(Un)delegating Discipline: Standard Condition 12 as an Exclusionary and Unconstitutional Delegation of Judicial Authority

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Introduction

Today in the United States, over 100,000 people are on supervised release, a form of federal post-imprisonment supervision established in 1984.[1] Congress initially intended supervised release to facilitate incarcerated people's reentry into society.[2] But many of the conditions, such as those that restrict a defendant's housing or employment options, are instead isolating and punitive. Post-imprisonment supervision burdens reentry, coinciding with the varying civil disabilities that accompany a criminal record, like exclusion from welfare programs and public housing.[3] This regime of post-incarceration punishment illustrates how the criminal legal system enforces the social exclusion of people with convictions, even after they have served their time in prison.

Standard Condition 12, known as the "risk notification condition" of supervised release, perpetuates the social exclusion function of the criminal legal system. Standard Condition 12 empowers a probation officer to decide whether an individual on supervised release must notify a third party that she could pose a risk to them. There is currently a circuit split as to whether Standard Condition 12 is an unconstitutional delegation of judicial authority to probation officers. While the First, Fifth, Sixth, Eighth, and Eleventh Circuits have upheld the risk notification condition as a permissible delegation of judicial authority, [4] the Second and Tenth Circuits have concluded that the condition impermissibly delegates the core judicial function of sentencing to probation officers.[5]

This Comment contends that Standard Condition 12 is an unconstitutional delegation of judicial authority, and approaches the circuit split using

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[1] Bureau of Just. Stats., Federal Justice Statistics 2 (2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fjs21.pdf [https://perma.cc/2RP7-X3GF].

[2] *See infra* section II.A.1.

[3] Alessandro Corda, *The Collateral Consequence Conundrum: Comparative Genealogy, Current Trends, and Future Scenarios*, 77 Stud. L. Pol. & Soc'y 69, 70 (2019).

[4] United States v. Maywalt, No. 22-11948, 2024 WL 2974482, at *5 (11th Cir. June 13, 2024); United States v. Campbell, 122 F.4th 624, 634-35 (6th Cir. 2024); United States v. Cruz, 49 F.4th 646, 654 (1st Cir. 2022); United States v. Mejia-Banegas, 32 F.4th 450, 452 (5th Cir. 2022); United States v. Janis, 995 F.3d 647, 653 (8th Cir. 2021).

[5] *See* United States v. Cabral, 926 F.3d 687, 697-98 (10th Cir. 2019); United States v. Boles, 914 F.3d 95, 111 (2d Cir. 2019).

a "prison abolitionist ethic"—a "moral orientation" developed by legal scholar Allegra M. McLeod that rejects the inevitability of imprisonment and surveillance as punishment.[6] The abolitionist ethic hopes to foster communities free from harm and violence, but it offers a unique perspective, encouraging us to address harm without the use of punitive social exclusion. Guided by the prison abolitionist ethic, this Comment advocates that the Condition be abolished. In the alternative, Standard Condition 12 should be amended, so Article III judges—rather than probation officers—have "ultimate authority" over the imposition of risk notification requirements.

Part I introduces the theoretical framework adopted in this Comment: the prison abolitionist ethic. Part II then offers necessary background on supervised release and Standard Condition 12 and delineates the current circuit split on whether the Condition constitutes an unconstitutional delegation of judicial authority. Part III argues Standard Condition 12 is an unconstitutional delegation of judicial authority for two reasons: (1) Standard Condition 12 affords probation officers, not judges, "ultimate authority" over the condition, and (2) the condition empowers probation officers to impermissibly infringe on a number of a defendant's fundamental liberty interests. Finally, Part IV argues Standard Condition 12 should be abolished or, in the alternative, amended to offer the defendant increased procedural protections.

In attempting to mitigate the harms of Standard Condition 12 and restore power to formerly incarcerated people, this Comment invites readers to imagine how legal tools can be used to move towards an *inclusionary*—rather than exclusionary—vision of justice.

I. Theoretical Background: The Abolitionist Ethic

Prison abolition is a critical political theory that rejects the use of policing, imprisonment, and post-imprisonment surveillance as an inevitable response to crime.[7] Under abolitionist theory, the current criminal legal system fails to achieve meaningful accountability. The status quo of policing, imprisonment, and government surveillance merely enforce the social exclusion of those deemed "criminal." Rather than ending cycles of violence, these methods of formalized social exclusion contribute to the isolation and impoverishment of people and communities.

This Note examines the Standard Condition 12 circuit split from the perspective of what Professor McLeod calls a "prison abolitionist ethic"—"a moral orientation" that is "committed to ending the practice of confining people in cages and eliminating the control of human beings through

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[6] Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1156, 1161-62 (2015).

[7] *See* Mariame Kaba, *So You're Thinking About Becoming an Abolitionist*, *in* We Do This 'Til We Free Us 2, 4 (Tamara K. Nopper ed., 2021); Angela Y. Davis, Are Prisons Obsolete? 10 (2003).

imminently threatened police use of violent force."[8] Rather than assuming that formalized social exclusion is a necessary or inevitable response to crime, the abolitionist ethic encourages us to reconsider whether social exclusion is the best, or even a justifiable, way to address harm.

This Part gives a brief background to prison abolitionist theory. Then, it justifies the choice of a prison abolitionist ethic as a moral framework for guiding the resolution of practical legal disputes, including the Standard Condition 12 circuit split.

A. Prison Abolitionist Theory

The United States has been widely criticized for its unprecedented rates of mass incarceration, which disproportionately impact low-income communities of color. [9] Black men are particularly affected: estimates suggest that one in three Black men might spend time incarcerated.[10] Scholars such as W.E.B. Du Bois and Michelle Alexander have thus characterized the U.S. criminal legal system as the modern form of racialized oppression, emerging from the abolition of chattel slavery and then Jim Crow.[11] Ultimately, prison abolitionists have long theorized that modern punishment enforces the social exclusion of groups designated as "dangerous classes"—particularly low-income Black and brown communities.[12]

The social exclusion function of the criminal legal system manifests in the structure of the prison itself.[13] Prison walls create borders between "us" and "them,"[14] isolating incarcerated people within physically demarcated boundaries of criminality.[15] Inside jails and prisons, incarcerated people lose

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[8] *Id.* at 1161-62.

[9] *See generally* Inst. for Rsch. on Poverty, No. 48-2020, Connections Among Poverty, Incarceration, and Inequality (2020), https://www.irp.wisc.edu/resource/connections-among-poverty-incarceration-and-inequality/ [https://perma.cc/7C8Y-2CE5].

[10] *See* Thomas P. Bonczar, Bureau of Just. Stats., Prevalence of Imprisonment in the U.S. Population, 1974-2001, at 1 (2003).

[11] *See* McLeod, *supra* note 6, at 1162-63 (describing prison abolition's origins in the movement to abolish slavery); *see also* W.E.B. Du Bois, Black Reconstruction in America 506 (Transaction Publishers 2013) (1935) ("The whole criminal system came to be used as a method of keeping Negroes at work and intimidating them."); *see also* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 21 (rev. ed. 2012) ("Since the nation's founding, African Americans repeatedly have been controlled through institutions such as slavery and Jim Crow, which appear to die, but then are reborn in new form, tailored to the needs and constraints of the time.").

[12] Alex S. Vitale, The End of Policing 48 (2018).

[13] *See* Inst. for Rsch. on Poverty, *supra* note 9.

[14] Philosophy professor R.A. Duff describes prison as the "most dramatically exclusionary punishment, . . . [carrying] the moral message that [the imprisoned] do not belong in the ordinary community of citizens." R.A. Duff, *Inclusion, Exclusion and the Criminal Law*, 4 Pol'y Futures Educ. 699, 708 (2003).

[15] The isolation enforced by imprisonment is especially stark with prison islands, such as the infamous Rikers Island in New York City, which is notorious for obscene levels of violence, neglect, and its "steady stream of [in-custody] deaths." Sam McCann & Erica Bryant, *In First*

their core liberties and are exposed to exorbitant rates of neglect, violence, and abuse.[16]

Social exclusion continues after imprisonment. Previously incarcerated people more often than not experience "collateral consequences" of their criminal convictions—"burdensome civil disabilities" that accompany their criminal records and affect their ability to successfully participate in everyday life.[17] Examples of such collateral consequences include exclusion from welfare programs and public housing,[18] disenfranchisement,[19] loss of parental rights,[20] deportation, [21] and a diminished ability to obtain an education.[22] Legal scholar Alessandro Corda characterizes this web of "invisible punishments" as "'practices of social shunning' that have been largely 'formalized into law.'"[23] These invisible punishments exacerbate other well-documented social and emotional barriers to reentry, such as reconnecting with family and coping with mental health issues.[24]

Prison abolitionist theory questions the assumption that the systematic social exclusion of those deemed "criminal" makes communities safer. There is little evidence, for example, that imprisonment actually reduces violence.[25] It might, more precisely, simply relocate violence to within the

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Week of New Year, Another Death on Rikers Island, Vera (Jan. 8, 2024), https://www.vera.org/news/nyc-jail-deaths [https://perma.cc/9AP6-AJW8].

[16] *See generally* Nazish Dholakia, *Prisons and Jails are Violent; They Don't Have to Be*, Vera (Oct. 18, 2023), https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be [https://perma.cc/Z9TB-TDGR].

[17] Corda, *supra* note 3, at 70.

[18] *See id.* at 79-80 (exploring how denial of welfare benefits and public housing programs to people with convictions has become institutionalized over time).

[19] *See* Christopher Uggen, Ryan Larson & Sarah Shannon, The Sentencing Project, 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016, at 9 (2016) (finding that in 2016, over 6.1 million people were disenfranchised due to a felony conviction—over five times the number of those who were disenfranchised in 1976).

[20] *See* Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* Invisible Punishment: The Collateral Consequences of Mass Imprisonment 15, 18 (Marc Mauer & Meda Chesney-Lind eds., 2002) ("[O]ffenders can be denied public housing, welfare benefits, the mobility necessary to access jobs that require driving, child support, parental rights, the ability to obtain an education, and, in the case of deportation, access to the opportunities that brought immigrants to this country. For many offenders, the social safety net has been severely damaged.").

[21] *Id.*

[22] *Id.*

[23] Corda, *supra* note 3, at 76 (quoting Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 Crime & Delinq. 64, 67 (2007)).

[24] *See* Jeremy Travis, Amy L. Solomon & Michelle Waul, Urban Inst. Just. Pol'y Ctr., From Prison to Home: The Dimensions and Consequences of Prisoner Reentry 29-30; 37-40 (2021).

[25] *See generally* Don Stemen, The Prison Paradox: More Incarceration Will Not Make Us Safer (2017) (arguing that incarceration does not reduce violent crime and states have proven that other strategies are more effective by both reducing incarceration and crime).

bounds of prison walls and forcibly confine people to these spaces of concentrated violence.[26]

The violence in carceral settings makes prisons and jails poor places for rehabilitation. The National Advisory Commission on Criminal Justice Standards and Goals concluded that prisons and jails in the United States have a "shocking record of failure," because of "overwhelming evidence that these institutions create crime rather than prevent it."[27] The decimation of marginalized communities by mass incarceration[28] and the alienation of formerly incarcerated people contribute to a self-perpetuating cycle of crime, evidenced by incredibly high recidivism rates post-imprisonment.[29] Research has shown, for example, that detaining people pretrial for only two to three days—people who are presumed innocent and have not yet been convicted of any criminal activity—increases their likelihood of committing new crimes by nearly 40%.[30] Abolitionist scholar and activist Mariame Kaba thus explains that since our system of punishment leads people to recidivate, "there can be no argument that the prison system supports either public safety or the public good."[31] Sending people to prison contributes to, rather than disrupts, cycles of violence.

Under prison abolitionist theory, systematic social exclusion fails to achieve true accountability, which requires more than mere punishment.[32] Instead, communities should foster accountability by helping individuals develop an "internal resource for recognizing and redressing the harms

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[26] McLeod, *supra* note 6, at 1204 ("By removing people from their home communities and transferring them into prison, incarceration generally prevents prisoners from committing crimes outside prison. But prison itself is a place where interpersonal violence, theft, and abuse are rampant and largely unreported. Therefore, incarceration does not necessarily reduce or incapacitate the commission of crime, but rather changes its location.").

[27] Nat'l Advisory Comm'n on Crim. Just. Standards & Goals, U.S. Dep't of Just., Report on Corrections 597 (1973).

[28] *See* Davis, *supra* note 7, at 16 ("[B]ecause the base of these communities is destroyed, education and other surviving social services are profoundly affected. This process turns the men, women, and children who live in these damaged communities into perfect candidates for prison.")

[29] *See generally* U.S. Sent'g Comm'n, Recidivism Among Federal Offenders: A Comprehensive Overview (2016) (finding that nearly half of people released from prison were rearrested within eight years).

[30] Christopher T. Lowenkamp, Marie VanNostrand & Alexander Holsinger, The Hidden Costs of Pretrial Detention 3 (2013).

[31] Kaba, *supra* note 7, at 21.

[32] *See* Mariame Kaba, Josie Duffy Rice & Reina Sultan, *What Does Accountability Look Like Without Punishment?*, Yes! (May 25, 2021), https://www.yesmagazine.org/opinion/2021/05/25/abolition-accountability-without-punishment [https://perma.cc/ZLX3-75XF] ("There's an assumption that being anti-punishment means that you're not pro-accountability; that couldn't be further from the truth . . . . Accountability is an active process through which people have to make a decision that they recognize the harms that are occurring, they want to try to redress them, and they're thinking about the harms through the lens of what's been done to others but also what's been done to them.").

[those individuals] have caused to [them]selves and others."[33] Rather than engaging with people who have caused harm as fellow human beings, the criminal legal system chooses retribution and expulsion. Indeed, legal commenters have drawn parallels to draconian and ancient forms of punishment such as banishment, exile, or civil death.[34] In resorting to social exclusion, everyone—including the offender and society at large—avoids truly addressing the root of the harm caused. As Kaba writes, "[o]ur failure to build a culture of care that nurtures human growth and potential, rather than incubating desperation, ensures that more 'criminals' will be created and subsequently punished."[35] In order to achieve more meaningful accountability, criminal law practitioners have thus increasingly turned instead to restorative justice practices, which emphasize "reconciliation, reparation, and restoration" rather than punishment and exclusion.[36] Community organizations have also implemented similar accountability processes that try to "maximize the safety and integrity of everyone involved—including the survivor, the aggressor, and other community members."[37]

Ultimately, prison abolition is a constructive project.[38] By failing to reconsider whether exclusionary punishments are productive, decisionmakers overlook the root causes of crime: poverty, inequality, and

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[33] Connie Burk, *Think. Re-Think.: Accountable Communities*, *in* THE REVOLUTION STARTS AT HOME: CONFRONTING PARTNER ABUSE IN ACTIVIST COMMUNITIES 264, 267 (Ching-In Chen, Jai Dulani & Leah Lakshmi Piepzna-Samarasinha eds., 2016).

[34] *See, e.g.*, Corda, *supra* note 3, at 72; Travis, *supra* note 20, at 19.

[35] KABA, *supra* note 7, at 21.

[36] Duff, *supra* note 14, at 709. Restorative justice is "an approach to post crime reparation that focuses on healing the harm done, promoting accountability and personal responsibility, and encouraging the active participation of the victim, offender, and other concerned parties." Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 167 (2003). Generally, the goals of restorative justice are "(1) to promote a mediated discussion between an offender and victim; (2) to give the victim an opportunity to explain the impact of the offense; (3) to give the offender a chance to apologize and reckon with the root causes of the offending behavior; and (4) to develop and then implement a plan to repair the harm and make amends." Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors' Perspective*, 88 FORDHAM L. REV. 2287, 2290 (2020).

[37] Alisa Bierria, Onion Carrillo, Eboni Colbert, Xandra Ibarra, Theryn Kigvamasud'Vashti & Shale Maulana, CMTYS. AGAINST RAPE & ABUSE, *Taking Risks: Implementing Grassroots Community Accountability Strategies*, *in* THE REVOLUTION STARTS AT HOME: CONFRONTING PARTNER ABUSE IN ACTIVIST COMMUNITIES 64, 64 (Ching-In Chen, Jai Dulani & Leah Lakshmi Piepzna-Samarasinha eds., 2016). For example, the organization Communities Against Rape and Abuse ("CARA") suggests "recogniz[ing] the humanity of everyone involved[,] . . . prioritiz[ing] the self-determination of the survivor[,] . . . identify[ing] a simultaneous plan for safety and support for the survivor as well as others in the community[,] … be[ing] clear and specific about what your group wants from the aggressor in terms of accountability[,] . . . let[ting] the aggressor know your analysis and your demands[,] . . . [and] consider[ing] help from the aggressor's friends, family, and people close to her." *Id.* at 64-68.

[38] *See Episode 29—Mariame Kaba*, AIRGO (Feb. 2, 2016), https://airgoradio.com/airgo/2016/2/2/episode-29-mariame-kaba [https://perma.cc/FM7Z-95EZ], at 34:34-34:59 ("Prison abolition is two things: It's the complete and utter dismantling of prisons, policing, and surveillance as they currently exist within our culture. And it's also the building up of new ways of . . . relating with each other.").

over-policing.[39] As activist and abolitionist scholar Angela Davis writes, "[the prison] relieves us of the responsibility of seriously engaging with the problems of our society." [40] But "[p]risons do not disappear social problems, they disappear human beings."[41] To live in a world in which prisons are unnecessary, we must confront the social conditions that generate crime by investing in institutions that make quality education, healthcare, and welfare support universally accessible.

B. The Abolitionist Ethic in Legal Debates

The abolitionist ethic is a vital perspective in practical legal debates for three primary reasons: (1) it offers a uniquely critical perspective, questioning pervasive assumptions about punishment and social exclusion that are often taken for granted; (2) as a moral framework, it helps us understand how the ultimate goal of abolition can guide incremental change and reform; and (3) perhaps most importantly, it resists the dehumanization of people accused and convicted of crimes.

First, the abolitionist ethic offers an opportunity to critically evaluate exclusionary approaches to punishment. The instinct to expel those who have caused harm is so deeply entrenched that one might assume that imprisonment and continued social exclusion are natural or inevitable responses to crime. But as political philosopher Joseph Carens writes, "it sometimes takes the critical perspective of theory to bring to light what is wrong with our practices."[42] The abolitionist ethic brings a new critical perspective, emphasizing the futility of blind reliance on cycles of imprisonment and exclusion. The ethic thus encourages an inclusionary approach to justice that promotes engagement with offenders and survivors alike to reach reconciliation.

Second, the adoption of an abolitionist *ethic* helps us understand how abolition can guide our responses to practical legal and policy questions—even those questions that arise within the very institutions that abolition seeks to dismantle. The ethic uses the ultimate goal of abolition as a lodestar: it derives from abolition a set of moral principles[43] that can inform incremental changes and responses to legal debates. The abolitionist ethic allows

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[39] *See generally* Inst. for Rsch. on Poverty, Connections Among Poverty, Incarceration, and Inequality (2020), https://www.irp.wisc.edu/resource/connections-among-poverty-incarceration-and-inequality/ [https://perma.cc/7C8Y-2CE5].

[40] Davis, *supra* note 7, at 16.

[41] Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, Colorlines (Sept. 10, 1998), https://colorlines.com/article/masked-racism-reflections-prison-industrial-complex/ [https://perma.cc/UT7W-JQS3].

[42] Joseph H. Carens, The Ethics of Immigration 232 (2013).

[43] *See Ethic*, Merriam-Webster, https://www.merriam-webster.com/dictionary/ethic [https://perma.cc/CS9H-27A3] (last visited May 14, 2025) ("a set of moral principles: a theory or system of moral values").

us to, as Carens writes, "take deeply entrenched social arrangements as givens for purposes of immediate action[,]" while "never forget[ting] about our assessment of their fundamental character."[44] We do not have to choose between inaction and "an immediate and indiscriminate opening of prison doors."[45] Instead, guided by abolition, we can chip away at exclusionary practices of punishment to create a system of justice that increasingly relies on the social inclusion of people who have caused harm.

Finally, the prison abolitionist ethic emphasizes the humanity and dignity of not only survivors of harm, but also of people who have caused harm. It reminds us to protect the oft-sidelined needs of those accused and convicted of crimes when attempting to resolve legal debates. In this way, the ethic embraces a form of harm mitigation that allows for provision of imminent relief to people affected by the criminal legal system, while not losing sight of the core critiques of abolitionist theory.

This Comment therefore applies the prison abolitionist ethic to the Standard Condition 12 circuit split.

II. Current State of the Law

This Part first offers a brief history of supervised release and its various conditions. This Part then introduces Standard Condition 12 and delineates the current Article III circuit split on whether the Condition constitutes an impermissible delegation of judicial authority.

A. Supervised Release

Supervised release, the federal form of post-imprisonment supervision,[46] has become increasingly common.[47] It has also become increasingly punitive.[48] This Section reviews the history of supervised release and examines the various court-imposed terms of release.

1. A Brief History

In 1984, Congress passed the Sentencing Reform Act ("SRA"), which abolished federal parole and established a new form of federal

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[44] Carens, *supra* note 42, at 231.

[45] McLeod, *supra* note 6, at 1161.

[46] Community supervision post-imprisonment is called supervised release in the federal system, and parole in the state system. Probation also exists in both the state and federal systems, but is generally imposed as "a sentence in its own right," in lieu of imprisonment. *Post Conviction Overview*, U.S. Prob. Off. W. Dist. Tex., https://www.txwp.uscourts.gov/supervision-overview/index.html [https://perma.cc/45F9-NV7N] (last visited Feb. 26, 2025).

[47] *See infra* text accompanying notes 64-69.

[48] *See infra* text accompanying notes 69-99.

post-imprisonment supervision, known as supervised release.[49] In the abolished parole system, a sentencing judge would impose on a defendant a range of years of imprisonment.[50] After the defendant served the minimum years of imprisonment, a parole board would determine her actual release date.[51] Post-release, the defendant would finish the rest of her sentence in her community under parole supervision.[52] Thus, the time the defendant spent on parole was dictated by how much time she had left of her original sentence—not by her need for rehabilitation or supervision.[53] For this reason, Congress "concluded that the parole system operated in an arbitrary manner," and sought to pursue more "honesty in sentencing."[54]

In contrast, Congress intended for supervised release to address the defendant's rehabilitative needs post-imprisonment rather than shorten her time incarcerated.[55] At a defendant's initial sentencing, the sentencing judge imposes a term of supervised release to be completed post-imprisonment.[56] Unlike parole, then, supervised release does not replace part of the sentence of imprisonment.[57] Instead, terms of supervised release are served *in addition* to the full term of imprisonment.[58] The Senate report accompanying the SRA therefore emphasizes that supervised release "may not be imposed for purposes of punishment or incapacitation since those purposes will have been served to the extent necessary by the term of imprisonment."[59] Rather, the goal of supervised release is "to ease the defendant's transition into the community" or "provide rehabilitation to a defendant who . . . needs supervision and training programs after release."[60]

In the years following the passage of the SRA, public concerns about crime increased, and strict law-and-order policies became more politically popular.[61] Federal legislators urged courts to use supervised release as a tool to surveil people with convictions and "protect the community from an offender presumed to be dangerous," rather than "facilitate formerly

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[49] Sentencing Reform Act of 1984, Pub L. No. 98-473, 98 Stat. 1837, 1987.

[50] *See* Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 Berkeley J. Crim. L. 180, 188-89 (2013).

[51] *Id.*

[52] *Id.*

[53] *See* Paula Kei Biderman & Jon M. Sands, *A Prescribed Failure: The Lost Potential of Supervised Release*, 6 Fed. Sent'g Rep. 204 (1994).

[54] *Id.* at 204.

[55] Scott-Hayward, *supra* note 42, at 190.

[56] *Id.* at 192.

[57] *Id.* at 190.

[58] U.S. Sent'g Guidelines Manual § 7A.3(b) (U.S. Sent'g Comm'n 2021, amended 2024).

[59] S. Rep. No. 98-225, at 125 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3308.

[60] *Id.* at 124. *See also* United States v. Johnson, 529 U.S. 53, 59 (2000) ("Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration.").

[61] *See* Biderman & Sands, *supra* note 53, at 204-05.

incarcerated people's reentry to society."[62] For example, in 1986, Congress enabled (and in some cases, mandated) courts to revoke supervised release and re-imprison individuals who violated conditions of their release.[63]

Encouraged to use supervise release as a way to maintain post-imprisonment control over defendants, courts quickly began to sentence individuals to terms of supervised release. Between the passage of the SRA in 1984 and 2010, nearly one million people had been sentenced to a term of supervised release.[64] The most recent data available suggest that over 100,000 people are currently serving a term of supervised release in the United States.[65] And between 2005 and 2009, over 95% of incarcerated people also had sentences of supervised release awaiting them following their release.[66]

For some crimes, imposing a term of supervised release is statutorily mandated, but for many, it is discretionary.[67] Nevertheless, it is popular. In cases in which judges were not statutorily mandated to impose supervised release on defendants sentenced to prison terms of more than one year, they did so anyway over 99% of the time.[68] Judges can decide the length of the supervision—from just a few months to life[69]—and have substantial discretion with respect to which conditions of supervision to impose.[70]

2. Supervised Release Conditions and their Impact

The United States Sentencing Commission Guidelines Manual sets forth the various conditions of supervised release.[71] The conditions are far-reaching, and are either mandatory or discretionary, depending on the specific offense committed. Mandatory conditions range from prohibiting the defendant from unlawfully possessing a controlled substance,[72] to periodic drug testing,[73] to submitting to DNA collection.[74] Discretionary

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[62] *Id.* at 205.

[63] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1006(a), 100 Stat. 3207.

[64] U.S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 69 (2010).

[65] BUREAU OF JUST. STATS., *supra* note 1, at 2.

[66] U.S. SENT'G COMM'N, *supra* note 64, at 50.

[67] U.S. SENT'G COMM'N, PRIMER ON SUPERVISED RELEASE 2-3 (2023).

[68] U.S. SENT'G COMM'N, *supra* note 64, at 52.

[69] From 2005 to 2009, over 2,200 defendants were sentenced to life terms of supervised release. *Id.* at 58.

[70] Jacob Schuman, *America's Shadow Criminal Justice System*, NEW REPUBLIC (May 30, 2018), https://newrepublic.com/article/148592/americas-shadow-criminal-justice-system [https://perma.cc/93R4-ABMM].

[71] U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2024).

[72] *Id.* § 5D1.3(a)(2).

[73] *Id.* § 5D1.3(a)(4).

[74] *Id.* § 5D1.3(a)(8).

conditions are similarly wide-ranging, and can be imposed by the court as long as the conditions

> (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need . . . to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes . . . ; and (D) the need to provide the defendant with needed education or vocational training, medical care, or other correctional treatment . . . ; and (2) involve no greater deprivation of liberty than is reasonably necessary . . . .[75]

Discretionary conditions fall into one of three categories: (1) "standard conditions," (2) "special conditions," and (3) "additional conditions."[76] First, standard conditions are "recommended" by the Sentencing Commission,[77] and include limitations on the defendant's movements,[78] where they can live,[79] the type of employment they must maintain,[80] and whom they may associate with.[81] Second, special conditions are "recommended" under particular circumstances but can also be imposed if the judge deems them appropriate.[82] For example, if the defendant was convicted of a sex offense, the judge can choose to impose a condition that requires the defendant to submit to a warrantless search of her person or property at any time by law enforcement or a probation officer.[83] Third, additional conditions "may be appropriate on a case-by-case basis,"[84] and range from mandating community confinement or home detention[85] to imposing occupational restrictions or curfews.[86] Finally, courts can also create "unique" supervision conditions.[87] The Ninth Circuit, for example, upheld a condition that mandated a defendant to wear a sign reading: "I stole mail; this is my punishment."[88] Despite the fact that the original intention of supervised release was to facilitate previously incarcerated people's reentry into society,[89] many of the conditions are merely punitive and isolating.

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[75] *Id.* § 5D1.3(b).
[76] *Id.* § 5D1.3(a), (c)-(e).
[77] *Id.* § 5D1.3(c).
[78] *Id.* § 5D1.3(c)(3).
[79] *Id.* § 5D1.3(c)(5).
[80] *Id.* § 5D1.3(c)(7).
[81] *Id.* § 5D1.3(c)(12).
[82] I*d.* § 5D1.3(d).
[83] *Id.* § 5D1.3(d)(7).
[84] *Id.* § 5D1.3(e).
[85] *Id.* § 5D1.3(e)(1)-(2).
[86] *Id.* § 5D1.3(e)(4)-(5).
[87] *See* U.S. SENT'G COMM'N, *supra* note 64, at 28-29.
[88] *See* United States v. Gementera, 379 F.3d 596, 602 (9th Cir. 2004).
[89] *See supra* section II.A.1.

Defendants must comply with all imposed conditions, or else they risk revocation of their supervised release and subsequent reimprisonment.[90] Complying with imposed conditions can be challenging, especially for defendants who face additional barriers to reentry, such as being unhoused, lacking transportation, or having substance misuse issues. Supervised release is revoked for approximately a third of all people serving a term of supervision,[91] meaning defendants are sent back to prison. The majority of these revocations (51.6%) are the result of "technical" violations—violations of the least serious kind, including missing a probation appointment or payment for a financial condition.[92] Due to the massive range of conditions of supervision, scholars have called their widespread implementation "a recipe for failure"— "[g]iven all the social, economic, and health deficits of those coming out of prisons, it becomes less than surprising that so many [people] are sent back to prison for rule violations."[93]

Supervised release thus reinforces the social exclusion of formerly incarcerated people. Post-imprisonment, the burden of complying with conditions of supervised release coincides with other barriers to reentry, like finding housing and maintaining employment. Together, these challenges make it harder for formerly incarcerated people to re-adjust to society and increase the risk that violation of a condition will lead to re-incarceration. This continuing social exclusion entrenches "deeper and longer-lasting distinctions between 'us' and 'them,'"[94] communicating that "punishment for the original offense is no longer enough; one's debt to society is never paid."[95]

B. Standard Condition 12

This Comment addresses the constitutionality of Standard Condition 12, a discretionary condition suggested by the Sentencing Commission. Standard Condition 12 is often referred to as the "risk notification condition." Standard Condition 12 reads:

> If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer

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[90] *See* Scott-Hayward, *supra* note 52, at 196-97.

[91] U.S. Sent'g Comm'n, *supra* note 64, at 69.

[92] *Id.* at 67-68.

[93] Michael Jacobson, Downsizing Prisons: How to Reduce Crime and End Mass Incarceration 150 (2005).

[94] Travis, *supra* note 20, at 33.

[95] *Id.* at 19.

> may contact the person and confirm that the defendant has notified the person about the risk.[96]

Courts may impose Standard Condition 12 on defendants who have been convicted of a wide range of crimes, including being a felon in possession of a firearm,[97] conspiring to distribute illegal narcotics,[98] or illegally reentering the country.[99] Once a court imposes Standard Condition 12 at the defendant's initial sentencing, the probation officer gains the authority to decide—at any time during the defendant's supervision, and often years after the defendant's initial sentencing—that the defendant must notify a given member of her community that she might pose a risk to them. For example, once a defendant is released from prison, gets a job, and informs her probation officer of the employment, the probation officer can compel her to notify the employer about her conviction status and any alleged risk she could pose to the workplace.

Standard Condition 12 has a relatively fraught legal history. A prior version of the Condition, promulgated by the Sentencing Commission in 1987, raised due process concerns across a number of circuits. The prior version allowed the probation officer to require the defendant to "notify third parties of risks that may be occasioned by [his] criminal record or personal history or characteristics.…"[100] The Second, Seventh, and Ninth Circuits criticized this iteration of the condition for being impermissibly vague.[101] The Seventh Circuit, for example, noted that "[t]here is no indication of what is meant by 'personal history' and 'characteristics' or what 'risks' must be disclosed to which 'third parties.'"[102] The Ninth Circuit similarly critiqued the condition for "leav[ing] [the defendant] guessing" about to whom and when he must provide notice of risks.[103]

The Sentencing Commission amended the Condition in 2016 to, among other changes, remove the phrase "personal history or characteristics" and require a probation officer to identify specific individuals or organizations whom the defendant must notify.[104] The First, Sixth, Eighth, and

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[96] U.S. Sent'g Guidelines Manual § 5D1.3(c)(12) (U.S. Sent'g comm'n 2021).

[97] *See* United States v. Campbell, 122 F.4th 624, 627 (6th Cir. 2024).

[98] *See* United States v. Cruz, 49 F.4th 646, 653-54 (1st Cir. 2022).

[99] *See* United States v. Mejia-Banegas, 32 F.4th 450, 452-53 (5th Cir. 2022).

[100] United States v. Evans, 883 F.3d 1154, 1163 (9th Cir. 2018).

[101] *See id.* at 1164; United States v. Thompson, 777 F.3d 368, 379 (7th Cir. 2015); United States v. Peterson, 248 F.3d 79, 85-86 (2d Cir. 2001).

[102] *Thompson*, 777 F.3d at 379; *see also* United States v. Hill, 818 F.3d 342, 345 (7th Cir. 2016) ("Hopelessly vague is the further condition . . . that the defendant 'shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics.' Does this mean that if he happens to be standing next to a six-year-old girl at a soda fountain he has to warn her that he has been convicted of receipt of child pornography? Does he have to explain to her what child pornography *is*?").

[103] *Evans*, 883 F.3d at 1164.

[104] *See* United States v. Cruz, 49 F.4th 646, 652 (1st Cir. 2022).

Ninth Circuits have all upheld the amended the Condition against vagueness challenges.[105] These Circuits conclude that "[t]he [Condition's] directive is unambiguous": defendants only need to follow the instructions given to them by their probation officers.[106] The Second Circuit, on the other hand, has held that the risk notification condition remains impermissibly vague[107] as it is "largely indistinguishable" from the prior version the Second Circuit had struck down.[108]

The question of Standard Condition 12's vagueness has not been the end of its legal controversy. Circuits are also split around the question of whether Standard Condition 12 constitutes an unconstitutional delegation of judicial authority.

C. The Non-Delegation Circuit Split

Defendants have also raised non-delegation challenges to Standard Condition 12, arguing that the Condition violates Article III of the Constitution by delegating the core judicial function of sentencing to probation officers. The First, Fifth, Sixth, Eighth, and Eleventh Circuits concluded that Standard Condition 12 is a permissible delegation of judicial authority.[109] The Second and Tenth Circuits disagreed, finding the Condition an unconstitutional delegation of judicial authority.[110] This Section first explains the constraints that Article III imposes on delegations of judicial authority to probation officers and then delineates the arguments on each side of the circuit split.

1. Article III Constraints on Delegations to Federal Probation Officers

Article III vests in the federal courts the power to resolve cases and controversies, and entrusts judicial functions to the judicial branch.[111] The separation of powers principle generally "forbids courts from delegating their

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[105] *See* United States v. Campbell, 122 F.4th 624, 634 (6th Cir. 2024); *Cruz*, 49 F.4th at 654; United States v. Gibson, 998 F.3d 415, 423 (9th Cir. 2021); United States v. Robertson, 948 F.3d 912, 918-19 (8th Cir. 2020); United States v. Hull, 893 F.3d 1221, 1225 (10th Cir. 2018).

[106] *Cruz*, 49 F.4th at 654.

[107] United States v. Boles, 914 F.3d 95, 111-12 (2d Cir. 2019).

[108] *Id.* at 112.

[109] United States v. Maywalt, No. 22-11948, 2024 WL 2974482, at *5 (11th Cir. June 13, 2024); *Campbell*, 122 F.4th at 634-35; *Cruz*, 49 F.4th at 654; United States v. Mejia-Banegas, 32 F.4th 450, 452 (5th Cir. 2022); United States v. Janis, 995 F.3d 647, 653 (8th Cir. 2021).

[110] United States v. Cabral, 926 F.3d 687, 697-98 (10th Cir. 2019); *Boles*, 914 F.3d at 111-12.

[111] U.S. Const. art. III, § 2, cl. 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *see also* United States v. Huerta, 994 F.3d 711, 716 (5th Cir. 2021) ("This limitation comes from Article III of the Constitution, which entrusts judicial functions to the judicial branch.").

Article III responsibilities" to other branches of the federal government.[112] It "has long been recognized," however, that federal courts can delegate some fact-finding functions to certain masters or commissioners, and Congress can delegate fact-finding functions to an administrative agency without violating Article III.[113] But even where certain delegations of judicial authority are permitted, "the court must retain the right to review findings and to exercise *ultimate authority* for resolving the case or controversy."[114]

Article III limits the delegation of judicial authority to other branches of government, but it also restricts courts' abilities to delegate certain responsibilities to officers who are "under the judicial branch" but are not themselves judges.[115] Courts generally "use [these] nonjudicial officers, such as probation officers, to support judicial functions."[116] Probation officers are statutorily authorized to "manage aspects of sentences," supervise people serving terms of supervised release, and report any violations to the court.[117] Indeed, courts and probation officers have "substantial discretion to work in tandem in the crafting and management of supervised release."[118] Nevertheless, as with delegation to other branches of government, Article III requires judges to retain their "ultimate authority" [119] over core judicial functions.

A district court therefore "violates Article III when it delegates a core judicial function to a probation officer."[120] Imposing a criminal sentence, including a term of supervised release, is a "core judicial function."[121] Thus, "Article III draws a line in the sand: imposing punishment upon a defendant

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[112] *Cruz*, 49 F.4th at 654.

[113] United States v. Johnson, 48 F.3d 806, 809 (4th Cir. 1997) (citing Crowell v. Benson, 285 U.S. 22, 54 (1932)).

[114] *Id.* (emphasis added).

[115] *See Probation and Pretrial Services — Mission*, U.S. Cts., https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/history/probation-and-pretrial-services-mission [https://perma.cc/PRM5-QSX3] (last visited Feb. 26, 2025); *see Johnson*, 48 F.3d at 808-09 ("[T]he type of duty that the court may [] delegate is limited by Art. III. Cases or controversies committed to Art. III courts cannot be delegated to nonjudicial officers for resolution.")

[116] United States v. Comer, 5 F.4th 535, 547 (4th Cir. 2021) (quoting United States v. Miller, 77 F.3d 71, 77 (4th Cir. 1996)).

[117] *Johnson*, 48 F.3d at 808 (citing 18 U.S.C. §§ 3601, 3602, 3603(4)-(8)).

[118] United States v. Amin, 85 F.4th 727, 734 (4th Cir. 2023).

[119] *Johnson*, 48 F.3d at 808-09; *see also* United States v. Nash, 438 F.3d 1302, 1305 (11th Cir. 2006) ("Although '[a] probation officer is an "arm of the court,"' and 'is statutorily mandated to "perform any . . . duty that the court may designate,"' Article III courts may not delegate the 'ultimate responsibility' of judicial functions to probation officers.") (citations omitted) (quoting United States v. Bernardine, 237 F.3d 1279, 1283 (11th Cir. 2001)).

[120] United States v. Ellis, 112 F.4th 240, 253 (4th Cir. 2024).

[121] *Johnson*, 48 F.3d at 808 (citing Ex Parte United States, 242 U.S. 27, 41 (1916)); United States v. Hollingsworth, No. 22-11250, 2023 WL 2771497, at *5 (11th Cir. Apr. 4, 2023) (quoting *Nash*, 438 F.3d at 1304-05); *see also* United States v. Cruz, 49 F.4th 646, 654 (2022) (describing the limited delegation of authority to probation officers).

convicted of a crime, a core judicial function, cannot be delegated."[122] In the context of supervised release, district courts cannot delegate to probation officers the "'final say on *whether* to impose' a condition of supervised release."[123] For administrative ease and efficiency, however, district courts can "delegate the ministerial function of how, when, and where the defendant must comply with the condition."[124] But ultimately, "[d]elegations to probation officers should not be made lightly."[125]

The circuits are currently split on whether Standard Condition 12 unconstitutionally delegates a judge's ultimate authority over sentencing to probation officers. Standard Condition 12 states that if a probation officer determines that a defendant poses a risk to someone, the officer may require her to notify that person about the risk.[126] While the First, Fifth, Sixth, Eighth, and Eleventh Circuits have concluded that Standard Condition 12 does not impermissibly delegate a judge's ultimate authority over sentencing to the probation officer,[127] the Second and Tenth Circuits have disagreed, concluding that the Condition is an unconstitutional delegation of judicial authority.[128]

2. Permissible Delegation of Authority

The First, Fifth, Sixth, and Eighth Circuits have held that Standard Condition 12 is not an unconstitutional delegation of judicial authority, and the Eleventh Circuit has concluded that it was not plain error for a district court to impose the Condition.[129] These circuits generally agree that because the district court chooses to impose the Condition at sentencing, the probation officer does not "unilaterally decide" *whether* the individual

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[122] United States v. Campbell, 77 F.4th 424, 432 (6th Cir. 2023), *amended and superseded by* 122 F.4th 624 (6th Cir. 2024).

[123] United States v. Mejia-Banegas, 32 F.4th 450, 452 (5th Cir. 2022) (quoting United States v. Huerta, 994 F.3d 711, 716-17 (5th Cir. 2021)) (emphasis added); *see also Cruz*, 49 F.4th at 654.

[124] *Hollingsworth*, 2023 WL 2771497, at *5.

[125] *Huerta*, 994 F.3d at 716.

[126] U.S. Sent'g Guidelines Manual § 5D1.3(c)(12) (U.S. Sent'g Comm'n 2021).

[127] *Cruz*, 49 F.4th at 654; *Mejia-Banegas*, 32 F.4th at 452; *Campbell*, 122 F.4th at 634-35; United States v. Janis, 995 F.3d 647, 653 (8th Cir. 2021); United States v. Maywalt, No. 22-11948, 2024 WL 2974482, at *5 (11th Cir. June 13, 2024).

[128] United States v. Boles, 914 F.3d 95, 111-12 (2d Cir. 2019); United States v. Cabral, 926 F.3d 687, 697-98 (10th Cir. 2019).

[129] *Cruz*, 49 F.4th at 654; *Mejia-Banegas*, 32 F.4th at 452; *Campbell*, 122 F.4th at 634-35; *Janis*, 995 F.3d at 653. In all of these cases, the defendants challenged Standard Condition 12 before the probation officer actually imposed a notification requirement. *Cruz*, 49 F.4th at 651, n.2; *Mejia-Banegas*, 32 F.4th at 451; *Campbell*, 77 F.4th at 428; *Janis*, 995 F.3d at 652-53. So, it is unclear what the risk notification would have looked like in practice. What we do know is that the defendants had been convicted of crimes ranging from being a felon in possession of a firearm, *Campbell*, 122 F.4th at 627, to illegally reentering the country, *Mejia-Banegas*, 32 F.4th at 451.

must be subjected to the Condition.[130] Rather, the probation officer merely determines the details of how the Condition will play out in practice for the particular defendant[131]—"when, where, and to whom the defendant must give notice."[132]

The First Circuit, for example, interpreted Standard Condition 12 to mean that when a probation officer determines that a defendant poses a risk to a third party, the probation officer "has no discretion as to *whether* [the defendant] must give notice pursuant to Standard Condition 12."[133] Once the probation officer identifies a risk to a third party and finds that a notification is warranted, the defendant *must* notify that person, as directed by the judge at sentencing.[134] The First Circuit thus found that the probation officer is merely given a "limited scope of authority" to determine the details of how and to whom the defendant must give notice.[135] The probation officer does not have the "final say" over *whether* the defendant is subject to the Condition.[136] Instead, the judge retains ultimate authority over the Condition.

Similarly, in *United States v. Maywalt*,[137] the Eleventh Circuit concluded that the district court's imposition of Standard Condition 12 was not plain error. The Eleventh Circuit's delegation analysis centered on the distinction between delegations to a probation officer of "a ministerial act or support service," which are constitutional, and delegations of the "'ultimate responsibility' of imposing a sentence," which are unconstitutional.[138] The court concluded that Standard Condition 12 likely constituted the former delegation because it "doesn't leave to the probation officer's discretion *whether* [a defendant] must comply with the condition."[139] Instead, Standard Condition 12 only enables the probation officer to determine the presence of a risk and decide to whom the defendant must give notice.[140]

To support its reasoning, the Eleventh Circuit distinguished *United States v. Nash*,[141] wherein the Eleventh Circuit had concluded that a condition requiring a defendant to attend mental health counseling "as deemed necessary by the Probation Officer" was an unconstitutional delegation of

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[130] *Mejia-Banegas*, 32 F.4th at 452.

[131] *Id.*; *Cruz*, 49 F.4th at 654.

[132] *Mejia-Banegas*, 32 F.4th at 452; *see also Cruz*, 49 F.4th at 654.

[133] *Cruz*, 49 F.4th at 654 (emphasis added). Note that the First Circuit made this conclusion even though the text of the Condition states that if the probation officer determines that a risk exists, she "*may* require [the defendant] to notify the person about the risk." *Id.* at 651 n.4 (quoting U.S. SENT'G GUIDELINES MANUAL § 5D1.3(c)(12) (U.S. SENT'G COMM'N 2016)) (emphasis added).

[134] *Id.* at 654.

[135] *Id.*

[136] *Id.* (quoting *Mejia-Banegas*, 32 F.4th at 452).

[137] No. 22-11948, 2024 WL 2974482 (11th Cir. June 13, 2024).

[138] *Id.* at *5 (quoting United States v. Nash, 438 F.3d 1302, 1304-05 (11th Cir. 2006)).

[139] *Maywalt*, 2024 WL 2974482, at *5.

[140] *Id.*

[141] *Nash*, 438 F.3d at 1306.

judicial authority.[142] There, the Eleventh Circuit concluded that the conditional phrase "as deemed necessary by the Probation Officer" impermissibly delegated the "ultimate responsibility of determining whether the defendant must submit to counseling."[143] Because Standard Condition 12 does not have the prohibited language "as deemed necessary by the Probation Officer," the Eleventh Circuit concluded that the Condition did not "allow the probation officer to 'unilaterally decide whether' [the defendant] shall be subject to the condition at all."[144]

Much like the First and Eleventh Circuits, the Fifth Circuit in *United States v. Mejia-Banegas*[145] found that Standard Condition 12 doesn't delegate to the probation officer *whether* the condition is imposed—merely "when, where, and to whom the defendant must give notice."[146] Unlike the other circuits that upheld the Condition, the Fifth Circuit's permissible delegation analysis accounted for a second consideration: the liberty interests of the defendant. According to the Fifth Circuit, when a condition involves "a significant deprivation of liberty," the district court cannot delegate its details to a probation officer.[147]

The Fifth Circuit first developed its liberty interest test in *United States v. Martinez*,[148] wherein it concluded that a condition of supervised release that enabled probation officers to require inpatient mental health treatment was an unconstitutional delegation of judicial authority. The Fifth Circuit cited the Second, Ninth, and Tenth Circuits, which had all found the Condition to be an unconstitutional delegation of judicial authority "because of the significant liberty interests at stake in confinement during inpatient treatment."[149] The Fifth Circuit reasoned that giving probation officers discretion to violate significant liberty interests "cannot be characterized as one of the managerial details that may be entrusted to probation officers."[150] Instead, such discretion must be retained by a judge. Thus, a condition of supervised release must not delegate to a probation officer the authority to infringe on a defendant's significant liberty interests.

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[142] *Maywalt*, 2024 WL 2974482, at *5 (citing *Nash*, 438 F.3d at 1306).

[143] *Id.*

[144] *Id.*

[145] 32 F.4th 450 (5th Cir. 2022).

[146] *Id.* at 452.

[147] *Id.* at 452.

[148] 987 F.3d 432 (5th Cir. 2021).

[149] *Id.* at 435 (citing United States v. Matta, 777 F.3d 116, 122-23 (2d Cir. 2015)); United States v. Mike, 632 F.3d 686, 695-96 (10th Cir. 2011); United States v. Esparza, 552 F.3d 1088, 1091 (9th Cir. 2009)). The Ninth Circuit, for example, had ruled that although a district court is generally not required to justify each condition of supervised release, if a condition "involves an especially significant liberty interest," the court must make "certain 'specific findings' justifying [its] imposition." *Esparza*, 552 F.3d at 1090 (quoting United States v. Weber, 451 F.3d 552, 560 (9th Cir. 2006)).

[150] *Martinez*, 987 F.3d at 435-46.

When applying the liberty interest analysis to Standard Condition 12 in *Mejia-Banegas*, however, the Fifth Circuit's assessment of potential infringements on liberty was cursory at best. The Court merely stated that the "limited scope of authority" delegated to the probation officer under Standard Condition 12 "neither leaves to the probation officer the 'final say' on whether to impose a condition of supervised release nor implicates a significant deprivation of liberty."[151] The Fifth Circuit added only that "if, in practice, an overzealous probation officer used the risk notification condition in a fashion that deprived a probationer of liberty, that person could seek relief under Federal Rule of Criminal Procedure 32.1," which enables a probationer to apply for a change of conditions.[152] The Fifth Circuit then quickly concluded that the risk notification condition is not an impermissible delegation of judicial authority.[153]

The remaining two circuits that upheld Standard Condition 12, the Sixth and Eighth Circuits, primarily based their holdings on the lack of any specific moments in the record indicating that the district court impermissibly relinquished its ultimate authority over the sentence. The Eighth Circuit, for example, relied on the lack of evidence in the record of the district court affirmatively indicating that it was relinquishing its ultimate responsibility for the sentence.[154] Similarly, the Sixth Circuit emphasized the district court's explanation that if the defendant had any "questions or concerns," the district court would "resolve" the issue, thus preserving its ultimate authority over the imposition of punishment.[155]

3. Impermissible Delegation of Judicial Authority

In contrast, the Second and Tenth Circuits have found that Standard Condition 12 is an unconstitutional delegation of judicial authority.[156] In *United States v. Boles*,[157] the Second Circuit concluded that the risk notification condition is impermissibly vague and affords too much discretion to the probation officer. The court remanded the case to "clarify the scope" of the risk notification condition.[158]

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[151] *Mejia-Banegas*, 32 F.4th at 452.

[152] *Id.* (citing FED. R. CRIM. P. 32.1).

[153] *Id.*

[154] *See* United States v. Janis, 995 F.3d 647, 653 (8th Cir. 2021) (citing United States v. Robertson, 948 F.3d 912, 919 (8th Cir. 2020)).

[155] United States v. Campbell, 122 F.4th 624, 635 (6th Cir. 2024).

[156] *See* United States v. Boles, 914 F.3d 95, 111-12 (2d Cir. 2019); United States v. Cabral, 926 F.3d 687, 697-98 (10th Cir. 2019).

[157] 914 F.3d at 111.

[158] *Id.* at 112. The Second Circuit reasoned that Standard Condition 12 is "largely indistinguishable" from a prior iteration of the Condition that the Second Circuit, among other circuits, had previously found unconstitutional. *Id.* (referencing United States v. Peterson, 248 F.3d 79 (2d Cir. 2001)). The prior version read: "*as directed by the probation officer*, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or

Like the Fifth Circuit, the Second Circuit examined whether the Condition infringes on the defendant's liberty interests. When describing its liberty interest test in prior cases, the Second Circuit had held that a district court cannot delegate "decisionmaking authority which would make a defendant's liberty itself contingent on a probation officer's exercise of discretion."[159] The *Boles* court thus concluded that Standard Condition 12 was unconstitutional because it enabled probation officers to infringe on a defendant's liberty interests without making the proper findings.[160] Specifically, the Second Circuit explained that the risk notification requirement could affect the defendant's employment, constituting an unlawful occupational restriction.[161] Under the text of Standard Condition 12, a probation officer could require a defendant to notify an employer about any risk at all—even perhaps a risk stemming from a separate, unrelated, conviction—and jeopardize her employment.[162] But *the district court itself* must impose any occupational restrictions, and it must ensure that such restrictions are related to the immediately relevant conviction.[163] Therefore, the court "may not simply leave the issues … to the probation officer's unfettered discretion."[164]

In *United States v. Cabral*,[165] the Tenth Circuit similarly found that the risk notification condition was an impermissible delegation of judicial authority. Like the Second and Fifth Circuits, the Tenth Circuit analyzed "the liberty interest affected by the probation officer's discretion."[166] Under this inquiry, if a condition enables a probation officer to restrict a defendant's significant liberty interest, the Tenth Circuit would deem it an "improper

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personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement[s]." *Peterson*, 248 F.3d at 81 (emphasis added). The current version of the Condition reads: "If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk." *Boles*, 914 F.3d at 110-11.

[159] United States v. Matta, 777 F.3d 116, 122 (2d Cir. 2015) (citing *Peterson*, 248 F.3d at 85).

[160] *Boles*, 914 F.3d at 111-12.

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.* at 112 (quoting *Peterson*, 248 F.3d at 86). After the Second Circuit remanded the case, the Western District of New York issued an amended standing order that replaced all risk notification conditions in the district. The revised risk notification condition mandates that the *court*, "in consultation with [the] probation officer" determine the risk posed by the defendant. The revised Condition further clarifies that the determination must be "based on [the defendant's] criminal record, personal history and characteristics, and the nature and circumstances of [her] offense." The new Condition also narrows the scope of the risk to the defendant "committing further crimes against another person." Amended Standing Order, *In re* United States v. Boles (W.D.N.Y. Mar. 22, 2019), https://www.nywd.uscourts.gov/sites/nywd/files/PTPR-2019-AmendedBolesStandOrd.pdf [https://perma.cc/9YDM-M2GC].

[165] 926 F.3d at 697-98.

[166] *Id.* at 697 (quoting United States v. Bear, 769 F.3d 1221, 1230 (10th Cir. 2014)).

delegation of the judicial authority to determine the nature and extent of a defendant's punishment."[167]

The Tenth Circuit ultimately concluded that the district court's imposition of Standard Condition 12 was unconstitutional because the probation officer's discretion could "implicate a multitude of liberty interests, depending on how [the Condition] [was] enforced: it '[c]ould affect girlfriends, family, living. It could, in theory, impact an occupation.'"[168] The Tenth Circuit decided even a narrow construction of Standard Condition 12 would contain a constitutionally impermissible delegation of judicial authority.[169] The Tenth Circuit pointed to specific instances in the record of the District Court expressly refusing to limit the scope of the Condition. For example, the District Court once stated that the probation officer's risk determination does not depend only on "what has transpired, from today backwards," implying that the risk could be determined based on factors unrelated to the defendant's criminal history. [170] The Tenth Circuit emphasized the District Court's "wide-ranging speculation about how the risk notification condition might apply to 'any number of things,' from a future 'mental-health issue' or 'drug issue' to a hypothetical rape investigation."[171]

In concluding that the District Court's imposition of Standard Condition 12 was an unconstitutional delegation of judicial authority, the Tenth Circuit elaborated "on some (though certainly not all) of the ways in which the risk notification condition implicates [a defendant's] liberty interests and therefore improperly delegates judicial power to the probation officer."[172] First, the Tenth Circuit found that if the probation officer orders the defendant to notify family members of a risk, the Condition could infringe on the defendant's "fundamental right of familial association."[173] And when a condition of supervised release interferes with the fundamental right to familial association, a judge must determine that "compelling circumstances [are] present to justify the condition."[174] Second, the Tenth Circuit held that if a probation officer compels a defendant to notify an employer about a risk, the condition could constitute an occupational restriction, which must be imposed by the *district court itself*, not a probation officer.[175] When a court imposes an occupational restriction, it must make specific findings: it can only consider "the [defendant's] conduct relevant to the offense of conviction," and it must determine that the restriction is "reasonably necessary

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[167] *Id.*

[168] *Id.* at 698 (quoting the record).

[169] *Id.*

[170] *Id.* at 698 (quoting the record).

[171] *Id.* (quoting the record).

[172] *Id.*

[173] *Id.* (citing United States v. Lonjose, 663 F.3d 1292, 1303 (10th Cir. 2011).

[174] *Id.*

[175] *See id.* at 698 (citing U.S. Sent'g Guidelines Manual § 5F1.5(a) (U.S. Sent'g Comm'n 2021)).

to protect the public."[176] Thus, the Tenth Circuit concluded that the risk notification condition constituted an impermissible delegation of judicial authority, because it enables a probation officer's discretion to infringe on a defendant's liberty interests without the necessary judicial findings.[177]

III. Standard Condition 12 as an Unconstitutional Delegation of Judicial Authority

This Part agrees with the Second and Tenth Circuits, arguing that Standard Condition 12 is an unconstitutional delegation of judicial authority. Section A analogizes to the legal doctrine governing delegations to non-Article III courts. Following this analogy, Section A concludes that because Standard Condition 12 allows probation officers to decide when to increase their own power over defendants' lives, the Condition impermissibly gives them "ultimate authority" over punishment. Section B then advocates for the adoption of the Second, Fifth, and Tenth Circuits' judicial delegation framework, which considers whether probation officers' discretion threatens defendants' liberty interests. Section B expands on the Circuits' liberty interest analyses, finding that probation officers' discretion can affect a wide range of liberty interests, such as freedom from compelled speech and freedom of association. In sum, this Part argues that Standard Condition 12 is unconstitutional both because of the concerning way it gives probation officers ultimate authority over punishment, and because of the severe threat it poses to defendants' liberty interests.

A. Examining Who Has "Ultimate Authority" over Standard Condition 12

Under Article III, a court may not delegate its "ultimate authority" over criminal sentencing to non-judicial officers, because sentencing is a core judicial function.[178] Thus, the court can delegate to the probation officer the ministerial details of when, where, and how a condition of supervised release will be implemented, but it cannot delegate the initial decision of *whether* to impose the punishment.[179] In practice, however, the difference between the "when," "where," "how," and the "whether" can become fuzzy. When does a delegation cross the crucial threshold into enabling the probation officer to decide *whether* to impose a punishment?

An analogy to the doctrine governing delegations to non-Article III courts offers an answer: when probation officers are empowered to determine

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[176] U.S. Sent'g Guidelines Manual § 5F1.5(a)(1)-(2) (U.S. Sent'g comm'n 2021).

[177] *Cabral*, 926 F.3d at 699.

[178] United States v. Janis, 995 F.3d 647, 653 (8th Cir. 2021) (quoting United States v. Thompson, 653 F.3d 688, 693 (8th Cir. 2011)).

[179] United States v. Mejia-Banegas, 32 F.4th 450, 451-52 (5th Cir. 2022)*; see* United States v. Cruz, 49 F.4th 646, 654 (1st Cir. 2022).

the facts that trigger their authority to impose a punishment, they impermissibly determine *whether* the punishment is imposed. When this logic is applied to Standard Condition 12, it is clear that the Condition is unconstitutional. It gives the probation officer power to determine a fact (the existence of a risk) that allows her to decide whether to impose a punishment (the risk notification requirement). The probation officer, not the court, has ultimate authority over the application of Standard Condition 12.

The Supreme Court has held that, under some circumstances, Congress can delegate Article III factfinding to administrative agencies and other non-Article III courts. Specifically, "legislative courts"—special Article I tribunals—can conduct factfinding in specialized and particularly complex areas of law, such as maritime law or taxation.[180] The Supreme Court has upheld factfinding by these non-Article III tribunals for pragmatic reasons, including efficiency and agency expertise.[181]

The delegation of judicial factfinding to non-Article III courts is comparable to a judge's delegation of authority to a probation officer. Both delegations are rationalized by efficiency considerations, as well as the delegate's relative expertise and proximity to the specific facts at hand. Administrative agencies might have more nuanced understandings of particularly complex or fact-intensive areas of law. Similarly, probation officers are closer to the ground than Article III judges: probation officers might know more about the defendants' lifestyles, habits, and risks, and be better suited to efficiently administer conditions of release.

In the context of delegations to non-Article III courts, however, the Supreme Court in *Crowell v. Benson*[182] articulated a limiting principle: the delegation of factfinding can be impermissible when the facts to be found are "jurisdictional"—facts whose "existence is a condition precedent to the operation of the statutory scheme."[183] Where a statute delegates cases to a non-Article III court, that non-Article III court cannot itself determine whether the statute applies in the first instance. Otherwise, the non-Article III court can aggrandize itself and arbitrarily assert power where it otherwise could not. The jurisdictional fact limit has weakened in the years since *Crowell*,[184] but Justice Clarence Thomas has nonetheless suggested that the Constitution still requires de novo review of facts by Article III courts where important liberty interests are at stake.[185]

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[180] *See* Crowell v. Benson, 285 U.S. 22, 50-51 (1932).

[181] *See id.* at 46.

[182] 285 U.S. 22, 54-57 (1932).

[183] *Id.* at 54.

[184] *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 82 n.34 (1982) ("*Crowell*'s precise holding, with respect to the review of 'jurisdictional' and 'constitutional' facts that arise within ordinary administrative proceedings, has been undermined by later cases.")

[185] *See* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 713-14 (2015) (Thomas, J., dissenting) (observing that "the core of the judicial power" concerns the disposition of the "three 'absolute' rights" to life, liberty, and property); Agosto v. INS, 436 U.S. 748, 753 (1978) (citing

This continued distrust of jurisdictional fact delegations reflects a fear that non-Article III actors will engage in arbitrary and abusive exercises of judicial power, potentially infringing on individuals' liberty interests without the necessary judicial oversight.[186]

The rationale for the jurisdictional fact limit applies in equal force to the supervised release context. When liberty interests are at stake, administrative agencies should not determine the facts that allow them to have jurisdiction over a particular case. Likewise, probation officers should not be able to determine the existence of facts that empower them to insert themselves further into defendants' lives and potentially violate defendants' core liberties. Standard Condition 12 is therefore concerning: the Condition empowers probation officers to decide the "jurisdictional" fact—whether the defendant poses a risk to a particular person—that triggers the probation officer's increased power—her ability to require a risk notification. In determining the existence of a risk, the probation officer is also determining the power she will have over the defendant's life.

Indeed, this concerning potential for self-empowerment becomes even more apparent—and crosses the line into unconstitutionality—when one considers the true nature of the punishment contained in Standard Condition 12. Functionally, the punishment felt by the defendant is the risk notification requirement itself. At sentencing, the court technically imposes the entirety of the text of Standard Condition 12 as the "punishment." But the probation officer alone determines whether Standard Condition 12 will impact the defendant in any practical way. The probation officer can mandate ten risk notifications within the first week of release or none at all throughout the entire term. Under Standard Condition 12, then, the probation officer is empowered to effectively abrogate the presence of any punishment in the defendant's life. The probation officer practically decides *whether* the defendant is subjected to a punishment—not merely when, why, or how she is subjected to a punishment.

In comparison, consider two other conditions of supervised release—Special Condition 4[187] and Special Condition 5[188]—that grant discretion to probation officers, but only *after* the court has made the necessary determination of jurisdictional facts. Special Conditions 4 and 5 are two discretionary conditions of supervised release that compel the defendant to participate in certain rehabilitative programs. The details of these programs are delegated to the discretion of the probation officer, but the factual predicates that

Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)) (finding that de novo judicial review is required for claims of American citizenship in deportation proceedings, because deportation "obviously deprives [individuals] of liberty").

[186] *See Crowell*, 285 U.S. at 56-57.

[187] U.S. Sent'g Guidelines Manual § 5D1.3(d)(4) (U.S. Sent'g Comm'n 2021).

[188] *Id.* § 5D1.3(d)(5).

trigger imposition of the Conditions are determined by an Article III court. Special Condition 4 reads:

> If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — [it may impose] a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse . . . .[189]

Similarly, Special Condition 5 reads,

> If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — [it may impose] a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.[190]

Key to both Special Conditions 4 and 5 is that the *court* makes the threshold, or "jurisdictional," finding that triggers the application of the condition—that the defendant is either an abuser of a controlled substance (Special Condition 4) or is in need of mental health treatment (Special Condition 5). Only once the court makes this threshold determination is the implementation of the condition delegated to the probation officer. Notably, the probation officer is afforded some discretion: she can determine whether the defendant's program is inpatient or outpatient, three hours a week or thirty minutes a week, on the other side of the city or next door. But she cannot decide that the defendant will not attend a program at all. It is therefore the court that makes the factual findings that determine whether the condition is triggered. Here, the court arguably retains ultimate authority over the condition.

By contrast, under Standard Condition 12, the probation officer herself makes the threshold or jurisdictional finding that triggers the application of the punishment. The probation officer determines whether the defendant poses a risk to another person or organization, and then, whether that risk mandates a risk notification. Rather than having authority only over when, where, and how the condition must be complied with, the probation officer decides whether the true punishment embodied in the Condition applies in the first instance. Standard Condition 12 thus fails the "ultimate authority" test. Because the probation officer can determine the facts that trigger her increased authority, the probation officer impermissibly has the final say over *whether* the punishment is imposed.[191]

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[189] *Id.* § 5D1.3(d)(4).

[190] *Id.* § 5D1.3(d)(5).

[191] *See* United States v. Lee, 950 F.3d 439, 447 (7th Cir. 2020) (finding a condition which limits the defendant's ability to interact with known felons without permission from her probation officer to be an impermissible delegation of judicial authority, because the "probation officer's future task, then, is not merely to manage or supervise, but to *determine* whether, when, and how a particular component of [the defendant's] punishment . . . is imposed").

B. Adopting and Expanding on the Second, Fifth, and Tenth Circuits' Framework: Considering a Defendant's Liberty Interests

Since Standard Condition 12 allows a probation officer to determine the facts that trigger her authority to impose a punishment, it is likely an unconstitutional delegation. But the inquiry should not end there. In considering whether conditions of supervised release are unconstitutional delegations of judicial authority, courts should adopt the Second, Fifth, and Tenth Circuits' judicial delegation framework, which considers how a probation officer's discretion might affect a defendant's liberty interests. The liberty interest test prevents probation officers from arbitrarily violating defendants' liberties. It therefore mitigates the exclusionary harm of Standard Condition 12 and protects the dignity of people serving terms of supervised release.

Additionally, a liberty interest test is faithful to the demands of the Constitution: the power to deprive a defendant of her liberty as a punishment for a crime lies in the hands of Article III judges rather than probation officers. Because only judges can impose significant deprivations of liberty, a condition of supervised release which "allow[s] a probation officer to make the decision to restrict a defendant's significant liberty interests constitutes an improper delegation of the judicial authority to determine the nature and extent of a defendant's punishment."[192] The liberty interest analysis is central to the delegation question because it ensures that a condition of supervised release does not violate Article III of the Constitution.

Furthermore, a liberty interest analysis helps align supervised release with its original congressional purpose: facilitating, rather than hindering, reentry.[193] Considering a defendant's liberty interests is vital to ensuring that the probation officer's discretion does not unduly burden reentry. In the post-imprisonment landscape of invisible punishments and collateral consequences of conviction, formerly incarcerated people face the daunting landscape of reentry with already-diminished rights.[194]

Indeed, Standard Condition 12 enables a probation officer to infringe on a number of the defendant's fundamental liberty interests. The circuits that have examined liberty interests in the context of Standard Condition 12, however, have fallen short of examining the full breadth of liberties that the probation officer is empowered to infringe when making a risk determination. The Fifth Circuit's liberty interest analysis was almost nonexistent,[195] and the Second Circuit only considered the possibility of Standard Condition 12's infringement on occupational freedom.[196] The Tenth Circuit,

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[192] United States v. Cabral, 926 F.3d 687, 698 (10th Cir. 2019) (quoting United States v. Bear, 769 F.3d 1221, 1230 (10th Cir. 2014)).

[193] *See* S. Rep. No. 98-225, at 124 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3308.

[194] *See supra* section I.A.

[195] *See* United States v. Mejia-Banegas, 32 F.4th 450, 452 (5th Cir. 2022).

[196] *See* United States v. Boles, 914 F.3d 95, 112 (2019).

for its part, also examined the Condition's potential to infringe on the right to familial association, and in doing so, emphasized that the Court was merely "elaborat[ing] on some (though certainly not all) of the ways in which the risk notification condition implicates [a defendant's] liberty interests."[197] The remainder of this section picks up where the Tenth Circuit left off, analyzing in greater depth the potential liberty interests affected by the probation officer's discretion under Standard Condition 12.

1. Freedom from Compelled Speech

Perhaps most obviously, Standard Condition 12 could infringe on a defendant's freedom from compelled speech. The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all."[198] Under the First Amendment's anti-orthodoxy principle, the government cannot compel statements of *opinion*, and thus force individuals to promote government orthodoxy, without satisfying strict scrutiny.[199] While the government tends to have more discretion to compel statements of *fact*, the Supreme Court has held that compelled statements of fact that burden the speaker's ability to engage in other, constitutionally protected speech—such as to express statements of opinion or exercise the fundamental First Amendment right to freedom of association[200]—must also satisfy strict scrutiny.[201]

Under Standard Condition 12, a probation officer could compel an individual to disclose her criminal history to any selection of individuals or organizations. This forced disclosure of criminal history—a highly personal and polarizing fact—is likely to burden the defendant's ability to engage in other forms of protected First Amendment expression.[202] It might negatively impact her interpersonal and professional relationships, encumbering her ability to converse freely with a close friend or professional mentor. It might also burden her First Amendment freedom of association if, for example,

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[197] *Cabral*, 926 F.3d at 698.

[198] Wooley v. Maynard, 430 U.S. 705, 714 (1977).

[199] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

[200] *See* De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (establishing the implied First Amendment right to freedom of association).

[201] Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797-98 (1988) ("[C]ases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech. . . . We believe, therefore, that [the law compelling statements of fact] is subject to exacting First Amendment scrutiny.").

[202] *See* State v. Hill, 341 So.3d 539, 551-53 (La. 2020) (holding that a state law requiring convicted sex offenders to carry an identification card that says "sex offender" in orange, capital letters, and to show it to police officers when asked for license and registration, is an unconstitutional compelled statement of fact that burdens other protected speech).

the defendant is compelled to notify her church leader of her conviction status and can no longer participate in her religious community of choice. The threat of being compelled to disclose criminal history could also have a chilling effect on the defendant's actions—she might become reluctant to form relationships out of fear that her probation officer will mandate a notification. Compelled disclosure of facts that burden other protected forms of expression must satisfy strict scrutiny, but under Standard Condition 12, the probation officer has unfettered discretion to infringe on the defendant's expressive freedoms without making the necessary findings.

Indeed, compelled disclosure of criminal history could extend beyond a mere compelled disclosure of fact—it could itself be conceived as an impermissible compelled statement of opinion, violating the First Amendment's anti-orthodoxy principle.[203] Conviction status carries with it the State's moral condemnation of the underlying acts that led to conviction. As legal philosopher Joel Feinberg writes, "[p]unishment is a . . . device for the expression of . . . judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those 'in whose name' the punishment is inflicted."[204] Just as the Supreme Court has held that compelling schoolchildren to pledge allegiance to the flag is to force them impermissibly to "declare a belief" promoted by the government, the compelled communication of conviction status can be understood as a forced "affirmation of a belief and an attitude of mind" about one's own guilt, criminality, or moral corruption.[205] Such compelled orthodoxy is unconstitutional unless it satisfies strict scrutiny.[206] Under Standard Condition 12, the probation officer could thus deprive the defendant of this core First Amendment liberty. This risk alone suggests that Standard Condition 12 is an unconstitutional delegation of judicial authority.

2. Freedom of Intimate Association

Additionally, the Condition enables the probation officer to impact the defendant's freedom of intimate association.[207] The Supreme Court has recognized that the freedom of intimate association—the ability to "enter into and maintain certain intimate human relationships"— is a "fundamental element of personal liberty" under the Fourteenth Amendment.[208] Conditions

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[203] *See Barnette*, 319 U.S. at 642.

[204] Joel Feinberg, *The Expressive Function of Punishment*, 49 Monist 397, 400 (1965).

[205] *Barnette*, 319 U.S. at 633.

[206] *Maynard*, 430 U.S. at 716-17 (1977).

[207] *See, e.g.*, United States v. Soltero, 510 F.3d 858, 866 (9th Cir. 2007) (stating that a restriction on a defendant's right to free association is only valid if it (1) is "reasonably related to" deterrence, protection of public, or rehabilitation, (2) "involves no greater deprivation of liberty than is reasonably necessary" and (3) is consistent with Sentencing Commission policy statements).

[208] Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984). Note that the Supreme Court has distinguished between two different kinds of "freedom of association." One is freedom of *expressive*

of supervised release that interfere with these "highly personal relationships"[209] are subject to enhanced procedural requirements—requirements which a probation officer would not be held to under Standard Condition 12. The Ninth Circuit, for example, requires district courts imposing such conditions to provide "record evidence that the condition . . . is necessary to accomplish one or more of the facts listed in § 3583(d)(1) [such as affording adequate deterrence and protecting the public from further crimes] and involves no greater deprivation of liberty than is reasonably necessary."[210] Any deprivation of this fundamental liberty as a form of punishment must be imposed by an Article III judge making the necessary findings, rather than left to the unfettered discretion of a probation officer.

Primarily, the discretion granted to a probation officer by Standard Condition 12 could impede the defendant's fundamental right to familial association, a type of intimate association.[211] The Supreme Court has emphasized that family relationships in particular "reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty."[212] This is because familial ties "by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life." [213] A probation officer's order that a defendant notify family members that she poses a risk to them could burden these essential relationships, impermissibly infringing on her ability to enter into romantic relationships,[214] marry,[215] or raise and educate children.[216]

Family relationships are central to successful reentry post-imprisonment[217] because they "provide both strong affectionate bonds (like emotional support

association, which is secured by the First Amendment, and was briefly discussed above. Second is freedom of *intimate* association, which is secured by the Fourteenth Amendment as a "fundamental element of personal liberty." *Id.* at 617-18.

[209] *Id.* at 618.

[210] United States v. Wolf Child, 699 F.3d 1082, 1090 (9th Cir. 2012) (quoting United States v. Stoterau, 524 F.3d 988, 1005 (9th Cir. 2008)).

[211] *See* United States v. Cabral, 926 F.3d 687, 698 (10th Cir. 2019) (explaining that a risk notification to family members could impermissibly interfere with a defendant's "fundamental right of familial association").

[212] *Jaycees*, 468 U.S. at 620.

[213] *Id.* at 619-20.

[214] *See Wolf Child*, 699 F.3d at 1095 ("[A] defendant's romantic relationship with his life partner" is one "that implicates a particularly significant liberty interest in intimate association.")

[215] *See* Zablocki v. Redhail, 434 U.S. 374, 383-84 (1978) (emphasizing that freedom to marry is a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment).

[216] *See* Smith v. Org. of Foster Families, 431 U.S. 816, 842-45 (1977) (describing the fundamental nature of the right to raise and instruct one's own children).

[217] *See generally* Jeffrey R. Breese, Khaz Rae'el & G. Kathleen Grant, *No Place Like Home: A Qualitative Investigation of Social Support and Its Effects on Recidivism*, 2 Socio. Prac. 1 (2000); Carol Shapiro & Meryl Schwartz, *Coming Home: Building on Family Connections*, 5 Corr. Mgmt. Q. 52 (2001). Family relationships also affect housing post-imprisonment.

and attachment) and important mechanisms of social support (like housing, transportation, and financial support)."[218] Recognizing this importance, the Tenth Circuit, for example, has found that "[w]here a condition of supervised release interferes with [the right of familial association], compelling circumstances must be present to justify the condition."[219] Under Standard Condition 12, however, the probation officer is empowered to restrict this fundamental right without showing any compelling circumstances. Because the probation officer's discretion could infringe on this fundamental right to familial association, Standard Condition 12 impermissibly delegates the judicial authority to impose punishment—by depriving the defendant of such liberty—to a probation officer.

3. The Right to an Occupation

Finally, Standard Condition 12 could constitute an unlawful occupational restriction, implicating the defendant's liberty interests. [220] An occupational restriction is a condition of supervised release that "prohibit[s] the defendant from engaging in a specified occupation, business, or profession, or limit[s] the terms on which the defendant may do so."[221] Before imposing an occupational restriction, a court must find "a reasonably direct relationship" between the defendant's occupation and "the conduct relevant to the offense of conviction" and ensure that the restriction is "reasonably necessary to protect the public."[222]

Probation officers mandating risk notifications, however, do not have to make these same findings when requiring defendants to notify their employers of their criminal conviction. For this reason, even the Office of the General Counsel for Administrative Office of the United States Courts has stated that "[t]he requirement that a defendant under supervision . . . inform his or her employer or another specified third party about the defendant's criminal conviction generally should be imposed, if necessary, by *the*

Because many people have trouble finding housing, most previously incarcerated people live with family members or intimate partners once they are released from prison. URB. INST., UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE'S PRISONER REENTRY PORTFOLIO 8 (2006), https://www.urban.org/sites/default/files/publication/42981/411289-Understanding-the-Challenges-of-Prisoner-Reentry.PDF [https://perma.cc/BXB3-7497].

[218] Thomas J. Mown, Richard Stansfield & John H. IV Boman, *Family Matters: Moving Beyond "If" Family Support Matters to "Why" Family Support Matters During Reentry from Prison*, 56 J. RSCH. CRIME & DELINQ. 483, 485 (2020).

[219] United States v. Lonjose, 663 F.3d 1292, 1303 (10th Cir. 2011).

[220] *See* United States v. Cabral, 926 F.3d 687, 699 (10th Cir. 2019).

[221] U.S. SENT'G GUIDELINES MANUAL § 5F1.5(a) (U.S. SENT'G COMM'N 2021).

[222] *Id.* § 5F1.5(a)(1)-(2).

court as a formal special condition."[223] But under Standard Condition 12, a probation officer can order a defendant to warn an employer or potential employer about a risk without making the necessary findings. The risk notification could therefore constitute an unlawful occupational restriction.

Indeed, probation officers seem to implement risk notifications most commonly in the employment context, especially for defendants who were convicted of fraud-related offenses.[224] As an example, in 2023, a defendant was convicted of fraud.[225] As part of his term of supervised release, the district court imposed Standard Condition 12.[226] The defendant got a job as a district manager at a Wingstop in Atlanta, Georgia and informed his probation officer of the good news.[227] The probation officer determined that the defendant's employment with Wingstop created a risk and ordered him to notify Wingstop of his criminal history.[228]

For many defendants, notification of criminal history is akin to sending a resignation letter. A survey of employers in major cities in the United States found that two-thirds of employers would not knowingly hire an ex-offender.[229] Steady employment, however, is integral to successful reentry and reduced recidivism[230]—both because having a stable source of income is an essential part of the transition back into the community and because full-time employment has been associated with lower levels of illegal activity and substance misuse.[231] Notifying an employer or potential employer of criminal history jeopardizes this essential part of reentry, and yet probation officers can mandate the notification without having to make the same findings a court has to make when imposing an occupational restriction.

In sum, as the Tenth Circuit concluded, Standard Condition 12 enables a probation officer to potentially infringe on a "multitude [of] liberty interests,"[232] without holding the probation officer to the same standards that a court is held to. The probation officer is impermissibly empowered to

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[223] Probation and Pretrial Servs. Off., Admin. Off. of U.S. Cts., Overview of Probation and Supervised Release Conditions 39 (2024), https://www.uscourts.gov/sites/default/files/overview_of_probation_and_supervised_release_conditions_0.pdf [https://perma.cc/H2TB-R2M2] (emphasis added).

[224] Conversations with former federal public defender (2023) (notes on file with author).

[225] *See* Warrant or Summons for Offender Under Supervision at *3, United States v. Giardina, No. 1:23-mj-00079 (N.D. Ga. Jan. 24, 2023).

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] Travis et al., *supra* note 24, at 31.

[230] *See* John Rakis, *Improving the Employment Rate of Ex-Prisoners Under Parole*, 69 Fed. Prob. 7, 7 (2005) (in 2003, previously incarcerated people who were unemployed had their supervision revoked at a rate more than 500% higher than those who were employed); Travis et al., *supra* note 24, at 32 (on average, people who participated in vocational programs while incarcerated have a recidivism rate 20% lower than those who did not).

[231] Travis et al., *supra* note 24, at 32-33.

[232] United States v. Cabral, 926 F.3d 687, 698 (10th Cir. 2019).

deprive a previously incarcerated person of her core liberties, including her First Amendment right to be free from compelled speech and her Fourteenth Amendment right to intimate association, jeopardizing relationships with family members or employers that are integral to successful reentry. Article III requires such deprivations of liberty to be imposed by a judge, not a probation officer. But Standard Condition 12 gives the probation officer authority over "the nature and extent of a defendant's punishment," rendering the condition an unconstitutional delegation of judicial authority.[233]

IV. Proposals

This Part argues that because Standard Condition 12 is unconstitutional, it should be abolished. District courts should refrain from adopting the Condition, courts of appeals should vacate the Condition from defendants' sentences, and the Sentencing Commission should eliminate the Condition from its guidelines. In the alternative, Standard Condition 12 should be amended so that the judge retains ultimate authority over its imposition, thus offering increased protections to defendants and ensuring transparency over its implementation.

A. Abolishing Standard Condition 12: Moving Towards an Inclusionary Approach to Justice

After concluding that Standard Condition 12 is an unconstitutional delegation of judicial authority, district courts should refrain from adopting the condition, and appellate courts should vacate the condition from defendants' sentences. Additionally, courts and other stakeholders should encourage the Sentencing Commission to eliminate the risk notification condition from its guidelines. Each year the Sentencing Commission revises its guidelines "in light of decisions from courts of appeals, sentencing-related research, . . . and input from the criminal justice community."[234] A wave of court decisions finding Standard Condition 12 unconstitutional could very well pressure the Sentencing Commission to include reconsideration of the Condition in its yearly proposed priorities, on which members of the public could submit comments urging the abolition of Standard Condition 12.[235]

The abolitionist ethic seeks to create safe communities and help previously incarcerated people reenter society. But the abolitionist ethic offers a unique perspective, arguing that punishments that enforce the social

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[233] *Id.* at 697 (quoting United States v. Bear, 769 F.3d 1221, 1230 (10th Cir. 2014)).

[234] *Amendment Process*, U.S. Sent'g Comm'n, https://www.ussc.gov/amendment-process [https://perma.cc/JVQ7-P3AT] (last visited Feb. 26, 2025).

[235] *See Public Comment*, U.S. Sent'g Comm'n, https://www.ussc.gov/policymaking/public-comment [https://perma.cc/DM39-XQEG] (last visited Feb. 26, 2025).

exclusion of formerly incarcerated people—like Standard Condition 12—do not make us safer, and should be gradually removed from the criminal legal system. For example, one might argue that Standard Condition 12 as it currently exists increases public safety by advancing specific deterrence. Indeed, the Administrative Office of the United States Courts states that Standard Condition 12 serves the purpose of "public protection."[236] But an individual serving a term of supervised release should not be assumed to be a threat to public safety: she has already served her full time in prison and has been deemed safe to reenter society. Indeed, the Senate explicitly stated that conditions of supervised release should not serve the purpose of incapacitation, because that purpose has already been "served to the extent necessary by the term of imprisonment."[237]

Of course, a probation officer might nonetheless worry that an individual under her supervision poses a specific risk to another person or organization. But to better facilitate the formerly incarcerated person's rehabilitation and address their needs, the probation officer can turn to other resources at her disposal, like counseling, mental health, or violence intervention services. In this way, the probation officer can help facilitate healthy relationships and participation in society, rather than sever community ties that are crucial to a successful reentry.

A justice framework centered on social inclusion rather than exclusion might more effectively advance specific deterrence and honor the inherent dignity of all people involved in the criminal legal system. By facilitating previously incarcerated people's participation in society, inclusionary justice aims to break cycles of alienation and reduce the prevalence of violence. Inclusionary justice centers restorative justice practices, which aim to "engage with offenders as our fellow citizens who must face up to and make apologetic reparation for the wrongs they have done."[238] Recognizing mutual humanity and seeking restoration on both sides—on the part of the victim and on the part of the offender—creates better outcomes for everyone involved.[239]

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[236] Prob. and Pretrial Servs. Off., *supra* note 223.

[237] S. Rep. No. 98-225, at 124 (1984), as *reprinted in* 1984 U.S.C.C.A.N. 3182, 3308.

[238] Duff, *supra* note 14, at 709.

[239] Restorative justice programs have been shown to reduce rates of recidivism. *See, e.g.*, William R. Nugent, Mona Williams & Mark S. Umbreit, *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 Utah L. Rev. 137, 163 (finding a 9% reduction in recidivism); Danielle Sered, Until We Reckon: Violence, Mass Incarceration, and a Road to Repair 134 (2019) (reporting a recidivism rate of less than 6% in a restorative justice program).
Additionally, restorative justice programs improve overall attitudes about how victims and offenders alike were treated during the criminal legal process. *See* Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 Utah L. Rev. 167, 178 (2003) (finding that both victims and offenders in restorative justice were "significantly and substantially more likely . . . to believe that the criminal justice system was fair than were victims or offenders in court.").

Rather than facilitating the severance of community ties as Standard Condition 12 does, the system should build connections with people who may have caused harm and served their time. Judges who hope to reduce the prevalence of harm in our communities should incorporate the inclusionary approach to justice advanced by the abolitionist ethic. The abolition of Standard Condition 12 is a small but important step towards a regime of justice based on social inclusion.

B. Amending Standard Condition 12: Protecting Defendants and Ensuring Transparency

If courts and the Sentencing Commission prefer to retain a version of Standard Condition 12 that does not run afoul of Article III, the text of the Condition should be amended so that judges retain ultimate authority over required risk notifications. Under the current version of Standard Condition 12, the delegation of discretion to a probation officer leaves the defendant vulnerable to the whims of the probation officer, who makes the risk determination without the defendant having an opportunity to advocate for herself, offer mitigating evidence, or challenge the determination in court. In contrast, an amended version of Standard Condition 12 should require the risk determination be made by an Article III judge in the presence of the defendant's counsel, who could advocate for the defendant.

Ensuring that risk determinations are made by Article III courts offers certain procedural and dignitary protections for defendants and mitigates the exclusionary effects of Standard Condition 12 on formerly incarcerated people. This Section thus proposes an amended version of Standard Condition 12 based on the Western District of New York's ("WDNY") risk notification condition.[240] This amended version is preferable because it is more faithful to the Constitution and it preserves the dignity of defendants by offering increased procedural protections and promoting accuracy and fairness in risk determinations.

1. The Amended Condition

As previously mentioned, the Second Circuit in *Boles*[241] was concerned with the probation officer's power to make risk determinations and ultimately concluded that Standard Condition 12 is an impermissible delegation of judicial authority. On remand, the Second Circuit directed the district court to "clarify the scope" of the Condition.[242] WDNY subsequently issued an amended order that replaced all risk notification conditions in the district.

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[240] *See* Amended Standing Order, *supra* note 164.

[241] United States v. Boles, 914 F.3d 95 (2d Cir. 2019).

[242] *Id.* at 112.

The amended condition permits the probation officer to order a risk notification only if "the court determines in consultation with [the defendant's] probation officer" that the defendant poses a risk.[243] Under this formulation, the judge who sentenced the defendant also makes the risk determination. WDNY's modification thus gives the court ultimate authority over whether the condition is necessary but retains some discretion for the probation officer.

How might this play out in practice? The court decides at sentencing to impose the risk notification condition if it believes a risk notification could be necessary at some point after imprisonment. When the defendant is released from prison, a probation officer becomes worried that the defendant might pose a risk to a particular individual and can approach the court with this concern. The court then makes the risk determination at a hearing,[244] and decides whether the defendant actually poses a risk to the specific individual.[245] In this way, the probation officer can still contribute "on-the-ground" insight, but the judge retains ultimate authority over the sentence.

2. Fidelity to Article III

Requiring the court, rather than the probation officer, to make the risk determination brings Standard Condition 12 in line with Article III. When the probation officer unilaterally makes the risk determination, she impermissibly assumes the role of an Article III judge. But when the judge participates in making the risk determination, she determines the existence of facts necessary to impose the true punishment embodied by Standard Condition 12: the risk notification requirement. Unlike probation officers, Article III judges are independent actors who are purported experts in determining sentences. As the Supreme Court has emphasized, judicial nondelegation doctrine "preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States."[246] It is the judge who determines how much prison time is "sufficient, but not greater than necessary" to comply with purposes that include protecting the public from a given defendant.[247] Similarly, it should be a judge who determines whether the defendant remains a risk to a particular individual after their release from prison.

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[243] Amended Standing Order, *supra* note 164.

[244] *See* United States v. Traficante, 966 F.3d 99, 105 (2nd Cir. 2020). Notably, the defendant is entitled to counsel present to advocate on her behalf at this hearing. FED. R. CRIM. P. 32.1(c).

[245] *See Traficante*, 966 F.3d at 104 ("[A]ny obligation to notify at-risk individuals is wholly contingent on a subsequent determination by the district court that the supervisee poses a specific risk to such persons.").

[246] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986).

[247] 18 U.S.C. § 3553(a).

3. Procedural Protections and Dignity Interests

Because mandating notification enlarges the condition under the Federal Rules of Criminal Procedure, [248] an amendment consistent with the WDNY condition would trigger procedural protections for defendants, preserving their dignity and promoting transparency around risk determinations. These protections include a hearing with an Article III judge at the time the risk determination is made, the presence of counsel to advocate on the defendant's behalf at that hearing, and the right to present mitigating evidence. This minimizes the possibility that a judge will simply defer to the probation officer without independent evaluation of the facts.

When a judge, instead of a probation officer, has ultimate authority over Standard Condition 12, the defendant becomes entitled to a hearing when the risk determination is made. Under Federal Rule of Criminal Procedure 32.1(c), the defendant is entitled to a judicial hearing any time a district court enlarges a condition of supervised release. [249] And as the Second Circuit explains, "if the district court were to make such a risk finding and impose the additional burden of notification on the supervisee, such an imposition 'would . . . *enlarge*' the condition…"[250] Thus, under the amended condition, the defendant is entitled to a 32.1(c) hearing where she has the right to counsel and "an opportunity to make a statement and present any information in mitigation."[251] The defendant's ability to exercise these rights is essential to protecting the aforementioned liberties potentially affected by the condition.

These procedural protections increase accountability and transparency around the implementation of risk notification requirements. When probation officers unilaterally make risk determinations, there are no court records produced (unless defendants challenge conditions in court or violate terms of release). It is therefore nearly impossible to glean how and when probation officers impose notification requirements at large. However, if the risk determination is made by a judge during a hearing, court records and dockets will be available online. These records will improve accountability, increasing the likelihood that risk notifications are required only upon reasonable determinations of a risk and without unnecessary infringements on defendants' liberties.

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[248] *Traficante*, 966 F.3d at 105.

[249] Fed. R. Crim. P. 32.1(c); *see also Traficante*, 966 F.3d at 105 (citing United States v. Murdock, 735 F.3d 106, 114 (2d Cir. 2013)) ("[I]f the district court were to make such a risk finding and impose the additional burden of notification on the supervisee, such an imposition 'would . . . enlarge' the condition, in which case the supervisee 'would be entitled to a hearing' under Federal Rule of Criminal Procedure 32.1(c).").

[250] *Traficante*, 966 F.3d at 105 (quoting *Murdock*, 735 F.3d at 114) (emphasis added).

[251] Fed. R. Crim. P. 32.1(c).

4. Prioritizing Accuracy and Fairness in Proceedings over Efficiency

A common justification for delegation to probation officers is the promotion of judicial efficiency.[252] As the argument goes, district courts have over-burdened dockets, and probation officers have more thorough knowledge of the ins and outs of defendants' lives. Thus, the delegation of risk determinations takes advantage of probation officers' expertise while saving crucial judicial resources.

But given that Standard Condition 12 enables probation officers to violate a wide range of defendants' liberties, it is unjust to prioritize efficiency over accuracy and fairness. When people's speech, family, relationships, jobs, and more are at stake, mere ex-post review of risk determinations fails to reverse violations of liberty that have already occurred. Considering these stakes, the accuracy and fairness promoted by the adversarial system should prevail over efficiency concerns.

Although probation officers might have more intimate knowledge of defendants' lives, the adversarial system is still necessary to ensure that risk determinations are not arbitrary. Probation officers serve the federal courts, but they are nonetheless "generally adversarial to defendants, in the same way that police officers, prosecutors, and other executive branch officials are adversarial to defendants."[253] Indeed, probation officers perform a quintessentially executive function: enforcing court orders and judgments."[254] Following the Sentencing Reform Act of 1984, probation officers occupy an "adversarial environment in the courtroom, where [defense] attorneys might dispute facts [offered by the probation officer], question guideline calculations, and object to the information in the presentence report."[255] But under the current version of Standard Condition 12, a probation officer can implement a notification requirement without hearing any mitigating evidence, and without considering the harm that a risk notification might cause to a defendant's reentry.

In contrast, an amended version of Standard Condition 12 should require risk determinations be made by Article III judges, at hearings where defendants are entitled to counsel and the opportunity to present mitigating evidence. WDNY's amended version is more faithful to the adversarial system: judges will consider the interests of both the public and the defendant and thus will have access to more information. The amended Condition therefore improves the accuracy and fairness of risk determinations, while

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[252] *See* United States v. Cruz, 49 F.4th 646, 654 (1st Cir. 2022); United States v. Gibson, 998 F.3d 415, 423 (9th Cir. 2021).

[253] Mark Thomson, *Who Are They to Judge?: The Constitutionality of Delegations by Courts to Probation Officers*, 96 Minn. L. Rev. 306, 308 (2011).

[254] *Id.* at 308.

[255] *Probation and Pretrial Services History*, Admin. Off. U.S. Cts., https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/probation-and-pretrial-services-history [https://perma.cc/6FPC-AM7H] (last visited Feb. 26, 2025).

still allowing courts to take advantage of probation officers' expertise and familiarity with defendants' day-to-day lives.

Still, some might argue that district courts are simply too overburdened to make these risk determinations. But district judges who are particularly concerned about efficiency have another option: if they encounter at sentencing a specific defendant about whom they are especially concerned, they can craft a special condition requiring a post-imprisonment risk notification to a particular third party, such as a certain kind of potential employer or a family member.[256] Given that such notifications could infringe on defendants' liberties, judges would have to make the proper judicial findings before doing so. This process would reduce the need for ex-post judicial review of erroneous or arbitrary risk determinations made by probation officers.

Ultimately, however, the abolitionist ethic rejects jeopardizing the liberties of people with convictions in order to dispense with their sentences in a more efficient manner. To protect the liberties and dignity of people who have served their sentences and are ready to reenter society, Article III courts should make risk determinations after hearing mitigating evidence from the defense.

V. Conclusion

Standard Condition 12 is an unnecessarily isolating and punitive condition of supervised release, subjecting formerly incarcerated people to alienation from their communities at the discretion of their probation officers. Because the probation officer has ultimately authority over the imposition of a risk notification requirement, she is empowered to violate a number of the defendant's liberty interests without making the necessary findings that a district court would have to make.

Standard Condition 12 is an unconstitutional delegation of judicial authority for two main reasons. First, when probation officers determine the facts that trigger their authority to impose a punishment, they impermissibly determine *whether* a punishment is imposed. Under Standard Condition 12, the probation officer is empowered to determine a fact (the existence of a risk) that allows her to decide whether to impose a punishment (the risk notification requirement). Thus, the probation officer, not the court, impermissibly has ultimate authority over the application of Standard Condition 12. Second, the probation officer's discretion can violate a wide range of a defendant's liberty interests, including freedom from compelled speech, freedom of intimate association, and the right to an occupation. But Article III courts, not probation officers, must make the determinations necessary

[256] *See, e.g.*, Probation and Pretrial Servs. Off., *supra* note 223 ("The requirement that a defendant under supervision . . . inform his or her employer or another specified third party about the defendant's criminal conviction generally should be imposed, if necessary, by the court as a formal special condition.").

to punish a defendant and infringe on her liberty. Thus, the Condition is an unconstitutional delegation of judicial authority. In seeking to delegate ultimate authority over punishment and the ability to infringe on liberty interests to probation officers, Standard Condition 12 violates the Constitution.

Standard Condition 12 should therefore be abolished. Here, the goals of the abolitionist ethic dovetail with the imperatives of the Constitution. Standard Condition 12 violates Article III, but it also violates the inherent dignities of people who have served their time and have been deemed safe to reenter society. In the alternative, Standard Condition 12 should be amended so that the judge retains ultimate authority over its imposition. Such an amendment would give defendants increased procedural protections that are vital to ensuring transparency and accountability surrounding the imposition of a risk notification requirement.

Standard Condition 12 is emblematic of a regime of post-imprisonment punishments that enforces the social exclusion of people with convictions. Instead, a justice regime based on social *inclusion* can create safer communities in which everyone can thrive. Envisioning a complete reorientation of our justice system, away from social exclusion and towards social inclusion, might seem radical and daunting. But abolitionist aspirations can guide how we approach more incremental, pragmatic legal decisions—including how we resolve circuit splits.