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Emily Brant

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COMMENTS

SENTENCING “CYBERSEX OFFENDERS”: INDIVIDUAL OFFENDERS REQUIRE INDIVIDUALIZED CONDITIONS WHEN COURTS RESTRICT THEIR COMPUTER USE AND INTERNET ACCESS

Emily Brant⁺

How to balance the government’s obligation to protect the public with an individual’s right to act freely has long been an issue in the legal world.¹ Recently, the issue has focused on how courts can appropriately balance a convicted “cybersex offender[’s]”² need for computer and Internet access with the government’s duties to protect society, deter further offending, and promote rehabilitation.³ Computers and the Internet—amenities in only

⁺ J.D. Candidate, May 2010, The Catholic University of America, Columbus School of Law; B.A., 2007, Saint Joseph’s University. The author would like to thank Professor Mary Graw Leary for her invaluable guidance and expertise; the editors and staff of the *Catholic University Law Review* for all of their hard work and dedication; her parents for their love and constant encouragement; and Ben Sprague for his unwavering patience and support.

1. Ed Johnson, *Law Takes Aim at Sex Offenders’ Computers: Internet Limits Raise Questions*, ASBURY PARK PRESS (N.J.), June 29, 2008, at A1; see also, e.g., *Graham v. Connor*, 490 U.S. 386, 396 (1989) (noting that the test for reasonableness “under the Fourth Amendment requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interest at stake” (internal quotation marks omitted)) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985))).

2. See Art Bowker & Michael Gray, *An Introduction to the Supervision of the Cybersex Offender*, 68 FED. PROBATION 3, 3 (Dec. 2004) (coining the term “cybersex offender”).

3. See 18 U.S.C. § 3553(a)(2) (2000) (describing factors for sentencing); Doug Hyne, *Examining the Legal Challenges to the Restriction of Computer Access as a Term of Probation or Supervised Release*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 215, 215–17 (2002) (discussing the balancing of the need to restrict access to computer and Internet use with consideration of an individual’s “First Amendment right to free speech and freedom of association”). Sex offenders, as referenced throughout this Comment, refer to

those who have been convicted, adjudicated delinquent or found not guilty by reason of insanity for the commission of a sex offense and are required to register under Megan’s Law; those who are serving a special sentence of community or parole supervision due to the commission of a sex offense; and those who have been convicted of promoting or providing obscene material to persons under the age of eighteen.

ASSEMBLY JUDICIARY COMM. STATEMENT ON S. BILL NO. 1979 (IR), L. 2007, c. 219 (2007), as reprinted in N.J. STAT. ANN. § 2C:43-6.6, at 14 (West Supp. 2008). Megan’s Law, passed by the United States Congress in 1996, has required every state to establish a registration system for certain offenders, as well as a notification system to distribute the offender’s information to the public. Megan’s Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (codified as amended at 42

affluent homes two decades ago—have become commodities increasingly accessible to many different groups of society.⁴ While this has granted many Americans the ability to shop, communicate, and access an unlimited amount of information with the mere click of a button, it has also led to the creation of unprecedented and unparalleled problems.⁵

While the existence of sexual offenses is certainly not an exclusively modern phenomena,⁶ computers with Internet access have become a frightful weapon by creating a new avenue for sexual offenders to produce, exploit, and disseminate illicit images, particularly those relating to child pornography.⁷ The accessibility, affordability, and anonymity⁸ presented by downloading child pornography from the Internet has created a “nearly perfect medium for offenders seeking children for sex.”⁹ Disguised in the “dark corners and back alleys”¹⁰ of cyberspace, sex offenders can capitalize on the infinite number of

U.S.C. § 14071(e) (2000 & Supp. V 2005)) (requiring the release of certain information); *see also* 42 U.S.C. § 14071(a)(1) (2000 & Supp. V 2005) (directing the Attorney General to establish state guidelines for registering offenders). For a comparative analysis of states’ registration and notification laws *see* Alan R. Kabat, Note, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol’s Sake*, 35 AM. CRIM. L. REV. 333, 334–35 (1998).

4. *See* U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2003, at 1, 4 (2005), *available at* <http://www.census.gov/prod/2005pubs/p23-208.pdf> (reporting that in 2003, 70 million American households, or 62 percent, had one or more computers, up from 15 percent in 1989).

5. *See* Hyne, *supra* note 3, at 215–16 (noting that “computer crime has brought a dark side to the otherwise beneficial ‘information age’ . . . [and that] [r]estricting an individual’s ability to use a computer has raised some thorny issues” (footnote omitted)).

6. *See* Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL’Y & L. 1, 2–3 (2007) (“[W]hile the existence of images of sexually exploited children is not new, today’s images are accessible to adults and children in a volume and severity never before seen.”).

7. *See* Bowker & Gray, *supra* note 2, at 3 (“Cybersex offenders use computers to view, store, produce, send, receive and/or distribute child and other forms of pornography; to communicate, groom, and entice children and others for victimization; and to validate and communicate with other sex offenders.”). Federal law defines child pornography as any visual depiction of a minor (under the age of eighteen) “engaging in sexually explicit conduct.” 18 U.S.C. § 2256(8). “Sexually explicit conduct” includes “actual or simulated (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person.” 18 U.S.C. § 2256(2). While teenagers make up a majority of juvenile victims of sexual exploitation (59 percent), 28 percent are between the ages of six and eleven, and 13 percent are below the age of six. Leary, *supra* note 6, at 7.

8. Andrew Bates & Caroline Metcalf, *A Psychometric Comparison of Internet and Non-Internet Sex Offenders from a Community Treatment Sample*, 13 J. OF SEXUAL AGGRESSION 11, 12 (2007).

9. MICHAEL MEDARIS & CATHY GIROUARD, U.S. DEP’T OF JUSTICE, PROTECTING CHILDREN IN CYBERSPACE: THE ICAC TASK FORCE PROGRAM 2 (2002), *available at* <http://www.ncjrs.gov/pdffiles1/ojdp/191213.pdf>.

10. *Id.* at 1.

unsupervised and curious children "with little fear of being readily discovered . . . or identified."¹¹ In addition, today's Internet has become the ideal "marketplace for offenders seeking to acquire material for their child pornography collections."¹² Access to a computer and the Internet greatly increases an offender's ability to produce, store, and transmit explicit images,¹³ which are "used by child molesters to recruit, seduce, and control their victims."¹⁴

At the same time, however, the Internet has grown to play an integral role in the lives of most Americans. According to a recent survey, 73 percent of American adults use the Internet for a myriad of reasons, including occupational and educational purposes, as well as various daily activities.¹⁵ Because the Internet is such an indispensable tool and is enjoyed throughout many sectors of society,¹⁶ it has been difficult for courts to decide whether to restrict a sexual offender's access to computers, the Internet, or both, as a condition of supervised release.¹⁷

Currently, there is a circuit split over the degree to which courts should restrict a convicted sex offender's access to computers and the Internet.¹⁸ The courts have struggled to find the appropriate balance between a sex offender's right to access the Internet with the broader societal goals of protecting the

11. Bowker & Gray, *supra* note 2, at 3.

12. MEDARIS & GIROUARD, *supra* note 9, at 2.

13. Bowker & Gray, *supra* note 2, at 3.

14. MEDARIS & GIROUARD, *supra* note 9, at 2. While all cases are unique, strong anecdotal evidence exists among those involved in prosecuting child pornography cases that there is a strong correlation between those who collect child pornography and those convicted of child molestation in seeking out potential victims. *Id.* By exposing children to pornographic images of other victims with the intention of building a sense of comfort and by using pictures of the victim to coerce them into keeping quiet, offenders are ultimately able to use these pornographic images as a tool to exert power over their victims. *Id.*

15. See PEW INTERNET & AM. LIFE PROJECT, LATEST TRENDS: INTERNET ACTIVITIES (2008), available at http://www.pewinternet.org/trends/Internet_Activities_7.22.08.htm.

16. See generally *id.* (displaying survey results depicting a wide variety of common Internet activities). The Pew Internet & American Life Project also reported that 88 percent of local government officials now use the Internet to communicate with their constituents' through e-mail or conduct research to learn of their constituents' activities and opinions. ELENA LARSON & LEE RAINIE, DIGITAL TOWN HALL: HOW LOCAL OFFICIALS USE THE INTERNET AND THE CIVIC BENEFITS THEY CITE FROM DEALING WITH CONSTITUENTS ONLINE 2 (Oct. 2, 2002), available at http://www.pewinternet.org/report_display.asp?r=74.

17. See *infra* Part I.A.

18. Compare United States v. Zinn, 321 F.3d 1084, 1092–93 (11th Cir. 2003) (upholding restrictions based on "the strong link between child pornography and the Internet"), with United States v. Sofsky, 287 F.3d 122, 126 (2d Cir. 2002) (rejecting prohibitions on Internet access because of the "virtually indispensable" nature of the Internet in today's world (internal quotation marks omitted)). See also discussion *infra* Parts I.B–C.

public and rehabilitating the offender.¹⁹ Some circuits have rejected broadly banning an offender from computers and Internet use, whereas other circuits have upheld broad restrictions, or even a complete ban, based on public safety concerns and deterrence.²⁰

Recently, some state legislatures have passed legislation that requires courts to implement certain computer and Internet restrictions for convicted sex offenders.²¹ However, these laws ultimately strip courts of their discretion and limit judges' ability to fashion individual sentences based on the circumstances surrounding each offender.²² Without the capacity to provide individualized sentences to sex offenders, courts cannot effectively carry out their traditional roles of balancing competing rights and interests.²³ In states without legislatively mandated conditions, some courts have used their discretion to issue narrowly tailored Internet restrictions; however, other courts have imposed overly broad restrictions that effectively ban a sex offender to the same extent as would an all-encompassing piece of legislation.²⁴

This Comment examines the different standards that federal appellate courts²⁵ have applied in reviewing challenges to restrictions on sex offenders'

19. See Bowker & Gray, *supra* note 2, at 5 (acknowledging that although the potential abuses of the Internet are particularly dangerous to the public, it is also clear that computers are an important resource in reintegrating offenders back into the community).

20. Compare *United States v. Peterson*, 248 F.3d 79, 82–83 (2d Cir. 2001) (per curiam) (rejecting a broad ban on computer and Internet use as excessive, overbroad, and unnecessary), with *United States v. Paul*, 274 F.3d 155, 169 (5th Cir. 2001) (upholding a complete ban on computer and Internet use for the purposes of deterrence and public protection). See also Susan S. Kreston, *Emerging Issues in Internet Child Pornography Cases: Balancing Acts*, J. INTERNET L., June 2006, at 22, 29 (2006) (discussing the differing approaches to computer and Internet restrictions).

21. See, e.g., N.J. STAT. ANN. § 2C:43-6.6 (West Supp. 2008).

22. See *id.* (“In the case of a person who has been convicted . . . of a sex offense . . . the court shall . . . order the following Internet access conditions . . .”); Kreston, *supra* note 20, at 29 (discussing how courts have looked to both the nature of the sexual offenders' crimes as well as their employment history in deciding whether to impose complete bans on Internet access).

23. See Kreston, *supra* note 20, at 31 (In many areas of law “courts are called upon to strike a balance between competing rights and interests. It is only when such balances are accurately struck, giving proper weight to not only particular facts of the case, but also according both research and policy their place in the equation, can justice be readily done . . .”).

24. Compare *United States v. Holm*, 326 F.3d 872, 877–78 (7th Cir. 2003) (overturning a restriction as overly broad where alternative methods, such as supervised Internet use, would be sufficient to balance the interests between the defendant's rights and protecting the public), with *United States v. Crandon*, 173 F.3d 122, 127 (3d Cir. 1999) (prohibiting the defendant from accessing the Internet without prior approval from his probation officer).

25. This Comment focuses solely on the split concerning Internet restrictions among federal circuits and will not discuss state court holdings on the subject. However, similar to the statutory factors laid in § 3553(a), most state courts hold that “when imposing a sentence, the judge should consider several goals: punishment, deterrence, protection of the public, and rehabilitation.” *Commonwealth v. Power*, 650 N.E.2d 87, 90 (Mass. 1995). Despite these factors, many state appellate courts have upheld fairly broad Internet restrictions imposed upon the offender by lower courts upon supervised release. See, e.g., *State v. Wardle*, 53 P.3d 1227, 1229 (Idaho Ct. App.

computer and Internet access as a condition of supervised release or probation. In Part I.A, this Comment reviews the Federal Sentencing Guidelines that set the standard for sentencing courts and provide judges wide discretion to impose the terms of supervised release. Parts I.B and I.C explore how different circuits have applied the Sentencing Guidelines and evaluates the opinions which have led to a multi-jurisdictional split regarding the limitations and scope of restricting sex offenders' computer and Internet access. Part I.D reviews how certain states have attempted to take the problem into their own hands through legislation. In Part II, this Comment examines the justifications for the various federal appellate courts' holdings and analyzes the constitutional and policy ramifications of setting restrictions that are either too narrow or too broad in scope. Finally, in Part III, this Comment proposes that states should permit courts to engage in a case-by-case determination rather than requiring a one-size-fits-all law that fails to take into account the unique factors of each individual offender.

I. FUNDAMENTAL APPROACHES IN RESTRICTING COMPUTER USE AND INTERNET ACCESS AS A "SPECIAL CONDITION" TO SUPERVISED RELEASE

A. *Sentencing Guidelines: Broad Discretion Leads to Mixed Results*

The digitization of America and the proliferation of the Internet have created new challenges for courts attempting to balance deterrence and public safety objectives against an offender's liberty interests and rehabilitative capabilities.²⁶ Many courts and supervising agencies have increasingly imposed conditions that restrict computer use and Internet access for convicted sex offenders upon their supervised release.²⁷ While these conditions have generally been carried out "without the benefit of clear legal guidance from higher courts or legislative bodies,"²⁸ the Federal Sentencing Guidelines create a set of uniform sentencing rules to be applied throughout all federal courts.²⁹

2002) (upholding a ban on computers in the defendant's home as reasonably related to his battery offense, despite the fact that the government could not prove sexual intent); *State v. Combs*, 10 P.3d 1101, 1103 (Wash. Ct. App. 2000) (holding that a complete prohibition on computer use was reasonable and necessary "during the 24 month community placement period" to protect the public from repetition of the defendant's heinous crimes, in which he displayed pornographic images to five and six year old girls, and then forced them to engage in the same actions).

26. See Brian W. McKay, Comment, *Guardrails on the Information Superhighway: Supervising Computer Use of the Adjudicated Sex Offender*, 106 W. VA. L. REV. 203, 203-04 (2003) (proposing that "courts should not adopt a per se rule against complete Internet bans").

27. See *id.* at 204.

28. *Id.*

29. 18 U.S.C. § 3553 (2000 & Supp. V 2005); see also U.S. SENTENCING GUIDELINES MANUAL Ch. 1, Pt. A, at 12-13 (2008); Christopher Wiest, Comment, *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). It is important to note that in *United States v. Booker*, the United States Supreme Court held that the Federal Sentencing Guidelines could no longer be mandatory and ruled that they were now merely "advisory." 543 U.S. 220, 245 (2005).

The Guidelines not only provide a baseline for the proper period of incarceration,³⁰ but also allow a court to impose a term of supervised release and grant them the discretionary authority to fashion special conditions of such supervision.³¹ This authority allows courts to impose various computer use and Internet access restrictions on a sexual offender when he is released from prison.³²

Despite having wide discretion, a federal judge's authority to set the specific conditions of a sex offender's supervised release is subject to the requirements and limiting factors outlined in 18 U.S.C. § 3583(d).³³ However, § 3583(d) also permits a judge to set conditions of release as long as those conditions are "reasonably related" to the factors described in § 3553(a)(1)–(2), and "to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in Section

30. 18 U.S.C. § 3553(a)–(b).

31. *Id.* § 3583(c); see also McKay, *supra* note 26, at 219–20; Wiest, *supra* note 29, at 849. At sentencing, the defendant may receive "supervised release, parole, or probation," in descending order of severity. Kreston, *supra* note 20, at 29. While a defendant may be sentenced to parole or probation without having to serve any period of incarceration, supervised release may only be ordered upon completion of some period of incarceration. See *id.*

32. See McKay, *supra* note 26, at 219–21. Similar to probation, "[s]upervised release is a form of government supervision [that follows] a term of imprisonment," and requires several mandatory and discretionary conditions depending on the crime. Harold Baer, Jr., *The Alpha & Omega of Supervised Release*, 60 ALB. L. REV. 267, 269, 276–82 (1996). A defendant's period of supervised release begins immediately after the term of incarceration, however, if any imposed conditions are violated, the defendant may be returned to prison. *Id.* at 270. An appellate court follows the abuse of discretion standard when reviewing the conditions of supervised release set by the district court. See *United States v. Crume*, 422 F.3d 728, 732 (8th Cir. 2005). In order to impose conditions of supervised release relating to Internet and computer use, such conditions must be "sufficiently related" to at least some of the factors in the Guidelines. *United States v. Johnson*, 998 F.2d 696, 697–99 (9th Cir. 1993) ("[T]he items listed in [the Guidelines] aren't necessarily elements, each of which has to be present. They are merely factors to be weighed, and the conditions imposed may be unrelated to one or more factors, so long as they are sufficiently related to others.").

33. 18 U.S.C. § 3583(d) (setting forth "explicit conditions of supervised release"); see also *Crume*, 422 F.3d at 732–33 (stating that 18 U.S.C. § 3583(d) limits a judge's discretion to determine conditions of a supervised release). Section 3583(d) also permits a court to order any conditions "reasonably related" to the sentencing factors described in § 3553(a)(1)–(2). 18 U.S.C. § 3583(d). The sentencing factors a district court must consider are:

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

Id. § 3553(a)(1)–(2).

3553(a)(2)."³⁴ As explained in a 1984 Senate Judiciary Committee Report, the primary goal of supervised release is not to incapacitate and punish, but rather "to ease the defendant's transition into the community . . . or to provide rehabilitation . . . after release."³⁵ Accordingly, when implementing special conditions of supervised release, courts must consider the goals of sentencing to ensure that the release conditions are reasonable in relation to the offense committed, and are designed to help the offender reenter society.³⁶

Although the Guidelines provide parameters for sentencing and releasing, several appellate courts have reached differing conclusions under the Guidelines with respect to a sex offender's access to the Internet upon release.³⁷ A circuit split has formed with the Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits on one side, and the Second, Third, Seventh, and Tenth Circuits on the other.³⁸ Some courts have determined that a sex offender may be completely prohibited from computers and Internet access as a condition of release,³⁹ while other courts have opted for a more narrow approach, solely restricting a sex offender's access to specific websites.⁴⁰ However, the most common restrictions utilize the probation officer as an administrator by granting the offender access to the Internet only with the probation officer's prior approval.⁴¹

34. *United States v. Peterson*, 248 F.3d 79, 82 (2d Cir. 2001) (internal quotation marks omitted) (quoting 18 U.S.C. § 3563(b)). In addition, 28 U.S.C. § 994(a)(2), provides:

The Commission . . . shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in [18 U.S.C. § 3553(a)(2)].

28 U.S.C. § 994(a)(2) (2000 & Supp. V 2005).

35. S. REP. NO. 98-225, at 124 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3307.

36. *See* 18 U.S.C. § 3553(a)(2); *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, 688, 703 (2007) ("The goals and objectives of supervised release imply that the value of a release program as a rehabilitative tool mirrors the extent to which the conditions of supervised release simulate life after the program's end.").

37. *Compare* *United States v. Paul*, 274 F.3d 155, 170 (5th Cir. 2001) (upholding an absolute ban on computer and Internet access as reasonably necessary under 18 U.S.C. § 3583(d)), *with* *United States v. Freeman*, 316 F.3d 386, 387 (3d Cir. 2003) (vacating the district court's special release condition that forbid the defendant from possessing a computer or using any online computer service because the restriction "unreasonably impinges upon [the offender's] liberty interests").

38. *See infra* Part I.B-C.

39. *See, e.g., Paul*, 274 F.3d at 170.

40. *See, e.g., United States v. Sofsky*, 287 F.3d 122, 127 (2d Cir. 2002) (holding that a condition which prevented the offender from using the Internet without the approval of his probation officer "inflict[ed] a greater deprivation on [offender's] liberty than [wa]s reasonably necessary," and that "a more focused restriction" was needed).

41. *See, e.g., United States v. Rearden*, 349 F.3d 608, 621 (9th Cir. 2003) (holding that forbidding the defendant Internet access without prior approval from his probation officer "[did]

The division among the circuits reflects the fact that the courts are being asked to reconcile statutory goals that are broad and, at times, contradictory.⁴² For example, some courts view the Internet as so indispensable that a condition prohibiting use of the Internet would be unreasonable.⁴³ Other courts, however, are mainly concerned with the “the strong link between child pornography and the Internet, and the need to protect the public.”⁴⁴ Still, some courts have refused to adopt either of those positions, and instead consider the statutory goals on a case-by-case basis to determine the proper balance between an offender’s Internet access and public safety.⁴⁵

B. A Restrictive Approach: Circuits that Endorse a Complete or Broad Prohibition

1. A Total Prohibition on Computer Use and Internet Access

The Fifth Circuit, in *United States v. Paul*, established a precedent for a complete ban on computer use and Internet access.⁴⁶ The defendant, Ronald Scott Paul, “was sentenced to five years of imprisonment and three years of supervised release” following his guilty plea to “knowingly possessing child pornography.”⁴⁷ Paul challenged the conditions of his supervised release,

not involve a greater deprivation of liberty than reasonably necessary for the [statutory] purpose because it is not absolute”); see also Kreston, *supra* note 20, at 29 (“The most common restriction uses the probation officer as an overseer of the defendant’s use, often allowing unannounced inspections of the defendant’s computer for child pornography images or requiring permission of the probation officer before Internet access is allowed.” (footnote omitted)). By permitting probation officers to make subjective decisions regarding computer and Internet usage, some have argued that this probation officer exception seemingly creates further legal issues in itself. See Wiest, *supra* note 29, at 867. Because the judiciary is granted the authority to impose special restrictions, without specific authorization from Congress, the imposition of such conditions by a probation officer may be an impermissible delegation of power from Congress to the executive branch. *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). While this issue is not without importance, it will not be discussed in this Comment.

42. See 18 U.S.C. § 3553(a)(2) (2000) (establishing sentencing goals that must be considered in every case).

43. See, e.g., *Sofsky*, 287 F.3d at 126–27.

44. See, e.g., *United States v. Zinn*, 321 F.3d 1084, 1092–93 (11th Cir. 2003).

45. See, e.g., *United States v. Holm*, 326 F.3d 872, 878 (3d Cir. 2002) (suggesting a middle ground approach “between the need to ensure that [the defendant] never again uses the Worldwide Web for illegal purposes and the need to allow him to function in the modern world”).

46. See *United States v. Paul*, 274 F.3d 155, 168–69 (5th Cir. 2001). Other courts have reached similar conclusions on restrictive conditions for sex offenders. See, e.g., *United States v. Granger*, 17 F. App’x 247, 248–49 (4th Cir. 2004) (per curiam) (upholding a computer and Internet restriction similar to that in *Paul*).

47. *Paul*, 274 F.3d at 157. Paul’s collection of child pornography and other disturbing items were lawfully seized after he took his personal computer to a local computer repair shop. *Id.* at 158. The technician working on his computer discovered the photos, notified the Federal Bureau of Investigation (FBI), and the FBI conducted a valid search of the defendant’s home. *Id.* The most disturbing item seized by FBI agents was a medical bag containing flyers written in Spanish that advertised lice removal for children. *Id.* The flyers stated that the defendant “would conduct

"argu[ing] that the condition . . . prohibiting him from having, possessing, or having access to 'computers, the Internet, photographic equipment, audio/video equipment, or any item capable of producing a visual image' [was] unreasonably broad."⁴⁸ Paul argued that a complete ban on his computer use and Internet access could not be upheld merely because he pled guilty to an Internet-related crime,⁴⁹ contending that such a restriction would prohibit him from using "computers and the Internet for legitimate purposes, such as word processing and research."⁵⁰ The court disagreed and held that "the supervised release condition . . . is reasonably related to Paul's offense and to the need to prevent recidivism and protect the public."⁵¹

Relying on the Third Circuit's reasoning in *United States v. Crandon*,⁵² the Fifth Circuit in *Paul* upheld the complete ban on computer and Internet access as "reasonably necessary to protect the public and prevent recidivism."⁵³ The Fifth Circuit also rejected the Tenth Circuit's reasoning in *United States v. White*,⁵⁴ and denounced the idea that an all-encompassing restriction is per se

a complete physical examination on each child for 'overall health,' which necessarily required the children to completely undress." *Id.*

48. *Id.* at 167. The court noted that it "interpret[ed] this 'overbreadth' claim to argue that the supervised release condition [was] inappropriate under 18 U.S.C. § 3583(d) because it involve[d] a greater deprivation of liberty than [was] reasonably necessary in light of the need to protect the public and prevent recidivism." *Id.* at 167 n.14.

49. *Id.* at 168.

50. *Id.*

51. *Id.* at 169. The prosecution provided significant evidence against Paul, including a substantial amount of child pornography stored on his computer, proof that he communicated with others about sexually explicit content via the Internet, and verification that, through e-mail, he directed others how to "'scout' single, dysfunctional parents and gain access to their children." *Id.* at 168.

52. 173 F.3d 122 (3d Cir. 1999). In *Crandon*, the defendant "used the Internet as a means to develop an illegal sexual relationship with a young girl over a period of several months," and, in that instance, the Third Circuit held that the district court's condition restricting Internet access was reasonably related to the defendant's criminal activities, to the goal of deterring him from engaging in further criminal conduct, and to protecting the public. *Id.* at 127.

53. *Paul*, 274 F.3d at 168–69. The Fifth Circuit found there was no abuse of discretion even though the restrictions in *Crandon* contained a proviso permitting the defendant to use computer resources with the approval of his probation officer, a condition not present in Paul's supervised release. *Id.* at 167–68.

54. 244 F.3d 1199 (10th Cir. 2001). In *White*, where the defendant was convicted of receiving child pornography, the Tenth Circuit held that an attempt to deny Internet access altogether "is 'greater than necessary,' [under] 18 U.S.C. § 3553(a), and fails to balance the competing interests the sentencing court must consider." *Id.* at 1206. The Tenth Circuit distinguished *White*'s facts from those in *Crandon*, and noted that in *Crandon*, where the defendant clearly used the Internet as a means to meet and exploit a young girl, he "clearly initiated and facilitated a pattern of criminal conduct and victimization that produced an immediate consequence and directly injured the victim." *Id.* at 1205.

unreasonable merely because it might prohibit a defendant from “get[ing] a weather forecast or . . . read[ing] a newspaper online.”⁵⁵

Similarly, the Fourth Circuit has also concluded that a complete ban on computer use and Internet access is an appropriate condition of supervised release for a sex offender.⁵⁶ In *United States v. Granger*, the Fourth Circuit upheld a broad condition of supervised release that required the defendant to “not possess or use any computer which [was] connected or ha[d] the capacity to be connected to any network.”⁵⁷

The defendant, Michael Wayne Granger, pled guilty to “transporting and shipping images of child pornography” that had been downloaded and saved on his computer.⁵⁸ Granger was sentenced to fifteen years of incarceration, followed by a three-year term of supervised release.⁵⁹ On appeal, Granger contended that the special condition restricting his computer and Internet use was overly broad and, as a practical matter, would “effectively prevent[] [him] from earning a living at any occupation where he might have to access a computer, including a job such as [a] cashier.”⁶⁰

In response, the Fourth Circuit offered three reasons for upholding the condition, independent of the Fifth Circuit’s reasoning given in *Paul*.⁶¹ First, the restrictions should not affect his ability to obtain meaningful employment because much of Granger’s prior employment had primarily involved physical labor and required neither access to computers nor the Internet.⁶² Second, because Granger would be “required to ‘work at a job which [was] pre-approved by [his] probation officer,’” there would be no doubt as to whether

55. *Paul*, 274 F.3d at 170 (internal quotation marks omitted) (quoting *White*, 244 F.3d at 1205).

56. *United States v. Granger*, 117 F. App’x 247, 248–49 (4th Cir. 2004) (per curiam).

57. *Id.* at 248 (internal quotation marks omitted).

58. *Id.* Numerous images of child pornography, including many with Granger sexually involved with his six-year-old daughter and seven-year-old stepdaughter, were discovered on Granger’s personal computer after his co-worker informed the authorities that Granger possessed the illicit images. *Id.*

59. *Id.*

60. *Id.* at 248–49 (internal quotation marks omitted) (alterations in original).

61. See *id.* at 249. The Fifth Circuit in *Paul* made several references to the “dual statutory goals of protecting the public and preventing future criminal activity.” *United States v. Paul*, 274 F.3d 155, 169 (5th Cir. 2001). In contrast, the Fourth Circuit in *Granger* made no direct reference to these statutory goals or to the *Paul* decision. *Granger*, 117 F. App’x at 249.

62. *Granger*, 117 F. App’x at 249. The Fourth Circuit distinguished Granger’s circumstances from those of the defendant in *United States v. Holm*, a Seventh Circuit decision finding that a complete ban on computer and Internet use was unreasonable due to the defendant’s thirty-year history of work in a computer-driven industry and the difficulty he would face in finding “gainful employment in the computer field upon his release.” 326 F.3d 872, 877–78 (7th Cir. 2003). Although the Fourth Circuit did not mention *Paul*, work history was also relevant in *Paul* where the Fifth Circuit noted that Paul had worked primarily as a truck driver, and made no specific objection to the computer and Internet bans affecting his employment. *Paul*, 274 F.3d at 170 & n.17.

any potential employment opportunities would violate the special conditions of his supervised release.⁶³ Third, the court noted that if the expansion of computer technology in fifteen years is so great as to severely impact a worker of Granger's skills and training, he would be able to seek a modification of this special condition after his release.⁶⁴

2. A General Affirmation of Broad Internet Bans

While the Eighth, Ninth, and Eleventh Circuits have not yet upheld a *complete* ban on computer use and Internet access,⁶⁵ these circuits have permitted significant restrictions on a sex offender's Internet access based largely on the need to protect the public.⁶⁶ In the Ninth Circuit decision *United States v. Rearden*, for example, the defendant Chance Rearden was convicted of shipping child pornography over the Internet and was sentenced to fifty-one months imprisonment, followed by a specified term of supervised release.⁶⁷ The Ninth Circuit affirmed the conditions of his supervised release that prohibited the possession or use of a computer with access to the Internet at any location without prior approval from his probation officer.⁶⁸ In so holding, the court pointed out that "a number of circuits have upheld similar restrictions on a convicted sex offender's use of the Internet."⁶⁹ While also acknowledging that other courts have held conversely,⁷⁰ the Ninth Circuit concluded that

63. *Granger*, 117 F. App'x at 249.

64. *Id.* (noting that 18 U.S.C. § 3583(e)(2) permits a district court to alter the conditions of release in the event of "unforeseen circumstances").

65. *See, e.g., United States v. Rearden*, 349 F.3d 608, 620–21 (9th Cir. 2003) (limiting the defendant's Internet access to that approved by the Probation Office); *United States v. Ristine*, 335 F.3d 692, 695–96 (8th Cir. 2003) (upholding the district court's sentence permitting computer use with probation officer permission and no access to the Internet); *United States v. Zinn*, 321 F.3d 1084, 1093 (11th Cir. 2003) (finding no abuse of discretion in the district court's order limiting Internet use to purposes acceptable to the defendant's probation officer).

66. *See, e.g., Zinn*, 321 F.3d at 1093 (recognizing the "concomitant dangers of the Internet and the need to protect both the public and sex offenders themselves from its potential abuses").

67. *Rearden*, 349 F.3d at 611–12. Rearden was discovered after frequently corresponding with another sex offender, David Settlemyer, who, in November 2000, began cooperating with federal authorities to bring down other sex offenders like Rearden. *Id.* Communication between the two began in July 2000, when Rearden expressed interest in a chat room message that advertised "'snuff films of little children' and inquir[ed] whether anyone was interested in 'raping and ravaging' [Settlemyer's] three nieces, ages sixteen, fourteen, and eight." *Id.* at 611. In December 2000, Rearden sent Settlemyer an e-mail containing three pornographic websites and fifteen child pornographic images. *Id.* at 612. Consequently, authorities arrested Rearden on February 23, 2001. *Id.*

68. *Id.* at 621–22.

69. *Id.* (citing *Ristine*, 335 F.3d at 696; *Zinn*, 321 F.3d at 1093; *United States v. Paul*, 274 F.3d 155, 169–70 (5th Cir. 2001)).

70. *Id.* at 621 (citing *United States v. Freeman*, 316 F.3d 386, 391–92 (3d Cir. 2003); *United States v. Scott*, 316 F.3d 733, 737 (7th Cir. 2003); *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002)).

Rearden's Internet restriction was reasonably related to his offense and to the important goals of deterrence, rehabilitation, and protecting the public.⁷¹

In *United States v. Zinn*, the Eleventh Circuit adopted a similar rationale in upholding a broad Internet restriction as a condition of supervised release where the defendant had pled guilty to possessing images of child pornography that had been transported in interstate commerce.⁷² While the court recognized that "the Internet has become an important resource for information, communication, commerce, and other legitimate uses," it ultimately concluded that the opportunity for misuse—evident from the facts of this case—justified fairly extensive computer and Internet restrictions.⁷³ As in *Rearden*, the Eleventh Circuit noted that the restriction in this case did not risk being overly broad because of the "probation officer exception" included in the condition.⁷⁴

In addition, the Eighth Circuit has also upheld fairly broad Internet restrictions in two cases dealing with sex offenders. In *United States v. Fields*, where the defendant pled guilty to selling child pornography,⁷⁵ and in *United States v. Ristine*, where the defendant pled guilty to receiving child pornography,⁷⁶ the Eighth Circuit cited two justifications for its decision to uphold the defendants' computer and Internet restrictions.⁷⁷ First, the court stated that "there was evidence that the defendant did more than merely possess child pornography."⁷⁸ Second, the court explained that the computer

71. *Rearden*, 349 F.3d at 621 (describing Rearden's offense as one that "involved e-mail transmissions of quite graphic child pornography"). The court also held that the condition did not impermissibly infringe on the defendant's liberty rights because these rights are not absolute, but allowed for limited Internet access if approved by his probation officer. *Id.*

72. *Zinn*, 321 F.3d at 1086, 1092–93.

73. *Id.* at 1093. Defendant Karl Zinn solicited two pornographic videotapes depicting girls under the age of thirteen from an undercover U.S. Customs Service website designed to catch sexual predators. *Id.* at 1086. When the two videotapes arrived at Zinn's home as part of a controlled delivery, Customs agents executed a search warrant and recovered computer disks containing over 4000 images of child pornography. *Id.*

74. *Id.* at 1093. The Eleventh Circuit relied on the reasoning of the Tenth Circuit in *United States v. Walser* in holding that this was a "relatively narrowly-tailored condition [which] 'readily accomplishes the goal of restricting use of the Internet and more delicately balances the protection of the public with the goals of sentencing.'" *Id.* (quoting *United States v. Walser*, 275 F.3d 981, 988 (10th Cir. 2001)).

75. *United States v. Fields*, 324 F.3d 1025, 1026 (8th Cir. 2003). After the defendant pled guilty to one count of selling child pornography, the district court sentenced him to fifty-seven months in prison, followed by a three-year term of supervised release under special conditions that restricted his use of computers and the Internet. *Id.*

76. *United States v. Ristine*, 335 F.3d 692, 693 (8th Cir. 2003). Defendant Scott Ristine was sentenced to twenty-seven months of imprisonment with three years of supervised release subject to a condition that restricted his use of photographic equipment, computers, and the Internet. *Id.*

77. *See id.* at 696; *Fields*, 324 F.3d at 1027.

78. *Ristine*, 335 F.3d at 696; *see also Fields*, 324 F.3d at 1027 (noting that selling child pornography is a more serious offense than simply possessing the material). Ristine's crimes were discovered after he attempted to purchase a catalog of videotapes "featuring boys and girls

restrictions were not absolute bans on computer use because both defendants were permitted to use computers (but were not allowed access to the Internet) with prior approval from their probation officers.⁷⁹

C. A Liberal Approach: Circuits that Endorse Narrowly Tailored Internet Restrictions

1. The Second Circuit: Adamantly Opposed to Broad Internet Bans

Not all circuits have elected to uphold such severe and all-encompassing computer and Internet restrictions like those approved in *Paul* and *Granger*.⁸⁰ The Second Circuit, in particular, has been adamantly opposed to such widespread restrictions on an offenders' computer use and Internet access.⁸¹ While several other circuits have agreed with the Second Circuit's reasoning in certain circumstances,⁸² no other circuit seems to take as fervent an approach.⁸³

under age ten engaging in sexual acts." *Ristine*, 335 F.3d at 693. A subsequent search by the police revealed "thousands of child pornography images that he downloaded from the Internet and . . . exchange[d] . . . with other Internet users." *Id.* Fields was discovered after he created "lolitagurls.com," a website that generated revenue of over \$22,000 from "provid[ing] subscribers access to 'hard to find' and 'shocking' nude pictures of 'girls between the ages of 12-17.'" *Fields*, 324 F.3d at 1026.

79. *Ristine*, 335 F.3d at 696; *Fields*, 324 F.3d at 1027. Two years later, the Eighth Circuit reversed a similar condition of supervised release as a greater deprivation of liberty than reasonably necessary; however, this case was distinguished on the grounds that the defendant did no more than "merely possess child pornography," and thus a more narrowly tailored restriction was appropriate. *See United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005) (noting that one of the main considerations for upholding broad restrictions in *Ristine* and *Fields* was that "the defendant[s] used [the] computer and the Internet to do more than merely possess child pornography"). Use of the word "merely" by the courts has alarmed some commentators when it is used by the courts to refer to "the concept of possession of images of child pornography." *Kreston*, *supra* note 20, at 30. These commentators argue that this language portrays the "possession of child pornography [as] a victimless crime." *Id.* However, this cannot be the case because a child somewhere was obviously used to produce the explicit images possessed by the offender. *See id.*

80. *See, e.g., United States v. Sofsky*, 287 F.3d 122, 124 (2d Cir. 2002); *United States v. Peterson*, 248 F.3d 79, 81 (2d Cir. 2001).

81. *See, e.g., Sofsky*, 287 F.3d at 124 (holding that a condition of supervised release prohibiting the defendant from accessing a computer or the Internet without his probation officer's approval inflicted a greater deprivation on the defendant's liberty than was reasonably necessary).

82. *See, e.g., United States v. Freeman*, 316 F.3d 386, 391-92 (3d Cir. 2003) (relying on *Sofsky* to declare a complete restriction on the defendant's computer use or Internet access without probation officer approval as excessively broad).

83. *Compare Sofsky*, 287 F.3d at 126-27 (holding that placing a restriction on *Sofsky's* computer and Internet use is a greater deprivation on his liberty than was reasonably necessary as the Government has the ability to randomly check *Sofsky's* computer without notice to determine whether he was using it at all as well as what he was using it for), *with Freeman*, 316 F.3d at 392 (noting that while a total ban on computer and Internet use was not appropriate in this case, the court would not hesitate to impose such a restriction in the future when it has been determined that the defendant has used the Internet in the past to contact children).

In *United States v. Peterson*, defendant Larry Peterson pled guilty to bank larceny and was sentenced to five years probation with conditions based in part on a prior, unrelated incest sex-offense conviction.⁸⁴ The district court imposed conditions broadly prohibiting Peterson from possessing or using computers or the Internet.⁸⁵ On appeal, Peterson argued that this restriction was not reasonably related to “the ‘nature and circumstances of the [larceny] offense’ or [his] ‘history and characteristics,’” nor were they “‘reasonably necessary’ to the broad sentencing purposes indicated in [18 U.S.C.] § 3553(a)(2).”⁸⁶ The government argued that the “restrictions were reasonably related to Peterson’s prior incest conviction[,]” however, the Second Circuit was not persuaded.⁸⁷

In rejecting the government’s argument, the Second Circuit relied on *United States v. White*,⁸⁸ and highlighted the fact that computers and the Internet have become “virtually indispensable” in today’s modern society.⁸⁹ By analogy, the court suggested that a total Internet ban would be just as inappropriate as an absolute ban on the use of telephones as a condition of release for the crime of using a telephone to commit fraud.⁹⁰ In the court’s view, the restriction was excessive, overbroad, and unnecessary to protect the public given the lack of evidence that Peterson’s prior incest offense was in any way related to the Internet.⁹¹ Moreover, the court asserted that the condition imposed constituted an “occupational restriction” by definitely prohibiting the use of technology that Peterson might need in a job which involved computers.⁹² Because

84. *United States v. Peterson*, 248 F.3d 79, 81 (2d Cir. 2001). The restrictions on Peterson’s Internet access stemmed from his prior incest conviction, his continued viewing of adult pornography, and the “probation officer’s finding that [he] ‘pose[d] a great risk to the community.’” *Id.* (alteration in original).

85. *Id.* (restricting Peterson’s ability to possess or use computers or the Internet, requiring him to enter a mental health program for the treatment of “sexual predators”, and requiring him to notify third parties (e.g., potential employers) of his prior sex offense conviction as well as his bank larceny conviction).

86. *Id.* at 82 (quoting 18 U.S.C. §§ 3553(a)(2), 3563(b) (2000)).

87. *Id.* at 82–83. The Second Circuit held that the restrictions were overly extensive because they completely prevented the defendant from “possessing or using a computer that includes either a modem, an Internet account, a mass storage device, or a writable or re-writable CD Rom.” *Id.* at 83.

88. 244 F.3d 1199, 1206 (10th Cir. 2001) (noting that a complete ban on computer use would “bar [the defendant] from using a computer at the library to do any research, get a weather forecast, or read a newspaper online”).

89. *Peterson*, 248 F.3d at 83.

90. *Id.* The Second Circuit also noted that the defendant’s propensity for pornography did not justify a ban on all books, magazines, and newspapers simply because he might use them to facilitate his addiction. *Id.*

91. *Id.* The items banned by the condition included: “a modem; Internet account; writable or re-writable CD Rom; tape backup or removable mass storage device; device/appliance that can be used to connect to the Internet; digital camera; [and] CDs (other than original manufacturer’s software distribution).” *Id.* at 81 (internal quotation marks omitted).

92. *Id.* at 83.

Peterson had a history of employment that required the use of computers, including his own business, the court considered these to be further justifications for deeming the restriction unreasonably broad.⁹³

The Second Circuit again rejected conditions imposing a complete ban on Internet access in *United States v. Sofsky*, a case with even more aggravating factors.⁹⁴ Defendant Gregory Sofsky received a ten-year and one month prison sentence as well as a period of supervised release after he entered a guilty plea to the charge of receiving child pornography.⁹⁵ Upon reviewing the conditions of Sofsky's supervised release, the Second Circuit held that "[a]lthough the condition prohibiting Sofsky from accessing a computer or the Internet without his probation officer's approval is reasonably related to the purposes of his sentencing, in light of the nature of this offense, . . . the condition inflicts a greater deprivation of [his] liberty than is reasonably necessary."⁹⁶ The court noted that it had previously considered a similar sentencing condition in *Peterson*, and still found the telephone analogy in *Peterson* to be persuasive.⁹⁷ The court rejected the government's argument that permitting such access would facilitate the continuation of electronically receiving child pornography.⁹⁸ The court again relied on *United States v. White* and held that "[a] total ban on Internet access prevents [the] use of e-mail, an increasingly

93. *Id.* at 84; *cf.* *United States v. Granger*, 117 F. App'x 247, 248–49 (4th Cir. 2004) (*per curiam*) (upholding a broad computer and Internet restriction where the great majority of defendant's work involved manual labor and not computer technology).

94. *United States v. Sofsky*, 287 F.3d 122, 124 (2d Cir. 2002).

95. *Id.* at 123–24. After the prosecution put forth substantial evidence that Sofsky used the Internet to obtain thousands of child pornographic images, Sofsky entered a guilty plea. *Id.* at 124.

96. *Id.* at 126.

97. *Id.* ("[A]lthough a defendant might use the telephone to commit fraud, this would not justify a condition of probation that includes an absolute bar on the use of telephones." (internal quotation marks omitted) (quoting *Peterson*, 248 F.3d at 83)). The court went on to note that the "same could be said of a prohibition on the use of the mails imposed on a defendant convicted of mail fraud." *Id.*

98. *Id.* The court also rejected the government's argument that a broad restriction was the only practically enforceable restriction. *Id.* at 126–27 (noting that narrower restrictions to Sofsky's Internet access, such as random hard drive monitoring, would be more appropriate). Six months after *Sofsky*, the Second Circuit, in *United States v. Carlson*, reiterated its apprehension for onerous computer and Internet restrictions. *United States v. Carlson*, 47 F. App'x 598, 599 (2d Cir. 2002) (vacating and remanding the conditions imposed by the district court in light of *Sofsky*). In that case, defendant Stanley Carlson pled guilty to possession of child pornography and was sentenced to sixty months imprisonment and three years of supervised release upon the condition that he not "possess, purchase or use a computer (including any Internet services) or computer equipment and is prohibited from using any commercial computer systems/service." *Id.* at 598 (internal quotation marks omitted). In vacating the conditions imposed on Carlson by the district court, the Second Circuit noted that the restrictions were even more severe than those overturned in *Sofsky*. *Id.* at 599.

widely used form of communication and . . . prevents other common-place computer uses.”⁹⁹

2. *A General Disapproval of Broad Internet Bans*

While the Third Circuit has upheld a broad restriction in the often-cited case *United States v. Crandon*,¹⁰⁰ it generally prefers the kind of minimal restrictions expressed by the Second Circuit in *Sofsky*. For example, in *United States v. Freeman*, the restriction at issue forbid the defendant, who had pled guilty to receipt and possession of child pornography, from possessing any computer in his home or using any online computer service without prior approval from his probation officer.¹⁰¹ Relying on *Sofsky*, the court noted that “there is no need to cut off Freeman’s access to email or benign internet usage when a more focused restriction, limited to pornography sites and images, can be enforced by unannounced inspections of material stored on Freeman’s hard drive or removable disks.”¹⁰² The court acknowledged that in *Crandon* it had previously allowed a condition restricting all Internet access,¹⁰³ but the court distinguished those facts, noting that “the defendant in *Crandon* used the internet to contact young children and solicit inappropriate sexual contact with them. Such use of the internet is harmful to the victims contacted and more difficult to trace than simply using the internet to view pornographic web sites.”¹⁰⁴ Here, because no evidence indicated that Freeman had used the Internet to contact young children, the court held that it was not reasonably necessary to restrict all access when a more limited restriction was available.¹⁰⁵

Similar to the Third Circuit, the Seventh Circuit has appeared willing to impose some restrictions, but has also expressed concern that severe

99. *Sofsky*, 287 F.3d at 126 (citing *United States v. White*, 244 F.3d 1199, 1206 (10th Cir. 2001)).

100. 173 F.3d 122, 127 (3d Cir. 1999) (upholding a condition restricting Internet access as reasonably related to the defendant’s criminal activities and the goals of deterrence and protecting the public, where the defendant employed the Internet to cultivate an inappropriate sexual relationship with a minor over an extensive period of time).

101. *United States v. Freeman*, 316 F.3d 386, 387–88 (3d Cir. 2003). Similar to *Rearden*, a convicted child molester assisted a U.S. Customs Service agent by urging Freeman to share and transport child pornography images. *Id.* at 387.

102. *Id.* at 392.

103. *Id.* (citing *Crandon*, 173 F.3d at 125–26).

104. *Id.*

105. *Id.* The court also recognized that its holding would in no way limit its ability to impose broader restrictions (such as in *Crandon*) “when a defendant has a past history of using the internet to contact children,” or if Freeman did not abide by the limited conditions. *Id.* In 2007, the Third Circuit reiterated its lack of tolerance for overly broad restrictions in *United States v. Voelker*, when it struck down a condition that imposed a lifetime ban on computer use and Internet access for a defendant who pled guilty to receipt of child pornography. 489 F.3d 139, 143–44 (3d Cir. 2007). The court noted that it had yet to uphold such an absolute ban, and that the *Crandon* decision (which involved a greater offense) had “imposed the most severe restriction on computer and internet use . . . thus far.” *Id.* at 145.

restrictions fail to account for the importance of the Internet in modern daily life.¹⁰⁶ In *United States v. Holm*, defendant Delbert Holm pled guilty to possession of child pornography, and as a post-prison release condition, was prohibited from possessing or using a computer with Internet access.¹⁰⁷ While it recognized the rationale behind an all-encompassing restriction, the court noted that such an extensive prohibition "renders modern life . . . exceptionally difficult."¹⁰⁸ As a result, the court remanded the case so that the district court could order more "precise restrictions that protect the child-victims," while simultaneously reflecting the prospects for Holm's rehabilitation.¹⁰⁹

The Tenth Circuit has also issued holdings that stress the need for narrowly tailored conditions in today's technological society. Particularly, in *United States v. White*, the Tenth Circuit overturned a condition requiring that the defendant "shall not possess a computer with Internet access throughout his period of supervised release."¹¹⁰ The court found that if the condition was interpreted literally, it was simultaneously both under- and over-inclusive.¹¹¹ As worded, the condition did not prohibit access to the Internet in libraries, cybercafés, and other locales, and thus was not reasonably related to prohibiting the defendant from all access to the Internet.¹¹² At the same time, the condition was "greater than necessary" because it prevented the defendant from using the Internet for truly legitimate means, and therefore failed to balance the competing interests described in the Guidelines.¹¹³

106. See, e.g., *United States v. Holm*, 326 F.3d 872, 877–78 (7th Cir. 2003).

107. *Id.* at 874. Holm's actions were uncovered when an anonymous complaint informed authorities that he "was in possession of a large amount of child pornography." *Id.*

108. *Id.* at 877–88. As examples of how modern life would be exceptionally difficult, the court noted that "the government strongly encourages taxpayers to file their returns electronically, [that] more and more commerce is conducted on-line, [and that] vast amounts of government information are communicated via website[s]." *Id.* at 878.

109. *Id.* at 879. The court suggested that the imposition of conditions requiring random searches of Holm's computer and residence, as well as filtering software, would more appropriately balance the need to protect the public with Holm's need for computers and the Internet. *Id.*

110. *United States v. White*, 244 F.3d 1199, 1205–06 (10th Cir. 2001). Robert White pled guilty to receiving child pornography after responding to an online advertisement placed by U.S. Customs officers for videos of young girls engaged in sexual fondling and intercourse with adult men. *Id.* at 1202. He was sentenced to twenty-four months in prison, followed by three years of supervised release. *Id.*

111. *Id.* at 1205–06.

112. *Id.* at 1204–05.

113. *Id.* at 1206 (noting the interests courts are required to consider under 18 U.S.C. § 3553(a)). The Tenth Circuit, in explaining why the condition was greater than necessary, noted that if the condition was interpreted in a broad manner, White would be barred from "using a computer at a library to do any research, get a weather forecast, or read a newspaper online." *Id.* Interestingly, the Tenth Circuit subsequently upheld a similar Internet restriction in *United States v. Walser*, but noted that the condition of release was not as "ill-tailored" as the one at issue in *White*. *United States v. Walser*, 275 F.3d 981, 988 (10th Cir. 2001). Because the condition in *Walser* allowed for Internet access with approval from the defendant's probation officer, the court

D. A Legislative Approach: How Some States Have Taken the Matter into Their Own Hands

As abuse and victimization through the Internet becomes increasingly prevalent, some states have sought to tighten their control over convicted sex offenders by drafting legislation that mandates Internet restrictions for those on supervised release or probation.¹¹⁴ While Nevada¹¹⁵ and Florida¹¹⁶ have enacted such legislation, New Jersey is the state with the most recent and most severe law mandating computer and Internet restrictions as a sentencing condition.¹¹⁷

As of December 2007, New Jersey state law¹¹⁸ requires courts to limit Internet access for individuals who are required under federal law to register with state authorities as a sex offender,¹¹⁹ are on community supervision for life, or on probation or parole under state law.¹²⁰ The conditions of the New Jersey statute:

(1) [p]rohibit the person from accessing or using a computer or any other device with Internet capability without the prior written approval of the court . . . ;

(2) [r]equire the person to submit to periodic unannounced examinations of the person's computer or any other device with Internet access by [the appropriate official];

(3) [r]equire 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

found that the condition better responded to the rehabilitative goal of sentencing while "more delicate[ly] balanc[ing]" the need to restrict Internet access with the need to protect the public. *Id.*

114. See, e.g., FLA. STAT. ANN. § 948.30(1)(h) (West 2006); NEV. REV. STAT. ANN. § 176A.410 (1)(q) (LexisNexis 2006); N.J. STAT. ANN. §§ 2C:7-2, 2C:43-6.6 (West Supp. 2008).

115. See NEV. REV. STAT. ANN. § 176A.410(1)(q) (mandating that "if a defendant is convicted of a sexual offense and the court grants probation or suspends the sentence, the court shall . . . order as a condition of probation or suspension of sentence that the defendant . . . not possess any electronic device capable of accessing the Internet and not access the Internet through any such device or any other means, unless possession of such device or access is approved by the parole and probation officer assigned to the defendant").

116. See FLA. STAT. ANN. § 948.30(1)(h) ("[T]he court must impose the following conditions . . . (h) a prohibition on accessing the Internet or other computer services until the offender's sex offender treatment program, after a risk assessment is completed, approves and implements a safety plan for the offender's accessing or using the Internet or other computer services.").

117. See N.J. STAT. ANN. §§ 2C:7-2, 2C:43-6.6.

118. *Id.*

119. 42 U.S.C. § 14071(a), (e) (2000 & Supp. V 2005) (allowing the states to release personal information of sex offenders when "necessary to protect the public"); see also Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996).

120. N.J. STAT. ANN. §§ 2C:7-2, 2C:43-6.6.

(4) [r]equire 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.¹²¹

Anyone who violates the statute's conditions is guilty of a crime under New Jersey law.¹²²

In addition, some state legislatures have attempted to mitigate the growing threat of online predators by directly regulating specific Internet and website activities.¹²³ For example, Minnesota and New York lawmakers have been considering legislation that would bar sex offenders from accessing local networking sites such as MySpace and Facebook.¹²⁴ Similarly, on October 13, 2008, the United States Congress passed the Keeping the Internet Devoid of Sexual Predators Act of 2008 (KIDS Act), which requires sex offenders to provide Internet identifiers, such as e-mail addresses and other self-identification designations, to a national sex offender registry.¹²⁵ The KIDS Act also requires the Justice Department to establish and maintain a system that allows social networking websites to compare the Internet identifiers of its users with those provided to the National Sex Offender Registry.¹²⁶ If the system finds a match, the Attorney General must provide the social networking website with information related to the identity of the individual.¹²⁷

On the same day that President Bush signed the KIDS Act into law, he also signed into law the "PROTECT Our Children Act of 2008".¹²⁸ This law requires the Department of Justice to create and implement a National Strategy for Child Exploitation Prevention and Interdiction; establishes by statute the Internet Crimes Against Children (ICAC) Task Force Program; and amends federal child pornography laws.¹²⁹

121. *Id.* § 2C:43-6.6(a)(1)-(4).

122. *Id.* § 2C:43-6.6(b).

123. See Trymaine Lee, *Bill Would Bar Sex Offenders From Facebook and MySpace*, N.Y. TIMES, Jan. 30, 2008, at B4; Bob Collins, *No Sex Offenders Allowed*, March 12, 2008, http://minnesota.publicradio.org/collections/special/columns/news_cut/archive/2008/03/no_sex_offenders_allowed.shtml.

124. See Lee, *supra* note 123 (New York proposition); Collins, *supra* note 123 (Minnesota proposition). Under these laws, "all registered sex offenders [would be required] to submit any e-mail addresses and other Internet identifiers, such as screen names used for instant messaging," to local law enforcement offices, which would then share these identifiers with social networking sites and allow them to block access. Lee, *supra* note 123.

125. KIDS Act of 2008, Pub. L. No. 110-400, 122 Stat. 4224 (to be codified at 42 U.S.C. § 16915a).

126. *Id.* § 3(a)(1).

127. *Id.* § 3(a)(2).

128. PROTECT Our Children Act of 2008, Pub. L. No. 110-401, 122 Stat. 4229 (to be codified at 18 U.S.C. §§ 2258A-E; 42 U.S.C. §§ 17601, 17611-16).

129. *Id.* §§ 101(a), (c)(1)-(2), (8), 102(a), 302, 303. The ICAC Task Force Program was created in 1998 to help State and local law enforcement agencies enhance their response to child pornography and enticement offenses on the Internet. MEDARIS & GIROUARD, *supra* note 9, at 3.

While the federal laws that require information sharing and reporting by website operators do not affect offenders as severely as those state laws that entirely prohibit computer or Internet access, all of these laws undoubtedly demonstrate an ever-increasing trend by federal and state legislatures in tightening the rope on convicted sex offenders.¹³⁰ However, if the new laws interfere with a judge's discretion to evaluate release conditions,¹³¹ the question becomes whether a legislature should set mandatory conditions for offenders, or whether courts should be free to make case-by-case determinations based upon the totality of the circumstances.¹³²

II. INTERNET RESTRICTIONS: THE INHERENT IMPLICATIONS OF BROAD RESTRICTIONS AND THE PRACTICALITY PROBLEMS OF NARROW RESTRICTIONS

Today, the Internet has become such a major information source and communication tool that it is indispensable to the functioning of individuals in society.¹³³ However, as the use of this technology grows, so does the need to protect society from dangerous criminals using these resources to victimize children.¹³⁴ Although computer and Internet restrictions have become a common condition of supervised release,¹³⁵ they vary from complete prohibitions on computer and Internet use,¹³⁶ to prohibitions with an exception for probation officer approval,¹³⁷ to narrowly tailored restrictions emphasizing the use of monitoring and filtering programs.¹³⁸ While a sex offender's liberty interest is the concern with these first two restrictions, the practicality of targeting specific unwanted Internet access is raised by the third type of restriction.

130. Compare N.J. STAT. ANN. § 2C:43-6.6 (West Supp. 2008) (restricting Internet use subject to written court order), with KIDS Act § 2(a), (e)(2) (requiring sex offenders to provide Internet identifiers to the sex offender registry).

131. See N.J. STAT. ANN. § 2C:43-6.6 (leaving no discretion to the trial judge).

132. See James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L. J. 773, 777 (1995) ("Formal rules limit future judicial discretion and generate predictability and consistency, while vague standards preserve the needed flexibility to respond to unique or unforeseeable circumstances.").

133. See U.S. CENSUS BUREAU, *supra* note 4, at 1, 13 (noting that "[t]he Internet has become an integral part of the economy").

134. See Bowker & Gray, *supra* note 2, at 3 (noting that "[c]ybersex offenders find the computer and/or Internet a compelling tool in their deviant behavior" because of its unique anonymity, the potential to "groom multiple victims," and the ability to store and conceal an extensive collection of pornographic material).

135. See Hyne, *supra* note 3, at 216.

136. See, e.g., *United States v. Paul*, 274 F.3d 155, 160, 167 (5th Cir. 2001).

137. See, e.g., *United States v. Rearden*, 349 F.3d 608, 611 (9th Cir. 2003); *United States v. Walser*, 275 F.3d 981, 983 (10th Cir. 2001).

138. See, e.g., *United States v. Sofsky*, 287 F.3d 122, 124, 126-27 (2d Cir. 2002) (reversing a broad restriction and remanding to set a more focused condition of supervised release).

A. Effects of Broad Internet Restrictions on the Offender

Although the Supreme Court has established that individuals on probation are subject to a forfeiture of some constitutional rights,¹³⁹ courts have recognized that at least some access to and use of the Internet is protected by the First Amendment's right to free speech.¹⁴⁰ Because the Internet has become a unique and world-wide medium of communication as well as a tool for information gathering, a restriction of one's Internet access can be compared with the denial of one's telephone use.¹⁴¹ As explained by the Supreme Court, "[a]nyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods,"¹⁴² and it is "no exaggeration to conclude that the content of the Internet is as diverse as human thought."¹⁴³

If convicted sex offenders are not allowed Internet access, they are undoubtedly prevented from participating in many everyday activities.¹⁴⁴ For example, a strict ban on Internet access as a condition of release would prohibit the offender from: getting money from an ATM; working for any company that communicates primarily by e-mail; attending college; starting a business; and even owning a cell phone, now that most cell phones have Internet capabilities.¹⁴⁵

139. See *United States v. Knights*, 534 U.S. 112, 119 (2001) ("Inherent in the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled.' Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (internal quotation marks omitted) (citation omitted) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987))).

140. See *United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005) (responding to defendant's contention that the imposed condition violated his First Amendment rights, the court noted that it was "particularly reluctant to uphold sweeping restrictions on important constitutional rights").

141. See *United States v. Peterson*, 248 F.3d 79, 83 (2d Cir. 2001).

142. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 850 (1997).

143. *Id.* at 852 (internal quotation marks omitted).

144. See U.S. CENSUS BUREAU, *supra* note 4, at 11–13. A significant percentage of Americans rely on the Internet to conduct various activities of daily life. For example, one study found that the percentage of Americans who accessed the Internet per day increased from 36 percent of the entire adult population in January 2002 to 44 percent in December 2005. JOHN HARRIGAN & LEE RAINIE, PEW INTERNET & AM. LIFE PROJECT, THE INTERNET'S GROWING ROLE IN LIFE'S MAJOR MOMENTS 1 (2006), available at http://www.pewinternet.org/pdfs/PIP_Major%20Moments_2006.pdf. In addition, the percentage of adults who reported that they went online at least once a day increased from 27 percent in January 2002 to 35 percent in late 2005. *Id.*

145. Wiest, *supra* note 29, at 866. Wiest makes the point that "[g]iven that most shopping purchases are made with a credit card, [the offender] is arguably accessing the Internet when he pays with a credit card." *Id.*

While Internet access is not necessarily a “right” that can never be taken away,¹⁴⁶ the extent to which the Internet has become so intertwined in the way society functions has the potential to severely hinder those denied access.¹⁴⁷ Although it can be argued that there is little that cannot be accomplished outside the virtual world,¹⁴⁸ little or no access to the Internet could considerably alter the lives of many sex offenders. For example, many will need to find a new job and others may live in rural areas that lack local resources such as a library.¹⁴⁹ Not only will sex offenders possibly face broad restrictions on basic decisions such as where to live,¹⁵⁰ but they will also be

146. See Jessica Habib, Note, *Cyber Crime and Punishment: Filtering Out Internet Felons*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1051, 1089 (2004) (noting that while Internet use “may not rise to the level of a right,” it is also not a “regulated activity or privilege for which state permission is required”). Habib compared the revocation of a driver’s license for driving under the influence, to a restriction of Internet access as a condition of supervised release. *Id.* at 1087–88. Habib pointed out the fact that

[i]n this society where public transportation is neither non-existent or is, at best, inadequate and entire commercial shopping areas are located in suburbs surrounding our cities, [a driver’s license can no longer be viewed] as merely a privilege which is given by the State and which is subject to revocation at any time.

Id. (internal quotation marks omitted) (alterations in original) (quoting Carlos F. Ramirez, Note, *Administrative License Suspensions, Criminal Prosecution and the Double Jeopardy Clause*, 23 FORDHAM URB. L.J. 923, 950 (1996)). The author equated this point with the idea that Internet is becoming increasingly important in the employment world, as well as everyday life activities, and argued that without access to computers and the Internet, people may be “technologically immobilized,” and severely hindered in today’s workforce. *Id.* at 1087. Furthermore, Habib argued that while the government reserves the power to revoke a license because driving is a regulated activity, it is “difficult to argue that Internet use is a privilege granted by a certain entity” because it is so easily and widely accessible. *Id.* at 1089. Accordingly, Habib concluded that “it should be more difficult to restrict Internet use as a result of [a crime facilitated by the Internet] than it is to suspend a license due to driving under the influence.” *Id.*

147. *Id.* at 1087.

148. See McKay, *supra* note 26, at 236. For example, “[t]ax returns can still be filed through the mail, banking is still offered at local branches, news is available on broadcast television,” the weather is still in the daily newspaper, research can still be done through hardcopy, and general communications remain available via telephone and mail. *Id.*

149. See Memorandum from Angie Boyce, Research Assistant, and Lee Raine, Director, The Pew Internet & Am. Life Project, Online Job Hunting 1–2 (July 2002), available at http://www.pewinternet.org/pdfs/PIP_Jobhunt_Memo.pdf (reporting that fifty-two million Americans have used the Internet to search for information about jobs, and over four million Americans do so on a normal day).

150. Since a series of child abductions in the spring of 2005, many jurisdictions across the United States have implemented residency restrictions that have essentially banned sex offenders from living in certain cities. JILL S. LEVENSON, SEX OFFENDER RESIDENCY RESTRICTIONS: A REPORT TO THE FLORIDA LEGISLATURE 2 (2005), available at [http://www.nacdl.org/sl_docs.nsf/issues/sexoffender_attachments/\\$FILE/Levinson_FL.pdf](http://www.nacdl.org/sl_docs.nsf/issues/sexoffender_attachments/$FILE/Levinson_FL.pdf). While these laws are appropriately concerned with child safety, there is no evidence that residency restrictions actually prevent sex crimes. *Id.* Furthermore, such laws greatly decrease available housing for sex offenders, forcing them out of urban areas and essentially away from social support, employment opportunities, education, and social services. *Id.* In fact, the report states, “[a]s a result, current social policies

prevented from being involved in many aspects of the world around them—denying them many opportunities to successfully reintegrate into their communities.¹⁵¹

The Internet can serve as an important educational, employment, and everyday life tool,¹⁵² and may be essential for reintegration of some offenders into society.¹⁵³ As noted above, the goals of sentencing must “reflect the seriousness of the offense, . . . afford adequate deterrence[,] . . . protect the public[,] . . . [and] provide the defendant with needed . . . correctional treatment in the most effective manner.”¹⁵⁴ By denying offenders the primary means of finding and securing a job, overbroad computer and Internet restrictions substantially undermine the rehabilitative goal of supervised release.¹⁵⁵ For example, with the launch of USAJOBS.com, the federal government has made obtaining employment within the government virtually impossible without access to a computer or the Internet.¹⁵⁶

may contribute to dynamic risk factors for offenders in the community, ultimately becoming counter-productive.” *Id.* at 10. As Judge Lay of the Eighth Circuit wrote:

It is sad 20th Century Commentary that society views the convicted felon as a social outcast. He has done wrong, so we rationalize and condone punishment in various forms. We express a desire for rehabilitation of the individual, while simultaneously we do everything to prevent it. Society cares little for the conditions which a prisoner must suffer while in prison; it cares even less for his future when he is released from prison. He is a marked man. We tell him to return to the norm of behavior, yet we brand him as virtually unemployable; he is required to live with his normal activities severely restricted and we react with sickened wonder and disgust when he returns to a life of crime.

Mark Loudon-Brown, Note, “*They Set Him on a Path Where He’s Bound to Get Ill*”: *Why Sex Offender Residency Restrictions Should Be Abandoned*, 62 N.Y.U. ANN. SURV. AM. L. 795, 796 (2007) (quoting *Morrissey v. Brewer*, 443 F.2d 942, 952–53 (8th Cir. 1971) (Lay, J., dissenting), *rev’d*, 408 U.S. 471 (1972)).

151. See John Q. La Fond & Bruce J. Winick, *Sex Offender Reentry Courts: A Proposal for Managing the Risk of Returning Sex Offenders to the Community*, 34 SETON HALL L. REV. 1173, 1187, 1189 (2004) (“Any sensible reentry process for sex offenders must focus both on community protection and on offender rehabilitation.”).

152. See HERRIGAN & RAINIE, *supra* note 144, at 2, 8 (reporting that 39 percent of all Americans said that they would first look to the Internet to obtain government information, and 31 percent would first look online for health care information).

153. See Karen J. Hartman, Comment, *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 knowledge and use of computer skills is important for an inmate attempting to reintegrate into society after completing a term of imprisonment); Rick Hepp & Robert Schwaneberg, *Bill Would Bar Sex Offenders From Internet*, STAR-LEDGER (N.J.), May 21, 2006, at 19.

154. See 18 U.S.C. § 3553(a)(2) (2000).

155. See La Fond & Winick, *supra* note 151, at 1187–89.

156. See USAJOBS.com, Search Jobs, <http://www.usajobs.gov> (last visited Apr. 21, 2009) (“USAJOBS is the official job site of the United States Federal Government. It’s your one-stop source for Federal jobs and employment information.”).

Employment can help an offender successfully reenter society¹⁵⁷ because steady work has been linked to increased public safety and deterrence of future crime.¹⁵⁸ Accordingly, without the ability to research, apply for, and work at any job that requires the use of a computer or the Internet, a sex offender is undoubtedly hindered in becoming a productive member of society.¹⁵⁹ When a sex offender is released from prison without employment, and is forced to suffer the continuing social stigma that accompanies notification and registration requirements,¹⁶⁰ the sex offender is inevitably subject to increased stress.¹⁶¹ Consequently, this stress often results in a loss of self-esteem, which “hamper[s] the offender’s ability to adhere to a relapse prevention plan,” and essentially creates a self-fulfilling prophecy for the offender.¹⁶²

Although the Ninth and Eleventh Circuits have upheld broad Internet restrictions,¹⁶³ these circuits have at least recognized that the Internet has grown into a valuable resource for all aspects of today’s society.¹⁶⁴ However, the analysis of these circuits remains inadequate because it fails to fully appreciate the negative effect that overbroad restrictions have on an offender’s rehabilitation process. In particular, the Ninth and Eleventh Circuits focus too heavily on the use of restrictive conditions as a deterrent.¹⁶⁵ These circuits also justify their decisions on the “concomitant dangers of the Internet and the need to protect both the public and sex offenders themselves from its potential

157. See Christopher Uggen, Sara Wakefield & Bruce Western, *Work and Family Perspective on Reentry*, in PRISONER REENTRY AND CRIME IN AMERICA 209, 211 (Jeremy Travis & Christy Visser eds., 2005) (“Criminological theories and commonsense understandings of crime and conformity underscore the importance of work as the setting for social reintegration.”).

158. See Dave Anderson, *Working to Reduce Recidivism: Employment as the Key to Offender Reintegration*, <http://www.hrcrossing.com/article/index.php?id=270120> (last visited Apr. 21, 2009) (reporting that the New York Department of Labor found that “eighty-three percent of sex offenders who violated probation or parole were unemployed at the time”). As noted by HRCrossing, a lead job-opening research company, a stable job not only provides a steady paycheck, but it also “bolsters ex-offenders’ work experience and teaches much-needed skills.” *Id.* Through building a resume and earning the respect of their employers, ex-offenders who can get and keep a job will develop stronger connections to society and have a greater chance of successful rehabilitation. *Id.*

159. See La Fond & Winick, *supra* note 151, at 1187 (positing that successful reentry of the offender into the community should mean that “the returning offender will become a productive member of society, an asset to the community rather than a liability”).

160. See *supra* note 3 for an explanation of sex offender registration requirements.

161. La Fond & Winick, *supra* note 151, at 1188.

162. *Id.*; see also Wiest, *supra* note 29, at 867 (“[A]llowing unduly burdensome restrictions undermines the general goal of rehabilitation. With such onerous punishment, we necessarily encourage additional criminal behaviors where the ex-convict is unable to reintegrate into society.”).

163. See *United States v. Rearden*, 349 F.3d 608, 622 (9th Cir. 2003); *United States v. Zinn*, 321 F.3d 1084, 1092–93 (11th Cir. 2003).

164. See, e.g., *Zinn*, 321 F.3d at 1093.

165. See, e.g., *id.* at 1092–93 (emphasizing that restricting Internet access can help prevent future criminal activity).

abuses," as well as the idea that the offenders can still seek probation officer approval.¹⁶⁶

While the public safety concern should be a high priority to all sentencing courts, it should not completely undercut the concern of rehabilitating an offender.¹⁶⁷ Supervised release is necessary to decrease the risk to the community; however, the ultimate goal of any sensible correctional process is not only prevention of recidivism, but also "the successful reentry of the offender into the community."¹⁶⁸ By eliminating one of the primary means a person can become immersed back into society, widespread Internet restrictions only serve to keep offenders sheltered from the world they are trying to reenter.¹⁶⁹

Mindful that offenders may need the Internet as part of their rehabilitation process, the Second and Third Circuits have proposed more limited restrictions designed to meet specific and discernable public safety needs.¹⁷⁰ To facilitate reintegration, other courts have allowed offenders to have access to the Internet

166. See *id.* at 1093. Although the Tenth Circuit, in *United States v. Walser*, upheld a condition of release, it noted that

[i]t may nevertheless be questionable whether the condition imposes no greater deprivation of liberty than is reasonably necessary to meet the goals referred to in 18 U.S.C. § 3853(d), since the vagueness of the special condition leaves open the possibility that the probation officer might unreasonably prevent the defendant from accessing one of the central means of information-gathering and communication in our culture today.

275 F.3d 981, 988 (10th Cir. 2001). However, the court held it was "not persuaded [that] this concern rises to the level necessary to clear the extremely high hurdle set by the plain error standard." *Id.*

167. See, e.g., S. REP. NO. 98-225, at 125 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3308 (stating that the terms of supervised release are similar to probation, but not as strict because the defendant should be moving along with his life).

168. La Fond & Winick, *supra* note 151, at 1187.

169. As noted in a Pew Internet and American Life Project:

The Internet has become increasingly important to users in their everyday lives. . . . [Fifty percent of those surveyed] said the internet played a major role as they pursued more training in their careers. [Forty-five percent] . . . said the internet played a major role as they made major investment or financial decisions. [Forty-three percent] . . . said the internet played a major role when they looked for a new place to live. . . . [Twenty-three percent] . . . said the internet played a major role as they bought a new car. [Finally, fourteen percent] said the internet played a major role as they switched jobs.

HORRIGAN & RAINIE, *supra* note 144, at 1.

170. See *United States v. Sofsky*, 287 F.3d 122, 126-27 (2d Cir. 2002) (arguing that narrower restrictions, such as monitoring systems, will be adequate to meet public safety needs); see also *United States v. Freeman*, 316 F.3d 386, 392 (3d Cir. 2003) (noting that completely cutting off the defendant's access to legitimate and innocent Internet uses, such as e-mail, is unnecessary).

for legitimate purposes.¹⁷¹ However, are these approaches practical and will they provide the appropriate and necessary balance?¹⁷²

B. Limited Internet Restrictions: Are They Practical in a Society Where the Internet Is So Prevalent?

As an alternative to conditions that restrict all access to computers and the Internet, several courts have proposed less restrictive means, such as prohibitions on certain websites enforced through filtering and monitoring systems.¹⁷³ These compromises strike a better balance between offenders' interests and the need to ensure that they do not re-offend.¹⁷⁴ For example, in *United States v. Holm*, the Seventh Circuit rejected a broad restriction on the defendant's computer and Internet use, proposing that "[v]arious forms of monitored Internet use might provide a middle ground between the need to ensure that Holm never again uses the Worldwide Web for illegal purposes and the need to allow him to function in the modern world."¹⁷⁵

Proponents of these narrowly tailored conditions contend that filtering software can block objectionable material by either "blacklisting [certain] sites and removing them from access, or by whitelisting [permissible] sites, blocking access to all sites except those listed on the 'white' list based on categories of content."¹⁷⁶ However, as the Tenth Circuit admitted in *United States v. White*, "the software regulates content only on the computer in which it is installed, and none of the software presently available is completely effective."¹⁷⁷ Even if these programs are completely effective in blocking

171. See *United States v. Holm*, 326 F.3d 872, 878 (7th Cir. 2003).

172. See Nancy Lofholm, *Law's Eye on Sex-Offender Digital Trials*, DENVER POST, Mar. 14, 2008, at A1 (reporting that a problem is created when many sex offenders know more about computers and the Internet than their probation officers).

173. See, e.g., *Sofsky*, 287 F.3d at 126–27 (rejecting a broad restriction because a more focused restriction, limited to certain sites and images, could be enforced through surprise inspections of the defendant's home and any computer he owned).

174. See, e.g., *Holm*, 326 F.3d at 878.

175. *Id.* at 877–79.

176. *United States v. White*, 244 F.3d 1199, 1206 (10th Cir. 2001).

177. *Id.* Probation officers presently lack monitoring systems designed exclusively for their use. Bowker & Gray, *supra* note 2, at 7. However, there are merchants who offer off the shelf products that can be used by probation offices to survey a computer user's activity. *Id.* For example, Security Software Systems Inc. of Sugar Grove, Illinois "donated 100 copies of their 'Cyber Sentinel' security software to [probation offices] to be used to monitor the activities of convicted sex offenders." Press Release, Securing Software Sys., SSSI Donates Software to Local Govt. to Track Sex Offenders (Sept. 7, 2001), available at http://www.securitysoft.com/press_release.asp?NewsID=5. The "Cyber Sentinel" software can be used to "automatically analyze, monitor, filter, and block undesirable, predatory, and sexually explicit computer activity." *Id.* The program is designed so that an email will automatically be sent to the probation officer once a violation has occurred. *Id.* In addition, a "Field Search Program" in Nueces County, Texas, now allows probation officers to conduct a forensic search of any

desired websites, they nonetheless fail to prevent an offender from trafficking inappropriate material via e-mail and it is almost impossible for probation officers to ensure that these programs remain up-to-date, given the ever-increasing number of social networks.¹⁷⁸ Even more troubling is the fact that software is also available that allows knowledgeable Internet users to delete the names of sites visited from the computer's hard drive.¹⁷⁹

In recognizing these limitations of monitoring systems, some circuits have suggested that any narrowly tailored restriction placed on an offender's computer use or Internet access must be accompanied by random computer searches and consistent monitoring by probation officers in order to compensate for such limitations.¹⁸⁰ However, probation offices generally lack the necessary funding for proper monitoring equipment and often fail to obtain the technical expertise required for adequate training.¹⁸¹ In addition, the growth of the personal computer and the Internet has further complicated busy probation officers' caseloads with offenders who are often more computer savvy than the officers attempting to supervise them.¹⁸²

Regardless of the downsides to monitoring programs and despite the fact that there is nothing to prevent a motivated sex offender from using a friend's computer or a public computer with Internet access, proponents of narrowly tailored conditions argue that efforts to monitor and supervise Internet activity can help low-risk offenders turn their lives around.¹⁸³ Furthermore, even if convicted sex offenders continue to offend, they will eventually be

offender's hard drive and monitor the offender's real-time activity. *Sex Offenders: Tracking Em' Down*, KIIITV NEWS, Aug. 15, 2008, <http://www.kiiitv.com/news/local/27034879.html>.

178. See McKay, *supra* note 26, at 235.

179. White, 244 F.3d at 1206-07; see also Lofholm, *supra* note 172 ("Offenders can now make end runs around some monitoring programs by using cellphones, Blackberrys, iPods, and video games to access the Internet. Programs are also available to wipe hard drives clean.").

180. See *United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005) (suggesting that unannounced inspections of the defendant's computer would be an appropriate and reasonable restriction); see also White, 244 F.3d at 1207. It is important to note that, while these random searches of convicted sex offenders' homes by probation officers certainly implicate several Fourth Amendment issues, the U.S. Supreme Court has held that probationers do not enjoy the same degree of liberty as other citizens, thus these issues will not be discussed here. *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987) ("[A] probation officer may . . . search a probationer's home without a warrant, and with only 'reasonable grounds' (not probable cause) to believe that contraband is present.").

181. Bowker & Gray, *supra* note 2, at 7 (warning that any evidence discovered must be appropriately and carefully handled in order to prevent the destruction of any information which may lead to the discovery of additional criminals).

182. Nat'l Law Enforcement and Corrs. Tech. Ctr., 'Monitoring' the Sex Offender, TECH BEAT, Winter 2005, at 1, available at <http://www.justnet.org/TechBeat%20Files/MonitorSexOffender.pdf> [hereinafter TECH BEAT].

183. See *supra* notes 153-63 and accompanying text.

discovered.¹⁸⁴ Accordingly, when such monitoring succeeds in catching a violator, these specified conditions would mandate that the offender return to prison without a trial, and would notify officials of the re-offense in order to prevent illegal behavior in the future.¹⁸⁵ As noted in *United States v. Freeman*, “if [an offender] does not abide by more limited conditions of release . . . it might [then] be appropriate to ban all use [of the Internet].”¹⁸⁶

III. THE DEBATE: JUDICIAL DISCRETION OR UNIFORMITY BY LAW?

A. *Factual Distinctions Require Case-by-Case Determinations*

The significant amount of discretion granted to judges fashioning the conditions of supervised release has led to a circuit split regarding the appropriate balance between the interest in protecting the public and the interest in preventing undue deprivation of an individual offender's liberty.¹⁸⁷ As demonstrated by the arguments on both sides of the issue, the line between protecting the public, deterring the offender, and preserving the rehabilitation process is a thin one at best.¹⁸⁸ Society's interests in protecting the public and preventing recidivism favor imposing heavy restrictions on convicted sex offenders.¹⁸⁹ However, the interests of the individual offender and the practical importance of the Internet suggest that courts should refrain from imposing severe Internet restrictions.¹⁹⁰ While the interest in public safety seems to outweigh the need to give an offender access to a resource he has already abused, several circuits have recognized that such a conclusion is not so easily reached.¹⁹¹

As previously discussed, in an attempt to crack down on the growing threat of Internet predators, the New Jersey state legislature¹⁹² and various circuits have mandated broad Internet restrictions for sex offenders.¹⁹³ While all-

184. TECH BEAT, *supra* note 182, at 2 (instructing probation officers “to equate the computer check [of sex offenders] to a drug test,” suggesting that much like drug users the sex offender “may beat a particular test, but . . . will eventually get caught”).

185. See Wiest, *supra* note 29, at 871.

186. *United States v. Freeman*, 316 F.3d 386, 392 (3d Cir. 2003).

187. See discussion *supra* Part I.A–C.

188. See discussion *supra* Part II.A–B.

189. See Kreston, *supra* note 20, at 30 (“Protection of the public and deterrence of future crime are acknowledged goals of sentencing. The defendant's counterbalancing interests in effective correctional treatment should not entitle him to obtain access to the Internet, a medium he has already misused to receive and possess child pornography.”).

190. See Wiest, *supra* note 29, at 871 (concluding that “complete” Internet and computer prohibitions will inevitably lead to “offenders who are unable to meaningfully function and reintegrate back into society”).

191. See, e.g., *Freeman*, 316 F.3d at 391–92.

192. See *supra* Part I.D.

193. See, e.g., *United States v. Granger*, 117 F. App'x 247, 248–49 (4th Cir. 2004) (per curiam); *United States v. Paul*, 274 F.3d 155, 167–70 (5th Cir. 2001).

encompassing restrictions seem like an obvious solution, they fail to take into account the needs of individual offenders and the different factors that must be considered under federal law.¹⁹⁴

Following the Supreme Court's decision in *United States v. Booker* rendering the Sentencing Guidelines advisory rather than mandatory,¹⁹⁵ district courts have been free to depart from the Guidelines in order to fashion more individualized sentences in accordance with the factors laid out in § 3553(a).¹⁹⁶ While such judicial discretion has led to disparity among circuit courts, the ability to grant proper sentences based on the facts presented is necessary in order to effectively balance the desired goals of sentencing.¹⁹⁷ For example, in their opinions, several circuits distinguished between offenders who used a computer or the Internet in the commission of a crime and offenders who did not,¹⁹⁸ as well as between offenders who had an employment background in computer technology and offenders whose employment history did not involve computer or Internet use.¹⁹⁹

194. See 18 U.S.C. § 3553(a) (2000) (listing the "factors to be considered in imposing a sentence").

195. *United States v. Booker*, 543 U.S. 220, 245 (2005).

196. See, e.g., *United States v. McBride*, 511 F.3d 1293, 1295–96 (11th Cir. 2007) (affirming a sentence which was below the Sentencing Guideline range for distribution of child pornography as reasonable).

197. See 18 U.S.C. § 3553(a).

198. Compare *United States v. Crandon*, 173 F.3d 122, 125, 127–28 (3d Cir. 1999) (upholding a broad restriction where the defendant used the Internet to communicate and ultimately have sex with a fourteen-year-old girl), with *United States v. Freeman*, 316 F.3d 386, 391–92 (3d Cir. 2003) (noting that unlike the defendant in *Crandon*, Freeman never used the Internet to illegally communicate with minors), and *United States v. Peterson*, 248 F.3d 79, 82–83 (2d Cir. 2001) (rejecting overbroad computer and Internet restrictions because there was no evidence linking the defendant's incest conviction to a computer or the Internet). As previously noted, the distinction between those who "merely" possess child pornography and those who use the computer in the commission of a crime suggests that "possession of child pornography is a victimless crime." Kreston, *supra* note 20, at 30. However, according to a recent study, "40 percent of arrested child pornography possessors were dual offenders who sexually victimized children and also possessed child pornography." *Id.* Nevertheless, it has also been argued that there is a major difference "between Internet crime and Internet-related crime," and that courts should only restrict Internet access "where the Internet was a necessary tool of the offense, without which the underlying crime could not have been committed." Habib, *supra* note 146, at 1074, 1090. Jessica Habib clearly defined the issue:

The goal of the supervised release condition should be to deter the underlying conduct, not to restrict one of many methods by which the crime has been realized—especially when that method does not involve a weapon, per se, but a technology with abundant legitimate uses. In many cases, there is a fine line between the use of the Internet to facilitate the crime and use that is merely incidental to its commission.

The threshold analysis, thus, should be whether the defendant could have committed the crime without going online to do so.

Id. at 1090–91.

199. Compare *United States v. Holm*, 326 F.3d 872, 877–78 (7th Cir. 2003) (finding that a complete ban on Internet use was overbroad when the defendant had worked in the computerized

In addition, courts must take into account relevant characteristics of each defendant including, but not limited to, whether the defendant has expressed remorse for or is in denial of his crimes; whether the defendant is a sophisticated computer user; the defendant's family life and educational background; the defendant's criminal and mental history; and most obviously, the extent of the crime committed.²⁰⁰ Consideration of these factors, in addition to individualized assessments of each offender's overall threat to society, is necessary to protect the public while allowing those deserving the opportunity to successfully re-enter society.²⁰¹

B. Appellate Review: Deferential Treatment to District Court Decisions Is Required

Because district court judges are granted the discretionary authority to weigh certain factors and order a sentence accordingly, appellate courts are called upon to review the sentence for substantive reasonableness under an abuse of discretion standard.²⁰² However, the Supreme Court has made clear that the appellate courts must give substantial deference to the decision of the district courts.²⁰³ Because a district court is able to evaluate live witnesses, determine credibility, and assess the evidence presented, a district court is in a better position to make factual findings and tailor sentences according to the characteristics of the defendant and the factors outlined in § 3553(a).²⁰⁴ Therefore, appellate courts have a limited power of review and may only

telecommunications field for thirty years), *with* United States v. Paul, 274 F.3d 155, 170 & n.17 (5th Cir. 2001) (upholding a total Internet ban where the defendant raised no particular concern as to the restriction's affect on his employment because he had mainly been employed as a truck driver).

200. See 28 U.S.C. § 994(d) (2000).

201. See Bowker & Gray, *supra* note 2, at 5 ("The decision to recommend discretionary computer conditions should be based upon the following criteria: probation/parole law in the particular jurisdiction; the offense of conviction; computer knowledge/skills of the offender; prior criminal conduct involving computers; necessity of the offender to have computer/Internet access; and the availability of a computer or the Internet to the offender."). Bowker and Gray also point out that determining what kind of offender the courts are dealing with is critical to fashioning the appropriate sentence, and familiarity with the documents found on the offender's computer is especially relevant. *Id.* at 4. For example, while the size of a collection clearly indicates the offenders' obsession with illegal material, an individual with a large amount of video files demonstrates a greater degree of commitment because these files take longer to download. *Id.* In addition, file names and organizational methods are critical to assessing the offender because much more dedication is required to categorize a large inventory of images. *Id.* Finally, the offender's use of the images (i.e., to masturbate, lure children, or to trade for other pornography) should factor into a determination of the seriousness of the offender's habits. *Id.*

202. *Gall v. United States*, 128 S. Ct. 586, 594 (2007).

203. *Id.* at 597.

204. *Id.*

reverse a sentencing order if the district court reached a conclusion that no reasonable judge could reach.²⁰⁵

While the authority of appellate courts is restricted to reviewing the reasonableness of the district court's conclusion,²⁰⁶ it would be unsound to suggest that appellate courts could never overturn a district court's sentencing order. For example, if an improper factor is considered, if a judge has clear bias against a group of defendants, or if a sentence is simply irrational, an appellate court should reverse a sentence as an unreasonable abuse of discretion.²⁰⁷ As stated above, however, appellate courts must give proper deference to the decision of the district courts and should not review a decision *de novo*.²⁰⁸ Therefore, appellate courts should be limited to reviewing the reasonableness of the district court's assessment of the factors set out in § 3553(a), and should refrain from conducting their own determination of what is reasonable.²⁰⁹

C. The Preservation of Judicial Discretion Is Necessary for Individualized Conditions

Although opponents, citing the ubiquitous nature of the Internet, question the enforceability of tailored Internet restrictions, their criticisms are less persuasive in the case of lower-risk offenders.²¹⁰ Admittedly, any sort of ban might not preclude the lifetime offender from engaging in extreme activities to obtain child pornography.²¹¹ However, for low-risk offenders and for offenders who are more likely to be receptive to rehabilitation, narrowly tailored restrictions are the only way to encourage rehabilitation while simultaneously seeking to protect society.

205. *See id.*

206. *United States v. Booker*, 543 U.S. 220, 261 (2005).

207. Lindsay C. Harrison, *Appellate Discretion and Sentencing After Booker*, 62 U. MIAMI L. REV. 1115, 1154–57 (2008).

208. *See Gall*, 128 S. Ct. at 594.

209. *See id.* at 597 ("The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify a reversal of the district court.").

210. *See Bowker & Gray*, *supra* note 2, at 5 (indicating that the first step in the restriction analysis should be the evaluation of the offender's behavior, and "[o]bviously, more restrictive conditions should be considered for offenders who have personally victimized a minor or demonstrated a willingness to do so").

211. *Id.* As Bowker and Gray noted, "[s]ome may wonder what would prevent an offender from just going out and getting another computer . . . or using some other unmonitored computer. The answer is nothing—just as there is nothing but fear of discovery to stop an offender from using drugs or obtaining a gun." *Id.*

While the statutes passed by Nevada,²¹² Florida,²¹³ and New Jersey²¹⁴ certainly generate predictability and consistency, such formal rules limit judicial discretion and prevent the flexibility needed to respond to the unique circumstances of each offender.²¹⁵ Statutes that require such broad restrictions for all offenders do not allow sentencing courts to fashion supervised conditions in an individualized manner. As a result, a one-size-fits-all law completely forecloses the possibility for narrowly tailored restrictions to offer low-risk offenders a greater chance of successful rehabilitation.²¹⁶

To propose that courts consider these factors when determining the permissibility of limited Internet restrictions should not be misconstrued as advocating that the right of convicted sex offenders to enjoy today's technology outweighs the need to protect the public, especially children, from the dangers and potential victimization that accompany the Internet. However, courts free of legislative mandates may determine that public safety will not be endangered by permitting limited access to the Internet, as long as sufficient policies are in place should the offender relapse.²¹⁷ In addition, courts should not assume that offenders who did not use the Internet in the commission of the crime are free from risk and thus do not need any restrictions. Rather, courts should engage in individual assessments, in accordance with statutory guidelines and established criteria, to objectively determine the particular offenders' overall threat to society if they are permitted limited computer and Internet access.

IV. CONCLUSION

Courts are often called on to balance the public's interest with the rights of the individual. At the center of this debate is how to appropriately handle the increasing threat of online sexual predators, particularly those who victimize children. While some courts argue that the ubiquitous nature of computers and

212. NEV. REV. STAT. ANN. § 176A.410(1)(q) (LexisNexis 2008) (prohibiting an offender from using the Internet unless he obtains approval from his probation officer).

213. FLA. STAT. ANN. § 948.30(1)(h) (West 2006) (imposing a total ban until the facilitator of defendant's treatment program determines he may have certain limited access).

214. N.J. STAT. ANN. § 2C:43-6.6 (West Supp. 2008) (requiring the offender to obtain written court approval to use the Internet, except in cases where the offender wishes to use the Internet for employment activities, in which case the offender need only obtain the approval of his probation officer).

215. See Bowker & Gray, *supra* note 2, at 5.

216. See KIDS Act of 2008, Pub. L. No., §§ 2(a), 3(a), 110-400, 122 Stat. 4224, 4224-25 (to be codified at 42 U.S.C. §§ 16915a-b). Although statutes that restrict all Internet access for all offenders are overly broad, others that restrict offenders' access to certain websites serve to provide a better balance between offenders' interests and the need to protect the public and should certainly be encouraged. See *id.*

217. See *United States v. Freeman*, 316 F.3d 386, 392 (3d Cir. 2003) (noting that if Freeman was unable to comply with more liberal computer and Internet restrictions, it would then be proper to restrict all computer and Internet access).

the Internet does not justify all-encompassing restrictions,²¹⁸ others contend that, despite the pervasiveness of technology today, broad restrictions are necessary to meet the dual goals of deterrence and protecting the public.²¹⁹

Because the Internet can provide a frightening level of anonymity to a sexual offender and has the potential to create an overwhelming number of victims, courts are justified in taking very seriously the danger of exposing sex offenders to the Internet. However, as with other crimes, there are different threat levels and offender characteristics, requiring a customization approach to Internet restrictions. Therefore, courts must objectively weigh the totality of the circumstances for each offender and the offender's crime, and impose computer and Internet restrictions accordingly—a solution that will only be possible if state legislatures refrain from implementing broad laws that mandate such restrictions.

218. See *supra* Part I.C.

219. See *supra* Part I.B.

