

Probation and Parole Officers Speak Out—Caseload and Workload Allocation

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COMMUNITY CORRECTIONS populations have experienced tremendous growth for the past two decades. The Bureau of Justice Statistics Correctional Survey (<http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm>) reveals that probation and parole populations have grown unabated since 1980. This growth has serious implications for probation and parole agencies regarding how to make caseload and workload decisions. It is important to consider differences between caseload, which is the number of offenders supervised by an officer, and workload, which is the amount of time needed to complete various tasks. While caseload size will grow as offender populations increase, workload per officer is a more stagnant figure, as there are only so many working hours available in each day, week, month, or year for each officer.

These issues related to workload allocation are further complicated by two additional trends in community corrections. Probation was once assigned almost exclusively to relatively low-level offenders who posed little threat to public safety and were mostly in need of pro-social steering (Petersilia, 1998). In an attempt to alleviate jail and prison crowding, however, probation caseloads are being populated with offenders who potentially pose greater community safety threats. This is a point made by Taxman, Shephardson, and Byrne (2004: 3) in *Tools of the Trade*, in which they mention that “probation rolls increasingly mirror the prison population.” Taxman and her colleagues add that “more than half of probationers today are convicted felons.” These offenders have more criminogenic needs, as they may be gang members, sex offenders, or domestic violence offenders. As a result, these offenders will require more officer time to provide adequate supervision, treatment, and enforcement of conditions, and hopefully behavior change.

A second trend facing probation and parole agencies is the growth in conditions of supervision. These conditions are often instituted by non-community corrections professionals such as judges,

releasing authorities, and legislators. What is often a “one-size-fits all” decision-making style has the potential to foster rather standard conditions being applied to offenders, with little consideration of individual offender characteristics. For instance, in many jurisdictions, regardless of an offender’s substance abuse history, he or she must submit to periodic drug tests. This type of sanction, while perhaps noble in its attempt to prevent drug use, may not be realistic, relevant, or based on research, something Carl Wicklund (2004), Executive Director of the American Probation and Parole Association (APPA), referred to as the three Rs of community supervision. Karol Lucken (1997: 367) points out the potential unanticipated consequences of increased failures due to what she refers to as the “piling up of sanctions” as they expose “offenders to a number of punitive and rehabilitative controls, which often leads to violations and returns to the correctional system.”

The fact that an external body—whether judge or releasing authority—has much discretion in establishing supervision conditions may not be problematic in and of itself. It becomes potentially problematic, however, when such decisions are made with little input from presentence investigation reports or risk assessments, and otherwise in isolation from research evidence supporting effective community corrections strategies. The use of research to identify effective programs is not a new idea. Rather, the medical field and several other areas of human services are beginning to see the value in evaluating the effectiveness of specific strategies with certain categories of people to more widely adopt strategies and policies that have been shown to work and to eliminate those that do not work.

To date, there is little research offering information from probation and parole officers to assist policymakers and administrators in confronting workload allocation issues. To fill this void, this study considers how probation and parole officers describe concerns related to workloads. Addressing how workers define their workloads provides a framework for understanding how these recent trends of growth in caseloads and standardization of probation/parole conditions have altered the probation/parole experience for officers and offenders.

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Community Corrections Goals in Practice

Community corrections agencies work with stakeholders in their jurisdictions to establish clearly defined organizational goals and an overall strategy to achieve, evaluate, and adjust such strategies. These goals are to be jurisdictionally appropriate and therefore rooted in local contextual conditions, not necessarily global national standards. However, it does seem to be generally accepted that probation and parole agencies are in the business of community safety through instituting a balanced approach of surveillance, treatment, and enforcement (see Taxman et al., 2004). This tripartite focus is rooted in evidence-based practices that begin with assessing an individual offender’s level of risk as an indication of his or her probability to re-offend. Of course, community corrections officers are not singly responsible for achieving the goal of public safety; rather, probation and parole outcomes are embedded in a larger multi-organizational justice system that incorporates law enforcement, institutional corrections, and courts, as well as non-justice agencies including victims of crime, treatment providers, and others.

Once probation and parole agencies define a locally acceptable goal, it is important to institute a strategy to accomplish their organizational goal. This strategy no doubt involves incorporating the many interested stakeholders involved in the justice system process through in-depth collaboration. Through collaboration and an overall strategy aimed at public safety, former New Jersey Parole Board Chair Mario Paparozzi (2007) suggests that probation and parole can “own their outcomes.” By “owning outcomes,” Paparozzi is identifying the importance for probation and parole administrators to establish clearly defined goals related to public safety and the community, state these goals, and institute policies and practices to achieve such outcomes. Expected outcomes may not always follow. As Paparozzi notes, “If I ended up on the 11 o’clock news, you know something went wrong.” It is expected that from time to time things will go wrong, offenders will re-offend, there will be highprofile cases receiving much media attention to exploit the faults of probation or parole agencies. What is important, however, is for probation

and parole agencies to work to diminish recidivism by utilizing scientific or “state-of-the-art” procedures to bring about offender behavior change (Taxman et al., 2004). Judy Sachwald (2004), Director of Maryland Probation and Parole, promotes a similar argument by incorporating a model of supervision rooted in scientific exploration and knowledge of offender behavior. She suggests that probation and parole agencies should “do it, tell it, and sell it,” with the “it” referring to shaping policies, operations, and professional development within agencies around scientific principles related to evidence-based practices.

There is no doubt that evidence-based practices designed to reduce risk of re-offending are infusing the community corrections field with more scientific approaches. These approaches rely on risk assessments to allow probation and parole agencies to differentiate and typologize offenders based upon their relative level of risk to re-offend. This strategy allows for addressing criminogenic needs—anti-social behavior, anti-social personality, anti-social values and attitudes, criminal peer groups, substance abuse, and dysfunctional family relations—through an integrated approach of surveillance, treatment, and enforcement. Although community corrections officers have numerous challenges to overcome, there are few issues more central to the organization and function of probation and parole practice and success than workload allocation issues. These issues form the base from which all other supervisory functions flow.

To gain a better understanding of how workload and caseload issues are viewed by probation and parole officers, this study focuses on how a group of probation and parole officials describe their concerns about workload. Focusing on the workload allocation concerns of probation and parole officials is important for at least four reasons. First, because they have experiences that others may not have had, probation and parole officers are in a position to provide insight into the way that broader influences have shaped workload allocation issues. Researchers and policy makers could use conjecture to understand these workload allocation issues, but such conjecture could be misleading and potentially ignore real concerns of probation and parole officials.

Second, probation and parole officials are in positions that have evolved a great deal over the past two decades. Much of the criminal justice overcrowding research has focused on the occurrence of prison overcrowding. However, this prison overcrowding research should lead naturally to research on the expanded use of community-based corrections. Ignoring the perceptions and experiences of probation and parole officials has resulted in shifting the overcrowding problem, rather than addressing it. By considering how these efforts to offset overcrowding have influenced probation and parole, a more complete picture of strategies to deal with overcrowding will appear.

Third, and on a related point, the growth in community-based corrections requires that policy makers and researchers determine how this growth is perceived by probation and parole officials. Identifying the most cost-effective community corrections supervision strategies is essential to U.S. justice system policy and practice. Despite the relative lack of research into community corrections effectiveness, the U.S. justice system depends, more than ever, upon well executed and fiscally constrained community supervision strategies. Since the 1980s, correctional populations have grown about threefold, with nearly 7 million adults (about 3.2 percent of the adult population) under community supervision or incarcerated (BJS, 2004a). This growth places a significant burden on government budgets, as local, state, and federal direct expenditures for corrections totaled \$36 billion in 1982 and climbed to \$167 billion by 2001 (BJS, 2004b). One area of the justice system especially affected by this 366 percent growth is community corrections services.

Fourth, asking probation and parole officers about their perceptions gives them a voice in the research and policy-making process. Providing individual voices in the policy-making process will give a sense of empowerment to those who have chosen to use their voices to effect change. In turn, those who feel empowered will be more likely to work towards organizational goals. Indeed, the community corrections field must inform the judiciary and releasing authorities as well as policymakers of the effect of growing caseloads of higher-risk offenders with more imposed conditions.

Methods

A web-based survey of the APPA membership was conducted. Several specific steps were taken to develop the sample of probation and parole officers used in this article. The survey was linked to the bi-weekly electronic distribution of APPA's newsletter, CC Headlines. CC Headlines is distributed via email to approximately 1,500 individuals and agencies combined. There is space in this newsletter to include a link to a web-based survey.

Approximately one week before disseminating the survey, a pre-notice was emailed to the CC Headlines mailing list. The pre-notice described the importance of the topic and the need for APPA to receive information on workload allocation. After the first survey distribution, 130 completed questionnaires were returned. Two subsequent requests produced a total of 240 responses. After eliminating responses due to errors (e.g., missing information, duplicate submissions), the total number of responses was 228 (for more information on Internet survey methods, see Schaefer & Dillman, 1998). The survey was divided into three sections (demographics, workload and caseload allocation, and sex offender and other high-risk supervision). The quantitative data is reported on elsewhere (see DeMichele, Paparozzi, & Payne, unpublished manuscript).

Sample

This survey was intended to gather exploratory data about current community corrections practices. As [Table 1](#) reveals, respondents were predominantly affiliated with probation departments, accounting for 56 percent (n = 129) of all respondents. Nearly one-third (n = 70) of respondents indicated working in combined agencies serving probation and parole functions, five percent (n = 12) were in parole agencies, and seven percent (n = 17) worked in an "other" type of agency. These descriptive items revealed that the bulk of respondents worked in rather large jurisdictions, with nearly half of respondents (n = 110) serving jurisdictions of 300,000 or more. Twenty-nine percent of respondents (n = 68) work in jurisdictions with between 75,000 and 300,000 residents. Other respondents indicated serving smaller jurisdictions with 10 percent (n = 24) serving populations between 30,000 and 75,000, and 12 percent of respondents (n = 26) work in jurisdictions with less than 10,000 to 30,000 people.

There was little difference in geographic regions in which respondents were employed. In fact, there is a nearly symmetrical distribution of respondents in rural (n = 60, 26 percent), suburban (n = 61, 27 percent), urban (n = 62, 27 percent), and "other" jurisdictions (n = 44, 19 percent). The over-representation of respondents serving larger jurisdictions could be related to the web-based nature of the survey, as agencies in smaller jurisdictions may lack computer resources. The number of full-time officers in the agency in which the respondent worked revealed that most agencies were relatively small. Forty percent (n = 91) of respondents worked in agencies with 25 or fewer full-time officers, 16 percent (n = 36) worked in agencies with between 26 and 50 officers, and 14 percent (n = 31) of respondents worked in agencies with between 51 and 100 officers. Nearly a quarter of respondents worked in agencies with a large number of full-time officers, with 19 percent (n = 43) of respondents indicating that their department has more than 200 officers and 8 percent (n = 19) serving in departments with between 101 and 200 fulltime officers (see [table 1](#)).

Findings

The open-ended comments were content analyzed to consider general themes that emerged from the probation and parole officials' comments. This involved reading all of their comments and inductively developing themes that surfaced consistently across respondents. From this analysis, three themes arose: 1) goal ambiguity, 2) concerns about funding, and 3) evidence-based principles. Each of these themes is addressed below.

Goal Ambiguity

It is often argued that rehabilitation and punishment are opposing justice system goals. One goal, rehabilitation, seeks to alter offender cognition (thought patterns) to bring about a concomitant shift in behavior (toward pro-sociality) (Andrews et al., 1990). The other goal, punishment, has been described as rooted in a more emotional desire to inflict pain or bring about some sort of discomfort for the offender in an attempt to rebalance the scales of justice (see Christie, 2000; Garland, 1990). This tension between rehabilitation, punishment, and providing victim and community safety is further elaborated by respondents in open-ended items. One respondent states (italics added) that “community safety, victim safety, and offender accountability have become focus points...but the resources to accomplish these changes is an ongoing process of adaptation to the demands placed upon supervision.”

This statement captures the interaction between these goals as well as the officer’s strain fostered by a context of limited resources and bloated workloads. A different respondent summarized the view in his or her agency as “We view ourselves as the front line between high-risk offenders and the community we live in.” Another respondent claimed that their department “has become more punitive, acting as police, rather than rehabilitative.” These responses potentially indicate a sense of moving toward community safety and crime reduction as central organizational goals, and a need to consider more fully the fiscal concerns emerging from steering community corrections’ function in such a way.

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Concerns about Funding

More clarity can be gained from respondents’ open-ended answers, in which they commented about caseload size and workload allocation methods. One respondent indicated that in his or her agency “caseloads have doubled...Our ability to meet the needs of these offenders has been difficult with very limited community resources, limited budgets, and a lack of support from the top and the bench.” This respondent’s frustration is an example of how community corrections agencies and officers are expected to supervise more offenders, with fewer resources, feeding employee strain and burn-out.

Another respondent simply stated that “More officers are needed to provide the level of expectations that each offender should receive.” Funding issues are tied to most decisions made by organizations—whether community corrections or for-profit industries—and they determine the possibility of such things as trainings, equipment purchases, and personnel hires. One respondent commented on the relationship between these items and how they come together to shape the ability to offer effective community interventions.

Training is minimal and equipment is sparse. [STATE NAME] has adopted a resource brokerage type of supervision. On the occasions when [officers] do venture out into the field to check up on probationers, [officers] are too poorly equipped and trained to do much more than a quick drive by of residence. Unfortunately, [STATE NAME] has disregarded officer safety even after some recent high profile assaults on probation officers who attempted home visits. Thus, furthering the belief that probation supervision is best conducted from the office.

Obviously, this respondent feels strongly about the potential ramifications for underfunding probation training and ensuring that officers have the appropriate equipment. However, this provides little advice on what administrators and policymakers should be doing to change this situation. Another respondent did suggest that “a resolution would be caseload caps, more equipment, and streamlining several processes.” No doubt such suggestions come easily when merely placed on paper, but are much more difficult to implement. Nevertheless, these respondents’ comments identify a certain uneasiness regarding the growth in caseloads of more high-risk offenders and the (fiscal) impact this has on most organizational operations.

Evidence-Based Practices

Contextualizing the above answers, one respondent bluntly stated that “we are trying to do supervision that works. We believe in the evidence based practices approach, but carrying them out can be difficult.” Another respondent mentioned that “we are in the process of instituting evidence-based practices and redistributing caseloads to focus more resources on higher risk offenders and better target our interventions.” These respondents focus on the need for developing effective strategies to intervene in offenders’ lives, which is not easy. Indeed, it can be “difficult” to say the least. One respondent emphasized further the movement in community corrections to evidence-based practices decision making when he or she commented that “recent implementations of new assessment tools, with incorporation of motivational interviewing, cognitive restructuring, and case planning has emphasized targeting high-risk offenders.”

The point here is that if evidence-based practices are going to amount to more than another catch phrase, then appropriate funding and personnel decisions are necessary preconditions. It seems that community corrections agencies, at least judging from the respondents to this survey, are seriously incorporating the notions advanced in the evidence-based practices literature. While agencies are interested in evidence-based practices, it appears that the lack of funding for fully implementing such changes fosters a half-hearted attempt.

Central to evidence-based practices is the use of specialized caseloads. Interventions should be targeted at an individual’s risks and needs, with little intervention planned for low-risk offenders and more directed (even intense) supervision for higher risk offenders. Respondents also commented on the trend toward developing specialized units for high-risk offenders, such as sex offenders. “Our department,” according to one respondent, “has more specialized and high-risk officers and casebooks than basic or general casebooks.” They go on to state that “this has become a trend.” Consider another respondent’s comment: “The proliferation and use of GPS with sex offenders has significantly increased our workloads and thus has altered our resource allocations.”

Anyone familiar with contemporary crime and justice issues is aware of the increased use of GPS to track offenders. For the most part, there has been little critical attention to using this tool as part of community supervision, especially from a pragmatic view of how these technologies affect workload. Consider one respondent’s view: “The proliferation and use of GPS with sex offenders has significantly increased our workloads and thus altered our resource allocation.”

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Discussion

Community supervision of offenders is one of the fastest growing justice system practices. Comments from the probation and parole officials in this study showed a concern about goal ambiguity, funding, and evidence-based practices. Based on the feedback from this sample of respondents, attention can be given to the way that these three themes can be addressed.

A growing area of emphasis for probation administrators is how to supervise more efficiently nonviolent offenders presenting relatively low levels of risk to the community (Dedel-Johnson, Austin, and Davies, 2002). Probation administrators are responsible for providing adequate levels of supervision and intervention to offenders, based upon individual risks and criminogenic needs (see Andrews et al., 1990). The potential exists for probation to over-supervise some offenders (i.e., the low risk) and divert resources—both time and funds—from the offenders presenting the greatest risk (i.e., repeat violent offenders).

Probation is routinely criticized for being soft on criminals. Over a three-year period, Langan (1994) analyzed survey data from 12,370 State probationers convicted of a felony during their probation supervision. Few probation departments adequately enforced conditions, as 69 percent of probationers did not pay supervision fees, 40 percent failed to pay restitution, and 32 percent never received ordered drug treatment. Many offenders do not complete the terms of their community supervision, with the best national figures estimating that about two-thirds of

parolees are rearrested within three years, and about 40 percent of probationers are unsuccessful (BJS, 2004a). ¹

Confronting the soft-on-crime image, and encompassing the bulk of research on probation effectiveness, some probation departments have created intensive supervision programs (ISP) for high-risk offenders. These programs are expected to provide more officer-offender interaction and be “more stringent and punitive than traditional probation but less expensive and coercive than incarceration” (Petersilia and Turner, 1991: 611). ISPs were initially met with optimism for their ability to reduce officer caseload size and increase the intensity of supervision to control high-risk offenders more effectively and better protect the public. ² However, little consideration was given to the high costs of ISPs for probation departments and their potential inability to supervise offenders in high-risk categories.

An analysis of three ISPs in California did not find them more effective than routine probation in reducing recidivism, despite having significantly more contact with offenders. Petersilia and Turner (1991) found that ISP probationers had higher failure rates than regular probationers. The authors suggest four reasons for this: 1) higher-risk candidates were placed in the ISPs (about 80 percent were high risk), 2) specialized units tend to enforce all technical violations strictly, 3) conditions and increased sanctions failed to deter probationers from reoffending, and 4) supervision without substantive treatment has little effect on underlying criminal behavior (Petersilia and Turner, 1991: 650). Petersilia and Turner (1991: 657) found that probationers completing counseling, employed, and paying restitution had lower recidivism rates. This suggests that probation interventions that focus on diminishing behaviors associated with criminality may be more important to encourage social conformity than multiplying contacts between officer and offender without focusing on the specific goals of these contacts (see Gottfredson and Hirschi, 1990).

In terms of evidence-based probation and parole practices, this study shows that community corrections officials are receptive to using research to inform community-based corrections policies and practices. Researchers should be sensitive to the problem of goal ambiguity, as well as to other trends that are influencing community corrections. With regard to goal ambiguity, researchers must recognize that probationer success can be evaluated in numerous ways. Probation conditions may require offenders to perform an assortment of duties (e.g., community service, pay restitution, fines), to undergo treatment (e.g., substance abuse, anger management), to maintain employment or other structured activities, and to avoid committing new offenses. This complexity places many administrators in the difficult position of determining what constitutes successful completion. Is an offender successful if he/ she is not rearrested? Should new convictions be most important? Should probation success be evaluated by the level of compliance with court orders (technical violations)? For these reasons, researchers should track several forms of probationer success and failure, including treatment completion (e.g., substance abuse, mental health), court order compliance (e.g., paying fines, restitution), and the more traditional recidivism concept (e.g., new arrests, convictions, and revocations).

Furthering the use of evidence-based principles in community corrections will require more rigorous research than has been conducted in the past. To date, no research analyzes the differences among low- and medium-risk offenders using an experimental design. Future research should focus on high-risk offenders by randomly assigning nonviolent, low- and medium-risk offenders to one of five probation supervision strategies to determine if differences in offender performance and cost-effectiveness exist among the five types of supervision included. In addition, justice system researchers need to collaborate with practitioner organizations to develop innovative research strategies to identify cost-effective supervision practices (Gist, 2000; Lane, Turner, and Flores, 2004).

Community corrections services offer ways to alleviate jail and prison crowding, deliver serious punishment, and contribute to rehabilitating offenders. Probation performs several functions to properly supervise offenders (e.g., home contacts; surveillance; drug testing; collection of restitution, fines, and fees; community work service; monitoring of curfews and travel restrictions; intermediate sanctions; and revocation) and offers offenders adequate treatment

options (e.g., assessment and treatment referrals, motivational interviewing, employment and educational assistance, and support and mentoring) (Paparozzi, 2003).

A shift away from rehabilitation to a more punitive model has emerged in tandem with public opinion favoring more punitive strategies (e.g., capital punishment, three-strikes laws, mandatory minimums) (Beckett, 1997; Pratt, 2000). Cullen, Fisher, and Applegate (2000: 79) highlight the strange coupling of get-tough and transformative policies, as more of the public wants “the correctional system to achieve the diverse missions of doing justice, protecting public safety, and reforming the wayward” (also, see Applegate, 2001; Bouley and Wells, 2001). No other branch of the criminal justice system is more affected by this bifurcated crime control policy shift than community corrections agencies. Public scrutiny and diminishing resources require community corrections agencies to maximize potential positive outcomes of offender programs. They must invest resources in the most cost-effective methods to decrease the potential for sanction stacking and ensure that the conditions of supervision are reasonable, realistic, and research based.

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Table 1: Descriptive Agency Information

Agency Type	Number	Percent
Probation	129	56
Parole	12	5
Combined	70	31
Other	17	7
Jurisdiction Size		
<10k	2	1
10-30	24	11
30-50k	11	5
50-75k	13	5
75-150k	35	15
150-300k	33	14
>300k	110	48
Jurisdiction Type		
Rural	60	26
Suburban	61	27
Urban	62	27
Other	44	19
# Full-Time Officers		
1-25	91	40
26-50	36	16
51-100	31	14
101-200	19	8
201+	43	19
N = 220		
Agency shift		
Decreased	43	19
# Officers Reduced		
Maximum	55	
Minimum	1	
Mean	9	
Unionization		

Yes	133	58
No	95	42
Years Experience		
1-5	26	11
6-10	47	21
11-20	67	29
20+	89	39
Mean Years = 17.68		

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¹ The views and opinions expressed in this commentary are those of the author, and should not be attributed to the State University of New York, Empire State College, the New York City Department of Correction, or its trustees.

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The Predictive Validity of the LSI-R on a Sample of Offenders Drawn from the Records of the Iowa Department of Corrections Data Management System

¹ The predictive validity of the LSI-R by race and ethnicity has been mixed and is still requiring additional research. However, studies have reported modest predictive validity by ethnicity (Holsinger, Lowenkamp & Latessa, 2006) and low predictive validity by race (Schlager & Simourd, 2007).

² A t-test, comparing the difference in means, or average LSI-R total scores, found that there was a significant difference in the actual total scores between probation and parole. However, based on the MHS cutoffs, both supervision status types would still be categorized as a moderate risk level.

³ The average score on the Criminal History domain for the Parole Group was 6.70 and the average score on the Criminal History domain for the Probation Group was 3.94. A t-test indicated that there was a significant difference between these two risk scores ($p < .001$).

⁴ The smaller sample size of female parolees ($N=26$) and non-white parolees ($N=53$), may account for the lack of significance with these correlations.

Probation and Parole Officers Speak Out—Caseload and Workload Allocation

¹ This lack of certainty of punishment is contrary to traditional conceptions of deterrence theories, which are predicated on the notion of offenders perceiving that criminal behaviors and technical violations will be met with punishment. Many jurisdictions are finding it difficult to respond adequately to noncompliant probationer behaviors due to overcrowding and funding issues, with some courts actually informally requesting that only the most serious probation violators be brought back to court.

² See Warchol (2000) and Bonta, Wallace- Capretta, and Rooney (2000) for a more complete historical development of ISPs. On the effects of caseload size, see Worrall, Schram, Hays, and Newman (2004)

Thacher, Augustus, and Hill—The Path to Statutory Probation in the United States and England

¹ The author is grateful to Professors Andrew Karmen and John Kleinig of John Jay College of Criminal Justice for their helpful comments

Looking at the Law—Probation Officers' Authority to Require Drug Testing

¹ In 1984, Congress replaced the Federal Probation Act with provisions in the SRA that repealed the chapter in Title 18 that contained the Federal Probation Act (except for '3656, which was renumbered '3672), effective November 1, 1987. While new '3603 applied only to offenses committed after November 1, 1987, the following language in '3655, construed by courts to authorize officers to require drug tests, was carried over to new '3603: '3655. Duties of probation officers. The probation officer shall furnish to each probationer under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. He shall keep informed concerning the conduct and condition of each probationer under his supervision and shall report thereon to the court placing such person on probation. He shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid probationers and to bring about improvements in their conduct and condition. 18 U.S.C. '3655 (1984) (repealed).

² See *United States v. Stephens*, 424 F. 3d 876, 885 (9th Cir. 2005) (Clifton, J., concurring in

part, dissenting in part); *United States v. Melendez-Santana*, 353 F. 3d 93, 105-06 (1st Cir. 2003) (recognizing that drug testing was authorized under ‘ 3603, but holding that it had been superseded by the mandatory drug testing provisions implemented by the VCCA), partially overruled on other grounds by *United States v. Padilla*, 415 F. 3d 211 (1st Cir. 2005) (en banc) (unlawful delegation of judicial discretion to determine the maximum number of drug tests to a probation officer is not subject to plain error review); *United States v. Duff*, 831 F. 2d 176, 178-79 (9th Cir. 1987) (holding that a probation officer has the power to order a defendant to submit to drug testing under 18 U.S.C. ‘3655 (the predecessor to ‘3603) even when the court had not explicitly imposed such a condition); *United States v. Smith*, 45 F. Supp. 2d 914, 919 (M.D. Ala. 1999) (holding that a probation officer’s authority under ‘3603, which took effect in 1987, was identical to that described in its predecessor, ‘3655).

³ Pub. L. No. 98-473, 98 Stat. 1987 (1984) (currently codified at 18 U.S.C. ‘3563(b)(9) and 18 U.S.C. ‘3583(d)).

⁴ 18 U.S.C. ‘ 3603(2), (3) & (7).

⁵ 831 F. 2d 176 (9th Cir. 1987).

⁶ *Id.* at 178-79.

⁷ *Id.* at 179 (emphasis added).

⁸ See *United States v. Morey*, 120 F. 3d 142, 143 (8th Cir. 1997) (probation officer authorized to require drug testing in furtherance of a special condition requiring participation “as instructed by the probation office” in drug treatment; “[g]iving the probation officer authority to require additional drug treatment [and testing] . . . is an appropriate discretionary condition that goes beyond the drug testing mandated by ‘3583(d)); *United States v. Schoenrock*, 868 F. 2d 289, 291 (8th Cir. 1989) (same); *United States v. Williams*, 787 F. 2d 1182, 1185 (7th Cir. 1985) (per curiam) (requirement to submit to random drug testing was narrowly tailored to prevent future drug use); *United States v. Consuelo-Gonzalez*, 521 F. 2d 259, 265-66 (9th Cir. 1975) (“The only limitation [imposed on a sentencing judge’s power to impose conditions] is that the conditions have a reasonable relationship to the treatment of the accused and the protection of the public.”). See also 18 U.S.C. ‘ 3583(d) (in addition to specified discretionary conditions, a court may impose “any other condition it considers to be appropriate”).

⁹ Two years after Congress created the discretionary drug treatment conditions, Section 1861(b)(1) of the Anti-Drug Abuse Act of 1986 authorized the Director of the Administrative Office of the United States Courts to contract and pay for testing and treatment. Pub. L. No. 99-570, 100 Stat. 3207 (1986).

¹⁰ 424 F. 3d 876 (9th Cir. 2005).

¹¹ *Id.* at 882.

¹² *Id.* at 883 (quoting *United States v. Fellows* 157 F. 3d 1197, 1204 (9th Cir. 1998)).

¹³ See *United States v. Heath*, 419 F. 3d 1312, 1315 (11th Cir. 2005) (delegating the ultimate decision of whether an offender must participate in mental health treatment program, in contrast to permissible delegation of administrative details regarding the type of program, was an unconstitutional delegation of sentencing authority); *United States v. Pruden*, 398 F. 3d 241, 251 (3d Cir. 2005) (condition of supervised release was an unconstitutional delegation of authority because it allowed probation officer to determine need for mental health treatment); *United States v. Melendez-Santana*, 353 F. 3d 93, 101 (1st Cir. 2003) (“Rather than simply vesting the probation officer with the responsibility for managing the administrative details of drug treatment, the court granted the probation officer the authority to decide whether Melendez would have to undergo treatment after testing positive for drugs. That treatment decision must be

made by the court[.]”); *United States v. Allen*, 312 F. 3d 512 (1st Cir. 2002) (affirming condition giving probation officer discretion to determine the details of the offender’s mental health treatment sessions; condition not an improper delegation of judicial sentencing authority because the court decided whether the defendant received treatment, and the probation officer only determined the type of mental health program); *United States v. Sines*, 303 F. 3d 793, 799 (7th Cir. 2002) (“[A] district court . . . must itself impose the actual condition requiring participation in a sex offender treatment program.”); *United States v. Peterson*, 248 F. 3d 79, 84-85 (2d Cir. 2001) (lawful delegation to probation officer regarding scheduling and selection of mental health treatment); *United States v. Kent*, 209 F. 3d 1073 (8th Cir. 2000) (unlawful delegation of judicial authority where probation officer authorized to determine if person sentenced must attend a psychological/ psychiatric counseling program).

¹⁴ Pub. L. No. 103-322, 108 Stat. 1796, 1830-31 (1994) (currently codified at 18 U. S. C. ’3563(a) (5) (probation), ’3583(d) (supervised release), and 4209(a) (parole)).

¹⁵ Section 3583(a)(5) provides: [F]or a felony, a misdemeanor, or an infraction, that the defendant refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant’s presentence report or other reliable sentencing information indicates a low risk of future substance abuse by the defendant. 18 U.S.C. ’3583(a)(5). Section 3583(d) was amended to require a court to “order, as an explicit condition of supervised release, that the Defendant refrain from any unlawful use of a controlled substance and submit to a drug test within fifteen days of release . . . and at least two periodic drug tests thereafter (as determined by the Court).” 18 U.S.C. ’3583(d).

¹⁶ 45 F. Supp. 2d 914 (M.D. Ala. 1999).

¹⁷ *Id.* at 918 (emphasis added).

¹⁸ *Id.* at 918-19 (quoting 18 U.S.C. ’3603(3)).

¹⁹ 146 F. 3d 502 (7th Cir. 1998).

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²⁴ 353 F. 3d 93, 105-06 (1st Cir. 2003), partially overruled on other grounds by *United States v. Padilla*, 415 F. 3d 211 (1st Cir. 2005) (en banc) (unlawful delegation of judicial discretion to determine the maximum number of drug tests to a probation officer is not subject to plain error review).

²⁵ *Id.* at 101 & n. 6.

²⁶ *Id.* at 104.

²⁷ *Id.* at 106.

²⁸ *Id.* at 105.

²⁹ *Id.* at 105.

³⁰ Id.

³¹ The Smith court stated: The amendment uses the phrase “at least” to describe the number of tests the court must impose. It does not state that three drug tests should be the maximum unless otherwise specified by the court. Clearly then, the purpose of the amendment is to set a minimum number of drug tests that a court must impose, not a maximum. Smith, 45 F. Supp. 2d at 918.

³² Melendez Santana, 353 F. 3d at 103-04.

³³ Id. at 105. The First Circuit overturned similar conditions imposed upon defendants convicted of illegal reentry in *United States v. Tulloch*, 380 F. 3d 8, 10-11 (1st Cir. 2004) (“the sentencing court essentially ‘vest[ed] the probation officer with the discretion to order an unlimited number of tests,’ which it could not do”) (quoting Melendez-Santana, 353 F. 3d at 103).

³⁴ Id. (quoting *Natural Resources Defense Council, Inc. v. EPA*, 824 F. 2d 1258, 1278 (1st Cir. 1987)).

³⁵ *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). In *Watt*, the Supreme Court observed the strong presumption against the sort of “repeal by implication” that the First Circuit found in Melendez Santana: [W]e decline to read . . . statutes as being in irreconcilable conflict without seeking to ascertain the actual intent of Congress. Our examination of the legislative history is guided by another maxim: “ ‘repeals by implication are not favored.’ ” . . . “The intention of the legislature to repeal must be ‘clear and manifest.’ ” . . . We must read the statutes to give effect to each if we can do so while preserving their sense and purpose. Id. (citations omitted).

³⁶ Melendez Santana, 353 F. 3d at 105.

³⁷ 424 F. 3d 876 (9th Cir. 2005).

³⁸ The issue was also implicated by the Bonanno holding, but the Seventh Circuit did not have occasion to address it in its opinion.

³⁹ Id. at 886 (Clifton, C. J. dissenting).

⁴⁰ Id.

⁴¹ The majority attempted to forestall any attempt to reconcile its holding with Duff by characterizing Duff as irrelevant to the drug-testing authority at issue in Stephens: The dissent claims our resolution ignores the binding precedent of Duff, that a probation officer has the authority to require drug testing even where never ordered by the district court. However, Duff is easily distinguished. The case considered the question of whether the probation officer had the power under 18 U.S.C. ‘ 3655 (1982 & Supp. III 1985), repealed by Pub. L. No. 98-473 (now codified at 18 U.S.C. ‘ 3603), to order Duff to submit to nontreatment drug testing. Here, we construe an entirely different statute, ‘ 3583(d), which specifically sets forth the obligation of the district judge to determine the number of drug tests. Id. at 884 n. 4.

⁴² While Stephens addressed only the ‘3583(d) mandatory testing condition, section 204143 of the VCCA imposed identical mandatory testing provisions for probationers in 18 U.S.C. ‘3563(a)(5) (as a condition of probation) and for parolees in 18 U.S.C. ‘4209 (as a condition of parole) (repealed). Under ‘3563(a)(5), the court must determine the maximum number of drug tests for probationers. Section 4209 required the Parole Commission to do the same when imposing parole conditions. Because ‘3563(a) (5), like ‘3583(d), requires that the district court determine the maximum number of mandatory drug tests, the Office of General Counsel and the Office of Probation and Pretrial Services advised that Stephens applies equally to drug testing of probationers. The same observation applies in the First and Seventh Circuits. By contrast, the

mandatory drug testing provision under ‘4209 requires the Parole Commission, and not the court, to determine the maximum number of mandatory tests. The delegation of Article III judicial power at issue in Stephens is not implicated when a probation officer determines the number of drug tests for parolees. In addition, 28 C.F.R. ‘2.38 authorizes probation officers to provide such parole services as the Commission may request. Stephens therefore did not require officers in the Ninth Circuit (or officers elsewhere conducting courtesy supervision of offenders within the jurisdiction of a Ninth Circuit district court) to alter their practices regarding mandatory drug testing of parolees if the Parole Commission had imposed a condition authorizing a probation officer to determine the number of drug tests for a parolee under supervision.

⁴³ 476 F. 3d 471 (7th Cir. 2007).

⁴⁴ *Id.* at 472. In addition to his special treatment condition, Dropik was subject to a mandatory testing condition. As the government noted in its brief and as Dropik’s judgment reveals, however, the district judge only required Dropik to submit to the statutory minimum of three mandatory tests, and the court delegated no authority to the probation officer to require additional testing under the mandatory condition. Thus, the only delegation issue before the Tejada panel was delegation to probation officers in the drug treatment special conditions.

⁴⁵ 146 F. 3d 502 (7th Cir. 1998).

⁴⁶ Tejada was the first published case erroneously applying the requirements of the ‘3583(d) mandatory condition to drug testing pursuant to a drug treatment special condition. The Seventh Circuit had previously issued at least one unpublished opinion that also misapplied the mandatory drug testing provision to a drug treatment special condition, however. See *United States v. Sam*, Nos. 05-2190 & 05-2418, 2006 WL 1586010 (7th Cir. 2006).

⁴⁷ Tejada, 476 F. 3d at 473 (“The authority to order drug testing comes from 18 U. S. C. ‘3583(d), which sets out conditions of supervised release. . . .”).

⁴⁸ Section 5D1. 3(d)(4) recommends: If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol ‘a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol. U.S.S.G. ‘5D1. 3(d)(4) (emphasis added).

⁴⁹ 424 F. 3d 876 (9th Cir. 2005).

⁵⁰ *Id.* at 882.

⁵¹ Tejada, 476 F. 3d at 473-74. The Ninth Circuit case cited by the Tejada panel, *United States v. Maciel-Vasquez*, 458 F. 3d 994 (9th Cir. 2006), discussed Stephens and observed that district courts may authorize probation officers to designate drug and alcohol testing if it is incidental to a treatment program, but are precluded from delegating if testing is required pursuant to a ‘3584(d) mandatory condition. The condition in *Maciel-Vasquez* was deemed “somewhat ambiguous” because it was unclear whether the district court had authorized the officer to require testing as a part of treatment or pursuant to a mandatory testing condition. The same cannot be said for the special condition in Tejada, which clearly required testing only as a component of treatment.

⁵² In Stephens, the Ninth Circuit affirmed a treatment and testing special condition that required the offender to “participate in a drug and alcohol abuse treatment and counseling program, including urinalysis testing, as directed by the Probation Officer.” Stephens, 424 F. 3d at 879. The special condition allegedly endowing probation officers with too much discretion in Tejada likewise required the offender to “participate in a program of testing and residential or outpatient treatment for drug and alcohol abuse, as approved by the supervising probation officer, until such time as he is released from such program.” Tejada, 476 F. 3d at 472-73.