

# A Theoretical Basis for Handling Technical Violations

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**ONE OF THE MAIN** features of community supervision is the importance attached to rules governing the behavior of the offender. The probationer's performance, movements, and attitudes are measured against the conditions of probation.

In 1973 the federal probation system used various generic requirements as conditions of probation, including: not breaking the law, associates, work, leaving jurisdiction, changes of address, following instructions, and reporting. By the 1995 things had changed. Federal statute (Section 5B1.4) provides a current list of recommended conditions for probation and supervised release. The court can impose a condition that the defendant not commit another federal, state or local crime during the term of probation. The court can also impose a condition that the defendant not possess illegal controlled substances. The court may impose other conditions that 1) are reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing and 2) involve only such deprivation of liberty or property as are reasonably necessary to effect the purposes of sentencing (USCA 1994 P.P. 5B1.3). If a term of probation is imposed for a felony, the court shall impose at least one of the following as a condition of probation: a fine, an order of restitution, or community service, unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the conditions set forth under 18 U.S.C. Sec. 3563(b)(11). These conditions include not

leaving the jurisdiction, reporting, honest reporting and following instructions, meeting family obligations, regular work, changes in employment or residence, substance abuse, associates, field visits, notification of arrest, working as an informer, and notification of inherent risk accompanying record.

Further conditions can be placed on the offender concerning possession of a firearm, payment of restitution, payment of fine, access to financial records, halfway house residency, home detention, community service, occupational restrictions, treatment, and electronic monitoring.

Ethical and legal problems arise when the probationer's behavior reaches the point that a violation is filed with the court (Smith and Berlin, 1979). The technical violation is a transgression against the conditions the probationer was ordered to live under. A technical violation is the most difficult to handle because of the discretion granted the officer, the prosecutor, and the court in the matter. If the probationer has rejected every available community resource and continues to pose a threat to the community, there is reason enough to bring the probationer back into court. It is assumed the offender cannot be managed in the community and should be sent to jail. If the probationer refuses to report, the officer needs to understand the reason for this failure. The problems could be related to work, transportation, substance abuse, the officer's attitude toward the probationer, or a breakdown in communication. Further investigation is warranted to sufficiently address the problem. It may be necessary for the probationer to report to another officer.

## Findings

Many probation officers are hesitant to bring a probationer to court for a violation. First, a new charge may be unfounded and dismissed by the court, which would mean a waste of time. Second, the officer may seek time to develop an alternative treatment plan. This is important if the officer wishes to maintain the relationship with the probationer and is concerned that a hearing will reverse the process. Third, the officer may feel somewhat responsible for the client's failure. This opinion certainly can develop out of recognition of the lack of time available for each case with rising caseloads and greater numbers of presentence reports.

Interviews conducted by the author with over 50 probation officers reveal that not all officers are likely to be concerned with violating the probationer and that something else might be happening. Officers report that by the time the violation has been brought to court, numerous instances have occurred in which the probationer chose to act contrary to the law and conditions of probation. Most officers take violations very seriously and only bring them to court after an administrative hearing has been held and other warnings have been issued. Often there appears to be no other alternative. One juvenile officer said: "Sometimes we have kids who are placed on probation who should never be on probation. You can also be fooled by it because the ones who you think should have gone away to jail sometimes work out and the ones that you think have everything going for them fail." Another added: "If I violate the probationer, it is not because I

don't like him. This is the responsibility that we both have. If we meet these responsibilities we won't have any problems."

One adult officer spoke of the frustrations of violations:

Violations are the most frustrating part of this job. It is extremely time consuming. When he violates probation he is violating the judge's order and yet the judge says we have a probation officer who is accusing you of having violated your probation. He gets a lawyer and we go to trial. The DA prosecutes and I am the witness for the prosecution. The judge is trying to decide if I am telling the truth or the probationer is telling the truth. So a lot of times arrangements have been made beforehand. Then it is a question of what will we do. Fifty percent of the time or more the defense attorney talks the judge into continuing him on probation. The defense attorney's thinking is just the opposite of mine. His thinking is, that if the judge didn't lock this guy up for his original crime, why would you even consider locking him up for something as insignificant as not reporting to a probation officer. They make me look like a schmuck.

And finally one ISP officer had this to say:

I almost never violate on "just not reporting." It is a bullshit technical violation. If he has a consistent record of failing to report, usually he will become an absconder, and I will get him with a warrant. If they are not reporting they are not going to counseling, they are not going to the clinic, they are not following up any other conditions of probation. Sometimes a violation is the only way to get their attention. He has a couple missed reports, he has a few positive urine tests for cocaine, marijuana, and you go into court for a violation on all of these things. That process will take you a month and a half. By the time that you get an arraignment, lawyer is assigned, you come back, conduct a hearing, adjournments, usually he is out because they set bail. Now in that month and half process, if you chose to refer him back to the clinic, you start working with a pre-existing relationship with the clinic, you know some of the counselors and you ask what do you think of this guy's chances? If I get some positive feedback from the counselor, even if I am in a violation process on the guy, I

will send him back there. If during that violation he does pretty well, you have got some options open to you.

Further elaboration on the conditions of probation is found in the Survey of Adults on Probation (SAP), a survey conducted by the Bureau of Justice Statistics on over 4000 probationers. Probation conditions are an important feature of probation supervision. The SAP data indicate that 82 percent of probationers are given three or more conditions, which often include monetary penalties, drug testing, employment requirements, and mandatory treatment. Monetary requirements were the most common condition (84 percent). We find that 61 percent were required to pay supervision fees, 56 percent were to pay a fine, and 55 percent were to pay court cost. Another 33 percent are required to pay victim restitution. One in ten probationers were restricted from any contact with the victim. One in four were required to perform community service, two of every five were required to maintain employment, to enroll in an employment or educational program. Ten percent of the probationers were under some form of monitoring or restriction of movement. Since so many probationers were convicted of public order offenses, especially those related to alcohol abuse, it is not surprising that two out of five probationers (40 percent) were required to enroll in substance abuse treatment. Alcohol treatment is required more frequently for misdemeanants than for felons (41 percent, compared to 21 percent), while drug treatment is required more often for felons (28 percent compared to 15 percent). Nearly a third of all probationers were subject to mandatory drug testing (Bonczar, 1997: 9).

Probationers who violate a condition of probation and are arrested for a new offense are called before court to review the circumstances of their violation. Such occasions may call for the issuance of an arrest warrant for the probationer who has absconded, imposition of a jail sentence, or reinstatement of probation with or without new conditions. It is estimated, using the SAP data, that of 18 percent of all adults on probation had experienced one or more formal disciplinary hearings. The data also indicate that of probationers who had served 36 months or more on probation, 38 percent had at least one formal hearing, compared to the 5 percent who had served less than 6 months on probation. Disciplinary hearings were more common among probationers who were unemployed

and those with prior sentences. Failure to maintain contact was the most frequent reason for the hearing. Despite what might be expected with violations, over 40 percent of the probationers received new conditions rather than incarceration (40 percent vs. 29 percent). (Bonczar, 1997: 9-10)

The rates of recidivism of probationers were historically low due to the selection of persons who were likely to succeed on probation. Today, however, we find felons on probation who have much higher rates of recidivism (Petersilia et al., 1985). Based on federal data alone, there were 20,956 probation terminations: 81 percent had no violations, 10 percent experienced technical violations, 3.5 percent were charged with new crimes, and 5 percent had administrative case closures (Bureau of Justice Statistics, 1996). At the federal level, we are dealing with 2,900 technical violations during any one year. Some officers violate as many as 25 probationers per year, some of whom are absconders.

In a record check of over 4000 cases in the SAP data there were a reported 2,172 technical violations. With the recent history of getting tough on offenders, one would expect violators to be given jail time when they fail to comply with the conditions of probation. This is not true. It seems clear that probationers are given new conditions when they have problems during supervision. If the offender is convicted of a new offense, we find that offenders are likely to be given a new condition (37 percent) more frequently than incarcerated (28 percent). Those arrested for a new offense are more likely to receive new conditions over jail time, too. Of offenders who abscond, 25 percent received jail time, but slightly more (28 percent) were given new conditions. We see a reluctance to put offenders in jail for their noncompliance. To some degree we see a sizeable proportion of offenders who experience no new conditions in response to their technical violations. This pattern continues with positive drug test, failure to appear, failure to pay fines, failure to attend and complete program, and other technical violations. This data indicates that the courts are approaching violations not as a means to discipline the offender but as a means to gain the offender's compliance with the law.

## PROBATION REVOCATION HEARINGS OUTCOMES

Reasons for Hearing	Outcome Incarcerated	Outcome Charges Not Sustained	Outcome New Conditions	Outcome No New Conditions	Outcome Hearing Continued	Outcome Other Outcome	Outcome Still Pending	Totals
Convicted New Offense	44 (28 percent)	1 (.0001 percent)	58 (37 percent)	20 (13 percent)	6 (.04 percent)	15 (10 percent)	11 (.07 percent)	155 (100 percent)
Arrest for New Offense	73 (21 percent)	25 (7 percent)	120 (35 percent)	38 (11 percent)	19 (5 percent)	54 (16 percent)	11 (3 percent)	340 (100 percent)
Absconded	39 (25 percent)	1 (.006 percent)	44 (28 percent)	31 (20 percent)	5 (.031 percent)	21 (13 percent)	16 (10 percent)	157 (100 percent)
Positive Drug Test	20 (18 percent)	0 (0 percent)	35 (31 percent)	16 (14 percent)	10 (9 percent)	17 (15 percent)	14 (13 percent)	112 (100 percent)
Failure to Appear	62 (16 percent)	3 (.007 percent)	94 (25 percent)	76 (20 percent)	22 (6 percent)	61 (16 percent)	61 (16 percent)	379 (100 percent)
Failure to Pay Fines	57 (12 percent)	9 (2 percent)	126 (27 percent)	97 (21 percent)	26 (5 percent)	88 (19 percent)	65 (14 percent)	468 (100 percent)
Failure to Attend and Complete Program	43 (17 percent)	2 (.008 percent)	52 (21 percent)	53 (21 percent)	16 (6 percent)	40 (16 percent)	43 (17 percent)	249 (100 percent)
Other Technical Violations	46 (15 percent)	3 (1 percent)	64 (20 percent)	64 (20 percent)	16 (5 percent)	70 (22 percent)	49 (16 percent)	312 (100 percent)
Totals								2172

### PO Authority

The American Probation and Parole Association believes officer authority to impose conditions of supervision is valid and deserves support, to promote consistency in the response to violations. In a recent survey (APPA, 2001) of APPA members, fewer than half (46 percent) of the respondents indicated that field officers have the authority to modify conditions of supervision. However, a substantial number (69 percent) felt that officers modified conditions informally. It is apparent in some jurisdictions that line officers feel justified in altering some aspects of an offender's supervision strategy, regardless of whether this is a matter of policy. Two states, Oregon and South Carolina, have programs that provide specific guidelines for the officer to increase imposed sanctions. In South Carolina, for example, field officers have a range of options that include: placing the offender in a halfway house, placements in a treatment facility, restructuring the plan of action, increasing contacts, and ordering additional community service. As is noted, the primary purpose here is to increase punitive sanctions. There appears to be little interest in lessening the severity of conditions of supervision without some type of judicial review. It is believed that by permitting the

officer to react quickly by modifying supervision conditions, the officer avoids the time-consuming task of obtaining a warrant and scheduling a case before a judge. It also gives the officer some flexibility to explore treatment options that hold the offender accountable and increase the officer's effectiveness. On the other hand, some argue that granting the officer additional authority only confuses the offender as to who has jurisdiction. There is also some belief that court-imposed sanctions have a greater impact. Moreover, there is concern that such a system will lead to abuses of discretion and greater liability for the officer. Last, there is concern that such activities will only diminish the existing relationship with the judiciary. The current practice of agent-imposed sanctions on an informal basis can result in vague, misunderstood, and often misapplied discretion instead of a policy-driven, risk-based violation process (Stroker, 1991).

### Forces at Work

As a result of the Comprehensive Crime Control Act of 1984, probation is considerably different from the dichotomous enforcement-social welfare model put forward by others earlier (Hughes and Henkel, 1997). Sentencing guidelines and mandatory minimum

sentences now set the tone and the probation officer-as-caseworker role is no longer predominant. At the state level, the recent language of the performance-based measures emphasizes risk assessment, resource allocation, and internal assessment.

### Regulation

Crime control is achieved through a combination of three forms of social regulation: self (internal processes), group (family, clan, gang, clique, workgroup, etc.), and state regulatory mechanisms. Self-regulation is manifested in the personal acceptance, through socialization, of various norms, customs, values, and traditions which were designed to reinforce conventional social practices (Nadel, 1953). Group regulation is the imposition of social control over the behavior of group members through the establishment, enforcement and punishment of group normative behavior. State regulation, as exemplified in criminal justice system, is a tertiary social control mechanism that becomes necessary after self-regulatory and group regulatory mechanisms have failed

Tomaino (1975) has offered a paradigm of probation supervision that considers rehabilitation on one axis and control on the other axis. The "let-him-identify" position places

the offender at the midpoint of both rehabilitation and control. Sentiments for rehabilitation and control are neither very high nor low. Probationers are thought to keep the rules if they like the probation officer and identify with him/her and his/her values, i.e., if the probation officer presents himself as a good role model. More important, the PO must work out compromises in his relations with the probationer. These compromises are manifested in negotiations between the probationer and the officer, within the context of organizational and environmental uncertainty and the officer's need to use discretion. Regulation, therefore, is affected by concerns for loose coupling, uncertainty, discretion, and compliance.

### Loose Coupling and Uncertainty

Hagan, Hewitt, and Alwin (1979) point out that one source of loose coupling is the historical shift from classical to positivist philosophy of crime and punishment. Moreover, they argue that the goals of court efficiency and individualized justice of probation are contradictory. To resolve the problem, the probation system is decoupled from the court system. Probation agencies, as loosely coupled organizations operating in a field of uncertainty, are characterized by structural elements that are loosely linked to each other, rules that are often violated, decisions that go unimplemented, technologies that are problematic, and evaluations that are subverted or rendered so vague they provide little coordination (Meyer & Rowan, 1977: 343). It is often difficult to identify what tasks are actually related to the accomplishment of specific goals in coping organizations (Stojkovic, Kalinich and Klofas, 1998: 202).

The perception of uncertainty in the environment is the result of three conditions: a lack of information about environmental factors important to decision making; an inability to estimate how probabilities will affect a decision until it is implemented; and a lack of information about the cost associated with an incorrect decision (Duncan, 1972). In other words, there is a great deal of important missing information, and there is little understanding of what will actually happen, and how much it will cost.

A high degree of uncertainty about the mission and how it is to be applied offers clear evidence of the social construction of the problems addressed by the agency (Hawkins & Thomas 1984, 17-18). Social constructionists focus primarily on the interpretation of

reality according to individual bureaucrats. Under circumstances of high caseloads, complicated offender treatment needs, and harsh and seemingly unfair sentences, there are few objective indicators of successful performance. Again, the officer's application of individualized punishments leaves some rules enforced and others not.

### Discretion

Public service workers who interact with citizens in the course of their jobs and who have substantial discretion in the execution of their work are called street-level bureaucrats (Lipsky, 1980:4). The concept of regulatory uncertainty implies a forced tolerance for individual conduct. This tolerance is exhibited in the choice of harmful activity subject to control. For example, a probation officer is not able to completely restrict all of the possible illegal activities available to a probationer. Second, regulatory agencies are charged with a particular policing mission. However, there is still the question as to the objective: Should the mission be eradication or the repression of the problem? If the behavior is not considered serious, is it to be repressed and handled with a measure of discretion? How much attention each violation receives depends on the resources available (Kagan, 1978:11). It would seem that officers use their discretion not so much to deter the offender but to regulate the offender's behavior, done in full recognition that rehabilitation may not be needed or always possible and that acceptable levels of incapacitation can only be achieved within certain limits. Rules, however, may be impediments to effective supervision, in that individualized justice would indicate a different course of action than the one called for by policy.

### Compliance

The principal objective of a regulatory system is to secure compliance with the law. Compliance systems are premonitory, they attend to a set of conditions prior to any violation in order to induce conformity. The idea is to prevent the violation rather than punish it. Bargaining and informal negotiations are central. The regulatory model of probation, furthermore, requires elaboration of the compliance concept. Maximization of the regulatory process is achieved by applying Garland's (1990, 132) concepts essential to the regulatory process: inspection, discipline, and normalization under conditions respecting human dignity.

### Inspections

Officer inspections of the clients are accomplished by field visits at home and work, blood and urine tests for drugs and alcohol, and checks conducted with various collateral sources who have knowledge and responsibility for the offender. Inspections, with the aid of technology, are conducted for the purpose of seeing if the offender is in compliance with the conditions set by the court.

### Discipline

Discipline is achieved in meeting the obligations our daily routines impose on us. What this means is that probationers are disciplined by the daily routine they are expected to live by, including: work, treatment, family obligations, etc. Discipline is maintained through inspections to determine whether compliance is achieved. The actual sanctions tend to bring conduct "into line" and help make the individual more self-controlled (Garland 1990:145). The goal is to be self-disciplined or self-regulated.

### Normalization

The real work of normalization is to further the reintegration process. Normalization is achieved by providing the offender with a combination of employment, job training, schooling, or counseling. It is hoped that through these skills the offender will become more self-controlled, self-motivated, compliant, and, once again, a full-fledged member of the community.

These three components of regulation provide the means for supervising the offender according to the reordered emphasis given to control, supervision and management. They allow the officer who desires to do so to treat the probationer as something more than a mere object of punishment, as someone who does command respect, support and understanding; as someone deserving dignified treatment.

### Conclusion

In dealing with their clients, probation officers have become regulators. They deal with the client in terms of compliance and bargaining in a field permeated by uncertainty. These street-level bureaucrats (Lipsky, 1980:5) are the essence of the criminal justice system, and how these employees are supervised and evaluated is one of the most pressing issues facing the criminal justice administration into the next century: Probation has entered a period

of post-modern maturity where it might consider becoming more aware of the realities of supervision and spending less emphasis on providing measures intended to restrict officer performance.

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