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## **BARELY LEGAL: VAGUENESS AND THE PROHIBITION OF PORNOGRAPHY AS A CONDITION OF SUPERVISED RELEASE**

MICHAEL SMITH<sup>†</sup>

### INTRODUCTION

Nationwide, over five million men and women were on probation or parole at the end of 2006.<sup>1</sup> Yet, having been released from jail, they are far from free. They exist in the penal equivalent of purgatory, waiting for the day when they can once again rejoin society as free citizens. Until then, although not confined to the hell of prison, they are subject to the conditions of their release, the violation of which may send them back to jail. Sometimes, these conditions prohibit otherwise noncriminal activity and even restrict constitutional freedoms. Judges are given wide latitude in determining what discretionary conditions to impose on a probationer. For example, a judge can prohibit a probationer from associating with certain people, accessing the Internet, or viewing pornography. These conditions are essentially criminal statutes unique to the probationer. Thus, not only must probationers follow the laws that everyone in society must follow, they must follow rules that prohibit specific noncriminal conduct.

Even though people on probation, parole, or supervised release have their constitutional rights curtailed, they are still entitled to some protections, namely due process of the law. A basic principle of due process is the right to be free from vague statutes. In *Grayned v. City of Rockford*, the Supreme Court enumerated three reasons why vague statutes are unconstitutional.<sup>2</sup> First, a statute must “give the person of

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<sup>1</sup> LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2006, 1 (2007), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1106>.

<sup>2</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

ordinary intelligence a reasonable opportunity to know what is prohibited.”<sup>3</sup> Such a law allows a person to “act accordingly.”<sup>4</sup> As the Court noted, “[v]ague laws may trap the innocent by not providing fair warning.”<sup>5</sup> Second, the law must provide explicit standards to those charged with applying the law in order to prevent “arbitrary and discriminatory enforcement . . . . A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”<sup>6</sup> Finally, the Court stated that a vague law that encroaches upon “sensitive areas of basic First Amendment freedoms” naturally “inhibit[s] the exercise of [those] freedoms”<sup>7</sup> because individuals who are uncertain of the meaning of a statute will “‘steer far wider’” than necessary in order to ensure compliance.<sup>8</sup>

Most probation conditions imposed are specific and do not raise vagueness concerns. Recently, however, circuit courts have split over whether imposing a general prohibition on viewing or possessing “pornography” is too vague. The Third and Ninth Circuits have held that imposing this condition without defining “pornography” violates the probationer’s due process rights.<sup>9</sup> Supporting these circuits, the Second Circuit agreed that the term “pornography” is inherently vague, yet has not found a factual scenario to overturn the imposition of the condition.<sup>10</sup> In contrast, the Fifth Circuit has held that the condition prohibiting

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<sup>3</sup> *Id.* at 108.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 108–09.

<sup>7</sup> *Id.* at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) and quoting *Cramp v. Bd. of Pub. Ins.*, 368 U.S. 278, 287 (1961)).

<sup>8</sup> *Id.* (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

<sup>9</sup> *United States v. Loy*, 237 F.3d 251, 254 (3d Cir. 2001) (“[T]he prohibition on pornography is unconstitutionally vague because it fails to provide any method for Loy or his probation officer to distinguish between those items that are merely titillating and those items that are ‘pornographic.’”); *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002) (noting that the term “pornography” is “entirely subjective” and “lacks any recognized legal definition”).

<sup>10</sup> *See, e.g.*, *United States v. Simmons*, 343 F.3d 72, 81–82 (2d Cir. 2003) (noting that although it is difficult to define pornography, under federal law the “definition of pornography . . . is sufficiently specific to give adequate notice as to what conduct violates a prohibition on pornographic material”).

the viewing or possession of “pornography” does not violate due process rights because there is a commonsense definition of “pornography” that gives probationers sufficient notice.<sup>11</sup>

This Note argues that a judge violates a probationer’s right to sufficiently specific conditions of supervised release that provide fair warning and curtail arbitrary and discriminatory application when he or she imposes a ban on viewing or possessing pornography because the term lacks a specific legal definition.<sup>12</sup> For a condition banning “pornography” to be validly imposed, a sufficiently specific definition of pornography must be developed that satisfies due process while also achieving the goals of probation and preserving judicial flexibility in imposing sentences.

Part I of this Note will discuss the current sentencing scheme in the federal system. It will discuss the goals of sentencing under the U.S. Sentencing Guidelines (the “Sentencing Guidelines” or “Guidelines”) and the discretion given to judges in imposing appropriate sentences, as well as some procedural safeguards. Additionally, Part I will discuss the process of supervised release, including how judges impose conditions and the process for revoking supervised release if a probationer violates a condition.<sup>13</sup> Part II of this Note will discuss the circuit split over the imposition of a general ban on legal adult pornography. Finally, Part III of this Note will discuss the advantages and disadvantages of requiring district courts to give a sufficiently specific definition of pornography when setting conditions of supervised release. Also, Part III will provide a specific definition of pornography that satisfies the Supreme Court’s vagueness concerns in *Grayned* and will show how this definition properly balances the rights of the probationer—namely, the right to conditions that are not

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<sup>11</sup> *United States v. Phipps*, 319 F.3d 177, 193 (5th Cir. 2003).

<sup>12</sup> The courts also use the terms “sexually stimulating” or “sexually oriented” material. Arguably, those terms are even vaguer than “pornography.” For example, advertisements for women’s underwear are not pornographic but could be considered sexually stimulating. Thus, while this Note will focus on the word “pornography,” the analysis applies equally to the terms “sexually stimulating” or “sexually oriented” material, and the proposed definition could also apply to these terms.

<sup>13</sup> While this Note focuses on the federal system, because the condition imposed implicates constitutional concerns and given the similarities between conditions of supervised release, parole and probation, the analysis could apply equally to state courts imposing a similar condition.

vague—with the goals of supervised release—ensuring public safety and furthering the probationer's rehabilitation.

I. SENTENCING AND SUPERVISED RELEASE IN THE FEDERAL SYSTEM

A. *The Sentencing Guidelines*

The Sentencing Guidelines are a vast scheme of regulations promulgated in 1987<sup>14</sup> by the Sentencing Commission<sup>15</sup> and designed to accomplish several goals,<sup>16</sup> namely uniformity, proportionality, and “honesty” in sentencing.<sup>17</sup> The Guidelines prescribe sentencing ranges for various federal crimes based on a variety of factors that judges use to determine what specific sentence to impose.<sup>18</sup> The Guidelines also allow judges to impose sentences greater or lesser than the range if the judge finds aggravating or mitigating circumstances.<sup>19</sup> Until the Supreme Court's decision in *United States v. Booker*<sup>20</sup> in 2005 declaring the mandatory nature of the Guidelines unconstitutional,<sup>21</sup> the Guidelines were mandatory and district court judges were required to impose the sentence given after making the requisite calculation.<sup>22</sup> Currently, the Guidelines are advisory, although district court judges are still required to consult them.<sup>23</sup>

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<sup>14</sup> See U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2009) (guidelines submitted to Congress on April 13, 1987 and took effect on November 1, 1987).

<sup>15</sup> The Commission itself was created by the Sentencing Reform Act of 1984. See Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551–673 (2006) and 28 U.S.C. §§ 991–98 (2006)).

<sup>16</sup> See 18 U.S.C. § 3553(a) (2006) (listing several factors to consider when a judge imposes sentences which embody the principles of deterrence, incapacitation, just punishment, and rehabilitation); see also U.S. SENTENCING GUIDELINES MANUAL § 1A1.2.

<sup>17</sup> U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2009).

<sup>18</sup> *Id.* § 1A1.2 (“The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories.”).

<sup>19</sup> 18 U.S.C. § 3553(b)(1) (stating that a court can depart from the guideline ranges if it “finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission”).

<sup>20</sup> *United States v. Booker*, 543 U.S. 220 (2005).

<sup>21</sup> *Id.* at 244–45.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

The Guidelines allow judges to impose a term of supervised release during sentencing.<sup>24</sup> Supervised release is a period of time after the convict has been released from prison during which the convict must follow certain conditions imposed on him or her by the court.<sup>25</sup> Once the term of supervised release expires, the convict has completed his or her sentence and is once again a free person.

The Guidelines advise judges to impose certain mandatory conditions of supervised release, such as a prohibition on possessing a controlled substance and a prohibition on violating any federal, state, or local laws.<sup>26</sup> The Guidelines also suggest other, discretionary conditions that should be imposed depending on the nature of the crime.<sup>27</sup> Courts have wide discretion in setting conditions of supervised release,<sup>28</sup> including the authority

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<sup>24</sup> U.S. SENTENCING GUIDELINES MANUAL § 5D1.1 (2009). The Guidelines require a term of supervised release when a judge imposes a sentence of more than one year or when required by statute. *Id.* § 5D1.1(a). The judge is also allowed to impose supervised release “in any other case.” *Id.* § 5D1.1(b). Subsection (b) applies if the judge finds that supervised release is necessary “for any of the following reasons: (1) to protect the public welfare; (2) to enforce a financial condition; (3) to provide drug or alcohol treatment or testing; (4) to assist the reintegration of the defendant into the community; or (5) to accomplish any other sentencing purpose authorized by statute.” *Id.* § 5D1.1 cmts. 1–2.

<sup>25</sup> See Hon. Harold Baer, Jr., *The Alpha and Omega of Supervised Release*, 60 ALB. L. REV. 267, 269 (1996). Judge Baer, District Court Judge for the Southern District of New York, goes into great detail and provides a helpful analysis of supervised release, its imposition and revocation. He notes that supervised release is different from parole and probation. *Id.* Parole is a release from prison before a convict has completed his sentence of imprisonment, supervised release is imposed in addition to imprisonment, and probation is a sentence where imprisonment is suspended. *Id.* at 269–70. However, the Second Circuit has noted that “supervised release is essentially similar to parole.” *United States v. Meeks*, 25 F.3d 1117, 1121 (2d Cir. 1994). The Supreme Court also noted that probation and parole are “constitutionally indistinguishable.” *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.3 (1973); see also *United States v. Parriett*, 974 F.2d 523, 527 n.2 (4th Cir. 1992); *United States v. Paskow*, 11 F.3d 873, 881 (9th Cir. 1993).

<sup>26</sup> U.S. SENTENCING GUIDELINES MANUAL § 5B1.3(a) (2009).

<sup>27</sup> *Id.* § 5B1.3(c)–(e).

<sup>28</sup> See *United States v. Jorge-Salgado*, 520 F.3d 840, 842 (8th Cir. 2008); *United States v. Sullivan*, 451 F.3d 884, 895 (D.C. Cir. 2006) (quoting *United States v. Henkel*, 358 F.3d 1013, 1014 (8th Cir. 2004)); *United States v. Simmons*, 343 F.3d 72, 80 (2d Cir. 2003). For an example of this discretion, consider *United States v. Brogdon*, where a trial court imposed, and the Sixth Circuit upheld, a condition prohibiting the defendant from possessing pornographic material even though he pleaded guilty to “being a felon in possession of a firearm.” 503 F.3d 555, 557 (6th Cir. 2007), *cert. denied*, 552 U.S. 1211 (2008). The court found the imposition was reasonable based on the defendant’s criminal history of indecent exposure, even

to curtail constitutional freedoms.<sup>29</sup> The Supreme Court has noted that a probationer, while having more freedom than someone who is incarcerated, is still serving a sentence and can have freedoms curtailed.<sup>30</sup> The Guidelines allow judges to impose any condition as long as that condition is “reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such condition[ ] involve[s] only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2).”<sup>31</sup> Under section 3553(a)(1), when imposing a condition of supervised release, a judge must consider “the nature and circumstances of the offense and the history and characteristics of the defendant.”<sup>32</sup> Moreover, under section 3553(a)(2), the judge must consider

the need for the sentence imposed . . . (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.<sup>33</sup>

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though the most recent incident occurred eleven years prior to his conviction for possession of a firearm. *Id.* at 558, 565.

<sup>29</sup> See *Samson v. California*, 547 U.S. 843, 850 n.2 (2006) (“[P]arolee’s constitutional rights are indeed limited . . .”) (dicta); *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972) (finding that states have the ability to impose restrictions on a parolee’s liberty); *Farrell v. Burke*, 449 F.3d 470, 497 (2d Cir. 2006) (noting that nonobscene pornographic material is protected by the First Amendment when possessed by “ordinary adults, but may be regulated in the hands of parolees to a much greater extent”); *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972) (holding that the government can infringe on the rights of parolees as long as it is reasonably and necessarily related to the government’s legitimate interests). Besides First Amendment restrictions, the state can restrict Fourth Amendment freedom from unreasonable searches and seizures. See *Samson*, 547 U.S. at 852–53; see also Isaac B. Rosenberg, *Involuntary Endogenous RFID Compliance Monitoring as a Condition of Federal Supervised Release—Chips Ahoy?*, 10 YALE J.L. & TECH. 331, 348–49 (2008) (collecting cases allowing for deprivations of liberty as a condition of supervised release).

<sup>30</sup> *Gall v. United States*, 552 U.S. 38, 48 (2007).

<sup>31</sup> 18 U.S.C. § 3563(b) (2006); see also U.S. SENTENCING GUIDELINES MANUAL § 5B1.3(b) (2009).

<sup>32</sup> 18 U.S.C. § 3553(a)(1) (2006).

<sup>33</sup> *Id.* § 3553(a)(2).

After considering the above factors, the judge must state with specificity the reasons for imposing the conditions to facilitate appellate review.<sup>34</sup>

*B. Revocation of Supervised Release*<sup>35</sup>

A term of supervised release does not begin until the probationer is released from prison.<sup>36</sup> Once released, a probation officer provides a written statement to the probationer detailing with sufficient specificity the conditions imposed.<sup>37</sup> The probation officer must supervise the probationer to ensure that he or she is following the conditions,<sup>38</sup> and the officer is also responsible to report any violations to the sentencing court.<sup>39</sup>

Probationers accused of violating supervised release are entitled to some procedural due process, but not to the same extent as a person accused of a crime,<sup>40</sup> even though for practical purposes the result—punishment if found guilty—is the same. The professed reason for the lesser degree of due process is that the revocation of supervised release is “not a criminal proceeding.”<sup>41</sup> Therefore, a probationer is not entitled to a jury and does not have a Fifth Amendment right against self-incrimination.<sup>42</sup> Also, the Fourth Amendment exclusionary rule generally does not apply; hearsay can be admissible evidence, and the government need only prove a violation by a preponderance of the evidence instead of beyond a reasonable doubt.<sup>43</sup>

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<sup>34</sup> *Id.* § 3553(c). On appeal, an appellate court reviews the imposition for abuse of discretion. *Gall*, 552 U.S. at 51.

<sup>35</sup> For a detailed discussion of supervised release and revocation proceedings, see generally Baer, *supra* note 25.

<sup>36</sup> 18 U.S.C. § 3624(e) (2006).

<sup>37</sup> 18 U.S.C. § 3583(f) (2006).

<sup>38</sup> 18 U.S.C. §§ 3601, 3603(2), (4) (2006).

<sup>39</sup> *Id.* § 3603(2), (8)(B).

<sup>40</sup> *United States v. Meeks*, 25 F.3d 1117, 1123 (2d Cir. 1994) (“[M]ost of the fundamental constitutional procedural protections that are normally applicable to a criminal prosecution are not required for supervised-release proceedings as a matter of constitutional law.”) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973)); see also *United States v. Pratt*, 52 F.3d 671, 676 (7th Cir. 1995) (“[A] defendant is afforded only the minimum requirements of due process at a revocation hearing.”) (citing *Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972)).

<sup>41</sup> *Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984).

<sup>42</sup> See Baer, *supra* note 25, at 287–90.

<sup>43</sup> *Id.* at 288–89.



In general, a probationer accused of violating a condition of supervised release is entitled to two hearings, a preliminary hearing and a revocation hearing.<sup>44</sup> The court may issue a warrant, or a probation officer, without a warrant but with probable cause, may arrest a probationer suspected of violating a condition of supervised release.<sup>45</sup> If the probationer is in custody for the violation, then the court must have a prompt preliminary hearing "to determine whether there is probable cause to believe that a violation occurred."<sup>46</sup> A court is required to give the probationer:

- (i) notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; (ii) an opportunity to appear at the hearing and present evidence; and (iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.<sup>47</sup>

If the judge determines that there is probable cause that a violation occurred, then he or she must hold a revocation hearing<sup>48</sup> "within a reasonable time."<sup>49</sup> In advance of the hearing, a probationer is entitled to:

- (A) written notice of the alleged violation; (B) disclosure of the evidence against the person; (C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear; (D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and (E) an opportunity to make a statement and present any information in mitigation.<sup>50</sup>

Once a court determines that a probationer violated a condition of supervised release, it may revoke the probationer's supervised release and have that person incarcerated.<sup>51</sup> The court can order imprisonment up to the full time allowed under

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<sup>44</sup> FED. R. CRIM. P. 32.1(b)(1)–(2).

<sup>45</sup> 18 U.S.C. § 3606 (2006).

<sup>46</sup> FED. R. CRIM. P. 32.1(b)(1)(A). The probationer may waive the hearing. *Id.*

<sup>47</sup> *Id.* 32.1(b)(1)(B).

<sup>48</sup> *Id.* 32.1(b)(1)(C). A revocation hearing, however, may also be waived by the probationer. *Id.* 32.1(b)(2).

<sup>49</sup> *Id.* 32.1(b)(2).

<sup>50</sup> *Id.* 32.1(b)(2)(A)–(E).

<sup>51</sup> 18 U.S.C. § 3583(e)(3) (2006).

the statute under which the probationer was originally convicted.<sup>52</sup> A court is not required to give credit for any time of supervised release already served.<sup>53</sup> Additionally, a probationer can be punished for violating a condition of supervised release and punished for the underlying conduct, if the conduct violates a law, without implicating double jeopardy concerns.<sup>54</sup>

Given the wide discretion courts may exercise in crafting conditions of supervised release and the dire consequences of violating a condition, it is imperative that the conditions imposed on the probationer be sufficiently specific to allow him or her to avoid that conduct which would violate the condition.

## II. THE CONSTITUTIONALITY OF PROHIBITING POSSESSION OF PORNOGRAPHY

Circuits are split over the constitutionality of imposing a general ban on possession of “pornography” as a condition of supervised release,<sup>55</sup> specifically, whether the term

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<sup>52</sup> *Id.* However, the term of imprisonment is subject to maximums under 18 U.S.C. § 3583(e)(3). The maximums are up to five years if convicted of a Class A felony, up to three years if convicted of a class B felony, up to two years if convicted of a Class C or D felony, or up to one year in any other cases. *Id.* For example, someone convicted of a Class C felony could have had a maximum term of imprisonment of twenty-four years and 364 days and an original term of supervised release of three years. See 18 U.S.C. § 3559(a)(3) (2006); see also 18 U.S.C. § 3583(b)(2). Upon revocation, a court could only impose a maximum term of imprisonment of two years. However, if the probationer had served the maximum sentence of imprisonment, his imprisonment would now exceed that by two years. See Baer, *supra* note 25, at 292–93.

<sup>53</sup> 18 U.S.C. § 3583(e)(3).

<sup>54</sup> See *United States v. Meeks*, 25 F.3d 1117, 1122–23 (2d Cir. 1994).

<sup>55</sup> State courts have also reviewed similar conditions imposed on state parolees or probationers. States are similarly split as to whether the imposition of such a condition is unconstitutionally vague. Compare *McVey v. State*, 863 N.E.2d 434, 447 (Ind. Ct. App. 2007) (holding condition prohibiting possession of pornographic or sexually explicit materials was unconstitutionally vague), *Fitzgerald v. State*, 805 N.E.2d 857, 866–67 (Ind. Ct. App. 2004) (same), *State v. Bahl*, 193 P.3d 678, 688 (Wash. 2008) (same), and *State v. Sansone*, 111 P.3d 1251, 1255 (Wash. Ct. App. 2005) (same), with *Wilfong v. Commonwealth*, 175 S.W.3d 84, 99 (Ky. Ct. App. 2004) (holding that a commonsense reading of the phrase “sexually arousing materials” does not render the ambiguous phrase unconstitutionally vague regarding its use in a condition of probation), and *Belt v. State*, 127 S.W.3d 277, 281–82 (Tex. Ct. App. 2004) (holding that condition prohibiting possession of “‘sexually stimulating’ or ‘sexually oriented’” material was not unconstitutionally vague). See also *Commonwealth v. Perreault*, 930 A.2d 553, 560 (Pa. Super. Ct. 2007) (holding that a condition is not unconstitutionally vague when statutes provide definitions of the terms). *But cf.* *Kasichke v. State*, 991 So. 2d 803, 814–15 (Fla. 2008) (applying the rule that ambiguous statutes are to be construed in favor of the criminal defendant

“pornography” as it applies to conditions of supervised release is inherently vague. The Third and Ninth Circuits held that it is. The Second Circuit stated that the term is inherently vague but has not expressly overturned the imposition of a condition banning pornography. The Fifth Circuit, however, held that the term is not inherently vague.<sup>56</sup>

#### A. *Void for Vagueness Doctrine*

Embodied in the Fifth and Fourteenth Amendments, the void-for-vagueness doctrine<sup>57</sup> invalidates any statute<sup>58</sup> that is “so

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in interpreting an ambiguous statute providing for a condition prohibiting possession of pornographic materials). Because vagueness is a constitutional issue, the analysis and the definition are applicable to state law.

<sup>56</sup> While the Third, Ninth, Second, and Fifth Circuits have all taken a position on this issue, other circuits have only ruled that there was no plain error on the part of the district court, but did not decide whether, when properly reviewed, they would find the condition unconstitutional. *See* *United States v. Wilkinson*, 282 F. App'x 750, 753–54 (11th Cir. 2008); *see also* *United States v. Ristine*, 335 F.3d 692, 695 (8th Cir. 2003).

<sup>57</sup> The Supreme Court case of *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), exemplifies the application of the void-for-vagueness doctrine. In *Papachristou*, the Court held that Jacksonville's vagrancy law was void for vagueness, violating both prongs of the vagueness test. *Id.* at 162. First, the Court found that the law failed to give fair notice because “[t]he Jacksonville ordinance makes criminal activities which by modern standards are normally innocent.” *Id.* at 163. The Court also found that the statute prohibited “activities [that] are historically part of the amenities of life” and activities that “have encouraged lives of high spirits rather than hushed, suffocating silence.” *Id.* at 164. Second, the Court found that the ordinance gave “unfettered discretion” to the Jacksonville Police. *Id.* at 168. It stated that there were no standards “governing the exercise of the discretion” to the police, and that this type of law encourages “arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for ‘harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.’” *Id.* at 170 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940)). The ordinance, according to the Court, required people to “comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts.” *Id.*

<sup>58</sup> It should be noted that it is questionable whether the void-for-vagueness doctrine applies to conditions of supervised release. The Supreme Court has never ruled that it does, although lower courts have applied the doctrine to conditions of supervised release. *See, e.g.,* *Farrell v. Burke*, 449 F.3d 470, 484–85 (2d Cir. 2006) (applying vagueness doctrine to condition of probation); *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002); *United States v. Loy*, 237 F.3d 251, 262 (3d Cir. 2001); *United States v. Schave*, 186 F.3d 839, 843 (7th Cir. 1999). Also, in *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court noted that conditions are sometimes “quite vague” but did not apply the void-for-vagueness doctrine. *Id.* at 479. Regardless, no circuit court has ruled that void-for-vagueness should not be applied to conditions of supervised release. However, none of the courts explain why the doctrine should apply to conditions of supervised release. Arguably, the courts may feel that it is so

vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.”<sup>59</sup> The Supreme Court has fashioned a two-prong test to determine whether a statute is void for vagueness.<sup>60</sup> Either prong can be satisfied to strike down a law as void-for-vagueness. First, a statute will be void if it “fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits.”<sup>61</sup> The purpose of this prong is to ensure a statute gives fair notice to enable a person to “conform his or her conduct to the law.”<sup>62</sup> Second, a statute will be void if it “may authorize and even encourage arbitrary and discriminatory enforcement.”<sup>63</sup> For example, a vague statute may allow “‘a standardless sweep [that] allows policemen [and] prosecutors . . . to pursue their personal predilections.’”<sup>64</sup>

While the Supreme Court has noted that a statute is not vague when a person “exercising ordinary common sense can sufficiently understand” the statute,<sup>65</sup> a statute will be considered unconstitutionally vague if enforcement depends on a completely subjective standard.<sup>66</sup> Thus, if it is up to the police officer on the street to decide what conduct falls within the statute because the statute itself does not define the prohibited conduct, then enforcement depends on a completely subjective standard.

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obvious that the void-for-vagueness doctrine applies to conditions of supervised release that they feel no need to justify the application. Practically speaking, the application of this doctrine to conditions of supervised makes sense. Although conditions are unique to the person on whom it is imposed, they are state-enforced prohibitions on conduct, the violation of which may lead to punishment, like any criminal statute. *See* United States v. Dane, 570 F.2d 840, 843–44 (9th Cir. 1977).

<sup>59</sup> *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *see also* *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966) (holding that a law violates due process if it is not sufficiently definite).

<sup>60</sup> *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion).

<sup>61</sup> *Id.*; *see also* *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

<sup>62</sup> *Morales*, 527 U.S. at 58.

<sup>63</sup> *Id.* at 56; *see also* *Kolender*, 461 U.S. at 357.

<sup>64</sup> *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)) (noting that arbitrary and discriminatory enforcement is “the more important aspect of [the] vagueness doctrine”).

<sup>65</sup> *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 579 (1973).

<sup>66</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 113 (1972); *see also* *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (holding that a statute is impermissibly vague when it prohibits conduct that annoys some but would not annoy others).

B. *Circuit Court Split: Is "Pornography" a Vague Term?*

While not all laws will be struck down merely because they are vague,<sup>67</sup> the Supreme Court requires laws that affect constitutionally protected rights, especially First Amendment rights, to meet the stringent standards of the void-for-vagueness doctrine, and it has not hesitated to strike down a law designed to protect the public and enacted with a valid purpose if it is too vague.<sup>68</sup> Some circuit courts have been equally adamant that, though there may be valid purposes, conditions of supervised release prohibiting the possession of pornography must be overturned because the term itself is inherently vague.

1. Third Circuit: Pornography Is Inherently Vague

In *United States v. Loy*,<sup>69</sup> the Third Circuit held that a condition prohibiting possession of "all forms of pornography, including legal adult pornography"<sup>70</sup> is unconstitutionally vague "because it fails to provide any method for [defendant] or his probation officer to distinguish between those items that are merely titillating and those items that are 'pornographic.'"<sup>71</sup> Also, the court held that the prohibition did not "provide any guidance as to whether the restriction extends only to visual materials, or whether purely textual works and sound recordings fall within its scope."<sup>72</sup> The Third Circuit did not forbid a district court from prohibiting a probationer from viewing or possessing pornography, but required that the condition must be "more tightly defined."<sup>73</sup>

In *Loy*, Ray Donald Loy was convicted of receiving and possessing child pornography.<sup>74</sup> Loy had answered an advertisement in a "sexually explicit" magazine that invited readers, in a round about way, to trade pornography involving

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<sup>67</sup> See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) ("The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment.").

<sup>68</sup> See *Morales*, 527 U.S. at 62, 64.

<sup>69</sup> *United States v. Loy*, 237 F.3d 251 (3d Cir. 2001).

<sup>70</sup> *Id.* at 253.

<sup>71</sup> *Id.* at 254.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 267.

<sup>74</sup> *Id.* at 253.

children.<sup>75</sup> In exchange for a video of young girls bathing, Loy agreed to send a video of children engaging in sex.<sup>76</sup> However, the advertisement was part of a joint undercover child pornography investigation conducted by the United States Postal Inspection Service and the Pennsylvania State Attorney General's Office.<sup>77</sup> Law enforcement officers arrested Loy at his home after they observed him pick up the videotape of children bathing at his post office box.<sup>78</sup> In his home, inspectors found another tape depicting child pornography, as well as fifteen computer disks, also containing child pornography.<sup>79</sup> After pleading guilty to one count of receiving child pornography in the mail, Loy was sentenced to thirty-three months of incarceration and three years of supervised release.<sup>80</sup> The District Court imposed a condition prohibiting Loy from possessing "all forms of pornography, including legal adult pornography."<sup>81</sup> Loy appealed the imposition of that condition.<sup>82</sup>

In overturning the imposition of the condition prohibiting possession of pornography, the Third Circuit reasoned that, unlike obscenity, "the term 'pornography' . . . has never received a precise legal definition from the Supreme Court or any other federal court of appeals, and remains undefined in the federal code."<sup>83</sup> The court noted that it could provide "numerous examples of books and films" that it could not say definitely were or were not pornographic.<sup>84</sup> The court also noted that the government was not able to determine whether *Playboy* would be prohibited.<sup>85</sup> Finally, because neither the court nor the

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<sup>75</sup> *Id.* at 254.

<sup>76</sup> *Id.* at 254–55.

<sup>77</sup> *Id.* at 254.

<sup>78</sup> *Id.* at 255.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 253.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 263. The court noted, however, that federal law contains a definition of child pornography. *Id.* at 263 n.4.

<sup>84</sup> *Id.* at 264. The court listed as examples *Playboy*, which contained nudity but not sexual conduct, the film adaptations of Vladimir Nabokov's *Lolita*, some Calvin Klein advertisements, and Edouard Manet's *Le Dejeuner sur L'Herbe*, which depicts a nude woman lunching with two fully dressed men. *Id.* The court further noted that it could not determine whether the condition prohibiting pornography applied only to visual materials or if it included pure text and sound recordings. *Id.*

<sup>85</sup> *Id.* The court stated that "[e]ven the government conceded . . . that it does not know whether *Playboy* is part of this group, which is, in fact, a change from its

government could discern what material was prohibited, the court found it unfair to assume that the probationer could do so in advance.<sup>86</sup>

In addition to finding that the probationer could not reasonably determine what material was prohibited and what was not, the Third Circuit held that the condition gave “the probation officer an unfettered power of interpretation.”<sup>87</sup> It noted that this power would “create one of the very problems against which the vagueness doctrine is meant to protect, i.e., the delegation of ‘basic policy matters to policemen . . . for resolution on an ad hoc and subjective basis.’”<sup>88</sup> As a solution, the Third Circuit recommended that a judge imposing conditions of supervised release borrow applicable language from the federal statutory definition of child pornography at 18 U.S.C. § 2256(8).<sup>89</sup>

## 2. Ninth Circuit: Pornography Is Inherently Vague

Agreeing with the Third Circuit, the Ninth Circuit, in *United States v. Guagliardo*,<sup>90</sup> held that a “blanket prohibition” on pornography violated a probationer’s due process rights because of the inherent vagueness of the term.<sup>91</sup> In *Guagliardo*, Thomas Guagliardo engaged in an online chat with an undercover police detective claiming to have a large collection of child pornography,

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position, taken during oral argument, that *Playboy* absolutely constituted ‘pornography.’” *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 266.

<sup>88</sup> *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)).

<sup>89</sup> *Id.* at 267. The relevant portion of the statute reads, “any visual depiction, including any photography, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct.” *Id.* at 267 n.8.

<sup>90</sup> *United States v. Guagliardo*, 278 F.3d 868 (9th Cir. 2002).

<sup>91</sup> *Id.* at 872. The Ninth Circuit later approved a condition that prohibited possession of pornography that was tied to the definition of sexually explicit material in the federal child pornography statute. *See United States v. Rearden*, 349 F.3d 608, 620 (9th Cir. 2003). This is in line with the Third Circuit’s suggestion in *Loy* that district courts use that specific language to overcome a vagueness challenge. *See Loy*, 237 F.3d at 267. The Second Circuit also held that if a person is convicted under the child pornography statute, then there is no vagueness issue with regard to a condition prohibiting possession of pornography since it is defined within the statute. *See United States v. Simmons*, 343 F.3d 72, 82 (2d Cir. 2003); *United States v. Cabot*, 325 F.3d 384, 385 (2d Cir. 2003). *But see United States v. Voelker*, 489 F.3d 139, 152 (3d Cir. 2007) (holding that, even though the district court imposed a condition prohibiting sexually explicit material as defined in a federal statute, the condition was not “narrowly tailored”).

and agreed to meet with the undercover detective to give him copies of some of his collection.<sup>92</sup> When Guagliardo gave the detective three computer disks containing child pornography, the detective arrested him.<sup>93</sup> After a bench trial, Guagliardo was convicted of possession of child pornography and sentenced to fifteen months imprisonment followed by three years of supervised release.<sup>94</sup> The trial court imposed a condition of supervised release that prohibited Guagliardo from possessing any pornography, including legal adult pornography.<sup>95</sup> Guagliardo appealed the conviction and the condition.<sup>96</sup>

In overturning the imposition of the condition, the Ninth Circuit noted that “a probationer cannot reasonably understand what is encompassed” by the pornography prohibition because the “term itself is entirely subjective” and “it lacks any recognized legal definition.”<sup>97</sup> The court pointed out that the district court itself could not define the term and scoffed at the district court’s declaration that it would not “‘have any trouble defining it if [Guagliardo] violate[d] it.’”<sup>98</sup>

### 3. Second Circuit: While Pornography May Be Vague, the Court Has Not Overturned the Imposition

The Second Circuit’s approach to conditions of supervised release prohibiting the possession of pornography is less straightforward than the Third and Ninth Circuits—which require sentencing judges to define the term “pornography.” First, in *United States v. Simmons*,<sup>99</sup> the Second Circuit held that the term “pornography” is inherently vague.<sup>100</sup> However, the court affirmed the condition imposed by the trial court, which prohibited possession of “any pornographic material, including videotapes, films, magazines, books and photographs, nor shall he subscribe to ‘adult-only’ movie channels.”<sup>101</sup> The court

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<sup>92</sup> *Guagliardo*, 278 F.3d at 870.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 872.

<sup>96</sup> *Id.* at 870.

<sup>97</sup> *Id.* at 872.

<sup>98</sup> *Id.* (“This after-the-fact definition . . . leaves Guagliardo in [an] untenable position . . .”).

<sup>99</sup> *United States v. Simmons*, 343 F.3d 72 (2d Cir. 2003).

<sup>100</sup> *Id.* at 82.

<sup>101</sup> *Id.* at 77.



reasoned that since Simmons was convicted under a statute that contained a definition of pornography, he was on notice as to what material the condition prohibited.<sup>102</sup>

In *Simmons*, Alan Simmons pleaded guilty to “knowingly transporting a minor in foreign commerce for the purpose of engaging in illegal sexual conduct” and “to using a minor to engage in sexually explicit conduct for the purpose of producing a videotape of the conduct.”<sup>103</sup> Simmons, a Canadian, took a ski trip to Vermont with his two sons, aged nine and twelve, and a fifteen-year-old girl, B.B., whom Simmons had coached in a girls’ hockey league and whose mother Simmons had dated.<sup>104</sup> After a day of skiing, they all ate dinner and watched videos.<sup>105</sup> Simmons prepared drinks for the kids, and later they fell asleep but did not wake up until noon the next day.<sup>106</sup> The girl thought this was unusual because she was an early riser; however, she did not suspect any wrongdoing.<sup>107</sup>

Four years later, Canadian authorities, while executing a search warrant in connection with an alcohol and tobacco smuggling case, seized a videotape of Simmons sexually abusing an unconscious adolescent female.<sup>108</sup> After investigating, the authorities determined that the tape had been made in Vermont during the ski trip and that the girl in the tape was B.B.<sup>109</sup> A federal grand jury in Vermont indicted Simmons, and he subsequently pleaded guilty to both charges contained in the indictment.<sup>110</sup> He was sentenced to 168 months imprisonment, to be followed by three years of supervised release.<sup>111</sup> He appealed, among other things, the condition of supervised release that prohibited him from possessing any pornographic material.<sup>112</sup>

In affirming the condition, the Second Circuit held that when a defendant is convicted under a statutory scheme that includes a definition of pornography, he is given “adequate notice as to

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<sup>102</sup> *Id.* at 81–82; *see also* *United States v. Cabot*, 325 F.3d 384, 385 (2d Cir. 2003).

<sup>103</sup> *Simmons*, 343 F.3d at 74.

<sup>104</sup> *Id.* at 75.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 77.

<sup>112</sup> *Id.* at 74–75.

what conduct violates a prohibition on pornographic material.”<sup>113</sup> Simmons was convicted under 18 U.S.C. § 2251(a) for persuading a minor to engage in sexually explicit conduct for the purpose of producing a videotape.<sup>114</sup> The court noted that the statute fell under the same chapter of the United States Code that contained a definition of child pornography.<sup>115</sup> According to the court, the section’s “definition of pornography avoids reference to subjective standards and is sufficiently specific to give adequate notice as to what conduct violates a prohibition on pornographic material.”<sup>116</sup> The court did not require the district court to explicitly reference the definition, but “urge[d] them to do so in future cases, particularly since in other contexts the term [was] inherently vague.”<sup>117</sup>

In *Farrell v. Burke*,<sup>118</sup> the Second Circuit again held that the term “pornography” is inherently vague,<sup>119</sup> but refused to strike down the condition as being void for vagueness because it found, as applied to Farrell, that the material he possessed “fit[ ] within any reasonable understanding of the term” pornography.<sup>120</sup>

In *Farrell*, Christopher J. Farrell filed a federal civil rights claim alleging that his parole officers violated his Fourteenth Amendment due process rights by enforcing a condition of his parole that prohibited possession of pornographic material.<sup>121</sup> Farrell had been arrested after paying four boys between the ages of thirteen and sixteen to have anal and oral sex with him at his home.<sup>122</sup> He pleaded guilty in state court to three counts of sodomy in the third degree.<sup>123</sup> After serving almost four years, he

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<sup>113</sup> *Id.* at 82.

<sup>114</sup> *Id.* at 81 n.6.

<sup>115</sup> *Id.* at 81.

<sup>116</sup> *Id.* at 82.

<sup>117</sup> *Id.*

<sup>118</sup> *Farrell v. Burke*, 449 F.3d 470 (2d Cir. 2006).

<sup>119</sup> *Id.* at 490. In fact, the court went to great lengths to reiterate the fact that the term is inherently vague. *Id.* at 486. It quoted from both the Third and Ninth Circuits, *id.* at 487–88, state appellate courts, *id.* at 488 n.4, and New York case law, *id.* at 488. It rejected the state’s argument that it should “reject the holdings of these cases” because the term pornography can be determined by “value-free criteria.” *Id.* The court finally noted that its ruling did not “in any way challenge the earlier cases from this Circuit and others finding that the term is insufficient to give notice to a reasonable offender of what material sweeps within its prohibition.” *Id.* at 490.

<sup>120</sup> *Id.* at 490.

<sup>121</sup> *Id.* at 476.

<sup>122</sup> *Id.* It is unclear how he was arrested.

<sup>123</sup> *Id.*

was paroled.<sup>124</sup> The parole officer imposed the standard conditions that New York law requires, as well as a special condition that Farrell would “not own or possess any pornographic material.”<sup>125</sup> Four months before Farrell’s parole was to expire, his parole officers visited him.<sup>126</sup> At Farrell’s apartment, the officers found three publications—a book called *Scum: True Homosexual Experiences*, a magazine called *My Comrade* with the headline “Gay Sex! The Shocking Truth!,” and an anthology called *Best Gay Erotica 1996*—all dealing with homosexual subject matters.<sup>127</sup> After looking through the material, the parole officer arrested Farrell.<sup>128</sup>

At Farrell’s revocation hearing, the parole officer testified that the book, *Scum*, and magazine, *My Comrade*, were pornographic because they contained pictures of nude men in certain positions.<sup>129</sup> The officer also testified, in general, that possession of *Playboy* would have been prohibited.<sup>130</sup> Regarding purely textual material, the officer testified that he would not arrest someone but would “run it past [his] supervisor and let him make that decision.”<sup>131</sup> Finally, according to the parole officer, if a parolee possessed a photograph of the statue of David, then the officer would have “locked [the parolee] up for that.”<sup>132</sup>

Farrell testified that he believed the prohibition related to “[t]he kind of stuff that you would get in an adult book store or an x-rated movie or a book that has pictures of people engaging in sex activity where the whole purpose of the book is to arouse your sexual appetite.”<sup>133</sup> He further explained that he believed pornographic material contained “pictures of people engaging in sexual activity . . . whose sole purpose is to pander [to] people’s

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* Under New York law, a parole officer can impose special conditions. See N.Y.C.R.R. tit. 9, § 8003.2(l) (2010).

<sup>126</sup> *Farrell*, 449 F.3d at 477.

<sup>127</sup> *Id.* The officer looked through the publications and saw sexually explicit pictures. *Id.* He did not read the text. *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 479.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 479–80.

<sup>132</sup> *Id.* at 479. The parole officer did not know what the statue of David was, so counsel for Farrell described it as “a large sculpture of a nude youth with his genitals exposed and visible,” prompting the officer’s response. *Id.*

<sup>133</sup> *Id.* at 480.

sexual arousal.”<sup>134</sup> Farrell did not believe that either the book or the magazine were pornographic.<sup>135</sup>

The Administrative Law Judge (“ALJ”) presiding over the revocation hearing found that the magazine was not pornographic but that the book was.<sup>136</sup> The ALJ noted that the magazine was satirical in nature.<sup>137</sup> However, the book, *Scum*, contained “numerous pictures [of] frontal male nudity, erect penises and males fondling their genitals.”<sup>138</sup> *Scum* also contained “numerous stories which describe sexual encounters involving underage males.”<sup>139</sup> The plaintiff’s parole was revoked and he was ordered held until the expiration of his maximum sentence.<sup>140</sup>

On appeal, the Second Circuit reaffirmed that the term “pornography” was “vague if it was not tied to a specific definition.”<sup>141</sup> It noted that “[w]here the offense of conviction does not involve pornography, a statutory definition of that term in a criminal statute that the defendant has never encountered no more provides notice of the meaning of that term than does any other definition of pornography.”<sup>142</sup> The court also noted that the condition did not provide any standards for those who enforced the term.<sup>143</sup>

The Second Circuit held, however, that, even though the term is inherently vague, the nature of the book, *Scum*, was such that any reasonable definition of pornography would have included it and that Farrell was on notice that the book was prohibited.<sup>144</sup> The condition “provided adequate standards for the parole officers to determine whether *Scum* was prohibited, even though its application to other materials would have been

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.* The plaintiff felt that the magazine was satirical in nature and not meant to arouse sexual feeling. *Id.* Regarding the book, the plaintiff felt like it was a “history of the way homosexuals lead their lives” and it provided “analysis of the way sexual behavior is reported in mainstream newspapers.” *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 481.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* The plaintiff served four-and-a-half months incarceration for the violation. *Id.*

<sup>141</sup> *Id.* at 486.

<sup>142</sup> *Id.* at 487.

<sup>143</sup> *Id.* at 493.

<sup>144</sup> *Id.* at 492.

uncertain.”<sup>145</sup> In so holding, the Second Circuit noted various possible definitions of pornography, including Farrell’s own testimony about what he believed to be pornography, and applied those definitions to *Scum*.<sup>146</sup> The court, however, admonished the State for failing to “provide meaningful notice of the scope of the Special Condition’s prohibition or meaningful limits on an enforcing officer’s discretion.”<sup>147</sup> It concluded, “We hope that greater efforts will be made in the future to define adequately the terms of parole conditions dealing with pornographic materials.”<sup>148</sup> Thus, the Second Circuit seemed to adopt the reasoning of the Third and Ninth Circuits, but refused to apply the standards to the facts in this particular case.

#### 4. Fifth Circuit: “Pornography” Is Not Inherently Vague

In contrast to the Third and Ninth Circuits, the Fifth Circuit, in *United States v. Phipps*,<sup>149</sup> held that, while the phrase “sexually stimulating” material is vague, the condition must be read in a “‘commonsense way’ because ‘it would be impossible to list’ every instance of prohibited conduct”<sup>150</sup> and this “commonsense reading of the special condition satisfies the dictates of due process.”<sup>151</sup> In *Phipps*, Michael Phipps and Dean Gilley followed a woman as she drove home from work.<sup>152</sup> After she drove into her carport, Phipps put a gun to her head and then Gilley restrained her in the back seat.<sup>153</sup> While Phipps drove on the highway, Gilley raped the woman while continuously threatening her.<sup>154</sup> Although Phipps and Gilley switched positions, Phipps did not rape the woman because Gilley warned Phipps to wait until they got to a motel.<sup>155</sup> At a

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<sup>145</sup> *Id.* at 494.

<sup>146</sup> *Id.* at 490–92.

<sup>147</sup> *Id.* at 498.

<sup>148</sup> *Id.*

<sup>149</sup> *United States v. Phipps*, 319 F.3d 177 (5th Cir. 2003).

<sup>150</sup> *Id.* at 193 (quoting *United States v. Paul*, 274 F.3d 155, 167 (5th Cir. 2001)).

<sup>151</sup> *Id.* The court later stated that, because the issue was reviewed for plain error since the defendant failed to object to the condition when it was imposed, it would reserve the question whether the court would uphold a similar condition when reviewed *de novo*. *Id.* at 194 n.20. However, the court later reaffirmed the holding in *Phipps* in an unpublished decision. See *United States v. Hartshorn*, 163 F. App’x 325, 330–31 (5th Cir. 2006).

<sup>152</sup> *Phipps*, 319 F.3d at 180.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 180–81.

<sup>155</sup> *Id.* at 181.

motel, Phipps was about to rape the woman when Gilley, who was nervous, stopped him.<sup>156</sup> Later, they drove with the woman to a nearby alley, but the woman was able to flee, fearing for her life.<sup>157</sup> Neither Phipps nor Gilley chased her.<sup>158</sup> They were arrested the next day.<sup>159</sup> Both were found guilty by a jury of conspiracy to commit kidnapping, kidnapping, use of a firearm during and in relation to the kidnapping, carjacking, and using a firearm during and in relation to the carjacking,<sup>160</sup> and both were sentenced to 65 years, 9 months and then to a term of supervised release.<sup>161</sup>

A condition of the supervised release was that defendants could not possess “sexually oriented or sexually stimulating materials” and could not patronize “any place where such material or entertainment is available.”<sup>162</sup> On appeal, the Fifth Circuit admitted that the term was “somewhat vague” and noted that “a more definite condition might be desirable,” but upheld the condition anyway given the wide discretion afforded to a district court and the commonsense manner in which the condition can be read.<sup>163</sup> The Fifth Circuit, by applying a “commonsense reading” to the condition, rejected defendants’ argument that the condition could apply to lingerie advertisements or the “Song of Solomon.”<sup>164</sup> The court also noted that the condition was narrowed by another condition imposed on the defendants that prohibited them from visiting any place where sexually oriented or sexually stimulating material is available.<sup>165</sup> The Fifth Circuit concluded that the condition prohibited the defendants from viewing sexually stimulating material that is of the type that is available at strip clubs, adult bookstores, and adult theaters.<sup>166</sup>

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 192–93.

<sup>163</sup> *Id.* at 193.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

## III. DEFINING PORNOGRAPHY

A. *Policy Arguments for a More Specific Definition*

In addition to the constitutional issue of vagueness, there are three reasons justifying the requirement that sentencing courts, when imposing a condition of supervised release prohibiting the possession of pornography, should provide a specific definition of "pornography."

First, a sufficiently specific definition furthers the goal of transitioning a convict from rigid and restrictive prison life back into society, where he or she can lead a more productive and well-meaning life. Judges do not impose conditions to arbitrarily punish the person. Because conditions are not meant to punish people on supervised release, a more specific definition will further the goals of supervised release. A more specific definition will also provide the probationer with an objective set of criteria that will allow that person to avoid any conduct that would send him or her back to prison. Furthermore, if supervised release is meant to assist the probationer in becoming a productive member of society, undefined conditions cut against this purpose because that probationer will not know what conduct is prohibited and what is not.

Second, a more specific definition would be more efficient by conserving judicial and administrative resources. Arresting and revoking supervised release consumes a lot of time, effort, and money.<sup>167</sup> In addition to the time and expense of arresting and

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<sup>167</sup> In 2007, in the federal system, there were 116,221 people under post-conviction supervision. JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 13 (2008), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2007/front/JudicialBusinesspdfversion.pdf>. This represents a twenty-four percent increase since 1998. *Id.* Also, there was an 18.6% increase over criminal cases filed in 2007 as compared to 1998, and an almost eighty-percent increase over pending cases. *Id.* In 2007, there were 2,460 sexual offense criminal cases commenced, an increase of over eighty-five percent from 2003. *Id.* at 228. Nationwide, as of 2006, there were over five million adult men and women on probation or parole, a thirty-four percent increase from 1995. See Glaze & Bonczar, *supra* note 1, at 1. Also, while child sex offenses comprised a relatively small share of the total criminal caseload, they are "among the fastest growing crimes" in the federal system, mainly due to child pornography prosecutions. MARK MOTIVANS & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS, 2006, at 1 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf>; see also

processing a probationer for a violation of supervised release, a probationer is entitled to two hearings, both which must occur within a reasonable time. Moreover, the probationer is entitled to counsel. The hearings must be on the record, and the judge must provide a written statement detailing why he or she revoked the probationer's supervised release. While this time and expense is necessary for those who willfully violate conditions of supervised release, it is patently unnecessary when the probationer on supervised release is trying to conform his or her conduct but fails because he or she cannot understand the condition or because a probation officer decides the probationer has violated the condition. Such waste can be avoided if a sentencing judge, at the hearing imposing sentence, provides a sufficiently specific definition of what constitutes "pornography" so that the probationer has notice as to what material he or she may or may not possess.

Finally, requiring a sentencing court to impose a more specific definition of pornography does not restrict judicial discretion. The courts will still have the authority to impose the condition; they will merely be required to include a specific definition when imposing a prohibition on viewing or possessing pornography. Also, although courts have wide discretion in imposing sentences, this discretion is not absolute. The Sentencing Guidelines and appellate review curtail a sentencing court's ability to sentence a defendant any way it wants. So even if requiring a more specific definition of pornography would curtail a judge's discretion, it would not do so any more than the Sentencing Guidelines, congressional legislation, or constitutional principles do. Finally, courts will probably welcome a more specific definition rather than struggling to find a constitutionally permissible definition.

*B. Policy Arguments Against a More Specific Definition*

Even though there are compelling constitutional and practical reasons to require sentencing courts to provide a more specific definition of pornography in conditions of supervised release, arguments exist against such a requirement.



First, critics argue that a more specific definition of pornography is not necessary because sufficient safeguards exist to protect a probationer's due process rights. For example, a probation officer will use common sense to determine whether or not the material in the probationer's possession constitutes pornography. Similarly, a district court judge will use reason and precedent to determine whether a violation of the condition occurred. Moreover, if for some reason both the probation officer and judge err, the revocation of supervised release can be appealed. Finally, while a probationer is not entitled to all the due process requirements of a criminal trial, he still has the right to be heard at two hearings, the ability to be represented by counsel, and the opportunity to call and question witnesses.

This argument, however, is not persuasive. It ignores Supreme Court precedent that arbitrary and discriminatory enforcement violates due process rights. This tenet is meaningless when a condition is completely subjective and relies on the personal predilections of those charged with the condition's enforcement. The purpose behind the void-for-vagueness doctrine is to encourage sufficient specificity in the statute or condition so that a law-abiding citizen can tailor their conduct to avoid violating the law. This doctrine is extremely important since being convicted of a crime deprives a person of liberty. To require a person to be found in violation of a condition, then sent to jail, and remain in jail while his or her appeal is being reviewed because that person reasonably did not understand what conduct was prohibited strikes at the very heart of the Constitution. Moreover, it is less efficient to discern *ex post facto* whether material is pornographic than to ensure that a probationer knows the law and can follow it.

Second, critics assert that requiring sentencing courts to use specific language when imposing a condition banning pornography undermines judicial discretion to craft an appropriate sentence tailored to the individual wrongdoer. Sentencing judges need latitude to craft individualized sentences that are tailored to the particular factual situation. Forcing a judge to impose a specific definition curtails this ability.

This argument is problematic for several reasons. First, judges usually impose conditions prohibiting possession of pornography when the probationer has been convicted of a sex offense, but they do not distinguish between sex offenses. Thus,

a person convicted of rape of an adult woman and a person convicted of possessing child pornography will probably get the same prohibition—no possession of pornography, even legal adult pornography—even though the crimes are very different.<sup>168</sup> Also, if a judge wants to limit the scope of the prohibition beyond the definition provided, he or she is free to do so.

Second, as noted above, judges do not have unlimited discretion to impose whatever sentence they like. Not only are judges constrained by constitutional concerns, they must sentence according to statute and are required to consult the Sentencing Guidelines. Moreover, a judge who fails to adequately explain any departure from the Guidelines risks reversal on appeal. Finally, requiring judges to define what they mean when imposing otherwise vague conditions does not impact their discretion; it merely requires them to be more precise in the language they use. Judges are still free to impose a condition prohibiting possession of pornography.

Finally, critics argue that if the definition is too specific, then the probationer will be able to tailor his or her activity right up to the line and will act with a wrongful state of mind but not be punished. If the condition is too specific, then the probationer

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<sup>168</sup> There is a sociological argument that it may not be wise to prohibit access to legal pornography. Under the “catharsis theory,” pornography acts as a safety valve because the repeated exposure of pornographic images will decrease the desire and interest of the viewer. See LIZ KELLY, RACHEL WINGFIELD, SHEILA BURTON & LINDA REGAN, *SPLINTERED LIVES: SEXUAL EXPLOITATION OF CHILDREN IN THE CONTEXT OF CHILDREN’S RIGHTS AND CHILD PROTECTION* 23 (1995), available at [http://www.barnardos.org.uk/splintered\\_lives\\_report.pdf](http://www.barnardos.org.uk/splintered_lives_report.pdf); see also Ronald J. Berger, Patricia Searles & Charles E. Cottle, *Ideological Contours of the Contemporary Pornography Debate*, 11 *FRONTIERS* 30, 34 (1990) (noting that in popular opinion a majority of both men and women that pornography provides “an outlet for bottled-up impulses”); W. Cody Wilson, *Facts Versus Fears: Why Should We Worry About Pornography?*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, Sept. 1971, at 105, 115. But see Diana E.H. Russell & Natalie J. Purcell, *Exposure to Pornography as a Cause of Child Sexual Victimization*, in *HANDBOOK OF CHILDREN, CULTURE, & VIOLENCE* 59, 60–61 (Nancy E. Dowd, Dorothy G. Singer & Robin Fretwell Wilson eds., 2006) (criticizing catharsis theory); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 *DUKE L.J.* 589, 599 n.71 (noting that catharsis theory has little empirical support). Therefore, it would seem, prohibiting a sex offender from viewing legal adult pornography may have the opposite intended effect of increasing the offender’s desire to the point that he commits a crime. Of course, there is an equally plausible argument that viewing pornography fuels the sex offender’s fantasies and actually increases the offender’s desire to commit a sex offense. See Dana A. Fraytak, *The Influence of Pornography on Rape and Violence Against Women: A Social Science Approach*, 9 *BUFF. WOMEN’S L.J.* 263, 291–92 (2001).

will know exactly how far to the line he or she can go. Thus, while the probationer is engaging in conduct that goes against the purposes of imposing the condition, the court will have no choice but to release the probationer and find that there was no violation.

This argument is also faulty. A more specific definition is designed to give a probationer notice and prevent arbitrary enforcement. It will encompass the type of material that a judge would have reasonably determined to be pornographic. If anything, a probationer will be sure to tailor his or her behavior to not violate the condition, thus satisfying the rehabilitative and public safety purposes of imposing conditions of supervised release. In any case, this argument applies equally to criminal statutes, but courts have not struggled with requiring sufficient specificity in those statutes. For example, the Chicago law struck down in *City of Chicago v. Morales* prohibited “criminal street gang members” from remaining in any one place with no apparent purpose.<sup>169</sup> As the Court noted, a person with a guilty mindset could avoid violating the law by making apparent his purpose in remaining in one place, while a person with an innocent mindset could be found guilty under the law by simply being with a family member who happened to be a gang member.<sup>170</sup>

### C. *A Modest Proposal*

The Sentencing Guidelines need a straightforward, clear definition of “pornography” that will not only give a probationer clear notice as to what material is prohibited and prevent arbitrary and discriminatory enforcement, but will also ensure that the goals of supervised release, rehabilitation, and public safety remain intact.

Over the years, judges, legislators, and scholars have struggled to define “pornography.” They have been hampered, however, because the need to define “pornography” existed in the context of regulating it. Those who attempted to define “pornography” did so to restrict its dissemination without violating a person’s First Amendment right to create and possess non-obscene material. Fortunately, in the context of conditions of

<sup>169</sup> *City of Chicago v. Morales*, 527 U.S. 41, 47 (1999) (plurality opinion).

<sup>170</sup> *See id.* at 62–63; *see also supra* note 57.

supervised release, no such problem exists because people on supervised release can have their constitutional rights curtailed.<sup>171</sup>

While the term “obscenity” has been defined by the Supreme Court,<sup>172</sup> “pornography” carries no such legal definition. Courts have looked to the dictionary definition, which they quickly dismiss as too broad<sup>173</sup> and have also struck down certain legislative attempts to define “pornography.”<sup>174</sup> Scholars have also attempted to define “pornography,” with little acceptance.<sup>175</sup>

In the criminal context, Congress has defined “pornography” as it relates to child pornography.<sup>176</sup> Thus, when advising district courts on how to impose a sufficiently specific definition of “pornography,” the circuit courts have used that definition of “pornography” to illustrate a definition that is sufficiently specific. That statute defines “pornography” as “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct.”<sup>177</sup> “Sexually explicit conduct” is defined as “actual or simulated (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether

<sup>171</sup> See *supra* notes 29–30 and accompanying text.

<sup>172</sup> See *Miller v. California*, 413 U.S. 15, 24–26 (1973); see also *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987); *Pinkus v. United States*, 436 U.S. 293, 297 (1978); *Smith v. United States*, 431 U.S. 291, 301, 305 (1977).

<sup>173</sup> See, e.g., *United States v. Loy*, 237 F.3d 251, 263–64 (3d Cir. 2001).

<sup>174</sup> See *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 334 (7th Cir. 1985) (striking statute down on First Amendment grounds), *aff’d*, 475 U.S. 1001 (1986).

<sup>175</sup> See James Lindgren, *Defining Pornography*, 141 U. PA. L. REV. 1153, 1155–59 (1993). Lindgren empirically studies the application of three different definitions of pornography. See *id.* at 1156. The first definition is simply the *Miller* obscenity test. See *id.* at 1159. The second definition was the definition drafted by Andrea Dworkin and Catharine MacKinnon, which was struck down by the Seventh Circuit on First Amendment grounds. See *id.* at 1156–57. Lindgren notes that this definition “has three elements: graphic sexual explicitness, the subordination of women, and depictions of any one of a long list of specific sexual acts.” *Id.* at 1157. Finally, Lindgren tests a definition proposed by Cass Sunstein: “In short, regulable pornography must (a) be sexually explicit, (b) depict women as enjoying or deserving some form of physical abuse, and (c) have the purpose and effect of producing sexual arousal.” *Id.* at 1158 n.16 (quoting Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 592). Lindgren notes that all three of these definitions were criticized for being overbroad, underbroad, and vague. See *id.* at 1157–59.

<sup>176</sup> See 18 U.S.C. § 2256 (2006).

<sup>177</sup> *Id.* § 2256(8).

between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person.”<sup>178</sup>

While this definition provides a specific definition of “pornography” and would survive any vagueness challenge, this definition is both under inclusive and over inclusive of the material it would prohibit. Thus, certain material that the court would not intend to prohibit would be prohibited, and other material that the court did intend to prohibit would not be prohibited. For example, a probationer would be prohibited from viewing an art house or foreign film that contains significant artistic merit and is considered to be a cinematic masterpiece because it might contain simulated sexual intercourse.<sup>179</sup> On the other hand, this definition would not prohibit possession of *Playboy* or other nude depictions of the human body, unless the probation officer determined that the depiction was a “lascivious exhibition of the genitals or pubic area.”<sup>180</sup> Therefore, while this is a good starting definition, some minor modifications are necessary to ensure the material the court intends to prohibited are in fact prohibited and no more.

The following definition of pornography should accomplish these goals: Pornography shall be defined as

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<sup>178</sup> *Id.* § 2256(2)(A). The statute also has a specific definition related to child pornography that involves computer generated images. *See id.* § 2256(8)(B), (2)(B). Essentially, it adds “graphic” and “lascivious” to the definition of sexually explicit conduct. *See id.* § 2256(2)(B).

<sup>179</sup> Movies that come to mind are the Oscar-nominated *LAST TANGO IN PARIS* (United Artists 1973) with Marlon Brando, *see* Jack Mathews, *Wanted: New MPAA Boss—It May Be Time for Jack Valenti To Step Aside*, N.Y. DAILY NEWS, Aug. 1, 1999, at 19; *HENRY & JUNE* (Universal Pictures 1990), the first movie to receive the MPAA’s NC-17 rating, *see* Peter Rainer, *Wispy ‘Henry & June’ All Soul, No Body*, L.A. TIMES, Oct. 4, 1990, at F1 (“[I]ts eroticism is far more suggestive than explicit.”); and the Mexican film of forbidden love, *LIKE WATER FOR CHOCOLATE* (Miramax Films 1992), which became the highest grossing foreign film released in the United States at the time of its release, *see* Beth Kleid, *Morning Report*, L.A. TIMES, May 2, 1994, at F2. All of these films contain scenes of simulated sexual intercourse.

<sup>180</sup> 18 U.S.C. § 2256(2)(A). It should be noted that the book that the Second Circuit found to be pornographic could arguably fit under this definition because it contained pictures of nude men, which the Second Circuit noted showed men with erect penises and “some of the men appear[ed] to be touching themselves.” *See Farrell v. Burke*, 449 F.3d 470, 477 (2d Cir. 2006).

(a)(1) any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct; or (2) any textual material describing sexually explicit conduct accompanied by visual depictions of the naked human body, such accompaniment to be taken from the publication as a whole; and

(b) that a reasonable person could believe is intended to arouse sexual excitement.

(c) "Sexually explicit conduct" is defined as actual or simulated (1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sadistic or masochistic abuse; or (5) lascivious exhibition of the genitals or pubic area of any person.

The proposed definition, while incorporating many aspects of the definition from 18 U.S.C. § 2256, both expands and limits that definition so that courts can be sure that what they intend to prohibit is actually prohibited. The definition is expanded by including textual material in a publication accompanied by pictures of nude people in the definition. Thus, a probationer would now know for sure that he or she cannot possess a book that has graphic descriptions of sexually explicit conduct but only has pictures of nude people. The probationer will also be on notice that a book of literary erotica will be acceptable because it will usually not contain any pictures at all. The definition is limited by adding an intent requirement. To be clear, the subjective intent of the creator is not the issue. A court must merely determine whether a reasonable person, upon viewing the material, would reasonably think that the creator intended to arouse sexual excitement in the viewer. Thus, art house and foreign films, as well as art work such as paintings and statues, considered to be of high artistic quality will not fall within this definition because a reasonable person viewing the material as a whole could conclude that the material was not designed to arouse sexual excitement, which is required in subsection (b).

Thus a probationer will have notice "that will enable [him or her] to understand what conduct [the condition] prohibits."<sup>181</sup> This definition will also prevent arbitrary and discriminatory

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<sup>181</sup> City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (plurality opinion).

enforcement since it provides the probation officer with a standard to enforce the condition. For example, photographs or videos of hard-core pornography are explicitly prohibited. Also, *Playboy*, *Penthouse*, and other similar magazines featuring nude people will be prohibited. However, books such as *Lolita* and medical textbooks would not be prohibited, although a book like the *Kama Sutra* would be because it has visual depictions of sexually explicit conduct. Also, magazines like *GQ*, *Maxim*, and *Vogue* would not be prohibited because they generally contain no nudity, but even if they do, it is not "lascivious exhibition of the genitals or pubic area of any person," and a reasonable person could conclude that the creator did not intend to arouse sexual excitement. Because there is now a definition of pornography, a probationer will no longer be able to challenge the condition on vagueness grounds.

Moreover, providing this language in the Sentencing Guidelines will not limit discretion. Judges still have the ability to impose the condition. This definition merely assists them in providing them with language that can be used to accomplish what the courts intend when they impose the condition. Furthermore, because of this definition, probation officers and judges will not be burdened trying to determine whether the probationer possesses material that is pornographic. This will lead to more efficiency and reduce the strain on an otherwise overburdened system. Also, probation officers can spend more time rehabilitating the probationer as opposed to punishing someone who reasonably believed his conduct did not violate any condition.

This definition could be implemented in either of two ways. First, the Sentencing Commission could include the definition in the U.S. Sentencing Guidelines Manual by adding subsection (D) to section 5B1.3(d)(7). This method is preferable because probationers are presumed to know the statutes, and therefore, if the court failed to define "pornography" when imposing the condition, the probationer could not challenge it on vagueness grounds since it is defined in the Sentencing Guidelines.<sup>182</sup> Alternatively, the courts themselves could include the definition in a condition prohibiting possession of pornography because

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<sup>182</sup> It should be noted, though, that sentencing courts should still specifically state the language of the statute when imposing a sentence to ensure that any doubt is removed from the probationer's mind.

18 U.S.C. § 3563(b)(22) allows the courts to impose conditions they think appropriate in the circumstances.

#### CONCLUSION

The right to have fair warning about prohibited conduct is an inviolate right under due process, and this right applies both to those who have not committed crimes and to those who have been convicted of crimes. The essence of due process prohibits arbitrary and discriminatory enforcement. Just like everyone else, a probationer must know with sufficient specificity what conduct is prohibited. For these reasons, when applying a condition prohibiting pornography, courts must define that term with sufficient specificity. The specific definition proposed will do that while balancing the needs of judicial discretion to impose sentences, the rights of the probationer, and the goals of the Guidelines to protect the public and promote rehabilitation.