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Protecting the Playgrounds of the Twenty-First Century: Analyzing Computer and Internet Restrictions for Internet Sex Offenders

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Notes

PROTECTING THE PLAYGROUNDS OF THE TWENTY-FIRST CENTURY: ANALYZING COMPUTER AND INTERNET RESTRICTIONS FOR INTERNET SEX OFFENDERS

[T]he skyrocketing on-line presence of children, the proliferation of child pornography on the Internet, and the presence of sexual predators trolling for unsupervised contact with children, has resulted in a chilling mix which has resulted in far too many terrible tragedies that steal the innocence from our children and create scars for life.¹

I. INTRODUCTION

A fourteen year old female just logged on to the computer as *SchoolGirl14* to talk to some friends.² Although her parents trust her judgment and want to give her a taste of freedom, they have responsibly installed monitoring software that will keep her out of restricted web sites. *Bigboy44* sits hundreds of miles away in his living room typing on his laptop. *Bigboy44* engages in a conversation with *SchoolGirl14*. He tells *SchoolGirl14* that he just moved to the area and is looking to meet people. *SchoolGirl14* responds by asking who he is and how he got her name. *Bigboy44* strategically avoids the question and asks if she would like to see a picture of him. Not knowing any better and letting her curiosity take over, *SchoolGirl14* agrees and clicks on the “accept picture” dialogue box that appears on her screen. Displayed on her screen is an indecent picture of *Bigboy44*. *Bigboy44* then asks *SchoolGirl14* if she has any pictures like the one he just sent her. *SchoolGirl14* tells *Bigboy44* she has to eat supper and later reports the incident to her parents. Concerned, her parents report the incident to police, and *Bigboy44* becomes the target of an investigation.

¹ 144 CONG. REC. H4491 (daily ed. June 11, 1998) (statement of Rep. Bill McCollum). *But see* Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529, 554 (2002). Lynch argues that under the Child Protection and Sexual Predator Punishment Act of 1998, the Internet is not an information super highway; rather, the Internet is a dead end for sexual predators. *Id.* at 553. Lynch states that the Act serves two important purposes: (1) it protects our children, and (2) it punishes child predators. *Id.*

² This hypothetical is completely fictional and entirely the creation of the author. Any resemblance to real persons or facts is coincidental.

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One week later, *SchoolGirl14* logs on and receives a message from *Bigboy44*, but this time *SchoolGirl14* is an undercover agent. After two weeks of soliciting *SchoolGirl14*, *Bigboy44* asks to meet her to have sexual intercourse. *SchoolGirl14* agrees, and the undercover agent initiates a sting operation. *Bigboy44* is then apprehended, prosecuted, and serves time in jail.

At *BigBoy44*'s supervised release hearing, the prosecuting attorney and supervising officer recommend that *BigBoy44* be prohibited from possessing and using a computer and accessing the Internet during the period of his supervised release unless otherwise approved by the officer or the court.³ Ultimately, however, although post-release supervision restrictions are generally left to the court's discretion, the judge's decision is nevertheless largely influenced by the laws in the jurisdiction in which he sits. Therefore, depending on the jurisdiction in which this case is considered, the judge may choose not to restrict *BigBoy44*'s computer or Internet use, to restrict *BigBoy44*'s computer but not Internet use, to restrict only *BigBoy44*'s Internet use and not his computer use, or to restrict *BigBoy44*'s computer and Internet use.

Federal statutes have not specifically addressed post-release supervision restrictions for Internet sex offenders and although some states have enacted statutes governing these restrictions, differing standards have emerged in these statutes, resulting in varying approaches to post-conviction release hearings for Internet sex offenders.⁴ This Note will analyze these varying approaches and propose a model statutory scheme for states, but it first briefly discusses the role of computers and the Internet in today's society.

The Internet can significantly increase one's ability to find, manage, and share information. As a result, today, a large number of Americans have access to the Internet. In October 2003, the United States Department of Commerce's National Telecommunications and

³ Supervised release is the period of time when an offender, serving a determinate sentence, is supervised in the community following release from the prison portion of the offender's sentence. U.S. Courts, <http://www.uscourts.gov/library/glossary.html#S> (last visited Jan. 6, 2009).

⁴ See, e.g., FLA. STAT. §§ 947.1405(7)(a)(7), 948.30(1)(g)-(h) (2007) (requiring that an Internet sex offender complete a treatment program before being allowed to regain computer or Internet access); MINN. STAT. § 243.055 (2003) (detailing Minnesota's computer restrictions for sex offenders who are determined to be at high risk for using the Internet to commit criminal acts); NEV. REV. STAT. § 176A.410(1)(q) (2006) (prohibiting sex offenders from Internet access); N.J. STAT. ANN. § 2C:45-1(d)(2) (West Supp. 2008) (restricting access to the Internet for certain Internet sex offenders). Currently, no federal statute specifically addresses computer and Internet restrictions for Internet sex offenders. See generally 18 U.S.C. §§ 3553, 3583 (2000) (setting forth the guidelines and conditions of sentencing, but not specifically addressing the use of computers or Internet).

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Information Administration ("NTIA") released its sixth report examining the use of computers and the Internet.⁵ The NTIA's report stated that approximately sixty-two percent of United States households reported owning a computer, and of that sixty-two percent, almost eighty-eight percent of these homes had access to the Internet.⁶ Never before have instruments so powerful as computers (and the Internet) been available to the public at affordable costs, but this power comes at a price.⁷ Indeed, in 2006, nearly half of all children in the United States under the age of eighteen used the Internet,⁸ and one in seven of these children received a sexual solicitation involving the request to engage in sexual talk or other sexual activity, or to provide personal sexual information.⁹

⁵ U.S. DEPARTMENT OF COMMERCE, A NATION ONLINE: ENTERING THE BROADBAND AGE (September 2004), <http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.pdf>.

⁶ *Id.* at 5. This means that almost 113 million households in America had Internet access, a number that has risen almost four percent since the Department of Commerce's 2002 report. *Id.* See also U.S. DEPARTMENT OF COMMERCE, A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET 1 (February 2002), <http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf> (providing statistics and data obtained during the 2001 survey of American households). This report provides statistical data and information on the spread of computer and Internet usage across the nation. *Id.* Use of the computer and Internet by Americans has grown substantially. *Id.* Children and teenagers use the computer and Internet more than any other age group. *Id.* The use of the Internet is increasing, irrespective of income, age, gender, ethnicity, and education. *Id.*

⁷ Steve Martinez, *The Internet*, Part 1, http://www.archdiossa.org/to_protect/victims/TheInternetPart1.pdf (last visited Nov. 3, 2007). In a six-part series, Mr. Martinez, Director of the Office of Victim Assistance and Safe Environment for The Archdiocese of San Antonio, discusses the findings of a report issued on September 1, 2006, by the Texas Council of Sex Offender Treatment. *Id.*

⁸ National Center for Missing and Exploited Children, *Punishment of Internet Predators Varies Greatly by State*, Dec. 6, 2006, http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=2947. The National Center for Missing and Exploited Children is a nonprofit organization that works in cooperation with the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention. *Id.* Since its establishment in 1984, the United States Department of Justice has assisted with more than 125,500 missing child cases, resulting in the recovery of more than 107,600 children. *Id.*

⁹ *Id.* See also DAVID FINKEHOR ET AL., CRIMES AGAINST CHILDREN RESEARCH CENTER, ONLINE VICTIMIZATION: A REPORT ON THE NATION'S YOUTH ix (2000). This survey suggested that many youth (approximately one in five) received a sexual solicitation over the Internet in the last year; one in thirty-three received an aggressive sexual solicitation; one in four had unwanted exposure to pictures of naked people or people having sex in the last year; and one in seventeen was threatened or harassed and encountered a substantial quantity of offensive episodes. *Id.* The Crimes Against Children Research Center ("CACRC") report defined sexual solicitations and approaches as "[r]equests to engage in sexual activities or sexual talk or give personal sexual information that were unwanted or, whether wanted or not, made by an adult." *Id.* at x (emphasis omitted). Aggressive sexual solicitation involves "offline contact with the perpetrator through regular mail, by telephone, or in person or attempts or requests for offline contact." *Id.* (emphasis omitted).

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Given the rise of computer and Internet use in all facets of our lives, it is not surprising that using computers and the Internet to perpetrate criminal activity has become increasingly common.¹⁰

To address the issue of escalating Internet and Internet-related crimes, when imposing post-release supervision restrictions for Internet sex offenders, some courts have restricted offenders' use of the Internet, and some have even gone so far as to restrict offenders' possession or use of a personal computer.¹¹ Federal appellate courts have disagreed, though, regarding whether computer and Internet use, post-release, supervision restrictions should be imposed for Internet sex offenders and, if they should be imposed, what types of restrictions are appropriate.¹² To be sure, computer and Internet restrictions began as a means of protecting the public, but because technology is constantly evolving, the legal analysis applied by courts in determining computer and Internet restrictions must also evolve.¹³ Before proposing a model approach for imposing these types of restrictions on Internet sex

Last, unwanted exposure to sexual material was defined as "[w]ithout seeking or expecting sexual material, being exposed to pictures of naked people or people having sex when doing online searches, surfing the web, [or] opening E-mail or E-mail links." *Id.* (emphasis omitted).

¹⁰ DANE C. MILLER ET AL., CONDITIONS OF SUPERVISION THAT LIMIT AN OFFENDER'S ACCESS TO COMPUTERS AND INTERNET SERVICES: RECENT CASES AND EMERGING TECHNOLOGY, CRIMINAL LAW BULLETIN 3, Vol. 42, No. 4 (July–August 2006); see BLACK'S LAW DICTIONARY 399 (8th ed. 2004) (defining a computer crime as a crime that involves the use of a computer).

¹¹ Compare *United States v. Paul*, 274 F.3d 155, 169–70 (5th Cir. 2001), *cert. denied*, 535 U.S. 1002 (2002) (holding that the district court did not abuse its discretion in imposing a condition of supervised release prohibiting the defendant from having, possessing, or having access to computers, the Internet, photographic equipment, audio/video equipment, or any item capable of producing a visual image), with *United States v. Holm*, 326 F.3d 872, 878–79 (7th Cir. 2003), *cert. denied*, 540 U.S. 894 (2003) (holding that a condition of defendant's supervised release, to the extent that the condition was intended to be a total ban on the Internet use, swept more broadly and imposed a greater deprivation on the defendant's liberty than was necessary). See also Robin Miller, Annotation, *Validity of Condition of Probation, Supervised Release, or Parole Restricting Computer Use or Internet Access*, 4 A.L.R. 6th 1, 19, 23–25 (2005).

¹² See *infra* Part II.C (discussing the federal circuit split). Unlike the Courts of Appeals for the Fifth, Eighth, Tenth, , and D.C. Circuits, which have upheld restrictions on Internet and computer use, the Second and Seventh Circuits have invalidated these restrictions. *Id.* Notably, the Third and Tenth Circuits fall in the middle of the spectrum; that is, they have both upheld and invalidated computer and Internet use restrictions, depending on the circumstances. *Id.*

¹³ MILLER ET AL., *supra* note 10, at *4. Miller cites to *People v. Rocco*, 309 A.D.2d 882 (N.Y. App. Div. 2003), in which the court noted that it would be difficult, if not impossible, to conduct business in contemporary society without the use of or access to a computer. *Id.* In addition, as new technology develops, there becomes a stronger link between television, telephones, and computers through Internet connections. *Id.*

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offenders, Part II of this Note discusses how courts have determined whether computer and Internet use, post-release, supervision restrictions for Internet sex offenders are appropriate.¹⁴ Part III then discusses arguments in favor of and against implementing these restrictions and also assesses the judicial reasoning and policy considerations in support of these restrictions.¹⁵ Finally, Part IV introduces a model statute for states to enact that appropriately addresses post-release supervision restrictions for Internet sex offenders.¹⁶ This Note now considers how the current inconsistent approach to post-release supervision restrictions for Internet sex offenders surfaced.

II. LEGAL HISTORY OF REGULATING SEX OFFENDERS

This Part explores the history of sex offender statutes and case law. Specifically, Part II.A examines how federal sex offender statutes have evolved as society has become increasingly concerned with punishing sex offenders.¹⁷ Next, Part II.B discusses the establishment and goals of the United States Sentencing Guidelines (“Sentencing Guidelines”) in addition to terms of supervised release.¹⁸ Part II.C then considers the inconsistencies among the circuit courts with regard to post-release supervision restrictions for Internet and non-Internet sex offenders.¹⁹ Finally, Part II.D examines how the rights of privacy of Internet sex offenders have become increasingly restricted.²⁰

A. *Congressional Actions Against Sex Offenders*

1. Progression of Sex Offender Statutes—From Jacob Wetterling to Adam Walsh

In 1989, Jacob Wetterling (“Wetterling”), an eleven year old boy, was abducted from Minnesota and has yet to be found.²¹ Wetterling’s mother

¹⁴ See *infra* Part II (discussing the history of Internet sex offender laws and relevant case law).

¹⁵ See *infra* Part III (analyzing the effectiveness of computer and Internet restrictions imposed on Internet sex offenders).

¹⁶ See *infra* Part IV (proposing a model statute for states to adopt).

¹⁷ See *infra* Part II.A (discussing legislation Congress has passed to regulate sex offenders).

¹⁸ See *infra* Part II.B (discussing the sentencing guidelines that courts may consider when sentencing Internet sex offenders).

¹⁹ See *infra* Part II.C (identifying inconsistencies in cases decided by federal courts).

²⁰ See *infra* Part II.D (discussing the limited expectations of privacy of both criminal and Internet sex offenders).

²¹ Susan Oakes, Comment, *Megan’s Law: Analysis on Whether it is Constitutional to Notify the Public of Sex Offenders Via the Internet*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1133,

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became an advocate for missing children after her son's abduction and, in 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Wetterling Act").²² This statute compelled states to require persons convicted of sexual crimes against children or sexually violent crimes to register with the government upon release from prison or placement on parole.²³ The statute applied to individuals convicted of sexual battery, kidnapping of a child, production or distribution of child pornography, and sexual conduct with a minor.²⁴

Two years after Congress passed the Wetterling Act it enacted Megan's Law which made two significant changes to the privacy rights of registered sex offenders.²⁵ First, Megan's Law required private registry data to become public information, and second, it required state and local law enforcement agencies to release relevant sex offender information necessary to protect the public.²⁶ The mandatory disclosure

1133-34 (1999). Wetterling and two other young boys were riding their bikes when a masked man jumped out and surprised them. *Id.* at 1133 n.2. The masked man told the boys to throw their bikes in the ditch and lay face down on the ground. *Id.* The man then dismissed the other two boys but took Wetterling; neither the man nor Wetterling were ever found. *Id.* See also Keith S. Hampton, *Children in the War on Crime: Texas Sex Offender Mania and the Outcasts of Reform*, 42 S. TEX. L. REV. 781 (2001) (reviewing sex offender laws in the historical context of high-profile child abductions and murders).

²² Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (Supp. 2004). See generally 42 U.S.C. § 14071. The Act requires states to implement a system whereby all persons who commit sexual or kidnapping crimes against children, or who commit sexually violent crimes against any person (whether adult or child), are required to register their addresses with the State upon their release from prison. *Id.* The 1994 Act also provides that law enforcement agencies may release relevant information about a sex offender if they deem it necessary to protect the public. *Id.*; see also Oakes, *supra* note 21, at 1138 (stating that the Jacob Wetterling Act encouraged states to establish a system in which any person who commits a sexual or kidnapping offense against a child is required to register his or her address with the state in which he or she resides upon release).

²³ 139 CONG. REC. H10320 (daily ed. Nov. 20, 1993). See also Christina Locke & Dr. Bill F. Chamberlin, *Safe From Sex Offenders? Legislating Internet Publication of Sex Offender Registries*, 39 URB. LAW. 1, 3 (Winter, 2007).

²⁴ Locke & Chamberlin, *supra* note 23, at 3. Shortly after passing the Wetterling Act, Congress imposed a two-year deadline on states to create a registry or else face a ten percent cut in federal funding for state law enforcement. *Id.* By 1996, all fifty states and the District of Columbia had complied with the Act. *Id.*

²⁵ *Id.* at 4. Unaware and uninformed, Megan Kanka ("Megan") and her parents lived across the street from a sex offender in their New Jersey home. *Id.* at 1. At the age of seven, Megan was raped and murdered by the neighboring sex offender, who had twice before been convicted of sex crimes against children. *Id.* After her death, Megan's parents lobbied the federal government to make sex offender information available to the public. *Id.* at 2.

²⁶ Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 62 Fed. Reg. 39,009 (July 21, 1997). See

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amendment applied to offenders committing both sex offenses against minors and sexually violent offenses.²⁷ In 1997, the United States House of Representatives discussed possible improvements that could be made to the original Wetterling Act.²⁸ Although the bill passed the House by a vote of 415 to 2, it was not passed into law as written.²⁹

2. Sex Offender Registration and Notification Act

On July 27, 2006, President George W. Bush signed the Adam Walsh Child Protection and Safety Act of 2006 ("Walsh Act") for nationalized sex offender registration.³⁰ The constitutional validity of the Walsh Act

Locke & Chamberlin, *supra* note 23, at 4. One element Megan's Law failed to include was how the sex offender registry information would be relayed to the public. *Id.*

²⁷ 62 Fed. Reg. at 39,009 (July 21, 1997). See Locke & Chamberlin, *supra* note 23, at 4. There were several other laws that amended the Wetterling Act. *Id.* at 4. See generally Pam Lyncher Act, Pub. L. No. 104-236, § 2, 110 Stat. 3093 (1996). First, the Pam Lyncher Act, passed in 1996, directed the FBI to compile a national database of registered sex offenders and gave the FBI discretion to release relevant information from the registry to the public. *Id.* See also generally PROTECT, Pub. L. No. 108-21, 117 Stat. 650 (2003). Then, in 2003, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today ("PROTECT") Act was passed, strengthening law enforcement's powers in preventing and investigating sex crimes against children and prosecuting and punishing the sex offenders responsible for committing these crimes. *Id.*; Locke & Chamberlin, *supra* note 23, at 4.

²⁸ Lynch, *supra* note 1, at 542. The purpose of this legislation was to strengthen the 1994 Wetterling Act by requiring federally convicted sex offenders to register in the state where they reside. *Id.* In addition, the legislation would have mandated offenders to register in multiple states if they commuted for work or school. *Id.*

²⁹ See *id.* However, H.R. 3494, proposing the Child Protection and Sexual Predator Punishment Act of 1998, was enacted into law in October 1998. *Id.* at n.17. The Act would increase federal punishment for persons engaged in child sex offenses and would also criminalize a range of Internet communications. *Id.* See generally Child Protection and Sexual Predator Punishment Act of 1998, 144 CONG. REC. H4491-505 (1998); Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Improvements Act of 1997, 144 CONG. REC. H7626-31 (1997).

³⁰ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006). The purpose of the Adam Walsh Act was to provide a more comprehensive, nationalized system for registration of sex offenders. *Id.* States are required to conform to the various aspects of sex offender registration including the information that must be collected. *Id.* The Act mandates sex offender registration as follows:

(b) Initial registration

The sex offender shall initially register –

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

42 U.S.C. § 16913(b) (2000). A key element of the Adam Walsh Act is that it establishes standards to promote greater uniformity across public sex offender websites—standards that the Wetterling Act had left to the discretion of individual states. Adam Walsh Act, 120 Stat. 587.

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has been challenged in courts on the grounds that the Act violates the non-delegation doctrine, fails to provide a hearing or petition process, and applies to crimes that were committed prior to its enactment.³¹ In *United States v. Madera*, the Court of Appeals for the Eleventh Circuit reversed a Florida district court's retroactive application of the Sex Offender Registration and Notification Act ("SORNA"); however, the *Madera* court did not rule on the constitutionality issues raised by the Act and decided by the district court.³²

³¹ See *infra* note 32 (discussing the facts of the Florida district court case). Compare *United States v. Smith*, 481 F. Supp. 2d 846 (E.D. Mich. 2007) (holding that the Sex Offender and Registration Act "SORNA" did not apply retroactively and that SORNA violates the Ex Post Facto Clause of the United States Constitution), with *United States v. Templeton*, No. 06-291, 2007 WL 445481 (W.D. Okla. Feb. 7, 2007) (finding that SORNA covered individuals convicted before July 27, 2006, and finding no violation of the Ex Post Facto, Due Process, or Commerce Clauses), and *United States v. Madera*, 474 F. Supp. 2d 1257 (M.D. Fla. 2007) (finding no violation of the non-delegation doctrine, applying the law retroactively, finding no violation of the Ex Post Facto, Due Process, or Commerce Clauses), *rev'd* 528 F.3d 852, 858-59 (11th Cir. 2008) (holding that the District Court did not have the authority to apply SORNA retroactively; therefore, the defendant was not in violation of the registration requirements). See also *United States v. Markel*, No. 06-20004, 2007 WL 1100416 (W.D. Ark. Apr. 11, 2007) (unpublished) (following the holdings in *Madera* and *Templeton*); *United States v. Manning*, No. 06-20055, 2007 WL 624037 (W.D. Ark. Feb. 23, 2007) (same). See generally *United States v. Muzio*, No. 4:07CR179 CDP, 2007 WL 2159462 (E.D. Mo. July 26, 2007) (holding that SORNA did not apply to the defendant based on a plain reading of the language, but nevertheless holding that the Act was constitutional).

³² *Madera*, 528 F.3d at 858-59, *rev'g* 474 F. Supp. 2d at 1257. The government indicted Wilfredo G. Madera, a convicted sex offender, for failure to register under SORNA guidelines. *Madera*, 474 F. Supp. 2d at 1258. Madera moved to have the action dismissed, arguing that the registration requirements under SORNA were unconstitutional. *Id.* at 1260. First, Madera argued that Congress had unconstitutionally delegated to the Attorney General the power to retroactively apply the Act. *Id.* Second, Madera's complaint alleged that the Act would punish him for crimes that were committed prior to the Act's enactment, violating the Ex Post Facto Clause. *Id.* at 1262. Third, Madera argued that the Act violates both substantive and procedural due process under the Fifth Amendment because it fails to provide for a hearing or petition process prior to the publication of the defendant's name on the sex offender registry or prior to the defendant being compelled to comply with the reporting conditions. *Id.* at 1264. Last, Madera contested the statute's constitutionality under the Commerce Clause. *Id.* at 1265. The district court held that SORNA does not violate any of the following: (1) the non-delegation doctrine of Article I, § 1 of the United States Constitution per *Mistretta v. United States*, 488 U.S. 361 (1989); (2) the Ex Post Facto Clause, pursuant to the logic in *Smith v. Doe*, 538 U.S. 84 (2003), which addressed the Alaska Sex Offender Registry requirements; (3) procedural due process under the Fifth Amendment pursuant to *Conn. Dep't of Safety v. Doe*, 538 U.S. 1 (2003); (4) substantive due process, pursuant to decisions in various circuits, such as *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005), *Doe v. Tandeske*, 361 F.3d 594 (9th Cir. 2004), and *Gunderson v. Hyass*, 339 F.3d 639 (8th Cir. 2003); and (5) the Commerce Clause, pursuant to *Gonzales v. Raich*, 545 U.S. 1 (2005).

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Title I of the Walsh Act created SORNA.³³ The law established guidelines for state registries and mandated a nationwide sex offender registry along with tougher penalties for sex offenders who failed to register.³⁴ In addition to the National Guidelines, section 146(c) of SORNA established the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking ("SMART").³⁵ The SMART office is responsible for determining whether jurisdictions have met all of the requirements of SORNA.³⁶

SORNA governs all fifty states, the District of Columbia, the five principal United States territories, and the federally recognized Indian tribes that elect to function as registration jurisdictions.³⁷ SORNA requires the registration of every sex offender who engages in a sexual act with another by force or threat of serious violence, a sexual act with another by rendering unconscious or drugging the victim, or a sexual act

³³ Adam Walsh Act, 120 Stat. 587. See U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, FACT SHEET: THE PROPOSED GUIDELINES FOR THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) 1 (May 17, 2007), available at http://www.ojp.usdoj.gov/smart/pdfs/sorna_factsheet.pdf. SORNA establishes minimum registration and notification standards for sex offenders. *Id.*

³⁴ 72 Fed. Reg. 30,210 (May 30, 2007). The Federal Register sets forth the national guidelines for states to establish sex offender registration and notification programs. *Id.* These National Guidelines comply with section 112(b) of SORNA, which requires the Attorney General to issue guidelines to interpret and implement SORNA. *Id.* According to the U.S. Department of Justice's Fact Sheet, the guidelines provide all guidance and advice regarding the administration and implementation of SORNA's standards. Fact Sheet, *supra* note 33, at 4. At the Presidential signing of SORNA, President Bush noted that SORNA "will greatly expand the National Sex Offender Registry by integrating the information in state sex offender registry systems and ensure that law enforcement has access to the same information across the United States." PRESIDENT GEORGE W. BUSH, Statement upon Signing H.R. 4472 (July 27, 2006), as reprinted in 2006 U.S.C.C.A.N. S35, S36.

³⁵ 72 Fed. Reg. 30,210. The purpose of SMART is to partner with state organizations as a resource in the federal government to help further the states' sex offender registration and notification programs. *Id.* See U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION 1, 10 (Proposed Guidelines, May 2007), available at http://www.ojp.usdoj.gov/smart/pdfs/proposed_sornaguidelines.pdf.

³⁶ See Guidelines, *supra* note 35, at 10. The final day for jurisdictions to meet the minimum requirements of SORNA is July 27, 2009. *Id.*

³⁷ Fact Sheet, *supra* note 33, at 4. See Guidelines, *supra* note 35, at 12. Although the governed jurisdictions are as described in the text, they are not limited to carrying out their functions through their own political subdivisions. *Id.* See also Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 IOWA L. REV. 563, 574 (2002). Demleitner discusses the typical Native American sex offender and the impact of the Sentencing Guidelines on this unique type of offender. *Id.* at 576. Additionally, Demleitner argues that Native Americans do not fit the stereotypical sexual predator model and are not high-risk sex offenders. *Id.* Demleitner concludes by suggesting that the sentencing Commission addressed the uniqueness of Native Americans and sentencing regulations. *Id.* at 587.

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with a child under the age of twelve.³⁸ Along with requiring sex offenders to register, SORNA also sets forth three tiers of sex offenders into which all sex offenders may be classified.³⁹ To comply with

³⁸ See Guidelines, *supra* note 35, at 17 (presenting the comparison of a jurisdiction's laws to those federal laws mentioned above). "'Sexual act' for this purpose should be understood to include any of the following: (i) oral-genital or oral-anal contact, (ii) any degree of genital or anal penetration, and (iii) direct genital touching of a child under the age of 16." *Id.* See also LA. REV. STAT. ANN. § 14:42(D)(2)(a) (2007). In Louisiana, it is theoretically possible for a defendant to receive the death penalty for aggravated rape of a minor under the age of thirteen. *Id.* But see Kennedy v. Louisiana, 128 S. Ct. 829 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child that was not intended to result in death).

³⁹ Guidelines, *supra* note 35, at 16. 42 U.S.C. § 16911 (2000) reads as follows:

In this title the following definitions apply:

(1) Sex offender. The term "sex offender" means an individual who was convicted of a sex offense.

(2) Tier I sex offender. The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender. The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and —

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of title 18, United States Code [18 USCS § 1591]);

(ii) coercion and enticement (as described in section 2422(b) of title 18, United States Code [18 USCS § 2422(b)]);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a) of title 18, United States Code [18 USCS § 2423(a)]);

(iv) abusive sexual contact (as described in section 2244 of title 18, United States Code [18 USCS § 2244]);

(B) involves —

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender. The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and —

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18, United States Code [18 USCS §§ 2241 and 2242]); or

(ii) abusive sexual contact (as described in section 2244 of title 18, United States Code [18 USCS § 2244]) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

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SORNA, a state does not have to label offenders as Tier I, Tier II, or Tier

(C) occurs after the offender becomes a tier II sex offender.

(5) Amie Zyla expansion of sex offense definition.

(A) Generally. Except as limited by subparagraph (B) or (C), the term “sex offense” means—

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18, United States Code [18 USCS § 1152 or 1153]) under section 1591 [18 USCS § 1591], or chapter 109A [18 USCS §§ 2241 et seq.], 110 [18 USCS §§ 2251 et seq.] (other than section 2257, 2257A, or 2258 [18 USCS § 2257, 227A, or 2258]), or 117 [18 USCS §§ 2421 et seq.], of title 18, United States Code;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

....

(6) Criminal offense. The term “criminal offense” means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of “specified offense against a minor” to include all offenses by child predators. The term “specified offense against a minor” means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of title 18, United States Code [18 USCS § 1801].

(G) Possession, production, or distribution of child pornography.

....

Id. Guidelines, *supra* note 35, at 16. *See also* 42 U.S.C. § 16911. First, Tier I sex offenders are those offenders who do not fit into either level II or III. *Id.* § 16911(2). Tier II sex offenders typically target minors and engage in violent crimes such as sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, and abusive sexual contact. *Id.* § 16911(3). In addition, Tier II classifications include the use of a minor in a sexual performance, solicitation of a minor to practice prostitution, or production or distribution of child pornography. *Id.* Tier III sex offenders have committed the following crimes: aggravated sexual abuse, sexual abuse, abusive sexual contact with a minor who has not attained the age of thirteen years, or kidnapping of a minor (unless committed by a parent or guardian). *Id.* § 16911(4).

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III sex offenders, per se, but it must show that its current classification system follows the same substantive principles that SORNA uses to classify offenders.⁴⁰ In addition, SORNA addresses several technical details of the sex offender registration process, such as the type of information sex offenders are required to disclose and how this information is disseminated to the public; instructions that advise sex offenders to what location they must report in order to begin the initial registration process and to keep their registration information current; requirements that indicate how frequently sex offenders must meet with the registration office to update their personal information; and information indicating how all of the sex registration requirements are enforced.⁴¹

In conclusion, the overall purpose of SORNA is to protect the public by requiring sex offenders who have been released from incarceration to report certain information and by also requiring states to collect and disseminate this information to the public.⁴² SORNA's success depends on effective interstate arrangements for tracking sex offenders as they move from one state to another. Of course, states are required under SORNA to implement some sort of registration system; in addition, in an

⁴⁰ See Guidelines, *supra* note 35, at 24. The Guidelines establish that a jurisdiction does not have to use the same terminology that SORNA has created so long as the classification system used is commensurate with the minimum standards set out in 42 U.S.C. § 16911. *Id.* Those sex offenders satisfying the criteria for each SORNA tier are subject to durations of registration, appearance frequency, and website disclosure requirements. *Id.* See also Safe NOW Act of 2006, H.R. 4815, 109th Cong. (2d Sess. 2006). Safe NOW Act of 2006 is a bill that proposes the establishment of a National Sex Offender Risk Classification Task Force whose duty would be to create a risk-based sex offender classification system that would be used nationwide to identify sex offenders and create a uniform national classification system. *Id.* The bill never went to vote before the end of the congressional session. *Id.*

⁴¹ 72 Fed. Reg. 30,210-211. See Ryland Devero, *Bill would add Internet details to Sex Offender Registry*, COLUMBIA MISSOURIAN, September 1, 2007, available at <http://www.columbiamissourian.com/stories/2007/09/01/bill-would-add-Internet-details-sex-offender-regis/>. "A Missouri state representative has proposed legislation that would require sex offenders to register e-mail addresses and electronic identities, such as instant messaging screen names, with state law enforcement." *Id.* Only those e-mail addresses and electronic identities registered will be allowed to be used, and use of a nonregistered ID will be treated the same as not registering an address. *Id.* See also Steven J. Wernick, Note, *In Accordance With a Public Outcry: Zoning Out Sex Offenders Through Residence Restrictions in Florida*, 58 FLA. L. REV. 1147 (2006). Expanding the registration laws to keep track of sex offenders, some states are resorting to even more restrictive measures by implementing residence restrictions, such as prohibiting sex offenders from living near schools and other child-centered facilities. *Id.*

⁴² Guidelines for Sex Offender Registration, 72 Fed. Reg. at 30,210-11. Ultimately, SORNA replaced the piecemeal, repeatedly-amended Jacob Wetterling Act of 1994. *Id.* See The National Conference of State Legislatures Summary for Public Law 109-248 (HR 4472), <http://www.ncsl.org/standcomm/sclaw/walshact.htm> (last visited Jan. 8, 2009) (providing a comprehensive summary of the Walsh Act).

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effort to further protect the public, some states have attempted to do more than what SORNA requires: some states have enacted their own sentencing guidelines and post-release supervision restrictions for Internet sex offenders.⁴³ Not only have sex offenders challenged the constitutionality of SORNA and the federal Sentencing Guidelines, but they have also challenged corresponding state sentencing guidelines and post-release supervision restrictions for Internet sex offenders.

B. Sentencing Guidelines and Terms of Supervised Release

1. United States Federal Sentencing Statutes

Former United States Attorney General Alberto Gonzales stated that “the ability of judges to exercise discretion ‘threatens the progress we have made in ensuring tough and fair sentences for federal offenders.’”⁴⁴ The Sentencing Guidelines provide the framework under which the judiciary imposes all sentencing in the federal criminal system.⁴⁵ Over the past few years, Congress has passed many federal laws enhancing

⁴³ 42 U.S.C. § 16912 (current through P.L. 110-316 approved 8-14-08) (requiring states to comply with SORNA requirements). See Guidelines for Sex Offender Registration, 72 Fed. Reg. at 30,210. The SMART Office is also responsible for determining whether a jurisdiction has substantially implemented the SORNA requirements. *Id.*

⁴⁴ FEDERAL SENTENCING REPORTER, NACDL Report, *Truth in Sentencing? The Gonzales Cases*, 17 No. 5, 327-34 (July 2005). Gonzales illustrated the varying types of judicial discretion by giving the following real life example. *Id.* Two defendants, one from New York and one from New Jersey, were convicted of similar charges involving the possession of child pornography. *Id.* at 327. The New York defendant faced sentencing of twenty-seven to thirty-three months in prison, but received only probation, whereas the New Jersey defendant faced sentencing of thirty to thirty-seven months and received forty-one months in prison. *Id.* Gonzales stated that the difference between the two sentences was based upon what each judge deemed important. *Id.* The New York judge reasoned that the defendant would best benefit from psychological treatment and only sentenced him to probation. *Id.* On the other hand, in New Jersey, the judge felt that protection of the public was most important and best accomplished by sentencing the offender to prison. *Id.* Some commentators argue that judicial discretion can protect society better than mandatory sentencing guidelines, but the discrepancy in sentencing is troublesome. *Id.*

⁴⁵ Christopher Wiest, Comment and Casenote, *The Netsurfing Split: Restrictions Imposed on Internet and Computer Usage By Those Convicted of a Crime Involving a Computer*, 72 U. CIN. L. REV. 847, 848-49 (2003). The Sentencing Guidelines determine the length of a prison sentence, while also allowing a judge to impose a term of supervised release after incarceration. *Id.* at 849. See 18 U.S.C. § 3553 (2000) (providing factors that courts look to when determining the appropriate sentence to impose on a defendant). See also Frank E. Correll, Jr., Note, *You Fall into Scylla in Seeking to Avoid Charybdis: The Second Circuit's Pragmatic Approach to Supervised Release for Sex Offenders*, 49 WM. & MARY L. REV. 681, 686-89 (2007) (discussing which factors courts look to in determining appropriate conditions of supervised release and how those factors are tied to the provisions presented in § 3553).

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the sentencing penalties for sex offenders and increasing the supervision of sex offenders who are released from prison.⁴⁶

In 1984, Congress established the United States Sentencing Commission ("Sentencing Commission") through the passage of the Sentencing Reform Act.⁴⁷ The Sentencing Commission is responsible for helping to create more equitable sentencing policies for delinquent members of society.⁴⁸ Subsequently, the Sentencing Commission

⁴⁶ Demleitner, *supra* note 37, at 564. Many federal laws that have been passed by Congress and aimed at enhancing the penalties for sex offenders have been driven by public concern about sex offenders and the media's active role in publicizing sexual crimes across the country. *Id.*; see *supra* Part II.A.1 (discussing numerous statutes that have helped shape sex offender registration and sentencing guidelines).

⁴⁷ See 28 U.S.C. § 991 (2000), which established the Sentencing Commission and set out its purpose:

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

Id. The legislative history of the Sentencing Reform Act alluded to the principal goal of supervised release. See also S. Rep. No. 98-225, at 124 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3307. The 1983 Senate Judiciary Committee reported that

the sentencing purposes of incapacitation and punishment would not be served by a term of supervised release—that the primary goal of such a term is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison . . . but still needs supervision and training programs after release.

Id.

⁴⁸ See Demleitner, *supra* note 37, at 566. Demleitner notes that in order for the Commission to create effective sentences for each type of individual, it must develop guidelines that consider the backgrounds and characteristics of typical offenders of the crime at issue rather than base the guidelines on an unrepresentative stereotypical offender. *Id.* This becomes even more difficult when dealing with sex offenders, in

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enacted two distinct, yet intertwined, statutes of Title 18 of the United States Code—section 3553, Imposition of a Sentence, and section 3583, Inclusion of a Term of Supervised Release.⁴⁹ The Sentencing Commission not only creates statutes that determine the length of the sentence that a convicted criminal may face, it also allows a court to impose a term of supervised release to follow any prison sentence.⁵⁰ The restrictions, however, must involve no greater deprivation of liberty than is reasonably necessary to afford adequate deterrence to criminal conduct, protect the public from future potential crimes of the defendant, and provide the defendant with the needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.⁵¹

particular, because of the diverse nature of this type of offender. *Id.* Thus, the following question arises: whether federal judges should impose individualized sentences or take a more nationally uniform approach. *Id.*

⁴⁹ See 18 U.S.C. §§ 3553, 3583 (2000). Section 3553(a) of the Code sets forth general factors to be considered when imposing a sentence for any criminal offender. *Id.* § 3553(a). In *United States v. Booker*, the Supreme Court determined that the Sentencing Guidelines are advisory rather than mandatory. 543 U.S. 220, 245–46 (2005). *Booker* arose in the context of sentencing enhancements, not supervised releases, and the Court's opinion narrowly reflects this. *Id.* at 244–45. See also *United States v. Crume*, 422 F.3d 728, 732–33 (8th Cir. 2005). Decided after *Booker*, the *Crume* court determined that a court may impose only those special conditions of supervised release that satisfy three statutory requirements:

First, the special conditions must be 'reasonably related' to five matters: the nature and circumstances of the offense, the defendant's history and characteristics, the deterrence of criminal conduct, the protection of the public from further crimes of the defendant, and the defendant's educational, vocational, medical or other correctional needs. Second, the conditions must 'involve[] no greater deprivation of liberty than is reasonably necessary' to advance deterrence, the protection of the public from future crimes of the defendant, and the defendant's correctional needs. Finally, the conditions must be consistent with any pertinent policy statements issued by the sentencing commission.

Id. at 733 (citations omitted) (alteration in original).

⁵⁰ See Wiest, *supra* note 45, at 849 (discussing the role of Section 3583 within the scope of the Sentencing Guidelines and the court's discretion in implementing those guidelines). See 18 U.S.C. § 3583, which states:

(a) In general.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b) [18 USC § 3561(b)].

Id.

⁵¹ 18 U.S.C. § 3583; 18 U.S.C. § 3553(a)(2)(B)–(D).

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Prohibitions on computer and Internet use for convicted Internet sex offenders on supervised release vary in form and degree.⁵² Special restrictions imposed and upheld by courts cover a broad range of exclusions.⁵³ At one end of the spectrum is a complete prohibition on computer and Internet use.⁵⁴ At the other end of the spectrum, circuit courts of appeals have required district courts to establish standards that are narrowly tailored to target specific unwanted Internet access, ultimately concluding that broad computer and Internet use restrictions are too invasive.⁵⁵ Finally, there is a middle-ground approach by which courts have implemented computer and Internet restrictions but have also required these restrictions to contain exceptions to allow computer or Internet use when it is approved in advance by the released sex offender's probation officer.⁵⁶ Although some circuit courts have created restrictions, the discretionary approach of these federal courts has caused states to take individual action and create their own statutory language.

2. State Statutory Sentencing Guidelines—Action in a Time of Inaction

While federal lawmakers merely debated and reviewed possible statutes and regulations regarding Internet crimes and Internet sex offenders, states like Minnesota and New Jersey took action.⁵⁷ In *United*

⁵² See Wiest, *supra* note 45, at 861. The variety and disparity in prohibitions and sentencing is in part due to the fact that there is no precise language for the courts to follow in their discretionary sentencing. *Id.*; see *infra* Part II.C (discussing the split among Federal Circuit Courts of Appeals and the various factors that each considers when choosing to uphold or deny a computer or Internet restriction).

⁵³ See Wiest, *supra* note 45, at 861 (identifying the various approaches and addressing several questions raised by the implementation of those approaches).

⁵⁴ *Id.*; see *infra* Part II.C.1 (discussing circuit cases that have upheld a complete ban on computer and Internet use).

⁵⁵ See *infra* Part II.C.2 (discussing circuit cases that disallow a complete ban on computer and Internet use).

⁵⁶ See Wiest, *supra* note 45, at 861. See also ARTHUR L. BOWKER & GREGORY B. THOMPSON, COMPUTER CRIME IN THE 21ST CENTURY AND ITS EFFECT ON THE PROBATION OFFICER, 65 Federal Probation 18 (Sept. 2001) (suggesting that as the criminal's modus operandi changes, so must the probation officer's approach to monitoring the criminal). This article notes that the type of probation officer recruited and the type of training a probation officer receives once hired has changed in the Twenty-First Century, compared to previous centuries. *Id.*

⁵⁷ See FLA. STAT. §§ 947.1405(7)(a)(7), 948.30(1)(g)-(h) (2007); MINN. STAT. § 243.055 (2003); NEV. REV. STAT. § 176A.410(1)(q) (2006); N.J. STAT. ANN. § 2C:45-1(d)(2) (West Supp. 2008). See also *Brown v. Cockrell*, No. 3-02-CV-2433-N, 2003 WL 21458751, *1 (N.D. Tex. Apr. 29, 2003). The *Cockrell* court held that the state's imposition of a condition that prohibited the defendant from owning or operating a computer or photographic equipment without prior approval did not violate the Ex Post Facto Clause. *Id.* at *5. The defendant was convicted of sexual assault with a child and indecency with a child. *Id.* at *1. After the defendant had already been sentenced and was serving his mandatory

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States v. Beckman, a Minnesota court rejected Bradley Beckman's contention that Minnesota's statutory provision prohibiting the use of the Internet while on probation was not reasonably related to the purposes of sentencing and that the restriction inflicted a greater deprivation on his liberty than was reasonably necessary.⁵⁸ Minnesota Statute Section 243.055(1) provides that the state can "prohibit the individual from possessing or using a computer with access to an Internet service or online service without the prior written approval of the [C]ommissioner[.]"⁵⁹ Prior to *Beckman*, when there was no Minnesota

supervised release, the State Department of Criminal Justice, pursuant to a newly enacted state statute, added ten new special conditions to his probation restrictions, including one that prohibited computer use. *Id.* at *4.

⁵⁸ *United States v. Beckman*, No. CX-02-2248; 2003 WL 22774394, at *4-5 (Minn. Ct. App. Nov. 25, 2003). Bradley Beckman was charged with possessing pornographic material of a minor on his computer zip drives and was sentenced to one year and one day of jail time, followed by three years of probation in which he was not allowed access to the Internet. *Id.* at *1. See *Miller*, *supra* note 11, at 22-23 (citing courts allowing complete bans on defendants' Internet access as long as the bans are pre-approved by a probation officer).

⁵⁹ MINN. STAT. § 243.055(1) (2003). Minnesota's statute reads as follows:

Subdivision 1. Restrictions to use of online services. If the commissioner believes a significant risk exists that a parolee, state-supervised probationer, or individual on supervised release may use an Internet service or online service to engage in criminal activity or to associate with individuals who are likely to encourage the individual to engage in criminal activity, the commissioner may impose one or more of the following conditions:

(1) prohibit the individual from possessing or using a computer with access to an Internet service or online service without the prior written approval of the commissioner;

...

(3) require the individual to consent to periodic unannounced examinations of the individual's computer equipment by a parole or probation agent, including the retrieval and copying of all data from the computer and any internal or external peripherals and removal of such equipment to conduct a more thorough inspection;

(4) require consent of the individual to have installed on the individual's computer, at the individual's expense, one or more hardware or software systems to monitor computer use; and

(5) any other restrictions the commissioner deems necessary.

Subd. 2. Restrictions on computer use. If the commissioner believes a significant risk exists that a parolee, . . . may use a computer to engage in criminal activity or to associate with individuals who are likely to encourage the individual to engage in criminal activity, the commissioner may impose one or more of the following restrictions:

(1) prohibit the individual from accessing through a computer any material, information, or data that relates to the activity involved in the offense for which the individual is on probation, parole, or supervised release;

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case law on point as to whether a state could deprive a defendant of use of the Internet, the Eighth Circuit Court of Appeals had held that a state could restrict the use of Internet.⁶⁰

In the New Jersey Senate, Assemblyman Richard J. Codey introduced Bill Number 1979 on June 12, 2006.⁶¹ This bill allowed for certain restrictions on the computer and Internet privileges of sex offenders.⁶² In addition, the bill required convicted sex offenders to

(2) require the individual to maintain a daily log of all addresses the individual accesses through computer other than for authorized employment and to make this log available to the individual's parole or probation agent;

...

Subd. 3. Limits on restriction. In imposing restrictions, the commissioner shall take into account that computers are used for numerous, legitimate purposes and that, in imposing restrictions, the least restrictive condition appropriate to the individual shall be used.

Id. § 243.055.

⁶⁰ *Beckman*, 2003 WL 22774394 at *4. See, e.g., *United States v. Fields*, 324 F.3d 1025 (8th Cir. 2003); *United States v. Ristine*, 335 F.3d 692 (8th Cir. 2003).

⁶¹ S. 1979, 212th Legis. (N.J. 2006) (as passed by Senate, March 15, 2007) http://www.njleg.state.nj.us/2006/Bills/S2000/1979_R2.PDF. See State of New Jersey, Office of the Governor, *Dec-27-07 Governor Codey Signs Legislation Making New Jersey a Leader in Cracking Down on Internet Predators*, Dec. 27, 2007, <http://www.state.nj.us/governor/news/news/approved/20071227a.html> (last visited Jan. 3, 2007). The bill passed in both houses and was signed by acting Governor Richard J. Codey on December 27, 2007. *Id.* The restrictions require Internet sex offenders to submit to periodic examinations of their computers, install monitoring software on their computers, inform law enforcement if they have access to computers or the Internet, and receive written approval from the state before using a computer or accessing the Internet.

Id.

⁶² S. 1979, 212th Legislature. This bill is directed toward individuals convicted of a sexual offense, who are currently serving a special sentence of community or parole supervision for life or who have been adjudicated delinquent or found to be insane, and for whom a trier of fact has made a finding that a computer or any other device with Internet capability was used to facilitate the commission of the crime. *Id.* In those situations, the court shall order the following computer and Internet restrictions:

(1) Prohibit the person from accessing or using a computer or any other device with Internet capability without the prior written approval of the court except, if such person is on probation or parole, the person may use a computer or any other device with Internet capability in connection with that person's employment or search for employment with the prior approval of the person's probation or parole officer;

(2) Require the person to submit to periodic unannounced examinations of the person's computer or any other device with Internet capability by a probation officer, parole officer, law enforcement officer or assigned computer or information technology specialist, including the retrieval and copying of all data from the computer or device and any internal or external peripherals and

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submit to periodic, unannounced examinations of their computer equipment as well as to agree to the installation of government monitoring software on their hard drive.⁶³ When this bill passed in 2007, New Jersey became one of few states with statutory language restricting computer and Internet access.⁶⁴

Minnesota and New Jersey are examples of states beginning to take a stand on the implementation of computer and Internet restrictions.⁶⁵ In addition, Florida and Nevada have also imposed computer restrictions as a condition of their parole guidelines.⁶⁶ Once the remaining states

removal of such information, equipment or device to conduct a more thorough inspection;

(3) Require the person to submit to the installation on the person's computer or device with Internet capability, at the person's expense, one or more hardware or software systems to monitor the Internet use; and

(4) Require the person to submit to any other appropriate restrictions concerning the person's use or access of a computer or any other device with Internet capability.

Id. See N.J. STAT. ANN. § 2C:45-1(d)(2) (West Supp. 2008). This bill was passed on December 27, 2007. S1979, 212th Legis. (N.J. 2007) (as signed into law by Acting Governor Richard J. Codey). See *id.*

⁶³ See Bills 2006-2007, Session Voting, <http://www.njleg.state.nj.us/bills/BillView.asp> (last visited October 13, 2007) (displaying a count of thirty-six yes votes and four nonvoters). On March 15, 2007, after several amendments, the New Jersey Senate passed this bill in a 36-0 vote allowing for certain restrictions on Internet sex offenders' computer and Internet privileges. *Id.* See also Tom Hester, Jr., *N.J. Acts to Keep Sex Offenders Off Internet*, PHILLY ONLINE, May 21, 2007, http://www.philly.com/philly/hp/news_update/20070521_N_J_acts_to_keep_sex_offenders_off_Internet.html. The measures also require that online dating services must disclose to New Jersey residents whether they do background checks on all individuals who participate in the dating service. *Id.*

⁶⁴ N.J. STAT. ANN. § 2C:45-1(d)(2) (restricting certain Internet sex offenders' access to the Internet, this bill was signed into law on December 27, 2007). See also Hester, *supra* note 63, at *1 (explaining that New Jersey was one of the few states that enforced computer and Internet restrictions).

⁶⁵ See MINN. STAT. § 243.055 (2003) (setting forth Minnesota's law on computer and Internet restrictions for all offenders); N.J. STAT. ANN. § 2C:45-1(d)(2) (West Supp. 2008) (setting forth New Jersey's computer and Internet conditions for offenders on probation); Associated Press, *Sex Offenders Are Barred from Internet by New Jersey*, N.Y. TIMES, Dec. 28, 2007, available at http://www.nytimes.com/2007/12/28/nyregion/28offender.html?_r=1&oref=slogin (last visited Jan. 4, 2008) (describing the new computer restriction statute passed by New Jersey).

⁶⁶ See FLA. STAT. §§ 947.1405(7)(a)(7), 948.30(1)(g) (2007) (stating, "a prohibition on viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern[]"); NEV. REV. STAT. § 176A.410(1)(q) (2006 & Supp. 2007) (stating that a defendant convicted of a sexual offense shall not "possess any electronic device capable of accessing the Internet and not access the Internet through any such device or any other means, unless

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begin addressing computer and Internet sentencing restrictions for sex offenders, discrepancies will likely develop between the restrictions imposed by state courts and those imposed by federal courts. Currently, inconsistencies already exist among the federal appellate courts regarding whether to impose computer and Internet restrictions for Internet sex offenders.

C. *Disagreement Among the Circuits*

Recently, computer and Internet restrictions imposed as conditions of the supervised release of Internet sex offenders have become increasingly common.⁶⁷ In response, constitutional challenges to these restrictions have become common and typically assert that the restrictions are unnecessarily broad or that they amount to unreasonable liberty deprivations.⁶⁸ The issue of whether to impose restrictions on computer use, Internet access, or both, has created a contradictory line of cases among the courts of appeals.⁶⁹ Courts weigh several key factors to determine whether a condition of supervised release is incidental or necessary to prevent the crime from recurring.⁷⁰ Appellate courts have upheld or overturned the holdings of district courts based on the district court's analytical approach to specific facts of the cases; these decisions are discussed below.⁷¹

possession of such a device or such access is approved"). See also Hester, *supra* note 63, at *1 (providing examples of states with computer and Internet restriction statutes).

⁶⁷ Brian W. McKay, Note, *Guardrails on the Information Superhighway: Supervising Computer Use of the Adjudicated Sex Offender*, 106 W. VA. L. REV. 203, 220 (Fall 2003). See *infra* Parts II.C.1–2 (discussing various circuit court holdings).

⁶⁸ See *infra* Part II.D (discussing the limited expectations of liberty deprivations for Internet sex offenders).

⁶⁹ Compare *United States v. Paul*, 274 F.3d 155, 169 (5th Cir. 2001) (upholding an Internet prohibition where the defendant had used Internet communication to encourage exploitation of children by providing other pedophiles with advice on how to gain access to child victims), and *United States v. Crandon*, 173 F.3d 122, 127–28 (3d Cir. 1999) (upholding a post-release ban on Internet use where the defendant had been convicted of receiving child pornography and had also engaged in sexual relations with an underage girl he had met via electronic mail), with *United States v. Freeman*, 316 F.3d 386, 391–92 (3d Cir. 2003) (vacating an absolute Internet prohibition in the absence of evidence that the defendant had used the Internet to contact children), *United States v. Sofsky*, 287 F.3d 122, 126–27 (2d Cir. 2002) (vacating and remanding in a case involving a strict Internet prohibition, where the defendant had plead guilty to only receipt of child pornography), and *United States v. White*, 244 F.3d 1199, 1205 (10th Cir. 2001) (finding a ban on all computer and Internet use to be greater than necessary to serve the goals of supervised release, where the defendant had been convicted only of possession of child pornography).

⁷⁰ Jessica Habib, Note, *Cyber Crime and Punishment: Filtering Out Internet Felons*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1051, 1063 (2004).

⁷¹ See *supra* note 69 (discussing the various approaches taken by different circuit courts).

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1. Some Courts Have Allowed Computer and Internet Use, Post-Release, Supervision Restrictions for Internet Sex Offenders

In 1999, the Court of Appeals for the Third Circuit was one of the first appellate courts to uphold computer and Internet use restrictions, and the Courts of Appeals for the Fifth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have since followed suit.⁷² In *United States v. Crandon*, the Court of Appeals for the Third Circuit held that the trial court's imposition of certain supervised release restrictions on Defendant Richard Crandon ("Crandon"), which prohibited the defendant-sex offender from accessing any form of a computer network, bulletin board, Internet, or an exchange format involving computers, without prior approval from his probation officer, was not an abuse of discretion.⁷³ In its analysis, the court acknowledged that the Internet has become an omnipresent aspect of American life.⁷⁴ Yet, the court held that the restriction was narrowly tailored and directly related to the social policies of deterring Defendant Crandon from committing sexual crimes and also protecting society.⁷⁵

⁷² See *United States v. Sullivan*, 451 F.3d 884, 895 (D.C. Cir. 2006) (upholding district court's imposition of computer and Internet restrictions for a released sex offender); *United States v. Rearden*, 349 F.3d 608 (9th Cir. 2003) (same); *United States v. Fields*, 324 F.3d 1025 (8th Cir. 2003) (same); *United States v. Zinn*, 321 F.3d 1084 (11th Cir. 2003) (same); *United States v. Walser*, 275 F.3d 981, 985 (10th Cir. 2001) (same); *Paul*, 274 F.3d at 172 (same); *United States v. Crandon*, 173 F.3d 122, 127-28 (3d Cir. 1999) (same). See also *United States v. Ritter*, 118 F.3d 502, 504 (6th Cir. 1997). The Sixth Circuit upheld a supervised release restriction in 1997, holding that most restrictions are valid if they are directly related to advancing the individual's rehabilitation and protecting the public from repeat offenders. *Id.*

⁷³ *Crandon*, 173 F.3d at 127. Crandon was convicted of receiving child pornography after engaging in correspondence with a fourteen-year-old girl via the Internet. *Id.* at 125. After communicating with the girl through e-mail, the defendant drove from New Jersey to Minnesota, where he met the girl, engaged in sexual relations with her, and took approximately forty-eight photographs of her. *Id.*

⁷⁴ *Id.* at 128. Crandon challenged his post-release supervision restrictions, which prohibited him from accessing any form of a computer network, bulletin board, Internet, or an exchange format involving computers, without prior approval from his probation officer, arguing that it infringed on his liberty and bore no logical relation to his offense. *Id.* at 127. In addition, he argued that the condition would hamper his employment opportunities and infringe on his freedoms of speech and association. *Id.*

⁷⁵ *Id.* at 127-28. The court explained that a judge is given wide discretion in imposing supervised release. *Id.* at 127. Additionally, pursuant to section 3583 of Title 18 of the United States Code, a district court may order any appropriate condition as long as it

(1) is reasonably related to certain factors, including (a) the nature and circumstances of the offense and the history and characteristics of the defendant, (b) deterring further criminal conduct by the defendant, or (c) protecting the public from further criminal conduct by the defendant; and (2) involves no greater deprivation of liberty than is

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Similarly, in *United States v. Paul*, in 2001, the Court of Appeals for the Fifth Circuit affirmed the imposition of a complete prohibition on any computer or Internet use for Robert Paul ("Paul").⁷⁶ The *Paul* court held that the district court did not abuse its discretion when it imposed a condition of supervised release that prohibited the defendant-sex offender from possessing or accessing a computer and the Internet.⁷⁷ Although Paul argued that the Internet restriction was too broad, the court disagreed, and held that the prohibition of computer and Internet access was rationally related to Paul's offense and was an appropriate public-protection measure.⁷⁸

In *United States v. Walser*, also in 2001, the Court of Appeals for the Tenth Circuit held that Russell Walser ("Walser") was prohibited from using the Internet unless he had the permission of his probation officer.⁷⁹

reasonably necessary for the purposes of deterrence and protection of the public.

Id. See McKay, *supra* note 67, at 228 (comparing and contrasting the decisions of the federal circuits in regard to computer and Internet use restrictions); Habib, *supra* note 70, at 1070 (same).

⁷⁶ *Paul*, 274 F.3d at 172. Paul's problem began the day he took his computer to a repair technician, who found child pornography on Paul's computer and reported Paul to the FBI. *Id.* at 158. FBI agents found evidence that Paul had downloaded several images of child pornography on his computer. *Id.* Additionally, with a search warrant, agents found pictures of children, magazines containing photographs of nude children, videotapes of children, and a large bag of children's clothes. *Id.* Agents also found a medical bag containing basic medical supplies and Spanish-language fliers advertising free lice removal services and physical examinations of children which necessarily required them to completely undress. *Id.*

⁷⁷ *Id.* at 167. The district court was concerned with allowing Paul computer and Internet access after it learned that Paul's computer had contained child pornography. *Id.* at 168. Paul was sentenced to five years in prison and three years of supervised release with a complete ban on computer and Internet use. *Id.* at 159-60. Paul contended that the "blanket prohibition on computer or Internet use [wa]s excessively broad and [could not] be justified based solely on the fact that his offense involved a computer and the Internet." *Id.* at 168. Paul argued that computers and the Internet are "indispensible communication tools" in today's society, and that this restriction would prevent him from "accessing computers and the Internet for legitimate purposes, such as word processing and [conducting] research." *Id.* See Miller, *supra* note 11, at 19-20 (discussing the facts of *Paul* more in-depth).

⁷⁸ *Paul*, 274 F.3d at 171. The court determined that Paul used the Internet to "encourage exploitation of children by seeking out fellow 'boy lovers' and providing them with advice on how to find and obtain access to 'young friends.'" *Id.* at 169. Furthermore, the court concluded that Paul used his e-mail to "advise fellow consumers of child pornography [regarding] how to 'scout' single, dysfunctional parents and gain access to their children and to solicit the participation of like-minded individuals in trips to 'visit' children in Mexico." *Id.* at 168. See also Miller, *supra* note 11, at 19 (discussing the outcome reached in *Paul*); McKay, *supra* note 67, at 224 (same); Habib, *supra* note 70, at 1071-72 (same).

⁷⁹ *United States v. Walser*, 275 F.3d 981, 985 (10th Cir. 2001). During a drug investigation, police entered and searched Walser's motel room. *Id.* at 983. The Criminal

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In *Walser*, the court noted that the condition was not a complete ban on all Internet use and allowed Walser the opportunity to regain access to the Internet; therefore, it consequently upheld the Internet use restriction.⁸⁰ However, the decision by the *Walser* court to uphold the Internet use restriction does not necessarily mean that the Tenth Circuit will uphold all future post-release supervision bans on Internet use. In *Walser*, the court scrutinized whether the restriction on Walser imposed a greater deprivation than was necessary, but it did not determine whether Internet use restrictions would be proper in all instances.⁸¹ Instead, the court suggested that in determining the appropriateness of Internet use restrictions, the circumstances of the situation must be considered. Although the Tenth Circuit has not adopted a definitive stance on whether computer and Internet use restrictions during supervised release will be upheld, it did note that a valid condition would impose no greater deprivation of liberty than is reasonably necessary.⁸²

More recently, in *United States v. Sullivan*, the Court of Appeals for the D.C. Circuit considered for the first time whether Internet restrictions imposed during supervised release were proper.⁸³ As a condition of his supervised release, Roger Sullivan ("Sullivan") was forbidden from possessing or using a computer that had access to any online computer service at any location, including his place of employment, without prior

Investigation Division conducted a forensic analysis of Walser's computer and uncovered child pornography. *Id.* at 984. Walser pled guilty to possessing child pornography on his personal computer, was convicted, and was sentenced to twenty-seven months in prison and three years supervised release. *Id.* at 985. It was important to the court that the post-release supervision restriction imposed allowed Walser to access the Internet as long as he first gained permission from his probation officer to do so. *Id.* at 988.

⁸⁰ *Id.* at 988. However, a concern that remains unaddressed is whether a probation officer might unreasonably restrict the defendant from accessing a central means of communication. *See id.* *See also* Miller, *supra* note 11, at 18 (discussing the facts in *Walser* and the court's holding).

⁸¹ *Walser*, 275 F.3d at 988. Again, the court specifically questioned only whether the probation officer involved in the particular case would be impartial in deciding whether to allow the defendant to access the Internet. *Id.*

⁸² *Id.* The court distinguished the condition imposed in *Walser* from that in *White*, noting the reasonableness of the restriction and the importance of a narrowly tailored restriction. *Id.*

⁸³ *United States v. Sullivan*, 451 F.3d 884, 895 (D.C. Cir. 2006). Roger Sullivan ("Sullivan") was convicted of possessing and transporting child pornography via the Internet in violation of interstate commerce laws. *Id.* at 885–86. Sullivan pled guilty to one count of knowingly possessing child pornography images that were transported interstate via the Internet. *Id.* at 885. Over 75,000 files of pornographic images were found on Sullivan's work computer and external hard drive. *Id.* at 886. Sullivan was sentenced to thirty months imprisonment followed by two years of supervised release. *Id.* at 887.

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approval.⁸⁴ The court reasoned that some measure of computer and Internet restriction was appropriate, and ultimately upheld the district court's imposition of computer and Internet restrictions for Sullivan.⁸⁵ By contrast, not all courts have been willing to prohibit the use of computers or the Internet as post-release supervision restrictions for Internet sex offenders.

2. Some Courts Have *Not* Allowed Computer and Internet Use, Post-Release, Supervision Restrictions for Internet Sex Offenders

Some courts, such as the Courts of Appeals for the Second, Third, Seventh, and Tenth Circuits, have declined to uphold computer and Internet use, post-release, supervision restrictions for Internet sex offenders, reasoning that computers and the Internet have become an indispensable way of life without which members of modern society cannot exist.⁸⁶ For instance, in *United States v. Sofsky*, Gregory Sofsky ("Sofsky") was convicted of receiving more than 1,000 images of child

⁸⁴ *Id.* See also *United States v. Yuknavich*, 419 F.3d 1302 (11th Cir. 2005). The defendant was convicted of four counts of exploitation of a child and one count of distributing obscene material and was sentenced to seven years of probation. *Id.* at 1304. The court imposed as terms of his probation the prohibition of the "[I]nternet at any time unless work related during work hours." *Id.* The court stated, "[i]t is always true of probationers . . . that they do not enjoy the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions." *Id.* at 1308 (alterations in original).

⁸⁵ *Sullivan*, 451 F.3d at 896. One question before the court was whether downloading images from the Internet should be considered interstate commerce. *Id.* at 886. The court held that "because the images of child pornography were 'instrumentalities' or 'things' in interstate commerce and passed over the Internet, a 'channel' of interstate commerce, or, alternatively, because the conduct at issue—possession of child pornography—has a substantial relation to interstate commerce[.]" they are rightly regulated under the Commerce Clause. *Id.* at 886–91.

⁸⁶ See *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002) (holding that while prohibiting Defendant Gregory Sofsky ("Sofsky") from accessing a computer or Internet is reasonably related to the purposes of his sentencing, due to the nature of his offense, the condition inflicts a greater deprivation of liberty than is reasonably necessary); *United States v. White*, 244 F.3d 1199, 1206 (10th Cir. 2001) (noting that a total ban on computer use and Internet access prevents access to an increasingly popular form of communication and also prevents everyday uses of the computer for checking the weather and news). See also Habib, *supra* note 70, at 1064. In a world of communications and information gathering, computer and Internet access are indispensable, and the mere fact that a computer with Internet access offers a medium through which abuse can occur is not a legitimate justification for imposing computer or Internet restrictions. *Id.* (citing *United States v. Peterson*, 248 F.3d 79, 83 (2d Cir. 2001)). For example, the fact that a defendant had used a phone to commit fraud would not substantially justify a condition of probation to bar his use of telephones. *Id.*

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pornography via the Internet.⁸⁷ The defendant-sex offender's supervised release sentence prohibited him from using a computer or the Internet without the approval of his probation officer, but the Court of Appeals for the Second Circuit reversed the district court's holding and determined that these restrictions were improper.⁸⁸ Although the court conceded that these restrictions were related to the purpose of sentencing, it concluded that the restrictions imposed a greater deprivation of Sofsky's liberty than was necessary.⁸⁹

The Court of Appeals for the Seventh Circuit has also overturned judicial decisions in which the lower courts had permitted computer and Internet use, post-release, supervision restrictions.⁹⁰ For example, in

⁸⁷ *Sofsky*, 287 F.3d at 124, 126 (declining to uphold the post-release supervision restriction of an Internet sex offender because it completely banned all Internet use). Sofsky pled guilty to receiving child pornography based on evidence that he downloaded over 1,000 images from the Internet and had exchanged them online with others. *Id.* Sofsky was sentenced to ten years in prison to be followed by a term of supervised release, during which time he was not allowed to have access to the computer or Internet without the approval of his probation officer. *Id.* Cf. *Sullivan*, 451 F.3d at 895 (upholding the Internet restriction for an Internet sex offender released on probation, reasoning that it had a substantial relationship to the goal of supervised release).

⁸⁸ *Id.* at 127. The court acknowledged that Sofsky's access to computers and the Internet could facilitate quicker access to child pornography. *Id.* at 126. However, the court was still unwilling to allow the prohibition. *Id.* A total ban on the Internet would prevent access to e-mail, which has become a significant communication tool. *Id.* The court relied on *United States v. Peterson*, in which it had previously struck down an Internet ban imposed on a felon who had pleaded guilty to bank larceny and had previously been convicted of incest. *Id.* (citing *Peterson*, 248 F.3d 79, 82-84 (2d Cir. 2001)). The Court of Appeals for the Second Circuit held in *Peterson* that the prohibition imposed was not *reasonably related* to Defendant Larry Peterson's offense and that the value of the defendant's ability to access the Internet outweighed the potential for abuse. *Peterson*, 248 F.3d at 83 (emphasis added). See also MILLER, *supra* note 10, at 4 (discussing the relationship between *Peterson* and *Sofsky*); Habib, *supra* note 70, at 1065-66 (same).

⁸⁹ *Sofsky*, 287 F.3d at 126. The court supported its conclusion with the statutory language of 18 U.S.C. § 3583(d), defining the Sentencing Commission's statement of policy. *Id.* The government contended during oral arguments that without a total ban on the defendant's access to the Internet, it would not be able to sufficiently monitor Sofsky's use of his computer. *Id.* The court responded by indicating that several alternatives for monitoring currently exist. *Id.* at 126-27. First, the probation officer could engage in unannounced monitoring to see if Sofsky was using his computer. *Id.* Second, the court could limit the type of sites that are accessible on Sofsky's computer. *Id.* at 127. Last, the government could test Sofsky by inviting him to respond to advertisements for pornography placed by the government as part of a sting operation. *Id.*

⁹⁰ See *United States v. Holm*, 326 F.3d 872, 877-78 (7th Cir. 2003) (court was unwilling to allow for a complete ban of the Internet for the post-release supervision restriction of an Internet sex offender). See also *United States v. Scott*, 316 F.3d 733, 737 (7th Cir. 2003). The court decided that a total ban on access to Internet services, imposed on the defendant without advance notice, was impermissible, particularly given the open-ended nature of the delegation of power to the probation officer. *Id.* The case was remanded to the district court to consider a more narrowly tailored and precise set of rules. *Id.*

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United States v. Holm, Delbert Holm ("Holm") was convicted of possessing child pornography that he had downloaded from the Internet.⁹¹ The Court of Appeals for the Seventh Circuit held that a total ban on Holm's use of the Internet was overly broad and imposed a greater deprivation of the defendant-sex offender's liberty than was necessary, and thus failed to satisfy the narrow tailoring requirements of section 3583(d)(2) of Title 18 of the United States Code.⁹² The appellate

⁹¹ *Holm*, 326 F.3d at 877-78. Holm was an information system technologist who pled guilty to possession of child pornography. *Id.* at 873-74. The defendant downloaded more than 100,000 pornographic images of which approximately 10-20 percent were children performing sexually explicit activities. *Id.* At his initial sentencing hearing, the court imposed several supervised release conditions, including the use or possession of any computer with Internet capabilities. *Id.* In his defense, Holm presented evidence that he had not used any of the computers from work in the commission of his crimes. *Id.* at 878. The court ultimately declined to uphold the complete ban on Holm's access to the Internet. *Id.*

But see generally *United States v. Taylor*, 338 F.3d 1280 (11th Cir. 2003) (where the defendant was convicted of the use of interstate facilities to transmit information about a minor child with the intent to solicit any person to engage in sexual activity with the minor, the court affirmed the special condition prohibiting the defendant from using or possessing a computer with Internet access); *McVey v. State*, 863 N.E.2d 434 (Ind. Ct. App. 2007) (where the defendant was convicted of child molestation and prohibited from using any computer with access to any online computer service without prior approval; the reviewing court held this was reasonably related to defendant's successful reintegration into the community and served to protect the public and prevent future criminal activity); *People v. Crumpler*, No. E034407, 2005 WL 428468 (Cal. App. 4th Dist. 2005) (unpublished) (where the defendant was convicted of solicitation of a lewd act upon a child and sentenced to refrain from using any computer with access to the Internet and to refrain from using any other computer except in the course of his employment; the reviewing court upheld the condition reasoning that it would only be invalid if it had no relationship to the crime involved); *Brown v. Cockrell*, No. 3-02-CV-2433-N, 2003 WL 21458751 (N.D. Tex. Apr. 29, 2003) (where the defendant was convicted of sexual assault of a child and indecency with a child; the court upheld a restriction prohibiting the defendant from owning or operating a computer or photographic equipment); *Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002) (where the defendant was convicted of child molestation and was prohibited from using any computer or having access to any online computer service; the court declared the condition valid because it was intended to prevent the defendant from viewing prohibited materials); *State v. McKinney*, 750 N.E.2d 1237 (Ohio Ct. Com. Pl. 2000) (where the defendant was prosecuted for rape after previously being convicted of gross sexual imposition; one of the conditions required that the defendant not own computers and stay off of the Internet, and the reviewing court upheld this condition explaining that the defendant's access to pornography was not in the defendant's or society's best interest and the Internet was the gateway to too many pornographic websites). There are several cases in which courts have upheld computer and Internet restrictions, even if neither computers nor Internet access was used in the facilitation of a crime. *See, e.g., Taylor*, 338 F.3d 1280; *Crumpler*, 2005 WL 428468; *Cockrell*, 2003 WL 21458751; *McVey*, 863 N.E.2d 434; *Smith*, 779 N.E.2d 111; *McKinney*, 750 N.E.2d 1237.

⁹² *Holm*, 326 F.3d at 877-78. The court noted that during the sentencing hearing, Holm pointed out that he had almost thirty years of employment in computerized telecommunications and that prohibiting him from the use of computers with network

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court acknowledged that it was understandable that the lower court was inclined to impose a ban on Internet use, given the severity of the defendant's sex offenses for which he was convicted, coupled with the fact that he had used the Internet to commit them, but it nonetheless held that a strict ban prohibiting all Internet use is counterproductive to enabling an individual to perform routine life tasks after being released from incarceration.⁹³ The court reasoned that the because the supervised release restrictions as written had the potential to affect the sex offender's future productivity and jeopardize his rehabilitation, they violated section 3583(d) of Title 18 of the United States Code.⁹⁴

connectivity would burden his ability to be a productive person in this type of work environment. *Id.* But see *United States v. Crandon*, 173 F.3d 122, 128 (3d Cir. 1999). Crandon also tried to argue that as businesses continue to integrate computers and Internet into the workplace, such a restriction would hamper his employment opportunities. *Id.* The court in *Crandon* held that the restrictions were permissible, though, because they were narrowly tailored and directly related to deterring Crandon from criminal activity and to protecting the public. *Id.* See also *State v. Ehli*, 681 N.W.2d 808 (N.D. 2004). In *Ehli*, the defendant pled guilty to continuous sexual abuse of a minor, and the trial court imposed as a probation condition a complete bar on contact with minor children and Internet access. *Id.* at 809. The defendant argued that his occupation involved computers and access to the Internet, but the court held that the bar on Internet access was reasonably related to the offense committed. *Id.* at 811.

⁹³ *Holm*, 326 F.3d at 878. "[F]or example, the government strongly encourages taxpayers to file their returns electronically, where more and more commerce is conducted on-line, and where vast amounts of government information are communicated via website[.]" *Id.* The *Holm* court, along with the *Sofsky* court, stated that various forms of Internet supervision could be implemented to provide a middle ground between an absolute ban on computer and Internet use and no restriction whatsoever on computer or Internet use to allow a released sex offender to function in the modern world. *Id.* at 877-78. See also Correll, *supra* note 45, at 684-86 (discussing the different implications of an absolute ban on computer and Internet use); Miller, *supra* note 11, at 18 (comparing absolute bans with absolutely no bans).

⁹⁴ *Holm*, 326 F.3d at 878. See *supra* note 91 (noting that sometimes courts will hold a condition valid even if computer or Internet use was not a part of the commission of the crime). However, the following cases involve sexual crimes where the post-release supervision restrictions were held to be invalid. See generally *United States v. Feigenbaum*, 99 Fed. Appx. 782 (9th Cir. 2004) (defendant was convicted of transporting a minor with the intent to engage in sexual activity, and the court held that restricting the defendant's Internet use was ambiguous because it was not clear whether the defendant was completely banned from the Internet or whether he could use the Internet subject to approval); *United States v. Cabot*, 325 F.3d 384 (2d Cir. 2003) (defendant pled guilty to persuading a minor to engage in sexually explicit conduct for the purpose of producing visual depictions, and the court held the condition of prohibiting possession of a computer with access to the Internet invalid pursuant to the reasoning in *Sofsky*); *Foster v. State*, 813 N.E.2d 1236 (Ind. Ct. App. 2004) (defendant was guilty of sexual misconduct with a minor and prohibited from possessing or viewing any pornographic or sexually explicit material on computer or Internet files, and the court found this restriction to be too broad and not sufficiently clear to inform the defendant as to what type of behavior was and was not allowed); *Fitzgerald v. State*, 805 N.E.2d 857 (Ind. Ct. App. 2004) (defendant was convicted

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In addition, although the Court of Appeals for the Third Circuit upheld the defendant's post-release supervision restriction prohibiting computer and Internet use in *Crandon* in 1999, the court was not willing to uphold a similar post-release supervision restriction prohibiting Defendant Robb Freeman's ("Freeman") computer and Internet use in *United States v. Freeman* in 2003.⁹⁵ The *Freeman* court held that the prohibition on computer possession and Internet access was overbroad, and in doing so, distinguished its decision from its earlier opinion in *Crandon*.⁹⁶ It noted that there was no evidence in the record to suggest that Defendant Freeman had used the Internet to contact children or that he had built his child pornography collection through online activities, whereas in *Crandon*, the defendant had used the Internet to contact minor children and solicit inappropriate sexual contact.⁹⁷ Therefore, the *Freeman* court held that because the evidence did not indicate that Freeman had used a computer or the Internet to commit the sex offenses for which he was convicted, the computer and Internet restriction imposed on Freeman involved a greater deprivation of liberty than was reasonably necessary.⁹⁸

of sexual misconduct with a minor and received similar prohibitions as the defendant in *Foster*, and the court again held the language of the restriction to be unconstitutionally vague and remanded the case).

⁹⁵ *United States v. Freeman*, 316 F.3d 386, 392 (3d Cir. 2003) (stating that there was no need to totally eliminate Freeman's computer or Internet access when a more narrow restriction was available). See *Crandon*, 173 F.3d at 127 (upholding the computer and Internet restrictions imposed by the district court).

⁹⁶ *Freeman*, 316 F.3d at 391-92. Freeman was arrested after an undercover customs agent, in a face-to-face meeting, permitted Freeman to copy computer files containing child pornography. *Id.* at 387. In addition to determining Freeman's sentence, the court also imposed special conditions on Freeman's supervised release. *Id.* at 389. The defendant was not allowed to possess or use a computer with Internet service, or have any computer equipment at his home. *Id.* at 389-90. In addition, the defendant was required to submit to all unannounced examinations of his residence and possessions. *Id.* at 390. More specifically, the court determined that there was no need to totally eliminate Freeman's access to e-mail or the Internet when a more focused restriction, limited to pornographic sites and images, could be enforced. *Id.* at 392. See also McKay, *supra* note 67, at 228 (distinguishing *Freeman* from *Crandon*).

⁹⁷ *Freeman*, 316 F.3d at 392. The record gave no explanation of the origin of Freeman's collection of child pornography or whether his collection was built through online activities. *Id.* See McKay, *supra* note 67, at 229 (noting that the Court of Appeals for the Third Circuit failed to consider, or considered unimportant, the online activities that likely led to Freeman's collection of child pornography). Compare *Freeman*, 316 F.3d at 387 (in which Freeman was convicted only of copying hard files from an undercover detective and possessing images on his computer of child pornography), with *Crandon*, 173 F.3d at 124-26 (in which Crandon used the Internet to contact minors and solicit inappropriate sexual contact).

⁹⁸ *Freeman*, 316 F.3d at 391-92.

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The Court of Appeals for the Tenth Circuit has also articulated distinctions between cases it decided. Unlike in *Walser*, where the Court of Appeals for the Tenth Circuit upheld the Internet use, post-release, restriction that was imposed on the defendant, in *United States v. White*, the same court determined that a similar post-release supervision restriction was overreaching.⁹⁹ In *White*, the trial court ordered Robert White (“White”) not to possess a computer with Internet access throughout the period of his supervised release.¹⁰⁰ The Court of Appeals for the Tenth Circuit overturned the trial court’s holding, however, reasoning that the post-release supervision restriction was overreaching because it prevented White from having access to the Internet.¹⁰¹ In sum, the struggle among circuit courts to balance the liberty interests of Internet sex offenders with society’s interests of safety and security has resulted in much disagreement regarding whether computer and Internet use restrictions are appropriate as conditions of the supervised release of Internet sex offenders.

D. Limited Expectations of Liberty – From Felon to Internet Sex Offender

Individuals possess a reasonable expectation of privacy when using their home computers.¹⁰² However, as the court stated in *Guest v. Leis*, an

⁹⁹ Compare *United States v. White*, 244 F.3d 1199, 1206 (10th Cir. 2001) (holding that the special conditions were too narrow and overly broad), and *infra* note 182 (giving examples of conditions that are both too narrow and overly broad), with *United States v. Walser*, 275 F.3d 981, 988 (10th Cir. 2001) (holding that the prohibition on Internet use was sufficiently and narrowly tailored because the prohibition allowed for an exception if the sex offender obtained permission from the probation officer to access the Internet).

¹⁰⁰ *White*, 244 F.3d at 1201. In 1996, White responded to an advertisement on the Internet for videos of young girls engaged in sexual intercourse; however, this was a sting operation by United States Customs officials. *Id.* White was arrested and convicted of receiving child pornography and violating a special condition of release. *Id.* He objected to three of the five supervised release conditions, arguing that the ban on possession of a computer with Internet access infringed on his First, Fourth, and Fourteenth Amendment rights. *Id.* at 1202.

¹⁰¹ *Id.* at 1206. The court reasoned that if the restriction was overreaching, it would prevent White from using a computer at the library to do any research, get a weather forecast, or read a newspaper online. *Id.* One question the court raised was as follows:

Although Mr. White may still technically possess a computer for word processing and record keeping, most computers now are equipped with an internal modem, rendering any use of the computer a possible access to the Internet. Without more, does his mere possession of such a computer equate to violating the special condition?

Id. at 1205 n.7.

¹⁰² *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004). See also *Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001) (stating that an individual has a reasonable expectation of privacy in a shared computer if his log-in is password-protected and that no other person

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individual loses that expectation of privacy after his transmissions, sent via the Internet or through e-mail, have reached the recipient.¹⁰³ In *United States v. Lifshitz*, the Court of Appeals for the Second Circuit addressed, for the first time, the government's interest in imposing conditions restricting a defendant-sex offender's computer and Internet use.¹⁰⁴ The court noted the government's interest not only in deterring the sex offender from reengaging in old behavior but also in controlling the defendant's computer and Internet access as a means of rehabilitation.¹⁰⁵ The *Lifshitz* court suggested that a close and substantial relationship between the governmental interest and the condition imposed must exist in order for computer and Internet use restrictions to be proper.¹⁰⁶ Nonetheless, the court acknowledged that individuals on probation would have a reduced expectation of privacy.¹⁰⁷

could consent to a search of the protected personal computer files); *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) ("Home owners would of course have a reasonable expectation of privacy in their homes and in their belongings—including computers—inside the home."); *Leventhal v. Knapek*, 266 F.3d 64, 73 (2d Cir. 2001) (holding that an employee "had a reasonable expectation of privacy in the contents of his office computer[]").

¹⁰³ *Guest*, 255 F.3d at 333 (comparing an e-mail to a letter sent through the mail, the court concluded that once the recipient took possession, the sender no longer held any expectation of privacy). In *Guest*, a task force investigating online obscenity seized two computer bulletin board systems operated by Cincinnati Computer Connection Bulletin Board System. *Id.* at 330. Users of the bulletin boards were able to access e-mail, chat rooms, online games, and conferences, where they could post or read messages on many topics and download pictures. *Id.*

¹⁰⁴ *Lifshitz*, 369 F.3d at 189. Brandon Lifshitz ("Lifshitz") was arrested after government agents investigated his home computer and found pornographic images of children. *Id.* at 175. Lifshitz pled guilty to one count of receiving illegal images. *Id.* at 176. The court sentenced Lifshitz to three years of supervised release during which time he was required to consent to the installation of monitoring software and filter devices on his personal computer and any other computer he owned. *Id.* at 177.

¹⁰⁵ *Id.* at 189. The court addressed the following three issues in the context of monitoring Lifshitz's computer use: (1) the government's interest in the particular condition; (2) the expectation of privacy of the offender; and (3) the scope and efficiency of the condition. *Id.* at 189–90.

¹⁰⁶ *Id.* at 192–93. See MILLER, *supra* note 10, at 6 (discussing how the Supreme Court's holding in *United States v. Knights*, 534 U.S. 112 (2001), applied to the computer monitoring of convicted sex offenders, where the court looked to the following two factors: (1) the degree to which the search intruded upon an individual's privacy, and (2) the degree of intrusion needed for the promotion of legitimate governmental interests).

¹⁰⁷ *Lifshitz*, 369 F.3d at 190. The court summarized its analysis by stating, "While the extent to which a probationer's privacy interests are implicated depends on the type of monitoring implemented[,] . . . they are, in any event, reduced by the very fact that he remains subject to federal probation." *Id.* (citing *United States v. Reyes*, 283 F.3d 446, 457 (2d Cir. 2002)). See also *United States v. Yuknavich*, 419 F.3d 1302 (11th Cir. 2005). In *Yuknavich*, Timothy K. Yuknavich ("Yuknavich") was discovered printing out pictures of child pornography at work and using his work computer to access pornographic images of children. *Id.* at 1304. Yuknavich pled guilty and received seven years of probation,

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Another case focusing on a defendant-sex offender's expectation of privacy is *United States v. Balon*, in which the court held that offenders on supervised release must endure a "diminished expectation of privacy that is inherent in the very term of 'supervised release.'" ¹⁰⁸ Unlike *Lifshitz*, the *Balon* court reviewed the factors laid out in the Sentencing Guidelines when it examined the restrictions imposed on Defendant Stephen A. Balon ("Balon"). ¹⁰⁹ In reviewing the remote monitoring conditions and the resulting implications for Balon's expectation of privacy, the court held that the government may employ such techniques to monitor Balon's behavior without harming his very limited expectation of privacy. ¹¹⁰

conditioned by not being able to access the Internet unless such use was work-related and during working hours. *Id.* In considering Yuknavich's expectation of privacy in his computer and computer related activities, the court considered the crime for which Yuknavich was on probation. *Id.* at 1310. The court stated that possession of child pornography is not a victimless crime and if the Internet restriction did not provide officers with the ability to examine Yuknavich's actions, then there would have been little reason for it to exist. *Id.* The court further noted that Yuknavich's expectation of privacy was reduced because of the actions he engaged in while on probation. *Id.* Because Yuknavich had repeatedly violated the terms of his release after being given several chances to correct his behaviors, he should have reasonably expected to be more closely monitored by probation officers. *Id.*

¹⁰⁸ *United States v. Balon*, 384 F.3d 38, 44 (2d Cir. 2004) (quoting *Reyes*, 238 F.3d at 460). Stephen A. Balon ("Balon"), a computer technician at a computer store, was convicted of one count of transporting child pornography in interstate commerce through the use of a computer. *Id.* at 41. Balon was caught trading movies and still images of pre-pubescent children engaged in explicit sexual activity with adults. *Id.* Balon's computer contained approximately 2,000 still images and 200 movie files of young children engaged in sexual conduct. *Id.* In addition, Balon had a prior conviction relating to Internet trading of child pornography and was a convicted sex offender because he had previously been convicted of sexually abusing his nine-year-old step sister. *Id.* Not only did Balon possess files on his computer, but agents also found compact discs in his vehicle that showed video files of children who had visited his workplace. *Id.*

¹⁰⁹ *Id.* at 42. Balon challenged the conditions of his supervised release sentence under various theories, but principally on the grounds that they were not reasonably related to his conviction and that they constituted a greater deprivation of liberty than reasonably necessary. *Id.* at 41. Due to Balon's status as a child sex offender and his admitted sexual interest in children, the court imposed the following three conditions on Balon's use of computers. *Id.* First, Balon was required to provide advance notice before using any computer, automated service, or connected device during his supervision. *Id.* Second, the probation office was authorized to install any application necessary on computers or connected devices to randomly monitor the defendant's media. *Id.* Last, Balon had to consent to and cooperate with unannounced examinations of computer equipment he owned or used. *Id.* See also 18 U.S.C. §§ 3553(a), 3583(d) (2006) (providing the statutory language that the court considered in rendering its opinion).

¹¹⁰ *Id.* at 45. Balon's appeal was ultimately dismissed for lack of ripeness, and the district court was ordered to review the supervised release conditions at a time closer to Balon's release into the program. *Id.* at 47. The court was insistent on examining the effectiveness

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The Sentencing Guidelines have provided a balancing test for courts to use when determining whether computer and Internet restrictions are warranted.¹¹¹ One question unanswered by the Sentencing Guidelines and corresponding case law, however, is whether these computer and Internet restrictions should be allowed at all, given the vast presence of computers and the Internet in modern society.¹¹² Currently, when Internet sex offenders are released into society after their incarceration, courts have to balance two duties in determining which type of probation restrictions are appropriate: (1) protecting citizens from those individuals who may reoffend, and (2) protecting the liberty interests of released individuals.¹¹³ Therefore, computer and Internet restrictions should be warranted in circumstances where the punishment is proportionate to the crime and the restriction provides the proper public protection while minimizing liberty deprivations.

III. WEIGHING THE OPTIONS: EXPECTATIONS V. RIGHTS

The Internet provides an anonymous forum for users to create new identities and engage in new and different modes of expression and presentation.¹¹⁴ In view of this reality, computer and Internet use restrictions enhance public safety and prevent criminal activity.¹¹⁵ However, opponents of computer and Internet restrictions look to the

and precision of proposed computer monitoring software and weighing the software's potential advantages with the likely downsides. *Id.* at 46–47.

¹¹¹ Habib, *supra* note 70, at 1056.

¹¹² *Id.* See John B. Horrigan, PEW INTERNET & AMERICAN LIFE PROJECT, A TYPOLOGY OF INFORMATION AND COMMUNICATION TECHNOLOGY USERS 2 (May 7, 2007), http://www.pewInternet.org/pdfs/PIP_ICT_Typology.pdf. In United States households, Internet access grew from less than forty-five percent in 2000 to over sixty percent in early 2007. *Id.* See also Correll, *supra* note 45, at 684–86 (describing the prevalence of the Internet in modern day society).

¹¹³ Habib, *supra* note 70, at 1056. See *infra* Part III.D (analyzing policy reasoning in support of computer and Internet restrictions). See generally McKay, *supra* note 67, at 234. There are two types of supervised release conditions, reactive and proactive measures. *Id.* Reactive measures require the officer to respond to a potential violation, whereas proactive measures are implemented to prevent future recurrences. *Id.*

¹¹⁴ Correll, *supra* note 45, at 689. See YVONNE JEWKES & KEITH SHARP, DOT.CON.S: CRIME, DEVIANCE, AND IDENTITY ON THE INTERNET, *Crime Deviance and the Disembodied Self: Transcending the Dangers of Corporeality*, 1–4 (Yvonne Jewkes ed., 2003). This anonymity allows criminals to commit a range of crimes from the passive and relatively harmless to the damaging and dangerous. *Id.* See also Jay Krasovec, Comment, *Cybersapce: The Final Frontier, for Regulation?*, 31 AKRON L. REV. 101 (1997) (discussing how users of the Internet can remain anonymous).

¹¹⁵ United States v. Paul, 274 F.3d 155, 169 (5th Cir. 2001).

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pervasiveness of computers and the Internet in society and argue that an individual has a right to access this prevalent form of communication.¹¹⁶

Part III.A analyzes arguments both for and against diminishing the liberty interests for Internet sex offenders.¹¹⁷ Next, Part III.B discusses the similarities and differences among the reasoning proffered by federal appellate courts.¹¹⁸ Then, Part III.C considers New Jersey's approach to computer and Internet restrictions for Internet sex offenders on supervised release.¹¹⁹ Finally, Part III.D addresses public policy considerations in support of computer and Internet use restrictions for Internet sex offenders.¹²⁰

A. *Should Internet Sex Offenders Have a Diminished Expectation of Freedom?*

1. Arguments in Favor of Implementing Computer and Internet, Post-Release, Supervision Restrictions for Internet Sex Offenders

As one commentator so aptly articulated, "Where a condition deprives a defendant of liberty or property, the condition must involve no greater diminishment than is necessary to protect the public from the defendant's future crimes, deter future criminal conduct, or provide correctional treatment and training in an effective manner."¹²¹ Courts allowing a ban on computer and Internet use hold that when a restriction is reasonably tailored to the offender's offense and the restriction serves the dual purpose of deterrence and public protection, the restriction is allowed.¹²² The defendant-sex offender's arguments in *Crandon* failed to persuade the court that the computer and Internet use prohibition would

¹¹⁶ See *infra* Part III.A.2 (arguing against recognizing that Internet sex offenders have diminished liberty interests).

¹¹⁷ See *infra* Part III.A (discussing whether a diminished expectation of freedom should apply to Internet sex offenders).

¹¹⁸ See *infra* Part III.B (analyzing whether federal courts of appeals have identified an underlying distinction between cases).

¹¹⁹ See *infra* Part III.C (discussing New Jersey's statute, which imposes Internet restrictions for sex offenders).

¹²⁰ See *infra* Part III.D (discussing policy reasons in support of computer and Internet restrictions).

¹²¹ McKay, *supra* note 67, at 220. McKay distinguishes between probation and supervised release in accordance with statutes 18 U.S.C. § 3563(b) and § 3583(d). *Id.* McKay restates the analysis courts apply when determining whether an imposed condition meets the elements set out in section 3583 of Title 18 of the United States Code. *Id.*; see also *United States v. Sullivan*, 451 F.3d 884, 895 (D.C. Cir. 2006); *United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005); *United States v. Scott*, 316 F.3d 733, 735 (7th Cir. 2003); *United States v. Walser*, 275 F.3d 981, 987-88 (10th Cir. 2001); *United States v. White*, 244 F.3d 1199, 1207 (10th Cir. 2001); *United States v. Crandon*, 173 F.3d 122, 127-28 (3d Cir. 1999).

¹²² See *supra* Part II.C (discussing the holdings and reasoning put forth by circuit courts regarding computer and Internet use restrictions).

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unnecessarily restrict career opportunities and freedom of speech and expression.¹²³ The *Crandon* court based its holding on the fact that the special condition was narrowly tailored, served a direct purpose of deterring Crandon from reoffending, and protected the public.¹²⁴

The *Crandon* court's reasoning is persuasive. First, Defendant Crandon used the Internet to develop an illegal sexual relationship with a young girl.¹²⁵ The court explained that the condition limiting Crandon's use of the Internet was directly related to the government's compelling purpose of "deterring [Crandon] from engaging in further criminal conduct[.]"¹²⁶ Second, the condition provided the opportunity for Crandon to gain permission from his probation officer to access a computer and the Internet.¹²⁷ This language strengthened the argument that the special condition was "narrowly tailored and [was] directly related to deterring Crandon and protecting the public."¹²⁸

Proponents of computer and Internet use, post-release, supervision restrictions for sex offenders argue that Internet access is a privilege—not an essential element to everyday living.¹²⁹ Opponents, on the other hand, argue that banning computer and Internet access for individuals who commit computer crimes is analogous to banning telephone use for individuals who commit fraud offenses by use of the telephone.¹³⁰ This analogy is inaccurate for a few reasons.¹³¹ First, to compare deprivation

¹²³ See *Crandon*, 173 F.3d at 128. Crandon was not only convicted of receiving child pornography, but also of using the Internet to develop a relationship with a young girl. *Id.* at 127.

¹²⁴ *Id.* at 128. See also *United States v. Ritter*, 118 F.3d 502, 504 (6th Cir. 1997) (holding that even though supervised release restrictions may affect constitutional rights, most restrictions are valid if directly related to advancing the released offender's rehabilitation and protecting the public from recidivism).

¹²⁵ See *supra* notes 73–74 and accompanying text; *supra* Part II.C.1 (describing the facts of *Crandon*).

¹²⁶ *Crandon*, 173 F.3d at 127–28. See also *United States v. Paul*, 274 F.3d 155, 168 (5th Cir. 2001) (noting the strong ties between Paul's dangerous behavior and computer activities, and ultimately upholding the computer and Internet restrictions imposed on him).

¹²⁷ *Crandon*, 173 F.3d at 127.

¹²⁸ *Id.* at 128. The court explained that when the district court imposed the conditions, it carefully considered Crandon's prior conduct and the need to protect the public, thus not abusing its broad discretion. *Id.*

¹²⁹ Habib, *supra* note 70, at 1078. Courts, such as the *White* court, have put more emphasis on the use of the Internet to facilitate the crime, as opposed to the Internet's role in society. *Id.* *Contra* *United States v. Peterson*, 248 F.3d 79 (2d Cir. 2001). The *Peterson* court noted that "[c]omputers and [the] Internet . . . have become virtually indispensable in the modern world of communications and information gathering." *Id.* at 83.

¹³⁰ See Habib, *supra* note 70, at 1064 (citing *Peterson*, 248 F.3d at 83).

¹³¹ See McKay, *supra* note 67, at 236–38 (describing the inaccuracies of the analogy). See, e.g., *Peterson*, 248 F.3d at 83 (putting forth the telephone analogy); *United States v. White*, 244 F.3d 1199, 1207 (10th Cir. 2001) (same).

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of the telephone with deprivation of the Internet is misleading.¹³² While both are prevalent forms of communication in today's society, they serve different purposes. If a person is deprived of using his telephone, he is prohibited from using one of the most basic forms of communication in today's society, a form of communication that most people would agree is absolutely necessary.¹³³ In contrast, the Internet, while prevalent, does not enable an individual to perform any task which cannot be achieved by some alternate method or means, such as by the telephone.¹³⁴ While the Internet may be a popular tool of choice, there are plenty of other channels of communication an individual may access more (or just as) easily, such as a telephone, which is not necessarily the case if a person is banned from a telephone.¹³⁵ The Internet provides a forum that is convenient, but it has yet to become a communication medium that is accessed exclusively for a specific purpose or with the same frequency as the telephone.¹³⁶ While it is powerful and has become an increasingly popular means of communication in today's society, it is still incapable

¹³² See McKay, *supra* note 67, at 236–38. See also Louis Llovio, *Cell Phones Increasingly Replace Standard Home Phone*, THE BALTIMORE DAILY RECORD, Oct. 6, 2006, available at http://findarticles.com/p/articles/mi_qn4183/is_20061006/ai_n16773947 (last visited Jan. 5, 2008). As the number of cell phones increases, the number of landlines decreases. *Id.* According to the 2006 U.S. Census American Fact Finder report, over five million Americans do not have landlines at home. *Id.* A trade group for wireless carriers reported that over 72 percent of Americans have cellular telephones. *Id.* Therefore, courts might face the following problem in the future when restricting Internet access: because many cell phones on today's market are Internet accessible, probation or parole officers must consider this point when enforcing Internet restrictions.

¹³³ See McKay, *supra* note 67, at 236–38. The telephone is especially important for making emergency phone calls. *Id.* at 236. While the Internet is powerful, it is still incapable of performing tasks that have been dominated by the telephone for the past few decades. *Id.*

¹³⁴ *Id.* McKay notes that through the Internet, information is placed at our fingertips, only a click away. *Id.* Everyday activities have been made easier, but there is little that can be done in the virtual world that cannot be accomplished in the physical world. *Id.*

¹³⁵ *Id.* at 236–38. Although likely not as efficient as the Internet, the defendant still has the ability to purchase newspapers, magazines, watch television, and listen to the radio as forums for news and weather. In addition, the defendant has the ability to communicate through telephone conversations and postal mail. Banning the Internet does not prohibit the offender from accessing current information pertaining to what is going on in the world.

¹³⁶ *Id.* McKay suggests that until the Internet is used for exclusive, privileged purposes, courts should consider the available alternatives when determining whether a ban is overbroad. *Id.* at 237. See Correll, *supra* note 45, at 685. Recent surveys indicate that Internet usage among Americans has reached an all-time high, with more than seventy percent of Americans reportedly using the Internet on a regular basis. *Id.* The Internet provides a forum for communication, research, job hunting, and access to government information. *Id.* What was once considered a luxury and business device can now be considered to serve a common purpose in daily life. *Id.* at 684.

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of performing tasks that have been dominated by the telephone for the past few decades, such as initiating contact with emergency 911 services.

The second flaw in the telephone analogy is the failure to recognize the degree to which public safety interests are served by post-release supervision restrictions for sex offenders.¹³⁷ The government's interest in protecting the public from potential repeat offenders is significant.¹³⁸ Internet sexual crimes are personal crimes—the offender has sought out a victim and personally made an attack on him.¹³⁹ In the age of the Internet, pedophiles are able to communicate easily with vulnerable children.¹⁴⁰ Offenders enter American homes without even knocking—all they need is a computer, Internet connection, and parents who are not closely monitoring their child's Internet activity.¹⁴¹ Considering the ease with which an offender may electronically enter a home, it is no wonder why courts have given greater deference to the government's interest in protecting society than to the liberty interests of convicted Internet sex offenders.¹⁴²

¹³⁷ See McKay, *supra* note 67, at 236–38.

¹³⁸ United States v. Zinn, 321 F.3d 1084, 1092 (11th Cir. 2003) (stating that there is a “strong link between child pornography and the Internet, and the need to protect the public, particularly children, from sex offenders[]”). See *supra* note 47 (laying out the government's interests that are targeted with supervised conditions).

¹³⁹ See McKay, *supra* note 67, at 237 (defining personal crimes). See also Christa M. Book, *Do You Really Know Who is on the Other Side of Your Computer Screen? Stopping Internet Crimes Against Children*, 14 ALB. L.J. SCI. & TECH. 749, 757–58 (2004). Sex abuse victims have scars that are more than skin deep. *Id.* This specific abuse can cause victims to suffer from “depression, eating disorders, distrust, [and] sexual dysfunction[.]” *Id.* at 758 (quoting Julie Posey, *They Call Me Kendra: A Crimefighter's Personal Story and Battle Against Online Pedophiles* 114, 159 (2002)) (alteration in original). In addition, these persons may also suffer from self-destructive behaviors, alcohol or drug abuse, excessive risk taking, and sometimes suicide attempts. *Id.* at 758.

¹⁴⁰ See Book, *supra* note 139, at 750 (describing how easy it is for pedophiles to communicate with children). See also Correll, *supra* note 45, at 690. The Internet allows sex offenders to remain anonymous to the general public. *Id.* Their false identities aid Internet sex offenders in concealing their true identities while at the same time creating barriers for investigative activities. *Id.* Soliciting victims in cyberspace makes it difficult for police officials to track down and match an actual person to a web address. *Id.*

¹⁴¹ See Book, *supra* note 139, at 750 (describing the ease with which Internet sex offenders gain access to children through computers and Internet). Correll, *supra* note 45, at 691. Arguably, the solicitation of a child or teenager would most likely not have happened but for the offender's access to the Internet. *Id.* Internet sex offenders using the Internet find their victims anonymously and with minimal fear of being captured. *Id.* Access to computers has allowed Internet sex offenders to expand their victim pool and also to engage in deviant behavior, such as trading child pornography with others who share the same interests. *Id.* at 690–91.

¹⁴² See *supra* Part II.C.1 (discussing cases in which courts have upheld computer and Internet use restrictions as supervised release conditions).

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Courts hold that when the government has a substantial interest in protecting the public, a restriction must be reasonably related to attaining that goal.¹⁴³ For example, one could argue that requiring a sex offender to give advance notice of computer use arguably causes more inconvenience than is reasonably necessary to attain the court's goal of deterrence because it requires the individual to give advance notice for all computer use, which would theoretically require reporting in advance the use of all automated banking and electronic airport check-in machines because these devices are technically computers.¹⁴⁴ However, in *Balon*, the Court of Appeals for the Second Circuit rejected this argument posited by Balon and instead determined that the requirement that a sex offender give advance notice of computer use was reasonable and reasonably necessary to achieving the goal of protecting the public.¹⁴⁵ To support its conclusion, the court noted that conditions of supervised release need only "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and as such, a requirement such as the one imposed on Balon clearly satisfies this goal.¹⁴⁶

When an Internet sex offender uses the Internet to communicate with vulnerable children, whom society has a compelling interest to protect, restrictions on the sex offender's First Amendment rights must

¹⁴³ See, e.g., *United States v. Rearden*, 349 F.3d 608, 621 (9th Cir. 2003) (holding that limiting Internet access is "reasonably related" to the offense and to the "goal of deterring him[,] [the Internet sex offender]," "rehabilitation[,] and "protecting the public[]"); *United States v. Zinn*, 321 F.3d 1084, 1093 (11th Cir. 2003) (holding that a "limited restriction on a sex offender's Internet use is a necessary and reasonable condition of supervised release[]"); *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002) (holding that while prohibiting access to the Internet without approval was "reasonably related to the purposes of his sentencing," the condition inflicted too great a deprivation on liberty); *United States v. Paul*, 274 F.3d 155, 168 (5th Cir. 2001) (holding that "prohibiting Paul from using a computer or the Internet is rationally related to his offense and that such an order is an appropriate public protection measure[]"); *United States v. Crandon*, 173 F.3d 122, 127 (3d Cir. 1999) (holding that a condition restricting Internet access was "reasonably related . . . to the goal of deterring [Defendant Crandon] from engaging in further criminal conduct[]").

¹⁴⁴ See MILLER, *supra* note 10, at 7-8. Not long after the Court of Appeals for the Second Circuit decided *Lifshitz*, it analyzed the reasonableness of computer and Internet in *Balon*. *Id.* See *supra* notes 108-10 and accompanying text (discussing the facts in *Balon*).

¹⁴⁵ *United States v. Balon*, 384 F.3d 38, 43 (2d Cir. 2004). The court was aware of the district court's concern in preventing Balon from trading child pornography in the future. *Id.* The notification provision obligated Balon to notify the probation office only of the use of a computer "able to obtain, store, or transmit illicit sexual depictions" of minor children. *Id.* The purpose of the provision was to monitor Balon's intake of information at any computer, not just his personal computer. *Id.*

¹⁴⁶ *Id.* (quoting *United States v. Simmons*, 343 F.3d 72, 81 (2d Cir. 2003)).

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be held valid.¹⁴⁷ In *United States v. Loy*, the Court of Appeals for the Third Circuit held that a narrowly tailored probationary condition cannot restrict First Amendment freedoms unless the probationary condition has some benefit to public safety.¹⁴⁸ To this point, the government has a significant interest in protecting the public, particularly children, from abuse by Internet sex offenders.¹⁴⁹ Sex offenders who commit acts of sexual violence against children have one of the highest rates of recidivism among all criminals; thus, the government is justified in limiting the liberty interests of those sex offenders who are on supervised release.¹⁵⁰ However, not everyone agrees.¹⁵¹

¹⁴⁷ See generally *United States v. Mitnick*, No. 97-50365, 1998 U.S. App. LEXIS 10836, at *2 (9th Cir. May 20, 1998); *Crandon*, 173 F.3d at 127-28 (rejecting First Amendment challenges to probation conditions).

¹⁴⁸ *United States v. Loy*, 237 F.3d 251, 266 (3d Cir. 2001). Ray Loy was convicted of possession of child pornography, some of which he helped produce. *Id.* at 254. While Loy's supervised release conditions did not involve restrictions on Internet access, Loy contested the restriction of his possession of any pornography. *Id.* at 255.

¹⁴⁹ UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, *Federal Prosecution of Child Sex Exploitation Offenders*, 2006, 1, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fpcseo06.pdf> (last visited Feb. 2, 2008). "Child sex offenses [are] among the fastest growing offenses of the Federal criminal caseload from 1994 to 2006[.]" *Id.* In 2006, child pornography made up 69 percent of the total number of sex offense cases referred to United States Attorneys' Offices. *Id.*

¹⁵⁰ UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *Criminal Offender Statistics, Summary Findings*, available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (click "Child Victimized" link) (last visited Jan. 4, 2009). According to the United States Department of Justice's Bureau of Justice Statistics, in 1994, approximately 272,111 persons were released from prisons. *Id.* at "Recidivism." Of those persons, within three years of release, 2.5 percent of charged rapists were rearrested for rape, and 1.2 percent of those serving time for homicide were rearrested for another homicide. *Id.* Out of the 272,111 persons released, approximately 4,300 were former child molesters. *Id.* at "Child Victimized." It was estimated that 3.3 percent of those 4,300 were rearrested within three years for another sex crime against a child. *Id.* The statistics went on to report that 60 percent of those in prison for child molestation had molested a child thirteen years or younger. *Id.* See also Lampson, 143 CONG. REC. H7630 (daily ed. Sept. 23, 1997) (statement of Mr. Lampson) (stating that scientific studies have shown that sex offenders committing acts against children have one of the highest rates of recidivism); McCollum, 142 CONG. REC. H11132 (daily ed. Sept. 25, 1996) (statement of Mr. McCollum) (describing the recidivism rate of registered sex offenders at "10 times greater than other criminals[.]"); Jackson-Lee, 142 CONG. REC. H11134 (daily ed. Sept. 25, 1996) (statement of Ms. Jackson-Lee) (arguing that the scientific community has concluded that most child sex offenders cannot control themselves). The previous statistics are used to illustrate recidivism rates and concerns stemming from a variety of sources.

¹⁵¹ See *infra* Part III.A.2 (providing arguments for protecting the liberty interests of Internet sex offenders).

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2. Arguments Against Implementing Computer and Internet, Post-Release, Supervision Restrictions for Internet Sex Offenders

One popular argument against judicially imposed computer and Internet restrictions for sex offenders, and in particular, restrictions that totally ban computer and Internet use, is that these restrictions violate an individual's First Amendment rights to freedom of speech and freedom of association.¹⁵² While not directly citing to the Constitution, courts that have declined to uphold computer and Internet bans have reasoned that e-mail is a widely used form of communication.¹⁵³ Indeed, the Internet functions as one of the most prevalent communication and information-sharing mediums.¹⁵⁴ Therefore, defendant-sex offenders argue that restrictions on computer and Internet use impermissibly infringes on a sex offender's right to freedom of expression and prevents an offender from associating with others who access the Internet.¹⁵⁵ However, two major government concerns undermine the force of these arguments.

Two principal reasons for supervising Internet sex offenders after their release from prison are rehabilitation of the offender and public safety.¹⁵⁶ In *United States v. Bolinger*, the Court of Appeals for the Ninth

¹⁵² See Wiest, *supra* note 45, at 863. Wiest suggests that Internet restrictions are permissible time, place, and manner restrictions. *Id.* at 863 n.151. See *United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005); *United States v. Scott*, 316 F.3d 733, 736-37 (7th Cir. 2003); *United States v. Zinn*, 321 F.3d 1084, 1092-93 (11th Cir. 2003); *United States v. Paul*, 274 F.3d 155, 169 (5th Cir. 2001); *United States v. White*, 244 F.3d 1199, 1205 (10th Cir. 2001). See also Habib, *supra* note 70, at 1079 (discussing cases that have based arguments on the constitutional grounds of computer and Internet restrictions).

¹⁵³ See *White*, 244 F.3d at 1206. The court noted that the meaning of the post-release supervision restriction made it susceptible to remand. *Id.* However, the *White* court did not reach the question of whether the prohibition violated the First Amendment. *Id.* See also *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002) (rejecting computer and Internet restrictions as supervised release conditions).

¹⁵⁴ See Correll, *supra* note 45, at 682. "The growth of Internet access has led to corresponding growth in Internet use: tens of millions of Americans now use the Internet for everything from communicating through e-mail and instant messaging to shopping and conducting bank transactions." *Id.* (footnote omitted).

¹⁵⁵ Habib, *supra* note 70, at 1080. See *Paul*, 274 F.3d at 169. In *Paul*, the court noted that Defendant Paul had used the Internet to seek out "fellow 'boy lovers' and provid[ed] them with advice on how to find and obtain access to 'young friends.'" *Id.*

¹⁵⁶ Habib, *supra* note 70, at 1080. *Contra* Hollida Wakefield, *The Vilification of Sex Offenders: Do Laws Targeting Sex Offenders Increase Recidivism and Sexual Violence?*, J. SEX OFFENDER CIV. COMMITMENT: SCI. & L., 1, 141-49 (2006).

Sex offenders are universally hated and despised and seen as dangerous sexual predators unless locked up and kept under surveillance. Following a number of highly publicized violent crimes, all states passed registration and notification laws and many passed civil commitment laws. Although these laws were passed as a means to decrease recidivism and promote public safety, the resulting

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Circuit rejected a defendant-sex offender's freedom of association claim explaining that, "Probation conditions may seek to prevent reversion into a former crime-inducing lifestyle by barring contact with old haunts and associates, even though the activities may be legal."¹⁵⁷ Not only do Internet sex offenders go online to solicit victims, they also use the Internet as a place to trade and collect child pornography.¹⁵⁸ Therefore, it is reasonable to conclude that restricting an Internet sex offender's use of the Internet and his freedom to associate with other offenders will greatly increase the likelihood of achieving the twin aims of successfully rehabilitating the sex offender and ensuring the safety of the public.¹⁵⁹

The inability of Internet sex offenders to reintegrate into the community when courts severely limit their ability to participate in society is another growing concern.¹⁶⁰ Take the defendant in *Crandon*, for example, who was prohibited from accessing any computer network and

stigmatization of sex offenders is likely to result in disruption of their relationships, loss of or difficulties finding jobs, difficulties finding housing, and decreased psychological well-being, all factors that could increase their risk of recidivism.

Id.

¹⁵⁷ *United States v. Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991). The defendant pled guilty to possession of a firearm by a felon and was sentenced to prison and supervised release during which he could not be involved in any motorcycle club activities. *Id.* The court upheld this restriction because it reasonably restricted Bolinger from associating with persons most likely to cause him to relapse. *Id.* at 480–81. *See also* *United States v. Showalter*, 933 F.2d 573, 574 (7th Cir. 1991) (upholding a restriction prohibiting the defendant from associating with skinheads or Neo-Nazi or white supremacist organizations after being convicted of possession of an unregistered firearm because such associations might increase his likelihood of relapse).

¹⁵⁸ *See* Book, *supra* note 139, at 750. *See* Mering de Villiers, *Free Radicals in Cyberspace: Complex Liability Issues in Information Warfare*, 4 NW. J. TECH. & INTELL. PROP. 13, 105 (2005) (noting that the degree of anonymity on the Internet allows cybercriminals to commit crimes they otherwise would not have committed).

¹⁵⁹ *See* Habib, *supra* note 70, at 1080–81 (discussing the notion that if you take away bad influences, the only thing left is positive influences). Helping offenders develop a new way of thinking can be beneficial in their treatment programs. *Id.* *Contra* Megan A. Janicki, Note, *Better Seen Than Heard: Residency Restrictions and Global Positioning System Tracking Laws for Sex Offenders*, 16 B.U. PUB. INT. L.J. 285, 286 (2007). Janicki argues that "no studies on these laws show that they actually reduce the number of sex offenses or the recidivism of previous sexual predators." *Id.*

¹⁶⁰ *See supra* note 47 (discussing the Senate Judiciary Committee Report on the principal goals of supervised release programs). *See* Wiest, *supra* note 45, at 866 (discussing the underlying purposes of section 3583 that are thwarted by computer and Internet restrictions). *See also* Wakefield, *supra* note 156, at 147 (arguing that registries, notification, and housing restrictions make it much more difficult for sex offenders to succeed in society and may make them more likely to reoffend); Karen J. Hartman, *Prison Walls and Firewalls: H.B. 2376 – Arizona Denies Inmates Access to the Internet*, 32 ARIZ. ST. L.J. 1423, 1434–35 (2000) (discussing how Internet access helps prepare prison inmates for transition back into the community).

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the Internet.¹⁶¹ The implications of such restrictions could be substantial.¹⁶² The restriction may hinder an individual's ability to get a job that requires a computer and access to the Internet, impair an individual's ability to search for jobs using one of the most resourceful job searching tools, and block an individual's access to Internet sites that, if monitoring software was used instead, may have just as easily been blocked.

Indeed, courts, in overturning computer and Internet bans, note the over-breadth and far-reaching implications of such restrictions as reasons for striking them down.¹⁶³ Additionally, opponents of these restrictions argue that such restrictions prevent sex offenders from being able to possess digital or cellular phones with access to the Internet, use local ATMs, and shop with a credit card—all of which they claim are forms of Internet use.¹⁶⁴ However, first, these arguments rely on a broad interpretation of Internet access, an interpretation that includes all devices capable of interacting via an Internet network (an interpretation which arguably need not be so broad).¹⁶⁵ Second, even though Internet

¹⁶¹ United States v. Crandon, 173 F.3d 122, 127 (3d Cir. 1999); see *supra* notes 73–74 (presenting the facts in *Crandon*).

¹⁶² *Id.* See generally Correll, *supra* note 45, at 703 (opposing the restriction of full Internet bans as post-release supervision restrictions for Internet sex offenders).

¹⁶³ See, e.g., United States v. Crume, 422 F.3d 728, 733 (8th Cir. 2005) (remanding the case to the district court to impose a more narrowly tailored post-release supervision restriction); United States v. Freeman, 316 F.3d 386, 391–92 (3d Cir. 2003) (holding that the condition forbidding Defendant Freeman from possessing any computer in his home or using any online computer service was overly broad); United States v. White, 244 F.3d 1199, 1206 (10th Cir. 2001) (remanding to the district court because the condition could be interpreted too narrowly or could be interpreted as overly broad).

¹⁶⁴ See Wiest, *supra* note 45, at 862. See ADAM WRIGHT, *Mobile Phones Could Soon Rival the PC as World's Dominant Internet Platform*, IPSOS INSIGHT, (April 18, 2006), available at http://www.ipsosna.com/news/client/act_dsp_pdf.cfm?name=mr060418-1b.pdf&id=3049 (last visited November 4, 2007). In 2006, *Ipsos Insight* declared that, globally, 28 percent of mobile phone owners had browsed the Internet on a wireless handset. *Id.* *Ipsos Insight* also reported that Internet surfing on mobile phones is an emerging activity engaged in by a variety of demographics. *Id.* Due to their greater convenience and faster connection speeds, mobile phones are becoming the personal computer of the future. *Id.*

¹⁶⁵ Wiest, *supra* note 45, at 862. Opponents of computer and Internet restrictions as post-release supervision restrictions for sex offenders argue that such restrictions on home computers limit the ability of the offender to obtain an online education from universities that conduct classes solely online. *Id.* If an offender is prohibited from accessing the Internet, then he would not be allowed to gain beneficial education. *Id.* at 862. In contrast, restrictions that allow the releasee to seek approval from a probation officer, which would then grant the offender access to such websites, have been upheld. *Id.* Other arguments specific to the daily use of the Internet include: the restricting of the offender's ability to shop both by credit card and online, communicate with others, and participate in recreational activities. *Id.* at 863–65. Americans now enjoy filing and paying taxes online, researching for jobs, reviewing current legislation, and much more. *Id.* The average

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restrictions deny access to legitimate information and material that is otherwise legal to possess, courts are entitled to uphold these restrictions because of the nature of a sex offender's inclination to use of the Internet to commit a sex crime.¹⁶⁶ As society becomes more technology-dependent, arguments against post-release supervision restrictions will likely gain force.¹⁶⁷ However, currently, as long as a restriction is narrowly tailored to the purposes of sections 3553 and 3583 of Title 18 of the United States Code, a court will uphold it.¹⁶⁸

B. Have Federal Courts of Appeals Already Identified Important Factual Considerations to Consider When Determining Whether Computer and Internet Use, Post-Release, Supervision Restrictions Are Valid?

In analyzing whether a computer or Internet use post-release supervision restriction is valid, sentencing courts follow the language in the United States Code.¹⁶⁹ A district court may order any restriction that

(1) is reasonably related to certain factors, including (a) the nature and circumstances of the offense and the history and characteristics of the defendant, (b) deterring further criminal conduct by the defendant, or (c) protecting the public from further criminal conduct by the defendant; and (2) involves no greater deprivation of

American with Internet access currently has more links to government information than at any point in the past. *Id.* As society becomes more dependent on technology and the Internet, restrictions prohibiting such access may have serious consequences in the future. *Id.* at 865.

¹⁶⁶ See, e.g., *United States v. Paul*, 274 F.3d 155, 169 (5th Cir. 2001) (upholding the computer and Internet restriction even though the defendant argued that the restriction would limit his career opportunities); *Crandon*, 173 F.3d at 125 (1999) (same). See Habib, *supra* note 70, at 1086. Courts uphold computer and Internet use, post-release, supervision restrictions for Internet sex offenders where the governmental interests—to protect the public and reintegrate the offender—outweigh the liberty interest of the defendant—to allow him to access the Internet. *Id.*

¹⁶⁷ Habib, *supra* note 70, at 1091-92. Recent surveys indicate that Internet usage among American consumers has reached an all-time high, with more than 70 percent of respondents reportedly using the Internet on a regular basis. Mary Madden, PEW INTERNET & AMERICAN LIFE PROJECT (Apr. 2006), available at http://www.pewInternet.org/pdfs/PIP_Internet_Impact.pdf.

¹⁶⁸ See *supra* note 143 (discussing which cases have upheld reasonably tailored computer and Internet use restrictions as post-release supervision restrictions for Internet sex offenders).

¹⁶⁹ See *supra* note 50 (discussing section 3583, of Title 18 of the United States Code). See also *Crandon*, 173 F.3d at 127.

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liberty than is reasonably necessary for the purposes of deterrence and protection of the public.¹⁷⁰

It is important to note that courts continually approach post-release supervision restriction challenges by applying a case-by-case analysis as opposed to a *per se* ban against them.¹⁷¹ A case-by-case approach is significant for two reasons. First, not all persons convicted of sexual crimes use computers or the Internet in the commission of their crimes.¹⁷² Whether a sex offender used a computer or the Internet to commit a crime has been an important factor for courts, particularly those courts placing less emphasis on the extent of the Internet's role in modern society.¹⁷³ Second, a post-release supervision restriction must be reasonably related to the offense committed and serve the purposes previously stated in the above excerpt from the *Crandon* case: to deter the sex offender from reoffending, and to protect the public. For example, where a defendant was convicted of bank larceny, the Court of Appeals for the Second Circuit held that completely banning Internet use was not reasonably related to the defendant's conviction and reversed the supervised release sentence, even though the defendant had previously been convicted for incest, and police officials had found legal adult pornography on his computer prior to his bank larceny sentencing hearing.¹⁷⁴ Courts supporting this position suggest that there is no need

¹⁷⁰ *Crandon*, 173 F.3d at 127. See 18 U.S.C. §§ 3553(a), 3583(d) (2006) (stating the official language cited by the *Crandon* court).

¹⁷¹ See *United States v. Freeman*, 316 F.3d 386, 386 (3d Cir. 2003) (reasoning that in *Crandon*, Crandon's previous actions of using the Internet to contact minor children, which led to his conviction for a sexual offense, warranted a conditional restriction on his computer and Internet access, whereas in *Freeman*, there was nothing in the record to suggest that Freeman used the Internet to contact minors). Each case is unique in its fact patterns, and each sex offender deserves the opportunity to state his position. Taking an individualized approach allows the courts to assess an offender's prior record, employment history, psychological evaluations, and any other relevant character evidence introduced.

¹⁷² See *supra* notes 91 & 94 (setting out the cases in which computer and Internet use restrictions have been both upheld and denied when the use of the Internet was not an element of the crime). See also *United States v. Peterson*, 248 F.3d 79, 81 (2d Cir. 2001), where Defendant Peterson was convicted of bank larceny, and *United States v. Scott*, 316 F.3d 733, 734 (7th Cir. 2003), where Defendant Todd Scott was convicted of fraud and police discovered images of child pornography on his work computer.

¹⁷³ See, e.g., *United States v. Paul*, 274 F.3d 155, 169-70 (5th Cir. 2001) (rejecting the *White* court's proposition that an absolute ban on Internet use is an unacceptable condition of supervised release only because it might keep someone from checking the weather or reading a newspaper online).

¹⁷⁴ *Peterson*, 248 F.3d at 82. In 1999, Larry Peterson ("Peterson") pled guilty to bank larceny for writing fraudulent checks. *Id.* at 81. In 2000, during Peterson's sentencing, the district court imposed special conditions of probation that were influenced by Peterson's

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to cut off access to a person's e-mail or Internet use when a more focused restriction, such as random inspections of the defendant's computer, is available.¹⁷⁵ It appears that courts are unwilling to uphold computer and Internet restrictions when neither a computer nor the Internet is used in the commission of the crime.¹⁷⁶

An underlying distinction between judicial opinions in the Tenth Circuit is whether a post-release supervision restriction allows the sex offender to regain access to the Internet at some point in the future.¹⁷⁷ In *Walser*, the Court of Appeals for the Tenth Circuit distinguished Defendant Walser's probation restrictions from the probation restrictions it had previously considered in *White*.¹⁷⁸ In both cases the courts considered whether the restrictions permitted the released offender to access the Internet under certain conditions.¹⁷⁹ The *Walser* court upheld the defendant-sex offender's probation restrictions because they allowed Walser to gain access to the Internet with permission from his probation officer.¹⁸⁰ In contrast, in *White*, White's supervised release restrictions

1996 conviction for incest and the legal adult pornography found on his computer both before and after sentencing. *Id.* The Court of Appeals for the Second Circuit did not see how the broad restrictions on Peterson's ownership of a computer or access to the Internet were "'reasonably related[]' to 'the nature and circumstances of the offense' or Peterson's 'history and characteristics.'" *Id.* at 82 (citation omitted).

¹⁷⁵ *Scott*, 316 F.3d at 737. For example, in *Scott*, Defendant Todd Scott ("Scott") was convicted of fraud. *Id.* at 734. During the investigation, child pornography was recovered from his computer. *Id.* at 734-35. The district court imposed, as a condition of his release, a complete ban on his use of computer and Internet use unless he obtained prior approval from his probation officer to use a computer or the Internet. *Id.* The Court of Appeals for the Seventh Circuit vacated the sentence and remanded to the lower court to impose a more narrow restriction. *Id.* at 737. The court noted that Scott did not have a record of extensive abuse of network communications that would justify a complete ban of his Internet access. *Id.* The court suggested that unannounced inspections of the defendant's home computer and hard drives or removable disks might be a more appropriate sentence, and accordingly, remanded the case for appropriate resentencing. *Id.*

¹⁷⁶ See *supra* Part II.C.2 (discussing cases in which circuit courts have reversed bans on computer and Internet use restrictions).

¹⁷⁷ See *supra* Part II.C (discussing how circuits disagree over the imposition of computer and Internet restrictions for Internet sex offenders).

¹⁷⁸ *United States v. Walser*, 275 F.3d 981, 988 (10th Cir. 2001) (holding that the sentence imposed by the court balanced the goals of protecting the public with the goals of sentencing: preventing recidivism and reintegrating the sex offender into the community). See *United States v. White*, 244 F.3d 1199, 1208 (10th Cir. 2001) (striking down the post-release supervision restriction on the computer and Internet use of a sex offender, reasoning that it represents a greater deprivation of his personal liberty interests than necessary).

¹⁷⁹ See *supra* note 178 (discussing the holdings in *Walser* and *White*). See also *supra* Part II.C.1 (discussing the Tenth Circuit's decisions relating to the post-release supervision restrictions on computer and Internet use for sex offenders that allow the sex offender to use the computer or Internet by obtaining permission from a probation or parole officer).

¹⁸⁰ *Walser*, 275 F.3d at 988.

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did not allow White to seek permission for Internet use under any circumstances; therefore, the court found his restrictions to be “potentially too narrow and overly broad.”¹⁸¹ The court gave examples of how it was possible to be both too narrow and overly broad.¹⁸²

Indeed, other courts have also upheld computer and Internet use restrictions as conditions of supervised release when the restrictions contained a provision allowing a probation officer to grant the released offender permission to access the Internet.¹⁸³ Specifically, the Courts of Appeals for the Third, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have upheld such restrictions for released Internet sex offenders.¹⁸⁴ When considering the conditions of supervised release of an Internet sex offender, a balance must be struck between the released sex offender’s liberty interests, rehabilitation and reintegration goals, and the state’s interest in protecting society from repeat Internet sex offenders.¹⁸⁵ States such as New Jersey acknowledge this balance.¹⁸⁶

¹⁸¹ *White*, 244 F.3d at 1206. The court ruled that any restriction on the computer or Internet use of a sex offender must allow some sort of monitoring by a probation officer in order to be upheld. *Id.* at 1207. *See also* Correll, *supra* note 45, at 694. Correll compares the reasoning of the Court of Appeals for the Second Circuit in *Sofsky* to the reasoning set forth by the Court of Appeals for the Tenth Circuit in *White*, explaining that neither court sees a simple way to prevent access to either the Internet or telephones. *Id.*

¹⁸² *White*, 244 F.3d at 1206. First, the restriction was too narrow because the way it was written, White could have easily used any computer with Internet access at a public library or cybercafé and still would have been in technical compliance with the restriction. *Id.* Alternatively, if White had not been allowed to use any computer device at all, the restriction would have been too broad. *Id.* at 1207.

¹⁸³ *See, e.g.*, *United States v. Zinn*, 321 F.3d 1084 (11th Cir. 2003) (holding that a ban on computer and Internet use as a post-release supervision restriction is valid as long as it contains a provision that allows a probation officer to grant the released offender permission to access a computer or the Internet); *United States v. Rearden*, 349 F.3d 608 (9th Cir. 2003) (same); *Walser*, 275 F.3d 981 (same); *United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999) (same).

¹⁸⁴ *See, e.g.*, *United States v. Sullivan*, 451 F.3d 884, 887 (D.C. Cir. 2006) (upholding the district court’s imposition of computer and Internet restrictions for a released sex offender); *Rearden*, 349 F.3d 608, 620 (9th Cir. 2003) (same); *United States v. Fields*, 324 F.3d 1025, 1026 (8th Cir. 2003) (same); *United States v. Zinn*, 321 F.3d 1084, 1087 (11th Cir. 2003) (upholding computer and Internet use restrictions that allow a probation officer to grant the released offender permission to access a computer or the Internet); *Walser*, 275 F.3d at 985 (same); *Crandon*, 173 F.3d at 127–28 (same).

¹⁸⁵ *Wiest*, *supra* note 45, at 871. *See* 18 U.S.C. §§ 3583 (d)(2); 3553(a)(2)(C) (2006). This balance is important to prevent “no greater deprivation of liberty than is reasonably necessary” and “to protect the public from further crimes of the defendant[.]” *Id.* *See also* *Crandon*, 173 F.3d at 127 (discussing the importance of balancing of section 3583 and section 3553 factors).

¹⁸⁶ *See infra* Part III.C (discussing the effectiveness of the New Jersey statute addressing computer and Internet restrictions as post-release supervision restrictions for Internet sex offenders).

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C. *Has New Jersey Found the Answer?*

In 2007, New Jersey enacted a statute that imposes post-release supervision Internet access conditions on a person convicted of committing a sex offense via the Internet.¹⁸⁷ These conditions include prohibiting the person from “accessing or using a computer or any other device with Internet capability without the prior written approval of the court[.]”¹⁸⁸ This language adequately reflects judicial opinions that have upheld Internet conditions. For example, the court explained in *United States v. Rearden* that a “condition does not plainly involve a greater deprivation of liberty than is reasonably necessary for the purpose because it is not absolute; rather, it allows for approval of appropriate online access by the Probation Office.”¹⁸⁹

The Court of Appeals for the Third Circuit has yet to hear a case challenging the constitutionality of New Jersey’s statute restricting the computer and Internet use of Internet sex offenders. However, despite disallowing the computer and Internet use restrictions in *Freeman*, the court upheld similar restrictions in *Crandon*.¹⁹⁰ In addition, although the *Freeman* court remanded the case for resentencing, it did not hold that computer and Internet restrictions, generally, are unconstitutional, but rather that the restrictions imposed on Defendant Freeman were a greater deprivation than reasonably necessary because there was no evidence in the record to suggest that Defendant Freeman had used the Internet to contact children or that he had built his child pornography collection through online activities.¹⁹¹ A factor that the *Crandon* court considered was that Crandon had used the Internet to contact young

¹⁸⁷ N.J. STAT. ANN. § 2C:45-1(d)(2) (West Supp. 2008).

¹⁸⁸ *Id.* § 2C:45-1(d)(2)(a).

¹⁸⁹ *Rearden*, 349 F.3d at 621. In July of 2000, Chance Rearden (“Rearden”) answered an online posting from David Settlemyer (“Settlemyer”), who posted a comment asking if anyone was interested in “raping and ravaging” his three nieces. *Id.* at 611. Rearden and Settlemyer engaged in several subsequent discussions, and in August of 2000 Settlemyer was arrested. *Id.* at 612. However, Rearden was unaware of the arrest and continued his communications with Settlemyer, who had subsequently agreed to work with federal authorities. *Id.* In December of the same year, Rearden e-mailed who he thought to be Settlemyer a list of websites with child pornography as well as some pictures of children performing sexual acts. *Id.* In February 2001, Rearden was arrested. *Id.* Rearden was convicted of shipping child pornography and sentenced to fifty-one months imprisonment followed by a period of supervised release with special conditions imposed. *Id.* at 612.

¹⁹⁰ *Crandon*, 173 F.3d at 128 (upholding the computer and Internet restrictions imposed on Defendant Crandon); *United States v. Freeman*, 316 F.3d 386, 391–92 (3d Cir. 2003) (holding that the restrictions on computer possession and Internet access were too broad to be enforceable). See *supra* note 97 (discussing factual differences between *Crandon* and *Freeman*).

¹⁹¹ *Freeman*, 316 F.3d at 391–92.

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children, whereas the defendant in *Freeman* merely used the Internet but made no direct (illegal) contacts with it.¹⁹² Therefore, if the proper set of facts is presented, like the facts in *Crandon*, one may reasonably assume that the Court of Appeals for the Third Circuit will uphold the New Jersey restrictions on computer and Internet use. Because New Jersey's statute makes using the computer or any other device with Internet capability an element of the sex crime for which the sex offender was convicted that must be proved before deciding whether to restrict computer or Internet use, the statute has a built-in safeguard to protect against overbroad application of these restrictions to all criminals—even those who did not use a computer or the Internet in committing their crime.

Some state statutes addressing computer and Internet use restrictions for Internet sex offenders on supervised release are not as thorough as New Jersey's statute, while others are comparably thorough.¹⁹³ What appears consistently among state statutes is a provision allowing for some type of review process through which the sex offender may request and receive permission to access the Internet.¹⁹⁴

¹⁹² *Crandon*, 173 F.3d at 125.

¹⁹³ See *supra* note 4 (listing state statutes that reflect computer and Internet restrictions). Compare NEV. REV. STAT. § 176A.410(1)(q) (2006) (stating that the defendant shall not "possess any electronic device capable of accessing the Internet and not access the Internet through any such device or any other means[] . . ."), and FLA. STAT. §§ 948.30(1)(g)–(h), 947.1405(7)(a)(7) (2007) (prohibiting the "viewing, accessing, owning or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern[]"), with MINN. STAT. § 243.055 (2003) (providing a more detailed approach to computer and Internet restrictions, such as if use is allowed, requiring the sex offender to agree to time logs, monitoring software, unannounced searches of the computer, and limitations on the types of software purchased), and N.J. STAT. ANN. § 2C:45-1(d)(2) (West Supp. 2008) (same).

¹⁹⁴ See, e.g., FLA. STAT. §§ 948.30(1)(g)–(h), 947.1405(7)(a)(7) (2007) (restricting computer programs and computer services "[u]nless otherwise indicated in the treatment plan provided by the sexual offender treatment program[]"); MINN. STAT. § 243.055(2)(5) (2003) (stating that the commissioner may "prohibit the individual from possessing or using any computer, except that the individual may, with the prior approval of the individual's parole or probation agent, use a computer in connection with authorized employment[]"); NEV. REV. STAT. § 176A.410(1)(q) (2006) (stating that the defendant cannot access the Internet with any device "unless possession of such a device or such access is approved by the parole and probation officer assigned to the defendant[]"); N.J. STAT. ANN. § 2C:45-1(d)(2)(a) (West Supp. 2008) (providing that the sex offender can only access a computer or Internet for the person's employment or in search of employment "with the prior approval of the person's probation officer[]"). Some review processes include requiring the sex offender to seek permission from a parole or probation officer before accessing the Internet, fulfill the requirements of a sex offender treatment program, and participate in a risk assessment test. See *supra* note 4 (listing state statutes that reflect computer and Internet restrictions).

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Such a provision creates a fair balance between protecting the public from repeat offenders and not unnecessarily infringing on the liberty interests of a released Internet sex offender. States such as New Jersey have enacted legislation that allows a court to impose strict computer and Internet use restrictions on high-risk Internet sex offenders, but also provides an opportunity for low-risk offenders to maintain access to computers and the Internet. Protecting the public is of utmost importance, and over the past several years this has been the primary underlying goal of sex offender statutes.

D. What Are the Driving Policy Considerations Behind Computer and Internet Use Restrictions?

Decreasing the rate of recidivism of Internet sex offenders and eradicating child pornography are two major government interests in imposing computer and Internet restrictions on Internet sex offenders.¹⁹⁵ However, the dangers posed by Internet sex offenders cannot easily be contained by regular in-person supervision.¹⁹⁶ Police officers arrest approximately eighteen thousand sex offenders in the United States each year.¹⁹⁷ More than half of all convicted sex offenders are placed on probation and assigned to officers operating under heavy case loads.¹⁹⁸ Given this ratio, the most convenient form of monitoring would be for the offender not to possess a computer at all, but this is seldom the

¹⁹⁵ United States v. Lifshitz, 369 F.3d 173, 189–90 (2d Cir. 2004). See United States Department of Justice, *supra* note 149, at 5. Child pornography defendants represented 65 percent of all sex exploitation criminals in 2006. *Id.* Sixty-six percent of sex abuse defendants received an enhanced sentence because the victim was under the age of sixteen. *Id.* at 6. Of child pornography defendants sentenced, two out of three were sentenced for having more than ten illegal items, such as books, magazines, or films. *Id.* “Ninety-five percent [of child pornography defendants] were sentenced for materials depicting a minor under age 12, and 97[] [percent] were sentenced for the use of a computer in the offense.” *Id.*

¹⁹⁶ JIM TANNER, RETHINKING COMPUTER MANAGEMENT OF SEX OFFENDERS UNDER COMMUNITY SUPERVISION, 15 JUVENILE OFFENDER MONITORING NO. 11, at 1 (2007), <http://www.kbsolutions.com/rcm.pdf> (last visited November 4, 2007). See UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, *Probation and Parole in the United States, 2006*, 1, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus06.pdf> (last visited Feb. 2, 2008). “The number of adult men and women in the United States who were being supervised on probation or parole at the end of 2006 reached 5,035,225[.]” *Id.*

¹⁹⁷ TANNER, *supra* note 196, at 1. Tanner also mentions that various Internet “search engines estimate 60 million pages of sexually related content currently exist on the Internet.” *Id.*

¹⁹⁸ *Id.* In addition to officer in-person observation, monitoring and filtering software have been considered as other possible supervision tools. BOWKER & THOMPSON, *supra* note 56, at 19. The results of such software can then be used as a basis for conducting a subsequent more intrusive computer search. *Id.*

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case.¹⁹⁹ Therefore, it is the probation officer's responsibility to monitor the activities of Internet sex offenders once they are released back into society.²⁰⁰ If restrictions become too narrow, for example, requiring weekly inspections of all Internet sex offenders' computers, it could become difficult for probation officers to keep pace and effectively monitor compliance with the restrictions.²⁰¹

In *United States v. Scott*, the Court of Appeals for the Seventh Circuit noted that if Internet sex offenders argue that Internet use, post-release, restrictions are unfair, then a court could instead increase prison sentences at its discretion to decrease the likelihood that offenders will have the opportunity to reoffend.²⁰² Although the defendant, Todd Scott, was not convicted of an Internet sex crime, but rather of fraud, the court explained that "[i]f full access [to the Internet] posed an unacceptable risk of recidivism, yet all controls on access were forbidden, then a judge would have little alternative but to increase the term of imprisonment in order to incapacitate the offender."²⁰³

Restricting an Internet sex offender's right to computer and Internet use is a justified response, considering both the severity of the crime and the government's interest in protecting the public.²⁰⁴ In addition, allowing probation officers to monitor Internet sex offenders' use of the Internet provides a proactive solution to helping offenders rehabilitate and reintegrate into society.²⁰⁵ Computer and Internet use restrictions

¹⁹⁹ BOWKER & THOMPSON, *supra* note 56, at 19.

²⁰⁰ *Id.* at 18. There are three reasons why a broad Internet restriction should not be allowed. *Id.* at 19. First, the term "computer" is difficult to define in today's technologically advanced society. *Id.* Second, as computers become more integral to society, so does the average person's dependence on them. *Id.* Third, when the probation officer is given the discretion to grant or deny Internet access, this authority has the potential to create discrepancies between the approaches adopted by different police officers to granting access for each offender, thus, defeating the court's position that the condition is narrowly tailored. *Id.*

²⁰¹ This is not to say that it would be impossible or that, in all cases, random checks would need to be monthly instead of weekly, but currently probation officers operate under heavy caseloads. Implementing more involved or more frequent observation requirements would negatively affect the efficiency of their work. On the other hand, if computer checks were limited to once a month, sex offenders who are highly skilled in working with computers may be able to hide more inappropriate material, correspondence, or images in undetectable locations than if a stricter monitoring sentence was implicated.

²⁰² *United States v. Scott*, 316 F.3d 733, 736-37 (7th Cir. 2003). Scott was convicted of fraud and the court held that because Scott did not have a record of extensive abuse of digital communications, an outright ban could not be justified. *Id.* at 737.

²⁰³ *Id.* at 736-37. However, it is unlikely that offenders would see this as a beneficial exchange and would likely prefer to take the conditional freedom of supervised release restrictions. *Id.* at 737.

²⁰⁴ See *supra* note 47 (citing the government's interest in sentencing conditions).

²⁰⁵ See Correll, *supra* note 45, at 686-88.

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should be warranted in circumstances where they are narrowly tailored to apply to sex offenders who used computers and the Internet to commit Internet sex crimes, and where the restrictions provide for proper public protection, while minimizing the liberty deprivations of the released offenders.

IV. A PROPOSED SOLUTION

Because many states lack statutory language regarding Internet sex offenders and, more specifically, special computer and Internet restrictions for Internet sex offenders, this Note proposes a model statute for states to consider in addressing this issue.²⁰⁶ Set forth below is a model statute incorporating provisions set out in the New Jersey and Minnesota statutes for computer and Internet use, post-release, supervision restrictions.²⁰⁷

A. *To Whom Does the Proposed Model Statute Apply?*

Proposed below is a model statute for states to address computer and Internet use post-release supervision restrictions for Internet sex offenders. This first section details to whom the restrictions may apply:

1. ~~In addition to any conditions imposed pursuant to subsection b. or c., the court may order [In the case of] a person who has been convicted[,] or adjudicated delinquent[, or found guilty by reason of insanity for the commission] of a sex offense as defined in subsection b. of section 2 of P.L.1994, c.133 (C.2C:7-2), [in the applicable statutory law,] and who is required to register as provided in subsections c. and d. of section 2 of P.L.1994, c. 133 (C.2C:7-2), or who has been convicted or adjudicated delinquent for a violation of N.J.S.2C:34-3 to be subject to any of the following Internet access conditions: [a sex offender, or who is serving a special sentence of community or parole supervision for life, and where the trier of fact makes a finding that a computer and any other device with Internet capability was used to facilitate the commission of the crime, the court shall, in addition to any~~

²⁰⁶ See *infra* Parts IV.A-E (providing model statutory language and the reasoning behind each section of the model statute).

²⁰⁷ See *infra* Parts IV.A-E (providing model statutory language, primarily based on New Jersey's and Minnesota's statutes).

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*other disposition, order the following Internet access restrictions:]*²⁰⁸

Commentary

The purpose of this first part of the model statute is to establish to whom the computer and Internet restrictions apply.²⁰⁹ Because New Jersey's statute effectively establishes to whom the statute applies, the proposed model statute is based largely on the language of New Jersey's statute. This model statute, however, does not define what a sex offense is or which sex offenses should be covered by the terms of the statute; these definitions should be left to the discretion of the state legislative body.²¹⁰

B. What Does the Proposed Model Statute Restrict?

This section of the model statute, which would follow immediately after the prior section set forth above, provides for a complete ban on computer and Internet use, unless the offender obtains prior approval from a probation officer to override the ban:

(A) Prohibit the person from accessing or using a computer *and/or any other device with Internet capability without prior written approval from either the court or probation or parole officer* ~~or any other device with Internet capability without the prior written approval of the court, except the person may use a computer or any other device with Internet capability in connection with that person's employment or search for employment~~

²⁰⁸ See N.J. STAT. ANN. § 2C:45-1(d)(2) (West Supp. 2008). The normal font in the cited statute represents the language of the original statute. See *id.* The text that appears in italics is the proposed language from this Note's author. See also *supra* note 62 (describing New Jersey's Internet sex offender statute restricting Internet use for Internet sex offenders on supervised release).

²⁰⁹ The broad applicability of the statute is intended to encompass a vast spectrum of Internet sex offenders, ranging from child victimizers to rapists who found their victims through on-line services.

²¹⁰ Setting forth model guidelines for Congress to implement is beyond the scope of this Note. See, e.g., *supra* notes 38-39 (giving an example of SORNA's guidelines, and noting that states have discretion in labeling sex offenders, in applying SORNA's Tier-I to a Tier-III approach).

~~with the prior approval of the person's probation officer[]~~.²¹¹

Commentary

This model language provides that an offender may be denied access to a computer and any other device with Internet capability. By creating an “and/or” option, the court has the discretion to decide whether an offender should be prohibited only from accessing the Internet or whether he should be completely banned from computers. In addition, unlike New Jersey's statute, the proposed language gives the court and the probation or parole officer the opportunity to override the restriction by granting approval. New Jersey's statute allowed the court to grant permission at any time, but gave only the probation or parole office such discretion for employment issues.²¹² This model statute, by contrast, allows for either the court or probation or parole officer to grant permission to the released offender to access a computer or the Internet.

C. How Does the Proposed Model Statute Apply to the Work Environment?

The next section of the proposed statute addresses the exception of work-related computer and Internet access:

(B) Prohibit the person from accessing or using a computer *and/or* any other device with Internet *capability* without the prior written approval of the court, except the person may use a computer or any other device with Internet capability in connection with that person's employment or search for employment *without prior written approval from either the court or probation or parole officer*.²¹³

²¹¹ N.J. STAT. ANN. § 2C:45-1(d)(2)(a) (West Supp. 2008). The normal font in the cited statute represents the language of the original statute, and the parts stuck through are the work of the author. *See id.* The text that appears in italics is the proposed language from this Note's author. *See also supra* note 62 (describing New Jersey's Internet sex offender statute that restricts Internet use for Internet sex offenders on supervised release).

²¹² *See* N.J. STAT. ANN. § 2C:45-1(d)(2)(a) (West Supp. 2008) (allowing a sex offender computer and Internet access for work-related purposes if the access is approved by the offender's probation officer). The author of this Note has placed employment exceptions in a separate section of the proposed statute. *See infra* Part IV.C (discussing when an offender may be granted permission to use the computer and Internet for employment related purposes).

²¹³ *See infra* note 212 (describing an exception in New Jersey's statute for employment related purposes).

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Commentary

This statutory language addresses the applicability of the restriction to the released offender's working environment and the ability to seek employment. Here, New Jersey's statutory section has been split into two parts, a bifurcation which allows courts to address the personal and professional aspects of the sex offender's life separately. Reintegration into the community is a top priority of the supervised release program, and the sex offender's ability to obtain and maintain a job will play a significant role in achieving that priority.²¹⁴

D. Safeguards for Alternative Monitoring

The next provision of the model statute provides safeguards for courts to implement when discretionary approval is granted by courts or probationary or parole officers:

(C) *If the person is granted computer and/or Internet access, require the individual to maintain a daily log of all addresses the individual accesses through any computer other than for authorized employment and to make this log available to the individual's parole or probation agent[.]*²¹⁵

Commentary

If the court chooses to give the released offender access to a computer, this additional precaution requires that the offender record his daily Internet activity. Although the person may not record all the sites visited, if the daily log is used in conjunction with a monitoring system, then this would serve as a check on the person's honesty with respect to reporting Internet activity.²¹⁶ Because few state statutes actually require released offenders to submit to periodic unannounced examinations and monitoring by software devices, these self-reporting requirements help ease the burden on those probation officers in charge of monitoring large caseloads of Internet sex offenders.²¹⁷

²¹⁴ See Correll, *supra* note 45, at 686–88 (defining the goals of rehabilitation and reintegration).

²¹⁵ See MINN. STAT. §243.055(2)(2) (2003). The proposed amendments are italicized and are the contribution of this Note's author.

²¹⁶ Different monitoring and filtering software are available for law enforcement agencies across the United States.

²¹⁷ See generally BOWKER & THOMPSON, *supra* note 56 (discussing the effects of computer crime on probation officers).

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E. Leaving Room for Technological Advancement

The last section of the proposed model statute addresses technological advancements and prevents crafty criminals from identifying and capitalizing on loopholes in the statutory text. Computer crimes are something relatively new to the criminal world, and enacting a broad regulatory restriction serves two purposes: (1) position the statute to be able to nimbly respond to technological advancements and thus prevent it from becoming moot, and (2) prevent offenders from being able to identify and take advantage of loopholes in the supervised release process.

(D) Require the person to submit to any other appropriate restrictions concerning the person's use or access of a computer or any other device with Internet capability.²¹⁸

Commentary

The final section of the model statute is significant and is taken directly from the New Jersey statutory scheme. This last section is important for the same reason that a statute is needed to address computer and Internet restrictions for Internet sex offenders—technology is forever advancing and changing our way of life, as well as the criminal's way of operating. By allowing the court broad discretion to impose appropriate restrictions, the statute will be able to keep pace with new technology and new forms of crime. By implementing this statutory language, states will help advance the criminal justice system into twenty-first century technology.

V. CONCLUSION

Bigboy44 will be sentenced in a jurisdiction that has implemented the model statute proposed in Part IV of this Note. What will the court decide? First, *Bigboy44* was convicted of a sex crime and will now have to register in the community as a sex offender pursuant to SORNA. Second, *Bigboy44* used the computer and Internet to facilitate his crime. Therefore, under the language of the proposed model statute, *Bigboy44* will likely be a prime candidate for computer and Internet use restrictions during his post-release supervision. Although the judge may

²¹⁸ See N.J. STAT. ANN. § 2C:45-1(d)(2)(d) (West Supp. 2008). See *supra* note 62 (describing New Jersey's recently passed Internet sex offender statute, conditioning Internet restrictions).

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impose such restrictions on *Bigboy44*, according to the model statute, the judge must provide *Bigboy44* with the opportunity to obtain access to a computer or the Internet by seeking permission from either the court or probation or parole officer.

The children of today are on computers and the Internet more than ever. Cyberspace is the playground of the twenty-first century. The Internet is a superhighway into our homes and communities. By restricting the access of Internet sex offenders to this superhighway, courts will not only protect the public from dangerous Internet predators, but they will also help offenders reintegrate back into society by taking away any criminal temptations. Accordingly, the model statute proposed in this Note provides a guide for states to consider when drafting legislation to address computer and Internet restrictions for Internet sex offenders.

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