Toborg, *et al.*, *Treatment Alternatives to Street Crime (TASC) Projects* (Washington, DC: National Institute of Law Enforcement and Criminal Justice, February 1976).
10. For more information on a variety of these programs, see C.L. Roslund, "Alternatives for Reducing the Risk to Community Safety Posed by Pretrial Release of the Dangerous Defendant," monograph submitted to the National Institute of Justice, August 1986, as part of the study *Public Danger As a Factor in Pretrial Release* by Toborg Associates, Inc. For more information about electronic monitoring, see D. Ford and A.K. Schmidt, "Electronically Monitored Home Confinement," *NIJ Reports* (Washington, DC: National Institute of Justice, November 1985).
11. J.A. Carver, "Drugs and Crime: Controlling Use and Reducing Risk through Testing," *NIJ Reports* (Washington, DC: National Institute of Justice, September/October 1986) and M.A. Toborg and J.P. Bellasai, "Background and Description of the Urine-Testing Program," Monograph No. 1, dated June 1987, of the study, *Assessment of Pretrial Urine-Testing in the District of Columbia*, conducted by Toborg Associates, Inc. for the National Institute of Justice.
12. J.A. Carver, *op. cit.*, and M.A. Toborg, *et al.*, "Analysis of Drug Use among Arrestees," Monograph No. 4, dated June 1987, of the study, *Assessment of Pretrial Urine-Testing in the District of Columbia*, conducted by Toborg Associates, Inc. for the National Institute of Justice.
13. A.M.J. Yezer, *et al.*, "The Efficacy of Using Urine-Test Results in Risk Classification of Arrestees," Monograph No. 6, dated June 1987, of the study, *Assessment of Pretrial Urine-Testing in the District of Columbia*, conducted by Toborg Associates, Inc. for the National Institute of Justice.

14. A.M.J. Yezer, *et al.*, "Periodic Urine-Testing As a Signaling Device for Pretrial Release Risk," monograph dated May 1988, prepared as part of the study, *Assessment of Pretrial Urine-Testing in the District of Columbia* conducted by Toborg Associates, Inc. for the National Institute of Justice. A reanalysis of the data using different analytic techniques and considering only pretrial rearrest found that the pretrial rearrest rate of the defendants who participated in the pretrial urine-testing program was about one-third lower than the pretrial rearrest rate for defendants who dropped out of the program. See Christy A. Visser (National Institute of Justice), "Assessment of Pretrial Urine-Testing in the District of Columbia: A Reanalysis," pp. 9-10 unpublished (1988).

15. It is not possible to tell from this experiment whether it was the periodic urine testing itself or compliance with the reporting conditions, or both, that produced the signaling effect for rearrests. As the researchers indicate, "release conditions involving reporting requirements or even electronic monitoring could also provide an opportunity to defendants to differentiate their individual degree of risk for rearrest or flight from other defendants with a similar criminal record. (Yezer et al 1988 p.25)."

16. M.A. Toborg and J.P. Bellasai, "The Views of Judicial Officers," Monograph No. 3, dated June 1987, of the study, *Assessment of Pretrial Urine-Testing in the District of Columbia*, conducted by Toborg Associates, Inc. for the National Institute of Justice.

17. D.C. Pretrial Services Agency, *1985 Annual Report*.

18. To date, only one legal challenge to the adequacy of PSA's chain-of-custody procedures and the accuracy of the EMIT testing system has resulted in a written

opinion from the DC Superior Court. See *United States v. Phillip Roy*, Criminal No. M12098-84, DC Superior Court, Order, September 24, 1985 (Burgess, J.) (challenge to revocation of pretrial release conditioned on periodic drug testing due to positive urine tests). In the Roy case, Associate Judge Franklin Burgess *inter alia* took judicial notice of the 98% level-of-accuracy of the EMIT system, as substantiated by the National Institute of Mental Health and the Centers for Disease Control; he also found PSA's chain-of-custody procedures and related practices to meet the standard of carefulness required by the court for release revocation proceedings. *Id.* at pp. 6, 10-15.

For the first time in 17 years of pretrial drug testing, in one form or another in the local DC trial court, a major constitutional challenge to the practice of pretrial drug testing per se is now pending. In *Tyrone Berry v. United States*, Docket No. 85-6158, US App. DC 1986, the appellant—who was subjected to periodic urine-testing by PSA in 1984 as a condition of his pretrial release in two separate cases—has raised broad-based challenges to the practice of lockup testing generally, and to various features of the PSA program of periodic drug testing as a condition of release, on Fourth, Fifth, Eighth and Fourteenth Amendment grounds, under §1983 of the Civil Rights Act of 1968. The case was argued for oral argument before a three-judge panel of the US Court of Appeals for the DC Circuit on September 11, 1987. Appellant Berry also sought to have the federal appeals court certify his case as a class action on behalf of other defendants ordered into the PSA urine-testing program from its inception in 1984. On November 24, 1987, the federal appeals court issued its opinion in *Berry*: the case was remanded back to the trial court with orders to develop a better record of the facts and circumstances, upon which to litigate

the constitutional issues raised by Mr. Berry with regard to periodic drug testing as a condition of pretrial release, and with direction to the trial court to review and integrate into the record any research findings which demonstrate that a positive correlation exists between drug use and pretrial misconduct. For technical procedural reasons, however, the appeals court found that the issues of whether lockup drug testing passed constitutional muster had not been raised in a timely manner by the appellant, and thus the court declined to review that aspect of his claim.

19. For more information on these topics, see J.P. Bellasai, "Analysis of Potential Legal Issues," Monograph No. 2 of the study, *Assessment of Pretrial Urine-Testing in the District of Columbia*, conducted by Toborg Associates, Inc. for the National Institute of Justice.

20. E.D. Wish, *et al.*, *op cit.*

21. For a narrative discussion of procedural features of the California and New York State civil commitment programs for addicts, as well as the corresponding federal program under the Narcotic Addict Rehabilitation Act (NARA), see J.P. Bellasai and P.N. Segal, "Addict diversion: an alternative approach for the criminal justice system" in *Georgetown Law Journal* 60 (February 1972): 676-680 and accompanying footnotes.

22. W.H. McGlothlin, *et al.*, *An Evaluation of the California Civil Addict Program* (Rockville, MD: National Institute on Drug Abuse, 1977).

23. M.D. Anglin and W.H. McGlothlin, "Outcome of Narcotic

Addict Treatment in California," in F. Tims and N. Ruchman, eds., *Drug Abuse Treatment Evaluation: Strategies, Progress, and Prospects* (Rockville, MD: National Institute on Drug Abuse, 1984).

24. *Program Brief of TASC Programs: Treatment Alternatives to Street Crime* (Washington, DC: Bureau of Justice Assistance, draft dated January 1987).

25. J.J. Collins and M. Allison, "Legal Coercion and Retention in Drug Abuse Treatment," *Hospital and Community Psychiatry* 34 (December 1983): 1145-1149.

26. For a general description of TASC and individual program models, see for example, M.A. Toborg *et al.*, *Treatment Alternatives to Street Crime (TASC) Projects*. Washington, DC: National Institute of Law Enforcement and Criminal Justice, February 1976; see also, J.P. Bellasai *et al.*, *Police Referral To Drug Treatment: risks and benefits*. Rockville, MD: National Institute on Drug Abuse, 1981.

27. H.K. Wexler and D.S. Lipton, *Interventions that "Work" with Drug-Involved Offenders*, National Institute of Justice *Briefing Paper* prepared for Bureau of Justice Assistance Regional Program Briefings, 1987.

28. J. Kaplan, *The Hardest Drug: Heroin and Drug Policy* (Chicago, IL: University of Chicago Press, 1983) and M.L. Stitzer and M.E. McCaul, "Criminal Justice Interventions with Drug and Alcohol Abusers: The Role of Compulsory Treatment," in E.K. Morris and C.J. Braukmann, eds., *Behavioral Approaches to Crime and Delinquency* (New York, NY: Plenum Press, in press).

References

- Anglin, M.D. "Civil commitment as a model for reducing drug demand." *Perspectives on Drug Abuse* (in press).
- Anglin, M.D., and McGlothlin, W.H. "Outcome of narcotic addict treatment in California," in Tims, F., and Ruchman, N., eds., *Drug abuse treatment evaluation: strategies, progress, and prospects*. NIDA Research Monograph 51. Rockville, MD: National Institute on Drug Abuse, 1984.
- Bellassai, J.P. and Segal, P.N. "Addict diversion: an alternative approach for the criminal justice system," in *Georgetown Law Journal* 60 (February 1972): 676-680.
- Bellassai, J.P. et al., *Police Referral to Drug Treatment: risks and benefits*. Rockville, MD: National Institute on Drug Abuse, May 1981.
- Bellassai, J.P. "Analysis of potential legal issues." Monograph No. 2, dated June 1987, of the study *Assessment of Pretrial Urine-Testing in the District of Columbia*, conducted by Toborg Associates, Inc. for the National Institute of Justice.
- Blumstein, A., Cohen, J., Roth, J.A., and Visher, C. *Criminal Careers and "Career Criminals."* Washington, DC: National Academy Press, 1986.
- Carver, J.A. "Drugs and crime: Controlling use and reducing risk through testing." In *NIJ Reports*, SNI 199, Washington, DC: National Institute of Justice, September/October 1986.
- Collins, J.J., and Allison, M., "Legal coercion and retention in drug abuse treatment." *34 Hospital and Community Psychiatry*, 34 (December 1983): 1145-1149.
- D.C. Pretrial Services Agency. *1985 Annual Report*.
- Dembo, R.M., Washburn, M., Wish, E., Yeung, H., Getreu, A., Berry, E., and Blount, W. "Heavy marijuana use and crime among youths entering a juvenile detention center." *Journal of Psychoactive Drugs* (in press).
- Ford, D. and Schmidt, A.K. "Electronically monitored home confinement." In *NIJ Reports*, Washington, DC: National Institute of Justice, November 1985.
- Forst, B. and Wish, E.D. "Drug use and crime: Providing a missing link." In Kenneth R. Feinberg, ed., *Violent Crime in America*, Washington, DC: National Policy Exchange, 1983.
- Gropper, B.A. "Probing the links between drugs and crime." *Research in Brief*. Washington, DC: National Institute of Justice, February 1986.
- Gropper, B.A. "*Drug Testing: Developing New Approaches for Criminal Justice Questions*," Presented at Academy of Criminal Justice Sciences Meeting, San Francisco, CA, April 7, 1988.
- Hansen, H.J., Caudill, S.P., Boone, D.J. "Crisis in drug testing: results of CDC blind study." *Journal of the American Medical Association*, 253 (1985): 2382-2387.
- Hawks, R.L., and Chiang, C.N. *Urine Testing for Drugs of Abuse*. NIDA Research Monograph 73. Rockville, MD: National Institute on Drug Abuse, 1986.
- Kaplan, J. *The Hardest Drug: Heroin and Drug Policy*. Chicago, IL: University of Chicago Press, 1983.

McGlothlin, W.H. "Criminal justice clients." In R.L. Dupont, A. Goldstein, and J. O'Donnell, eds., *Handbook of Drug Abuse*, Rockville, MD: National Institute on Drug Abuse, January 1979.

McGlothlin, W.H., Anglin, M.D., and Wilson, B.D. *An Evaluation of the California Civil Addict Program*. Rockville, MD: National Institute on Drug Abuse, 1977.

NIJ Reports, "Drug use forecasting system will help assess extent of drug use among offenders," Washington, DC: National Institute of Justice, March/April 1987.

Program Brief of TASC Programs: Treatment Alternatives to Street Crime. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, draft dated January 1987.

Roslund, C.L. "Alternatives for reducing the risk to community safety posed by pretrial release of the dangerous defendant." Monograph submitted to the National Institute of Justice, August 1986, as part of the study *Public Danger as a Factor in Pretrial Release* by Toborg Associates, Inc., Washington, DC.

Stitzer, M.L., and McCaul, M.E. "Criminal justice interventions with drug and alcohol abusers: the role of compulsory treatment," in Morris, E.K., and Braukmann, C.J., eds., *Behavioral Approaches to Crime and Delinquency*, New York City, NY: Plenum Press, (in press).

Toborg, M.A. and Bellasai, J.P. "Background and description of the urine-testing program." Monograph No. 1, dated June 1987, of the study, *Assessment of Pretrial Urine-Testing in the District of Columbia*, conducted by Toborg Associates, Inc. for the National Institute of Justice.

Toborg, M.A. and Bellasai, J.P. "The views of judicial officers." Monograph No. 3, dated June 1987, of the study *Assessment of Pretrial Urine-Testing in the District of Columbia*, conducted by Toborg Associates, Inc. for the National Institute of Justice.

Toborg, M.A., Bellasai, J.P., and Yezer, A.M.J. "The Washington, DC urine-testing program for arrestees and defendants awaiting trial: A summary of interim findings." Presented at the NIJ conference, *Drugs and crime: Detecting use and reducing risk*. Washington, DC, June 1986.

Toborg, M.A., Levin, D.R., Milkman, R.H., and Center, L.J. *Treatment Alternatives to Street Crime (TASC) Projects*. Washington, DC: National Institute of Law Enforcement and Criminal Justice, February 1976.

Toborg, M.A., Yezer, A.M.J., and Bellasai, J.P. "Analysis of drug use among arrestees." Monograph No. 4, dated June 1987, of the study, *Assessment of Pretrial Urine-Testing in the District of Columbia*, conducted by Toborg Associates, Inc. for the National Institute of Justice.

Visher, Christy A. (National Institute of Justice), "Assessment of Pretrial Urine-Testing in the District of Columbia: A Reanalysis," (unpublished), 1988.

Wexler, H.K., and Lipton, D.S. *Interventions that "Work" with Drug-Involved Offenders*. National Institute of Justice Briefing Paper prepared for Bureau of Justice Assistance Regional Program Briefings, 1987.

Wish, E.D. "Urine testing of offenders: A guide for practitioners." Presented at the National Academy of Sciences Workshop on Drug Use and Crime, Atlanta, GA, December 1986.

Wish, E.D., Brady, E., and Cuadrado, M. "Drug use in arrestees: Findings from Manhattan." Presented at the NIJ conference, Drugs and Crime: Detecting Use and Reducing Risk. Washington, DC: June 1986.

Wish, E.D., Cuadrado, M., and Martorana, J. "Estimates of drug use in intensive supervision probationers: Results of a pilot study." *Federal Probation*. Administrative Office the U.S. Courts, Washington, DC, December 1986.

Wish, E.D. and Johnson, B.D. "The impact of substance abuse on criminal careers." In A. Blumstein, J. Cohen, J.A. Roth and C.A. Visher, eds., *Criminal Careers and "Career Criminals,"* Volume II, Washington, DC: National Academy Press, 1986.

Yezer, A.M.J., Trost, R.P., Toborg, M.A., Bellasai, J.P. and Quintos, C. "The efficacy of using urine-testing results in risk classification of arrestees." Monograph No. 6, dated June 1987, of the study, *Assessment of Pretrial Urine-Testing in the District of Columbia*, conducted by Toborg Associates, Inc. for the National Institute of Justice.

Yezer, A.M.J., Trost, R.P., Toborg, M.A. Bellasai, J.P., and Quintos, C. "Periodic Urine-Testing as a signaling device for pretrial release risk." Monograph No. 5, dated May, 1988, of the study *Assessment of Pretrial Urine-Testing in the District of Columbia*, conducted by Toborg Associates, Inc. for the National Institute of Justice.