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Demystifying “Pornography”: Tailoring Special Release Conditions Concerning Pornography and Sexually Oriented Expression

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Demystifying “Pornography”: Tailoring Special Release Conditions Concerning Pornography and Sexually Oriented Expression

LAURA A. NAPOLI*

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I. INTRODUCTION

In 1998, Ray Donald Loy was convicted of receiving and possessing child pornography.¹ After Loy had served thirty-three months in prison, the district court placed him on supervised release, subject to certain conditions,

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1. *United States v. Loy*, 237 F.3d 251, 253, 255 (3d Cir. 2001).

including a condition that prohibited Loy from possessing “pornography.”² Loy challenged this condition in court, claiming both that he did not understand the meaning of the word “pornography” and that the condition prohibited both adult pornography, to which Loy claimed a First Amendment right of access, and illegal child pornography.³ In essence, Loy argued that the condition was both vague and overbroad. In response, the government argued that Loy’s probation officer could help him determine the meaning of the term “pornography” as it applied to his release condition.⁴ The government also asserted that the special release condition would serve to deter any future misbehavior by Loy as well as serve the goals of rehabilitating him and protecting the public.⁵ Faced with these arguments, the Third Circuit reviewed the sentencing court’s decision to impose conditions of supervised release to determine whether the release condition was in fact unconstitutionally vague and overbroad.⁶

Loy’s case has become an all too common scenario in the circuit courts, as defendants repeatedly challenge similar special release conditions across the country. As circuit courts have attempted to determine what exactly makes a special release condition vague or overbroad, a split has arisen over their interpretation of release conditions concerning pornography or sexually stimulating materials.

Determinations about special release conditions and probationers’ rights have the potential to make a wide-ranging impact. According to the United States Department of Justice, as of 2010, approximately 4.9 million adults were on supervised release and about four million adults were on probation.⁷ In 2004, the average length of a probation sentence for a person convicted of a felony offense was three years and two months.⁸ Thus, probationers on supervised release make up a fairly significant group of individuals who, for a significant period of their lives, must live with unique rights and restrictions.

When evaluating special release conditions, courts have accepted that probationers in some circumstances may be prohibited from accessing sexually oriented materials as a condition of their probation.⁹ Even though many sexually oriented materials are ordinarily protected by the First Amendment, the constitutional rights of probationers may sometimes be

2. *Id.* at 253.

3. *Id.* at 253, 262.

4. *Id.* at 255–56.

5. *See id.* at 255, 266.

6. *Id.* at 256.

7. Thomas P. Bonczar & Lauren E. Glaze, *Probation and Parole in the United States, 2010*, BUREAU OF JUST. STATS., <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2239> (last updated Nov. 21, 2011).

8. *Felony Sentences in State Courts, 2004*, BUREAU OF JUST. STATS., <http://bjs.ojp.usdoj.gov/content/pub/ascii/fssc04.txt> (last updated July 10, 2007).

9. *See, e.g., United States v. Bee*, 162 F.3d 1232 (9th Cir. 1998) (upholding condition of supervised release prohibiting probationer from possessing sexually stimulating materials).

restricted to further legitimate state interests.¹⁰ Even assuming that such restrictions are constitutional in the context of probationers, however, defining the category of materials subject to these restrictions in order to meet constitutional standards is often problematic.

This article examines the design of special release conditions and the problems that arise when such conditions do not comport with constitutional standards. Part I provides a general overview of the First Amendment issues that often arise with respect to special release conditions. Part II discusses the current state of the law and classifies the types of bans defendants have encountered in supervised release conditions. Part III explains the factors that are frequently considered in assessing the validity of special release conditions, and Part IV suggests a new approach for evaluating the constitutionality of special release conditions. The article concludes by endorsing constitutionally permissible tailoring for release conditions and by encouraging courts to interpret these conditions with careful attention to the individual defendant’s situation.

II. BACKGROUND

A. *First Amendment Doctrine*

Although probationers’ First Amendment rights may constitutionally be limited, probationers cannot be precluded from exercising their First Amendment rights unless certain standards are met. Certain speech, such as obscenity, receives no First Amendment protection and can therefore be prohibited outright for everyone under the law.¹¹ Yet, obscenity encompasses only a very narrow category of speech—that which has no societal value.¹² Other forms of speech, including pornography and forms of sexually oriented expression, do receive First Amendment protection and therefore raise vagueness and overbreadth issues when they are prohibited in special release conditions.

Over the years, courts have imposed many restraints on speech. For example, courts have expanded the obscenity doctrine to include expression that is “obscene for children.”¹³ The Supreme Court has also held that zoning ordinances differentiating between movie theatres that show sexually

10. See *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 & n. 14 (9th Cir. 1975) (stating that “probationers, like parolees and prisoners, properly are subject to limitations from which ordinary persons are free” and “[m]erely because a convicted individual’s fundamental rights are involved should not make a probation condition . . . automatically suspect”).

11. *United States v. Williams*, 553 U.S. 285, 288 (2008).

12. *Id.*

13. See *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992) (stating expression is obscene for children if it meets the criteria for obscenity as set forth in *Miller v. California*, 414 U.S. 881 (1973), when examined from a minor’s point of view).

explicit material and those that do not violate neither the First Amendment nor the Equal Protection Clause of the Fourteenth Amendment.¹⁴

The subject matter this article explores is different from obscenity, child pornography, and the other examples of regulated speech given above, in that when a special release condition seeks to constrain “pornography” or “sexually oriented” materials, it is regulating a form of expression that is otherwise protected by the First Amendment. Courts have repeatedly acknowledged that the First Amendment protects these materials, particularly when they can be shown to have some kind of artistic value.¹⁵ Indeed, at least one court has explicitly stated that pornography that is not obscene and that is in the hands of an ordinary adult receives full First Amendment protection.¹⁶ Thus, in every case involving special release conditions and pornography, courts must evaluate the state’s interest in restricting otherwise protected speech.

Over the years, a principle has emerged that, in appropriate circumstances, the state may prohibit probationers from having access to certain protected materials if the prohibition can be shown to serve the ends of the probation.¹⁷ For example, people who have been convicted of an offense related to a political protest may be subject to a special release condition prohibiting them from participating in political demonstrations.¹⁸ Although the right to demonstrate is a form of protected political expression, courts will uphold the denial of this right to probationers if the government can demonstrate that the restriction helps prevent public disorder and rehabilitates the defendant.¹⁹ In the case of sexually oriented expression, courts have held that free speech rights may be restricted in order to address a defendant’s “sexual deviance problem.”²⁰

But when exactly can a defendant be said to have a “sexual deviance problem” sufficient to warrant a denial of access to constitutionally protected materials? Courts have struggled to answer this question for years, and no clear set of guidelines has emerged. In general, when a statute, ordinance, or release condition restricts expressive activity that is typically protected by the First Amendment (such as pornography), plaintiffs argue that the restriction is overbroad because “it is unclear whether it regulates a substantial amount

14. See generally *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 69–70, 72–73 (1976).

15. See *id.* at 70.

16. *Farrell v. Burke*, 449 F.3d 470, 497 (2d Cir. 2006).

17. See *Consuelo-Gonzalez*, 521 F.2d at 265 (holding that probationers, parolees, and prisoners can be subject to limitations from which ordinary people are free as long as the limitations serve the ends of probation); see also *id.* at 497 (“Pornographic materials—at least those that are not obscene—receive full First Amendment protection when in the possession of ordinary adults, but may be regulated in the hands of parolees to a much greater extent.”).

18. Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 203 (1967).

19. *Id.*

20. *United States v. Rearden*, 349 F.3d 608, 619 (9th Cir. 2003).

of protected speech."²¹ In each relevant case, the ultimate determination of overbreadth has depended, at least in part, on the individual's prior behavior, current situation, and suspected future tendencies.²² If a special release condition can be shown to serve the goals of preventing recidivism and protecting the public from harm, it can pass the overbreadth test; if not, the special release condition may be considered overbroad because it infringes on First Amendment rights without providing benefit to society and the probationer.²³

B. *Vagueness Doctrine*

In addition to addressing whether a special release condition goes too far, courts evaluating the constitutionality of special release conditions must consider whether the release conditions are too vague. Vagueness doctrine originates from the Due Process Clause of the Fifth Amendment.²⁴ The Supreme Court has held that a statute or ordinance does not comport with due process if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."²⁵

"First Amendment vagueness" occurs when a vague condition restricts First Amendment-protected activity. As the Supreme Court has explained, laws must serve at least two purposes to avoid being void for vagueness. First, they must give a person of ordinary intelligence fair notice of the kind of conduct that is prohibited.²⁶ Second, laws must not allow for enforcement that is arbitrary or discriminatory.²⁷ The Supreme Court has endorsed a standard for evaluating vague laws: a statute or condition may not forbid or require conduct "in terms so vague that men of common intelligence must necessarily guess at its meaning."²⁸ With this definition, the Court has implicitly embraced a type of "reasonable person" standard that has been used to evaluate vagueness since 1926.

21. *Williams*, 553 U.S. at 304; *see also Loy*, 237 F.3d at 259 n.2 ("When a statute is vague and arguably involves protected conduct, vagueness analysis will necessarily intertwine with overbreadth analysis.").

22. *See, e.g., Loy*, 237 F.3d at 264 (observing that a probation condition must be directly related to the goal of promoting Loy's rehabilitation); *United States v. Perazza-Mercado* 553 F.3d 65, 70–71 (1st Cir. 2009) (noting that courts have upheld supervised release conditions based on the defendant's underlying offense, the defendant's history, and the defendant's particular characteristics).

23. *See, e.g., Perazza-Mercado*, 553 F.3d at 70–71 (summarizing case law discussing when a special release condition may be upheld and noting that "the ultimate purpose of supervised release is . . . the offender's return to society").

24. *Williams*, 553 U.S. at 304.

25. *Id.*

26. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

27. *See id.*; *see also City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (holding that an enactment may be impermissibly vague if it does not establish standards for the police and the public that sufficiently guard against the arbitrary deprivation of liberty).

28. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

As several leading court cases have indicated, vague laws raise enormous issues, particularly in the criminal law context. First, vague laws can have the effect of criminalizing activity that is normally innocent.²⁹ Additionally, unclear laws can threaten liberty, freedom and independence, as everyone is entitled to know what conduct is prohibited and what is not.³⁰ Vague laws further complicate the law by incentivizing inefficient conduct: people must rearrange their behavior so as to steer clear of a wide range of actions—some innocent and some not—that might trigger the vague law, while law enforcement officials must take more steps to punish conduct they might not be punishing were the law otherwise clear.³¹ Finally, vague laws can and do result in discretionary and even discriminatory enforcement.³² In other words, vague laws may give enforcement officials the power to prohibit behavior, not because it is illegal, but because the enforcing official simply does not like it.

As an example of the problems associated with vagueness, consider the term “pornography.” No legal standard currently exists to clarify the word “pornography.” As a result, “pornography” could be interpreted to encompass only those materials that depict or describe sexual conduct. Alternatively, the term could be read more broadly so as to encompass all material featuring nudity, including works of art such as Michelangelo’s *David* sculpture or Eduard Manet’s famous painting, *Le Dejeuner sur L’Herbe*. If release conditions using the word “pornography” are interpreted expansively, they run the risk of criminalizing speech that may be beneficial to the probationer. As discussed throughout this article, it is often difficult for people—both those subject to the conditions as well as those enforcing them—to understand the limitations of the term and therefore to know what materials fall under the scope of the condition. Furthermore, courts faced with discriminatory enforcement claims have struggled to find an acceptable definition for the term so that they can give clearer guidance to enforcement officials.

To overcome a vagueness challenge, a law must “provide explicit standards for those who apply [it].”³³ Vague laws that implicate First Amendment rights receive special treatment: as one court has noted, “a stricter standard of definiteness applies if material protected by the First

29. *Papachristou*, 405 U.S. at 163.

30. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“Vague laws may trap the innocent by not providing fair warning.”); see *Papachristou*, 405 at 164; see also *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”).

31. *Grayned*, 408 U.S. at 108–09 (“Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.”).

32. *Papachristou*, 405 U.S. at 170 (striking down an ordinance as impermissibly vague because the ordinance lacked standards to govern the exercise of discretion by law enforcement officials and thus encouraged arbitrary and discriminatory enforcement of the law).

33. *Grayned*, 408 U.S. at 108.

Amendment falls within the prohibition."³⁴ Thus, when looking at special release conditions, vagueness and First Amendment law seem to operate in connection with each other: the more the condition infringes on a defendant's First Amendment rights, the clearer the prohibition needs to be.³⁵ Yet, if the defendant's First Amendment rights are limited as a consequence of the defendant's individual circumstances, some vagueness may be acceptable in the prohibition.³⁶

As an example of how vagueness doctrine operates in relation to the exercise of constitutional rights, consider the case of a defendant convicted of possession of child pornography. While it is clear that the government may prohibit this defendant from possessing child pornography again, courts have also upheld government restrictions prohibiting such defendants from going to areas that children are likely to frequent.³⁷ Even though the defendant may argue that this restriction is too vague and that places children are likely to frequent may not be clear, this defendant may nevertheless be thus restricted if the government can show that the imposition of this restriction will adequately meet the goals of curbing the defendant's desire for child pornography, protecting children from harm, and/or rehabilitating the defendant.³⁸ In this way, the restriction can be upheld even though it may not be exactly clear as to where the defendant can and cannot go.

Finally, vagueness doctrine typically applies to statutes and ordinances; however, most courts apply the same doctrine to release conditions with one procedural distinction.³⁹ Because special release conditions are not enacted by a legislature, but are rather imposed by the sentencing courts themselves, they do not have the presumption of validity that would otherwise be accorded to statutes and ordinances facing a vagueness challenge.⁴⁰ Therefore, the probationer arguably has a lower burden of establishing that the conditions are unconstitutional, and these conditions may be overturned if

34. *State v. Bahl*, 193 P.3d 678, 685 (Wash. 2008).

35. *See, e.g., United States v. Kenrick*, 241 F. App'x 10, 17 (3d Cir. 2007) (holding that even if a condition has a rehabilitative, deterrent, or penological purpose, it must be balanced against First Amendment concerns); *Williams*, 553 U.S. at 304 (noting that in the First Amendment context, a plaintiff may argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech).

36. *See, e.g., Farrell v. Burke*, 449 F.3d 470, 497 (2d Cir. 2006) (holding that because the special release condition at issue applied to someone with limited First Amendment rights regarding access to sexual materials, there was no threat to chilling constitutionally protected conduct such that a vagueness challenge might be sustained).

37. *See, e.g., Bee*, 162 F.3d at 1235–36 (9th Cir. 1998) (holding that restriction prohibiting defendant from loitering within 100 feet of places primarily used by children was not unconstitutionally vague because the limitation would effectively address defendant Bee's problem and because it would be reasonable for Bee to avoid places that would be unacceptable).

38. *See id.* at 1236 ("In a case such as this, even very broad conditions are reasonable if they are intended to promote the probationer's rehabilitation and to protect the public.").

39. *Bahl*, 193 P.3d at 686.

40. *Id.*

a reviewing court finds that they are patently unreasonable.⁴¹

C. *Prisoners, Probationers, and Special Release Conditions*

A brief examination of the constitutional limitations for prisoners will help put the situation for probationers into context. Although prisoners do not have the full constitutional rights enjoyed by ordinary people, they do receive some First Amendment protection.⁴² This protection is subject to limitations, and the Supreme Court has held that “[w]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”⁴³ These “interests” include deterrence, prisoner rehabilitation, and institutional security.⁴⁴ Prison administrators are also given great deference in their enforcement of these regulations, so the amount of First Amendment protection a prisoner receives may well depend on the individual situation.⁴⁵ The Court has identified several factors that could lead to the conclusion that a given prison regulation is “reasonably related” to legitimate interests, including whether the regulation has “a logical connection to legitimate governmental interests invoked to justify it[,]” whether other ways of exercising the right are available to inmates, and the impact that accommodation of the right would have on other inmates, prison officials, and on prison resources.⁴⁶

For example, in *O’Lone v. Estate of Shabazz*,⁴⁷ Islamic prison inmates claimed that two policies adopted by officials in their New Jersey prison prevented them from attending a Muslim service on Friday afternoons.⁴⁸ The first policy mandated that the inmates work outside of the building in which the service was held, and the second policy prohibited the inmates from going into that building during the day.⁴⁹ The inmates claimed that these regulations interfered with their rights under the Free Exercise Clause of the First Amendment.⁵⁰ The Supreme Court held that, based on findings at the district court level, the policies were reasonably related to legitimate penological interests and therefore were consistent with the prisoners’ rights under the First Amendment.⁵¹ The Court reasoned that the policies were related to government interests in institutional order and security and that

41. *Id.*

42. *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987).

43. *Id.* at 349 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

44. *Id.* at 348.

45. *Id.* at 349.

46. *Id.* at 350–52.

47. 482 U.S. 342 (1987).

48. *Id.* at 345.

49. *Id.* at 345–47.

50. *Id.* at 347.

51. *Id.* at 350.

they did not prohibit the inmates from attending *all* Muslim services.⁵² Finally, the Court held that alternatives to the policies would have adverse effects on the prison institution.⁵³

With respect to constitutional rights, probationers fall somewhere between prisoners and citizens who have full access to their rights. The question of where exactly probationers' rights fit in on the spectrum is one of the central legal issues courts struggle with today. Compared with prisoners, there are fewer cases involving restrictions on probationers' constitutional rights; however, certain guidelines do exist for imposing special release conditions on probationers.

After a defendant completes his prison sentence, he may be subject to several months or years of supervised release. During this time, he must comply with certain conditions, and one or more probation officers are assigned to him to ensure his compliance. In general, the sentencing court delineates special release conditions for the probationers to follow and is given broad discretion to do so, even if those conditions limit the exercise of the probationer's fundamental rights.⁵⁴ The court may impose whatever "conditions of supervised release it considers appropriate"; however, restrictions on probationers' constitutional rights will generally be regarded more favorably if it is clear that the conditions are reasonably related to the offense, do not deprive the defendant of any more liberty than is reasonably necessary under the circumstances, and are consistent with any relevant policy statements the Sentencing Commission might have issued.⁵⁵ The Sentencing Guidelines provide several different types of conditions that might be appropriate in particular cases; however, courts are free to deviate from the provided conditions if they so choose.⁵⁶ As a result of the leeway given to courts, supervised release conditions can take many forms.

III. THE CURRENT LAW

A. *Types of Bans*

As mentioned in Part I, not all conditions of supervised release are alike; however, this article focuses on defendants who challenge release conditions that fall into two broad categories: bans on "pornography," and/or bans on material that is "sexually stimulating" or "sexually oriented." The following is a brief overview of these types of bans.

Sometimes, a supervised release condition will simply ban a defendant's

52. *Id.* at 351–52.

53. *O'Lone*, 482 U.S. at 352–53.

54. 9B Fed. Proc., L. Ed. § 22:2012 (2008).

55. *Id.*

56. *Id.*

access to or possession of “pornography” without further explanation or clarification. In these cases, courts must examine whether the term “pornography” itself is unconstitutionally vague or overbroad or whether, in their view, the release condition gives fair notice to defendants on special release and is reasonably related to the goals of the state.⁵⁷ In general, most courts faced with a ban containing the word “pornography” have held that the term as used in release conditions is impermissibly vague and have struck down the release condition as unconstitutional.⁵⁸

Defendants have also brought challenges to release conditions that do not mention “pornography” explicitly, but instead ban material of a “sexually stimulating” nature. Courts facing challenges to these bans have typically upheld the conditions as constitutional while differentiating them from blanket prohibitions on “pornography.”⁵⁹ Although the government’s arguments typically remain the same in both types of cases, courts have generally found bans on “sexually stimulating” materials to be more acceptable than bans on “pornography.”

Of course, some special release conditions include bans on both “pornography” and material of a “sexually stimulating” nature. The case law here contains mixed holdings, illustrating that the wording of the release condition itself often does not make a difference when dealing with these

57. See, e.g., *Farrell*, 449 F.3d at 486–92 (2d Cir. 2006) (discussing the term “pornography” and noting the confusion generated by the term).

58. Compare *Farrell*, 449 F.3d at 489 (finding that condition fails to give proper notice or contain discretion), and *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002) (holding that “pornography” is inherently vague and condition leaves too much discretion to probation officer), and *Loy*, 237 F.3d at 265 (holding that condition conflicts with due process values and threatens to chill protected conduct), with *United States v. Wilkinson*, 282 F. App’x 750, 753–54 (11th Cir. 2008) (upholding the special release conditions at issue), and *United States v. Ristine*, 335 F.3d 692, 694–95 (8th Cir. 2003) (upholding restriction as tailored to the goals of promoting rehabilitation and protecting children). It is noteworthy that in both *Wilkinson* and *Ristine*, the defendant did not raise the vagueness issue at trial, and the appeals court in each case was forced to evaluate the challenge using a clear error standard of review. *Wilkinson*, 282 F. App’x at 753–54; *Ristine*, 335 F.3d at 694. Both courts noted that while the condition might not be upheld on a stricter standard of review, because the law was so unclear in this area, the court could not strike down the prohibition under this very deferential standard of review. *Wilkinson*, 282 F. App’x at 754; *Ristine*, 335 F.3d at 695.

59. Compare *United States v. Phipps*, 319 F.3d 177, 193 (5th Cir. 2003) (upholding a condition prohibiting possession of “sexually oriented or sexually stimulating materials”), and *Bee*, 162 F.3d at 1235 (upholding a condition prohibiting possession of “sexually stimulating or sexually oriented material” because purpose of limitation was primarily to rehabilitate the probationer and protect the public), with *United States v. Kenrick*, 241 F. App’x 10, 17 (3d Cir. 2007) (striking down a condition prohibiting “sexually explicit conduct”). *Kenrick* is arguably distinguishable from *Bee* and *Phipps*, however, in that a ban on conduct is different from a ban on possession. While the case in *Kenrick* largely revolved around First Amendment issues, the Third Circuit noted that the phrase “sexually explicit conduct” might actually be broader than “pornography.” *Kenrick*, 241 F. App’x at 16–17. In spite of this finding, the court upheld the release condition on First Amendment grounds, suggesting that the more the government can show that a condition is closely related to the goals of deterrence, public protection, and defendant rehabilitation, the less stringent the court will be in requiring the condition to be clear on its face. *Id.* at 17, 20. It is noteworthy that this same court, only eight years earlier, had issued a strong prohibition against using vague language in special release conditions in *Loy*, suggesting that the First Amendment and due process requirements operate on a sort of sliding scale. *Loy*, 237 F.3d at 264.

types of release conditions.⁶⁰

B. Case Law

The circuit courts are divided on the question of whether or not using words such as “pornography” or “sexually stimulating” to describe prohibited material is unconstitutionally vague. This Section provides an overview of the current state of the law and a look at the circuit split. Notably, the Eighth, Eleventh, Fifth, Second and Ninth Circuits have all upheld challenged conditions, while the First, Third, and Ninth⁶¹ Circuits have struck down similar conditions as unconstitutional.

1. Cases where release provisions have been upheld as constitutional.

In general, courts that have upheld special release conditions containing the words “pornography” or “sexually oriented materials” have done so when they believe that the conditions, though vague, are nevertheless reasonably related to the goals proffered by the state in relation to the defendant.⁶² For example, in *United States v. Boston*,⁶³ the Eighth Circuit upheld a special release condition that prohibited defendant Boston from possessing “any form of pornography, sexually stimulating or sexually oriented material” in spite of Boston’s argument that he only had a sexual offense history with minors.⁶⁴ Despite the apparent breadth of the condition, the court accepted the government’s argument that the terms of the prohibition were “reasonable and rationally related” to the twin goals of deterring Boston from

60. Compare *United States v. Boston*, 494 F.3d 660, 667–68 (8th Cir. 2007) (upholding the special release condition prohibiting “any form of pornography, sexually stimulating, or sexually oriented material”), with *United States v. Antelope*, 395 F.3d 1128, 1142 (9th Cir. 2005) (following *Guagliardo*, 278 F.3d at 868, and striking down the special release condition prohibiting “any pornographic, sexually oriented or sexually stimulating materials”).

61. While the Ninth Circuit still contains precedent upholding a release condition prohibiting “sexually stimulating” materials, its most recent decisions have struck down release provisions on both “pornography” and “sexually stimulating” materials as unconstitutional. *Antelope*, 395 F.3d at 1142; *Bee*, 162 F.3d at 1236.

62. E.g., *Bee*, 162 F.3d at 1235 (9th Cir. 1998) (holding that condition challenged for vagueness could be upheld because the state had shown that it would effectively rehabilitate Bee and was an appropriate reflection of the seriousness of Bee’s offense). Although the Ninth Circuit later declined to follow *Bee* in *Antelope*, *Bee* has nevertheless been cited as valid precedent in at least one recent case. *Wilkinson*, 282 F. App’x at 754. For other examples of courts that have upheld special release conditions of the type considered here, e.g. *Ristine*, 335 F.3d at 694–95 (upholding a condition prohibiting “pornography” because it was tailored to the goals of rehabilitating the defendant and protecting the public and because, on plain error review, the law on vagueness was so unsettled that the court could not find clear error); *Wilkinson*, 282 F. App’x at 754–55 (upholding release condition prohibiting “pornography” because the defendant could not convincingly show that the lower court had committed plain error in light of unsettled vagueness law).

63. 494 F.3d 660 (8th Cir. 2007).

64. *Id.* at 667–68.

committing the offense again and rehabilitating him.⁶⁵ The court reasoned that, given Boston's history⁶⁶ and the government's desire to deter future unlawful conduct on Boston's part, the condition was reasonably related to the goal of addressing his problem and could be upheld in spite of Boston's contention that the conditions were overbroad.⁶⁷

The Fifth Circuit took a different approach in *United States v. Phipps*⁶⁸ when it upheld a ban on possession of "sexually oriented or sexually stimulating materials."⁶⁹ The court acknowledged that the language in the prohibition could be considered vague; however, it held that the prohibition was not vague when read in a "commonsense" way.⁷⁰ The *Phipps* court understood "commonsense" to mean reading the condition in connection with the other conditions of supervised release.⁷¹ By looking at all of the conditions as a coherent scheme, the court reasoned, it could better understand how each individual condition was meant to be applied to the defendant.⁷² The Fifth Circuit proceeded to read the prohibition at issue in conjunction with another condition prohibiting the defendant from patronizing sexually oriented establishments, which the court determined were "places such as strip clubs and adult theaters or bookstores."⁷³ The court decided that the ban on "sexually oriented or sexually stimulating materials" was limited in practice to the kinds of sexually oriented materials commonly available at those establishments.⁷⁴ By reading the special release conditions together, the court was able to narrow and clarify the condition being challenged for vagueness.

In general, when courts uphold special release conditions, they tend to do so because the government can demonstrate that the conditions are reasonably related to its goals of deterrence and public protection. In this way, the condition can usually withstand challenges of being overbroad because the government has a legitimate interest in regulating a particular *individual's* conduct. Similarly, the government is more likely to survive a vagueness challenge because some vagueness is more likely to be acceptable once the government proves a legitimate interest. When courts determine that these types of prohibitions sufficiently relate to the government's goals, they uphold the conditions even though the conditions may nevertheless

65. *Id.*

66. Defendant Boston had a history of producing and receiving child pornography. *Id.* at 663–64.

67. *Id.* at 665, 668.

68. 319 F.3d 177 (5th Cir. 2003).

69. *Id.* at 192–93. It is noteworthy that the supervised release condition in the *Phipps* case, like the conditions in *Ristine* and *Wilkinson*, also came up on plain error review; however, in *Phipps*, the Fifth Circuit gave more attention to the condition. Compare *Wilkinson*, 282 F. App'x at 753–55, and *Ristine*, 335 F.3d at 694–97, with *Phipps*, 319 F.3d at 181, 192–94.

70. *Phipps*, 319 F.3d at 193.

71. *Id.*

72. *See id.*

73. *Id.*

74. *Phipps*, 319 F.3d at 193.

contain vague language.

2. Cases where release provisions have been struck down as unconstitutionally vague.

In cases where courts strike down special release conditions, it appears that the court—when weighing the vagueness of each condition against the government’s stated goals for the public and the defendant—finds that the vagueness of the condition’s language outweighs any legitimate interests the government may have in imposing the condition. For example, in *United States v Loy*,⁷⁵ defendant Loy challenged a release condition that prohibited him from possessing “all forms of pornography, including legal adult pornography” on the grounds that it was vague and overbroad.⁷⁶ The government argued that the supervised release condition was similar to regulations the defendant might face were he in prison.⁷⁷ Because pornography was prohibited in prison regulations, the government reasoned that it was equally acceptable to put a blanket ban on pornography while the defendant was on supervised release.⁷⁸ The government also contended that, should Loy be unclear of the scope of the term “pornography,” he could ask his probation officer to clarify.⁷⁹ Finally, the government maintained that the condition was not overbroad because Loy’s constitutional rights were more limited than others based on his prior conduct, and therefore no “protected conduct” could be chilled in the context of Loy’s supervised release.⁸⁰

In spite of the government’s arguments, the Third Circuit struck down the ban.⁸¹ The court first explained that *Miller v California*⁸² applied to this case, stating that the term “pornography” was broader than the term “obscenity” as defined in *Miller*.⁸³ Specifically, the court noted that “pornography” could encompass many things that were not patently offensive or even obscene, such as Michelangelo’s *David* sculpture.⁸⁴ Next, the court rejected the government’s argument that we “know [pornography] when we see it;” it held that the special release conditions conflicted with due process, threatened to chill protected conduct, and could give probation officers too much discretion in enforcement.⁸⁵ The court noted that probation officers are no more qualified than the public to know pornography when

75. 237 F.3d 251 (3d Cir. 2001).

76. *Loy*, 237 F.3d at 253, 261.

77. *Id.* at 264 n. 5.

78. *Id.*

79. *Id.* at 266.

80. *Loy*, 237 F.3d at 259–60.

81. *Id.* at 270.

82. 413 U.S. 15 (1973) (establishing the test for determining whether material was “obscene”).

83. *Loy*, 237 F.3d at 262–63.

84. *Id.* at 264.

85. *Id.* at 264–65.

they see it.⁸⁶

Although the court in *Loy* struck down the prohibition, it narrowed its holding, stating that it only applied to extreme cases where the ban in question could arguably apply to any art form that employs nudity.⁸⁷ The court noted that such broad bans could not possibly serve the goals of public protection and defendant rehabilitation when they were so all-encompassing.⁸⁸

The government unsuccessfully employed similar arguments in *United States v. Guagliardo*.⁸⁹ In that case, defendant Guagliardo challenged both his conviction for possessing child pornography as well as his conditions of supervised release.⁹⁰ The relevant prohibition at issue was again a blanket ban on “any pornography.”⁹¹ The government again argued that the prohibition was not vague because the defendant’s probation officer had the authority to interpret the release provision and could consequently clarify it for the defendant.⁹² The Ninth Circuit nevertheless struck down the prohibition, holding that it was impermissibly vague since the definition of pornography was “entirely subjective.”⁹³ In its opinion, the court expressed concern that pornography could acquire a dangerous “after-the-fact” definition, where the limitations of the term would be understood only after the defendant was accused of violating the condition.⁹⁴ The court held that such an “after-the-fact” definition was unconstitutional, and that the prohibition gave the probation officer too much discretion.⁹⁵

In *Farrell v Burke*,⁹⁶ the defendant, after being accused of violating a probation condition banning “pornographic material,” challenged the ban. He argued that he could not understand the meaning of “pornographic,” and supported his contention with evidence that the government itself could not come up with a meaning for the term that was acceptable to all parties involved.⁹⁷ For its part, the government conceded that the restriction was

86. *Id.* at 266.

87. *Id.* Despite the language the court used to narrow its holding, *Loy* has nevertheless been cited by other cases as an example of a case that definitively struck down bans on pornography in special release conditions. See, e.g., *Phipps*, 319 F.3d at 193 (noting that the *Loy* court reasoned that the category of “pornography” is too broad to give a probationer adequate notice of what he may and may not possess while on probation).

88. *Loy*, 237 F.3d at 266.

89. 278 F.3d 868 (9th Cir. 2002).

90. *Id.* at 870.

91. *Id.* at 872.

92. *Id.*

93. *Id.*

94. *Guagliardo*, 278 F.3d at 872.

95. *Id.*

96. 449 F.3d 470 (2d Cir. 2006).

97. *Farrell*, 449 F.3d at 482. Farrell was arrested for possessing “pornographic material” after parole officers searched his home, and found two publications in his possession that they claimed were “pornographic”: *Scum: True Homosexual Experiences*, and the magazine, *My Comrade*, featuring an article on gay sex. *Id.* at 477. In reviewing the publications, the court found that *Scum*’s graphic descriptions of sex between young boys were more prurient in nature than *My Comrade*, which was meant

unclear, yet argued that it should nevertheless be upheld because it was reasonably related to the state’s goal of rehabilitating Farrell.⁹⁸ In response, the Second Circuit stated that “pornography” would always carry a presumption of inherent vagueness when it was used in release conditions.⁹⁹ In its decision, the court adopted a two-part test for evaluating the vagueness of special release conditions.¹⁰⁰ First, the court asked whether the condition or statute gave adequate notice to the concerned parties.¹⁰¹ The court next evaluated whether the statute or condition created a threat of arbitrary or discriminatory enforcement.¹⁰² The court expressed its hope that a clear and workable definition for the word “pornography” could someday be developed and used in special release conditions.¹⁰³ Notably, the court rejected Farrell’s overbreadth challenges, holding that Farrell’s First Amendment rights were limited because he was a paroled sex offender, and, therefore, it was unlikely that the condition chilled any protected conduct as applied to him.¹⁰⁴

In recent years, several other circuits have struck down release conditions prohibiting “pornography” or similar terms.¹⁰⁵ Recently, in *State v Bahl*, the Washington Supreme Court struck down a ban on “pornographic materials.”¹⁰⁶ After Bahl submitted a vagueness challenge, the court held that despite the fact that “pornography” was defined in a state statute, the *ordinary* meaning of “pornography” still could not be determined from the statutory definition.¹⁰⁷ Although the court held that prohibitions must be considered “in the context in which they are used,” it rejected the government’s argument that the condition could readily be interpreted by Bahl’s probation officer.¹⁰⁸ Instead, the court found that the government’s reliance on the probation officer’s interpretation was itself evidence of the fact that the condition did not provide facially ascertainable standards for

to be satirical, and which contained pictures that seemed, in the words of the court, to be “more artistic than prurient.” *Id.* at 477–79. The court concluded that Farrell’s as-applied vagueness challenge had no merit with respect to *Scum*, since Farrell, and his parole officers had adequate notice that *Scum* violated the special release condition, and since *Scum* was so over the line that no reasonable parole officer would doubt that Farrell’s possession of *Scum* violated the condition. *Id.* at 494.

98. *Id.* at 497.

99. *Id.* at 490.

100. *Id.* at 485.

101. *Farrell*, 449 F.3d at 485.

102. *Id.*

103. *Id.* at 498.

104. *Id.* at 497.

105. See, e.g., *Perazza-Mercado*, 553 F.3d at 79 (striking down a ban on “pornography of any kind” on plain error review); *Kenrick*, 241 F. App’x at 16–17 (holding that the prohibition encompassed materials that were not reasonably relatable to Kenrick’s offense, and that “sexually explicit” could be more vague than “pornography”); *United States v. Antelope*, 395 F.3d 1128, 1142–43 (9th Cir. 2005) (rejecting the government’s argument that “sexually oriented and sexually stimulating” could be read to define and clarify “pornographic”).

106. 193 P.3d 678 (Wash. 2008).

107. *Bahl*, 193 P.3d at 687.

108. *Id.* at 686–87.

enforcement.¹⁰⁹ Finally, the court noted that “sexually explicit,” a phrase used in several of the other release conditions at issue in the case, was not inherently vague, since the term had been defined in a state statute, and could easily be understood in the context of the conditions in which it was found.¹¹⁰

In summary, courts are likely to strike down special release conditions if they find that the language is too broad to be a useful means to the government’s stated ends of defendant rehabilitation, deterrence, and public protection. Although the government can sometimes effectively argue that broad language is necessary to meet its goals, the language cannot be so broad that it can be read to infringe rights that are not reasonably related to the defendant’s prior misconduct. Additionally, courts are hesitant to enforce conditions that they feel may not be understandable in practice, such as conditions that provide no easily identifiable standards for probation officers to interpret them. Finally, the court’s determination of whether or not to uphold a release condition may be influenced by whether the court is asked to focus primarily on vagueness or on overbreadth. Courts that examine overbreadth challenges look at the government’s goals and ask whether the release condition meets those goals, while courts that focus on vagueness ask whether a reasonable person would be able to understand what the condition means. These two different questions may lead to different ways of analyzing similar conditions. Thus, the constitutionality of special release conditions may turn at least to some degree on the questions the court is tasked with deciding in relation to these conditions.

IV. ATTEMPTS TO NARROW RELEASE CONDITIONS

What the courts have thus far failed to see is that, for the vast majority of probationers, a ban on “pornography” or “sexually stimulating” materials is virtually always going to be overbroad. A presumption underlying the imposition of special release conditions prohibiting pornography is that such a prohibition will effectively deter the probationer from engaging in future criminal conduct. What is noticeably lacking in most challenges to these special release conditions, however, is any argument that these prohibitions are not effective deterrent mechanisms. Can it truly be said, for example, that a probationer with a penchant for child pornography will be better served by a blanket ban on all pornography as opposed to a ban on just child pornography? Or that a person on probation after being charged with sexual assault will be less likely to engage in recidivism if that person is prohibited from possessing pornography?

On the latter question, the evidence linking pornography to sexual assault

109. *Id.* at 688.

110. *Id.* at 688–89 (noting that the condition containing the words “sexually explicit” was a ban on conduct, rather than on possession).

is questionable at best.¹¹¹ In fact, some evidence even suggests that looking at pornography may actually make a person *less* likely to engage in sexual assault.¹¹² Without a link between pornography and sexual assault, special release conditions prohibiting pornography seem like they are primarily geared toward punishment of the probationer, rather than the fulfillment of government goals such as preventing recidivism and promoting public welfare. If there is no prevention or public welfare justification for these special release conditions, the argument for infringing on a probationer's First Amendment rights gets substantially weaker.

In thinking about whether a given special release condition is constitutional, courts must keep in mind that the primary purpose of special release conditions is not to punish the probationer. Indeed, probationers have already been punished and have already served time for punishment. Instead, the primary purpose of supervised release is to make sure that probationers do not relapse and repeat their offending conduct.¹¹³

A. *The Legal Definitions*

Over the years, courts have generated several ideas about where one might look in order to clarify the meaning of special release conditions involving pornography and sexually oriented expression. This Section provides a brief overview of sources that courts have relied on in evaluating special release conditions and discusses some of the problems inherent in these sources.

111. *Some Link Pornography to Sexual Assault, Violence*, ONLINE GONZAGA BULLETIN (Apr. 27, 2006), http://www.gonzagabulletin.com/article_4adae5ca-eda2-536d-8757-009e1176a828.html (noting that there is conflicting evidence linking pornography to sexual assault and describing study in Japan observing rise in pornography consumption but decline in sexual crimes); Jensen, Robert, *Pornography and Sexual Violence*, NATIONAL ONLINE RESEARCH CENTER ON VIOLENCE AGAINST WOMEN (July 2004), <http://www.mincava.umn.edu/documents/arpornography/arpornography.html> (noting a study that high pornography use is not necessarily indicative of high risk for sexual aggression).

112. Steve Chapman, *Is Pornography a Catalyst of Sexual Violence?*, REASON.COM (Nov. 5, 2007), <http://reason.com/archives/2007/11/05/is-pornography-a-catalyst-of-s> (observing that since the rise of the Internet, "violent crime in America has dropped by 58 percent", rape has dropped by "72 percent," and "sexual assaults have fallen by 68 percent" and concluding that adult fare on the Internet may inoculate against sexual assaults; noting that states where Internet access expanded the fastest saw rape decline the most, and concluding that pornographic Web sites provide a harmless way for potential predators to satisfy sexual urges that play a big role in the incidence of rape).

113. *Roberts v. United States*, 320 U.S. 264, 272 (1943) (noting that the basic purpose of probation is to offer an offender an opportunity to rehabilitate himself); "Federal Offenders Sentenced to Supervised Release," United States Sentencing Commission at 6 (July 2010), *available at* http://www.ussc.gov/Research/Research_Publications/Supervised_Release/20100722_Supervised_Release.pdf (last visited Jan. 22, 2013) (noting that supervised release is primarily concerned with facilitating the defendant's reintegration into the community).

1. The Child Pornography Statute.

Although there is no legal definition for the term “pornography,” “child pornography” is defined in a federal statute. Codified in 18 U.S.C. § 2256, the child pornography statute offers several definitions that courts have attempted to apply to release conditions involving pornography.¹¹⁴

The child pornography statute defines “sexually explicit conduct” as “actual . . . (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether 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.”¹¹⁵ The statute then defines “child 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, where . . . the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.¹¹⁶

At least two courts have suggested that borrowing language from the child pornography statute and reworking it could result in an acceptable clarification for special release conditions.¹¹⁷ At the same time, any definition of adult “pornography” must be narrow enough to encompass only the conduct that the government desires to prohibit, including conduct that involves more than visual depictions.

Yet, the purpose of the child pornography statute is different from the purpose of special release conditions. The child pornography statute is aimed at protecting children from harm, and is designed to be used in a broad range of contexts; whereas special release conditions in the probation context need to be aimed at addressing the effect certain materials have on the particular person possessing them. Thus, taking definitions from the child pornography statute, without anything more, could not achieve the desired results.

114. Several courts have recently recognized this statute as unconstitutional. *See* *United States v. Stewart*, 839 F.Supp. 2d 914 (E.D. Mich. 2012); *Lora v. Boland*, 825 F.Supp. 2d 905 (N.D. Ohio 2011); *Parker v. States*, 81 So.3d 451 (Fla. App. 2 Dist. 2011).

115. 18 U.S.C. § 2256(2)(A)(i)–(v) (2008).

116. *Id.* § 2256(8)(A)–(C).

117. *See Loy*, 237 F.3d at 267 (suggesting that borrowing from the child pornography statute would provide a sense of legality that is lacking in the “pornography” cases); *see also Farrell*, 449 F.3d at 486–88 (noting approvingly of the idea of borrowing from the child pornography statute but suggesting that the Ninth Circuit might not accept a modified definition from the child pornography statute).

2. State Statutes.

Some state statutes contain definitions of “pornography” or related terms. For example, Washington state law provides that promotion of pornography occurs when “[a] person [], for profit-making purposes and with knowledge, sells, exhibits, displays, or produces any lewd matter. . . .”¹¹⁸ “Lewd matter” is also defined in the state code as “synonymous with ‘obscene matter,’ which is defined generally in accord with the definition of ‘obscenity’ adopted by the United States Supreme Court in *Miller v. California*.”¹¹⁹ Reading these definitions together, it seems that in Washington, “pornography” is synonymous with “lewd matter,” which is synonymous with “obscene matter.” Although the Washington statute provides a helpful way to think about “pornography,” the Washington Supreme Court recently held that “obscenity” and “pornography” could not be equated, and that the statute provided an inadequate definition of “pornography,” at least as related to special release conditions.¹²⁰

The Washington Supreme Court’s decision implicitly rejected yet another possibility for defining “sexually oriented materials,” thereby reworking the *Miller* definition of “obscenity.” In *Miller*, the Supreme Court held that, to determine whether or not something is *obscene*, the fact finder must consider:

- (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹²¹

Despite the fact that *Miller* represents a Supreme Court-articulated definition, reworking a definition for *obscenity* would be of no use because “pornography” and “obscenity” are not equivalent.¹²² Specifically, “pornography” is not a legal term of art like “obscenity”; while the Court articulated a test for “obscenity,” it explicitly declined to develop a definition for “pornography,” even though the case at hand arguably was concerned

118. WASH. REV. CODE ANN. § 9.68.140 (West 1985).

119. *Bahl*, 193 P.3d at 687 (citing WASH. REV. CODE ANN. § 7.48A.010(2) (West 1990)).

120. *Id.*

121. *Miller*, 413 U.S. at 24.

122. See *Loy*, 237 F.3d at 263 (rejecting the adoption of the *Miller* test because many items that would not be patently offensive or obscene might still qualify as pornography); *Farrell*, 449 F.3d at 489 n. 6 (differentiating the case at hand from *Miller*, and noting that the Supreme Court cited the dictionary definition of “pornography” in a footnote, illustrating the difficulty of finding a workable definition for the term).

with both pornography and obscenity.¹²³ Finally, the definition of “obscenity” excludes material that has some kind of value. A value-driven definition is not desirable in the context of special release conditions; instead, release conditions must be focused on the kinds of materials that create dangerous behavior in the probationer. Thus, while the *Miller* test may have created a legal term of art, the definition would not have been effective in curtailing materials that trigger a harmful response in probationers.

3. Court Definitions and Clues From Case Law.

In several instances, courts have implicitly expressed their own limitations on the meaning of pornography in dicta, and several courts have come up with definitions of their own that have been approved for certain situations. Examples include the definition of what is “obscene for children,”¹²⁴ and the Supreme Court’s reasoning as to how much sexually explicit activity is necessary before the material in question is “characterized by an emphasis” on sexually explicit material.¹²⁵ Similarly, other definitions that have been developed for use in practice, such as those used in prison regulations¹²⁶ or in Federal Communications Commission regulations.¹²⁷ While these examples serve as good starting points for attempting to clarify the meaning of release conditions prohibiting sexually oriented materials, they fail to take into account the unique situations of individual probationers.

Even if they do not explicitly endorse a unique definition, several court opinions still provide guidance as to what terms courts think should be included in a prohibition of sexually oriented expression. Specifically, courts have suggested, in dicta, that the type of materials to be prohibited should be designed to cause sexual excitement,¹²⁸ contain explicit or offensive descriptions of sex,¹²⁹ and have the primary intention of arousing sexual appetite.¹³⁰ Courts have also expressed concern whenever artistic material risks falling into a given definition.¹³¹

In short, courts’ attempts to define or narrow terms in special release conditions involving pornography miss the mark because even the narrower

123. *Miller*, 413 U.S. at 19 n. 2.

124. *Video Software Dealers Ass’n*, 968 F.2d at 688 (noting that something is obscene for children if it meets the *Miller* criteria for obscenity when examined from the point of view of a minor).

125. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976).

126. *See, e.g., Loy*, 237 F.3d at 264 n. 5.

127. *See, e.g., F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 737–40 (1978) (noting that the term “indecent” has been defined by the Federal Communications Commission).

128. *See, e.g., Miller*, 413 U.S. at 19 n. 2 (using a dictionary reference to define pornography as “a portrayal of erotic behavior designed to cause sexual excitement”).

129. *See, e.g., Farrell*, 449 F.3d at 489 (suggesting that there must be “an element of sexual explicitness or offensiveness” involved in any definition of “pornography”).

130. *See, e.g., id.* at 490–91 (suggesting that material should be wholly designed to arouse sexual appetite).

131. *See, e.g., Loy*, 237 F.3d at 264.

definitions often fail to address the probationer’s specific background, problems, and tendencies, and therefore, fail to comply with the government’s goals for these special release conditions: rehabilitating the probationer and preventing repeat offenses.

B. “Commonsense” Reading

Rather than attempt to define sexually oriented expression, some courts have suggested that special release conditions merely be read in a “commonsense” manner. The argument behind this approach is that defendants really do know enough to understand what conduct is and is not prohibited by the release condition without a definition. Courts charged with interpreting the condition can merely use contextual common sense to know where the line is drawn. Of the circuit courts, the Fifth Circuit most strongly endorsed a commonsense reading of special release conditions in its decision in *United States v Phipps*.¹³² The Fifth Circuit did not merely embrace an “I know it when I see it” approach, but urged that a release condition be read in context with (1) other conditions of supervised release imposed on the same defendant, and (2) the circumstances of the defendant’s underlying conviction.¹³³ By reading the conditions together, the court was able to read limitations into the terms “sexually oriented” and “sexually explicit.”

In short, by placing the supposedly vague condition in the context of the defendant’s overall situation, the Fifth Circuit was able to determine the limitations of the prohibition without changing the language of the condition itself. To defend its position, the Fifth Circuit pointed out that reading a broader condition in context was more desirable than reading a condition that specified each type of prohibited conduct.¹³⁴ The court stated that listing every instance of prohibited conduct in a release condition would be nearly impossible and almost certainly counterproductive.¹³⁵ Thus, the Fifth Circuit, by reading the prohibitions in context and using common sense, was able to add clarity to otherwise imprecise language.

In spite of the Fifth Circuit’s endorsement of a “commonsense reading,” both the Third and the Ninth Circuits have strongly suggested, in dicta, that there is no real way to read prohibitions using common sense alone. Specifically, these courts have held that relying on the defendant—or anyone else—to “know it when he sees it” is extremely problematic and

132. 319 F.3d 177 (5th Cir. 2003).

133. *Id.* at 193.

134. *Id.* This argument is similar to a “roadmap for evasion” argument—the idea that one can avoid liability by particularizing one’s actions. See E. Gates Garrity-Rokous, *Preserving Review of Underdeclared Programs: A Statutory Redefinition of Final Agency Action*, 101 YALE L.J. 643, 657 (1991) (describing the roadmap for evasion problem in the agency context).

135. *Id.*

unconstitutional.¹³⁶ Yet, it is not clear how the courts would react to the *contextual*, holistic commonsense reading approach employed by the Fifth Circuit. Therefore, although the “I know it when I see it” test should be unqualifiedly rejected, the idea of an informed, contextual reading ought to be retained in a sense by requiring that special release conditions be narrowly tailored to address the problems surrounding a particular probationer.

V. TAILORING SPECIAL RELEASE CONDITIONS

The circuit split indicates the conflict among the courts over how to evaluate challenges to special release conditions. Although some vagueness in special release conditions may be helpful in encouraging probationers to steer far afield of prohibited materials, special release conditions are too often overly vague, resulting in confusion and lawsuits. In addition, special release conditions are often overbroad in that they prohibit materials that are not reasonably related to goals of deterrence and rehabilitation.

The development of a consistent approach to evaluating the types of sexually oriented expression that may constitutionally be restricted for probationers could help courts to interpret these types of release conditions. In light of evidence questioning the link between pornography and sexual crimes, it is critical that courts develop and interpret special release conditions that are narrowly tailored to address the probationer’s specific situation; this is particularly true when those conditions involve infringements on First Amendment rights.

Furthermore, a more uniform approach to addressing special release conditions that ban pornography, or sexually stimulating materials, is desirable because it will give probationers advance notice of what types of release conditions are acceptable in a given situation.

A. *Using Tailoring*

Rather than putting a blanket ban on “pornography,” or “sexually stimulating” materials, courts should tailor special release conditions at the outset to prohibit only those subcategories of pornography that relate to the probationer’s illegal conduct. For example, for a probationer that has committed a sexual crime, a blanket ban on all “pornography” may be inappropriate and even counterproductive, given the tenuous link between pornography and sexual crimes. Instead, prohibiting only pornography that features sexual assault may be a more appropriate release condition for this particular probationer. Similarly, for a probationer convicted of possessing child pornography, a special release condition prohibiting both simulated and

136. See *Loy*, 237 F.3d at 264; see also *Guagliardo*, 278 F.3d at 872.

real child pornography may be called for instead of a blanket ban.

By issuing more narrowly-tailored special release conditions at the outset, courts will avoid the trouble of both overbreadth and vagueness. Because the condition would directly target the specific type of criminal conduct in which the probationer previously engaged, it would arguably be more responsive to the goals of preventing recidivism, and protecting the public, thereby avoiding an overbreadth challenge. Similarly, prohibiting specific subcategories of a broader category (pornography) would make it more difficult for probationers to bring vagueness challenges, because the link between their prior conduct and the current release condition would be substantially clearer.

In addition to varying special release conditions based on the type of crime committed, courts should also take the number of times a probationer has committed a given offense into account. Repeat offenders should be subject to stricter special release conditions. This is especially true for repeat probation violators. Thus, to the extent that a narrower special release condition is not working, courts could broaden the ban to include more forms of pornography.

Requiring special release conditions to be tailored to the specific probationer at the outset would make the government's job easier if it is called upon to argue in favor of these special release conditions. Currently, the government must argue that broad release conditions covering all forms of "pornography" are, nevertheless, appropriate because they can somehow relate back to the individual situation of a particular probationer. This line of argument often requires elaborate justifications and extensive reasoning. By contrast, closer tailoring of these conditions at the outset would make it easier for all parties, including courts, probationers, and the government, to understand and address how these conditions effectively address the problems of a particular probationer.

Furthermore, enforcement of more narrowly tailored special release conditions would not be any more difficult than enforcement of the current blanket bans. Arguably, probation officers would have an easier time enforcing such narrow conditions, as they would inherently contain even more guidance from courts as to what types of pornography were impermissible.

Special release conditions in the context of other types of violations are similarly more narrowly tailored. For example, probationers with a history of weapons violations frequently receive special release conditions prohibiting them from purchasing or obtaining firearms *or other dangerous weapons*.¹³⁷ Note that this special release condition does *not* provide a

137. See MINNESOTA DEPARTMENT OF CORRECTIONS, REVIEW OF GUIDELINES FOR REVOCATION OF PAROLE AND SUPERVISED RELEASE (March 2009), available at <http://www.doc.state.mn.us/publications/legislative-reports/documents/ReviewofGuidelinesforParole->

blanket prohibition on all weapons. For example, Nerf guns, or dull kitchen knives, arguably would not fall under this release condition. In contrast, for probationers subject to release conditions banning pornography, *all* pornography is prohibited, regardless of whether it invokes dangerous behavior in the probationer.

The vagueness doctrine evidences the need for more definition in special release conditions, while the First Amendment doctrine dictates that any restrictions on a defendant's freedoms must be reasonably related to the government's goals of deterrence, rehabilitation, and protection of the public. Although any supervised release condition may inevitably deprive defendants of some of their First Amendment freedoms, conditions must nevertheless be crafted and interpreted so that they only deprive the liberty necessary for the state to meet its goals. Thus, all supervised release conditions should be both narrowly tailored and directly related to address the defendant's specific situation.

Special release conditions must also be interpreted in context, with the defendant's specific situation in mind. When issuing a special release condition, judges must also think about how the condition will serve to address the behavioral problems of the specific defendant at issue. Specifically, the court should consider the types of prohibitions the defendant has been exposed to in prison, the type of conduct that has been problematic for the defendant in the past, and how the conditions, taken as a whole, serve to remedy the defendant's behavior, and guide the defendant's future conduct. This will help the court tailor the condition to the defendant, thereby giving the defendant clearer notice since the defendant should reasonably be expected to know what kind of materials or behavior induces his own misbehavior or deviant conduct.¹³⁸ In practice, the probation officer should also interpret each condition with the defendant's deviant behavior in mind.¹³⁹

The tailored special release condition is neither overly rigid, nor overly flexible. As discussed, the extent to which the condition needs to be tailored may vary depending on the probationer. The First Amendment requires no tailoring once a standard is clearly defined.¹⁴⁰ Yet, for purposes of avoiding

ReleaseRevocation2009Report_002.pdf; UNITED STATES SENTENCING COMMISSION, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE (July 2010), *available at* http://www.ussc.gov/Research/Research_Publications/Supervised_Release/20100722_Supervised_Release.pdf ("The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.").

138. *See Grayned*, 408 U.S. at 112 (holding that an ordinance may give fair notice if it is placed in a particular context).

139. *See Kenrick*, 241 F. App'x at 17 (specifying that purpose must be balanced against First Amendment concerns).

140. *See Grayned*, 408 U.S. at 109 (noting that "where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it operates to inhibit the exercise of (those) freedoms" and that "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.")

vagueness challenges to special release conditions, courts issuing the conditions would be wise to make sure that the conditions are reasonably tailored to address the particular dangerous behavioral problems of each defendant. In particular, courts may want to structure the conditions based on the defendant’s sexual preferences. Courts should pay particular attention to whether the material being prohibited appeals to the prurient interest of the particular probationer. By customizing the release condition to the particular defendant in a given case, courts will be able to more accurately target the materials that cause problems for the probationer, and, therefore, produce a more accurate balance of state interests with probationer’s rights. While some courts have implicitly endorsed individualized release conditions, it is not something courts evaluating special release conditions have explicitly embraced in the past.¹⁴¹ Instead, courts generally either accept or reject special release conditions as a whole, without considering whether altering or tailoring them may produce beneficial results. As burdensome as it might be to tailor a special release condition to a particular defendant prior to issuing the condition, those that are individualized to some extent are necessary to ensure that only that speech that triggers the defendant’s problematic behavior is prohibited. Tailoring the special release condition at the outset saves time and resources later on by making it less likely that these conditions will be litigated for vagueness or overbreadth.

Arguably, the prohibitions found in special release conditions derive some strength on account of their vagueness. Instituting a bright-line legal definition for “pornography,” as some courts and commentators have advocated, would give defendants the opportunity to seek out loopholes whereby they can obtain material that triggers their deviant behavior yet falls outside the scope of the legal definition.¹⁴² Yet, adding a baseline individualization for use of “pornography” or “sexually oriented” materials in the release conditions should strike a better balance in that the condition proposed is dependent on the particular behavior of the defendant concerned.

The approach of a more tailored release condition, augmented by an informed, contextual understanding of the defendant, and the charges against him/her shifts the bulk of the interpretive responsibility from the probation officer to the court. This shift would help curtail concerns about giving probation officers too much discretion. Of course, the court’s interpretation of a release condition would still allow officials some level of discretion in the interpretation; however, the restrictions should be less dependent on the probation officer’s personal understanding of the terms in the release

141. See, e.g., *Phipps*, 319 F.3d at 193–94.

142. See, e.g., *Farrell*, 449 F.3d at 498 (“We hope that greater efforts will be made in the future to define adequately the terms of parole conditions dealing with pornographic materials.”); *United States v. Simmons*, 343 F.3d 72, 82 (2d Cir. 2003) (urging courts imposing prohibitions relating to pornography to reference the child pornography statute and noting that the term “pornography” is inherently vague when not associated with a specific definition).

condition, and more dependent on whether, and how the defendant's situation changes over time. The resulting level of discretion would thus be more limited than it would be if the probation officer was faced with a broad and undefined term in the release condition.¹⁴³

The practice of further tailoring special release conditions also addresses many of the concerns courts have expressed about regulating speech protected by the First Amendment. Specifically, as discussed above, courts are often hesitant to limit speech that might have some social value. The proposed individualization allays these concerns by penalizing only that speech that invokes an offensive or dangerous reaction in the probationer. By addressing sexual arousal in a particular defendant, an individualized special release condition provides a behavior-driven solution that is more targeted to address the probationer's underlying problems than a generic condition. Because the condition is designed to be tailored specifically to the probationer and the circumstances of the case, it will provide a more adequate and more accurate balance of state and First Amendment interests than a generic legal definition, which runs the same risks of vagueness that characterize the word "pornography."

Because the special release condition is informed by the individual's particular problem, it allows probation officers to remove the specific material that causes the defendant's problem while still giving the probationer access to other materials protected by the First Amendment. Furthermore, and perhaps more importantly, the tailoring provides more notice to individuals about their prohibited conduct and is tied to a narrow prohibition that has less room for arbitrary or discriminatory enforcement. Specifically, tying the release condition to a particular individual helps that individual understand what materials he can and cannot possess, while giving probation officers a clearer sense of how to treat material that they find in the probationer's home.

V. CONCLUSION

This article shows how misguided attempts at defining and analyzing overly broad special release conditions relating to pornography and sexually oriented expression create more problems for courts and probationers. Instead of focusing on narrowing an overly broad category by attempting to attach a legal definition to it, courts should individualize special release conditions so that they are more closely related to the behavior and problems of the individual probationer. In this way, special release conditions involving pornography can be more aligned with the purpose of all special release conditions: to prevent recidivism and further the public interest.

143. See *Grayned*, 408 U.S. at 114 (permitting ordinances to allow for *confined* judgment and discretion).

The problems inherent in supervised release conditions cannot be solved with a rigid definition. In particular, since each condition concerns an individual, the conditions should be tailored so that the defendant's unique behavioral triggers are taken into account.

Requiring courts to issue special release conditions that address the probationer's specific criminal problems will help courts evaluate challenged special release conditions and allow them to avoid most challenges altogether. Tailoring release conditions to individual defendants also provides greater assistance to the probation officers who have the duty of enforcing these conditions on a day-to-day basis, and will put probationers on more effective notice as to what conduct is and is not prohibited for them. Because release conditions will comport with probationers' actual situations, in the event a probationer challenges a release condition, courts should not struggle with interpreting the scope of the condition.