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COMMENT

Narrowing the Scope of Pornography: Why Released Sex Offenders Need to Know It When They See It

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INTRODUCTION

Imagine that a court convicts George and Christopher for possession of child pornography and sentences them to prison terms.[1] In both cases, the court also places the defendant on supervised release following his imprisonment.[2] The courts further impose special conditions on their supervised releases, banning them from possessing all forms of pornography.[3] Both men appeal their sentences, maintaining that the special conditions violate their rights under 18 U.S.C. § 3583(d) to have reasonable conditions of supervised release.[4] They further contend that the special conditions of release violate their First Amendment right of free speech and Fourteenth Amendment due process rights.[5] While the facts of each case are identical, the outcomes of their appeals are not.[6] The outcomes are different because of each court's distinct interpretation of 18 U.S.C. § 3553 and 18 U.S.C. § 3583.[7] These statutory provisions represent the standards governing the imposition of sentences and the imposition of special conditions of supervised release.[8] In George's case, the appellate court decides that the special condition upon release is neither overly broad nor unconstitutionally vague.[9] The court bases its decision on the

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[1] This hypothetical is loosely based on the facts of *United States v. Loy*, 237 F.3d 251 (3d Cir. 2001) and *United States v. Boston*, 494 F.3d 660 (8th Cir. 2007). The parties are fictitious. *See infra* Part II (discussing facts, holding, and rationale of *Loy* and *Boston*).

[2] *See generally Loy*, 237 F.3d at 255 (describing defendant's sentence of supervised release following imprisonment).

[3] *See generally id*. (describing special conditions placed on defendant's supervised release).

[4] *See* 18 U.S.C. § 3583(d). *See generally Boston*, 494 F.3d at 665 (noting that defendant appealed sentence based on § 3583(d) violation); *Loy*, 237 F.3d at 255 (explaining that defendant appealed sentence based on violation of fundamental statutory rights).

[5] *See* U.S. CONST. amend. I; U.S. CONST. amend. XIV. *See generally Boston*, 494 F.3d 660 (explaining that defendant asserted violations of both First Amendment and Fourteenth Amendment rights); *Loy*, 237 F.3d 251(noting that defendant asserted both First Amendment and Fourteenth Amendment violations).

[6] *Compare Loy*, 237 F.3d at 267 (holding that pornography condition is unconstitutionally vague), *with Boston*, 494 F.3d at 667 (concluding that pornography condition is not overly broad).

[7] *See* 18 U.S.C. §§ 3553(a)(1), 3553(a)(2)(B)-(D), 3583(d)(1-3) (2010) (enumerating relevant factors necessary for imposing sentences generally and for special conditions of supervised release specifically); *Boston*, 494 F.3d at 667; *Loy*, 237 F.3d at 267.

[8] *See* 18 U.S.C. §§ 3553(a)(1), 3553(a)(2)(B)-(D), 3583(d)(1-3).

[9] *See generally Boston*, 494 F.3d at 667 (finding no problematic issues of vagueness).

public's interest in deterring George from committing future offenses.[10] Alternatively, the appellate court in Christopher's case decides that it should not impose the special condition upon release because of the unnecessary deprivation of liberty.[11] The differing results from identical factual backgrounds represent clearly inconsistent judicial application of the law, and the Supreme Court must resolve such inconsistency.[12]

Differing implementations of special conditions of supervised release are problematic because sex offenders frequently receive sentences with a term of supervised release following imprisonment.[13] Under 18 U.S.C. § 3583, individuals sentenced to incarceration for a misdemeanor or felony may be subject to a subsequent term of supervised release.[14] Several mandatory conditions accompany these terms of supervised release, including prohibitions on the commission of any crime and possession of controlled substances during release.[15] In addition, § 3853 states that courts may choose to mandate special conditions of release specific to the defendant's case.[16]

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[10] *See generally* 18 U.S.C. § 3553(a)(2)(C) (identifying that courts should consider need for sentence to protect public from further crimes committed by defendant); *Boston*, 494 F.3d at 667 (holding condition of supervised release constitutional based on desire to deter him from this conduct in future).

[11] *See generally* 18 U.S.C. § 3583(d)(2) (explaining that court may not impose conditions that deprive liberty more than is reasonably necessary); *Loy*, 237 F.3d at 267 (declaring that condition chills defendant's First Amendment rights).

[12] *See Boston*, 494 F.3d at 667; United States v. Antelope, 395 F.3d 1128, 1130-32 (9th Cir. 2005); *Loy*, 237 F.3d at 267; *infra* Part III (arguing that Supreme Court should side with Third Circuit's decision in *Loy*, and that court should construct and adopt specific legal definition of pornography).

[13] *See* United States v. Wilkinson, 282 F. App'x. 750, 752 (11th Cir. 2008) (convicting defendant of shipping child pornography and sentencing him to 160 months imprisonment followed by ten years supervised release); *Boston*, 494 F.3d at 664 (convicting defendant of producing child pornography and sentencing him to 360 months in prison followed by lifetime supervised release); *Antelope*, 395 F.3d at 1130-32 (convicting defendant of possession of child pornography and sentencing defendant to twenty months in prison followed by three years supervised release); *Loy*, 237 F.3d at 255 (convicting defendant of knowingly receiving child pornography and sentencing defendant to thirty-three month imprisonment followed by three years supervised release).

[14] 18 U.S.C. § 3583(a) (noting that court may include term of supervised release after imprisonment as part of sentence requirement for defendant).

[15] *See* 18 U.S.C. § 3583(d) (enumerating mandatory conditions when courts should order supervised release).

[16] *See id.* (noting that court may order, as further condition of supervised release, any other condition it considers appropriate).

In addition to statutory challenges, defendants often contend that special conditions are unconstitutionally vague under the Fourteenth Amendment or overly broad under the First Amendment.[17] Circuit courts of appeals are split regarding the constitutionality of special conditions that bar sex offenders from accessing pornography.[18] The Ninth and Third Circuits hold that these conditions are overly broad and unconstitutionally vague.[19] By contrast, the Eighth and Fifth Circuits maintain the opposite position.[20] This Comment analyzes the circuit split by examining the Eighth Circuit's *United States v. Boston* decision and the Third Circuit's *United States v. Loy* decision.[21]

This Comment argues that such special conditions are indeed vague and overly broad, and therefore, unconstitutional.[22] Courts must adopt a narrowly tailored definition of "pornography" to satisfy the First and Fourteenth Amendments and to maintain consistency in their administration of justice.[23] Part I introduces the legal background regarding special

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[17] *See Wilkinson,* 282 F. App'x. at 752 (raising both First Amendment and Fourteenth Amendment concerns); *Boston*, 494 F.3d at 664; *Antelope*, 395 F.3d at 1130-32 (noting that probationer raised Fourteenth Amendment question); *Loy*, 237 F.3d at 255 (involving both First Amendment and due process issues); United States v. Bee, 162 F.3d 1232, 1234-35 (9th Cir. 1998) (ruling on probationer's First Amendment claim).

[18] *See Wilkinson*, 282 F. App'x. at 754 (noting that courts have not addressed whether term "pornography" used in special conditions is unconstitutionally vague or overbroad or violates defendant's First Amendment rights). *Compare Antelope*, 395 F.3d at 1141-42 (concluding that supervised release condition barring access to pornography was unconstitutionally vague), *with Boston*, 494 F.3d at 667-68 (concluding that supervised release condition restricting access to pornography was constitutional).

[19] *See Antelope*, 395 F.3d at 1141-42 (concluding that supervised release condition restricting possession of any pornographic, sexually oriented or sexually stimulating materials was unconstitutionally vague); *Loy*, 237 F.3d at 263-67 (concluding that supervised release condition restricting possession of all forms of pornography, including legal adult pornography was unconstitutionally vague).

[20] *See Boston*, 494 F.3d at 667-68 (concluding that special condition barring defendant from possessing any form of pornography was not overbroad); United States v. Phipps, 319 F.3d 177, 192-93 (5th Cir. 2003) (holding that supervised release condition barring possession of sexually oriented or sexually stimulating materials was not unconstitutionally vague).

[21] *Compare Loy*, 237 F.3d at 264-65 (holding special conditions of supervised release barring access to pornography unconstitutional), *with Boston*, 494 F.3d at 667-68 (holding special conditions of supervised release barring access to pornography constitutional).

[22] *See infra* Part III (arguing that *Loy* court was correct in determining that special release condition barring pornography was unconstitutionally vague).

[23] *See* Miller v. California, 413 U.S. 15, 20 n.2 (1973); *Loy,* 237 F.3d at 263; Claudia Tuchman, *Does Privacy Have Four Walls? Salvaging* Stanley v. Georgia, 94 COLUM. L. REV. 2267, 2271 (1994) (explaining evolution of Court's definition of obscenity from Roth v. United States, 354 U.S. 476, 478 (1977) to *Miller*); *infra* Part III (arguing that courts must adopt precise legal definition of "pornography").

pornography conditions of release.[24] It introduces the standard that appellate courts use in determining whether the sentencing court abused its discretion.[25] Part II explains the current circuit split by examining *United States v. Boston* and *United States v. Loy*.[26] Part III argues that the Third Circuit's approach in *Loy* was correct and that the court in *Boston* failed to address important constitutional concerns.[27] First, the term "pornography" is too vague under the Fourteenth Amendment because neither the Supreme Court nor any federal court of appeals specifically defined "pornography."[28] Second, the special conditions of supervised release are overly broad and restrict fundamental freedoms under the First Amendment without any resulting benefit to public safety.[29] Finally, courts should prohibit special conditions of supervised release involving pornography because they delegate too much power to parole officers.[30] This Comment concludes that the Supreme Court should resolve the circuit split in favor of the *Loy* court.[31]

I. BACKGROUND

Courts utilize several statutes in assessing the constitutionality of special conditions of supervised release that prohibit access to pornography.[32] Courts also look to the Supreme Court case of *Miller v. California*, but this case only provides a flimsy, unworkable definition of

[24] *See infra* Part I (providing legal background regarding definition of "pornography").
[25] *See infra* Part I (introducing criteria used in determining if court abused its discretion in issuing additional conditions of supervised release).
[26] *Boston*, 494 F.3d at 661; *Loy*, 237 F.3d at 252; *see infra* Part II (explaining split in authority in circuit courts of appeal).
[27] *See infra* Part III (arguing in favor of *Loy* court's decision and criticizing holding in *Boston*).
[28] *See Loy*, 237 F.3d at 263; *infra* Part III.A (addressing concerns regarding need to develop legal definition of "pornography").
[29] *See infra* Part III.B (providing analysis of First Amendment right to receive information in context of special conditions of supervised release).
[30] *See infra* Part III.C (explaining that such delegation violates constitutional limits on judicial power under Article III).
[31] *See infra* Conclusion (emphasizing importance of issues court raised in *Loy* and supporting *Loy* court's ruling).
[32] *See* 18 U.S.C. §§ 3553, 3583 (2010); United States v. Boston, 494 F.3d 660, 667 (8th Cir. 2007); *Loy*, 237 F.3d at 256; *infra* Part I.A (providing background of statutes and explaining their application).

"pornography."[33] Without a specific definition, statutes that include the term "pornography" may be overly broad or unconstitutionally vague.[34] However, the Supreme Court did provide courts with standards to determine when statutes are overly broad or unconstitutionally vague.[35] Examining the statutory provisions regarding special conditions of supervised release aids in understanding the constitutional issues involved.[36]

A. Statutory Provisions Governing Sentencing Guidelines and Special Conditions of Supervised Release

Congress dictated the statutory guidelines for imposition of a sentence in criminal matters in 18 U.S.C. § 3553.[37] More specifically, 18 U.S.C. § 3553(a) sets forth the factors courts should consider in imposing a sentence.[38] Because a term of supervised release constitutes an addition to a sentence, these factors help determine the parameters of supervised release terms.[39] The statute asserts that courts may consider the nature of the offense and the defendant's history when issuing a term of supervised release.[40] Courts may also impose special conditions of supervised release to deter future criminal conduct, protect the public, and efficiently rehabilitate the defendant.[41] In applying these statutory guidelines to child pornography cases, some courts

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[33] *See* Miller v. California, 413 U.S. 15, 20 n.2 (1973) (defining "pornography" as either description of prostitutes or prostitution, depiction of lewdness, or portrayal of erotic behavior designed to cause sexual excitement); Farrell v. Burke, 449 F.3d 370 (2d Cir. 2005); *Loy*, 237 F.3d at 263; *infra* Part I.C (providing background regarding *Miller* decision and problems with Court's definition of "pornography").
[34] *See infra* Part III.A. *See generally* U.S. CONST. amend. XIV, § 1 (establishing right to due process of law); *Loy*, 237 F.3d at 265 (noting Fourteenth Amendment vagueness problem with current legal definition of "pornography").
[35] *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002) (noting that Constitution provides protection from overbroad laws that chill First Amendment speech); Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972) (holding that regulations implicating First Amendment right to free speech must be narrowly tailored to further legitimate government interest); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1925) (noting that courts determine vagueness by assessing whether reasonable men must guess at meaning of terms); *see infra* Part I.E (providing background regarding *Connally*).
[36] *See* 18 U.S.C. § 3583(d). *See generally* U.S. CONST. amend. XIV, § 1 (establishing right to due process of law); *Loy*, 237 F.3d at 265 (involving issues of constitutionality of statutes prohibiting access to pornography).
[37] 18 U.S.C. § 3553.
[38] *Id*. at § 3553(a).
[39] *See id*. at § 3583(d) (explaining that courts can include supervised release in sentence).
[40] *Id*. at § 3553(a)(1).
[41] *Id*. at § 3553(a)(2)(B)-(D).

uphold special conditions of supervised release barring access to all pornographic materials.[42] However, courts do not agree on whether § 3553 permits the imposition of these conditions of supervised release.[43]

Congress provided the specific statutory language governing special conditions of supervised release in 18 U.S.C. § 3583(d).[44] Under § 3583(d), a special condition must involve no greater deprivation of liberty than is reasonably necessary for the purposes of deterrence, protection, or rehabilitation.[45] Courts struggle to determine whether barring sex offenders from accessing pornography involves a greater than necessary deprivation of liberty.[46] Appellate courts review a sentencing court's decision to impose special conditions of release for abuse of discretion.[47] In determining whether the sentencing court abused its discretion, appellate courts apply 18 U.S.C. §§ 3553(a) and 3583(d) to the relevant facts of the case.[48] In addition to statutory challenges against conditions of supervised release, probationers often object to their conditions through constitutional claims.[49]

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[42] *See* United States v. Boston, 494 F.3d 660, 667 (8th Cir. 2007) (affirming government's contention that prohibitive condition was reasonably and rationally related to sex crime); United States v. Loy, 237 F.3d 251, 266 (3d Cir. 2001) (conceding that such restrictions may well aid in rehabilitation and protection of public); United States v. Bee, 162 F.3d 1232, 1235 (9th Cir. 1998) (asserting that condition reflected seriousness of offense).
[43] *See* 18 U.S.C. § 3553. *Compare Boston*, 494 F.3d 660 (holding that such conditions are lawfully imposed), *with Loy*, 237 F.3d 251 (holding that deprivation of liberty resulting from condition outweighs statutory considerations of 18 U.S.C. § 3553(a)).
[44] 18 U.S.C. § 3583(d); *see Loy*, 237 F.3d at 267 (enumerating factors set forth in 18 U.S.C. § 3583(d)).
[45] *Id.* at § 3583(d)(2); *see Loy*, 237 F.3d at 267 (identifying this statutory requirement).
[46] *Compare Boston*, 494 F.3d 660 (holding that such conditions are lawfully imposed) *and Bee*, 162 F.3d 1232 (determining that such conditions do not involve greater deprivation of liberty than necessary), *with Loy*, 237 F.3d 251 (holding that deprivation of liberty resulting from condition outweighs statutory considerations of 18 U.S.C. § 3553(a)).
[47] *See Boston*, 494 F.3d at 667 (noting that abuse of discretion is standard of review); United States v. Heidebur, 417 F.3d 1002, 1004 (8th Cir. 2005); *Loy*, 237 F.3d at 256.
[48] *See* 18 U.S.C. §§ 3553(a), 3583(d); *Boston*, 494 F.3d at 667; *Loy*, 237 F.3d at 256.
[49] *See Boston*, 494 F.3d at 665; *Loy*, 237 F.3d at 253; *Bee*, 162 F.3d at 1235.

B. The First Amendment Right to Receive

The First Amendment prohibits Congress from making a law that restricts freedom of speech.[50] This free speech right protects the right to receive information and ideas.[51] This right generally permits commercial receipt and distribution of sexually explicit materials that are not obscene, including legal adult pornography.[52] In *Stanley v. Georgia*, the Court noted that an individual has the right to receive information and ideas even if their social worth is minimal.[53] The Supreme Court held that the First Amendment protects possession of obscene material in the privacy of an individual's home.[54] In *Stanley*, the police searched the appellant's home and discovered that he possessed obscene films in violation of a state statute.[55] The appellant argued that the statute violated his First Amendment free speech rights because it attempted to control a private person's thoughts.[56] The court reversed the conviction, and held that private possession of obscene material did not violate the First Amendment.[57] The *Stanley* decision thus implied that the right to receive applied broadly, and therefore, individuals could publicly possess

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[50] U.S. CONST. amend. I; *see* United States v. Grace, 461 U.S. 171, 176 (1983); Grosjean v. Am. Press Co., 297 U.S. 233, 243 (1936).

[51] Martin v. Struthers, 319 U.S. 141, 143 (1943); *see* Bd. of Educ. v. Pico, 457 U.S. 853, 866-67 (1982) (addressing right to receive in library setting); Red Lion Broad. v. FCC, 395 U.S. 367, 390 (1969) (asserting that right to receive information is crucial); Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (noting that right to receive information is fundamental right); Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965) (holding that state may not contract spectrum of available knowledge consistently with spirit of First Amendment); Thomas v. Collins, 323 U.S. 515, 530 (1945) (noting that right to receive is necessarily part of rights guaranteed by First Amendment); Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living Libraries: The Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*,74 UMKC L. REV. 799, 799-801 (2006) (explaining right to receive information); Susan Nevelow Mart, *The Right to Receive Information*, 96 LAW LIBR. J. 175, 175-76 (2003) (providing history of First Amendment right to receive); Jamie Kennedy, Comment, *The Right to Receive Information: The Current State of the Doctrine and the Best Application for the Future*, 35 SETON HALL L. REV. 789, 789-92 (2005) (identifying right to receive as positive right and providing historical background).

[52] *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969); Winters v. New York, 333 U.S. 507, 510 (1948); Richard Peltz, *Use "The Filter You Were Born With": The Unconstitutionality of Mandatory Internet Filtering for the Adult Patrons of Public Libraries*, 77 WASH. L. REV. 397, 440 (2002).

[53] *Stanley*, 394 U.S. at 564.

[54] *Id*.

[55] *Id*. at 558.

[56] *Id*. at 565-66.

[57] *Id.* at 564; *see also Winters*, 333 U.S. at 510 (asserting that even propaganda magazines, which court determined had no social value, deserve same protection of free speech as finest literature).

nonobscene pornography under the right to receive.[58] Therefore, probationers often argue that special conditions of supervised release prohibiting receipt of nonobscene pornography violate their First Amendment right to receive.[59] In particular, probationers claim that special conditions of supervised release that are overly broad violate their First Amendment right to receive.[60] They argue that conditions prohibiting nonobscene pornography violate the First Amendment because they are not narrowly tailored to fit the goals listed in § 3583.[61]

C. Obscenity and Pornography

The Supreme Court originally asserted that First Amendment protections did not extend to obscene materials in *Roth v. United States*.[62] In *Roth*, the petitioners appealed their convictions for mailing obscene materials in violation of statutory provisions, arguing that the convictions violated their First Amendment rights.[63] The Court upheld the constitutionality of the statutes, and determined that Congress could ban obscene material because it was of such slight social value.[64] While the *Stanley* Court upheld private possession of obscene material, the Supreme Court held that Congress could ban public obscene materials in *Miller v. California*.[65] In *Miller*, the state charged the defendant with distributing obscene material through the mail.[66] In upholding the defendant's conviction, the Court permitted Congress to ban commercial

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[58] *See Stanley*, 394 U.S. at 564.
[59] *See generally* United States v. Boston, 494 F.3d 660 (8th Cir. 2007) (noting that defendant's special condition violated First Amendment rights due to restrictions on range of accessible materials); United States v. Loy, 237 F.3d 251, 266-67 (3rd Cir. 2001) (noting that defendant asserted that condition violated First Amendment rights); Kennedy, *supra* note 51, at 789-92 (identifying right to receive as positive right and providing historical background).
[60] *See Boston*, 494 F.3d at 667; United States v. Antelope, 395 F.3d 1128, 1141-42 (9th Cir. 2005); United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002).
[61] *See Boston*, 494 F.3d at 667; *Antelope*, 395 F.3d at 1141-42 *Guagliardo*, 278 F.3d at 872.
[62] Roth v. United States, 354 U.S. 476 (1957); *see* Tuchman, *supra* note 23, at 2268.
[63] *Roth*, 354 U.S. at 479-80; *see* 18 U.S.C. § 1461 (2010); CAL. PENAL CODE § 311 (1955) (making sale or advertisement of obscene or indecent materials punishable as misdemeanor).
[64] *Roth*, 354 U.S. at 485; *see* Tuchman, *supra* note 23, at 2268 (noting also that Court ruled concurrently in *Alberts v. California*, 354 U.S. 476 (1957) regarding similar statute).
[65] *See* Miller v. California, 413 U.S. 15, 23 (1973) (establishing that obscene material does not receive First Amendment protection); Stanley v. Georgia, 394 U.S. 557, 564 (1969).
[66] *See Miller*, 413 U.S. at 16-17.

distribution of obscene material, and it developed a three-part test to determine obscenity.[67] The Court in *Miller* held that a work is obscene if the prosecution proves three conditions.[68] First, the average person with the typical community viewpoint must find that the work, taken as a whole, appeals to the prurient interest.[69] Second, the work must describe sexual conduct in a patently offensive way.[70] Finally, the work, taken as a whole, must lack serious literary, artistic, political, or scientific value.[71]

The *Miller* opinion also included the Court's first and only definition of "pornography."[72] The Court used a definition of "pornography" from a footnote in a 1969 edition of Webster's Dictionary.[73] The Court defined "pornography" as a description of prostitution, a depiction of lewdness, or a portrayal of erotic behavior designed to cause sexual excitement.[74] However, this definition lacked the specificity and accompanying analysis that the *Miller* Court provided for the word "obscene."[75] Therefore, scholars conclude that the term "pornography" is vague and its use in statutes potentially violates the Fourteenth Amendment's prohibition on overly vague statutes.[76]

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[67] *See id.* at 24.
[68] *See id.*
[69] *See id.*
[70] *See id.*
[71] *See id.*
[72] *See id.* at 20 n.2; United States v. Loy, 237 F.3d 251, 263 (3d Cir. 2001); sources cited *supra* note 33.
[73] *See Loy*, 237 F.3d at 263; *Miller*, 413 U.S. 15, 20 n.2 (identifying Court's selected definition of pornography); *supra* note 33.
[74] *See Miller*, 413 U.S. at 20 n.2.
[75] *See Loy,* 237 F.3d at 263; *Miller*, 413 U.S. at 20 n.2; Tuchman, *supra* note 23, at 2271 (explaining evolution of Court's definition of obscenity from *Roth* to *Miller*).
[76] *See* Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L. J. 589, 606 (1986); Nicholas Wolfson, *Eroticism, Obscenity, Pornography and Free Speech*, 60 BROOKLYN L. REV. 1037, 1063 (1994). *See generally* U.S. CONST. amend. XIV, § 1 (establishing Fourteenth Amendment prohibition on vague statutes).

D. The Fourteenth Amendment Void for Vagueness Doctrine

The Fourteenth Amendment prohibits states from depriving individuals of life, liberty, or property without due process of law.[77] This guarantee prohibits enactment of statutes containing vague language based on what the Supreme Court identifies as the vagueness doctrine.[78] Government officials violate the due process rights of individuals when they enact statutes that are too vague.[79] In *Connally v. General Construction Co.*, the Supreme Court introduced the test for determining whether a statute is unconstitutionally vague.[80] In *Connally*, an employer challenged the constitutionality of a statute that forced state employers to pay laborers at least the current local wage rate.[81] The employer argued that the terms "current rate of wages" and "locality" were not sufficiently explicit for an employer to understand what they meant.[82] The Court held that a statute violates the due process guarantee if it includes terms so vague that reasonable people must guess at their meaning.[83] The terms must also be so vague that reasonable minds would apply the statutes differently.[84]

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[77] U.S. CONST. amend. XIV, § 1; *see* Bloom v. Illinois, 391 U.S. 94, 195 (1968); *In re* Converse, 137 U.S. 624, 631-32 (1891).
[78] *See* John Calvin Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196 (1985) (explaining vagueness doctrine's formulation and factors in evaluating statutes); Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases – The Standardless Standard*, 64 N.C.L. REV. 941, 954 (1986) (defining vagueness doctrine and its applications). *See generally* Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (providing overview of history of vagueness doctrine); Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279 (2003) (providing history of doctrine and suggesting that its basic tenets need revision).
[79] *See* City of Chi. v. Morales, 527 U.S. 41, 64 (1999) (striking down gang ordinance that prohibited loitering for failing to meet standards of definiteness and clarity); Kolender v. Lawson, 461 U.S. 352, 361-62 (1983) (finding invalid statute requiring persons who loiter to provide credible and reliable identification because it failed to clarify what those terms meant); Colautti v. Franklin, 439 U.S. 379, 401 (1979) (ruling that abortion statute that included requirement of determining viability of fetus was unconstitutional due to ambiguous standards).
[80] Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).
[81] *Id*. at 388.
[82] *Id*. at 390
[83] *See id*. at 391; *see also* Int'l Harvester Co. v. Kentucky, 234 U.S. 216, 221 (1914) (holding statute unconstitutionally vague because it contained standard that was impossible to know); Collins v. Kentucky, 234 U.S. 634, 638 (1914) (holding that statute violated due process because of uncertainty).
[84] *See Connally*, 269 U.S. at 385.

The *Connally* Court identified two main concerns in support of the vagueness doctrine.[85] The first concern involved the concept of fair notice.[86] Fair notice is the idea that states should give reasonable warning in plain language about the legal repercussions that flow from certain conduct.[87] The second concern was the need to prevent arbitrary and selective enforcement of the laws.[88] The Court deemed this second interest more important, because a statute lacking precise language permits policemen and juries to personally interpret statutes.[89] Allowing nonjudicial individuals to interpret statutes violates Article III of the Constitution, which forbids judges from delegating judicial functions to any nonjudicial agent.[90] Only a judge can decide and pronounce a judgment and enforce it between parties who bring a case to court.[91] The *Connally* Court held that this subjective interpretation carries the attendant dangers of arbitrary and discriminatory application of the law.[92]

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[85] *See* Hill v. Colorado, 530 U.S. 703, 732 (2000) (citing City of Chi. v. Morales, 527 U.S. 41, 56-57 (1999)); Goldsmith, *supra* note 78, at 286-88; Rosen, *supra* note 78, at 954.
[86] *See Hill*, 530 U.S. at 732; *Connally*, 269 U.S. at 385; Goldsmith, *supra* note 78, at 286-88 Rosen, *supra* note 78, at 954.
[87] *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); McBoyle v. United States, 238 U.S. 25, 27 (1931).
[88] *See Hill*, 530 U.S. at 732; *Connally*, 269 U.S. at 385; Goldsmith, *supra* note 78, at 286-88; Rosen, *supra* note 78, at 955.
[89] *See* Kolender v. Lawson, 461 U.S. 352, 358 (1983) (citing Smith v. Goguen, 415 U.S. 566, 574 (1974)).
[90] *See* United States v. Raddatz, 447 U.S. 667, 683 (1981) (asserting that courts must perform judicial decision-making to comport with Article III). *See generally* U.S. CONST. art. III, § 1 (establishing judicial power of courts); ORGANIZATION OF COURTS, TENURE, AND COMPENSATION OF JUDGES, http://caselaw.lp.findlaw.com/data/constitution/article03/01.html (last visited Jan. 7, 2011) (providing analysis of Article III).
[91] *See* Raddatz, 447 U.S. at 683. *See generally* U.S. CONST. art. III, § 1 (establishing judicial power of courts); ORGANIZATION OF COURTS, TENURE, AND COMPENSATION OF JUDGES, http://caselaw.lp.findlaw.com/data/constitution/article03/01.html (last visited Jan. 7, 2011) (providing analysis of Article III and judicial power).
[92] *See Grayned*, 408 U.S. at 108-09; *Connally*, 269 U.S. at 385; *see, e.g.*, Giaccio v. Pennsylvania, 382 U.S. 399 (1966) (holding statute void for vagueness because it left jurors free to decide, without any fixed standards, what it prohibited and what it did not); Herdon v. Lowry, 301 U.S. 242, 261-64 (1937) (finding statute void for vagueness because it provided no sufficiently ascertainable standard of guilt).

The Supreme Court uses the vagueness doctrine to invalidate statutes that include terms whose meanings allow room for debate.[93] Yet the Court only applied the vagueness doctrine to one sentencing statute, and has yet to apply it to special conditions of release.[94] However, this Comment argues that the Court should apply the doctrine to special conditions of supervised release involving pornographic bans if presented with the question.[95]

II. THE CIRCUIT SPLIT: *BOSTON* AND *LOY*

The Supreme Court never passed judgment on the constitutionality of special conditions of supervised release that ban access to pornography.[96] Currently, circuit courts of appeals disagree over the matter.[97] The Eighth Circuit's decision in *Boston* and the Third Circuit's decision in *Loy* illustrate this jurisprudential divide.[98] Their respective opinions reflect differing results even though they applied the same legal authority to similar scenarios.[99]

A. United States v. Boston

In *Boston*, the federal district court for the Southern District of Iowa sentenced the defendant to thirty years in prison for child pornography possession.[100] The court also sentenced the defendant to a lifetime of supervised release following imprisonment.[101] The district court

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[93] *See* City of Chi. v. Morales, 527 U.S. 41, 56-57 (1999) (invalidating as vague Gang Congregation Ordinance prohibiting gang members from loitering); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (holding city vagrancy ordinance void for vagueness); Interstate Circuit v. Dallas, 390 U.S. 676, 683-84 (1968) (determining that ordinance classifying motion picture as not suitable for young persons was too vague).

[94] *See Giaccio*, 382 U.S. at 405 (upholding defendant's vagueness challenge to Pennsylvania statute allowing juries to impose costs on acquitted defendant because statute contained no standard for jury decision).

[95] *See infra* Part III.A (arguing for determination that special conditions of release barring access to pornography are void for vagueness).

[96] *See* United States v. Wilkinson, 282 F. App'x. 750, 754 (11th Cir. 2008) (identifying circuit split on issue of special conditions of supervised release involving prohibitions on pornography).

[97] *See id;* United States v. Boston, 494 F.3d 660, 661 (8th Cir. 2007) (finding such conditions constitutional); United States v. Loy, 237 F.3d 251, 252 (3d Cir. 2001) (holding that these conditions violate First and Fourteenth Amendment protections).

[98] *See Boston*, 494 F.3d at 661 (finding such conditions constitutional); *Loy*, 237 F.3d at 252 (holding that these conditions violate First and Fourteenth Amendment protections); *supra* note 26 and accompanying text.

[99] *See Boston*, 494 F.3d at 661; *Loy*, 237 F.3d at 252.

[100] *Boston*, 494 F.3d at 664.

[101] *Id.*

additionally imposed a special condition that prohibited the defendant from viewing, possessing, or entering a location that sells any form of pornography.[102] The defendant appealed his sentence on the grounds that the condition was vague, and therefore, it violated his Fourteenth Amendment right to due process.[103] The defendant argued that the condition additionally violated his First Amendment right to receive legal sexual material involving adults.[104] The defendant further contended that the condition violated 18 U.S.C. § 3583(d) because it entailed a greater deprivation of liberty than was reasonably necessary.[105]

The Eighth Circuit denied the defendant's appeal, and upheld his sentence and special condition of supervised release.[106] The opinion relied entirely on the defendant's criminal history and the desire to deter him from future criminal conduct as justification for his special condition.[107] The court used this reasoning as the basis for denying his First Amendment claim.[108] The court failed to address whether a greater than reasonable deprivation of liberty resulted and whether "pornography" was too vague under the Fourteenth Amendment.[109] Therefore, the court upheld the defendant's special condition of supervised release.[110] The facts in *Loy* and *Boston* were similar, but the holdings were in direct opposition.[111]

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[102] *Id*.
[103] *Id.* at 664-65.
[104] *Id*. at 668. *See generally supra* note 67 and accompanying text (providing history of First Amendment right to receive and providing examples of its appearance in jurisprudence).
[105] *Boston*, 494 F.3d at 667. *See generally* 18 U.S.C. § 3583(d)(2) (2010) (setting forth deprivation of liberty consideration).
[106] *See Boston*, 494 F.3d at 668.
[107] *See id*.
[108] *See id*.
[109] *See id*.
[110] *See id*.
[111] *See* United States v. Loy, 237 F.3d 251, 267, 270 (3d Cir. 2001).

B. United States v. Loy

In *Loy*, the defendant was convicted of child pornography possession in a federal district court for the Western District of Pennsylvania.[112] The court sentenced him to thirty-three months in prison followed by three years of supervised release.[113] Additionally, the district court imposed a special condition of release prohibiting him from possessing pornography of any type.[114] The defendant appealed the special condition, and the Third Circuit Court of Appeals remanded the case.[115] Upon remand, the district court reimposed the pornography condition and the defendant then appealed for a second time.[116] The defendant maintained that the special condition was too vague, and therefore, violated his Fourteenth Amendment due process right.[117] He argued that it was too vague because there was no workable method to differentiate between pornography and more innocuous forms of media.[118] The defendant further contended that the special condition violated his First Amendment right to receive because it was overbroad.[119] He argued that the special condition was not narrowly tailored to serve the goals of rehabilitation and public protection.[120] The defendant asserted that without this narrow tailoring, the special condition of supervised release violated his First Amendment right to receive information.[121] The Third Circuit sided with the defendant, concluding that the condition was unconstitutionally vague under the Fourteenth Amendment and unconstitutionally broad under the First

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[112] *Id*. at 255
[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] *Id*.
[117] *See id*. at 261. *See generally supra* note 78 and accompanying text (explaining void for vagueness doctrine and enumerating cases in which Court applied doctrine to find statutes unconstitutionally vague).
[118] *See Loy*, 237 F.3d at 261.
[119] *Id.* at 264
[120] *Id*.
[121] *Id*. *See generally supra* note 68 and accompanying text (providing history of First Amendment right to receive and providing examples of its appearance in jurisprudence).

Amendment.[122] In so ruling, the Third Circuit indicated the need for a precise definition of "pornography."[123]

III. ANALYSIS

The Third Circuit's ruling in *Loy* represents the proper jurisprudence with respect to conditions of release that ban access to pornography.[124] The *Loy* court correctly identified the fact that such conditions violate due process of law under the Fourteenth Amendment because they are too vague.[125] The *Loy* decision also properly emphasized the probationer's interest in preserving his right to engage in conduct protected by the First Amendment.[126] Finally, without a legal definition of "pornography", probation officers will prohibit whatever material comports with their personal definition of "pornography."[127] The *Loy* court, therefore, properly invalidated the conditions of supervised release banning all access to pornography.[128]

A. Loy *Accurately Held That Conditions Prohibiting Access to Pornography Are Unconstitutionally Vague*

Conditions prohibiting access to pornography are unconstitutionally vague under the Fourteenth Amendment because courts do not provide a precise definition of "pornography."[129] While the Court in *Miller* delivered clear and specific guidance regarding the definition of

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[122] *See Loy*, 237 F.3d at 267.
[123] *See id*. at 266-67.
[124] *See infra* Part III.A-C (arguing in favor of *Loy* decision in resolving circuit split).
[125] *See Loy*, 237 F.3d at 265 (2001); *infra* Part III.A (providing analysis of due process claim and applying void for vagueness doctrine).
[126] *See Loy*, 237 F.3d at 266; *infra* Part III.B (addressing First Amendment claims including right to receive information).
[127] *See infra* Part III.C (arguing that delegation of authority to probation officer constitutes violation of judicial power under Article III). *See generally* U.S. CONST. art. III, § 1 (establishing judicial power of courts).
[128] *See Loy*, 237 F.3d at 266. *See generally* U.S. CONST. amend. XIV, § 1 (establishing right to due process of law); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (asserting that vague statutes violate due process of law if they are so vague that reasonable men must guess at their meaning).
[129] *See generally* U.S. CONST. amend. XIV, § 1 (establishing right to due process of law); *Loy*, 237 F.3d at 265 (noting Fourteenth Amendment vagueness problem with definition of "pornography"); Jeffries, *supra* note 78 (explaining vagueness doctrine's formulation and factors in evaluating statutes).

"obscenity," the term "pornography" remains legally unclear.[130] Lower courts assert that "pornography" is entirely subjective and lacks any precise legal definition.[131] Ambiguity in defining "pornography" even leads some scholars to maintain that pornography is more similar to a sexual device than to protected First Amendment speech.[132] Others contend that pornography may include material that has serious social value.[133] Even dictionaries cannot provide consistent definitions of the term.[134] Whatever pornography means, the term is complex, vague, and controversial.[135] In *Loy*, the court imposed a special condition on the defendant prohibiting access to any pornography.[136] The defendant took this prohibition to mean that he could not access any visual, textual, or audial material involving sexuality.[137] However, other reasonable individuals might have thought that the prohibition only extended to visual works that explicitly depict sexual intercourse.[138] Special conditions prohibiting access to pornography are,

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[130] *See* Miller v. California, 413 U.S. 15, 24 (1973); *Loy*, 237 F.3d at 263 (2001) (noting that while courts exhaustively defined "obscenity," courts did not give term "pornography" such treatment). *See generally* Sunstein, *supra* note 76, at 606 (noting lack of clear definition of "pornography").

[131] *See* United States v. Guagliardio, 278 F.3d 868, 872 (9th Cir. 2001) (finding that no legally accepted definition of pornography currently exists); *see also Loy*, 237 F.3d at 263. *See generally* Sunstein, *supra* note 76 (noting lack of clear definition of "pornography.").

[132] *See* Sunstein, *supra* note 76, at 606; *see also* John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 326 (2009) (noting that pornography has more in common with sexual devices than with cognitive speech); Wolfson, *supra* note 76, at 1063 (noting argument that pornography is merely masturbatory aid and not form of expression).

[133] *See* Wolfson, *supra* note 76, at 1038-39.

[134] *See Loy*, 237 F.3d at 263-64. *See generally* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (1999) (defining "pornography" as depiction of erotic behavior intended to cause sexual excitement); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1969) (defining "pornography" as description of prostitutes or prostitution); THE FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (1941) (defining "pornography" as expression or suggestion of obscenity in speaking, writing, etc.; licentious art or literature).

[135] *See* Wolfson, *supra* note 76, at 1039. *See generally* Roth v. United States, 354 U.S. 476, 478 (1977) (asserting that sex is mysterious and great force in human life); LYNN HUNT, INTRODUCTION TO THE INVENTION OF PORNOGRAPHY 11 (Lynn Hunt ed., 1993) (noting that pornography involves tension between government and artists regarding what sexual depictions are permissible).

[136] *See Loy*, 237 F.3d at 261.

[137] *See id*. at 253.

[138] *See id*. at 264. *See generally* United States v. Guigliardo, 278 F.3d 868, 872 (9th Cir. 2001) (quoting Farrell v. Burke, No. 97 Civ. 5708, 1998 U.S. Dist. LEXIS 16896 at *6 (S.D.N.Y. Oct. 28, 1998)) (highlighting fact that "pornography" is vague and allows for multiple possible interpretations); Sunstein, *supra* note 76 (explaining wide variation in potential interpretations of "pornography").

therefore, unconstitutionally vague under the *Connally* test because reasonable individuals must guess at the meaning of "pornography."[139]

Some courts suggest that special conditions prohibiting access to pornography are not too vague because probationers can interpret them using common sense.[140] These courts argue that this is an appropriate method of interpretation because it would be impossible for courts to list every instance of prohibited conduct.[141] Under this reasoning, it should be obvious to probationers what materials constitute pornography and violate the terms of release.[142] The Fifth Circuit also supports this viewpoint and held that a lack of specificity for supervised release conditions involving admittedly vague terms was constitutional.[143] The court held that commonsense readings of special conditions satisfy the mandate of due process under the Fourteenth Amendment.[144]

However, due process requires fair notice of prohibited conduct.[145] Under the Fourteenth Amendment, courts cannot infer understanding of special conditions, but instead must give appropriate notice to ensure understanding of prohibited material.[146] The convenience of implementing a common sense standard does not negate the due process violation of imposing a vague condition.[147] The Supreme Court emphasized that it is fundamental to the constitutional

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[139] *See Loy*, 237 F.3d at 262, 265. *See generally* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (establishing vagueness test referenced by *Loy* court); Amsterdam, *supra* note 78 (providing overview and history of vagueness doctrine).
[140] *See* United States v. Brigham, 569 F.3d 220, 234 (5th Cir. 2009); United States v. Phipps, 319 F.3d 177, 192-93 (5th Cir. 2003); United States v. Paul, 274 F.3d 155, 166-67 (5th Cir. 2001).
[141] *See Phipps*, 319 F.3d at 192-93; *see also Brigham*, 569 F.3d at 234; *Paul*, 274 F.3d at 166-67.
[142] *See Phipps*, 319 F.3d at 192-93; *see also Brigham*, 569 F.3d at 234; *Paul*, 274 F.3d at 166-67.
[143] *See Phipps*, 319 F.3d at 192-93.
[144] *See id*.
[145] *See* U.S. CONST. amend. XIV, § 1. *See generally* Jeffries, *supra* note 78 (explaining vagueness doctrine's formulation and factors in evaluating statutes); Rosen, *supra* note 78 (defining vagueness doctrine and its application).
[146] *See* U.S. CONST. amend. XIV, § 1. *See generally* Jeffries, *supra* note 78 (explaining requirement of notice with respect to vagueness doctrine); Rosen, *supra* note 78 (highlighting issue of notice in vagueness doctrine).
[147] *See generally* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (asserting that vague statutes violate due process of law if they are so vague that reasonable men must guess at their meaning); Int'l Harvester Co. v.

concept of liberty to give fair warning of what constitutes criminal conduct.[148] The probationers in both *Loy* and *Boston* did not possess such warning with respect to what materials qualified as pornography, and therefore, contraband.[149] Because even Supreme Court justices could not specifically define pornography, the burden is too great to impose upon probationers.[150]

The Supreme Court should develop a specific legal definition of "pornography" so that probationers have the required notice regarding prohibited materials.[151] The Court could create a test similar to the *Miller* test for obscenity to define "pornography."[152] Indeed, such a test is necessary, as current interpretations of "pornography" could include any visual, audial, or literary works that reference sexuality.[153] Most importantly, a bright-line test would allow special conditions of supervised release prohibiting pornography to comport with the Fourteenth Amendment due process requirement.[154] Reasonable individuals would no longer need to guess at the meaning of the terms, and therefore, the special conditions would not violate the vagueness

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Kentucky, 234 U.S. 216, 221 (1914) (involving vague statute that was struck down for due process violation); Collins v. Kentucky, 234 U.S. 634 (1914) (holding vague statute invalid on due process grounds).

[148] *See* Marks v. United States, 430 U.S. 188, 191 (1977); United State v. Harriss, 347 U.S. 612, 617 (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

[149] *See* United States v. Boston, 494 F.3d 660, 667-68 (2007); United States v. Loy, 237 F.3d 251, 264 (3d Cir. 2001) (noting difficulty in determining whether works such as *Playboy*, Vladimir Nabokov's *Lolita*, or Edouard Manet's *Le Dejeuner sur L'Herbe* are pornography).

[150] *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (asserting that while he may never succeed in concisely defining pornography, he knows it when he sees it); sources cited *supra* note 147.

[151] *See* Sunstein, *supra* note 76, at 591-92 (suggesting that definition of "pornography" should be sexually explicit depictions involving women enjoying or deserving physical abuse with purpose and effect of causing sexual arousal). *See generally* 18 U.S.C. § 2256(8) (2010) (providing much more specific language in defining child pornography); *Loy*, 237 F.3d at 267 (asserting that Constitution would not forbid more tightly defined restriction on pornography).

[152] *See generally* Miller v. California, 413 U.S. 15, 23 (1973) (providing Court's test for determining whether material is obscene); Sunstein, *supra* note 76 (providing example of specific definition of "pornography"); Wolfson, *supra* note 76, at 1041 (explaining problem of vagueness in absence of specific definition of "pornography").

[153] *See generally* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (1999) (defining "pornography" as depiction of erotic behavior intended to cause sexual excitement, which could encompass any visual, audial, or literary works that reference sexuality); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1969) (defining "pornography" in such a manner that could encompass any visual, audial, or literary works that reference sexuality); Wolfson, *supra* note 76, at 1040-41 (listing range of possible materials encompassed by contemporary understandings of pornography's meaning).

[154] *See generally* U.S. CONST. amend. XIV, § 1 (establishing due process requirement); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (explaining that statutes involving clear, definite language do not offend due process requirements); Collins v. Kentucky, 234 U.S. 634, 638 (1914) (holding that statute violated due process because of uncertainty).

doctrine.[155] While special conditions of supervised release that prohibit access to pornography run afoul of the Fourteenth Amendment's protections, they also implicate the First Amendment.[156]

B. Loy *Correctly Identified the Probationer's Right to Engage in Conduct Protected by the First Amendment*

Probationers have a protected right of free speech under the First Amendment to receive media, including pornography.[157] However, courts can restrict a probationer's access to pornography based on § 3583(d) if this restriction is necessary to deter, protect, or rehabilitate the probationer.[158] With no narrowly tailored definition of "pornography," upholding special conditions prohibiting access to pornography could chill protected conduct, such as viewing Michelangelo's *David*.[159] Prohibiting examination of fine artwork or medical textbooks clearly does not serve a deterrent, protective, or rehabilitative purpose.[160] Therefore, special conditions

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[155] *See Connally*, 269 U.S. at 391 (providing void for vagueness test and standard to meet for constitutionality). *See generally* U.S. CONST. amend. XIV, § 1 (establishing due process requirement); Int'l Harvester Co. v. Kentucky, 234 U.S. 216, 221 (1914) (holding statute unconstitutionally vague because it contained standard that was impossible to know).

[156] *See Loy*, 237 F.3d at 267; *infra* Part III.B. *See generally* U.S. CONST. amend. I (establishing right to free speech and right to receive information); U.S. CONST. amend. XIV, § I (establishing due process requirement).

[157] *See* Stanley v. Georgia, 394 U.S. 557, 559 (1969) (holding that right to receive applies to private possession of even obscene materials). *See generally* Mart, *supra* note 51 (providing history of First Amendment right to receive); Kennedy, *supra* note 51 (identifying right to receive as positive right and providing historical background).

[158] *See* 18 U.S.C. § 3583(d) (2010); United States v. Bee, 162 F.3d 1232, 1235 (1998) (determining that restricting access to pornography was appropriate due to its furtherance of probationer's rehabilitation). *See generally* U.S. CONST. amend. I (establishing constitutional right to free speech, including right to freely access or create legal visual, audial, or literary works); United States v. Consuelo-Gonzalez, 521 F.2d 259, 262 n.14 (9th Cir. 1975) (asserting that special condition of release does not infringe upon probationer's rights court primarily designs statute to rehabilitate probationer or ensure protection of public).

[159] *See* United States v. Guigliardo, 278 F.3d 868, 872 (9th Cir. 2001) (quoting Farrell v. Burke, No. 97 Civ. 5708, 1998 U.S. Dist. LEXIS 16896 at *6 (S.D.N.Y. Oct. 28, 1998)). *See generally* Sunstein, *supra* note 76 (explaining wide variation across definitions of "pornography"); Wolfson *supra* note 76 (noting difficulty in defining "pornography").

[160] *See Loy*, 237 F.3d at 251, 266. *See generally* 18 U.S.C. § 3583(d) (enumerating mandatory conditions courts should order on supervised release); *Guigliardo*, 278 F.3d at 872 (indicating that such extensions of definition of "pornography" fail to serve any practical goal of probation conditions).

like those imposed in *Loy* and *Boston* prohibit protected conduct, and are unconstitutionally overbroad under the First Amendment.[161]

The *Boston* court's holding permits prohibition of pornography without a governmental showing of necessity, and therefore, violates the defendant's First Amendment right to receive.[162] The court ignored the potential First Amendment violation entirely, instead relying solely on the defendant's history as justification for upholding the special condition of release.[163] The court should have addressed the defendant's right to receive and analyzed the condition's relationship to the statutory guidelines set forth in § 3583(d).[164] The *Boston* court should have acknowledged the defendant's right to receive material unless the prohibition was necessary to deter, protect, or rehabilitate.[165] Because the court failed to support its determination that the condition served a rehabilitative purpose outweighing a constitutional freedom, the condition violated the First Amendment.[166]

Other courts suggest that prohibiting defendants convicted of sex offenses involving minors from possessing pornography is not an overly broad restriction under the First Amendment.[167]

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[161] *See generally* U.S. CONST. amend. I (establishing right to free speech and right to receive information); United States v. Boston, 494 F.3d 660 (8th Cir. 2007) (involving similar special conditions of supervised release barring access to pornography); *Loy*, 237 F.3d 251 (holding such special conditions of release unconstitutionally overbroad).
[162] *See generally Boston*, 494 F.3d 660 (upholding special condition of release without addressing First Amendment right to receive); sources cited *supra* note 51 (noting fundamental nature and explaining violations of right to receive).
[163] *See Boston*, 494 F.3d at 667-68 (referencing specifically probationer's history of sexual offenses and desire to deter him from similar conduct in future).
[164] *See generally* U.S. CONST. amend. I (establishing right to free speech and right to receive information); 18 U.S.C. § 3583(d) (establishing goals of sentencing statutes); *Loy*, 237 F.3d 251 (addressing range of materials defendant has right to access and evaluating relationship between prohibition on pornography and factors set out in 18 U.S.C. § 3583(d)).
[165] *See generally* U.S. CONST. amend. I (establishing right to receive information); 18 U.S.C. § 3583(d) (establishing factors of deterrence, protection, and rehabilitation as goals of sentencing statutes); *Boston*, 494 F.3d 660 (choosing instead to address defendant's criminal history).
[166] *See generally* 18 U.S.C. § 3583(d) (explaining rehabilitation as part of purpose of special conditions of release); *Boston*, 494 F.3d 660 (failing to provide such analysis); *Loy*, 237 F.3d 251 (explaining that courts must provide such analysis to avoid violation of First Amendment freedoms).
[167] *See Boston*, 494 F.3d at 667-68 (upholding special condition of supervised release barring access to pornography); United States v. Phipps, 319 F.3d 177, 192-93 (5th Cir. 2003); United States v. Bee, 162 F.3d 1232,

The Ninth Circuit defined "pornography" as sexually stimulating or sexually oriented materials, and held that restrictions prohibiting such materials did not violate the First Amendment.[168] The court stated that such prohibitions were sufficiently narrow to avoid prohibiting protected material.[169] The court's concern was that allowing sex offenders to view such content would lead to recidivism, harming public safety, and that it would inhibit rehabilitation.[170] The court noted that the prohibition was necessary for public safety, and therefore, it did not interfere with the probationer's right to consume such materials.[171]

However, defining "pornography" as sexually stimulating or sexually oriented material is not an acceptable, narrow definition of pornography under the First Amendment.[172] Restriction of all sexually stimulating or sexually oriented material is not necessary to alleviate concerns of public safety and rehabilitation.[173] Therefore, this overly broad restriction unnecessarily chills protected conduct under the First Amendment.[174] The minimal benefits to society of such special conditions do not necessitate greatly restricting a probationer's First Amendment right to access legitimate materials.[175]

1234-35 (9th Cir. 1998) (determining that such conditions do not involve greater deprivation of liberty than necessary).

[168] *See Bee*, 162 F.3d at 1235

[169] *See id*.

[170] *See id*. at 1235-36.

[171] *See id*.

[172] *See* United States v. Antelope, 395 F.3d 1128, 1141-42 (9th Cir. 2005) (rejecting this definition, describing it as grammatically unnatural); Wolfson, *supra* note 76, at 1041 (explaining that if pornography is simply graphic depiction of sex or sexual organs, this creates impossibly broad category). *See generally* Sunstein, *supra* note 76 (explaining difficulties involved in defining "pornography").

[173] *See generally* 18 U.S.C. § 3583(d) (2010) (giving factors of public safety and rehabilitation in sentencing probationers to special conditions of supervised release); United States v. Boston, 494 F.3d 660, 667-68 (8th Cir. 2007) (arguing instead in favor of special condition of supervised release barring access to pornography on public safety grounds); United States v. Loy, 237 F.3d 251 (3d Cir. 2001) (holding that goals of public safety and rehabilitation can be met without restricting probationers' access to all materials with sexual content).

[174] *See Antelope*, 395 F.3d at 1141-42; United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002). *See generally* U.S. CONST. amend. § I (establishing right to free speech and right to receive information).

[175] *See Antelope*, 395 F.3d at 1141-42; *Guagliardo*, 278 F.3d at 872. *See generally* U.S. CONST. amend. § I (establishing right to receive information).

Probationers certainly must anticipate some restrictions on their First Amendment freedoms.[176] However, the restrictions on pornography constitute a greater than reasonable deprivation of liberty that is inconsistent with the First Amendment and sentencing guidelines.[177] Probation conditions must be narrowly tailored and directly related to the goals of deterrence, protection, or rehabilitation set out in 18 U.S.C. § 3583(d).[178] Conditions such as those in *Loy* and *Boston* do not meet these criteria due to the lack of a specific legal definition of "pornography."[179] A statute that fails to advise the probationer of prohibited conduct cannot satisfy the three goals of probation conditions.[180] A probationer will not be deterred from further crimes without knowledge of what constitutes those crimes.[181] The goal of public protection cannot be met if the probationer is not deterred from committing subsequent offenses.[182] Finally, rehabilitation requires that the probationer understand clearly the differences between acceptable and unacceptable conduct, and vague statutes deny probationers this understanding.[183] Therefore,

[176] *See Bee*, 162 F.3d at 1234; United States v. Consuelo-Gonzales, 521 F.2d 259, 265 (9th Cir. 1975); Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 203 (1967).
[177] *See Antelope*, 395 F.3d at 1141-42; *Loy*, 237 F.3d at 263-67. *See generally* U.S. CONST. amend. I (establishing fundamental freedom of speech and right to receive); 18 U.S.C. § 3583(d) (establishing sentencing guidelines for imposition of special conditions of supervised release).
[178] *See* 18 U.S.C. § 3583(d); United States v. Crume, 422 F.3d 728, 732-33 (2005); United States v. Crandon, 173 F.3d 122, 128 (3d. Cir. 1999) (finding special condition of supervised release that prohibited probationer from accessing internet constitutional because it was narrowly tailored to goal of protection of public).
[179] *See* 18 U.S.C. § 3583(d); United States v. Boston, 494 F.3d 660, 667-68 (8th Cir. 2007); *Loy*, 237 F.3d at 264.
[180] *See* Arthur Anderson LLP v. United States, 544 U.S. 696, 703 (2005); United States v. Lanier, 520 U.S. 259, 265 (1997); McBoyle v. United States, 283 U.S. 25, 27 (1931) (noting that criminals should receive fair warning and prohibited conduct should be clear).
[181] *See generally* sources cited *supra* note 180 (explaining problem of fair warning).
[182] *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (holding that vague statutes restrict ability to steer between lawful and unlawful conduct). *See generally McBoyle* 283 U.S. at 27 (noting that criminals should receive fair warning of prohibited conduct); Note, *Development in Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1944, 1961 (1998) (noting that goal of public protection is best measured with respect to probationers by recidivism rates).
[183] *See* United States v. Bingham, 569 F.3d 220, 232 (5th Cir. 2009); United States v. Phipps, 319 F.3d 177, 193 (5th Cir. 2005). *See generally Grayned*, 408 U.S. at 108 (holding that vague statutes restrict ability to steer between lawful and unlawful conduct).

special conditions prohibiting all pornography are not necessary to satisfy these goals, and are thus overbroad, unconstitutionally prohibiting a substantial amount of protected speech.[184]

C. Absent a Legal Definition of Pornography, the Probation Officer Becomes the Judge

Without a specific test or methodology for assessing what constitutes pornography, the probation officer will prohibit whatever fits his or her personal definition of "pornography."[185] Vague and overbroad laws, such as the special conditions in *Boston* and *Loy*, delegate judicial interpretation to individual probation officers and permit possible discriminatory application.[186] An officer could interpret "pornography" much more broadly than the court intended, and therefore, infringe upon the court's authority to issue sentences.[187] A specific legal test for pornography like the *Miller* obscenity test would result in greater consistency in sentencing and eliminate misinterpretation of the term "pornography."[188] Additionally, delegating the determination of what is pornographic to probation officers strips the probationer of judicial notice of what conduct will result in further incarceration.[189] Courts must issue specific

[184] *See Loy*, 237 F.3d at 263-67. *See generally* 18 U.S.C. § 3583(d) (giving factors of public safety and rehabilitation in sentencing probationers to special conditions of supervised release); *Boston*, 494 F.3d 660 at 667-68 (arguing instead in favor of special condition of supervised release barring access to pornography on public safety grounds).
[185] *Cf.* Coates v. Cincinatti, 402 U.S. 611 (1971) (holding that statute prohibiting annoying assemblies was unconstitutional because enforcement depended solely on officer's personal definition of "annoying"). *See generally* U.S. CONST. art. III (establishing judicial power of courts); *supra* note 139 and accompanying text (asserting that pornography is term so vague that reasonable men, including probation officers, must guess at its meaning).
[186] *See Grayned*, 408 U.S. 104, 109 (citing Edwards v. South Carolina, 372 U.S. 229, 236 (1963)); Garner v. Louisiana, 368 U.S. 157, 200, 202 (1961) (Harlan, J., concurring); *cf.* Int'l Soc'y for Krishna Consciousness v. Eaves, 601 F.2d 809, 822-23 (5th Cir. 1979) (holding that vague statutes regulating freedoms impermissibly permit low-level administrative officials to determine what conduct is acceptable). *See generally Boston*, 494 F.3d at 667-68 (prohibiting probationer from accessing pornography); *Loy*, 237 F.3d at 255 (including special condition of release barring access to pornography).
[187] *See generally supra* note 139 and accompanying text (asserting that pornography is term so vague that reasonable men, including probation officers, must guess at its meaning).
[188] *See supra* Part III.A. *See generally* U.S. CONST. amend. XIV, § 1 (establishing Fourteenth Amendment prohibition on vague statutes); Miller v. California, 413 U.S. 15, 23 (1973) (providing Court's test for determining whether material is obscene); Sunstein, *supra* note 76, at 591-92 (suggesting example of more specific, narrow definition of pornography).
[189] *Cf. Coates*, 402 U.S. 611 (asserting that such delegation violates due process because public cannot be on notice of what type of assembly officer will find annoying); Cleveland v. Anderson, 13 Ohio App. 2d 83, 90 (1968) (holding unconstitutional statute that allowed officer to interpret what is annoying and failing to provide notice of

guidelines for special conditions because probationers cannot ascertain the probation officer's subjective view of what constitutes pornography.[190] The particular sensitivities of probation officers are untenable benchmarks for the legality of conduct and the enforcement of the law.[191]

Furthermore, leaving the duty to define pornography to the probation officer constitutes an unconstitutional delegation of judicial power under Article III of the Constitution.[192] Probation officers serve under the guidance of the court, manage aspects of the sentence, and supervise probationers with respect to conditions imposed by the court.[193] Imposing punishment, however, is a strictly judicial function.[194] Courts may not delegate a judicial function to the probation officer because such delegation would violate Article III.[195] Therefore, the *Boston* court erred in upholding the special condition of release because the probation officer had wide discretion to interpret the word "pornography."[196] When a probation officer decides what constitutes pornography, the officer is defining the terms of release, in violation of Article III.[197] Probation

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prohibited conduct to public). *See generally* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (holding statute invalid because standard of prohibited conduct unclear).

[190] *Cf. Coates*, 402 U.S. 611 (finding lack of notice due to subjective nature of officer's assessment of annoying conduct); *Cleveland*, 13 Ohio App. 2d 83 (finding lack of notice due to subjective nature of statute's standard of prohibited conduct). *See generally Connally*, 269 U.S. 385 (establishing void for vagueness doctrine).

[191] *See generally Coates*, 402 U.S. 611 (making similar assertion with respect to police officers); *Cleveland*, 13 Ohio App. 2d 83 (same). *See generally Connally*, 269 U.S. 385 (holding statute invalid because standard of prohibited conduct unclear).

[192] *See* United States v. Johnson, 48 F.3d 806, 808-09 (4th Cir. 1995); Whitehead v. United States, 155 F.2d 460, 462 (6th Cir. 1946) (holding that deciding terms and conditions of release is not delegable to probation officers). *See generally* U.S. CONST. art. III (establishing judicial power of courts).

[193] United States v. Miller, 341 Fed. App'x. at 932; United States v. Berdardine, 237 F.3d 1279, 1283 (11th Cir. 2001); *Johnson*, 43 F.3d at 808.

[194] *See Ex parte* United States, 242 U.S. 27, 41 (1916); United States v. Heath, 419 F.3d 1312, 1315 (11th Cir. 2005) (holding that condition imposed by district court violated Article III because it delegated judicial function to probation officer). *See generally* U.S. CONST. art. III (establishing judicial power to impose punishment).

[195] *Johnson*, 48 F.3d at 808; *see Miller,* 341 Fed. App'x at 932. *See generally* U.S. CONST. art. III (establishing judicial power to impose punishment).

[196] United States v. Boston, 494 F.3d 660, 667 (8th Cir. 2007) (noting that special condition established that probation officer had power to make determinations regarding what constituted pornography, sexually stimulating, or sexually oriented material). *See generally* U.S. CONST. art. III (establishing judicial power of courts); *Heath*, 419 F.3d at 1315 (holding that condition violated Article III because it delegated judicial function to probation officer).

[197] *Cf. Heath*, 419 F.3d at 1315 (holding that condition imposed by district court was unconstitutional under Article III because it delegated judicial authority to probation officer); United States v. Prouty, 303 F.3d 1249, 1255 (11th Cir. 2002) (holding that allowing probation officer to set restitution schedule was improper delegation of core

officers also may enforce the special condition of release differently than the sentencing court intended.[198] This discrepancy allows for inconsistent application of law across jurisdictions and among individual cases.[199] Therefore, probation officers exercise an unconstitutional judicial authority in the absence of a narrow definition of "pornography."[200]

CONCLUSION

Courts should not uphold special conditions of supervised release that prohibit access to pornography.[201] These conditions are unconstitutionally vague based on the Fourteenth Amendment due process requirement.[202] The Third Circuit in *Loy* also correctly asserted that because there is no current legal definition of "pornography," such conditions are impermissibly overbroad.[203] Therefore, upholding such conditions infringes upon the probationer's First Amendment right to receive information.[204] In *Boston*, the court incorrectly ruled that the special condition was constitutional under the First Amendment, and failed to even address the Fourteenth Amendment problem.[205] Furthermore, failure to produce a workable definition of "pornography" transforms probation officers into judges, which is an impermissible delegation

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judicial function); *Johnson*, 48 F.3d at 808 (explaining that courts may not assign probation officers any judicial function, such as determining amount probationer should pay in restitution).

[198] *Cf.* Coates v. Cincinatti, 402 U.S. 611 (1971) (holding that statute prohibiting annoying assemblies was unconstitutional because enforcement depended solely on officer's personal definition of "annoying"); Cleveland v. Anderson, 13 Ohio App. 2d. 83, 90 (1968) (finding statute invalid because enforcement depended upon officer's interpretation of unclear standard of conduct). *See generally* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (holding statute invalid because standard of prohibited conduct unclear).

[199] *See* Grayned v. Rockford, 408 U.S. 104, 108-09 (1972) (noting dangers of discriminatory and inconsistent application of law resulting from imposition of vague statutes); Edwards v. South Carolina, 372 U.S. 229, 236-37 (1963); Garner v. Louisiana, 368 U.S. 157, 200 (1961).

[200] *Cf. Johnson*, 48 F.3d 806 (noting that probation officers exercise unconstitutional authority in subjectively determining restitution payments); *Coates*, 402 U.S. 611 (finding lack of notice due to subjective nature of officer's assessment of annoying conduct). *See generally* U.S. CONST. art. III (establishing judicial power to impose punishment).

[201] *See supra* Part III (providing argument that Supreme Court should side with *Loy* court and determine that these special conditions of release are unconstitutional).

[202] *See supra* Part III.A (providing background regarding Fourteenth Amendment void for vagueness doctrine and its application to circuit split).

[203] *See* United States v. Loy, 237 F.3d 251, 266 (3d Cir. 2001); *supra* Part III.B.

[204] *See* U.S. CONST. amend. I (establishing right to free speech and right to receive information). *See generally* sources cited *supra* note 51 (explaining First Amendment right to receive).

[205] *See* United States v. Boston, 494 F.3d 660, 667-68 (8th Cir. 2007); *supra* Part III.A-B.

of authority under Article III.[206] If this particular issue comes before the Supreme Court, the Court should adopt the position asserted in *Loy* and overturn the *Boston* holding.[207] The Court must develop a specific standard similar to the *Miller* test and define "pornography" to ensure consistent and just administration of the law.[208]

[206] *See* United States v. Raddatz, 447 U.S. 667, 683 (1981) (asserting that court must perform judicial decision-making to comport with Article III); *supra* Part III.C. *See generally* U.S. CONST. art. III, § 1 (establishing judicial power of courts).

[207] *See supra* Part III (providing argument that Supreme Court should side with *Loy* court and determine that these special conditions of release are unconstitutional). *Compare Boston*, 494 F.3d 660 (holding that special conditions barring access to pornography are lawfully imposed), *with Loy*, 237 F.3d 251 (holding that special conditions of supervised release barring access to pornography are unconstitutional).

[208] *See supra* Part III.A. *See generally* Miller v. California, 413 U.S. 15, 23 (1973) (providing Court's test for determining whether material is obscene); Sunstein, *supra* note 76, at 591-92 (suggesting example of more specific, narrow definition of pornography).