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Delegational Delusions: Why Judges Should Be Able To Delegate Reasonable Authority Over Stated Supervised Release Conditions

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Delegational Delusions: Why Judges Should Be Able To Delegate Reasonable Authority Over Stated Supervised Release Conditions*

Eugenia Schraa

Abstract

This Note examines the constitutionality of allowing a probation officer the discretion to either impose or forego particular conditions of a supervised release, depending on the officer's assessment of the defendant's needs. Two federal Circuits allow probation officers to have such discretion; the majority have held that such arrangements violate Article III of the Constitution, which makes imposing a sentence an exclusively judicial task. In this Note, the author investigates the history of delegation of judicial function to non Article-III officers and examines the split in federal courts over this particular issue, ultimately advocating for the adoption of the so-called "pragmatic approach" used by the minority circuits allowing such arrangements.

KEYWORDS: supervised release, Article III judges

*J.D. Candidate, Fordham University School of Law, 2012; B.A., Harvard College, 2004. I dedicate this Note to my father, David Schraa. On this project, as on so many others, he steered me away from pitfalls of the "Fn 85, please check with Bob" sort, and provided the encouragement that allowed me to succeed. Thank you to Judge Dora L. Irizarry, whose dedication to helping defendants on supervised release in the Eastern District of New York gain control of their lives ignited my interest in the subject, and led to this Note. Kelly O'Keefe, Head of Probation, also in the Eastern District, provided resources and insights that significantly strengthened this Note. Professor John Pfaff provided the perfect combination of guidance, space, and genuine interest. Lynda Garcia both encouraged me before my Note landed on her desk, and provided brilliant editing thereafter. I owe a debt to Professor Larry Abraham, who located lost sources, literally saving portions of this paper. Finally, thanks to team Garcia: Tricia Walsh, a true friend, Jere Keyes, Haley Plourde-Cole, Rob Meyerhoff, Jessica Berkey, Brett Clements, and Tavish DeAtley. And to team Schraa: my mentor, Mary Pennisi, my aunt, Marian Young, my brother, Anthony D'Souza, and the man I love, Ming-Tai Huh.

**DELEGATIONAL DELUSIONS: WHY JUDGES
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AUTHORITY OVER STATED SUPERVISED
RELEASE CONDITIONS**

*Eugenia Schraa**

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INTRODUCTION

Presiding over a sentencing hearing in 2005, a federal judge faced a dilemma.¹ He had sentenced Lawrence Bowman to three years in prison for possession of child pornography.² He had also sentenced Bowman to three years of supervised release,³ which would require Bowman to report to a probation officer and abide by certain conditions upon his release from prison.⁴

But the particulars of the case presented the judge with a difficult choice: because Bowman had a ten year-old son and a young grandson, the judge was worried about whether they could safely spend time with Bowman when he returned from prison.⁵ On the other hand, the judge recognized that a psychologist had concluded that Bowman did not have sexual proclivities that would endanger young children.⁶ Therefore, he did not want to impose a condition that would cruelly punish not only Bowman, but also his family by keeping them separated unless it was truly necessary.⁷ The judge stated that, even though Bowman did not appear to pose a risk at the time of sentencing, he did not want to allow Bowman to see his son and grandson unsupervised “without having input from the counselors . . . and from the probation officer who knows the matter best.”⁸

At the suggestion of Bowman’s probation officer who spoke at the hearing, the judge resolved this dilemma by making the supervision requirement a condition of Bowman’s supervised release, but adding that his probation officer could relieve him of the condition if, after consulting with his sex offender treatment provider, she determined that he was not a threat.⁹

Most appellate courts, however, would not permit this solution.¹⁰

The majority of circuit courts hold that allowing a probation officer to decide whether or not to impose a particular condition of supervised re-

1. See *United States v. Bowman*, 175 F. App’x 834, 837-38 (9th Cir. 2006).

2. *Id.* at 836.

3. Brief for Defendant-Appellant, *Bowman*, 175 F. App’x 834 (No. 05-30106), 2005 WL 2704004, at *1.

4. See 18 U.S.C. § 3583 (2006) (containing main provisions of the supervised release statute).

5. See Brief for Defendant-Appellant, *supra* note 3, at *18.

6. See *id.*

7. See *id.* In his sentencing memorandum, Bowman contended that he had a “stable home life,” had been married to the same woman for over thirty years, and that his four children were supportive of him “as evident [sic] from their letters and their appearance in court.” See *id.* at *9-10.

8. *Id.* at *19.

9. *Id.*

10. See *infra* note 193 (collecting cases).

lease—depending on that officer’s assessment of the defendant’s needs—violates the Constitution.¹¹ These courts hold that imposing a sentence is an exclusively judicial task, and that conditions of supervised release are part of a sentence.¹² Because Article III of the Constitution requires that federal judges enjoy life tenure and guaranteed salaries,¹³ these courts hold that probation officers, who do not enjoy those protections,¹⁴ cannot exercise authority to determine whether or not to impose a stated supervised release condition,¹⁵ such as needing supervision to spend time with a son and grandson.

However, Bowman’s sentencing judge happened to sit in one of only two circuits that have upheld the kind of delegation he employed.¹⁶ Had the sentencing judge sat in one of the majority circuits, he would in all likelihood have imposed the supervision condition on Bowman *without* allowing Bowman’s probation officer to relieve him of the burden of needing an officer to be present when spending time with his son and grandson. Presumably, most judges would err on the side of safety in such situations, even to the detriment of the defendant. In a majority circuit, therefore, Bowman would either have had to abide by the condition, or go through the expense of petitioning for another hearing in hopes of having the condition removed.¹⁷

This Note examines the split in federal circuit courts over whether sentencing judges may delegate to probation officers the decision to implement specified conditions of a defendant’s term of supervised release. Part

11. For an analysis of the constitutional basis of the majority approach, see *infra* Part II.A.

12. These courts frequently cite *Ex parte United States*, 242 U.S. 27, 41 (1916), for the proposition that “the right to try offenses against the criminal laws, and, upon conviction, to impose the punishment provided by law, is judicial.” For an analysis of the way the majority approach uses that case, see *infra* Part II.A.1. For a discussion of the limits on the judiciary’s authority over punishment in Supreme Court jurisprudence, see *infra* Part I.A.2.

13. U.S. CONST. art. III, § 1. For a discussion of the Supreme Court’s jurisprudence on delegation to non-Article III officers, see *infra* Part I.A.1. For a discussion of the majority’s analysis of this jurisprudence, see *infra* Part II.A.1.

14. See 18 U.S.C. § 3602(a) (2006) (“A district court of the United States shall appoint qualified persons to serve . . . as probation officers within the jurisdiction and under the direction of the court making the appointment. The court may, for cause, remove a probation officer appointed to serve with compensation, and may, in its discretion, remove a probation officer appointed to serve without compensation.”).

15. See *infra* notes 217, 231-234 and accompanying text.

16. These are the Eighth and the Ninth Circuits. The Ninth produced *Bowman*. See *infra* note 1900 and accompanying text.

17. See 18 U.S.C. § 3583(e) (providing that a judge must hold a hearing to impose sanctions for violations of supervised release conditions); *id.* § 3742(a)(3), (b)(3) (giving defendants and the government, respectively, the right to appeal conditions of supervised release to the district court).

I.A examines the original intent behind Article III, the long history of delegation of judicial functions to non-Article III officers, and the deference that the judiciary must give to the executive branch in the realm of punishment. Part I.B traces the history of supervised release, the scheme that replaced parole in the Sentencing Reform Act of 1984's overhaul of federal sentencing rules. Part I.C discusses the major components of the supervised release statute.

Part II examines the split in federal authority. Part II.A focuses on the majority of circuits that hold delegation impermissible on constitutional grounds, and explores a seeming tension between the Article III values that the majority approach purports to protect and the actual facts in those cases. Part II.B examines the reasoning of the minority of circuits that, adopting a more pragmatic approach, condone judicial delegation of supervised release conditions that the sentencing judge has specified. Part III advocates for the adoption of the pragmatic approach on constitutional and policy grounds.

I. BACKGROUND

Part I.A provides an overview of judicial delegation to non-life-tenured officers under Article III. The majority approach relies on Supreme Court jurisprudence regarding the constitutionality of non-Article III tribunals.¹⁸ Part I.A.1 explores this jurisprudence, and Part I.A.2 explores the relationship between the judiciary's right to impose criminal punishment—also an important basis for the majority approach—and its obligation to defer to the executive branch on some punitive matters. Finally, Parts I.B and I.C briefly trace the history and development of the federal supervised release system.

A. Article III: Judicial Impartiality

The Supreme Court has guarded Article III's mandate that federal judges enjoy life tenure and receive undiminished compensation¹⁹ so jealously that, in 1982, it struck down the entire Bankruptcy Court system as unconstitutional.²⁰ The Court believed that the amount of judicial power bank-

18. *See infra* Part II.A.1.

19. U.S. CONST. art. III, § 1.

20. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). The Court noted that the Constitution "commands that the independence of the Judiciary be jealously guarded." *Id.* at 60.

ruptcy judges, who serve finite terms,²¹ were able to wield infringed on Article III.²²

The historical record indicates that the framers considered Article III's requirement that federal judges enjoy life tenure and undiminished compensation a "guarantee of judicial impartiality."²³ For example, the Declaration of Independence denounced King George III for having "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."²⁴ A decade later, the Constitutional Convention defeated a proposal to give the executive and legislative branches power to remove judges.²⁵ Advocating for ratification in the Federalist Papers, Alexander Hamilton wrote: "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support."²⁶

21. Definite terms violate Article III's guarantee of judicial impartiality. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955) (stating that the "good Behaviour" Clause guarantees that Article III judges enjoy life tenure, subject only to removal by impeachment); *see also* U.S. CONST. art. III, § 1.

Today, bankruptcy judges remain non-Article III officers. First, they serve fourteen-year terms and the judicial council of the circuit in which they serve may still remove them for incompetence, misconduct, neglect of duty, or disability, exactly as was true in *Northern Pipeline*. Compare 28 U.S.C. § 152(a)(1), (e) (2006), with *N. Pipeline Constr. Co.*, 458 U.S. at 53 (describing the elements of the Bankruptcy Act of 1978 that made bankruptcy judges non-Article III officers). Second, their salaries are still set by statute, as they were in *Northern Pipeline*, at ninety-two percent of district court judges' salaries. Compare 28 U.S.C. § 153(a), with *N. Pipeline Constr. Co.*, 458 U.S. at 53 ("[T]he salaries of the bankruptcy judges are set by statute and are subject to adjustment under the Federal Salary Act.").

22. *N. Pipeline Constr. Co.*, 458 U.S. at 52.

23. *Id.* at 58. The guarantees also served additional purposes, such as promoting "public confidence in judicial determinations," *id.* at 59 n.10 (citing THE FEDERALIST NO. 78, at 300 (Alexander Hamilton) (H. Lodge ed., 1988)), helping to attract well-qualified professionals to the federal bench, *id.*, and promoting judicial individualism. *Id.*; Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 713 (1979) (separation of powers is "essential to protect the independence of the individual judge, even from incursions by other judges").

24. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

25. *N. Pipeline Constr. Co.*, 458 U.S. at 59 n.11; 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 428-29 (Max Farrand ed. 1911) [hereinafter 2 Farrand]; *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 7 (5th ed. 2003 & supp. 2008). A Pennsylvania delegate commented: "The Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Govt." 2 Farrand, *supra*, at 429.

26. THE FEDERALIST NO. 79, *supra* note 23, at 491 (Alexander Hamilton). Hamilton continued: "In the general course of human nature, a power over a man's subsistence amounts to a power over his will." *Id.*

1. *Delegation: An “Essential Attribute” of the Administrative State*

Nonetheless, Congress delegated judicial authority to non-Article III judges in its very first session.²⁷ It vested in executive officers the power to resolve issues such as claims to veterans’ benefits,²⁸ and authorized commissioned officers to preside over courts martial in military tribunals.²⁹ The Supreme Court approved these schemes from the start. In 1828, Chief Justice Marshall upheld Congress’ use of non-Article III federal tribunals to adjudicate disputes in the federal territories,³⁰ setting an enduring precedent of “legislative courts”—non-Article III adjudicative bodies created by Congress.³¹

Today, non-Article III judges shoulder a larger proportion of the federal docket than do life-tenured judges.³² Primarily, this proliferation stems from the demands of the modern administrative state.³³

27. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 919-20 (1988) [hereinafter Fallon, *Legislative*].

28. See Act of Sept. 29, 1789, ch. 24, 1 Stat. 95. The first congressional session also allowed executive officers to resolve controversies surrounding customs duties. See Act of July 20, 1789, ch. 5, 1 Stat. 29; Act of Sept. 1, 1789, ch. 11, 1 Stat. 55.

29. See David P. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 150 (1980).

30. *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828).

31. See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (acknowledging three exceptions to the “literal command” of Article III, § 1, which “must be interpreted in light of the historical context in which the Constitution was written,” while otherwise holding that that literal reading must prevail); *Crowell v. Benson*, 285 U.S. 22 (1932) (upholding administrative agency’s power to resolve disputes, and placing it within the tradition of other Article I courts); Fallon, *Legislative*, *supra* note 27, at 921. See generally MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 37-53 (1980) (detailing the history of legislative courts).

32. Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2605 (1998) [hereinafter, Resnik, *The Federal Courts*]. The application of federal law would be impossible today without non-Article III judges, barring a significant increase in the judiciary. *Id.*

33. Fallon, *Legislative*, *supra* note 27, at 925. See generally Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) (describing the New Deal origins of the modern administrative agency).

Besides the demands of the modern administrative state, however, there is at least one other contributor to the Supreme Court’s approval of congressional schemes that delegate some judicial functions: maintaining the prestige of the federal bench. Article III judges tend to lobby for a small, life-tenured judiciary, reasoning that one too large would threaten the elite status that is necessary to lure first-rate lawyers to the bench. See, e.g., Judicial Conference of the United States, Long Range Plan for the Federal Courts (Dec. 1995), at 98 (1996) (recommendation 15) (titled, “The growth of the Article III judiciary should be carefully controlled so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise federal court jurisdiction”); see also FALLON, JR. ET AL., *supra* note 25, at 384-85 (describing Chief Justice Warren Burger’s “aggressive lobbying effort” to prevent the conferral of Article III status on

In 1932, the Supreme Court first approved the adjudication of private rights by an administrative agency in *Crowell v. Benson*.³⁴ *Crowell* held that Article I tribunals are constitutional so long as the “essential attributes” of the decision remain in an Article III court.³⁵ That is, so long as the Article I court functions more as an adjunct of the federal court than as an independent tribunal.³⁶ *Crowell* noted that, even traditionally, officers other than judges can determine some of the facts in a case, so long as judges make the final decisions. For example, masters³⁷—even without the parties’ consent—have long made advisory findings of fact by which the parties must abide if the judge accepts them.³⁸ *Crowell* found that the district court’s ability to review the agency’s findings of law and fact *de novo*, that is, anew, satisfied the essential attributes standard,³⁹ although the dissent would have insisted upon allowing *de novo* trials.⁴⁰

In the late 1960s, Congress began delegating federal adjudicatory powers to magistrates,⁴¹ who serve eight-year renewable terms.⁴² Citing *Cro-*

bankruptcy judges); Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 7-12 (1985); Penelope Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; Or Why the Federal Circuits’ Nonprecedential Status Rules are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955, 1011 (2009); Resnik, *The Federal Courts*, *supra* note 32, at 2594.

Ironically, the bankruptcy court system struck down by *Northern Pipeline* did not feature life-tenured judges in large part because Chief Justice Burger, as head of the United States Judicial Conference, had lobbied against conferring Article III status on bankruptcy judges. See FALLON, JR. ET AL., *supra* note 25, at 384-85; Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 74-94 (1996). At the same time, however, these same judges tend to demand help in managing their caseload. Resnik, *The Federal Courts*, *supra* note 32, at 2605.

34. 285 U.S. 22 (1932) (upholding Congress’ vesting of responsibility for deciding cases under the Longshoremen’s and Harbor Workers’ Compensation Act in the United States Employee Compensation Commission).

35. *Id.* at 51.

36. *Id.* at 50-51.

37. A master is a “parajudicial” officer that helps a court with its proceedings by taking testimony, hearing and ruling on discovery disputes, entering temporary orders, and handling other pretrial matters, as well as computing interest, valuing annuities, investigating encumbrances on land titles, and the like. BLACK LAW’S DICTIONARY 408 (9th ed. 2009); see also FED. R. CIV. P. 53 (providing rules for proceedings led by masters).

38. *Crowell*, 285 U.S. at 52.

39. *Id.* at 62-63; see also Fallon, *Legislative*, *supra* note 27, at 925 (“Anticipating the vital role of administrative adjudication, *Crowell* sought to preserve the role of the [A]rticle III courts not by excluding agencies from adjudication altogether, but by requiring *de novo* judicial review of the most important agency decisions.”).

40. *Crowell*, 285 U.S. at 66 (Brandeis, J., dissenting).

41. The Magistrate Judges’ Act of 1968, Pub. L. 90-578, 82 Stat. 1107, codified as amended at 28 U.S.C. §§ 604, 631 (2006), and 18 U.S.C. § 3401 (2006); see also Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1115 (2006) [hereinaf-

well, the Supreme Court upheld the magistrate scheme in *United States v. Raddatz*,⁴³ which held that “delegation does not violate Art. III so long as the ultimate decision is made by the district court.”⁴⁴ *Raddatz* noted that Congress allowed magistrates only to hear certain pre-trial matters and to conduct hearings (and only to do so in the district court’s sole discretion),⁴⁵ and that district judges would review these decisions *de novo*.⁴⁶ Based on these factors, the Court found that the magistrate statute met the ultimate decision test.⁴⁷

Two years after *Raddatz*, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,⁴⁸ which struck down the bankruptcy system, seemed to indicate a reversal in the Court’s more permissive delegation jurisprudence. Justice Brennan’s plurality opinion⁴⁹ reasoned that Congress’ creation of non-Article III bankruptcy judges—replacing a system in which “referees” conducted most bankruptcy proceedings as adjuncts of the district court—threatened the separation of powers.⁵⁰ Bankruptcy judges enjoyed “plenary” jurisdiction, while referees only had jurisdiction “over controversies involving property in the actual or constructive possession of the court.”⁵¹ Bankruptcy judges’ decisions were appealable, but only under a “clear error standard.”⁵²

Acknowledging that a literal interpretation of Article III was impossible, the plurality allowed a few narrow historical exceptions for legislative courts, such as military tribunals and administrative agencies (provided they acted as “adjuncts” to federal courts, which would retain the “essential

ter Resnik, *Whither*] (describing the history of Congress’ delegation of judicial authority in the twentieth century).

42. 28 U.S.C. § 631(e). District judges appoint magistrates. *Id.* § 631(a). The president appoints Article III judges “by and with the Advice and Consent of the Senate.” U.S. CONST. art. II, § 2, cl. 2.

43. 447 U.S. 667 (1980).

44. *Id.* at 683.

45. *Id.* Today, magistrate judges can also preside over civil trials, if the parties consent. 28 U.S.C. § 636(c).

46. *Raddatz*, 447 U.S. at 682-83.

47. *Id.* at 683-84.

48. 458 U.S. 50 (1982).

49. While no opinion in *Northern Pipeline* garnered a majority, the concurring justices, Rehnquist and O’Connor, agreed that Congress could not constitutionally confer jurisdiction on a non-Article III federal tribunal to decide a common law contract action. *See N. Pipeline Constr. Co.*, 458 U.S. at 91 (Rehnquist, J., concurring).

50. *Id.* at 73-74 (plurality opinion).

51. *Id.* at 55 (plurality opinion).

52. *Id.* at 55 n.5 (plurality opinion).

attributes of the judicial power”).⁵³ However, the plurality held that the availability of appellate review to an Article III court alone was not enough to satisfy this standard.⁵⁴

Thus, allowing only narrow exceptions, the plurality insisted on a literal interpretation of Article III that, commentators criticized, was at odds with the momentum of the administrative state.⁵⁵ This likely explains why cases subsequent to *Northern Pipeline* have followed Justice White’s more pragmatic dissent,⁵⁶ which proposed a balancing test that weighs Article III “values” against the practical and constitutional arguments for non-Article III adjudication.⁵⁷

In a later case,⁵⁸ the Supreme Court emphasized that the balancing test should be flexible,⁵⁹ and outlined four factors to weigh: (1) the extent to which Congress reserves the “essential attributes” of judicial power to Article III courts through appellate review; (2) the extent to which the non-Article III forum exercises powers normally vested in Article III courts; (3) the importance of the right to be adjudicated; and (4) the concerns that drove Congress to depart from Article III’s requirements.⁶⁰

For example, in another post-*Northern Pipeline* case, the Supreme Court upheld a scheme delegating the approval of certain Environmental Protec-

53. *Id.* at 77 & n.29, 78, 81, 84, 87 (plurality opinion) (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

54. *Id.* at 86 n.39 (plurality opinion).

55. See Martin H. Redish, *Legislative Courts, Administrative Agencies and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 197; see also Fallon, *Legislative*, *supra* note 27, at 927.

56. See, e.g., *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 847 (1986) (upholding the Commodity Futures Tradition Commission’s exercise of jurisdiction over a state law cause of action, and reasoning that the congressional interest in providing for administrative adjudication must be weighed against “the purposes underlying the requirements of Article III”); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) (upholding congressional scheme that permitted a federal arbitrator, subject to article III court review only for fraud or misconduct, to rule on compensation claims relating to the Environmental Protection Agency’s approval of pesticide registrations); see also Fallon, *Legislative*, *supra* note 27, at 929; Resnik, *Whither*, *supra* note 40, at 1115.

57. *N. Pipeline Constr. Co.*, 458 U.S. at 113-16 (White, J., dissenting) (“[T]his Court [need not] always defer to the legislative decision to create Art. I, rather than Art. III, courts. Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities.”).

58. *Schor*, 478 U.S. 833.

59. *Id.* at 851. Justice O’Connor, writing for the majority, stated that, while a more “formalistic” approach might “lend a greater degree of coherence to this area of the law,” it might also “unduly constrict Congress’ ability to take needed and innovative action pursuant to its Article I powers.” *Id.*

60. *Id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

tion Agency claims to a non-Article III court because: (1) the scheme provided for an Article III court review—even though this review was limited only to findings of fraud or misconduct;⁶¹ (2) it approved of Congress' reasons for needing speedy administrative determinations;⁶² and (3) although not corresponding exactly to one of the four factors, it found that the scheme was inherently fair,⁶³ which is the value that lies at the heart of Article III.⁶⁴

In sum, Article III literalism has never long prevailed in Supreme Court jurisprudence. *Northern Pipeline* is a spectacular exception, showing literalism's power to upset congressional schemes. The post-*Northern Pipeline* approach, which prevails today, is not only more pragmatic, but, also more true to the real purpose—or “values,” as Justice White termed it—of Article III: assurance that litigants will obtain fair treatment from the federal judiciary.

2. *Punishment: Deference to Prison Authorities*

Punishment exists at an uneasy intersection between the three branches of government.⁶⁵ While Congress has the constitutional authority to define the punishments for the laws it creates⁶⁶ and the judiciary the obligation to impose sentence,⁶⁷ prisons are part of the executive branch's domain.⁶⁸ The Supreme Court has held that “prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations.”⁶⁹ District courts must accord “deference to the judgment of the

61. *Union Carbide*, 473 U.S. at 591.

62. *Id.* at 592-93.

63. *Id.* (noting in particular the fact that both parties participated voluntarily).

64. *See supra* notes 23-26 and accompanying text.

65. *See, e.g., Ex parte United States*, 242 U.S. 27, 41-42 (1916) (“[T]he right to try offenses against the criminal laws, and, upon conviction, to impose the punishment provided by law, is *judicial*, [but] the authority to define and fix the punishment for crime is *legislative*, . . . and the right to relieve from the punishment fixed by law . . . belongs to the *executive* department.”) (emphasis added).

66. *Id.* at 42.

67. *Id.* at 41.

68. The Bureau of Prisons operates as an agency of the United States Department of Justice. 18 U.S.C. § 4042(a) (2006) (stating that the Bureau of Prisons is subject to the authority of the Attorney General); 28 C.F.R. §§ 0.95 et seq., 500.1 (2011) (describing Bureau of Prisons' place within United States Department of Justice hierarchy).

“The Department of Justice is an executive department of the United States.” 28 U.S.C. § 501 (2006). The Attorney General heads the Justice Department, and is appointed by the president, by and with the consent of the Senate. *Id.* § 503.

69. *Turner v. Safley*, 482 U.S. 78, 89 (1987) (citing *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 128 (1977)); *accord Procunier v. Martinez*, 416 U.S. 396, 404 (1974)

prison authorities” over prison regulations, including those that impinge on inmates’ constitutional rights.⁷⁰

Even when legislatures primarily view prison sentences as serving a punitive purpose—as opposed to deterring crime or rehabilitating offenders⁷¹—prison officials have considerable discretion to determine the form of punishment. For example, they can determine whether the prisoner must submit to solitary confinement.⁷² Thus, despite the judiciary’s right to impose sentence, the executive branch, via its prisons, also has the right to impose more or less punitive measures against an offender.

Similarly, the Bureau of Prisons has the sole discretion to decide where to place offenders. For example, offenders may be sent to prison or a half-way house.⁷³ In making that decision, the Bureau relies on information about the offender’s criminal history, education, medical history, and substance abuse issues that it garners from the sentencing court and the Probation Office’s presentence report for each defendant.⁷⁴ However, a sentenc-

(“Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration.”), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

70. *Lewis v. Casey*, 518 U.S. 343, 361-62 (1996) (holding that prison whose lockdowns “routinely” forced inmates to experience delays in receiving legal assistance, in some cases lasting over two weeks, were not of constitutional significance, even where they resulted in actual injury, so long as they were the product of prison regulations reasonably related to penological interests). For more examples of prison regulations that the Supreme Court has upheld, see *infra* note 72.

71. For a discussion of American theories of criminal justice and incarceration, see *infra* Part I.B.1.

72. *Sandin v. Conner*, 515 U.S. 472 (1995) (holding prison officials have broad discretion to segregate prisoners from the company of others for misconduct); see also *Beard v. Banks*, 548 U.S. 521 (2006) (upholding prison officials’ decision not to allow inmates reading material in solitary confinement); *Meachum v. Fano*, 427 U.S. 215 (1976) (holding that the Due Process Clause does not entitle a state prisoner to a hearing when prison officials transfer him or her to a prison whose conditions are substantially less favorable).

73. 18 U.S.C. § 3621(b).

74. Jennifer Borges, *The Bureau of Prisons’ New Policy: A Misguided Attempt to Further Restrict a Federal Judge’s Sentencing Discretion and to Get Tough on White-Collar Crime*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 141, 173 (2005). In determining where to house offenders, 18 U.S.C. § 3621(b) dictates that the Bureau consider the following factors:

- (1) the resources of the facility contemplated;
- (2) the nature and circumstances of the offense;
- (3) the history and characteristics of the prisoner;
- (4) any statement by the court that imposed the sentence—
 - (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
 - (B) recommending a type of penal or correctional facility as appropriate; and
- (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

ing court's order as to the type of housing in which the defendant should serve his or her term of incarceration is not binding on the Bureau.⁷⁵

Parole⁷⁶ and probation⁷⁷ authorities have also played a role in the American corrections system. Today, probation officers oversee federal offenders on supervised release⁷⁸ as adjuncts of the judicial branch—the district court appoints them and they serve under the court's direction.⁷⁹ Traditionally, however, the Parole Office was an executive agency, and had the authority, in most instances, to shorten the sentence that the trial judge had imposed, as discussed in Part I.B.1 below. Thus, the judiciary has never had the *exclusive* right to impose a sentence on a criminal defendant, but has had to share that responsibility with the executive branch's prison and parole authorities.

B. Supervised Release and the Sentencing Reform Act of 1984

This Part traces the history of supervised release. Part I.B.1 focuses on the rehabilitative ideal that initially led to the creation of the federal parole system, and of the coalition of forces on the political left and right that dismantled that system, finding fault with what they saw as its excessive discretion. Part I.B.2 examines the conflicting ideas behind the supervised release system that replaced parole—in theory, the ideal of rehabilitation animates supervised release, but a punitive impulse has arguably dominated it in practice. Part I.B.3 explores the dual failures of supervised release as

Id. The statute further dictates that “[t]he Bureau shall make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse.” *Id.*

75. 18 U.S.C. § 3621(b). The Bureau also has the discretion to decide whether to grant a prisoner temporary release under certain circumstances, such as to visit a dying relative or reestablish family ties. *Id.* § 3622.

76. Parole is conditional release from imprisonment before a prisoner has served his or her full sentence, usually granted for good behavior and on condition that the parolee regularly report to a supervising officer for a specified period. BLACK LAW'S DICTIONARY 1227 (9th ed. 2009).

77. Probation is a criminal sentence in its own right that replaces any jail or prison time, allowing the offender into the community on condition that he or she regularly report to a supervising officer for a specified period. *Id.* at 1322.

78. The Sentencing Reform Act of 1984 placed probation officers in charge of supervising offenders on supervised release, replacing parole officers who had formerly served that function. Hillard M. Sterling, *Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1986-1987: Sentencing, Probation, and Parole*, 76 GEO. L.J. 1182, 1184 (1988); see also 18 U.S.C. § 3603(a) (listing probation officers' duties). For a discussion of probation officers' duties, see *infra* notes 179-183 and accompanying text.

79. Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 42 (2005) [hereinafter Luna, *Gridland*]; see also 18 U.S.C. § 3602(a).

instituted: its high financial costs and dismal recidivism statistics. This Part also briefly looks at the role that probation officers play within the system.

1. Sentencing and Parole Before the Act: "Unfettered Discretion"

From about 1870 to 1970, a rehabilitative ideal dominated the American model of punishment,⁸⁰ which aimed to "cure" the offender of criminality.⁸¹ Thus, legislatures delegated wide sentencing discretion to judges,⁸² customarily prescribing an array of sanctions for each crime from which the judge could choose the one best calculated to rehabilitate the defendant.⁸³ The sentencing decision was then largely immune from appeal.⁸⁴

80. See, e.g., Frank O. Bowman, III, *Debacle: How the Supreme Court has Mangled American Sentencing Law and How it Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 370 (2010) [hereinafter Bowman, *Debacle*] (stating that the rehabilitative model "emphasized individualized sentences, rehabilitation of offenders, and judicial and administrative discretion"); Luna, *Gridland*, *supra* note 79 (stating that for "most of the previous century," federal sentencing "shap[ed] the sentence to the offender in order to 'cure' his 'disease' of criminality (or effectively quarantine him from lawful society)"); see also Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 455 (1928) ("Even a socially harmful criminal has a right, in justice, to be treated with those instrumentalities that give him the greatest promise of self-improvement and rehabilitation."); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 893 (1990) (stating that the primary purpose of incarceration in American shifted in 1870 from one concerned with "retribution and punishment" to rehabilitative theory).

81. In 1870, for example, the National Congress of Prisons issued a Declaration of Principles that stated: Crime is "a moral disease, of which punishment is the remedy. . . . The supreme aim of prison discipline is the reformation of criminals and not the infliction of vindictive suffering." Nagel, *supra* note 79 (quoting AM. CORR. ASS'N, TRANSACTIONS OF THE NATIONAL CONGRESS OF PRISONS AND REFORMATORY DISCIPLINE (1870)); see also Williams v. New York, 337 U.S. 241, 248 (1949) (discussing "[t]oday's philosophy of individualizing sentences"); Commonwealth of Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."); PAMALA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND REALITY OF RETRIBUTIVE JUSTICE 11 (1991) (discussing the rise of the rehabilitative "juggernaut" between 1877 and 1970 and noting that a "medical analogue was frequently invoked"); Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 421 (1999) ("Like a social worker or doctor, the judge exercised his or her clinical judgment to arrive at a sentence.").

82. See, e.g., Nagel, *supra* note 80 ("Concomitant with the theories of prison as a rehabilitative institution . . . was the development of the then innovative indeterminate sentence."); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993) ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion.").

83. Bowman, *Debacle*, *supra* note 80 (noting that legislatures set ranges of possible fines as well as of restrictions on the convict's liberty).

In keeping with the rehabilitative ethos, Congress introduced parole into the federal system in 1910.⁸⁵ Each federal prison had a parole board, which had the statutory power to release any prisoner who had served one-third of his or her stated sentence, if the board was satisfied that “there is a reasonable probability that [the prisoner] will live and remain at liberty without violating the laws,” and that release “is not incompatible with the welfare of society.”⁸⁶ In all, the length of time that the prisoner served depended on the discretion both of the judge, at the front end, and the Parole Office, at the back, within the limits set by the legislature.⁸⁷

84. See, e.g., *Koon v. United States*, 518 U.S. 81, 96 (1996) (“Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal.”); *Freeman v. United States*, 243 F. 353 (9th Cir. 1917) (holding that the nature of the sentence imposed is within sole discretion of the trial court and not reviewable if within the statutory maximum); Bowman, *Debacle supra* note 80, at 370-71 (“The judge’s choice of sentence within the statutory parameters for the crime(s) of conviction was largely unconstrained by . . . appellate review.”); Luna, *Gridland supra* note 79, at 42-43 (“Trial judges did not have to offer reasons for any particular sentence, their decisions were largely immune from appeal.”); Stith & Koh, *supra* note 82, at 226 & n.8 (noting that there was a brief period, following the 1891 creation of the federal circuit courts, when federal criminal sentences were reviewable, but that “ultimately the view prevailed that Congress had repealed such authority”).

85. Act of June 25, 1910, ch. 387, 36 Stat. 819 (creating parole boards at each United States federal penitentiary) (repealed); *Zerbst v. Kidwell*, 304 U.S. 359, 363 (1938) (“Parole is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency—under guidance and control of the Board.”); *United States v. Murray*, 275 U.S. 347, 357 (1928) (“The parole statute provides a board to be invested with full opportunity to watch the conduct of penitentiary convicts during their incarceration, and to shorten it.”); PETER B. HOFFMAN, HISTORY OF THE FEDERAL PAROLE SYSTEM 6 (2003), available at <http://www.usdoj.gov/uspc/history.pdf>; see also Stith & Koh, *supra* note 82, at 227 (“Under the rehabilitative model, parole officials’ power to determine a sentence’s duration was seen both as a valuable incentive to prison inmates to rehabilitate themselves and as a vehicle to permit “experts” to determine when sufficient rehabilitation had occurred to warrant release from prison.”).

86. Act of June 25, 1910, ch. 387, § 3, 36 Stat. 819; Frank O. Bowman, III, *The Failure of the Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1321 n.23 (2005); Luna, *Gridland supra* note 79; Stith & Koh, *supra* note 82, at 226.

87. Bowman, *Debacle supra* note 80, at 371 (“In many systems, the parole board had an equal or even greater voice than the judge in determining how much time defendants would really serve.”); Luna, *Gridland supra* note 79 (“[T]rial court judges retained primary control over punishment, as Congress had established only maximum prison terms for most federal offenses, thus giving district courts the discretion to impose sentences below that limit.”); Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina*, 29 CRIME & JUST. 39, 43 (2002) (describing North Carolina sentencing practices prior to 1981, which involved largely unconstrained front-end judicial sentencing discretion combined with a back-end parole release mechanism, as “typical for the times”). In the federal system, the judge could constrain the Parole Board in certain ways:

Upon entering a judgment of conviction, the court . . . when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of

By the 1970s, however, this rehabilitative theory, with its emphasis on individualized, indeterminate sentencing and parole, came under increasing criticism from across the political spectrum.⁸⁸ The left believed it produced unacceptable and frequently racially motivated sentencing disparities, which themselves harmed prisoners by causing them anxiety about their sentences.⁸⁹ The right called for “truth in sentencing,” that is, for offenders to serve their entire sentence,⁹⁰ which, generally speaking, the right be-

imprisonment imposed a *minimum term* at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the *maximum sentence* of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

18 U.S.C. § 4205(b) (1982) (repealed by Pub. L. 98-473, § 218(a)(5), 98 Stat. 2027).

88. For example, the Comprehensive Crime Control Act of 1984, of which the Sentencing Reform Act of 1984 was a part, had sponsors both on the left, including Senators Joseph Biden, Edward M. Kennedy, and Harvard Law Professor Alan Dershowitz, and on the right, including Senators Roman L. Hruska and Strom Thurmond. *See* S. REP. NO. 98-225, at 37 (1984); *see also* Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, CATO POL’Y ANALYSIS, Nov. 1, 2002, at 4-5 (discussing convergence of opinion against indeterminate punishment and the odd political coalition that produced the Sentencing Reform Act); Stith & Koh, *supra* note 82, at 223 (noting that sentencing reform legislation was “conceived by liberal reformers as an anti-imprisonment and antidiscrimination measure, but finally born as part of a more conservative law-and-order crime control measure”); Alan Dershowitz, *Let the Punishment Fit the Crime*, N.Y. TIMES, Dec. 28, 1975, Magazine Section, at 7 (“[A] surprising consensus is emerging around the idea that it is time to return to uniformity in sentencing.”). President Ronald Reagan signed the Reform Act, which had passed both Houses of Congress with “overwhelming” majorities. Stith & Koh, *supra* note 82, at 223.

89. Liberal reformers believed rehabilitation had not proven successful, that it bred anxiety among prisoners because of uncertainty about their release dates and disparity in sentences, and that the disparities were “at odds with ideals of equality” that could produce bias against minorities. Stith & Koh, *supra* note 82, at 227.

Indeed, the most influential criticism of indeterminate federal sentencing and parole was that of a liberal, Marvin E. Frankel, a federal district judge. *See, e.g.*, 128 CONG. REC. 26, 503 (1982) (statement of Sen. Kennedy) (referring to Judge Frankel as the “father of sentencing reform”); Stith & Koh, *supra* note 82, at 228; Steven Greenhouse, *Marvin E. Frankel, Federal Judge and Pioneer of Sentencing Guidelines, Dies at 81*, N.Y. TIMES, Mar. 5, 2002, at C15 (quoting Judge Marvin’s 1973 statement denouncing Nixon’s “proposals for severity” in criminal sentencing as “neither new nor useful, but only invite us to official cruelties unlikely to accomplish anything beneficial”).

In 1972, Judge Frankel indicted the federal judiciary’s sentencing authority as “almost wholly unchecked and sweeping” and “terrifying and intolerable for a society that professes devotion to the rule of law.” MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973); *see also* Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

90. *See, e.g.*, Bowman, *Debacle*, *supra* note 80, at 374 (describing circumstances in the 1960s and 1970s that produced “a national movement toward tougher, more definite, less discretionary criminal sentences for both drug offenses and traditional crimes against persons and property”); Stith & Koh, *supra* note 82, at 227 (citing J. Edgar Hoover, *The Dire*

lieved should be longer.⁹¹ Under these influences, the dominant theory of punishment shifted in the 1970s and 1980s to one deemphasizing rehabilitation and embracing punishment, deterrence, and incapacitation.⁹² In response to these criticisms, Congress passed the Sentencing Reform Act of 1984.⁹³

2. Congress' Intent: Rehabilitation's Tenuous Hold

The Senate Report introducing the Sentencing Reform Act denounced the old system of indeterminate sentences. First, it stated that the “unjustifiabl[e]” disparities it produced were the direct result of the “unfettered discretion the law confers on . . . judges and parole authorities” to impose and implement sentences, and blamed the system’s “sweeping discretion” on a “lack of statutory guidance.”⁹⁴ Second, it noted “the fact that the sentencing judges and parole officers are constantly second-guessing each other” compounded these disparities, and that, based on “when they believe the Parole Commission will release” the offender, “some judges deliberately impose sentences above . . . [or] below the [parole] guidelines in order to retain control over the release date.”⁹⁵ Third, it stated that the system led to “prisoners and the public . . . seldom [being] certain about the real sentence a defendant will serve.”⁹⁶

The Act created the United States Sentencing Commission, whose members the President appoints and may remove for cause,⁹⁷ and charged it

Consequences of the Premature Release of Dangerous Criminals Through Probation and Parole, 27 F.B.I. L. ENFORCEMENT BULL. 1 (1958)) (noting that critics on the right were dissatisfied with the “perceived leniency of sentencing judges and parole officials”).

91. Explaining its rationale for creating sentences in 1987, the United States Sentencing Commission stated that, while it usually synthesized pre-Sentencing Reform practices, “legislative direction” superseded that analysis for drug crimes, rape, white-collar crimes, and violent crimes, all of which received “much higher” sentences. U.S. SENTENCING COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 16-19 (1987), available at www.fd.org/pdf_lib/Supplementary%20Report.pdf.

Under the Guidelines, nominal sentences increased on average by nearly 80% (from twenty-eight months to fifty months), and actual time served rose by 230% (from thirteen months to forty-three months). Luna, *Gridland*, *supra* note 79, at 45 & n.117, 46. The elimination of parole also contributed to this increase. *Id.* at 45 n.117.

92. Bowman, *Debacle*, *supra* note 80, at 364-65.

93. Pub. L. No. 98-473, 98 Stat. 1987 (1984).

94. S. REP. NO. 98-225, at 38 (1984).

95. *Id.* at 47-48.

96. *Id.* at 38-39.

97. See 28 U.S.C. § 991(a) (2006) (original version at Pub. L. 98-473, tit. II, § 217(a), Oct. 12, 1984, 98 Stat. 2017).

with creating and disseminating Sentencing Guidelines.⁹⁸ It also compelled judges to fix exact, reviewable sentences⁹⁹—although the Bureau of Prisons retained the power to award small discounts for good behavior in prison.¹⁰⁰ Critics contend, however, that the Sentencing Commission’s Guidelines did not reduce disparities, but may actually have increased them, while also hiding them from public scrutiny.¹⁰¹

98. According to the statute, the purpose of the Commission is to “establish sentencing policies and practices” for the federal justice system that—as also stated in 18 U.S.C. § 3553(a)(2)—“reflect the seriousness of the offence,” promote “respect for the law,” and provide “just punishment,” while also affording “adequate deterrence to criminal conduct,” protecting the public from any future crimes of the defendant, and providing him or her with “needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” 28 U.S.C. § 991(b)(1)(A); 18 U.S.C. § 3553(a)(2) (2006).

The sentencing practices that the Commission establishes must also “provide certainty and fairness . . . avoiding unwarranted sentencing disparities . . . while maintaining sufficient flexibility to permit individualized sentences when warranted,” to reflect “advancement in knowledge of human behavior as it relates to the criminal justice process,” and, finally, to develop “means of measuring” whether sentencing practices are effective in deterring crime, providing just punishment and the other § 3553(a)(2) factors. 28 U.S.C. § 991(b).

99. 18 U.S.C. § 3742(a), (b) (allowing the defendant and the Government, respectively, to appeal a sentence or condition of probation or supervised release) (original version at Pub. L. No. 98-473, tit. II, § 213(a), Oct. 12, 1984, 98 Stat. 2011).

100. *Id.* § 3624(b)(1) (allowing the Bureau of Prisons to award most prisoners up to fifty-four days’ credit toward their sentence for “exemplary compliance with institutional disciplinary regulations,” and mandating that the Bureau consider, if relevant, whether the prisoner has earned or is making progress toward earning a high school diploma) (original version at Pub. L. No. 98-473, tit. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2008).

101. *See, e.g.*, Address to the House Judiciary Committee’s Subcommittee on Criminal Justice, 2 FED. SENTENCING REP. 224, 226 (1990) (statement of Thomas W. Hillier, II, Federal Public Defender) (“Disparity under the Sentencing Guidelines continues in several insidious forms. Vagaries in plea bargaining and charging practices of United States Attorneys throughout the country contribute to disparate sentences. . . . Finally, judges, torn between ‘injustice and infidelity,’ decide cases differently.”); Jelani Jefferson Exum, *Why March to a Uniform Beat?*, 15 TEX. J. C.L. & C.R. 141, 157-58 (2010) (“[S]cholars have pointed to the complexity of Guidelines calculations as a contributor to sentencing disparities. The numerous factors involved in calculating sentences using the Guidelines can lead to varying results depending upon who selects the factors to include in the computation. This discrepancy has been shown by studies involving different probation officers who, given the same facts, come to different sentencing range determinations.”); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 164-65 (1991) (“Continuing disparities are largely systemic in nature, arising out of . . . the guidelines. The most disturbing systemic disparity is the apparent disparate treatment of young, black males, who on the average receive guidelines sentences significantly longer than those received by their white counterparts for similar offenses. Disparities also result from the investigative, charging, and guilty plea practices of prosecutors.”); Stith & Koh, *supra* note 81, at 287 (“We also believe that unwarranted sentencing disparity is as great now as it was before the Federal Sentencing Guidelines.”). *But see* Theresa W. Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and*

The Act abolished the parole system entirely, despite the fact that less than ten years before, in 1976, Congress had overhauled the indeterminate parole system in favor a guideline system¹⁰² similar to the one that the Act adopted for sentencing.¹⁰³ The 1970s overhaul had promised to provide “a scientific and objective means of structuring and institutionalizing discretion in parole release decision-making” and minimize sentencing disparities.¹⁰⁴ Nonetheless, many sentencing reform advocates wanted the complete elimination of the discretion and uncertainty inherent in the parole system.¹⁰⁵ Critics on the left were particularly concerned by the fact that the period of a defendant’s “street supervision” following their release by the Parole Board depended on the time remaining on the original sentence, rather than on the defendant’s actual needs.¹⁰⁶

Under these pressures, the Act replaced parole with the new concept of supervised release.¹⁰⁷ In some ways, supervised release is very different

Case Law Analysis, 40 EMORY L.J. 393, 444 (1991) (presenting a study indicating the guidelines were generally effective in reducing disparity).

102. Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, 90 Stat. 219 (codified in various sections of 5 U.S.C. & 18 U.S.C. (1982) (repealed 1984)).

103. See *Battle v. Norton*, 365 F. Supp. 925, 933 (D. Conn. 1973) (providing a copy of the guidelines that the United States Parole Board adopted in 1973 in Appendix II); 38 Fed. Reg. 26,652 (Sept. 24, 1973) (citing 38 Fed. Reg. § 2.24(i) at 26,655) (stating, for example, that the Parole Board “shall adopt and periodically review explicit guidelines for parole decisionmaking to insure consistent treatment of similarly situated offenders”); see also Stith & Koh, *supra* note 82, at 229 (noting that “[l]ike the sentencing guidelines grid which the United States Sentencing Commission would institute a decade later, the parole Guideline Table consisted of a two-dimensional matrix,” with one axis assessing the offense’s severity and the other the inmate’s prior criminal record).

104. William J. Genego, Peter D. Goldberg & Vicki C. Jackson, *Project: Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 823 (1975). The *Yale Law Journal*’s 1974 examination of parole reform played a seminal role in the 1970s overhaul of the parole system. Stith & Koh, *supra* note 82, at 229.

105. See, e.g., Tom Goldstein, *New Studies Insist on the Same Treatment for the Same Crimes; Inequities Common in Jail Sentences*, N.Y. TIMES, Dec. 19, 1976, at D8 (quoting David Rudenstine, Director of the New York Civil Liberties Union, on parole: “Junk it”); President Ronald Reagan, Speech at the Department of Justice (Oct. 14, 1982), in *Text of President’s Speech on Drive Against Crime*, N.Y. TIMES, Oct. 15, 1982, at A20 (arguing that the “criminal justice system has broken down” because the justice system coddled rather than deterred, and prosecuted a growing “hardened criminal class,” and promising increased spending on prisons and jails to remove the incentive to release prisoners early).

106. Paula K. Biderman & Jon M. Sands, *A Prescribed Failure: The Lost Potential of Supervised Release*, 6 FED. SENT. R. 204, 204 (1994) (the authors were federal public defenders at the time of publication).

107. 18 U.S.C. § 3583 (2006) (original version at Pub. L. 98-473, tit. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1999). In the words of a federal district court judge: “In many ways supervised release was akin to probation and in other respects parole, but any such analysis provides only a glimmer of familiarity and, to be honest, adds some confusion.” Harold Baer, Jr., *The Alpha and Omega of Supervised Release*, 60 ALB. L. REV. 267, 268 (1996).

from parole. It supplements a sentence, rather than decreasing it: after serving their full sentence, in accordance with the Act's truth in sentencing ethos,¹⁰⁸ prisoners can be released into an additional term of supervision.¹⁰⁹ Moreover—whereas the decision of whether to release a prisoner early on parole took place while the prisoner was in prison, based on his or her apparent progress towards rehabilitation¹¹⁰—the decision about whether to impose a term of supervised release occurs before the sentence begins, and must be “based on factors known at the time of sentencing.”¹¹¹ Congress likely enacted this measure to ensure that discretion—which can result in treating the defendant either too leniently or too harshly—did not “creep back into the system.”¹¹²

In other ways, however, supervised release bears a strong resemblance to its predecessor. First, the Act uses language from the repealed federal parole statute to mandate that conditions of supervision be “reasonably related” to the offense and the defendant's history and character.¹¹³ The Act gave the responsibility for imposing conditions of release, which had formerly belonged to the Parole Board,¹¹⁴ to the sentencing judge.¹¹⁵ Doing so addressed Congress' concern about judges and parole officers acting at cross-purposes.¹¹⁶

Second, Congress seems to have intended supervised release to serve the same rehabilitative function that post-parole supervision had also been intended to serve. The Senate Report stated: “[T]he sentencing purposes of incapacitation and punishment would not be served by a term of supervised

108. See, e.g., S. REP. 98-225, at 56 (1983) (“Under the bill, the sentence imposed by the judge will be the sentence actually served.”).

109. 18 U.S.C. § 3583(a); see also Sterling, *supra* note 78, at 1183.

110. See *supra* note 84 and accompanying text.

111. S. REP. NO. 98-225, at 56.

112. Stith & Koh, *supra* note 82, at 235 n.73 (citing 1980 Senate Dill (S. 1722) on supervised release, which was a precursor to the eventual supervised release statute).

113. Compare 18 U.S.C. § 4209(a) (1982) (repealed) (creating mandatory conditions, such as drug testing and the prohibition on committing another crime, and conditions within the Parole Commission's discretion, which had to be “reasonably related” to the “nature and circumstances of the offense” and the parolee's “history and characteristics”), with 18 U.S.C. § 3583(d) (2006) (mandating drug testing and prohibitions on committing other crimes as supervised release conditions, and allowing judge to add conditions so long as they relate to specified factors of 18 U.S.C. § 3553(a)). Subsections 3553(a)(1) and (a)(2) state: the “nature and circumstances of the offense” and “history and characteristics of the defendant.” 18 U.S.C. § 3553(a).

114. 18 U.S.C. § 4209(a) (1982).

115. 18 U.S.C. § 3583(d).

116. See *supra* note 95 and accompanying text.

release,” rather, “the primary goal of such a term is to ease the defendant’s transition into the community . . . or to provide rehabilitation.”¹¹⁷

However, before supervised release’s 1987 implementation, the dominance of conservative political views wrought significant changes on the statute.¹¹⁸ Congress first amended it in 1986 by adding a revocation procedure that allows the judge to end supervised release and return the offender to prison for violation of any condition.¹¹⁹ In 1988, it added a provision for mandatory revocation should the court find that the defendant has been “in the possession of a controlled substance.”¹²⁰

The Sentencing Commission’s Guidelines, which were mandatory until 2005,¹²¹ and continue to strongly affect sentencing,¹²² also increased the punitive aspect of supervised release. First, the Guidelines require mini-

117. S. REP. NO. 98-225, at 124 (1983).

118. Biderman & Sands, *supra* note 106 (“In the years following the passage of . . . [the Sentencing Reform Act], Congress shifted the primary purpose of supervised release from rehabilitation to punishment and deterrence”); Stith & Koh, *supra* note 82, at 286 (“Over the course of four Congresses, Senator Kennedy’s bill accumulated compromise after compromise with more conservative forces.”).

119. Pub. L. No. 99-570, § 1006(a), 100 Stat. 3207-6 (1986) (authorizing 18 U.S.C. § 3583(e), which provides for revocation of supervised release within judge’s discretion). Prior to this amendment, the Senate Judiciary Committee Report indicated that revocation was not authorized because the Committee “does not believe that a minor violation of a condition of supervised release should result in resentencing of the defendant and because it believes that a more serious violation should be dealt with as a new offense.” S. REP. NO. 98-225, at 125.

120. Pub. L. No. 100-690, § 7303(b)(2), 102 Stat. 4464 (1988) (“If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release.”). Today, section 3583(g) also mandates revocation if the defendant possesses a firearm, refuses to comply with drug testing, or tests positive for drugs more than three times in a year. 18 U.S.C. § 3583(g) (2006).

121. *United States v. Booker* held that the Sentencing Guidelines could not constitutionally be mandatory, and that the Sentencing Reform Act had to be amended to make the Guidelines “effectively advisory,” requiring the sentencing court only “to consider” them. 543 U.S. 220, 245 (2005).

122. Since *Booker*, in the vast majority of cases, courts continue to impose the minimum supervised release period described by the Guidelines in section 5D1.1(a) (courts should impose supervised release for sentences over a year) and section 5D1.2 (prescribing the length of time that the supervised release should last for various categories of offenses). U.S. SENT’G COMM’N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 7, 52, 57 (2010) [hereinafter FEDERAL OFFENDERS]. The Supreme Court has also emphasized the importance of adhering to the Guidelines, despite their advisory nature. *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.”); *see also* *Gall v. United States*, 552 U.S. 38, 49 (2007) (“As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.”); *Rita v. United States*, 551 U.S. 338, 342 (2007) (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range).

num supervised release terms for most sentences,¹²³ so that the length of supervised release now arguably depends more on the original offense than on the defendant's post-incarceration needs.¹²⁴ Second, they recommend numerous and fairly restrictive conditions in all cases: the fifteen "standard" conditions of supervised release include geographic restrictions, an employment requirement, and a prohibition on the "excessive use of alcohol."¹²⁵ The Guidelines also prescribe seven "special" conditions,¹²⁶ which

123. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 5D1.1(a) (2009) (mandating that courts impose supervised release for sentences of one year or more, or when so required by statute), *limited on constitutional grounds by Booker*, 543 U.S. 220.

124. Biderman & Sands, *supra* note 106, at 205 ("The length of a term of supervised release is based on the classification of the original offense, not on the particular person's need to readjust to non-prison life.").

125. See U.S. SENTENCING GUIDELINES MANUAL § 5D1.3 (c)-(d). The Guidelines provide, in pertinent part:

(c) (Policy Statement) The following "standard" conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute . . . [The defendant shall]:

- (1) . . . not leave the judicial district or other specified geographic area without the permission of the court or probation officer;
- (2) . . . report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- (3) . . . answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- (4) . . . support the defendant's dependents and meet other family responsibilities . . . ;
- (5) . . . work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- (6) . . . notify the probation officer at least ten days prior to any change of residence or employment;
- (7) . . . refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;
- (8) . . . not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;
- (9) . . . not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- (10) . . . permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- (11) . . . notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- (12) . . . not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- (13) as directed by the probation officer . . . notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifica-

tions and to confirm the defendant's compliance with such notification requirement;

(14) . . . pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;

(15) . . . notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.

Id. § 5D1.3(c).

126. The additional conditions set out in the Guidelines are:

(d) (Policy Statement) The following "special" conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense—a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(2) Debt Obligations

If an installment schedule of payment of restitution or a fine is imposed—a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine—a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol—a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

(5) Mental Health Program Participation

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

(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation . . . ; or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable—a condition ordering deportation by a United States district court or a United States magistrate judge.

(7) Sex Offenses

If the instant offense of conviction is a sex offense . . .

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

depend on the defendant's circumstances, such as a requirement that the defendant participate in a mental health program if the court has reason to believe the defendant needs such treatment, and six "additional" conditions, to be imposed on "a case-by-case basis."¹²⁷

Critics claim these changes have made the statute primarily punitive—aimed more at keeping offenders off the streets than at shepherding them back safely into the community.¹²⁸ The Chairman of the House Judiciary Committee at the time later placed the blame for this shift in the statute's purpose on the fact that a "presidentially appointed panel can too easily be dominated by political interests," especially the "temptation to seek public approval by appearing tough on crime and therefore to propose standards biased in favor of prosecution and incarceration."¹²⁹ Calling the Sentencing Commission a "junior-varsity Congress," Justice Scalia also accused the system of disrupting the separation of powers in a dissent from the 1989 Supreme Court case that upheld the Commission.¹³⁰

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

Id. § 5D1.3(d).

127. See U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(e).

128. "The present [supervised release] system amounts to little more than increased punishment. If this is what lawmakers want supervised release to be, the more honest way to achieve it—'honesty in sentencing'—is to do away with supervised release and lengthen sentences." Biderman & Sands, *supra* note 106, at 207.

Many critics of the scheme's increased harshness believe it is the result of the reduction in the judiciary's power over the criminal system. See, e.g., *Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 95th Cong. 1491 (1978) (testimony of Senior Judge Alphonse J. Zirpoli) ("[The] Sentencing Commission . . . [is] inseparable from the judicial functions vested in the courts by Article III of the Constitution, control of . . . [which] should be vested in the Judicial Conference . . . rather than in the executive branch . . . and thus avoid conflict in the application of the principle of separation of powers."); Stith & Koh, *supra* note 82, at 281 ("[I]t is clear that the sentencing guidelines have effected a fundamental transfer of authority over criminal sentencing from an independent judiciary to a politically dependent government agency—severely diminishing the judiciary's role as a check and a balance on the political branches of government.").

129. Stith & Koh, *supra* note 82, at 236 (quoting Peter W. Rodino, Jr., *Federal Criminal Sentencing Reform*, 11 J. LEGIS. 218, 131 (1984)).

130. See *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). According to Justice Scalia, many of the Commission's decisions, such as when probation may

Nonetheless, in theory at least, the original congressional purpose of supervised release remains paramount. According to the Sentencing Commission, “[T]he purpose of . . . supervised release should focus on the integration of the violator into the community, while providing the supervision designed to limit further criminal conduct.”¹³¹ Similarly, the Supreme Court has stated, “Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration.”¹³²

3. *In Practice: Costly and Ineffective*

In the last few years, the pendulum seems to be swinging back towards a rehabilitative ethos, and all three branches of the federal government have shown signs of dissatisfaction with supervised release.¹³³ Congress, for example, passed the Second Chance Act in 2008,¹³⁴ whose stated aims are to “encourage the development and support of . . . evidence-based programs

be imposed, “are heavily laden (or ought to be) with value judgments and policy assessments,” and should be made by a legislature. *Id.* at 414-15.

131. U.S. SENTENCING GUIDELINES MANUAL, at ch. 7, pt. A(4) (2008); *see also* FEDERAL OFFENDERS, *supra* note 122, at 2 (citing *United States v. Granderson*, 511 U.S. 39, 50 (1994)) (“[S]upervised release . . . is not a punishment in lieu of incarceration” and, moreover, supervised release is primarily concerned with “facilitat[ing] the reintegration of the defendant into the community.”).

132. *United States v. Johnson*, 529 U.S. 53, 59 (2000).

133. The most recent available statistics show that only fifty-five percent of federal supervised release cases terminated without violation. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 231822, FEDERAL JUSTICE STATISTICS, 2008 STATISTICAL TABLES 33 tbl.7.5 (2010), *available at* <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/fjs08st.pdf>; *see also* FEDERAL OFFENDERS, *supra* note 122, at 68 (stating that “revocations accounted for one-third of all supervision cases closed between 2005 and 2008,” according to statistics from the U.S. Court’s Administrative Office); Biderman & Sands, *supra* note 106, at 204 n.1, 205 (noting that, as promulgated by the Guidelines, conditions “will make successful completion of a term of supervised release almost totally infeasible,” and citing the U.S. Court’s Administrative Office for the statistic that, in 1992, nearly fifty percent of people had their supervised release revoked).

These statistics are likely due to the fact that inmates who struggle with drug addiction and mental health problems constitute a large portion of the federal inmate population. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 209588, SUBSTANCE DEPENDENCE, ABUSE, AND TREATMENT OF JAIL INMATES, 2002, at 1 (2005), *available at* bjs.ojp.usdoj.gov/content/pub/pdf/sdatji02.pdf (“In 2002 more than two-thirds of jail inmates were found to be dependent on or to abuse alcohol or drugs.”); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), *available at* bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf (“At midyear 2005 more than half of all prison and jail inmates had a mental health problem, including . . . 45% of Federal prisoners.”); FEDERAL OFFENDERS, *supra* note 122, at 65 (stating that drug offenders constituted the largest portion of the supervision caseload, at forty-five percent of the cases closed in fiscal year 2008).

134. Pub. L. No. 110-199, 122 Stat. 657 (2008).

that . . . reduce recidivism, such as substance abuse treatment, alternatives to incarceration, and comprehensive reentry services,” and to achieve a “reduction in violations of conditions of supervised release.”¹³⁵ Similarly, the Justice Department announced in late 2010 that it would be spending \$110 million on reentry programs.¹³⁶

Moreover, a growing number of federal district courts are instituting intensive reentry programs to deal more effectively with their supervised populations, especially those struggling with addiction.¹³⁷ A consent form for one of these programs—offenders opt into them—describes it as “more intense than regular supervised release,” in that “[y]ou will probably meet with the judge and your probation officer every month,” be “tested for drugs and alcohol frequently,” and have a higher probability of the judge imposing sanctions for violations of conditions, such as curfews or weekends in jail.¹³⁸

Rehabilitative programs, such as reentry courts, with their focus on stemming addiction and other root causes of criminal behavior, appear to save money.¹³⁹ Thus, the shift towards a more rehabilitative supervision

135. 122 Stat. 657, 664, 658 (2008). The U.S. Sentencing Commission appears to be taking note of the effect of this Act on supervised release. *See* FEDERAL OFFENDERS, *supra* note 122, at 2 n.11 (engaging in a lengthy discussion of the Act in the context of explaining the purpose behind supervised release). Federal courts are also using the Act to inform their decisions concerning supervised release. *See* United States v. Wessels, 539 F.3d 913, 915 (8th Cir. 2008) (Bright, J. concurring) (“In this Act, the Congress has directed a shift from policing those on parole to rehabilitating them. The parole system now bears an increasing special obligation to help federal offenders successfully reenter into society.”).

136. Press Release, U.S. Dep’t of Just., Office of Pub. Affairs, Department Announces \$110 Million for Reentry Programs; Efforts to Reduce Spending on Corrections (Oct. 8, 2010), available at <http://www.justice.gov/opa/pr/2010/October/10-ag-1129.html>. The money will in part go toward Second Chance Act reentry grants and other initiatives which aim to reduce “recidivism rates and state and local spending on corrections through the use of evidence-based, smart-on-crime approaches.” *Id.*

137. At least six federal district courts have reentry programs, including: the Eastern District of New York (since 2002); the District of Oregon and the Western District of Michigan (since 2005); the District of Massachusetts and the Southern District of Mississippi (since 2006); the Southern District of Indiana and the Eastern District of Pennsylvania (since 2007); and the Eastern Districts of Utah and of Missouri (since 2008). KEVIN ALLTUCKER ET AL., THE DISTRICT OF OREGON REENTRY COURT: EVALUATION, POLICY RECOMMENDATIONS, AND REPLICATION STRATEGIES 2 (2009).

138. EASTERN DISTRICT OF NEW YORK, INTENSIVE POST-SENTENCE DRUG SUPERVISION PROGRAM CONSENT FORM 2 (2006).

139. *See, e.g.,* NPC RES., INC., A DETAILED COST ANALYSIS IN A MATURE DRUG COURT SETTING: A COST-BENEFIT ANALYSIS OF THE MULTNOMAH COUNTY DRUG COURT II (2003) (finding that a state drug court in Oregon reduced investment per offender by over \$5,000); Brandon C. Welsh, *Monetary Costs and Benefits of Correctional Treatment Programs: Implications for Offender Reentry*, 68 FED. PROBATION 9, 12 (2004) (finding almost uniform conclusion among studies that drug courts result in savings).

system is a result of the punitive model's high incarceration levels and related costs, which have become more problematic during the recent recession.¹⁴⁰

Supervised release is a relatively expensive system because of its monitoring costs and revocation rate of about ten percent, which results in further incarceration costs.¹⁴¹ The Sentencing Commission's Guidelines called for extensive use of supervised release, as shown above in Section I.B.2,¹⁴² and thus made the system more expensive than it might theoretically have been. Federal statutes require imposition of supervised release in less than half of federal crimes; yet from 2005 to 2009, sentencing courts have imposed supervised release terms in ninety-nine percent of cases in which the judge need not have imposed any term.¹⁴³ Moreover, those terms were relatively long, averaging more than three years.¹⁴⁴

Critics have also pointed out that the Guidelines "do not detail how a court should predict the rehabilitative needs the defendant will face in the distant future"¹⁴⁵—a problem arguably at the root of the judicial split that this Note examines. Indeed, while the Guidelines are extremely detailed in spelling out the conditions the Sentencing Commission believes courts

140. See, e.g., CHRISTINE S. SCOTT-HAYWARD, *THE FISCAL CRISIS IN CORRECTIONS: RE-THINKING POLICIES AND PRACTICES 2* (2009), available at http://www.vera.org/The-fiscal-crisis-in-corrections_July-2009.pdf (stating that, under the influence of the recession, states are using a variety of methods to shrink their inmate populations, such as increasing the availability of parole and investing more resources into reentry programs); see also CHARLES B. SIFTON & JACK B. WEINSTEIN, *REPORT ON A PROPOSED INTENSIVE POST-SENTENCE SUPERVISION PROGRAM FOR THE EASTERN DISTRICT OF NEW YORK 3* (2006) ("[T]he Program seeks to reduce expenditures on supervision."); Cecilia Klingele, *Changing the Sentence Without Hiding the Truth*, 52 WM. & MARY L. REV. 465, 465 (2010) ("[I]n the wake of unprecedented budget shortfalls, state governments [are] [r]eversing years of ever-harsher sentencing policies.").

Nationwide, public spending on corrections increased from under \$10 billion in 1982 to \$60 billion in 2002. COUNCIL OF STATE GOV'TS, *REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY 1* (2005), available at <http://reentrypolicy.org/Report/Download> (follow "download" hyperlink).

141. See FEDERAL OFFENDERS, *supra* note 122, at 49-69. In 2007-2008, there were 23,820 arrests for violations of supervised release conditions, constituting 13.6% of all federal arrests. BUREAU OF STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 231822, *FEDERAL JUSTICE STATISTICS, 2008-STATISTICAL TABLES 5 tbl.1.1* (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/fjs08st.pdf>. This number is down from 2001-2002, however, when it was nearly one-fifth of all federal arrests. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 207447, *STATISTICS, FEDERAL CRIMINAL CASE PROCESSING 2002*, at 7 (2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fccp02.pdf>.

142. See *supra* notes 121-26 and accompanying text.

143. FEDERAL OFFENDERS, *supra* note 122, at 3-4.

144. *Id.* at 4.

145. Biderman & Sands, *supra* note 105, at 206.

should impose upon defendants,¹⁴⁶ they do not provide guidance for carrying out their stated rehabilitative mission, nor do they address the “real world” issues that recently released offenders might face in seeking employment and refraining from drug use.¹⁴⁷

In addition, some scholars have blamed the role that probation officers play in the Sentencing Reform scheme for pushing to keep sentences lengthy, especially since the Guidelines became advisory after *Booker*.¹⁴⁸ The Sentencing Commission, they argue, transformed the role of the probation officer by teaching them the content and application of the hundreds of pages of Guidelines rules, resulting in officers seeing themselves more as law-enforcement agents than social workers.¹⁴⁹ According to the Sentencing Reform Act’s Senate Report, Congress feared that plea agreements could “reduce the benefits” of the Guidelines,¹⁵⁰ which motivated the Sentencing Commission to train probation officers to conduct their own investigation of facts relevant to sentencing and report those facts to the court should the plea bargain not reflect them.¹⁵¹ Moreover, judges tend to value the probation officer’s reports as being neutral, when they may instead reflect anti-defendant, prosecutorial bias.¹⁵²

However, evidence from the federal district courts’ reentry programs, mentioned above in Part I.B.2, suggests that the probation officers in those districts place a greater priority on improving the outcomes of those on supervised release than on adhering to the Guidelines. Probation offices fre-

146. See *supra* notes 122, 124-125 and accompanying text.

147. See Biderman & Sands, *supra* note 105, at 206.

148. See Ricardo J. Bascuas, *The American Inquisition: Sentencing After the Federal Guidelines*, 45 WAKE FOREST L. REV. 1, 2 (2010) (“[T]oday’s federal probation officers see themselves primarily as law-enforcement agents rather than agents of mercy. The transformation of the federal probation officer’s role is owed to the Sentencing Reform Act of 1984.”); Frank O. Bowman, III, *The Political Economy of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 245 (“The Sentencing Reform Act affected . . . institutional players . . . changing the role of probation officers from quasi social workers to special masters of Guidelines fact-finding.”); Nancy Glass, *The Social Workers of Sentencing? Probation Officers, Discretion, and the Accuracy of Presentence Reports Under the Federal Sentencing Guidelines*, 46 NO. 1 CRIM. L. BULL. ART 2, III.4. (2010) (“[Probation] officers’ orientation toward the Guidelines has apparently slowed the pace of sentencing reform in the post-*Booker* period.”); Kate Stith, *Judges, Prosecutors and the Exercise of Discretion*, 117 YALE L.J. 1420, 1437 (“The Sentencing Commission boldly sought to transform both the role of the probation officer and the content of the pre-sentence report, [by taking] great pains to teach probation officers around the country the content and application of the hundreds of pages of Guidelines rules.”).

149. See Glass, *supra* note 147, at para. 13.

150. S. REP. NO. 98-225, at 167 (1983).

151. Glass, *supra* note 147, at pt. III.3.

152. *Id.*

quently spearhead these reentry programs, which involve substantially more work from probation officers than does regular supervised release.¹⁵³

In all, it seems that the role that probation officers play in the supervised release scheme varies substantially from district to district.¹⁵⁴ Moreover, scholars acknowledge that research into the role of probation officers under the Sentencing Reform Act is lacking.¹⁵⁵ Thus, generalizing about their role in the supervised release system is difficult.

C. The Supervised Release Statute

This section briefly outlines how the supervised release statute works. The main provisions of supervised release are in 18 U.S.C. § 3583,¹⁵⁶ which gives the court some discretion to place the defendant on supervised release, usually for up to only five years, depending on the class of felony committed.¹⁵⁷

1. Imposing Conditions

Section 3583(c) requires that, before they include a supervised release term, judges must consult section 3553(a), which prescribes factors judges

153. See, e.g., ALLTUCKER ET AL., *supra* note 136, at 8, 28, 31 (discussing, respectively, the lead that the Oregon Probation Office took in setting up the reentry court, the “extensive professional training and experience in both case management and law enforcement” of its officers, and the extent of the monthly commitment from the Office, which must prepare a detailed report on each participant before each hearing); CAITLIN J. TAYLOR, FED. PROBATION DEP’T, AN INVESTIGATION OF THE KEY COMPONENTS OF THE SUPERVISION TO AID REENTRY (STAR) PROGRAM: OVERCOMING OBSTACLES TO EX-OFFENDER REENTRY THROUGH UNIQUE JUDICIAL ROLES, SANCTIONS & REWARDS, PARTNERSHIPS WITH SOCIAL SERVICE PROVIDERS AND ENHANCED SOCIAL CAPITAL 3 (2010) (stating that the Probation Office for the Eastern District of Pennsylvania initiated the reentry program); SIFTON & WEINSTEIN, *supra* note 139, at 1 (indicating that the Probation Department developed the reentry program at the request of Judge Sifton).

Kelley O’Keefe, the Supervising U.S. Probation Officer and Clinical Coordinator for the Eastern District of New York, stated: “The [reentry court] is a lot more work for our department, but we do it because we think it produces results.” Interview with Kelley O’Keefe, U.S. Probation Office for the Eastern District of New York, in Brooklyn, N.Y. (Nov. 4, 2010).

154. See Glass, *supra* note 147, at Introduction & n.8 (“[L]ocal practices vary between districts,” because of “the vast regional variations in federal districts across the country.”).

155. See Bascuas, *supra* note 147, at 3 (“[A]ssigning the United States Probation Office to investigate defendants and to argue for particular sentencing outcomes ha[s] received . . . scant attention.”); Glass, *supra* note 147, at pt. II.1 (“It is difficult to assemble a profile of the typical person who becomes a probation officer because there are no national statistics on probation officers’ backgrounds.”).

156. See 18 U.S.C. § 3583 (2006).

157. *Id.* § 3583(a)-(b). Federal criminal statutes often mandate a term of supervised release. See *supra* notes 142-144 and accompanying text.

must consider when imposing any sentence.¹⁵⁸ The section 3553 factors include the circumstances of the offense, the defendant's character and history, the need to protect the public from the defendant and provide restitution to victims, the goal of helping the defendant by providing educational or vocational training or medical care, and the avoidance of "unwarranted" sentence disparities.¹⁵⁹ Thus, section 3583 allows the judge some discretion, based on the particulars of the case, to implement supervised release. However, judges must also examine the Sentencing Commission's Guidelines, which prescribe numerous additional standard conditions and continue to inhibit judicial discretion, even though they are no longer strictly mandatory.¹⁶⁰

Section 3583(c) does not point to all of section 3553(a)'s factors, however.¹⁶¹ In particular, it leaves out section 3553(a)(2)(A), "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."¹⁶² In this way, section 3583 demonstrates its roots in the rehabilitative parole system—it seems more concerned with looking forward to the defendant's integration back into society than back at the defendant's crime.

Section 3583(d) describes conditions of supervised release, some of which are mandatory and some of which are discretionary.¹⁶³ For example, the judge must order the defendant to refrain from committing another crime and to submit to three drug tests.¹⁶⁴ Although, in a somewhat circuitous fashion, section 3583(d) provides that the court may dispense with, or decrease, the drug test condition.¹⁶⁵ Section 3583(d) also allows the court to order any number of conditions specified in section 3563(b).¹⁶⁶ These are numerous, and include paying restitution to victims, undergoing medical or psychiatric treatment, and respecting prohibitions on visiting certain places or people.¹⁶⁷ However, the discretionary condition must meet certain criteria before the court may require it.¹⁶⁸

First, the condition must "reasonably relate[]" to section 3553 factors (a)(1)—the offense's nature and circumstances and the defendant's history

158. 18 U.S.C. § 3553(a).

159. *See id.* Section 3583 points to most, but not all of the factors in § 3553(a).

160. *See supra* notes 123, 125-26 and accompanying text.

161. § 3583(c).

162. § 3553(a)(2)(A).

163. § 3583(d).

164. *Id.*

165. *Id.*

166. *Id.*

167. *See* § 3563(b)(2), (6), (9).

168. *See* § 3583(d).

and characteristics—as well as (a)(2)(B)-(C)—the need for the sentence to “afford adequate deterrence to criminal conduct,” protect the public from the defendant and provide him or her with “needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”¹⁶⁹ Second, the condition must involve “no greater deprivation of liberty than is reasonably necessary” for section 3553(a)(2)(B)-(C) purposes.¹⁷⁰

2. *The Right to Appeal*

Under section 3742, the defendant and the government both have the right to appeal conditions of supervised release and have the court modify them or revoke or terminate the supervised release altogether under section 3583(e).¹⁷¹ Section 3583(g) mandates revocation of supervised release if a defendant possesses a firearm, refuses to comply with drug testing, or tests positive for drugs more than three times in a year.¹⁷² Revocation results in the defendant serving all or part of his or her supervised release term in prison.¹⁷³

3. *Termination, Modification, and Revocation*

Section 3583(e) gives the court discretion to terminate the defendant’s supervised release as no longer necessary, or to modify the conditions or revoke the term for a violation of a condition of release, provided the court considers the same section 3553(a) factors required to impose supervised release conditions in the first place.¹⁷⁴ Before modifying a term of supervised release in any way unfavorable to the defendant—any extension of supervised release is considered unfavorable—the court must conduct a hearing at which the defendant has a right to a lawyer.¹⁷⁵ Moreover, whenever a defendant is held in custody for violating a condition of supervised release, he or she has the right to a “prompt preliminary hearing” to determine whether there is probable cause to believe that the violation oc-

169. *Id.*

170. *Id.* Third, the condition must also be consistent with any pertinent policy statements that the Sentencing Commission issues. *Id.* (referencing 28 U.S.C. § 994(a) (2006), which gives the Commission the authority to promulgate sentencing guidelines and policy statements concerning how to apply the guidelines and use revocation and modification of probation powers).

171. 18 U.S.C. § 3742(a)(3), (b)(3); *see also supra* note 99 and accompanying text.

172. § 3583(g); *see also supra* note 119 and accompanying text.

173. § 3583(e)(3).

174. § 3583(e); *see also* FED. R. CRIM. P. 32.1(c) (providing rules on hearings for revoking or modifying probation and supervised release).

175. FED. R. CRIM. P. 32.1(b); Baer, Jr., *supra* note 107, at 282-83.

curred.¹⁷⁶ A hearing is mandatory before revocation.¹⁷⁷ The judge may delegate supervised release revocation proceedings to a magistrate judge, with the consent of the parties.¹⁷⁸

4. Probation Officers' Duties

Section 3603 lists the duties of probation officers, charging them with informing those on supervised release of the conditions which they must respect¹⁷⁹ and to “keep informed . . . as to the conduct and condition of a . . . person on supervised release, and report his conduct and condition to the sentencing court,”¹⁸⁰ as well as reporting to the judge the defendant’s violation of his or her terms of supervised release.¹⁸¹ Section 3603 also requires that probation officers “bring about improvements in [the defendant’s] conduct and condition.”¹⁸² The section ends by allowing probation officers to “perform any other duty that the court may designate.”¹⁸³

II. CONFLICT

A sentencing hearing thus determines far more than the number of years a defendant will spend in prison as punishment, as demonstrated in Parts I.B.2, I.B.3, and I.C.¹⁸⁴ It also when determines the theoretically rehabilitative conditions by which defendants will have to live post-release, as they begin to remake their lives.¹⁸⁵ That is, the judge must predict the

176. Baer, Jr., *supra* note 107, at 286; *see also* FED. R. CRIM. P. 32.1(b)(1) (promulgating rule for preliminary hearings in revocation proceedings).

177. FED. R. CRIM. P. 32.1(b)(2) (“Unless waived by the person, the court must hold the revocation hearing within a reasonable time.”).

178. 28 U.S.C. § 636 (2006); 18 U.S.C. § 3401(h).

179. 18 U.S.C. § 3603(1).

180. § 3603(2).

181. § 3603(7).

182. § 3603(3).

183. § 3603(10).

184. Although, as discussed in Part I.A.2, the judge, informed by the Guidelines, determines only the number of years the prisoner must serve. The Bureau of Prisons is responsible for all other aspects of the term of imprisonment, from the type of housing in which it takes place to the kinds of restrictions it may place on his or her constitutional rights.

185. “Because conditions of supervised release always follow an individual’s release from prison, those who serve lengthy terms of incarceration are necessarily subject to conditions of release that were first imposed many years before.” *United States v. Hahn*, 551 F.3d 977, 984 (10th Cir. 2008); *see also* 18 U.S.C. § 3583(a) (“The court, in imposing a sentence to a term of imprisonment . . . may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment.”); *id.* § 3583(d) (allowing a judge to impose conditions of supervised release).

Note that a judge may modify supervised release conditions at any time before the term expires. *Id.* § 3583(e); *see also* FED. R. CRIM. P. 32.1(c) (giving rules for revoking or modify-

needs of the defendant years or even decades ahead, and decide whether he or she will require drug treatment, anger management, or a prohibition from spending time with underage children.¹⁸⁶ For financial crimes, judges also determine the amount of restitution the defendant should pay—despite not knowing what income a defendant will earn post-release, or whether he or she will be able to secure a job at all.¹⁸⁷

Because of the difficulty of predicting so far ahead, a number of district judges have imposed specific supervised release conditions, but worded them so that they are at the discretion of the probation officer. Such delegation allows the officer, who will monitor the defendant upon his or her release,¹⁸⁸ to use his or her discretion about whether the contemplated condition is still appropriate.

The split in authority thus does *not* involve cases in which the judge allowed the probation officer to add a new condition to the defendant's supervised release. Rather, the delegation at issue in these cases involves only the power to implement—or not—a condition that the judge *described* during sentencing. Borrowing language from a Second Circuit case,¹⁸⁹ Part III.B.1.a posits that these conditions are best understood as being contingent on a specified behavior or characteristic of the defendant that will not be known until the term of supervised release begins. For example, a delegated mental health condition would be contingent on the defendant actually requiring mental health treatment post-incarceration, and a restitutionary condition would be contingent on the defendant's ability to pay.

Only the Eighth and Ninth Circuits have upheld this kind of delegation.¹⁹⁰ In their opinions, these courts tend to demonstrate a concern for the

ing probation and supervised release). For detailed information about how the supervised release statute works, see *supra* Part I.C.

186. See 18 U.S.C. § 3563(b) (listing conditions of supervised release that a judge may impose in his or her discretion); *id.* § 3553(a) (listing factors to which conditions of supervised release must reasonably relate); see also *supra* Part I.C.

187. See 18 U.S.C. § 3664; see also *United States v. Porter*, 41 F.3d 68, 70-71 (2d Cir. 1994) (stating that courts face a “dilemma” in setting restitution orders because “[d]istrict judges are not seers and cannot accurately predict a defendant’s economic future”).

188. See 18 U.S.C. § 3603; see also *supra* notes 179-183 and accompanying text.

189. *United States v. Prescott*, 360 F. App'x 209, 212 (2d Cir. 2010).

190. See, e.g., *United States v. Fenner*, 600 F.3d 1014, 1027 (8th Cir. 2010) (“[T]here is no improper delegation where the district court does not disclaim ultimate authority for deciding the appropriateness of treatment. . . . [T]he phrase ‘as approved by the probation officer’ does not indicate an abdication of responsibility, and nothing in the record suggests otherwise.”); *United States v. Wynn*, 553 F.3d 1114, 1120 (8th Cir. 2008) (upholding condition that defendant “participate in mental health counseling (if so directed) under the supervision of the U.S. Probation Office”); *United States v. Kerr*, 472 F.3d 517, 523 (8th Cir. 2006) (upholding condition stating that “[t]he defendant shall participate in a mental health evaluation and/or treatment program, as directed by his probation officer. This may include

pragmatic effects of delegation.¹⁹¹ While the opinions typically do not devote much space to discussing the constitutional issues involved, many invoke the ultimate responsibility rule, which has constitutional roots.¹⁹² In contrast, the majority of U.S. Courts of Appeals have ruled such delegation impermissible.¹⁹³ Espousing a literal interpretation of Article III,¹⁹⁴ these courts find that allowing a non-Article III officer to determine whether or

participation in a sex offender treatment program”); *United States v. Mickelson*, 433 F.3d 1050, 1051 (7th Cir. 2006) (upholding condition that defendant receive health counseling “if his probation officer deemed it appropriate”); *United States v. Smart*, 472 F.3d 556, 559 (8th Cir. 2006) (upholding conditions relating to sex offender status that district court stated probation officer could cancel within its discretion); *United States v. Huffman*, 146 F. App’x 939, 943 (10th Cir. 2005) (finding district court did not unconstitutionally delegate authority to require defendant to reside in a community corrections facility); *United States v. Mark*, 425 F.3d 505, 507 (8th Cir. 2005) (upholding condition that defendant “have no contact with, or reside with, any children under 18 years of age, including his own children, unless approved in advance and in writing by the probation office”).

A number of courts seem to favor delegation, grounding their reasoning in pragmatic considerations, but have not actually ruled on the issue. *See, e.g.*, *United States v. Bishop*, 603 F.3d 279, 280 (5th Cir. 2010) (finding that condition requiring defendant to participate in a mental health program “as deemed necessary and approved by the probation officer” did not constitute plain error); *United States v. Wayne*, 591 F.3d 1326, 1336 (10th Cir. 2010) (finding no error where the district court stated that “if the evaluation shows that Ms. Wayne needs treatment, then the probation office can request a modification of this supervised release condition and I will make a determination as to whether treatment will be required or not”); *United States v. Warden*, 291 F.3d 363, 366 (5th Cir. 2002) (holding it was not plain error to allow a probation officer to determine a defendant’s ability to pay for drug treatment).

191. For a discussion of the minority’s approach, see *infra* Part II.B; especially Part II.B.2, which provides an example of the trial judge’s “dilemma,” and II.B.4, which explores these courts’ analyses of the policy issues involved.

192. For a discussion of the constitutional roots of the ultimate responsibility rule, and the way in which the minority approach reappropriated that rule from the majority side, see *infra* Parts II.A.1 and II.B.1.

193. *See, e.g.*, *United States v. Stephens*, 424 F.3d 876, 883 (9th Cir. 2005) (striking condition allowing probation officer to determine maximum number of non-treatment drug tests to which defendant had to submit); *United States v. Heath*, 419 F.3d 1312, 1314-15 (11th Cir. 2005) (striking condition that defendant participate in mental health program “if and as directed by the probation office”) (per curiam); *United States v. Meléndez-Santana*, 353 F.3d 93, 106 (1st Cir. 2003), *overturned on other grounds by United States v. Padilla*, 415 F.3d 211, 223-24 (1st Cir. 2005) (striking condition of supervised release that authorized the probation officer to determine whether defendant needed to enroll in drug treatment program in the event he tested positive for drugs as unconstitutional); *United States v. Albro*, 32 F.3d 173, 174 (5th Cir. 1994) (striking delegation of “manner of payment” to a probation officer because “the manner of payment should be recited in the [sentencing] order, rather than delegat[ed] . . . to the probation officer” (citing *United States v. Mancuso*, 444 F.2d 691, 695 (5th Cir. 1971))); *United States v. Porter*, 41 F.3d 68, 71 (2d Cir. 1994).

194. For a discussion of the origins of Article III and delegation in congressional history and Supreme Court jurisprudence, see *supra* Part I.A.1.

not to impose a condition of supervised release violates the constitutional allocation of judicial power.¹⁹⁵

The majority non-delegation view heavily predominates. Even the Eighth and Ninth Circuits have occasionally ruled with the majority against delegation. Thus, while the Eighth Circuit otherwise embraces the pragmatic approach,¹⁹⁶ it produced *United States v. Kent*,¹⁹⁷ one of the most-cited cases on the majority side.¹⁹⁸ The Ninth Circuit has ruled both ways.¹⁹⁹ Cases in the Sixth and Ninth Circuits, which are the most divided on the issue, have featured strong dissents.²⁰⁰ The Sixth Circuit hews to the non-delegation line, but does allow parole officers to decide some issues, such as setting defendants' post-incarceration restitution schedules,²⁰¹

195. For a discussion of the majority's ultimate responsibility rule, see *infra* Part II.A.1.

196. See, e.g., *United States v. Mickelson*, 433 F.3d 1050, 1056 (8th Cir. 2006) ("Conditions delegating limited authority to non judicial officials such as probation officers are permissible so long as the delegating judicial officer retains and exercises ultimate responsibility."); *United States v. Cooper*, 171 F.3d 582, 586 (8th Cir. 1999) (upholding condition that defendant participate in testing and treatment for drug and alcohol abuse "as directed by" probation officer); *United States v. Behler*, 187 F.3d 772, 780 (8th Cir. 1999) (upholding condition that defendant attend and pay for diagnostic evaluation, counseling, or treatment as directed by probation officer); *United States v. Iversen*, 90 F.3d 1340, 1344 (8th Cir. 1996) (upholding condition giving probation officer authority to order psychiatric treatment); see also *United States v. Schoenrock*, 868 F.2d 289, 290 n.3 (8th Cir. 1989) (upholding probation officer's authority to force defendant to attend programs for drug and alcohol use, to search defendant's premises, vehicle, or person for alcohol or controlled substances without a warrant, and to make defendant submit to chemical testing for alcohol or drugs in his body). But see *United States v. Rhone*, 535 F.3d 812, 814-15 (8th Cir. 2008) (striking delegation of "legal determination" of whether defendant qualified as a sex offender based on his prior juvenile convictions under the Adam Walsh Act, which imposes a mandatory supervised release condition).

197. *United States v. Kent*, 209 F.3d 1073, 1079 (8th Cir. 2000) (finding "that the lower court improperly delegated a judicial function to [the defendant's] probation officer when it allowed the officer to determine whether [the defendant] would undergo counseling").

198. See, e.g., *Rhone*, 535 F.3d at 815; *United States v. Pruden*, 398 F.3d 241, 250 (3d Cir. 2005) (per curiam); *Heath*, 419 F.3d at 1315; *United States v. Stephens*, 424 F.3d 876, 881 & n.2 (9th Cir. 2005); *United States v. Peterson*, 248 F.3d 79, 85 (2d Cir. 2001).

199. Compare *United States v. Bowman*, 175 F. App'x 834, 838 (9th Cir. 2006) (allowing probation officer to decide whether defendant could spend unsupervised time with his son and grandson), and *United States v. Fellows*, 157 F.3d 1197, 1204 (9th Cir. 1998) (same), with *Stephens*, 424 F.3d at 880 (reversing a condition allowing the probation officer to set the defendant's maximum number of drug tests).

200. See *Stephens*, 424 F.3d at 885; *Weinberger v. United States*, 268 F.3d 346 (6th Cir. 2001).

201. See *Weinberger*, 268 F.3d at 359 (holding that district judges may delegate to the probation office the "rate" of installment restitution payments, so long as the court sets the total amount of restitution that defendant must pay); *United States v. Gray*, No. 95-1832, 1997 WL 413663, at *4 (6th Cir. July 17, 1997) (same); *United States v. Ferguson*, No. 95-1629, 1996 WL 571142, at *5 (6th Cir. Oct. 3, 1996) (same).

which other courts in the majority do not allow.²⁰² The majority view prevails in the First,²⁰³ Second,²⁰⁴ Third,²⁰⁵ Fourth,²⁰⁶ Seventh²⁰⁷ and Eleventh Circuits.²⁰⁸

Before exploring the differences between the two approaches, it is important to note that both sides do allow some delegation: all courts to address the issue have agreed that the judge may delegate purely administrative tasks to probation officers, such as deciding which drug treatment center a defendant must attend if the judge has ordered drug treatment as a condition.²⁰⁹

202. See *infra* note 208 and accompanying text.

203. See *United States v. Meléndez-Santana*, 353 F.3d 93, 101 (1st Cir. 2003); *United States v. Allen*, 312 F.3d 512, 516 (1st Cir. 2002) (ruling that judges may not delegate the decision to require mental health counseling to a probation officer).

204. The Second Circuit is different from other majority circuits. First, in that its rule, first expressed in *United States v. Peterson*, 248 F.3d 79, 85 (2d Cir. 2001), is not clearly constitutional. Second, in that some more recent cases appear to allow delegation. Compare *United States v. Kieffer*, 257 F. App'x 378, 381 (2d Cir. 2007) (“[I]t is an impermissible delegation to allow a probation officer the discretion to determine whether defendants can go to . . . places [where children congregate].”), *United States v. Myers*, 426 F.3d 117, 130 (2d Cir. 2005) (“[A]lthough it would be proper for the district court to *postpone* determining whether a special condition is necessary, the district court may not improperly *delegate* this determination to the probation office.”), and *United States v. Peterson*, 248 F.3d 79, 85 (2d Cir. 2001) (calling condition requiring defendant to “participate in a mental health intervention only if directed to do so by his probation officer” impermissible), with *United States v. Prescott*, 360 F. App'x 209, 212 (2d Cir. 2010) (upholding condition where “the district court expressly retained the authority to shorten the defendant’s term of supervised release”), and *United States v. MacMillen*, 544 F.3d 71, 75 (2d Cir. 2008) (upholding condition prohibiting defendant from visiting areas where children are likely to congregate without prior approval from the probation office).

205. See *United States v. Pruden*, 398 F.3d 241, 251 (3d Cir. 2005) (per curiam) (ruling that judges may not constitutionally delegate the decision to require mental health counseling to a probation officer).

206. See *United States v. Johnson*, 48 F.3d 806 (4th Cir. 1995).

207. See *United States v. Sines*, 303 F.3d 793, 799 (7th Cir. 2002) (“[A] district court . . . must itself impose the actual condition requiring participation in a sex offender treatment program.”).

208. See *United States v. Heath*, 419 F.3d 1312, 1315 (11th Cir. 2005) (per curiam); *United States v. Prouty*, 303 F.3d 1249, 1255 (11th Cir. 2002) (holding that giving a probation officer the authority to set a restitution schedule is improper delegation of a core judicial function); *United States v. Bernardine*, 237 F.3d 1279, 1283 (11th Cir. 2001) (“A court may not delegate a judicial function to a probation officer. Such a delegation would violate Article III of the United States Constitution.”).

209. The Eleventh Circuit stated the majority’s rule on administrative delegation succinctly: “To determine if a court improperly delegated the judicial authority of sentencing, we have drawn a distinction between the delegation to a probation officer of ‘a ministerial act or support service’ and ‘the ultimate responsibility’ of imposing the sentence.” *United States v. Nash*, 438 F.3d 1302, 1304-05 (11th Cir. 2006) (quoting *Bernardine*, 237 F.3d at 1283).

Some majority non-delegation courts have justified this stance by noting the special role that probation officers play in the judicial system. In the words of the Tenth Circuit:

Delegations of authority to probation officers may be less likely to be constitutionally problematic than those involving other officials because probation officers, while not judicial officers, are statutorily bound to serve within the jurisdiction and under the direction of the appointing court. They function as an arm of the court, and the Sentencing Guidelines *themselves entrust many correctional decisions to their discretion*. . . . As a practical matter, moreover, many district courts must rely on probation services to ensure the efficient administration of justice in criminal cases.²¹⁰

The courts tend to agree that choosing a treatment center is an administrative task, and thus delegable. *See, e.g., Pruden*, 398 F.3d at 250-51 (holding that, while probation officers do require “some discretion in dealing with their charges,” that discretion should be limited to allowing the officer to select a treatment program and coordinate the timing of the defendant’s participation); *United States v. Tulloch*, 380 F.3d 8, 10-11 (1st Cir. 2004) (giving probation officer discretion to order unlimited drug tests is an improper delegation; allowing the probation officer to determine the timing of tests is permissible administrative task); *United States v. Meléndez-Santana*, 353 F.3d 93, 103 (1st Cir. 2003) (explaining that while courts need not become involved in details such as scheduling tests, Congress assigned the courts the responsibility of stating the maximum number of tests to be performed or to set a range; they may not vest probation officers with the discretion to order an *unlimited* number of drug tests); *United States v. Rearden*, 349 F.3d 608, 619 (9th Cir. 2003) (upholding condition allowing probation officer to select type and extent of treatment for sex offender); *United States v. Peterson*, 248 F.3d 79, 85 (2d Cir. 2001) (finding no impermissible delegation where the district court intended only to delegate to probation officer the details of therapy, including selection of provider and schedule of treatment).

However, there is a split on the issue of restitution within the majority of courts that prohibit delegation. Some non-delegation courts do allow the judge to delegate to probation officers the *rate* at which defendants must pay their restitution. These include the Sixth, Ninth and Eleventh Circuits. Others do not even permit that amount of delegation, including the Second, Third, Fourth, and Fifth Circuits. *Compare* *Weinberger v. United States*, 268 F.3d 346, 359 (6th Cir. 2001) (allowing delegation of rate to probation officer), *United States v. Gray*, No. 95-1832, 1997 WL 413663, at *4 (6th Cir. July 17, 1997) (same), *United States v. Fuentes*, 107 F.3d 1515, 1528 n.25 (11th Cir. 1997) (same), *United States v. Ferguson*, No. 95-1629, 1996 WL 571142, at *5 (6th Cir. Oct. 3, 1996) (same), *United States v. Stinson*, 97 F.3d 466, 468 n.1 (11th Cir. 1996) (same), *United States v. Barany*, 884 F.2d 1255, 1260 (9th Cir. 1989) (same), *and* *United States v. Signori*, 844 F.2d 635, 642 (9th Cir. 1988) (same), *with* *United States v. Coates*, 178 F.3d 681, 684-85 (3d Cir. 1999), *United States v. Miller*, 77 F.3d 71, 78 (4th Cir. 1996), *United States v. Yahne*, 64 F.3d 1091, 1097 (7th Cir. 1995), *United States v. Johnson*, 48 F.3d 806, 809 (4th Cir. 1995), *United States v. Kassir*, 47 F.3d 562, 568 (2d Cir. 1995), *and* *United States v. Albo* 32 F.3d 173, 174 (5th Cir. 1994) (per curiam).

210. *United States v. Huffman*, 146 F. App’x 939, 944-45 (10th Cir. 2005) (emphasis added) (internal quotation marks and alterations omitted) (citing *United States v. York*, 357 F.3d 14, 22 n.6 (1st Cir. 2004)).

In sum, even the majority non-delegation approach appreciates that probation officers are so entwined in the post-Sentencing Reform Act criminal system that disentangling their role from that of Article III judges is no easy task. The Tenth Circuit's analysis expresses the complex issues that make adhering closely to a literal reading of Article III so difficult,²¹¹ especially when it comes to issues of punishment, which do not fit neatly within one branch of government in the separation of powers scheme.²¹² When Congress adds supervised release into the mix—with its hybrid punitive and rehabilitative purposes and accordingly ambiguous role for probation officers, as shown in Part I.B—it is perhaps not surprising that courts have disagreed on the proper approach to the sentencing judge's supervised release dilemma.

A. The Majority Approach: Article III Literalism

The majority of U.S. Courts of Appeals hold that Article III limits the functions that judges may delegate to probation officers.²¹³ These courts do not allow a judge to set a condition of supervised release at sentencing with the caveat that the probation officer has discretion to implement it or not. Because of the importance these circuits accord the constitutional aspect of their holdings, policy implications are secondary or non-existent in most of the opinions.²¹⁴

1. *The Ultimate Responsibility Rule*: United States v. Johnson

In 1995, *United States v. Johnson*²¹⁵ was one of the first cases to address the delegation issue. The analytical framework that it established for the delegation “problem”²¹⁶ has proven influential in the cases that have followed.²¹⁷

Johnson ruled impermissible a condition of supervised release that allowed a probation officer to “appropriately” adjust Victoria Johnson's restitution payments between a court-established \$6,000 minimum and \$35,000

211. See *supra* Part I.A.1.

212. See *supra* Part I.A.2.

213. See *infra* note 193.

214. For a discussion of the factual issues that arise with the majority's approach, see *infra* Parts II.A.1-2. For a discussion suggesting that some policy concerns may lie behind the majority's approach, see *infra* Part II.A.3.

215. 48 F.3d 806 (4th Cir. 1995).

216. The court's exact phrase is “[t]he problem is a difficult one.” *Id.* at 809.

217. See, e.g., *United States v. Nash*, 438 F.3d 1302, 1305 (11th Cir. 2006); *United States v. Pruden*, 398 F.3d 241, 250 (3d Cir. 2005); *United States v. Butler*, 297 F.3d 505, 518 (6th Cir. 2002); see also *infra* Part II.B.1.

maximum to be paid in installments of at least \$100 per month, depending on her ability to pay.²¹⁸ According to the government's brief, the district judge had based his estimates on a prediction that Johnson's prison sentence would not hamper her ability to find a job because of its short duration, her level of education, and her youth.²¹⁹

The Fourth Circuit expressed sympathy for the trial judge's position. It found the order "understandably fashioned" to address the problem that Johnson's future earnings could not be "accurately forecasted at the time of sentencing—particularly when [she] faced a prison term of almost four years and supervised release of five years."²²⁰ The Court noted that "fixing an inflexible amount of payment at the time of sentencing would be perilous at best."²²¹ Finally, it acknowledged that, "to remain efficient," district courts "must be able to rely as extensively as possible on the support services of probation officers."²²²

Nevertheless, the Court ruled that the statute's grant of authority to the court to fix the terms of restitution "must be read as exclusive because the imposition of a sentence, including any terms for . . . supervised release, is a core judicial function."²²³ *Johnson* cited the 1916 Supreme Court case *Ex parte United States* for this proposition.²²⁴ That case noted that "the right to try offenses against the criminal laws and upon conviction to impose the punishment provided by law is judicial."²²⁵ In doing so, it ruled the custom of federal judges sentencing defendants to probation rather than jail or prison unconstitutional when Congress had not explicitly passed legislation permitting that practice.²²⁶

Arguably, *Johnson* mischaracterized *Ex parte United States*' statement in two ways. First, *Johnson* seems to have taken a leap by including the imposition of supervised release terms—which, as discussed in Part I.B.2, Congress did not, in theory, intend to be punitive—in *Ex parte United States*' constitutionally judicial category of imposing punishment.

218. *Johnson*, 48 F.3d at 807 (quoting the May 25, 1994 order of restitution of the United States District Court for the Middle District of North Carolina). The maximum amount was actually \$35,069.10. *Id.*

219. Brief for Plaintiff-Appellee, *Johnson*, 48 F.3d 806 (4th Cir. 1995) (No. 94-5472), 1994 WL 16046729, at *10.

220. *Johnson*, 48 F.3d at 809.

221. *Id.*

222. *Id.*

223. *Id.* at 808.

224. *Id.*

225. *Ex parte United States*, 242 U.S. 27, 41 (1916) (emphasis added).

226. *Id.* at 52.

Second, *Johnson* uses the word “exclusive,” but the notion of exclusivity does not seem to be present in *Ex parte United States*.²²⁷ The Court’s decision concerned the way in which judicial power was encroaching on the legislature’s sphere, and was not concerned with the ways in which other branches might have infringed upon judicial authority. Moreover, as discussed in Part I.A.2 above, in 1916, the judiciary would have shared authority over sentencing with the Parole Office, then a branch of the executive, and would have deferred to prison authorities over the way in which the defendant would serve his or her sentence. Thus, it is doubtful that *Ex parte United States* would have considered sentencing to be a “core judicial function,” as *Johnson* held.²²⁸ Nonetheless, *Johnson* ruled supervised release conditions “non-delegable,”²²⁹ including not only the amount of restitution, but also the number of installments and their timing.²³⁰

Johnson echoed the language of the early major Supreme Court delegation cases in support of its rule.²³¹ Oddly, however, it did not cite the Court’s more recent, post-*Northern Pipeline* cases, which emphasize flexibility and are reluctant to “unduly constrict Congress’ ability to take needed and innovative action pursuant to its Article I powers.”²³² Instead, *Johnson* relied on the ambiguous “essential attributes of judicial power”²³³ idea without further elaboration. It did so despite the fact that this idea had proven particularly amorphous in Supreme Court jurisprudence: permitting delegation in *Crowell*, forbidding it in *Northern Pipeline*, and allowing it once again in the post-*Northern Pipeline* cases.²³⁴

In sum, *Johnson* acknowledged the “perilous” difficulties that a sentencing judge faces in imposing supervised release, as well as the need for dis-

227. *Johnson*, 48 F.3d at 808; see also *Ex parte United States*, 242 U.S. at 41-42 (discussing inherent judicial power).

228. *Johnson*, 48 F.3d at 809.

229. *Id.*

230. *Id.*

231. *Id.* at 809 n.9 (citing *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76-87 (1982) (finding delegation unconstitutional if “essential attributes of the judicial power” are not retained in an Article III court); *United States v. Raddatz*, 447 U.S. 667, 683 (1980) (holding that delegation appropriate “so long as the ultimate decision is made by the district court”); *Crowell v. Benson*, 285 U.S. 22, 54 (1932) (delegation appropriate if “reservation of full authority to the court to deal with matters of law provide[s] for the appropriate exercise of the judicial function”).

For a discussion of the Supreme Court’s delegation jurisprudence, see *supra* Part I.A.1.

232. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986); see also *supra* Part I.A.1.

233. See *Crowell*, 285 U.S. at 51. The exact quotation is “the essential attributes of the judicial power.” *Id.* (emphasis added).

234. See *supra* Part I.A.1.

strict courts to rely on probation officers in order to remain efficient.²³⁵ However, it ruled against allowing district courts to rely on probation officers to solve the problem of predicting what restitution payment would be fair both to the defendant and the victim. The reason the Court provided was not the potential for abuse by the probation officer—section 3742 guards against such abuse by allowing defendants to appeal to the court.²³⁶

Rather, the decision rested on an interpretation of the Supreme Court's jurisprudence that seems flawed in three respects. First, *Johnson* ruled that only the judiciary may constitutionally impose a sentence, which includes conditions of supervised release. However, *Ex parte United States* used the word "punishment" not "sentence."²³⁷ Given Congress' and the Sentencing Commission's intent that supervised release serve a rehabilitative purpose, it is not clear that *Johnson* should have considered supervised release conditions part of the judiciary's inherent jurisdiction. Second, even if *Johnson* was correct in that regard, it is not clear that sentencing is the exclusive preserve of the judiciary, given the judiciary's long history of yielding to the executive concerning the sentence that defendants actually serve.

Third, even if *Johnson* was right that imposing conditions of supervised release is an exclusive function, it is not clear that it is also non-delegable. Under the post-*Northern Pipeline* Supreme Court cases, a court should balance Article III's "values"—essentially, fair treatment of litigants—with the constitutional and practical values of the non-Article III scheme.²³⁸ *Johnson* itself had acknowledged its rule's practical difficulties and potential unfairness to the defendant and her victims, but had found no potential for unfairness in the delegation. Thus, *Johnson* might well have found the condition permissible under post-*Northern Pipeline* delegation analysis alone. Nonetheless, subsequent opinions on both sides of the issue have cited *Johnson*'s rule frequently, and none seems to have raised these issues.²³⁹

2. *Policy Implications: United States v. Heath and United States v. Stephens*

United States v. Heath,²⁴⁰ an Eleventh Circuit case that uses *Johnson*'s rule,²⁴¹ illustrates some of the tensions that can play out between the reali-

235. See *supra* notes 220-222 and accompanying text.

236. See *supra* note 171 and accompanying text.

237. *Ex parte United States*, 242 U.S. 27, 41 (1916); see also *supra* note 225 and accompanying text.

238. See *supra* Part I.B.1.

239. See *supra* note 217 and accompanying text.

240. 419 F.3d 1312 (11th Cir. 2005) (per curiam).

ties of supervised release and the ultimate authority rule. *Heath* struck down a condition of supervised release that left it to the probation officer to decide whether the defendant had to participate in a mental health program.²⁴²

a. Heath Facts: Leeway, But Only So Much

In 2001, James Kincaid Heath was about seven months into his five-year term of supervised release, following a seven-year prison sentence for crack cocaine distribution, when his probation officer filed a motion with the district court asking that it revise the release terms.²⁴³ She apparently believed that Heath was in need of psychiatric testing because he was “acting out” and mentally unstable.²⁴⁴ The court modified Heath’s supervised release by adding the condition that, should his probation officer direct him to do so, he submit to a mental health evaluation at a particular facility.²⁴⁵ Following his probation officer’s direction, Heath initially showed up at the facility for the evaluation, but did not follow up, to which the officer made no objection.²⁴⁶ Three years later, in 2004, the probation officer requested that Heath go for a “follow-up” evaluation at another mental health facility—presumably because Heath was again exhibiting symptoms of mental instability.²⁴⁷ When Heath did not attend, the officer filed a petition for revocation of his supervised release, claiming Heath’s refusal to participate violated the 2001 mental health condition.²⁴⁸

During the first of two revocation hearings, the judge “asked the probation officer if she could suggest a modification of Heath’s conditions that would address her concerns.”²⁴⁹ After the second hearing, the court did not grant revocation, but instead modified Heath’s terms of release a second time, requiring that the defendant “participate if and as directed by the probation office in . . . mental health programs.”²⁵⁰ In a decision that seems consonant with the rehabilitative aims of supervised release,²⁵¹ the judge

241. *See id.* at 1315.

242. *Id.*

243. *Id.* at 1314.

244. *See* Brief for Defendant-Appellant, *Heath*, 419 F.3d 1312 (11th Cir. 2005) (No. 05-10175-CC), 2005 WL 3141115, at *7.

245. *Heath*, 419 F.3d at 1314.

246. Brief for Defendant-Appellant, *supra* note 243, at *6.

247. Brief for Defendant-Appellant, *supra* note 243; *see also Heath*, 419 F.3d at 1314.

248. *Heath*, 419 F.3d at 1314.

249. Brief for Plaintiff-Appellee, *Heath*, 419 F.3d 1312 (11th Cir. 2005) (No. 05-10175-CC), 2005 WL 3141116, at *5-6.

250. *Heath*, 419 F.3d at 1314.

251. *See supra* Parts I.B.1-2.

chose to support Heath's mental health needs by amending his release conditions, rather than using the punitive measure of revocation.²⁵²

b. Heath Holding: An Impermissibly Ambivalent Sentence

Heath appealed both the 2001 and 2004 modifications of his supervised release terms as unconstitutional delegations of a judicial function.²⁵³ The court devoted little space to its finding that the delegation of "the authority to make the ultimate decision of whether Heath had to participate at all" in a mental health evaluation violated Article III.²⁵⁴ The government itself had conceded the issue.²⁵⁵

The main point of dispute was whether the violation affected Heath's substantial rights, necessitating reversal.²⁵⁶ The Court found that reversal was necessary because his sentence would have been different but for the error: it would have been clear as to whether it required the mental health condition or not.²⁵⁷ Instead, the sentence was ambivalent on this point because the condition was discretionary.²⁵⁸ Rejecting the government's contention that, "had the district court recognized its mistake, it likely would have required Heath's participation in a mental health program instead of delegating that authority,"²⁵⁹ the court rejoined that to "ignore this error" would be to leave "the ultimate determination of Heath's sentence . . . in the hands of the probation office."²⁶⁰

The court's analysis is striking in the way in which it glosses over the actual facts of the case to reach its conclusion that the district judge's delegation had a real effect on Heath's sentence. The facts show that, directly after each instance in which the probation officer expressed a need to secure mental health counseling for Heath, the judge modified the terms of Heath's supervised release to require treatment at the officer's discretion.²⁶¹ Thus, the court's finding that Heath's sentence would have been different

252. Brief for Defendant-Appellant, *supra* note 243, at *6.

253. *Heath*, 419 F.3d at 1314; Brief for Plaintiff-Appellee, *supra* note 249, at *10. The court, however, only reviewed the second modification, finding that Heath had not timely filed his appeal for the first. *Heath*, 419 F.3d at 1314 n.1.

254. *See Heath*, 419 F.3d at 1315. *Heath* did not cite *Johnson*, but use of the phrase "ultimate decision" demonstrates its influence on the Eleventh Circuit. *Id.* at 1314-16.

255. *Id.* at 1315; Brief for Defendant-Appellant, *supra* note 243, at *11.

256. *Heath*, 419 F.3d at 1315.

257. *Id.* at 1316.

258. *Id.*

259. *Id.*; *accord* Brief for Plaintiff-Appellee, *supra* note 248, at *15.

260. *Heath*, 419 F.3d at 1316.

261. *See id.* at 1314; Brief for Plaintiff-Appellee, *supra* note 249, at *3-9; Brief for Defendant-Appellant, *supra* note 244, at *3-6.

were it not for the delegation,²⁶² is almost certainly untrue. Had the court not delegated, it likely would have required Heath to attend treatment without allowing the probation officer to relieve him of that responsibility if she felt it was no longer necessary.²⁶³ Given how adamant Heath's probation officer seemed to be about his need for counseling, however, it seems likely that he would have attended the counseling either way.

Even if the case was different—for example, if Heath's probation officer thought he was exhibiting symptoms of depression, but was unsure that he required intervention—a discretionary condition would not make Heath's sentence ambivalent. Rather, it would mean that the judge had personally agreed—at a sentencing hearing that is mandatory for imposing or modifying supervised release conditions²⁶⁴—that Heath required counseling, but allowed the officer to refrain from imposing the condition *contingent* on his not exhibiting symptoms of severe depression.²⁶⁵ In other words, the sentence would be clear, it would just hinge on a particular, specified need.

Moreover, the facts indicate that the district judge did impose his own will over that of the probation officer—that is, that he did make the ultimate determination.²⁶⁶ When Heath refused to attend mental health counseling at the officer's direction in 2004, she had petitioned the court to revoke Heath's release and send him back to prison.²⁶⁷ Instead, the court chose the alternate course of modifying his supervised release to allow Heath to receive mental health treatment.²⁶⁸ Thus, the facts also do not support the court's statement that delegation left the ultimate determination of Heath's sentence in the hands of the probation officer.

c. Narrow Tailoring and United States v. Stephens

United States v. Stephens,²⁶⁹ an opinion from the Ninth Circuit, which is divided over the delegation issue,²⁷⁰ concerned a defendant sentenced to a year of prison and three years of supervised release for importing marijuana.²⁷¹ The conditions of Antonio Stephens' supervised release included an

262. *Heath*, 419 F.3d at 1316.

263. This was the government's argument. *See supra* note 259 and accompanying text.

264. *See supra* Part I.C.

265. For a discussion of how delegated supervised release conditions are better understood as being contingent on particular behaviors of the defendant, see *infra* Part III.B.1.a.

266. *See supra* note 260 and accompanying text.

267. *Heath*, 419 F.3d at 1314; Brief for Defendant-Appellant, *supra* note 243, at *5-6.

268. *Heath*, 419 F.3d at 1314; Brief for Defendant-Appellant, *supra* note 243, at *5-6.

269. 424 F.3d 876 (9th Cir. 2005).

270. *See supra* note 199 and accompanying text.

271. *Stephens*, 424 F.3d at 878.

initial test directly following his release from prison, and “at least two” subsequent drug tests. The majority held the condition impermissible.²⁷²

i. *Stephens* Facts: A Struggle With Drug Use

Stephens tested positive for cocaine four times within his first two months of supervised release.²⁷³ Upon the first positive test, his probation officer referred him to “relapse group counseling,” and Stephens enrolled in an outpatient drug treatment program.²⁷⁴ When he tested positive again, Stephens waived a hearing to modify his conditions of supervised release, the court approved the modification,²⁷⁵ and he enrolled into a residential treatment program.²⁷⁶ He successfully completed the program five months later in June.²⁷⁷ By October, however, Stephens tested positive for cocaine again,²⁷⁸ failing what his brief termed his probation officer’s “strict regiment [sic] of drug testing.”²⁷⁹ The officer had him enroll in a sober living residence, but, she later alleged, he had trouble adjusting to the center.²⁸⁰ He moved out within ten days, without notifying her.²⁸¹

A few weeks later, the probation officer filed a petition with the court for an arrest warrant for Stephens.²⁸² She also filed a petition for revocation, alleging that he had violated his supervised release by testing positive for drugs four times since completing the first treatment program in June, failing to submit to four other drug tests, leaving the sober house without notice and then failing to report to her, and failing to submit his monthly supervision report.²⁸³ The implication is that Stephens went missing when he left the sober house.

The judge granted the revocation, sentencing Stephens to four months in custody and two additional years of supervised release under the “same

272. *Id.* at 884.

273. *Id.* at 879.

274. Brief for Plaintiff-Appellee, *Stephens*, 424 F.3d 876 (9th Cir. 2005) (No. 04-50170), 2004 WL 2203020, at *4.

275. *Stephens*, 424 F.3d at 879.

276. Brief for Plaintiff-Appellee, *supra* note 274, at *4.

277. *Id.*

278. *Id.*

279. Brief for Defendant-Appellant, *Stephens*, 424 F.3d 876 (9th Cir. 2004) (No. 04-50170), 2004 WL 1762979, at *5.

280. *Id.* at *6.

281. *Id.* at *4.

282. *Id.*

283. Brief for Plaintiff-Appellee, *supra* note 274, at *5.

conditions as previously imposed.”²⁸⁴ Those conditions were the subject of his appeal.²⁸⁵

ii. *Stephens* Holding: A Struggle to Find the Limiting Principle

The divided *Stephens* opinion debated what practical effects the majority rule would have on defendants’ sentences. In particular, the debate centered on whether the rule would tend to increase the number of conditions placed on defendants post-incarceration. *Stephens* held that the district court erred by leaving the *maximum* number of drug tests to the probation officer’s discretion.²⁸⁶ It stated: “Where, as here, a probation officer can of his own accord order a test, he is subjecting the defendant to the possibility of further criminal punishment. . . . [I]t is for the court to determine how many times a defendant may be placed in jeopardy of being tested.”²⁸⁷

The dissent took issue with this reasoning.²⁸⁸ It argued that the rule “makes little sense” because, at sentencing, the district court is “not in a position to determine how many tests may be required for proper supervision.”²⁸⁹ As a policy matter, the dissent held that probation officers are necessary because district courts cannot logistically “monitor each defendant’s situation and determine [his or her] supervision needs.”²⁹⁰ Thus, the dissent argued, *Stephens* “invites” sentencing courts to set a “sky-high” maximum number of drug tests, creating in practice additional, less-tailored post-release burdens on the defendant.²⁹¹

Addressing this critique, the majority posited that district judges would not likely make such “unprincipled determinations.”²⁹² Yet, the next sentence conceded that, “given an offender with serious predilections toward drug use, the district court will set the maximum number sufficiently high to give the probation officer flexibility in supervising the offender.”²⁹³ The majority concluded that “the key under the statute is that the sentencing court . . . make the penological decision of placing the offender in jeopardy of submitting to the tests.”²⁹⁴ Here, the implication is that placing an of-

284. Brief for Defendant-Appellant, *supra* note 279, at *6.

285. *Stephens*, 424 F.3d at 878.

286. *Id.* at 883.

287. *Id.*

288. *Id.* at 885 (Clifton, J., concurring in part and dissenting in part).

289. *Id.*

290. *Id.* at 887.

291. *Id.*; see also *id.* at 884 n.5 (majority opinion).

292. *Id.* at 884 n.5 (majority opinion).

293. *Id.*

294. *Id.*

fender in jeopardy of more penological measures than he or she needs *is* constitutionally acceptable—so long as a judge makes those decisions. *Heath*'s main concern is thus not with limiting supervised release conditions that it considers punitive, but with ensuring that they are judge-imposed.

Finally, it is worth noting that *Heath*, like *Johnson*,²⁹⁵ describes supervised release conditions as punitive, despite the legislative history and Guidelines' stated mission that these conditions be considered rehabilitative.²⁹⁶ Yet, the facts show that Stephens did have a serious drug abuse problem, and suggest that his probation officer's strict regimen of drug treatment may have had some rehabilitative success, despite his subsequent relapse and disappearance.

3. *Protecting Defendants' Rights: United States v. Pruden*

Another factor may be at play in some of the majority cases, however. *United States v. Pruden*²⁹⁷ illustrates the way in which the constitutional rule may protect defendants' rights by limiting supervised release conditions that could be needlessly burdensome. The Third Circuit in *Pruden* struck down a condition because it delegated to the defendant's probation officer the decision of whether to require mental health treatment.²⁹⁸

a. *Facts: An Extraneous Condition*

The district court had sentenced Calvin Edward Pruden on a gun charge to nearly two years in prison, followed by three years of supervised release with a number of conditions.²⁹⁹ The district judge included the mental health condition, even though the prosecution had not requested it, nor had the probation office noted any mental health problems in Pruden's presentence report.³⁰⁰ At sentencing, the judge told Pruden that the conditions of supervised release "are put on there for one reason: To give you the help you need when you get back on the street. They're not punitive. They're assistance. I hope you take them that way, sir."³⁰¹

295. *See supra* Part II.A.1.

296. *See supra* Part I.B.2.

297. 398 F.3d 241 (3d Cir. 2005) (per curiam).

298. *Id.* at 250.

299. *Id.* at 245.

300. *Id.*

301. *Id.* at 245.

b. Holding: Two Legal Reasons to Strike the Condition

Pruden noted of this exchange: “We are not unappreciative of the good intentions of the District Court . . . [i]n its desire to try to convert *Pruden* into a constructive member of society.”³⁰² However, the court held that the mental health condition was nonetheless unacceptable for two reasons, one statutory and the other constitutional. First, the court noted that the supervised release statute dictates that conditions involve “no greater deprivation of liberty than is reasonably necessary.”³⁰³ Because *Pruden* had no history of mental illness, the court found that the mental health condition violated that rule.³⁰⁴ Interestingly, *Pruden*’s brief raised only this tailoring issue, not the delegation issue.³⁰⁵ Moreover, in its reply, the government argued the fact that the mental health condition was “*at the discretion of [Pruden’s] probation officer*” was a reason the court should uphold it.³⁰⁶ It demonstrated how “narrowly tailored” the condition was, serving “merely as an additional mechanism for corrective treatment available to the probation officer if he or she, in his or her profession judgment, deems it necessary.”³⁰⁷

Thus, neither brief raised the delegation issue. The court nonetheless included a sizeable discussion of delegation in its opinion, ruling that a “probation officer may not decide the nature or extent of the punishment imposed upon a probationer.”³⁰⁸ The court struck down the mental health condition on that basis alone.³⁰⁹ *Pruden* expressly rejected a statutory rationale for its rule, which it held stemmed from Article III.³¹⁰

Additionally, *Pruden* indicated that two policy considerations weighed heavily against such conditions: first, imposing conditions of supervised release creates significant monetary costs on the probation system,³¹¹ and,

302. *Id.* at 249-50.

303. *Id.* at 249 (citing 18 U.S.C. § 3583(d)(2) (2006)).

304. *Id.* at 250.

305. Brief for Defendant-Appellant at 17-21, *Pruden*, 398 F.3d 241 (No. 04-1863); Reply Brief for Defendant-Appellant at 1-5, *Pruden*, 398 F.3d 241 (No. 04-1863).

306. Brief for Plaintiff-Appellee at 19-24, *Pruden*, 398 F.3d 241 (No. 04-1863).

307. *Id.* at 19-20.

308. *United States v. Pruden*, 398 F.3d 241, 250 (3d Cir. 2005) (per curiam) (citing *Ex parte United States*, 242 U.S. 27, 41-42 (1916); *United States v. Kent*, 209 F.3d 1073, 1078 (8th Cir. 2000)).

309. *Id.* at 251.

310. *Id.* at 250 (ruling that the limitation on probation officers’ authority “is of constitutional dimension, deriving from Article III’s grant of authority over ‘cases and controversies’” to the courts).

311. *Id.* (noting that, as of September 2004, “a total of 10,216 post-conviction offenders received contracted mental health treatment services paid for by the Probation Office,” and

second, that those costs “can result in sanctions on the defendant for violation of the condition,” such as a return to prison.³¹²

As the parties’ failure to raise the delegation issue indicates, the Third Circuit had not ruled on delegation prior to *Pruden*. However, there is circuit precedent supporting the notion that courts need to prevent probation officers from treading on defendants’ rights. In *United States v. Loy*,³¹³ the Third Circuit struck a condition of supervised release prohibiting the defendant from possessing pornography.³¹⁴ The court found the condition void for vagueness because it gave Ray Loy’s probation officer the power to decide what materials constituted pornography.³¹⁵ Although *Loy* had a different constitutional basis than *Pruden*—in the First Amendment, rather than in Article III³¹⁶—the rationale of limiting probation officer discretion because it might potentially harm a defendant is similar to that in *Pruden*.

Nonetheless, it is worth noting that 18 U.S.C. § 3583(d)(2), which mandates that supervised release conditions “involve[] no greater deprivation of liberty than is reasonably necessary,” provides protection for defendants from over-zealous judges and probation officers,³¹⁷ as *Pruden* itself illustrated by striking the mental health condition purely on statutory grounds before moving on to the delegation issue.³¹⁸

B. The Minority Pragmatic Approach

The pragmatic approach allows judges to delegate the decision whether or not to implement conditions of supervised release to parole offices. These circuits tend to justify their positions with policy rationales, focusing on the logistical feasibility of overseeing nuanced supervisory conditions, and positing that limited parole officer discretion may tend to create better tailored supervised release terms than the judge is capable of setting at sentencing.

that the “total mental health expenditures ran to \$12,926,006, or some \$1,265 per offender”).

312. *Id.*

313. 237 F.3d 251 (3d Cir. 2001).

314. *Id.* at 265.

315. *Id.* The condition prohibited Loy from possessing “all forms of pornography, including legal adult pornography.” *Id.* at 261 (internal quotation marks omitted).

316. *Id.* at 253.

317. 18 U.S.C. § 3583(d)(2) (2006).

318. *Pruden*, 398 F.3d at 249 (citing *id.* § 3583(d)(2) (2006)); see *supra* notes 303-304 and accompanying text.

1. *Recasting United States v. Johnson's "Ultimate Responsibility"*

The minority approach adopted the majority's constitutionally rooted ultimate responsibility rule as its own, finding that it justifies the minority courts' more permissive holdings. Most of the minority Courts trust that the judge will, in practice, retain final authority over a defendant's conditions of supervised release. As noted in Part I.C.3 above, 18 U.S.C. § 3583(e) and § 3742 allow defendants to appeal supervised release conditions to the district court, so that ultimate responsibility in a judge is essentially statutorily guaranteed.

One example of this approach is *Bowman*,³¹⁹ the case described in the introduction to this Note, concerning a sex offender whose supervised release contained a delegated prohibition on being able to see his son and grandson unsupervised.³²⁰ *Bowman* ruled that, if the district court expressly retains final authority to modify a supervised release condition, it is legitimate under 18 U.S.C. § 3583.³²¹ However, while *Bowman* adhered to the letter of the law in *Johnson*, in spirit it differed completely. *Bowman* upheld the delegation of a supervision condition in a way that neither of those cases likely would have.

Bowman found that the sentencing transcript indicated that the district court had retained final authority over the discretionary condition.³²² Interestingly, however, it found this *even though* the government had conceded in its brief that the record was "somewhat confused as to whether the probation officer would make the final determination as to whether unsupervised contact . . . would be allowed without further court intervention or whether the modification would have to be implemented by the court."³²³ *Bowman* was apparently satisfied that the district court would, in practice, intervene independently should a dispute arise. In fact, it pointed to the fact that *Bowman* could seek relief from the district court should the probation officer "arbitrarily or unfairly" deny him permission.³²⁴ Thus, *Bowman* indicates that the fact that supervised release conditions are appealable may make the *Johnson* ultimate responsibility rule a nullity.

319. 175 F. App'x 834 (9th Cir. 2006).

320. *See supra* notes 1-9 and accompanying text.

321. 18 U.S.C. § 3583 (2006); *Bowman*, 175 F. App'x at 837 (citing *United States v. Stephens*, 424 F.3d 876, 880 (9th Cir. 2005)). The court explicitly ruled on the delegation issue, though it might have avoided it altogether, a stance urged by the government. *See* Brief for Plaintiff-Appellee at 28, *Bowman*, 175 F. App'x 834 (No. 05-30106).

322. *Bowman*, 175 F. App'x at 838.

323. Brief for Defendant-Appellant, *supra* note 3, at *10.

324. *Bowman*, 175 F. App'x at 838; *see also* 18 U.S.C. § 3583(e)(1) (stating that a district court may terminate a term of supervised release "if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice").

Other courts in the minority have reappropriated the *Johnson* rule with equal ease. The Eighth Circuit did so in *United States v. Mickelson*,³²⁵ upholding two conditions to Thomas Mickelson's supervised release term following his sentence for receiving child pornography: one which allowed the probation office to track him on a GPS system at its discretion, and a second which required him to receive mental health counseling should his probation officer deem it appropriate.³²⁶ *Mickelson* cited *United States v. Kent*³²⁷—the non-delegation outlier in the Eighth Circuit, which itself had cited to *Johnson*³²⁸—for its rule that 18 U.S.C. § 3583 allows judges to delegate “limited” authority to non-judicial officials, “so long as the delegating judicial officer retains and exercises ultimate responsibility.”³²⁹

2. Policy Rationale: Delegation Limiting Supervised Release Conditions

Unlike the majority court opinions, the minority courts do tend to discuss policy rationales for their holdings. Thus, *Mickelson* stated that “flexible conditions” likely serve a defendant’s “interests” because they can be “tailored to meet his specific correctional needs.”³³⁰ The court noted with approval the district court’s statement that it intended to “limit[] conditions to those actually needed,” which a probation officer’s input on Mickelson’s need for mental health counseling would make easier.³³¹ In addition, *Mickelson* noted that prohibiting judges from delegating would lead to lo-

325. 433 F.3d 1050 (8th Cir. 2006); see also *United States v. Wynn*, 553 F.3d 1114, 1120 (8th Cir. 2008) (citing *United States v. Smart*, 472 F.3d 556, 560 (8th Cir. 2006); *United States v. Kerr*, 472 F.3d 517, 524 (8th Cir. 2006); *United States v. Mickelson*, 433 F.3d 1050, 1057 (8th Cir. 2006)) (“[W]e have upheld a district court’s limited delegation of authority to a probation officer where the court gives no affirmative indication that it would not retain ultimate authority over all of the conditions of supervised release.”).

326. *Mickelson*, 433 F.3d at 1056-57.

327. 209 F.3d 1073 (8th Cir. 2000). *Kent* struck a condition of supervised release that allowed the probation officer authority to decide whether the defendant needed to undergo psychiatric treatment. *Id.* While the Eighth Circuit generally espouses the minority permissive rule, *Kent* is an exception in that it supports the majority non-delegation approach. See *supra* notes 196-198 and accompanying text.

328. *Kent*, 209 F.3d at 1078 (citing *United States v. Johnson*, 48 F.3d 806, 808-09 (4th Cir. 1995)).

329. *Mickelson*, 433 F.3d at 1056-57 (citing *Kent*, 209 F.3d at 1078-79); see also Brief for Respondent-Appellee at 25, *Mickelson*, 433 F.3d 1050 (No. 05-2324) (arguing that five previous Eighth Circuit cases upheld conditions of supervised release similar to the one at issue).

330. *Mickelson*, 433 F.3d at 1057 (citing *United States v. Cooper*, 171 F.3d 582, 587 (8th Cir. 1998)).

331. *Id.*

gistical problems because trial courts “cannot be expected to police every defendant to the extent that a probation officer is capable of doing.”³³²

For its part, *Bowman* cited research indicating that over ninety percent of reported child molestations occur within the family to bolster its decision not to strike the supervised release condition that prohibited Bowman from visiting his son and grandson unsupervised.³³³ It is unclear how a majority court would rule in such a situation. Presumably, it would strike the condition as violative of Article III. However, the potential for harm to young children would, in such an instance, perhaps give pause.

III. RESOLUTION

This Part argues that the Supreme Court should rule that trial judges may delegate the decision of whether or not to implement particular supervised release conditions to probation officers on constitutional and policy grounds. Part III.A finds support for delegation in the Constitution, and in Supreme Court precedent pertaining to the larger delegation question and to the judiciary’s relationship to prison authorities. Part III.B illustrates the policy reasons that make ruling in favor of delegation a better result for defendants and the public.

A. Constitutional Reasons to Delegate

1. Literally Constitutional

Even under a strict literal reading of Article III, the limited delegation that is *actually* at issue in these supervised release cases should pass constitutional muster. As shown in Part I.A’s introduction, which discussed the ideas animating Article III’s life tenure and guaranteed salary mandates for the judiciary, the founders’ objective was to prevent federal judges from being beholden to any other branch of government.³³⁴ According to the Declaration of Independence, they felt unable to obtain true justice from judges under the colonial system because of the corrupting influence that King George III wielded over the entire judicial establishment.³³⁵

332. *Id.* (quoting *Kent*, 209 F.3d at 1079).

333. *United States v. Bowman*, 175 F. App’x 834, 838 (9th Cir. 2006) (citing Leonore M.J. Simon, *Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485, 490-92 (1999)).

334. *See supra* notes 23-26 and accompanying text.

335. *See supra* note 24 and accompanying text.

The presidentially-appointed Sentencing Commission appears to have marred supervised release with a separation of powers problem.³³⁶ The executive may well wield excessive power over the scheme, resulting in a “tough on crime” bias against defendants in the federal criminal system.³³⁷ It does not follow, however, that invalidating minimal delegations from trial judges to probation officers will counter-balance the much larger and very different encroachment of the Executive on judicial power.

The federal judiciary, including trial judges, appears dissatisfied with sentencing reform’s legacy.³³⁸ Thus, trial judges working on the front lines of the criminal justice system deserve some deference when they create solutions to help protect defendants’ rights. The cases discussed in Part II demonstrate that trial judges delegate particular conditions to probation officers out of a desire to balance the imposition of conditions they believe the defendant might require post-incarceration with the fear that they might be wrong about the defendant’s future needs—transforming a condition from a helpful intervention into a punitive restriction on liberty. Thus, delegations to the probation officer are perhaps best understood as putting a small amount of counter-veiling pressure on the Executive’s intruding and excessively punitive influence on the judiciary.

Moreover, these small delegations to the probation officer are, as the Tenth Circuit noted, “less likely to be constitutionally problematic” because probation officers “are statutorily bound to serve within the jurisdiction and under the direction of the appointing court.”³³⁹ Lastly, these delegations fundamentally treat the defendant fairly—or as fairly as possible within the supervised release scheme’s constraints. Surely, a judge’s fair treatment of a defendant is the best and most important measure of whether a judicial action falls within the bounds of Article III. The Supreme Court itself has said so in its post-*Northern Pipeline* delegation cases.³⁴⁰

336. See *supra* notes 26-27 and accompanying text (discussing Justice Scalia’s and Representative Rodino’s critiques of the effect of the Sentencing Commission on separation of powers).

337. Stith & Koh, *supra* note 82, at 236 (quoting Peter W. Rodino, Jr., *Federal Criminal Sentencing Reform*, 11 J. LEGIS. 218, 131 (1984)); see also *supra* note 129 and accompanying text.

338. Stith & Koh, *supra* note 82, at 281-82 (citing *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, at 22) (“Within the federal judiciary, criticism [of the Sentencing Guidelines] has come from Republicans and Democrats, liberals and conservatives.”).

339. *United States v. Huffman*, 146 F. App’x 939, 944-45 (10th Cir. 2005) (citing *United States v. York*, 357 F. 3d 14 (1st Cir. 2004)) (internal quotation marks, alterations, and citation omitted); see also *supra* note 210 and accompanying text.

340. See *supra* Part I.A.1.

2. *In the Pipeline*

a. *Plurality*

Northern Pipeline, the most recent Supreme Court delegation case that *Johnson* cited for its influential ultimate responsibility rule, was not the most recent one on which the Supreme Court had ruled.³⁴¹ Nonetheless, supervised release delegation would pass Justice Brennan's stringent plurality standard.

Justice Brennan wrote that the bankruptcy system, unlike the magistrate system, threatened the separation of powers because bankruptcy judges, while not of Article III status, enjoyed plenary jurisdiction reviewable only under clear error.³⁴² He also maintained that even the availability of *de novo* Article III court review was insufficient, on its own, to satisfy the adjunct test, as measured by the essential attributes of judicial power standard.³⁴³

In the context of the limited authority parole officers enjoy under supervised release delegation—either to impose a particular condition of supervised release or to deem that the defendant does not in fact require that condition—their jurisdiction is far from being “plenary” or even akin to that lesser jurisdiction of referees in the old bankruptcy system.³⁴⁴ Moreover, because of the parole officer's statutory obligation to “keep informed . . . as to the conduct and condition of a . . . person on supervised release, [to] report his conduct and condition to the sentencing court,” and to notify the court of any violation of his or her terms of supervised release,³⁴⁵ judges, theoretically at least, stay attuned to the defendant's case even without their formal section 3742 right to appeal.³⁴⁶

Thus, a careful examination of the actual amount of delegation at issue reveals the extent to which probation officers truly serve as adjuncts to the court, as well as the extent to which the judges retain not only the “essential” attributes of judicial power, but indeed all of them. The judge's close involvement in Heath's mental health issues, and his refusal to revoke his release, as Heath's probation officer wanted, provide a good example of that relationship. Therefore, these delegations satisfy even the *Northern Pipeline* plurality standard.

341. *See supra* Part II.A.1.

342. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 55 & n.5 (1982) (plurality opinion); *see also supra* notes 51-52 and accompanying text.

343. *Id.* at 86 n.39; *see also supra* note 54 and accompanying text.

344. *See supra* notes 50-51 and accompanying text.

345. 18 U.S.C. § 3603(2) (2006); *see also supra* Part I.C.4.

346. *See supra* Part I.C.2.

b. Dissent

However, the more relevant Supreme Court delegation standard is not that contained in Justice's Brennan's *Northern Pipeline* plurality opinion, but in Justice White's more influential dissent. Had *Johnson* looked to a post-*Northern Pipeline* case,³⁴⁷ it is possible that it, and the many which followed in the majority of circuit courts, would have come out differently, perhaps avoiding this split altogether.

The later approach involves a balancing test that evaluates Article III values against the practical and constitutional arguments for non-Article III adjudication—such as: (1) the importance of the right to be adjudicated; (2) the inherent fairness of the system in which the adjudication is conducted; (3) the extent to which Congress reserves the essential attributes of judicial power to Article III courts; (4) the extent to which the non-Article III forum exercises powers normally vested in Article III courts; and (5) the concerns that drove Congress to depart from Article III's requirements.³⁴⁸

Delegation in the context of supervised release preserves Article III values. As examined above, (1) it provides a way to potentially decrease punishment (with the possible exception of restitutionary conditions, where delegation could in some cases decrease the fine, but might in others increase it, although that would also be an increased remedy for victims). Because of the many opportunities for informal court review, through the probation officer's statutorily-required updates³⁴⁹ and the conditions' formal appealability,³⁵⁰ (2) the system has strong procedural safeguards to assure fairness. In all, delegation is a fair means of dealing with an important right.

Trial judges, rather than Congress, created the delegating scheme. As examined in the paragraph directly above, as well as at the end of Part III.A.1.a above, (3) trial judges retain the essential attributes of judicial power because of the many opportunities judges have to oversee the probation officer's actions. As to (4), the extent to which a probation officer's adjusting a condition of release is normally an Article III court responsibility, here, traditionally, a parole officer and not a judge would have been in charge not only of conditions of release, but also of the time of release.³⁵¹ Vesting judges with the responsibility for these conditions is new, and thus the tiny delegation back to probation officers does not disrupt traditional

347. These include *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), and *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985). See *supra* Part I.A.1.

348. See *supra* notes 60-64 and accompanying text.

349. See *supra* Part I.C.4.

350. See *supra* Part I.C.2.

351. See *supra* Part I.B.1.

values. Finally, (5) the concerns animating the trial judges are protecting the public, ensuring the efficient operation of the supervised release system and rehabilitating defendants by ensuring that former convicts receive needed help with issues that are prevalent among them, such as mental health problems or drug addiction, and that can lead to crime.³⁵² These are also the stated concerns of supervised release,³⁵³ and, surely, the ideal of any criminal justice system, even the “tough on crime” conservative scheme created in the 1980s.

In sum, *Johnson*’s faulty, but influential, analysis failed not only because it did not fully examine the Supreme Court’s delegation jurisprudence, but also, and especially, because it neglected to investigate the actual facts involved—which all of the Supreme Court’s delegation opinions demand. *Johnson* features no analysis of the trial judge’s reasons for delegating to the probation officer.³⁵⁴ Nor does it engage in an examination of what power, in reality or by statute, the judge would retain over the supervised release condition that he or she delegates.³⁵⁵ This failure to investigate the facts resulted in a failure to correctly assess the scheme’s constitutionality. Delegation, within the limited context of supervised release, is not only constitutional, it also better serves the “Article III values” that Justice White rightly held to be the paramount constitutional concern.

3. *The Judicial Probation Officer and the Executive Prison Authority*

Finally, the majority approach’s concern about a delegation that involves *only* whether or not to implement a judicially-set condition of release seems out of place in comparison to the power over punishment that prison authorities in the executive branch enjoy.³⁵⁶

As shown in Part I.A.2, the Supreme Court holds that federal courts must give “deference” to prison authorities’ punitive decisions, such as placing an inmate in solitary confinement, or incarcerating them—even in defiance of the sentencing judge’s order—in a secure facility rather than a half-way house. It is true that judges owe this deference due to “the difficult judgments concerning institutional operations” of prisons for important logistical and safety reasons³⁵⁷—it would not be possible for the judiciary to closely monitor every aspect of prison administration, and, even if it

352. *See supra* Part II.

353. *See supra* Part I.B.2.

354. *See* United States v. Johnson, 529 U.S. 53 (2000).

355. *See id.*

356. *See supra* Part I.A.2.

357. *Turner v. Safley*, 482 U.S. 78, 89 (1987) (quoting *Jones v. N.C. Prisoners’ Labor Union*, 433 U.S. 119, 128 (1977)); *see also supra* note 69.

were, the judiciary may well lack the institutional competence to keep prisons safe. It thus makes sense to keep this exception to the judiciary's otherwise exclusive oversight of punishment a narrow one.

Nonetheless, the analogy is informative. Like prison authorities, probation officers perform an important logistical function. They keep abreast of the offenders' behavior under the stated goal of ensuring their adjustment to post-incarceration life.³⁵⁸ Like prison authorities, probation officers have a unique and useful institutional competence, which comes from being closely involved in the offender's post-incarceration life. Thus, it makes sense to vest them with the power to decrease or adjust specified supervised release conditions in a way that is generally helpful to offenders. Such limited delegation to probation officers fits within the narrow exception to the judiciary's oversight of punishment.

Moreover, delegation to probation officers is different from the judiciary's deference to prison authorities in that delegation is simply not deference. Because of the continued oversight that judges provide offenders on supervised release, even when judges have delegated particular conditions, judges need never *defer* to the probation officer even once having *delegated*. Once again, the best example of this is *Heath*, where the probation officer sought to revoke Heath's supervised release, but—at the statutorily-mandated revocation hearing³⁵⁹—the judge disagreed and modified Heath's mental health treatment condition a second time.³⁶⁰ Although there appears not to be much research on how available judicial oversight of supervised release is to defendants in practice, the cases in Part II anecdotally indicate that trial judges do hold hearings on supervised release matters frequently.

Thus, although none of the courts to address the delegation issue explored the constitutional parameters of judicial oversight of punishment, that approach might have provided a second path—besides the Article III delegation path explored above in Parts III.A.1 and III.A.2—to finding delegation constitutional.

B. Policy Reasons to Delegate

This section posits that delegation is good policy, not only because it advances supervised release's original goals, but also because it plays a role in ameliorating some of the problems that have arisen since its enactment.

358. See *supra* Part I.B.2.

359. See 18 U.S.C. § 3583(e) (2006); *supra* Part I.C.

360. See *supra* Part II.A.2.a.

1. *The Original Goals of Supervised Release*

This section argues that delegation best serves three of the original goals behind supervised release: (a) truth in sentencing; (b) ensuring that judges and parole officers not work at cross-purposes; and (c) helping to rehabilitate offenders.

a. *A Sentence With No Surprises*

Delegation does not make a defendant's life post-incarceration a mystery, but rather makes the condition contingent on the defendant acting or not acting in a specified way. As discussed in Part I.B.1, supervised release is the child of an alliance between the left and the right, both of which blamed unfettered judicial and probationary discretion for unpredictable sentences.³⁶¹ The left was more concerned with the effects of the old indeterminate system's unfairness on defendants, the right was more eager to see offenders serve longer sentences, but both were united in believing that the defendant and the public should know what the true sentence would be by the end of the sentencing hearing.³⁶²

Heath best illustrates the way in which delegation makes a sentence contingent, but not unclear.³⁶³ That case involved two mental health conditions, one that the judge imposed early in Heath's term of supervised release, which gave the probation officer the discretion to require Heath to be evaluated at a particular center, and a second imposed a few years later at a revocation hearing, which gave the probation officer the discretion to require Heath to participate in the mental health program of the officer's choosing.³⁶⁴

The court took issue with both conditions, holding that Heath's sentence "certainly would have been different" but for the delegation pertaining to his conditions of supervised release because "the district court would have decided whether he had to participate in a mental health program, and that

361. *See supra* Part I.B.1.

362. *See supra* Part I.B.1.

363. One Second Circuit opinion appears to have adopted a similar understanding of delegated conditions. *See United States v. Prescott*, 360 F. App'x 209 (2d Cir. 2010). *Prescott* involved a two-year term of supervised release which could only be reduced at the discretion of the probation officer. *Id.* at 212. The court upheld the condition, stating that it did not "in any way 'leave the issue of the defendant's participation in [drug treatment] to the discretion of the probation officer.'" *Id.* (quoting *United States v. Peterson*, 248 F.3d 79, 85 (2d Cir. 2001) (per curiam)). Rather, the court stated that the condition "left Prescott's freedom entirely in his own hands: if he remained drug free after one year of supervision by the probation office, the district court would terminate the remaining term of supervised release; if he did not, he would remain under supervision for the full term." *Id.*

364. *See supra* Part II.A.2.a.

decision would have been incorporated into his sentence.”³⁶⁵ With the delegation, the court felt that “Heath’s sentence reflects only that the probation office will determine whether Heath has to participate in such a program.”³⁶⁶

Here, the Court mischaracterized the actual effect of the court’s delegation. When the judge added the condition that Heath would need to seek evaluation at a mental health center only if the probation officer made him do so, that condition was perfectly clear: If Heath continued to “act out,” which was the reason that the officer petitioned the court for the first modification,³⁶⁷ the officer would make him obtain a mental health evaluation. If Heath no longer exhibited symptoms of mental instability, she would in all likelihood not do so. Simply because a condition of supervised release is *contingent* on a specific event—such as displaying mental health problems—does not mean that it is arbitrary or that it holds any surprises for the defendant.

The cases in Part II all featured equally clear conditions. For example, in *Stephens*, the probation officer had the discretion to set the number of drug tests³⁶⁸—Stephens’ condition of supervised release was thus contingent on his need for drug testing. Presumably, if Stephens was no longer addicted to drugs by the time of his release from prison, his probation officer would have imposed fewer drug tests. As examined in Part II.A.3, if the officer did impose those conditions capriciously, Stephens would always have the right to appeal to the district court. In *Johnson*, the probation officer had the discretion to set the defendant’s restitution payments within a range of maximum amounts.³⁶⁹ This meant that the condition was contingent on her ability to pay restitution upon her release from prison. In *Bowman*, the probation officer had the authority to allow the defendant to see his son and grandson without seeking permission beforehand.³⁷⁰ The condition was unambiguously contingent on whether or not he showed signs of posing a danger to them.

Thus, contrary to the majority’s assertion in *Heath*, delegation in the supervised release context does not obfuscate the true content of a condition of supervised release. Rather, it makes that condition contingent on specific behavior that indicates whether the defendant truly needs it or not. The

365. United States v. Heath, 419 F.3d 1312, 1316 (11th Cir. 2005) (per curiam); *see also supra* Parts II.A.2.a-b.

366. *Heath*, 419 F.3d at 1316.

367. Brief for Plaintiff-Appellee, *supra* note 248.

368. *See supra* Part II.A.2.c.

369. *See supra* Part II.A.1.

370. *See supra* Part II.B.2.

congressional parents of supervised release were concerned about indeterminate sentencing, but this kind of delegation does not implicate that problem. Those on the left wanted to end unprincipled differences in treatment, and delegation actually tailors a defendant's supervised release conditions to those she or he truly needs (or, in the case of restitution, can afford). Those on the right were concerned about coddling defendants, but, while delegation can serve to lessen the restrictions that a defendant on supervised release experiences, it does not do so unjustifiably. Delegation in no way contravenes the purpose of reducing the unpredictability in sentencing that lay at the origin of the supervised release scheme.

b. Removing the Strategy from Sentencing

Related to the clarity in sentencing goal was a joint desire on the right and left to ensure that sentencing did not turn into a game in which the judge's decisions were strategically made at the front-end to counterbalance a guess as to what the parole officer might do on the back-end.³⁷¹

The cases discussed in Part II demonstrate that trial judges primarily intend delegation as a tool to *prevent* a similar sort of speculative strategizing about the sentence on the part of the trial judge. The discussion between the majority and the dissent in *United States v. Stephens*³⁷² best illustrates the problem.³⁷³ In that case, the judge had sentenced Stephens to drug treatment and testing as conditions of supervised release, but left it to his probation officer to determine the maximum number of drug tests.³⁷⁴

The dissent approved of this decision, noting that, at sentencing, the district court is “not in a position to determine how many tests may be required for proper supervision” of the defendant.³⁷⁵ Because judges cannot logistically “monitor each defendant's situation and determine [his or her] supervision needs,” the dissent wrote that it made sense to delegate the amount of testing to the probation officer.³⁷⁶ More importantly, the judge noted that, in the alternate, sentencing courts would set drug tests “sky-high”³⁷⁷ to—as the majority itself conceded—“give the probation officer flexibility in supervising the offender” if that person has “serious predilections toward drug use,”³⁷⁸ as Stephens apparently did.

371. *See supra* Part I.B.1.

372. *United States v. Stephens*, 424 F.3d 876 (9th Cir. 2005).

373. *See supra* Part II.A.2.c.

374. *See supra* notes 272-285 and accompanying text.

375. *Stephens*, 424 F.3d at 887 (Clifton, J., concurring in part and dissenting in part).

376. *Id.*

377. *Id.*

378. *Id.* at 884 n.5 (majority opinion).

The facts in *Stephens* suggest that the probation officer used a strict regimen of frequent drug testing on a defendant with a severe drug problem, a policy that met with initial success.³⁷⁹ Thereafter, however, *Stephens* relapsed and went missing, prompting his officer to file a motion to revoke his supervised release.³⁸⁰

These facts vividly illustrate the difficulties facing a judge sentencing a defendant with drug problems—a common condition for offenders.³⁸¹ It is unclear from the record how many drug tests *Stephens*' officer imposed upon him in total,³⁸² but the task of setting the proper maximum number of drug tests would seem extremely difficult and arbitrary. Moreover, it might lead to probation officers rationing their tests as they approach their judge-imposed limit, to the detriment of an offender needing the tests as an inducement to stay clean. While the officer can file a petition with the court for a modification of the condition—in this instance, for more tests—doing so takes time and energy so that, in practice, it simply might not happen other than in pressing situations.

One solution appears promising. It might seem that the judge could simply set an extremely high number of drug tests and give the probation officer discretion to impose fewer than that number. However, as the cases in Part II illustrate, that is precisely the scenario that the majority non-delegation courts prohibit. They do not allow judges to impose a condition—for example, participation in a drug treatment center—and then leave it to the probation officer to relieve the defendant from participating if he or she does not seem to need it after prison.³⁸³ Indeed, in *Stephens*, the majority itself conceded that, under their rule, defendants with drug problems would indeed be subjected to more drug tests than they might necessarily need.³⁸⁴ The implication is that the judge may not allow the probation officer to carry out fewer tests than are set at sentencing within his or her discretion.

Thus, prohibiting delegation does indeed invite³⁸⁵ the judge to make decisions not based on the defendant's post-incarceration needs, but based on

379. *See supra* Part II.A.2.c.i.

380. *See supra* Part II.A.2.c.i.

381. *See supra* note 133.

382. *See Stephens*, 424 F.3d 876.

383. *United States v. Heath*, 419 F.3d 1312 (11th Cir. 2005), best illustrates this proposition. *See supra* Parts II.2.a-b.

384. *See supra* note 293 and accompanying text.

385. *United States v. Stephens*, 424 F.3d 876, 887 (9th Cir. 2005) (Clifton, J., concurring in part and dissenting in part) (“Today’s decision simply invites sentencing courts to set a high maximum number of tests—the largest number of tests that might be required or sought by a probation officer.”).

a best guess about the amount of lee-way a probation officer might require as he or she attempts to, for example, help a defendant kick a drug habit. Allowing delegation ends this needless and harmful game, in a manner that is consonant with Congress' intent for supervised release.

c. Rehabilitation

Allowing delegation also treats conditions of release as rehabilitative measures, which, in theory at least, they are;³⁸⁶ prohibiting delegation treats them as punitive. Again, *Stephens* best illustrates this point. While *Stephens*' facts do not provide enough information to draw a firm conclusion about the probation officers' methods or effectiveness, they do suggest that she used drug testing, not in a punitive manner, but as a rehabilitative tool to help Stephens overcome his addiction. She did file for revocation of his supervised release, but only after he had relapsed and gone missing.³⁸⁷ Moreover, she succeeded in getting Stephens to enter two intensive treatment centers, at one of which he was, however briefly, successful.³⁸⁸

The majority in *Stephens*, however, did not see the drug tests as rehabilitative tools, but described them as "criminal punishment."³⁸⁹ That approach seems misguided. It ignores evidence suggesting that Stephens' probation officer needed the tests—and, arguably, the threat of revocation—to help him build a new life. Treating conditions as punitive, thus, leads to a rule that divorces them from their purpose. Focusing on form over substance, *Stephens* placed the formalistic goal of prohibiting delegation above the trial judge's attempts to prescribe a form of supervised release that would most benefit Stephens.

In no case examined in Part II did a judge demonstrate any intention other than to help a defendant or demonstrate a belief that the conditions of supervised release were somehow punitive. Allowing delegation thus advances supervised release's rehabilitative goal in a small, but meaningful way.

2. Critiques of Supervised Release

Delegation cannot solve the many problems that critics believe are inherent in the supervised release scheme, as discussed in Part I.B.3. But it does play a small part in ameliorating them.

386. *See supra* Part I.B.2.

387. *See supra* note 283 and accompanying text.

388. *See supra* notes 274-80 and accompanying text.

389. *Stephens*, 424 F.3d at 883; *see also supra* note 287 and accompanying text.

First, the evidence indicates that many, including the Justice Department, Congress, and some federal district courts,³⁹⁰ believe that supervised release does not achieve its rehabilitative aims as well as it might. But, as demonstrated in Part III.B.1.c directly above, delegation serves supervised release's rehabilitative aims—and prohibiting delegation works against them. In *Stephens*, allowing the probation officer some discretion to set the number of drug tests gave her more power to help Stephens overcome his addiction than she might have had if operating under a fixed limit. Thus, delegation helps—albeit in a small way that does not compare with the ambitions of the Department of Justice's research into reentry systems, of the federal district courts' reentry courts, or of Congress' recent Second Chance Act—to make supervised release more rehabilitative than it otherwise might be.

Second, because supervised release so frequently results in revocation, sending prisoners back to prison, which is costly, the system is widely considered excessively expensive.³⁹¹ As the cases in Part II show, however, delegation tends to reduce the number of conditions by which a defendant must abide. A system without delegation imposes conditions on defendants that they may not actually need. For example, had Bowman's case³⁹² come up in a majority jurisdiction, the court would likely have imposed the prohibition from seeing his son and grandson unsupervised upon him—rather than allowing his probation officer to relieve him from that condition should she feel that he posed no threat. Presumably, a greater number of conditions of release means a greater number of violations and, thus, more costly revocations. Thus, delegation likely keeps costs lower than they otherwise might be.

CONCLUSION

The split over delegation pits appellate courts against trial judges, punitive specters against rehabilitative hopes, and righteous theory against actual facts. In the circuit courts today, reality is losing the battle to a blindered vision of the Constitution. The Supreme Court should weigh in on the side of the trial courts, of the defendants whose rights animate Article III, and of common sense. Delegation, as practiced in the context of supervised release, is perfectly appropriate. Upon examination, it is not the lazy act of a judge abandoning a defendant to the unfettered caprices of the Probation Office. It merely brings a small measure of support to what is, by all

390. *See supra* Part I.B.3.

391. *See supra* Part I.B.3.

392. *See supra* Part II.B.2.

accounts, a broken reentry system inadequately serving former convicts. Certainly, it is far from being the separation of powers bogeyman its appellate court adversaries take pride in slaying.