

September 2003

## Guardrails on the Information Superhighway: Supervising Computer Use of the Adjudicated Sex Offender

Brian W. McKay  
*University of Tulsa College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Criminal Law Commons](#), [Internet Law Commons](#), and the [Law Enforcement and Corrections Commons](#)

---

### Recommended Citation

Brian W. McKay, *Guardrails on the Information Superhighway: Supervising Computer Use of the Adjudicated Sex Offender*, 106 W. Va. L. Rev. (2003).

Available at: <https://researchrepository.wvu.edu/wvlr/vol106/iss1/9>

This Student Work is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

# GUARDRAILS ON THE INFORMATION SUPERHIGHWAY: SUPERVISING COMPUTER USE OF THE ADJUDICATED SEX OFFENDER

---

I.	INTRODUCTION .....	203
II.	SEXUAL OFFENDING IN THE INTERNET AGE: A PRIMER .....	205
III.	SEARCHES BY SUPERVISION OFFICERS .....	212
IV.	CONDITIONS OF SUPERVISION IMPACTING COMPUTER USE.....	219
	A. <i>Second Circuit Disapproval of Internet Bans</i> .....	221
	B. <i>Others Affirm Broad Internet Prohibitions</i> .....	223
	C. <i>The Middle Ground</i> .....	227
	D. <i>State Courts</i> .....	233
V.	A FUTURE DIRECTION FOR EFFECTIVE SUPERVISION .....	234
	A. <i>Limitations on Internet Access</i> .....	234
	B. <i>Permissible Computer Searches</i> .....	239
VI.	CONCLUSION .....	243

## I. INTRODUCTION

The proliferation of the Internet and increased capabilities of computers have presented new challenges to community correctional agencies supervising adjudicated sex offenders. Despite the many productive ways in which computers and the Internet can be applied, ample opportunities exist to utilize them in manners that undermine rehabilitative and public safety objectives.<sup>1</sup> Procur-ing child pornography,<sup>2</sup> cruising for potential victims, and networking with other sex offenders are just a few ways new technology is used to serve the in-terests of the sex offender.<sup>3</sup>

---

<sup>1</sup> See *infra* text and accompanying notes 44-71 for a discussion of ways pedophiles misuse the Internet.

<sup>2</sup> European authorities are making efforts to call sexual photographs of children “child abuse images” rather than “child pornography.” Jennifer 8. Lee, *High Tech Helps Child Pornographers and Their Pursuers*, N.Y. TIMES, Feb. 9, 2003, at 22. Although the author supports these efforts, illegal sexual depictions of minors are referred to in this article as child pornography.

<sup>3</sup> See *infra* text accompanying notes 44-71.

In response to the threats posed by this special population, many sentencing courts and supervision agencies<sup>4</sup> have authorized supervising officers to search offenders' computers for signs of illegal or inappropriate material or indications that the user has engaged in violative conduct online.<sup>5</sup> Some courts and supervising agencies have imposed conditions restricting computer use or Internet access.<sup>6</sup> However, both of these measures are employed without the benefit of clear legal guidance from higher courts or legislative bodies. Fourth Amendment jurisprudence relevant to searches of probationers and parolees provides little direction for agencies conducting probation searches.<sup>7</sup> Moreover, some appellate courts have closely scrutinized limitations on computer activities as computers and the Internet become more integral to daily life.<sup>8</sup> Yet these federal appellate decisions broadening offenders' "virtual" mobility have not fully accounted for the risks assumed when permitting sex offenders to have online access, and they threaten to undermine effective sex offender supervision practices.<sup>9</sup>

This article contends that prohibitions on Internet access for convicted sex offenders represent an appropriate balance between public safety interests and the offenders' liberty interests in many cases. Therefore, courts should not adopt a *per se* rule against complete Internet bans. It is further asserted that suspicionless searches of sex offenders' computer equipment should withstand Fourth Amendment scrutiny when conducted in a reasonable manner pursuant to a condition of supervision authorizing searches. Section II examines the research on sex offending behavior and discusses ways in which pedophiles are

---

<sup>4</sup> Parole — a conditional release from incarceration — and probation — a community-based sentence in lieu of incarceration—are both included in the term “supervision agencies.” In many jurisdictions, typically in the parole system, the supervision agency has some authority to impose conditions of supervision. *See, e.g.*, TEX. GOV'T. CODE ANN. § 508.221 (Vernon 2003) (permitting parole panel to impose conditions of parole that would be permissible for court to impose upon probationer); 730 ILL. COMP. STAT. 5/3-3-7 (2003) (permitting Prisoner Review Board to impose conditions of parole).

<sup>5</sup> *See, e.g.*, United States v. Zinn, 321 F.3d 1084, 1087 n.2 (11th Cir. 2003).

<sup>6</sup> *See, e.g.*, United States v. Cabot, 325 F.3d 384, 385 (2d Cir. 2003); United States v. Fields, 324 F.3d 1025, 1026 (8th Cir. 2003); United States v. Zinn, 321 F.3d 1084, 1087 (11th Cir. 2003); United States v. Scott, 316 F.3d 733, 734 (7th Cir. 2003); United States v. Sofsky, 287 F.3d 122, 124 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 981 (2003); United States v. Paul, 274 F.3d 155, 160 (5th Cir. 2001), *cert. denied*, 535 U.S. 1002 (2002); United States v. White, 244 F.3d 1199, 1201 (10th Cir. 2001); United States v. Crandon, 173 F.3d 122, 125 (3d Cir. 1999); United States v. Deaton, 204 F. Supp. 2d 1181, 1183 (E.D. Ark. 2002); United States v. Ebihara, No. 01 CR.225-01(RWS), 2002 WL 432378, at \*3 (S.D.N.Y. Mar. 20, 2002); *In re* A.K.W., No. CX-02-1665, 2003 WL 21384893, at \*1 (Minn. Ct. App. June 17, 2003); *see also* Geoffrey Fattah, *Judge Pulling Internet Plug*, DESERET NEWS (Salt Lake City), Nov. 27, 2002, at A1.

<sup>7</sup> *See infra* text accompanying notes 103-22 (identifying issues related to correctional supervision searches yet to be resolved by the Supreme Court).

<sup>8</sup> *See, e.g.*, Sofsky, 287 F.3d at 126.

<sup>9</sup> *See infra* Part V.A.

known to use computers to entertain their illegal interests. Section III outlines the jurisprudence related to community correctional supervision searches and identifies important aspects of this area undeveloped to this point. Section IV details recent cases challenging conditions of supervision that place limitations, including outright prohibitions, on computer and Internet use. Finally, Section V proposes considerations for the development of the law in a direction that promotes effective sex offender supervision without significant adverse effects on the legitimate liberty interests of adjudicated offenders.

## II. SEXUAL OFFENDING IN THE INTERNET AGE: A PRIMER

During the past few decades there has been increased scientific attention in the United States, Canada, and Europe focused on sexually offending behavior.<sup>10</sup> Although the information gained from these studies has not answered all the questions about the etiology of sexual offending, it has shed light on many aspects of offending behavior relevant to rehabilitation and community protection and, therefore, is relevant to criminal justice practitioners and the legal community. Meanwhile, another phenomenon impacting sex offender management issues developed, and this phenomenon has created new concerns for government agencies tasked with supervising sex offenders. The digitization of America and the dramatic growth of the Internet have revolutionized sexual offending in ways that challenge effective supervision practices.<sup>11</sup>

Contemporary research indicates that sexually offending behavior, like many other behaviors, is a process rather than an isolated event or act.<sup>12</sup> This process, termed by many as the “offense cycle,”<sup>13</sup> is comprised primarily of mental states, thoughts, and behaviors.<sup>14</sup> Of particular interest to risk manage-

---

<sup>10</sup> See generally Stephen M. Hudson & Tony Ward, *Future Directions*, in *SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT* 481 (D. Richard Laws & William O’Donohue eds., 1997). This is evidenced by the increase in scholarly journals and organizations devoted to the study of sexual offender behavior and related topics. One prominent example is the Association for the Treatment of Sexual Abusers, incorporated in 1984. During this same period, community-based correctional agencies have developed supervision practices for this unique offender population. See Georgia F. Cumming & Maureen M. Buell, *Relapse Prevention as a Supervision Strategy for Sex Offenders*, 8 *SEXUAL ABUSE: A J. RESEARCH & TREATMENT* 231, 231-32 (1996).

<sup>11</sup> See *infra* text accompanying notes 44-71.

<sup>12</sup> See Ray Wyre, *Pornography and Sexual Violence: Working with Sex Offenders*, in *PORNOGRAPHY: WOMEN, VIOLENCE AND CIVIL LIBERTIES* 236, 237 (Catherine Itzen ed., 1992).

<sup>13</sup> The process has been labeled as the “offense cycle,” “abuse cycle,” or “assault cycle.” There is some contention within the field of psychology whether offending behavior is best described as a constantly recurring “cycle” or as distinctly interrupted “chains.” See Mark S. Carich, *In Defense of the Assault Cycle: A Commentary*, 11 *SEXUAL ABUSE: A J. RESEARCH & TREATMENT* 249 (1999). In using the term offense cycle, this article seeks to communicate the process and the interrelatedness of the stages. The question of whether this process is a cycle or chain is outside the scope of this article.

<sup>14</sup> See, e.g., Wyre, *supra* note 12, at 237.

ment are the roles of cognitive distortions<sup>15</sup> and sexual arousal to children. Pornography, especially sexual images of children, appears to impact both of these risk factors.<sup>16</sup>

Sexual offenders consume pornography at a higher rate than do non-offenders.<sup>17</sup> The exact role of pornography in the etiology of sexual abuse has been debated; however, there is considerable evidence that pornography use impacts the offense cycle, even if it cannot be considered a "cause" of offending behavior.<sup>18</sup> Pornography is very closely linked with sexual fantasy and sexual fantasy is thought to fuel the engine of sexual behavior, including abusive behavior.<sup>19</sup> For a significant number of offenders, pornography affects the offense cycle by strengthening cognitive distortions, reducing inhibitions, and reinforcing deviant sexual arousal.<sup>20</sup>

Pornography use can strengthen cognitive distortions by reinforcing the seeds of justification and rationalization in the offender's mind.<sup>21</sup> For example, it has been noted that most pornographic depictions of coerced sex portray the encounter as one where the resistant woman eventually changes her mind and enjoys rape.<sup>22</sup> These depictions of male entitlement and domination can reinforce the beliefs and perceptions of a mind inclined toward rape.<sup>23</sup> Similarly,

---

<sup>15</sup> Cognitive distortions have been described as "self-statements made by offenders that allow them to deny, minimize, justify, and rationalize their behavior." William D. Murphy, *Assessment and Modification of Cognitive Distortions in Sex Offenders*, in HANDBOOK OF SEXUAL ASSAULT 331, 332 (W.L. Marshall et al. eds., 1990). Common examples of sex offender distortions include: "We were just playing," "I did what she wanted," or "I didn't really hurt anybody." See *id.* at 333 tbl. 1. In a detailed discussion of sex offenders' distortions, Langton and Marshall discuss distortions and their relevance at three stages of the offense cycle: preoffense distortions, distortions arising during the offense, and postoffense distortions. Calvin M. Langton & W.L. Marshall, *The Role of Cognitive Distortions in Relapse Prevention Programs*, in REMAKING RELAPSE PREVENTION WITH SEX OFFENDERS: A SOURCEBOOK 167, 170-75 (D. Richard Laws et al. eds., 2000).

<sup>16</sup> See *infra* notes 17-43 and accompanying text.

<sup>17</sup> W.L. Marshall, *The Use of Sexually Explicit Stimuli by Rapists, Child Molesters, and Non-offenders*, 25 J. SEX RESEARCH 267, 279-80 (1988) [hereinafter Marshall, *Sexually Explicit Stimuli*].

<sup>18</sup> See Mary R. Murrin & D.R. Laws, *The Influence of Pornography on Sexual Crimes*, in HANDBOOK OF SEXUAL ASSAULT, *supra* note 15, at 73, 88.

<sup>19</sup> See Wyre, *supra* note 12, at 238, 243. The seminal FBI study of serial sexual killers also recognizes the importance of the fantasy-behavior link. See ROBERT K. RESSLER, ET. AL., SEXUAL HOMICIDE: PATTERNS AND MOTIVES 215 (1988).

<sup>20</sup> See *infra* notes 21-39 and accompanying text.

<sup>21</sup> See Wyre, *supra* note 12, at 239.

<sup>22</sup> *Id.* at 236.

<sup>23</sup> W.L. Marshall, *Revisiting the Use of Pornography by Sexual Offenders: Implications for Theory and Practice*, 6 J. SEXUAL AGGRESSION 67, 72-73 (2000) [hereinafter Marshall, *Revisiting*].

the child molester is likely to involve themes in his<sup>24</sup> sexual fantasies of children that portray the offender as in control or the child as cooperative and enthusiastic.<sup>25</sup> Pornography can similarly reinforce these beliefs.<sup>26</sup> In a study of child pornography and online activities, researchers noted that offenders who consumed pornography gave themselves “permission” to abuse based on their reinforced beliefs that no harm was done.<sup>27</sup> By viewing photographs in which the children were smiling and appeared happy, some offenders reinforce their distorted views that children are willing participants in the abuse.<sup>28</sup>

Many offenders employ external disinhibitors<sup>29</sup> in the pre-offense stages of their cycle.<sup>30</sup> Most often, alcohol is the “offense-facilitative” intoxicant used.<sup>31</sup> However, significant numbers of child molesters report using pornography as part of their pre-offense preparation.<sup>32</sup> Marshall found that among abusers who reported that sexually explicit materials incited their offenses, more than half “deliberately used the stimuli in their typical planned preparation for offending.”<sup>33</sup> It is debatable whether the purposeful use of pornography in the pre-offense stages indicates that use causes offending or is simply a symptom of

---

<sup>24</sup> By using gender-specific language, this article risks reinforcing a popular myth that all sex offenders are male. Approximately twenty percent of sexual offenders who offend against children are female. CTR. FOR SEX OFFENDER MGMT., MYTHS & FACTS ABOUT SEX OFFENDERS, at <http://www.csom.org/pubs/mythsfacts.html> (last visited Aug. 19, 2003). This article seeks to minimize the use of gender-specific language but uses it at some points for ease of the reader.

<sup>25</sup> Marshall, *Revisiting*, *supra* note 23, at 72.

<sup>26</sup> Ethel Quayle & Max Taylor, *Child Pornography and the Internet: Perpetuating a Cycle of Abuse*, 23 *DEVIANT BEHAVIOR: AN INTERDISCIPLINARY J.* 331, 340 (2002).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* The researchers noted one case in which the distorted thinking that children enjoy molestation enabled the offender to ignore contrary indications, such as when the victim cried and covered her face with her nightgown. *Id.* For more discussion of this issue, see Marshall, *Revisiting*, *supra* note 23, at 72-73. See also Langton & Marshall, *supra* note 15, at 174 (“Cognitive distortions arising *during the offense* result from the offender’s selective and biased processing of social information (i.e., operations). The sum effect of these biases is the facilitation of the offense by minimizing awareness of inhibiting features such as distress and physical resistance from the victim.”) (emphasis in original).

<sup>29</sup> As its name suggests, a disinhibitor is something that reduces a person’s “reservations or prohibitions against engaging in sexual activities.” CTR. FOR SEX OFFENDER MGMT., GLOSSARY OF TERMS USED IN THE MANAGEMENT AND TREATMENT OF SEXUAL OFFENDERS 9 (1999), available at <http://www.csom.org/pubs/glossary.pdf> (last visited Aug. 19, 2003) [hereinafter CTR. FOR SEX OFFENDER MGMT.]. Cognitive distortions are an example of an internal disinhibitor. *Id.*

<sup>30</sup> See W.L. Marshall, *Pedophilia: Psychopathology & Theory*, in *SEXUAL DEVIANCE*, *supra* note 10, at 152, 162 [hereinafter Marshall, *Pedophilia*].

<sup>31</sup> *Id.*

<sup>32</sup> Marshall, *Sexually Explicit Stimuli*, *supra* note 17, at 280.

<sup>33</sup> *Id.* at 284.

an offender mindset, yet even those skeptical of a causal relationship acknowledge pornography's potentially catalytic properties.<sup>34</sup>

A more dangerous effect of pornography on offending dynamics is its reinforcement of deviant sexual arousal. The role of sexual arousal in managing offenders is difficult to overstate, as sexual arousal to children is the greatest predictor of risk for recidivism.<sup>35</sup> Sexual preference is thought to be a rather static trait;<sup>36</sup> however, some conditioning can affect sexual arousal.<sup>37</sup> For those who consume pornography, it is often used as fuel for masturbatory fantasy.<sup>38</sup> Masturbation to this material, by means of operant conditioning, causes the user to associate the stimulus with a sexual pleasure, thus reinforcing the stimulus.<sup>39</sup>

In addition to reinforcing cognitive distortions and sexual preference, some offenders use pornography to groom victims.<sup>40</sup> Grooming is the process by which an offender manipulates a potential victim in a manner "intended to reduce [the child's] resistance to sexual abuse."<sup>41</sup> By showing pornography to children, offenders can initiate a discussion about sex and present it to a potential victim as though it is normal and enjoyable.<sup>42</sup> Just as it does in the mind of the offender, the images can facilitate a distorted view of sex in the mind of the child. Additionally, pornography can be used to facilitate the progression from talking about sex to having the child actively participate in sexual behaviors.<sup>43</sup>

---

<sup>34</sup> See Marshall, *Revisiting*, *supra* note 23, at 73. Even when not intentionally sought out and used for the purpose of emboldening the offender, use of disinhibitors can have that effect. See Tony Ward & Stephen M. Hudson, *A Self-Regulation Model of Relapse Prevention*, in *REMAKING RELAPSE PREVENTION WITH SEX OFFENDERS: A SOURCEBOOK*, *supra* note 15, at 79, 92 ("[T]he use of alcohol and pornography can increase the risk of disinhibition by potentially strengthening the desire for deviant sex and by decreasing regulatory control.").

<sup>35</sup> R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING AND CLINICAL PSYCHOL. 348, 351 (1998).

<sup>36</sup> H.E. Barbaree, *Stimulus Control of Sexual Arousal: Its Role in Sexual Assault*, in *HANDBOOK OF SEXUAL ASSAULT*, *supra* note 15, at 115, 116.

<sup>37</sup> This is discussed and illustrated in the context of fetishes by John Junginger, *Fetishism: Assessment & Treatment*, in *SEXUAL DEVIANCE: THEORY, ASSESSMENT, & TREATMENT*, *supra* note 10, at 92, 96-97.

<sup>38</sup> Quayle & Taylor, *supra* note 27, at 338; see Wyre, *supra* note 12, at 238.

<sup>39</sup> See D.R. Laws & W.L. Marshall, *A Conditioning Theory of the Etiology and Maintenance of Deviant Sexual Preference and Behavior*, in *HANDBOOK OF SEXUAL ASSAULT*, *supra* note 15, at 209, 213-14.

<sup>40</sup> See, e.g., Wyre, *supra* note 12, at 240-41; see also *infra* text accompanying note 276.

<sup>41</sup> CTR. FOR SEX OFFENDER MGMT., *supra* note 29, at 11 ("Typical grooming activities include gaining the child victim's trust or gradually escalating boundary violations of the child's body in order to desensitize the victim to further abuse.").

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

Just as the Internet has brought about changes in other criminal endeavors, the revolution in computing has altered the practices of sexual offenders in ways that challenge effective correctional supervision.<sup>44</sup> For the probationer, impermissibly possessing pornography and evading detection was once more difficult than it is now. A few photographs, videotapes, and magazines were easily discovered in piles in a closet, under a bed, or behind the seat of a vehicle. Now several digital images can be hidden on a disk the size of a thumbnail, on a computer drive, or in a remote data storage service.<sup>45</sup>

Yet pornography consumption is not the only use to which offenders can apply modern computer networking technology to their dangerous activities. Keith Durkin studied the ways in which pedophiles misuse the Internet.<sup>46</sup> He noted that the most prominent manner in which the Internet is abused is as a means of trafficking child pornography.<sup>47</sup> Government sting operations have garnered significant media attention in recent years,<sup>48</sup> and federal court dockets indicate that the number of prosecutions for pornography offenses has increased as the Internet has become more prevalent in the nation's households and offices.<sup>49</sup>

A more alarming use of the Internet involves its utilization as a means of contacting potential victims.<sup>50</sup> Often, through the use of chat rooms and instant messaging,<sup>51</sup> offenders make use of the online world to meet children and

---

<sup>44</sup> See *infra* text accompanying notes 45-71.

<sup>45</sup> Most of the commercial Internet providers permit users to upload files and documents to the company's computers where they are privately stored and can be accessed by the user. Conducting searches of remote storage areas on the Internet has unique legal implications of which a supervision officer should be aware. See David N. Adair, Jr., *Looking at the Law*, FED. PROBATION, Sept. 2001, at 66, 68.

<sup>46</sup> See Keith F. Durkin, *Misuse of the Internet by Pedophiles: Implications for Law Enforcement and Probation Practice*, FED. PROBATION, Sept. 1997, at 14.

<sup>47</sup> *Id.* at 14. It has also been noted that the availability of digital cameras and high-speed Internet connections has led to an "explosion" of homemade child pornography. Lee, *supra* note 2.

<sup>48</sup> Durkin, *supra* note 46, at 14; see, e.g., Cary Aspinwall, *Man Is Arrested in Internet Sex Sting*, TULSA WORLD, Mar. 15, 2003, at A22 (discussing a Connecticut man, who was arrested by FBI agents when he traveled to Tulsa allegedly intending to have sex with a 13-year-old girl); Rebecca Carr, *FBI Cracks Child-Porn Ring on Net*, DAYTON DAILY NEWS, Mar. 19, 2002, at 1A, available at 2002 WL 6593978.

<sup>49</sup> The number of defendants sentenced in federal courts for pornography or prostitution charges increased almost three-fold from 1992 to 2000. Compare U.S. DEP'T. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, at 520 (Kathleen Maguire et al. eds., 1993) with U.S. DEP'T. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000, at 440 (Kathleen Maguire & Ann L. Pastore eds., 2001). The numbers for pornography and prostitution crimes are aggregated for SOURCEBOOK reporting.

<sup>50</sup> Durkin, *supra* note 46, at 15.

<sup>51</sup> These online communication systems permit two (or more) users to send messages to each other in real time. See *id.* at 15 n.2.



explore their vulnerabilities.<sup>52</sup> Characterized as the playground of the new century,<sup>53</sup> those who want to meet children can log on to child-oriented web sites and take advantage of the communication channels they provide.<sup>54</sup> Compared to “traditional” methods<sup>55</sup> of initiating child contact, online prowling for victims is considered easier, as offenders often perceive their activities to be safer by means of the Internet’s perceived anonymity.<sup>56</sup>

Durkin also noted that pedophiles use the Internet to engage in inappropriate sexual chat with minors.<sup>57</sup> This conduct may be considered part of the grooming process toward contact victimization, yet even absent such intent, inappropriate communication with children is disconcerting and a public safety concern.<sup>58</sup> The case for curbing such behavior is even more compelling when it involves adjudicated sex offenders. For most offenders under supervision, contact with children constitutes a violation of supervision terms.<sup>59</sup>

The Internet is also used by pedophiles to network among each other.<sup>60</sup> Durkin noted that this interaction serves as both a support group and an avenue for the exchange of information.<sup>61</sup> Whereas nonconformists were once stigma-

---

<sup>52</sup> See, e.g., *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir. 1999). Accounts of offenders contacting minors online for sexual purposes are common in the news media. See, e.g., Ruben Castaneda, *Man Gets 30 Years for Sex Abuse of 2 Teens*, WASH. POST, Nov. 2, 2002, at B2 (reporting on HIV-positive man convicted of sexually assaulting two teenagers he met through online chat rooms); *Teacher Admits Sex Assault*, HOUS. CHRONICLE, Mar. 26, 1999, at A34 (reporting that Texas teacher traveled to Illinois to have sex with a fourteen-year-old girl he met in a chat room).

<sup>53</sup> See Durkin, *supra* note 46, at 15 (“[I]nstead of hanging around the playground looking for the loneliest kid, potential child molesters simply have to log on.”) (quoting B. Kantrowitz et al., *Child Abuse in Cyberspace*, NEWSWEEK, Apr. 14, 1994, at 40).

<sup>54</sup> Approximately two-thirds of children in the United States have Internet access at home. ERIC C. NEWBURGER, U.S. CENSUS BUREAU, HOME COMPUTERS & INTERNET USE IN THE U.S.: AUG. 2000, at 2 (2001), available at <http://www.census.gov/prod/2001pubs/p23-207.pdf>.

<sup>55</sup> Ways in which pedophiles will sometimes facilitate child contact include babysitting, coaching youth sports activities, or dating single parents with vulnerable children.

<sup>56</sup> See Durkin, *supra* note 46, at 15.

<sup>57</sup> *Id.* For discussion of how easily children can be engaged online to discuss inappropriate topics, see Bert Sass & Kent Dana, *Sex Offenders Sound Alarm*, ARIZ. REPUBLIC, Nov. 7, 2002, at B9, available at 2002 WL 102844870.

<sup>58</sup> Computerized stalking and inappropriate communication with children are considered to have public safety ramifications. See Washington Attorney General Christine Gregoire, Remarks at the National Conference of Law Reviews (Mar. 28, 2003) (edited and delivered by Narda Pierce, Solicitor General).

<sup>59</sup> See Durkin, *supra* note 46, at 17; Brian McKay, *The State of Sex Offender Probation Supervision in Texas*, FED. PROBATION, June 2002, at 16, 18-19 (noting that most sex offenders on probation have limitations on child contact).

<sup>60</sup> Durkin, *supra* note 46, at 15.

<sup>61</sup> *Id.*

tized and isolated, the Internet has enabled any user to find legitimization in a virtual community for any viewpoint or interest.<sup>62</sup> Pedophiles have not been left behind by this capability and are increasingly turning to the Internet for support and validation.<sup>63</sup> This is evident in the express purpose of one group noted by Durkin:

Alt.support.boy-lovers is a forum for males to discuss their feelings toward boys. It is intended to provide a sense of peer support for those having difficulties with their feelings, for boy-lovers who feel isolated with their orientation, and for those who have no other avenue of discussion than via a group such as this.<sup>64</sup>

Durkin described the tone of postings in the newsgroup as one of validation.<sup>65</sup> By shedding pejorative terms, “boy-lovers” seek to affirm and normalize their sexual interests.<sup>66</sup> Researchers have observed that child pornography users networked on the Internet create their own social norms where pedophilia is not deviant.<sup>67</sup> More than simply neutralizing social stigma to refrain from abusive behavior, these online support groups can further entrench a pedophile’s belief that sexual contact with children is inherently permissible.<sup>68</sup>

The Internet also serves as an information exchange for pedophiles, permitting users to swap information useful to the pedophilic lifestyle.<sup>69</sup> In his

---

<sup>62</sup> The Internet has mitigated social isolation for many who may be characterized as “fringe” or deviant. The networking capabilities of the Internet facilitate support and validation for almost any viewpoint or interest. For examples, see *The American Nazi Party*, at <http://www.americannaziparty.com> (last visited Aug. 19, 2002); *The Raellian Revolution*, at <http://www.rael.org/int/english/index.html> (last visited Aug. 19, 2003).

<sup>63</sup> Durkin, *supra* note 46, at 15.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* One example of this can be found at the website for the National Man/Boy Love Association. *National Man/Boy Love Association*, at <http://www.nambla.org> (last visited Aug. 19, 2003). NAMBLA is an organization that normalizes sexual contact between men and boys and advocates for the abolition of laws prohibiting sex between adults and male children.

<sup>67</sup> See E. Quayle et al., *The Internet and Offending Behavior: A Case Study*, 6 J. SEXUAL AGGRESSION 78, 94 (2000).

<sup>68</sup> Those supporting a sex offender’s right to liberal online access may contend that the support group function of the Internet can help offenders cope with the social stigmas that accompany life as a sex offender. Although there is likely therapeutic and public safety value in ensuring that offenders properly deal with the frustrations of being a publicly identified sex offender, interactions among pedophiles are best limited to those occurring under clinical or correctional supervision. Without proper supervision, there is a significant likelihood that the online discussion of healthy adjustment will degenerate to one that mutually reinforces cognitive distortions.

<sup>69</sup> Quayle et al., *supra* note 67, at 94.

study of Internet use, Durkin noticed postings instructing readers how to obtain pedophilic materials such as comic books and poetry.<sup>70</sup> In one federal court case involving possession of child pornography, the court observed that the defendant emailed other computer users and advised them how to “scout” single parents through Alcoholics Anonymous or welfare offices to identify vulnerable children.<sup>71</sup>

Because the Internet can be such a dangerous place for adjudicated sexual offenders to spend their time unsupervised, courts and government agencies have implemented measures to monitor activities and prevent unauthorized behaviors by adjudicated offenders.<sup>72</sup> Computer searches designed to detect signs of misuse are employed by some agencies.<sup>73</sup> However, this practice is not without the peril that accompanies excursions into uncharted legal territories.

### III. SEARCHES BY SUPERVISION OFFICERS<sup>74</sup>

The Fourth Amendment safeguards citizens against unreasonable searches and seizures,<sup>75</sup> and the protection afforded by this Amendment is not denied those convicted of crimes.<sup>76</sup> However, the United States Supreme Court has held that probationers and parolees do not enjoy the same degree of liberty

---

<sup>70</sup> Durkin, *supra* note 46, at 15.

<sup>71</sup> See *United States v. Paul*, 274 F.3d 155, 158 (5th Cir. 2001), *cert. denied*, 535 U.S. 1002 (2002).

<sup>72</sup> See McKay, *supra* note 59, at 19-20.

<sup>73</sup> See, e.g., David Harper, *Judge Toughens Child-Porn Sentence*, TULSA WORLD, Sept. 27, 2002, at A13 (reporting that federal judge imposed condition of supervision permitting computer searches upon reasonable suspicion); Catie O’Toole, *New Program Aimed at Sex Offenders: State Grant Will Give County Probation Officers Greater Tools for Supervision*, THE POST-STANDARD (Syracuse, N.Y.), Nov. 5, 2001, at B1 (discussing a probation supervision program implementing home and computer searches).

<sup>74</sup> This article’s analysis is predicated upon the fact that there is no meaningful distinction between probation and parole status for purposes of determining Fourth Amendment expectations of privacy. The Supreme Court has not made any differentiations, and other courts have expressly stated that no difference exists. See, e.g., *United States v. Harper*, 928 F.2d 894, 896 n.1 (9th Cir. 1991); *State v. Smith*, 540 A.2d 679, 691 n.13 (Conn. 1988); *State v. Malone*, 403 So. 2d 1234, 1238 (La. 1981).

<sup>75</sup> The Amendment states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .” U.S. CONST. amend. IV; see also *Davis v. Mississippi*, 394 U.S. 721, 726 (1969) (“Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry . . .”); *Jones v. United States*, 357 U.S. 493, 498 (1958) (“The decisions of [the Supreme Court] have time and time again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy.”).

<sup>76</sup> See *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (“A probationer’s home, like anyone else’s, is protected by the Fourth Amendment’s requirement that searches be ‘reasonable.’”).

as that exercised by other citizens.<sup>77</sup> Although the nuances of community correctional search and seizure law have not been fully articulated, the general landscape can be ascertained from the Supreme Court's decisions.

Despite obvious connections to the criminal justice system, the Supreme Court has labeled community correctional searches as administrative searches, akin to school searches<sup>78</sup> and commercial regulatory searches,<sup>79</sup> which are outside the realm of law enforcement searches.<sup>80</sup> When analyzing administrative search cases, courts weigh the government's need to conduct the search against the individual's privacy interest to determine whether a particular search is reasonable.<sup>81</sup>

The Supreme Court first addressed community correctional searches in *Griffin v. Wisconsin*.<sup>82</sup> Wisconsin probation officers received information that Griffin may have possessed firearms in violation of the terms of his probation.<sup>83</sup> Probation officers, escorted by plainclothes police officers, went to Griffin's house and conducted a search of his residence.<sup>84</sup> Their search revealed a handgun, and Griffin was charged with possession of a firearm by a convicted felon.<sup>85</sup>

In affirming the trial court's decision not to suppress the handgun as fruit of an illegal search, the Wisconsin Supreme Court held that probationary status diminishes a person's reasonable expectation of privacy to the degree that probation officers may search upon reasonable belief of illegal activity.<sup>86</sup> The United States Supreme Court upheld the decision but expressly noted that its holding did not paint as broad a brushstroke as did the court below.<sup>87</sup> Rather than embracing the broad principle that home searches by probation officers are permissible when conducted upon reasonable belief, the Court held that the

<sup>77</sup> *Id.* at 874.

<sup>78</sup> *See, e.g.,* *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>79</sup> *See, e.g.,* *New York v. Burger*, 482 U.S. 691 (1987).

<sup>80</sup> *Griffin*, 483 U.S. at 873-74. The administrative search is sometimes called the "special needs" search or regulatory search. *See id.*; CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* § 13.01 (4th ed. 2000).

<sup>81</sup> 4 WAYNE R. LAFAYE, *SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 767-68 (4th ed. 1996).

<sup>82</sup> 483 U.S. 868.

<sup>83</sup> *Id.* at 871.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 871-72.

<sup>86</sup> *State v. Griffin*, 388 N.W.2d 535, 541 (Wis. 1986), *aff'd*, 483 U.S. 868.

<sup>87</sup> *Griffin*, 483 U.S. at 872 ("[W]e find it unnecessary to embrace a new principle of law . . . that any search of a probationer's home by a probation officer satisfies the Fourth Amendment as long as the information possessed by the officer satisfies a federal 'reasonable grounds' standard.").

search was permissible because it was based upon a Wisconsin regulation that satisfied Fourth Amendment requirements.<sup>88</sup>

As the Supreme Court's first pronouncement of search law in the community correctional setting, *Griffin* indicated that aspects of the probation system are important factors in the reasonableness inquiry.<sup>89</sup> First, the Court recognized that the probation system is distinct from law enforcement such that the usual warrant and probable cause requirements may be dispensed with in some situations.<sup>90</sup> Second, the Court stressed the need of a probation system to be quick to respond to possible violations.<sup>91</sup> Third, the Court acknowledged that the probation system, to be most effective, must have the ability to deter future criminal behavior.<sup>92</sup>

More recently, the Supreme Court unanimously determined that searches of a probationer's home by a police officer with reasonable suspicion of illegal activity satisfy the Fourth Amendment reasonableness standard when the probationer is subject to a search condition.<sup>93</sup> In *United States v. Knights*, the defendant was under probation supervision when he was suspected of a new offense.<sup>94</sup> The sentencing court imposed a condition of supervision that required him to submit to a warrantless search by any probation officer or law enforcement officer, even where there was no reasonable suspicion of criminal activity.<sup>95</sup> Subsequent to *Knights*' placement on supervision, a deputy sheriff investigating sabotage of railroad facilities and aware of *Knights*' search condition, searched *Knights*' apartment without a warrant and without *Knights*' consent at the time of the search.<sup>96</sup>

The Supreme Court engaged the balancing of interests inquiry to determine whether the *Knights* search was permissible.<sup>97</sup> On the side of the individual's privacy interest, the Court noted that imposition of a search condition di-

---

<sup>88</sup> *Id.* at 873. Wisconsin State Department of Health and Social Services, the agency charged with supervision of probationers, maintained regulations which permitted probation officers to search a probationer's home without a warrant if the officers had reasonable grounds to believe that contraband was present. *Id.* at 870-71 (citing WIS. ADMIN. CODE §§ 328.21(4), 328.16(1) (1981)).

<sup>89</sup> *Infra* text accompanying notes 90-92.

<sup>90</sup> *Griffin*, 483 U.S. at 873-74.

<sup>91</sup> *Id.* at 876.

<sup>92</sup> *Id.* at 876, 878.

<sup>93</sup> *United States v. Knights*, 534 U.S. 112, 122 (2001).

<sup>94</sup> *Id.* at 114-16.

<sup>95</sup> *Id.* at 114.

<sup>96</sup> *Id.* at 115.

<sup>97</sup> *See id.* at 118-21.

minished Knights' reasonable expectation of privacy.<sup>98</sup> By way of government interest, the Court pointed to the community correctional system's dual role of attempting to rehabilitate the offender and preventing future criminal behavior in a population more prone to criminality than the general public.<sup>99</sup> The Court held that the search pursuant to the authorizing probation condition was permissible when reasonable suspicion is present.<sup>100</sup>

These two prominent Supreme Court cases provide some direction for supervision officers monitoring sex offenders' use of the Internet. Officers searching computers are typically examining hard drives or removable disks for evidence of behavior that violates the conditions of supervision, such as possession of pornographic images, communications with children, or accessing inappropriate Internet web pages. To the degree that this evidence comprises a file or document on a magnetic medium, there appears to be no less privacy protection afforded it compared to traditional hardcopy files.<sup>101</sup> Where a condition of supervision permits searching an offender's home or specifically permits searching a computer, a supervision officer with reasonable suspicion that evidence of violative behavior may be found by a search of the computer, may inspect that computer without a warrant.<sup>102</sup> However, it is not clear whether the limits of searching authority for community correctional officers extend beyond this situation.

Although *Knights* has provided guidance on community correctional search law in a general manner, many contours of Fourth Amendment jurisprudence in this area have not yet been clarified. In deciding *Knights*, the Court declined to address three issues important to the development of search and seizure law for probationers and parolees.

The Supreme Court has held that government searches do not violate the Fourth Amendment when the individual voluntarily consents to the search.<sup>103</sup> However, the Court has thus far refused to determine whether a probationer's acceptance of the supervision terms, which include a search condition, constitutes consent to search.<sup>104</sup> In *Knights*, the government urged the Supreme Court to decide the case on a consent rationale, stating that the defen-

---

<sup>98</sup> *Id.* at 119-20.

<sup>99</sup> *Id.* at 120-21.

<sup>100</sup> *Id.* at 122.

<sup>101</sup> Raphael Winick, *Searches and Seizures of Computers and Computer Data*, 8 HARV. J.L. & TECH. 75, 80-81 (1994).

<sup>102</sup> See *United States v. Tucker*, 305 F.3d 1193, 1201-02 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 1335 (2003).

<sup>103</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ("It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

<sup>104</sup> *Knights*, 534 U.S. at 118.

dant's acceptance of the condition constituted a voluntary consent to search.<sup>105</sup> However, the Court expressly refused to determine whether Knights' acceptance of the supervision terms constituted consent to search.<sup>106</sup>

Courts that have dealt with the consent issue in the community correctional context have reached divergent results.<sup>107</sup> The Ninth Circuit decided *Knights* below on the basis of consent, concluding that Knights consented to probation searches.<sup>108</sup> The Arkansas Supreme Court, in circumstances similar to *Knights*, held that a notice to parolees advising that they may be searched upon reasonable suspicion constitutes consent to search when signed by the parolee.<sup>109</sup> Similarly, a Virginia appellate court treated a search condition in a plea-bargained, suspended-sentence order as a voluntary waiver of Fourth Amendment protections.<sup>110</sup> However, some courts have espoused the opposite view, contending that consent to search is not voluntarily given when the choice opposite giving consent is incarceration.<sup>111</sup>

A second issue not yet addressed by the Supreme Court is whether supervision agents possess the same authority to conduct searches of parolees and

---

<sup>105</sup> *Id.* at 118. The Court noted that Knights signed the probation order immediately below a paragraph that stated: "I have received a copy, read and understand the above terms and conditions of probation and agree to abide by same." *Id.* at 114.

<sup>106</sup> *Id.* at 118 ("We need not decide whether Knights' acceptance of the search condition constituted consent in the *Schneckloth* sense of a complete waiver of his Fourth Amendment rights . . .").

<sup>107</sup> *Compare* *Dearth v. State*, 390 So. 2d 108, 109-10 (Fla. Dist. Ct. App. 1980) (holding that defendant did not give voluntary consent to imposition of a search condition when the other alternative was incarceration) *with* *State v. Benton*, 695 N.E.2d 757, 762 (Ohio 1998) (holding that parolee voluntarily waived Fourth Amendment protections when he signed a consent form to become eligible for parole).

<sup>108</sup> *United States v. Knights*, 219 F.3d 1138, 1142 (9th Cir. 2000), *rev'd*, 534 U.S. 112. The Ninth Circuit affirmed the suppression of evidence on grounds that a search pursuant to a condition of supervision can only be done for probation purposes. *Id.* Having concluded that none of the officers involved could have believed that the search was performed for probation purposes, the court ruled the warrantless search impermissible. *Id.* The difference between probation and investigation searches is explained *infra* note 113.

<sup>109</sup> *Cherry v. State*, 791 S.W.2d 354, 356 (Ark. 1990). The defendant signed a statement stating: "Any parolee's person, automobile, residence, or any property under his control may be searched by a parole officer without a warrant if the officer has reasonable grounds for investigating whether the parolee has violated the terms of his parole or committed a crime." *Id.* The facts in *Cherry* differ from *Knights* in that the offender was on parole (instead of probation) and the search was conducted by a parole officer (rather than a law enforcement officer).

<sup>110</sup> *Anderson v. Commonwealth*, 490 S.E.2d 274, 278 (Va. Ct. App. 1997), *aff'd*, 507 S.E.2d 339 (Va. 1998). The court noted that because the sentence was the result of a plea-bargain, it was imposed upon the defendant's request rather than imposed by the trial court's own initiative. *Id.*

<sup>111</sup> *See, e.g., Dearth*, 390 So. 2d at 110 ("We likewise conclude that *Dearth's* choice between a term of imprisonment or a term of supervised freedom [with the search condition] was really no choice at all."). Brief discussion of this issue is provided in 1 JOHN WESLEY HALL, JR., SEARCH & SEIZURE 153-54 (3d ed. 2000).

probationers as compared to law enforcement officers. Historically, the issue has not been framed by the affiliation of the person conducting the search, but instead by the purpose of the search.<sup>112</sup> Some courts have maintained that searches are undertaken to serve one of two possible interests: probation purposes or investigation purposes,<sup>113</sup> and that searches of offenders conducted pursuant to a search condition are reasonable only if conducted for probation purposes.<sup>114</sup> This was the position of the Ninth Circuit prior to the Supreme Court's decision in *Knights*.<sup>115</sup> However, the Supreme Court settled the issue to the degree that a search condition and reasonable suspicion are involved.<sup>116</sup> Where both reasonable suspicion and a proper search condition are present, there is no distinction between the searching authority for investigation and probation purposes.<sup>117</sup> What remains unknown is the degree to which supervision officers and law enforcement officers have the ability to conduct searches in other contexts.

The third issue not yet addressed by the Supreme Court is whether searches of offenders under community correctional supervision can be conducted in the absence of individualized suspicion. This issue, too, has led to divergent results in courts across the nation,<sup>118</sup> and the Court expressly declined to rule on it in *Knights*.<sup>119</sup> The subject of suspicionless supervision searches has often arisen in the context of compelled submission of a urine sample for drug testing.<sup>120</sup> Most courts dealing with this issue have held that urinalysis testing of

---

<sup>112</sup> See *infra* note 113.

<sup>113</sup> What is the difference between a search for probation purposes and one for investigation purposes? "Unlike an investigation search, a probation search advances the goals of probation, the overriding aim of which is to give the [probationer] a chance to further and to demonstrate his rehabilitation while serving a part of his sentence outside the prison walls." *United States v. Ooley*, 116 F.3d 370, 372 (9th Cir. 1997) (internal quotations omitted), *overruled in part by* *United States v. Knights*, 534 U.S. 112 (2001). A probation search is not one that is merely a subterfuge for police activity. See *id.*

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

<sup>116</sup> *Knights*, 534 U.S. at 122.

<sup>117</sup> *Id.*

<sup>118</sup> Compare *Carswell v. State*, 721 N.E.2d 1255, 1262 (Ind. Ct. App. 1999) ("[T]hough not explicitly contained in the probation statute, we think that a limitation that all searches of probationers be conducted only upon reasonable cause is inherent in such conditions . . .") with *State v. Smith*, 589 N.W.2d 546, 548 (N.D. 1999) ("We hold the search did not violate the Fourth Amendment because 'reasonable suspicion' is not required for a probationary search as long as the search is reasonable.").

<sup>119</sup> 534 U.S. at 120 n.6.

<sup>120</sup> The Supreme Court has held that urinalysis testing constitutes a search under the Fourth Amendment. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 652 (1995).



probationers does not require any individualized suspicion.<sup>121</sup> However, at least one court has hinted that reasonable suspicion is needed.<sup>122</sup>

Outside the context of drug testing, courts have been more noticeably split regarding the role of individualized suspicion in community correctional searches pursuant to conditions of supervision.<sup>123</sup> Several courts have held that the reasonable suspicion requirement is inherent in supervision conditions, statutes, or guidelines that permit warrantless searches.<sup>124</sup> The Kentucky Supreme Court has supported the position that a parolee has a reasonable expectation of privacy in the residence that cannot be overcome absent individualized suspicion.<sup>125</sup> The court reversed a conviction based on a parole officer's seizure of a firearm and drugs during a home visit.<sup>126</sup> The parole officer entered the residence after the parolee demonstrated initial reluctance to permit entry.<sup>127</sup> Once inside, the officer smelled marijuana and conducted a search, uncovering the prohibited items.<sup>128</sup> The court treated entry into the home as a search<sup>129</sup> and held that it could not have been conducted without reasonable suspicion.<sup>130</sup>

---

<sup>121</sup> See, e.g., *State v. Morris*, 806 P.2d 407, 410-11 (Haw. 1991) (declaring that no reasonable suspicion is required to conduct urinalysis where statute permits such tests to be imposed as condition of supervision); *Kopkey v. State*, 743 N.E.2d 331, 336 (Ind. Ct. App. 2001) ("We do not believe there is a prohibition against conducting a search . . . via urinalysis in the absence of 'reasonable suspicion' . . ."). The Indiana Court of Appeals noted the Supreme Court's willingness to permit school athletes to be drug tested and concluded: "Certainly, the privacy expectations of a person convicted of a crime and sentenced to in-home detention should fall below those of a student-athlete who has never been suspected of any wrongdoing whatsoever." *Kopkey*, 743 N.E.2d at 337-38 (discussing *Vernonia Sch. Dist.*, 515 U.S. at 657).

<sup>122</sup> *State v. Smith*, 540 A.2d 679, 691 (Conn. 1988).

<sup>123</sup> See *supra* note 118.

<sup>124</sup> See, e.g., *Carswell v. State*, 721 N.E.2d 1255, 1262 (Ind. Ct. App. 1999) (finding inherent reasonable suspicion requirement in a probation requirement to submit to search); *State v. Malone*, 403 So. 2d 1234, 1239 (La. 1981) ("[A] probation officer's decision to search must be supported by something more than a mere hunch . . ."); *State v. Ham*, 910 P.2d 433, 438 (Utah Ct. App. 1996) ("[T]he Fourth Amendment to the United States Constitution requires that a probation officer have reasonable suspicion before commencing a warrantless search of a probationer's residence.").

<sup>125</sup> *Coleman v. Commonwealth*, 100 S.W.3d 745, 752 (Ky. 2002).

<sup>126</sup> *Id.* at 746.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 746-47. The Kentucky Supreme Court held that a condition of parole requiring the parolee to "[p]ermit his parole officer to visit his home and place of employment at any time" did not grant the officer authority to enter the home without contemporaneous consent by the parolee. *Id.* at 750 (quoting 501 KY. ADMIN. REGS. 1:030 § 6(1)(b) (2000)). *Accord* *State v. Guzman*, 990 P.2d 370, 373-74 (Or. Ct. App. 1999) (holding that a condition of supervision permitting home visits by the supervision officer did not confer the authority to conduct a search). Yet the Second Circuit has hinted that a similar condition may confer searching authority upon the officer. See *United States v. Sofsky*, 287 F.3d 122, 127 n.4 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 981 (2003)

On the other side, some courts have permitted suspicionless searches under the auspices of community correctional supervision requirements.<sup>131</sup> In *People v. Reyes*, the California Supreme Court permitted suspicionless probation searches pursuant to properly imposed court requirements so long as they are not conducted arbitrarily or to harass.<sup>132</sup> In arriving at its conclusion, the court noted the diminished privacy of the probationer and the deterrent effect of random searches.<sup>133</sup> However, searches that were unreasonable regarding their frequency, time of day, duration, motivation, or purpose were not permitted.<sup>134</sup>

Most of the community supervision search law has developed outside the context of computer use. As computers become more prevalent in American homes, including those homes inhabited by adjudicated sexual offenders, supervision agencies have become aware of the need to place guardrails on the information superhighway in order to foster rehabilitation and prevent future victimization. Sentencing courts and parole agencies have begun imposing supervision conditions limiting or completely prohibiting computer activities, and these conditions are being tested in many courts.

#### IV. CONDITIONS OF SUPERVISION IMPACTING COMPUTER USE

In the federal court system, statutes limit the judge's discretion over the supervision conditions that may be imposed upon a criminal defendant placed on probation or supervised release.<sup>135</sup> When imposing either type of community-based sentence, statutes specifically enumerate several conditions that are mandatory<sup>136</sup> or discretionary,<sup>137</sup> depending upon the circumstances. Such con-

---

(suggesting that probation officers can inspect a defendant's home and computer and observing that the defendant is required by terms of supervision to "permit a probation officer to visit him . . . at any time at home or elsewhere.").

<sup>130</sup> *Coleman*, 100 S.W.3d at 752. The court apparently read *Knights* to mean that reasonable suspicion is required.

<sup>131</sup> *See, e.g.,* *People v. Reyes*, 968 P.2d 445, 451 (Cal. 1998).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *See* 18 U.S.C. §§ 3563(b), 3583(d) (2000). Probation is a community-based supervision sentence granted in lieu of incarceration. *See* Cathryn Jo Rosen, *The Fourth Amendment Implications of Urine Testing for Evidence of Drug Use in Probation*, 55 BROOK. L. REV. 1159, 1160 n.5 (1990) (citing WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 25.3 (1984)). Supervised release, akin to a state parole system, is a community-based supervision term following release from incarceration. *See id.*

<sup>136</sup> 18 U.S.C. § 3563(a) (applicable to probation); *id.* § 3583(d) (applicable to supervised release).

<sup>137</sup> *Id.* § 3563(b) (applicable to probation); *id.* § 3583(d) (applicable to supervised release).

ditions include crime-free behavior,<sup>138</sup> abstinence from illegal drugs,<sup>139</sup> or a ban on unauthorized travel outside the court's jurisdiction.<sup>140</sup> Additionally, the court can fashion its own special conditions of supervision.<sup>141</sup> It is by this authority that courts have imposed such creative terms as polygraph testing.<sup>142</sup>

However, the court's discretion in setting supervision conditions is not unbounded. Where a condition deprives a defendant of liberty or property, the condition must involve no greater diminishment than is necessary to protect the public from the defendant's future crimes, deter future criminal conduct, or provide correctional treatment and training in an effective manner.<sup>143</sup> In making its determination, the court may consider the nature and circumstances of the crime and the characteristics of the offender.<sup>144</sup> Although not specifically codified in some states, most states similarly require that a special condition of supervision bear some reasonable relationship to the crime or protection of the public.<sup>145</sup>

Recent years have seen an increase in the imposition of computer or Internet restrictions as conditions of supervision.<sup>146</sup> Restrictions have taken several forms, from complete bans on all Internet use and prohibitions against possession of a modem,<sup>147</sup> to permissible Internet use with restrictions on certain

<sup>138</sup> *Id.* § 3563(a)(1).

<sup>139</sup> *Id.* § 3563(a)(3).

<sup>140</sup> *Id.* § 3563(b)(14).

<sup>141</sup> *Id.* § 3563(b)(22); *id.* § 3583(d).

<sup>142</sup> *See United States v. Lee*, 315 F.3d 206, 217 (3d Cir. 2003) (upholding imposition of polygraph testing as a condition of supervised release). Conditions of supervision for sexual offenders have become quite comprehensive, including bans on pornography possession or use, search conditions, and restrictions on computer or Internet use. *See, e.g., United States v. Ebihara*, No. 01 CR.225-01(RWS), 2002 WL 432378, at \*3 (S.D.N.Y. Mar. 20, 2002).

<sup>143</sup> *See* 18 U.S.C. §§ 3563(b), 3583(d). The differences between the limitations for probation and supervised release are subtle. Section 3563(b) permits conditions "to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes of indicated in [18 U.S.C.] section 3553(a)(2)." *Id.* § 3563(b). Section 3583(d)(2), pertaining to supervised release, permits the condition to the extent that such condition "involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in [18 U.S.C.] section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D)." *Id.* § 3583(d)(2).

<sup>144</sup> *Id.* §§ 3563(b), 3583(d).

<sup>145</sup> *See, e.g., Commonwealth v. McIntyre*, 767 N.E.2d 578, 582 (Mass. 2002) (stating that conditions must be reasonably related to goals of sentencing and probation, including deterrence, incapacitation, and rehabilitation); *State v. Jones*, 550 N.E.2d 469, 452-53 (Ohio 1990) (court imposing condition should consider whether condition's relationship to the offender, the crime, or conduct which is criminal or reasonably related to future criminality); *Tamez v. State*, 534 S.W.2d 686, 691 (Tex. Crim. App. 1976) ("[P]ermissible conditions should have a reasonable relationship to the treatment of the accused and the protection of the public.").

<sup>146</sup> *See, e.g., Ebihara*, 2002 WL 432378, at \*3.

<sup>147</sup> *See United States v. Peterson*, 248 F.3d 79, 81 (2d Cir. 2001) (reviewing condition where trial court imposed ban on possession or use of computer equipment and ban on use of computer

online activities.<sup>148</sup> Challenges to these conditions have been built upon contentions that restrictions on Internet use are unnecessarily broad or amount to unreasonable restrictions upon the defendant's liberty.<sup>149</sup> These challenges have created a split among the federal circuits, with the most pronounced differences evident between the Second and Fifth Circuits.<sup>150</sup>

#### A. *Second Circuit Disapproval of Internet Bans*

The Second Circuit has been fervently opposed to broad Internet restrictions. It first addressed the permissibility of Internet restrictions in *United States v. Peterson*.<sup>151</sup> Larry Peterson was convicted of bank larceny, but a prior state incest conviction was the basis for imposition of sex offender-related terms of probation.<sup>152</sup> The sentencing court imposed a condition prohibiting the possession of computer equipment and use of the Internet.<sup>153</sup> On appeal, the Second Circuit rejected the Internet ban, noting that the restriction was "neither reasonably related to [the prior state conviction] nor 'reasonably necessary' to the sentencing objectives."<sup>154</sup> The court discussed the excessiveness of the re-

---

system except for employment purposes).

<sup>148</sup> *M.G. v. Travis*, 667 N.Y.S.2d 11, 13 (1997) (involving a condition prohibiting "participation in any on-line computer service involving the exchange of pornographic or sexually explicit messages.").

<sup>149</sup> *See, e.g., United States v. Paul*, 274 F.3d 155, 167-68 (5th Cir. 2001), *cert. denied*, 535 U.S. 1002 (2002); *United States v. Crandon*, 173 F.3d 122, 127 (3d Cir. 1999).

<sup>150</sup> *Compare United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 981 (2003) (holding that prohibition on Internet access is overbroad) *with Paul*, 274 F.3d at 170 (permitting complete prohibition on Internet access).

<sup>151</sup> 248 F.3d 79 (2d Cir. 2001).

<sup>152</sup> *Id.* at 81. The court also noted that Peterson accessed legal adult pornography on his computer before and after sentencing, and the probation officer believed Peterson posed a "great risk to the community." *Id.*

<sup>153</sup> *Id.* The court ordered:

[The] defendant shall not possess, purchase, or use a computer or computer equipment, which includes: a modem; Internet account; writable or re-writable CD Rom; [sic] tape backup or removable mass storage device; device/appliance that can be used to connect to the Internet; digital camera; CDs (other than original manufacturer's software distribution). The defendant is prohibited from using any commercial computer systems/services except for employment purposes as authorized by the probation officer. If allowed to use a computer for employment, the system shall only contain software required to perform his/her job.

*Id.*

<sup>154</sup> *Id.* at 83.

striction by first observing the importance of computers in contemporary life.<sup>155</sup> Analogizing to another common communication tool, the court reasoned that such a broad restriction is like banning all telephone use by an offender who uses the telephone to commit fraud.<sup>156</sup>

In striking down the computer and Internet ban, the Second Circuit also held that the ban was not reasonably necessary to protect the public from future crimes.<sup>157</sup> The court supported its conclusion by pointing out there was no evidence that Peterson's prior sexual offense had any connection to computer use.<sup>158</sup> Additionally, the court pointed out that restrictions on computer and Internet use limited Peterson's occupational opportunities, and sentencing guidelines in place regulate a judge's ability to impose terms precluding a defendant's participation in an occupation or profession.<sup>159</sup>

The Second Circuit's intolerance of Internet bans became more evident in *United States v. Sofsky*.<sup>160</sup> Unlike *Peterson*, *Sofsky* involved a defendant who used the Internet in the commission of his crime.<sup>161</sup> Evidence presented at trial indicated that Gregory Sofsky received more than 1,000 images of child pornography through his computer and traded child pornography with others on the Internet.<sup>162</sup> Upon conviction, the sentencing court banned Sofsky from using a computer or the Internet.<sup>163</sup>

As was done in *Peterson*, the Second Circuit struck down the Internet ban in *Sofsky*.<sup>164</sup> Although it conceded that the restriction was related to the purposes of sentencing, the court concluded that it "inflict[ed] a greater deprivation on Sofsky's liberty than is reasonably necessary."<sup>165</sup> The court again employed its analogy to telephone use first applied in *Peterson* to support its holding that the condition was overbroad.<sup>166</sup>

---

<sup>155</sup> *Id.* (noting that computers and the Internet have become "virtually indispensable in the modern world").

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* (contrasting the facts of *United States v. Crandon*, 173 F.3d 122, 127-28 (3d Cir. 1999)).

<sup>159</sup> *Id.* at 83 (citing U.S.SENTENCING GUIDELINES MANUAL § 5F1.5).

<sup>160</sup> 287 F.3d 122 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 981 (2003).

<sup>161</sup> *Id.* at 124.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* (The trial court ordered: "[T]he defendant may not access a computer, the Internet, or bulletin board systems at any time, unless approved by the probation officer.") (internal quotations omitted).

<sup>164</sup> *Id.* at 127.

<sup>165</sup> *Id.* at 126.

<sup>166</sup> *Id.*

The *Sofsky* panel brushed aside government contentions that a broad ban on Internet use was necessary because a probation officer would have great difficulty monitoring compliance with a term aimed only at restricting access to pornography online.<sup>167</sup> The court noted that the probation officer was not without any means of monitoring, specifically noting that the officer could first monitor whether Sofsky used a computer at all, and was permitted to conduct searches of the computer's hard drive and any removable disks.<sup>168</sup> Further, the court noted that the government could check Sofsky's compliance through undercover stings by inviting him to respond to emails advertising pornography.<sup>169</sup>

### B. Others Affirm Broad Internet Prohibitions

The Fifth Circuit was the first to establish wide approval of online restrictions,<sup>170</sup> and it has been followed by the Eighth<sup>171</sup> and Eleventh<sup>172</sup> Circuits. In *United States v. Paul*, the Fifth Circuit affirmed imposition of a complete prohibition on any computer or Internet use.<sup>173</sup> Legal problems began for Robert Scott Paul when he took his personal computer to a repair shop in Texas.<sup>174</sup> A technician found child pornography on the computer and notified the Federal Bureau of Investigation.<sup>175</sup> After Paul picked up his computer, FBI agents served a search warrant at his residence.<sup>176</sup> Agents found evidence that

---

<sup>167</sup> *Id.* at 126-27.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 127.

<sup>170</sup> *United States v. Paul*, 274 F.3d 155, 167-70 (5th Cir. 2001), *cert. denied*, 535 U.S. 1002 (2002). The Third Circuit was the first to uphold a broad Internet ban in *United States v. Crandon*, 73 F. 3d 122 (3d Cir. 1999); however, its later decisions have established it in the middle ground. *See infra* Part IV.C.

<sup>171</sup> The Eighth Circuit could also be placed in Part IV.C. among circuits listed as the "middle ground." Although the Eighth Circuit has upheld the two Internet bans brought before it, it has hinted that it would strike down bans for possession of child pornography in cases where there is no evidence that the defendant distributed pornography. *See infra* notes 194-207 and accompanying text. Further questioning of the Eighth Circuit's placement in this category is appropriate when considering that both of the court's cases of Internet ban conditions utilized plain error review. *See United States v. Ristine*, 335 F.3d 692, 694 (8th Cir. 2003); *United States v. Fields*, 324 F.3d 1025, 1026 (8th Cir. 2003).

<sup>172</sup> *Infra* notes 188-93.

<sup>173</sup> *Paul*, 274 F.3d at 169-70. The sentencing court ordered that Paul "shall not have [...] possess or have access to computers, the Internet, photographic equipment, audio/video equipment, or any item capable of producing a visual image." *Id.* at 160 (alteration in original).

<sup>174</sup> *See id.* at 158. Paul was convicted of a crime involving child pornography approximately fourteen years earlier. *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

Paul had downloaded several images of child pornography from the Internet,<sup>177</sup> and they also discovered photographs of children, magazines containing photographs of nude children, videotapes of children, and a large bag of children's clothes.<sup>178</sup> Among the most unsettling items removed from his residence were Spanish-language fliers advertising free lice removal services and promising that Paul would perform a complete physical examination on each child.<sup>179</sup>

Paul pled guilty to possession of child pornography and was sentenced to five years of incarceration, followed by three years of supervised release.<sup>180</sup> A complete ban on computer and Internet use was imposed as a term of the supervised release.<sup>181</sup> On appeal, Paul contended that the Internet ban was overbroad.<sup>182</sup> Like Peterson, Paul pointed to the importance of the Internet in modern day life and contended that such a broad restriction would prohibit him from engaging in legitimate activities.<sup>183</sup> The court rejected this contention, and in so doing noted the strong ties between Paul's dangerous behavior and computer activities, including downloading pornography and advising others how to select parents with children vulnerable to victimization.<sup>184</sup> The court also rejected the Tenth Circuit's rationale in *United States v. White*<sup>185</sup> that a complete Internet ban would be overbroad because it would prevent the defendant from engaging in some legitimate activities.<sup>186</sup> The court noted the "strong evidentiary support"<sup>187</sup> for the conclusion that such a broad prohibition was reasonably necessary and also observed that Paul could not show that such a ban would have an impact on his employment or expressive activities.<sup>188</sup>

---

<sup>177</sup> The computer was found to contain over 1,200 images of child pornography. *Id.* at 160.

<sup>178</sup> *Id.* at 158.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 158-59.

<sup>181</sup> *Id.* at 160.

<sup>182</sup> *Id.* at 167.

<sup>183</sup> *Id.* at 168.

<sup>184</sup> *Id.*

<sup>185</sup> 244 F.3d 1199 (10th Cir. 2001).

<sup>186</sup> *Paul*, 274 F.3d at 169. The court stated:

[W]e reject the *White* court's implication that an absolute prohibition on accessing computers or the Internet is *per se* an unacceptable condition of supervised release, simply because such a prohibition might prevent a defendant from using a computer at the library to "get a weather forecast" or to "read a newspaper online" during the supervised release term.

*Id.* at 169 (quoting *White*, 244 F.3d at 1206).

<sup>187</sup> *Id.* at 170.

<sup>188</sup> *Id.* Paul was primarily employed as a truck driver. *Id.* at 170 n.17.

The Eleventh Circuit adopted *Paul* in its initial Internet ban case.<sup>189</sup> Karl Zinn purchased, and had delivered to himself, two pornographic videotapes of girls between the ages of six and thirteen.<sup>190</sup> The web site where he made his purchase was an undercover operation by the United States Customs Service, and when agents served a search warrant on his residence they discovered more than 4,000 computer images of child pornography that he had admittedly obtained through the Internet.<sup>191</sup> The trial court imposed a condition of supervised release restricting Internet access, and Zinn challenged this term before the Eleventh Circuit.<sup>192</sup> Although the appellate court acknowledged that the Internet is important to modern life, it found more compelling the “need to protect both the public and sex offenders themselves from [the Internet’s] potential abuses.”<sup>193</sup> In upholding the Internet ban condition, the court noted that Zinn’s legitimate Internet use could be enabled through the clause permitting online access with approval of the probation officer.<sup>194</sup>

In its first case addressing the issue, the Eighth Circuit upheld a broad Internet ban imposed upon an offender convicted of selling child pornography.<sup>195</sup> The trial court imposed a condition of supervision severely limiting Keith Fields’ ability to possess computers and use the Internet<sup>196</sup> after he was convicted of operating a web site that sold child pornography.<sup>197</sup> On appeal, Fields argued that the prohibition was overbroad; however, the Eighth Circuit disagreed.<sup>198</sup> The court noted that the condition was reasonably related to the offense of selling child pornography online and was designed to protect the pub-

<sup>189</sup> United States v. Zinn, 321 F.3d 1084, 1092-93 (11th Cir. 2003).

<sup>190</sup> *Id.* at 1086.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 1087. The sentencing court imposed the following: “You shall not possess or use a computer with access to any on-line service at any location, including employment, without written approval from the probation officer. This includes access through any Internet service provider, bulletin board system, or any public or private computer network system . . .” *Id.*

<sup>193</sup> *Id.* at 1093.

<sup>194</sup> *Id.*

<sup>195</sup> United States v. Fields, 324 F.3d 1025, 1027-28 (8th Cir. 2003).

<sup>196</sup> *Id.* at 1026. The appellate opinion notes:

Condition seven prohibits Fields from “owning or operating any photographic equipment including . . . computers, scanners, and printers,” and condition eight states that he may not have [I]nternet service in his residence and may only possess a computer if he is granted permission by his probation officer and agrees to periodic inspections and other restrictions.

*Id.*

<sup>197</sup> *Id.* The court noted that the website generated more than \$22,000 in its eight months of operation. *Id.*

<sup>198</sup> *Id.* at 1026.



lic by curbing similar future behavior.<sup>199</sup> The court also found that the commercial trafficking in child pornography permitted broader restrictions without running afoul of the statutory limitations on supervision conditions.<sup>200</sup> The Eighth Circuit's repeated emphasis on the commercial nature of Fields' behavior to justify imposition of a broad Internet ban implies that the court would not have upheld such a broad ban had Fields' crime had been merely possession of child pornography.<sup>201</sup>

The Eighth Circuit later solidified its position as one that is more tolerant of broad Internet bans.<sup>202</sup> Scott Ristine was arrested for possession of child pornography after police found 111 computer disks, two hard drives, and three videotapes containing child pornography in his home.<sup>203</sup> Ristine admitted exchanging child pornography with other users.<sup>204</sup> He was sentenced to twenty-seven months in prison, followed by three years of supervised release, during which use of computers required permission of the probation officer and installation of special hardware or software to monitor his computer use.<sup>205</sup>

Ristine appealed the imposition of these conditions and cited cases from other circuits striking down broad Internet bans.<sup>206</sup> Noting that the Eighth Circuit was not among those rejecting Internet bans, the court analogized to *Fields* and upheld Ristine's ban.<sup>207</sup> The court reigned in its previous reliance on the

<sup>199</sup> *Id.* at 1027 (citing *Zinn*, 321 F.3d at 1092-93 and *United States v. Paul*, 274 F.3d 155, 169 (5th Cir. 2001) *cert. denied*, 535 U.S. 1002 (2002)).

<sup>200</sup> *Id.* ("Selling subscriptions to child pornography is more serious than a possessory offense.").

<sup>201</sup> The court gave considerable attention to contrasting conditions of supervision for possessory offenses and crimes involving "greater exploitation" by commenting: "Appellate courts have overturned conditions seen as overly restrictive, especially in cases involving simple possession of child pornography. In cases where defendants used computers or the [I]nternet to commit crimes involving greater exploitation, such restrictions have been upheld." *Id.* (internal citations omitted).

<sup>202</sup> *United States v. Ristine*, 335 F.3d 692, 696 (8th Cir. 2003). The contention that the Eighth Circuit is tolerant of broad bans may be questionable in light of the fact that review of both bans were conducted under the plain error standard, a measure that errs toward affirming lower court decisions. *See supra* note 171.

<sup>203</sup> *Ristine*, 335 F.3d at 693. Police originally came into contact with Ristine when he contacted an undercover online operation advertising tour services for trips to foreign countries during which travelers could have sexual contact with minors. *Id.* After determining that he did not have enough money to take such a trip, Ristine elected instead to purchase a videotape produced by the "travel company" advertised as being a tape of boys and girls under the age of ten engaged in sexual acts. *Id.*

<sup>204</sup> *Id.* at 693.

<sup>205</sup> *Id.* at 695-96.

<sup>206</sup> *Id.* at 695-96 (citing *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002) and *United States v. Freeman*, 316 F.3d 386, 392 (3d Cir. 2003)).

<sup>207</sup> *Id.* at 696-97.

commercial nature of Fields' behavior but perpetuated the implication that it would not approve a broad ban for "mere possession" of child pornography. Unlike Fields, Ristine did not charge others a fee to access child pornography, but he did distribute pornography to others. The court found this to be a "distinction . . . of no consequence."<sup>208</sup> The distribution of child pornography evidenced a degree of exploitation beyond simple possession of illegal images such that a broad Internet restriction was permissible.

### C. *The Middle Ground*

In addition to the circuits discussed above, the Third, Seventh, and Tenth Circuits have also contributed to the jurisprudential discussion of the Internet ban issue. Of these, the Third Circuit was the first to hear a sex offender's challenge to Internet restrictions.<sup>209</sup> This challenge came from Richard Crandon, a New Jersey resident convicted of receiving child pornography.<sup>210</sup> Crandon, thirty-nine years old, met a fourteen-year-old girl in Minnesota through the Internet.<sup>211</sup> After exchanging correspondence for several months, he traveled to Minnesota where he sexually abused the girl and took photographs of her engaged in acts of abuse.<sup>212</sup> He had the film developed after returning to New Jersey.<sup>213</sup> Two months later, Crandon returned to Minnesota and attempted to take the girl back to New Jersey with him, but he abandoned his plan after learning that the police were looking for them.<sup>214</sup> When he returned to New Jersey, he was arrested, and police discovered the photographs.<sup>215</sup>

Crandon pled guilty to receiving child pornography, and the trial court imposed a sentence of incarceration followed by a three-year term of supervised release.<sup>216</sup> Among the conditions of release, the court ordered Crandon to refrain from using the Internet, or any other computer network, without permission of the probation officer.<sup>217</sup>

---

<sup>208</sup> *Id.* at 696.

<sup>209</sup> *United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999).

<sup>210</sup> *Id.* at 125.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 127 ("The defendant shall not possess, procure, purchase or otherwise obtain access to any form of computer network, bulletin board, Internet, or exchange format involving computers unless specifically approved by the United States Probation Office.").

Crandon challenged the imposition of an Internet ban, arguing that it unnecessarily infringed upon his liberty and bore no logical relation to his offense, in violation of 18 U.S.C. § 3583.<sup>218</sup> He contended that the condition would hamper his employment opportunities and infringe upon his freedoms of speech and association.<sup>219</sup> However, the Third Circuit dismissed the argument that supervision conditions infringing upon fundamental rights are invalid.<sup>220</sup> Noting other cases in which fundamental rights were implicated by supervision conditions, the court held that the Internet ban was permissible because “the special condition [was] narrowly tailored and [was] directly related to deterring Crandon and protecting the public.”<sup>221</sup>

The subsequent decision in *United States v. Freeman*<sup>222</sup> indicated that the Third Circuit would be more scrutinizing of broad Internet bans than was communicated in *Crandon*. Robb Freeman was arrested after an undercover customs agent, in a face-to-face meeting, permitted Freeman to copy computer files containing child pornography.<sup>223</sup> A subsequent search of Freeman’s home revealed additional digitized child pornography.<sup>224</sup> After a guilty plea, the sentencing court imposed a condition of supervised release prohibiting possession of computer equipment and precluding Internet use without permission of the probation officer.<sup>225</sup>

The Third Circuit ruled that the prohibition on computer possession and Internet access was overbroad, and in so doing, distinguished Freeman’s case from *Crandon*.<sup>226</sup> It noted that, unlike in *Crandon*, there was no evidence that Freeman used the Internet to contact children.<sup>227</sup> The court declared that it

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 128.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> 316 F.3d 386 (3d Cir. 2003).

<sup>223</sup> *Id.* at 387.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 389-90. The court ordered:

Defendant is prohibited from having any computer equipment in [his] place of residence. The defendant shall not possess or use a computer with access to any on-line computer service at any location without the written approval of the Probation Officer. This includes, although it is not limited to, any Internet service provider, bulletin board system, or any other public or private computer network.

*Id.* The order also provided for searches of his residence and the seizure of any computer equipment or suspected pornography. *Id.* at 390.

<sup>226</sup> *Id.* at 392.

<sup>227</sup> *Id.*

would allow the imposition of an Internet ban where a defendant used the service to contact children; however, it would not be appropriate in Freeman's case.<sup>228</sup> The peculiar aspect of *Freeman* is that no explanation is given as to the origins of Freeman's collection of child pornography found at his residence. Whether he built his collection through online activities was apparently unimportant to the Third Circuit's evaluation of the Internet ban.<sup>229</sup>

The Tenth Circuit was first presented with the issue of Internet prohibitions in *United States v. White*.<sup>230</sup> Robert E. White was in the federal penal system after he made an online purchase of child pornography videotapes in a sting conducted by the U.S. Customs Service.<sup>231</sup> White pled guilty and was sentenced to two years of incarceration followed by a term of supervised release.<sup>232</sup> After his release from prison, White was re-incarcerated for twice violating conditions of release, and the court modified his terms to add new special conditions.<sup>233</sup>

White challenged three of the supervised release conditions, including the ban on possession of a computer with Internet access.<sup>234</sup> White argued that the Internet ban was flawed on two grounds. First, White contended that it impeded the rehabilitative goals of supervision by preventing him from conducting research for a book he was writing.<sup>235</sup> Second, White claimed that it also infringed his First Amendment rights.<sup>236</sup> The government relied on *Crandon* and argued that the Internet ban was related to the offense.<sup>237</sup> The Tenth Circuit first noted that the order was flawed if it was meant to be a broad prohibition against all Internet use.<sup>238</sup> By ordering that the defendant "not possess a computer with Internet access,"<sup>239</sup> the trial court did not preclude access to the Internet through

---

<sup>228</sup> *Id.*

<sup>229</sup> The Third Circuit's jurisprudence is not further illuminated by its decision in *United States v. Harding*, No. 02-2102, 2003 WL 179796 (3d Cir. Jan. 28, 2003). The court upheld, with little comment, a condition banning Internet use without permission of the probation officer where the defendant had been convicted of receiving child pornography and was found to have possessed computer images of child pornography. *Id.* at \*2.

<sup>230</sup> 244 F.3d 1199 (10th Cir. 2001).

<sup>231</sup> *Id.* at 1201.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* White twice violated the terms of supervision by consuming alcohol. *Id.*

<sup>234</sup> *Id.* at 1201. The trial court ordered that White "shall not possess a computer with Internet access throughout his period of supervised release." *Id.* at 1205.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* The court did not decide whether the prohibition violated his First Amendment rights. *Id.* at 1206.

<sup>237</sup> *See id.* at 1206.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

a computer not in White's possession,<sup>240</sup> or via a device that is arguably not a computer.<sup>241</sup> Further, the Tenth Circuit noted that if it was the trial court's intention to prevent him from having any access to the Internet, its condition of supervision was overreaching, as such a condition would "bar Mr. White from using a computer at a library to do any research, get a weather forecast, or read a newspaper online."<sup>242</sup> This language clearly points toward a disfavor of broad Internet prohibitions.

Like the Second Circuit in *Safsky*, the Tenth Circuit recommended other methods it thought more appropriate to preclude White's access to child pornography online.<sup>243</sup> The court recommended using filtering software on White's computer.<sup>244</sup> Having given some direction as to what is permissible, the appellate court remanded the case to the trial court for imposition of a reasonable condition.<sup>245</sup>

The Tenth Circuit upheld an Internet prohibition in *United States v. Walser*,<sup>246</sup> but its decision did not signal a wide-ranging acceptance of broad Internet bans.<sup>247</sup> Wyoming police, pursuant to a search warrant, searched a hotel room registered to Russell Walser during an investigation into drug distribution.<sup>248</sup> The Wyoming Division of Criminal Investigation conducted a forensic analysis of his computer and uncovered child pornography.<sup>249</sup> Walser pled guilty to possession of child pornography and was given a term of incarceration followed by supervised release.<sup>250</sup>

<sup>240</sup> *E.g.*, at a library or cybercafe.

<sup>241</sup> The court used web-t.v. as an example; however, a computer may be defined so broadly as to include almost anything with a microchip. Mobile telephones now permit access to the Internet and are arguably computers. This can pose definitional problems for courts and supervision agencies. *See, e.g.*, *State ex rel. Allen v. Fabian*, 658 N.W.2d 913, 914-15 (Minn. Ct. App. 2003) (prisoner contended in habeas petition that his probation was revoked for violation of Internet prohibition when he purchased a cellular telephone with Internet capabilities). The Tenth Circuit also questioned whether use of a computer with an internal modem is per se accessing the Internet. *White*, 244 F.3d at 1205 n.7.

<sup>242</sup> *White*, 244 F.3d at 1206.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* Filtering software controls the computer user's ability to access certain specified webpages that contain prohibited material. *See id.* at 1207 n.8.

<sup>245</sup> *Id.* at 1207.

<sup>246</sup> 275 F.3d 981 (10th Cir. 2001), *cert. denied*, 535 U.S. 1069 (2002).

<sup>247</sup> *See infra* notes 254-56.

<sup>248</sup> *See Walser*, 275 F.3d at 983.

<sup>249</sup> *Id.* at 984-85.

<sup>250</sup> *Id.* at 985.

The trial court imposed upon Walser a condition of supervised release prohibiting any Internet use without permission of the probation officer.<sup>251</sup> In permitting the condition to stand, the Tenth Circuit contrasted the language of Walser's condition with the "ill-tailored"<sup>252</sup> condition in *White*. The court noted that Walser's condition was not a complete ban on all Internet use.<sup>253</sup> Rather, it appeared important to the court that the term only required that he get permission from the probation officer before accessing the Internet.<sup>254</sup>

Despite the court's decision in *Walser*, upholding the Internet ban, this case is not a definite indication that the Tenth Circuit will uphold Internet bans subject to probation officer approval in all cases where computer use is germane to the crime or the offender's background. The court questioned whether the restriction imposed involved a greater deprivation than necessary to meet sentencing goals.<sup>255</sup> Specifically, the court posited that the vagueness of the condition may be used by the probation office to unreasonably prevent the defendant from accessing the Internet.<sup>256</sup> However, rather than resolving these important issues, the Tenth Circuit held that they did not rise to the level of plain error, the degree of scrutiny employed in that case.<sup>257</sup>

In *United States v. Scott*, its first case on the subject, the Seventh Circuit reversed a broad Internet ban<sup>258</sup> and remanded it to be reformed by the sentencing court.<sup>259</sup> Todd Scott was sentenced to a term of prison and supervised release for fraud; however, child pornography was discovered on his office computer during the investigation of the fraud charges.<sup>260</sup> For that reason, the sentencing court ordered that he not have access to the Internet.<sup>261</sup> The appellate court found the sentencing court's imposition of the condition unjustified,<sup>262</sup>

---

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 988.

<sup>253</sup> *Id.* at 988.

<sup>254</sup> *Id.* This distinction between a complete ban and a ban on use without permission has been adopted by at least one court outside the Tenth Circuit. See *United States v. Deaton*, 204 F. Supp. 2d 1181, 1183 (E.D. Ark. 2002) (modifying complete Internet prohibition to condition precluding Internet use without permission of the probation office and establishing broad guidelines for grant of permission).

<sup>255</sup> *Walser*, 275 F.3d at 988.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> See *United States v. Scott*, 316 F.3d 733 (7th Cir. 2003).

<sup>259</sup> *Id.* at 737.

<sup>260</sup> *Id.* at 734.

<sup>261</sup> *Id.* The trial court ordered that Scott "shall be prohibited from access to any Internet Services without prior approval of the probation officer." *Id.*

<sup>262</sup> *Id.* ("[H]ere the only justification [for the Internet ban] was misbehavior that neither resulted in a conviction nor was treated as relevant conduct, making an outright ban difficult to

however, the appellate court did not completely foreclose the possibility of upholding a broad Internet ban in another case.<sup>263</sup> Judge Easterbrook wrote that “[i]f Scott had used the Internet extensively to commit the crime of conviction, then perhaps a ban might be justified.”<sup>264</sup> The Seventh Circuit had few instructions to guide the sentencing court upon remand,<sup>265</sup> yet it did encourage the sentencing court to provide precision in its conditions regarding online activity so the probation officer would not be impermissibly tasked with the duty to determine what was inappropriate.<sup>266</sup>

Soon after *Scott*, the Seventh Circuit’s holding in *United States v. Holm*<sup>267</sup> signaled a more substantial objection to broad Internet bans. Delbert Holm, an information system technologist by trade, pled guilty to possession of child pornography after agents of the Illinois State Police found illegal pictures on his computers and disks.<sup>268</sup> The sentencing court imposed a condition of supervision prohibiting possession or use of computer hardware or software capable of accessing the Internet.<sup>269</sup> Although the nexus between the Internet and offense was much more substantial in *Holm* as compared to *Scott*, the Seventh Circuit declared that the prohibition was overbroad.<sup>270</sup> The court adopted the Internet-telephone analogy<sup>271</sup> and further noted the impact such a provision would have on Holm’s opportunities in his chosen profession, as it required

justify.”).

<sup>263</sup> *Id.* at 735.

<sup>264</sup> *Id.* Judge Easterbrook also noted that if a judge was unable to place restrictions on online access, that judge may be more inclined to incarcerate the offender than to permit unfettered access to the Internet. *Id.* at 736-37 (“If full access posed an unacceptable risk of recidivism, yet all controls on access were forbidden, then a judge would have little alternative but to increase the term of imprisonment in order to incapacitate the offender.”).

<sup>265</sup> *See id.* at 737 (“What conditions short of a ban may be appropriate in this case is a subject for the district judge to address in the first instance.”).

<sup>266</sup> *See id.* at 736.

<sup>267</sup> 326 F.3d 872 (7th Cir. 2003).

<sup>268</sup> *Id.* at 873-74. The Seventh Circuit noted that Holm downloaded “more than 100,000 pornographic images, approximately 10 to 20% of which depicted underage children engaged in sexually explicit activity.” *Id.*

<sup>269</sup> *Id.* at 877. The trial court ordered:

You shall not possess or use a computer that is equipped with a modem, that allows access to any part of the Internet, e-mail service, or other “on-line” services. You shall not possess software expressly used for connecting to online service, including e-mail, or installation disks for online services or e-mail.

*Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *See id.* at 879; *see also supra* text accompanying note 156.

working with computers.<sup>272</sup> Rather than impose a broad Internet ban, the court encouraged the use of a more limited restriction with enforcement through computer searches and filtering software.<sup>273</sup>

#### D. State Courts

The degree of divergence concerning Internet restrictions among the federal circuits is not found across state systems.<sup>274</sup> Although many states require that a special condition of supervision be reasonably related to the crime, offender, or protection of the public,<sup>275</sup> there typically does not exist the formal statutory restriction on a judge's discretion similar to 18 U.S.C. §§ 3563(b) and 3583(d). The few courts that have heard challenges to Internet bans have ratified the prohibitions.<sup>276</sup> For instance, a Washington appellate court affirmed the imposition of a ban on computer use where the offender groomed his five- and six-year old victims by showing them pornography and having them reenact the poses in the pictures.<sup>277</sup> Similarly, an Idaho court let stand an order to remove all computers from the home of a probationer who fondled his victim while he showed her pornography on a computer.<sup>278</sup> In what may be the ruling most supportive of an Internet ban, an Indiana appellate court approved a complete ban on computer and online access in a case where there was no indication of computer or online use related to the crime.<sup>279</sup> The court noted that the Internet ban was an effort to block the defendant's access to prohibited material which, if left unregulated, would "provide a temptation of such a magnitude that exposure to it would not be in the best interests of [the defendant's] rehabilitation."<sup>280</sup>

It is clear from the survey of courts weighing computer and Internet prohibitions that considerable divergence exists.<sup>281</sup> There will certainly be many

---

<sup>272</sup> *Holm*, 326 F.3d at 878. The Seventh Circuit noted that Holm presented "undisputed evidence" that he did not use any computer system at work to download child pornography; however, the court did not discuss whether a finding that he did use the Internet would have permitted imposition of broad Internet restrictions. *See id.*

<sup>273</sup> *Id.* at 879.

<sup>274</sup> *See infra* text accompanying notes 274-79.

<sup>275</sup> *See supra* note 145.

<sup>276</sup> *See, e.g., State v. Combs*, 10 P.3d 1101, 1103 (Wash. Ct. App. 2000). Because most states do not have the statutory or jurisprudential equivalent of the "reasonably necessary" requirement in 18 U.S.C. § 3563(b) (2000), state courts may have more flexibility in fashioning conditions of supervision. *See supra* note 145.

<sup>277</sup> *See Combs*, 10 P.3d at 1103.

<sup>278</sup> *See State v. Wardle*, 53 P.3d 1227, 1228-30 (Idaho Ct. App. 2002).

<sup>279</sup> *See Smith v. State*, 779 N.E.2d 111, 118 (Ind. Ct. App. 2002).

<sup>280</sup> *Id.*

<sup>281</sup> *See supra* note 150.



opportunities in the future for courts to clarify the degree to which conditions can justifiably restrict Internet access for sexual offenders under community correctional supervision. As this area of law further develops, consideration should be given to several factors that, if ignored, could hamper effective supervision and undermine rehabilitative and public safety goals.

## V. A FUTURE DIRECTION FOR EFFECTIVE SUPERVISION

The most effective community correctional supervision techniques have both reactive and proactive aspects.<sup>282</sup> Ideally, terms of supervision should permit the supervising agency to adequately detect and respond to all material violations. It is through the effective detection and response to violations that these practices acquire proactive facets, deterring future violative conduct.<sup>283</sup> The Supreme Court has recognized that both components are valid interests of the government.<sup>284</sup>

As the law related to adjudicated sex offenders and computers continues to develop, courts should be mindful of undermining legitimate government interests served by supervision practices. More specifically, courts should expressly sanction the use of random suspicionless computer searches to verify compliance with supervision terms and resist any efforts to establish a per se rule that Internet prohibitions are overbroad.

### A. *Limitations on Internet Access*

Circuit courts that are intolerant of supervision conditions prohibiting all Internet use<sup>285</sup> have yet to thoroughly examine all of the material aspects of the issue. Their decisions misjudge the problems inherent in permitting online access, miscalculate the degree of deprivation to individual defendants, and misunderstand the purpose of the conditions.

---

<sup>282</sup> See *supra* text accompanying notes 91-92.

<sup>283</sup> The Classical School of criminological theory and much of public policy is based on simple principles of hedonistic calculus. See COLLECTED WORKS OF JEREMY BENTHAM: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 166 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (“*The value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence.*”). See generally FRANK P. WILLIAMS III & MARILYN D. MCSHANE, CRIMINOLOGICAL THEORY 16-17 (2d ed. 1994). All other things being equal, a potential offender who perceives the likelihood of getting caught as high is more likely to be dissuaded from committing the contemplated crime than one who thinks detection and capture are unlikely.

<sup>284</sup> See *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987) (noting that a warrant requirement would make the supervision agency less able to “respond quickly to evidence of misconduct, and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create”) (internal citations omitted).

<sup>285</sup> See, e.g., *United States v. Sofsky*, 287 F.3d 122, 126-27 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 981 (2003).

Appellate courts striking down Internet restrictions have not fully comprehended the risks posed by sex offenders in the online world. Recommendations made to supervising authorities by these courts demonstrate that they do not fully appreciate the opportunities to misuse online access. For instance, the Tenth Circuit suggested the use of filtering software to screen out inappropriate materials online.<sup>286</sup> Although employing this software can give the correctional system and court a sense of “doing something,” the advice suggests that access to pornography is the only activity to be monitored.

Recognizing filtering software as sufficient to prevent online malfeasance is flawed in many ways. Filtering software is considered an inefficient means of blocking access to inappropriate material.<sup>287</sup> However, were it completely effective in blocking access to pornographic and child-oriented web pages, it would not address the considerable threat posed by sex offenders accessing chat rooms.<sup>288</sup> Moreover, filtering technology would not prevent an offender from sending or receiving inappropriate photographs via email. Furthermore, as new pages are introduced onto the web every day, it would be practically impossible for a supervision officer to ensure that the software’s directory of inappropriate web pages remained current.<sup>289</sup> These issues suggest that filtering software is not a comprehensive or effective supervision technique, as much as it is a hook upon which a court can hang its hat to believe that it is doing something to contain the risk presented by sex offenders online.

Suggestions made by the Second Circuit similarly evince the dangerous belief that pornography use is the sole danger to be monitored online.<sup>290</sup> In *Sofsky*, the court suggested that a supervision condition banning Internet access could be modified to a prohibition on online pornography use.<sup>291</sup> The court noted that such a condition could be monitored through computer searches and government stings inviting sex offenders to respond to ads for pornography surreptitiously placed on the Internet by the government.<sup>292</sup> Again, these provisions do not respond to any of the supervision concerns that Internet access can be used to traffic child pornography through means other than web pages, to maintain child contact, to easily receive and disseminate information about of-

---

<sup>286</sup> See *United States v. White*, 244 F.3d 1199, 1206 (10th Cir. 2001).

<sup>287</sup> The Tenth Circuit acknowledges the limited effectiveness of filtering software. *Id.* (“[N]one of the software presently available is completely effective.”).

<sup>288</sup> There is also some question whether filtering software would adequately control access to inappropriate newsgroups that are not technically on the World Wide Web and not accessed by normal browsing software such as Microsoft Internet Explorer or Netscape Navigator.

<sup>289</sup> Some filtering software packages require the person filtering (i.e., the probation officer, parent, etc.) to manually list the web pages that are off limits.

<sup>290</sup> See *Sofsky*, 287 F.3d at 126-27.

<sup>291</sup> *Id.* at 127.

<sup>292</sup> *Id.*

fending, and to network in a manner that supports and encourages offending behavior.<sup>293</sup>

Courts that have stricken Internet bans have not thoroughly examined the degree to which Internet bans involve deprivations of individual liberty. The Tenth Circuit noted that banning a defendant from the Internet “would bar [him] from using a computer at a library to do any research, get a weather forecast, or read a newspaper online.”<sup>294</sup> The Tenth Circuit, however, declined to note that the Internet is not the exclusive means of conducting research or that weather forecasts and news can be received regularly through print, television, and radio media.<sup>295</sup> Although the Internet has placed more information at our fingertips and made certain everyday activities easier, there is very little that can be done in the virtual world that cannot be accomplished in the “brick and mortar” world. Tax returns can still be filed through the mail, banking is still offered at local branches, news is available on broadcast television, and communication remains possible through the telephone and United States Postal Service.

To support their determination that Internet bans are overbroad, the Second and Tenth Circuits have analogized an Internet ban to a prohibition on the use of telephones for fraud offenses.<sup>296</sup> However, this analogy is defective in at least two ways. First, it is misleading as to the degree of deprivation placed upon the offender. When prohibiting a person from using the telephone, a court is prohibiting the offender from using the most prevalent communication device available in modern life, including the most practical means of summoning emergency assistance. Conversely, the Internet is not used for emergency purposes and is not the most prevalent communication device. Although precluding online access may require someone to resort to slower forms of communication, it does not fundamentally alter the scope of legitimate activities one can undertake. There is currently very little that can be done exclusively on the Internet that would be considered necessary for more than a few people. Until

---

<sup>293</sup> For a discussion of ways pedophiles misuse the Internet, see *supra* notes 45-71 and accompanying text. Some may argue that use of the Internet restriction to prevent participation in pedophilic support or information networks would violate the First Amendment right to peaceable assembly. However, conditions of supervision that impinge fundamental rights are permissible if “primarily designed to meet the ends of rehabilitation and protection of the public . . . .” *United States v. Ritter*, 118 F.3d 502, 504 (6th Cir. 1997). The prevention of networking among sex offenders (outside the supervision of a treating psychologist or psychiatrist) aims to foster rehabilitation by ensuring that the treatment goals are not undermined and protects the public through the same process.

<sup>294</sup> *United States v. White*, 244 F.3d 1199, 1206 (10th Cir. 2001).

<sup>295</sup> *White* contended that he needed access to the Internet to conduct research for a book he was writing. *Id.* at 1205. Although it is unlikely that many adjudicated sex offenders are conducting online research in preparation for publishing, many more would likely make such claims if having aspirations of writing is key to gaining Internet access.

<sup>296</sup> See *United States v. Peterson*, 248 F.3d 79, 83 (2d Cir. 2001) (“Although 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.”); *White*, 244 F.3d at 1207.

the Internet grants unique opportunities or privileges,<sup>297</sup> courts should consider the available alternatives when determining whether a ban is overbroad.<sup>298</sup>

The telephone analogy is also flawed because it fails to acknowledge the degree to which public safety interests are served by the supervision condition.<sup>299</sup> In the Second Circuit's example of prohibiting a defendant convicted of fraud from using a telephone, the court is presumably attempting to prevent other citizens from losing some of their money or possessions. In this example, the weighing of individual and government interests, at first glance, does appear imbalanced. However, by precluding a convicted sex offender from accessing the Internet, the court attempts to guard the public from a most personal crime<sup>300</sup> that society presumably has a greater interest in preventing.<sup>301</sup>

Another aspect of the government interest yet to be considered by some circuits is in preventing activities that will undermine effective rehabilitation. Most sex offenders placed on supervision are ordered into a sex offender treatment program.<sup>302</sup> One legitimate goal of relapse prevention,<sup>303</sup> a component of

---

<sup>297</sup> An example that may be realized in the not-too-distant future is the use of the Internet to transmit real-time patient vital signs and other medical information from the patient's home monitors to medical experts hundreds of miles away. In this example, the alternative to the Internet use would be to send the patient to the distant city. The alternative is not a truly practical alternative, especially where long-term monitoring would require a residential move. This example is dissimilar to the alternatives between sending a letter instead of email or watching the Weather Channel instead of logging on.

<sup>298</sup> Perhaps the better analogy is to a condition of probation prohibiting a car-theft offender from operating a motor vehicle during the term of supervision. Where the defendant lives in a metropolitan area with mass transportation, such a condition is more likely permissible due to available alternatives, than where the defendant lives in a rural area with no other means of transportation to an employment hub.

<sup>299</sup> See generally 18 U.S.C. § 3553(a)(2)(C) (2000).

<sup>300</sup> Sexual assault, including child molestation, often has devastating effects on its victim that far outweigh those encountered by property crime victims. For discussions of those effects, see Jim Hopper, *Sexual Abuse of Males: Prevalence, Possible Lasting Effects, and Resources*, at <http://www.jimhopper.com/male-ab/#last> (last visited Aug. 19, 2003); *Sexual Abuse*, at <http://www.dmh.missouri.gov/cps/facts/cpssex.html> (last visited Aug. 19, 2003).

<sup>301</sup> It is appropriate to consider the nature of the harm to be avoided when determining reasonableness. This notion is present in many aspects of American law. See, e.g., *In re Sealed Case*, 310 F.3d 717, 738 (U.S. Foreign Intel. Surv. Ct. Rev. 2002) (discussing national security interests). In Judge Hand's classic case explaining negligence, the "gravity of the resulting injury" is considered to determine negligence (i.e., reasonableness). *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

<sup>302</sup> See generally McKay, *supra* note 59, at 18-19.

<sup>303</sup> This term refers to the component of treatment that is squarely directed at the planning process for preventing re-offending. Although all aspects of treatment are generally related to prevention of re-offending (e.g., victim empathy or reframing cognitive distortions), relapse prevention is focused squarely upon the offender's plan for coping strategies in future risk situations. For a good discussion of the relapse process and relapse prevention planning, see William D. Pithers, *Relapse Prevention with Sexual Aggressors*, in *HANDBOOK OF SEXUAL ASSAULT*, *supra*

many treatment programs, is to structure the offender's environment in a manner that is not conducive to offending.<sup>304</sup> To the degree that the Internet facilitates offending behavior, it is an appropriate target of judicial supervision or control. Using online access to seek out pornography or communicate with other sex offenders in a manner that supports offending undermines the rehabilitative process.

To say that courts should weigh the considerations above when determining the permissibility of Internet restrictions is not to advocate that all sex offenders must be broadly banished from the virtual world. Reasonable courts weighing specific circumstances may conclude that public safety is not jeopardized when a sex offender accesses the Internet with adequate relapse prevention strategies in place.<sup>305</sup> However, courts should not presume that online access is appropriate for each offender who did not use, or was not *known* to have used, computers in the commission of the crime.<sup>306</sup> Instead, judges determining the appropriateness of Internet limitations should assess the offender's legitimate need for Internet access and the objective risk of misuse posed by that offender.<sup>307</sup>

---

note 15, at 343, 346-60.

<sup>304</sup> See BARRY M. MALETZKY, *TREATING THE SEXUAL OFFENDER* 152-54 (1991). Maletzky observes that for most offenders, "the offense requires the availability of a victim, the absence of sure detection . . . and [individual] variables such as the level of general sexual arousal at the time." *Id.* at 152.

<sup>305</sup> In fact, a cogent argument can be made that Internet access can reduce offender risk. By permitting an offender to engage in activities that would otherwise require public contact (e.g., to shop for books or groceries, or to watch a movie), the Internet can reduce the chances of an offender coming into contact with children. Setting aside important concerns about the complete isolation of the offender, this argument may have some merit. However, if an offender's impulse control and relapse prevention planning are so poor that the offender is unable to choose an appropriate time and place to do grocery shopping or other personal tasks, it is unlikely that Internet access would be appropriate without strict monitoring capabilities.

<sup>306</sup> The circuits assessing limitations on computer use for sex offenders have apparently shown great deference to the issue of computer use in the crime charged. See, e.g., *United States v. Scott*, 316 F.3d 733, 735 (7th Cir. 2003) ("If Scott had used the Internet extensively to commit the crime of conviction, then perhaps a ban might be justified."); *United States v. Peterson*, 248 F.3d 79, 83 (2d Cir. 2001) ("There is no indication that Peterson's past incest offense had any connection to computers or to the Internet."). Courts should not place too much reliance upon this factor, as doing so serves only to be reactive. Permitting an offender to have online access merely because there is no *known* history of a computer-crime connection fails to be proactive by controlling the manner in which an increasing number of offenders commit their crimes.

<sup>307</sup> It seems to some extent improper — but a practical necessity — for courts to also consider the resources available to the supervising agency. Funding dedicated to probation and parole supervision programs is paltry, and supervision of computer activity may deplete time and funding capabilities of these agencies, especially when it requires detailed analysis of computer hardware. Some courts may have reservations about forcibly dedicating the limited resources of a supervision agency to computer supervision or making supervision officers "Internet babysitters." For an illustration of the strained conditions under which supervision agencies operate, see Melvin Claxton, *Felons on Probation Go Unwatched*, *DETROIT NEWS*, Dec. 10, 2002, at 1A, noting that in

When a sentencing court grants access to computers and the Internet, other conditions should be in place to ensure that the computer is not used for criminal purposes or to undermine the sex offender treatment process. Some supervision agencies attempt to detect and deter such misuse through random searches of computer equipment.

*B. Permissible Computer Searches*

The Supreme Court has established that persons convicted of crimes are subject to some diminishment of constitutional rights.<sup>308</sup> When a citizen convicted of a sex crime is subject to a search condition, the offender’s reasonable expectation of privacy is reduced.<sup>309</sup> The government interest in supervision is simultaneously increased, especially in cases of child sexual victimization.<sup>310</sup> For these reasons, courts should expressly hold that suspicionless community supervision searches of sexual offenders’ computers do not offend Fourth Amendment requirements when conducted pursuant to a valid condition of supervision and performed in a reasonable manner.<sup>311</sup>

Wayne County, Michigan, 249 probation officers are charged with monitoring more than 30,000 people under supervision.

<sup>308</sup> See *United States v. Knights*, 534 U.S. 112, 119 (2001).

<sup>309</sup> See Carol S. Steiker, *Foreword: The Limits of the Preventative State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 804 (1998).

<sup>310</sup> Those convicted of sexual crimes pose a greater risk of future offending than do members of the general law-abiding public, and can therefore be subjected to “a degree of impingement upon privacy that would not be constitutional if applied to the public at large.” *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987). Research indicates that significant numbers of sex offenders are rearrested for subsequent offenses. See Hanson & Bussière, *supra* note 35, at 351 (noting that meta-analysis showed that thirteen percent of child molesters were arrested for a new sexual offenses within four to five years, approximately thirty-seven percent were arrested for any (sexual or non-sexual) new offense). Even more, rearrest rates yield a conservative estimate of true re-offending, as many sexual offenses go undetected. See *id.* The reasonable probability of recidivism, coupled with the high physical and social costs of sexual offending, increase the government interest in preventing re-offenses among sexual offenders compared to other offender populations.

<sup>311</sup> Because this conclusion is based in part upon the serious social costs and risks posed specifically by sex offenders, it is expressly limited to adjudicated sex offenders and those supervised pursuant to a deferred adjudication regime that requires substantiation of the defendant’s guilt. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(a) (Vernon 2003). Whether suspicionless searches are permissible when they involve different felony offenders or at different stages of the trial process (e.g., pre-trial supervision) is outside the scope of this article.

The Second Circuit implied that random suspicionless searches are permissible when it recommended searches in lieu of a broad ban on Internet access. *United States v. Sofsky*, 287 F.3d 122, 127 (2d Cir. 2002), *cert. denied*, 112 S. Ct. 981 (2003); *accord* *United States v. Holm*, 326 F.3d 872, at 879 (7th Cir. 2003), (“The district court . . . imposed the condition that [the defendant] be subjected to random searches of his computer and residence — a condition we find entirely reasonable.”).

Unreasonableness of a supervision search can be identified by examining the time and manner in which the search is conducted, the motivation and scope of the search, and the identity of the searcher. Unreasonableness is certainly signaled when a search is "arbitrary, capricious or harassing."<sup>312</sup> Searches conducted during deep-night hours, except in exigent circumstances or where the offender observes a nocturnal lifestyle, and searches performed out of hostility toward the offender do not further legitimate public interests and should never be considered reasonable.

The scope of a search may also be used to determine reasonableness. A sentencing court may limit the scope of a suspicionless search by express terms in the condition.<sup>313</sup> In the absence of such a limitation, courts should permit suspicionless searches of the complete computer hard drive, floppy disks, and any other computer media storage device. Limiting supervision searches to only specified sections of a computer drive would reduce the effectiveness of searches, as the offender who keeps prohibited materials would know to simply bury these materials in computer files outside the permissible scope of the officer's search.

In the absence of express limitation by the sentencing court, the suspicionless search authority should also extend to places where removable disks or drives are likely to be found.<sup>314</sup> It would seem inconsistent with the purposes of the search to permit the noncompliant offender to defeat the search by simply removing a disk containing child pornography and putting it in a drawer of the desk upon which the computer sits. Places where disks and devices are likely to be found may include desk drawers, disk storage boxes, and other places where that individual offender has been known to place these items. To prevent the searching officer from using the suspicionless computer search to conduct a broad search of the whole home, a search that moves from places where disks and other devices are *likely* to be found to places where disks and other devices *may* be found would have to be supported by articulable reasonable suspicion.<sup>315</sup>

---

<sup>312</sup> *People v. Reyes*, 968 P.2d 445, 450 (Cal. 1998).

<sup>313</sup> For example, a court may order that the defendant permit the supervision officer to inspect the content of any computer file that records or otherwise identifies the web sites visited by the computer user. In a Windows-based computer, this could limit an officer's search to Temporary Internet and Cookies files.

<sup>314</sup> How one determines whether such materials would "likely" be found in a given location is outside the scope of this article. Such a determination would necessarily have to be broad — that is, not bound to a requirement of individualized suspicion — so as not to swallow whole the suspicionless nature of the computer search. In other words, if the supervision officer must have reasonable suspicion to believe a disk is in the desk drawer, such a requirement could effectively nullify the officer's ability to conduct a suspicionless search of the disk once found. However, some outer limit would have to be established on an officer's ability to search for disks and other similar items.

<sup>315</sup> This does not consider whether additional authority to search beyond the computer — to look for pornographic magazines, children's toys, weapons, or other items — may be conducted pursuant to a valid search order. At first glance, I see no reason to find otherwise.

The identity of the searcher should impact the reasonableness inquiry of a suspicionless supervision search. The “purpose test” of probation searches formerly employed by the Ninth Circuit<sup>316</sup> was effectively deemed irrelevant by the Supreme Court’s decision in *Knights*.<sup>317</sup> However, its underlying rationale has merit, and the test should be resurrected with some modification for suspicionless searches. Rather than attempting to determine the purpose of the search, courts should look to the identity of the agency conducting the suspicionless search, with supervision officers being the exclusive agents permitted to conduct permissible suspicionless searches.<sup>318</sup> This modified test has two advantages to the original “purpose” test. First, differentiating between supervision and law enforcement officers better preserves the logical underpinnings of the administrative search doctrine. Second, it provides an objective bright-line test that is more easily and reliably applied than a test discerning the purpose of a search.

To prevent the supervision purposes of the suspicionless search from becoming a tool for impermissible circumvention of the Fourth Amendment requirements, courts should restrict the authority to conduct suspicionless supervision searches to community correctional agencies.<sup>319</sup> The police and correctional supervision agencies may serve the same primary goal of public safety, but blurring the lines between the two would threaten to undermine the logic underlying the Supreme Court’s crucial distinction between correctional supervision and law enforcement agencies.<sup>320</sup> In this respect, suspicionless supervision searches should not be employed as subterfuge for police investigative purposes.<sup>321</sup>

---

<sup>316</sup> See *supra* note 113 (discussing probation searches and investigation searches).

<sup>317</sup> See *supra* notes 116-17.

<sup>318</sup> This article focuses only on the distinction between the searching authority of correctional supervision officers and law enforcement officers. Whether other government agencies (e.g., child welfare agencies) can conduct suspicionless searches under the authority of correctional supervision conditions is outside the scope of this article.

<sup>319</sup> Whether a law enforcement officer may act under the direction of the supervision officer to conduct suspicionless searches is outside the scope of this article.

<sup>320</sup> The correctional supervision search is analyzed under the administrative search doctrine precisely because supervision agencies are not law enforcement agencies. To blur the distinctions between the two would erode the underlying argument for treating supervision searches as administrative searches. The Ninth Circuit has noted the different roles of supervision officers and law enforcement officers. See *Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir. 1975) (“A good parole officer does not regard himself as a policeman.”).

<sup>321</sup> Cf. *United States v. Ooley*, 116 F.3d 370, 372 (9th Cir. 1997), *overruled in part by United States v. Knights*, 534 U.S. 112 (2001). The Ninth Circuit recently held that reasonable suspicion is required for FBI agents to conduct a parole search of an offender’s residence. *United States v. Crawford*, 323 F.3d 700, 715-16 (9th Cir. 2003), *vacated pending rehearing en banc*, \_\_\_ F.3d \_\_\_, No. 01-50633, 2003 WL 22061604, (9th Cir. Sept. 2, 2003).



One new technology designed to assist in the supervision of sex offenders' computer use is dependent upon the permissibility of suspicionless searches. Monitoring software has been developed to record the computer use of the designated defendant. Originally designed to enable parents to monitor children's online activities, correctional agencies and software developers have modified it to watch what sex offenders do and where they go online.<sup>322</sup> Unlike filtering software that simply blocks inappropriate websites, monitoring software actually takes a "snapshot" of the computer screen when the software detects possible violations, permitting the officer to see what the defendant saw and preserving the evidence for use in a hearing.<sup>323</sup> The software monitors chat, instant messaging, and web surfing, and when it detects a possible violation, such as when the user types in a word or message on its alert list,<sup>324</sup> it takes a snapshot of the screen and preserves it for review by the supervision officer.<sup>325</sup> The software can also automatically generate an email to the supervision officer to warn of the possible violation.<sup>326</sup>

The use of this monitoring software likely constitutes a suspicionless search.<sup>327</sup> Yet, ironically, this technology may constitute many offenders' best hope of having some limited Internet access in jurisdictions that permit broad bans on Internet access.<sup>328</sup> When the choice is between unfettered access, or at

<sup>322</sup> John O'Connor, *Software Helps Officers Monitor Sex Offenders*, ST. LOUIS POST-DISPATCH, Jan. 7, 2002, at B5.

<sup>323</sup> *Id.*

<sup>324</sup> The officer can program the software to begin recording when it detects the entry of certain phrases, such as "Do you like to kiss men?"

<sup>325</sup> See O'Connor, *supra* note 322. The software stores the screen image in a password-protected database that the officer can review when conducting a search of the computer files. Some software packages record a snapshot at designated time intervals known only by the supervision officer.

<sup>326</sup> See John Schwartz, *Internet Leash Can Monitor Sex Offenders*, N.Y. TIMES, Dec. 31, 2001, at C1.

<sup>327</sup> Two alternative rationales may be argued that would permit the use of monitoring software under the reasonable suspicion rubric of *Knights*. One is that placement of software settings to activate the recording when certain keystrokes are made or when certain websites are contacted, in essence, permits the computer software to determine when reasonable suspicion exists. Another possible contention is that the particular circumstances of sex offenders — because they are sufficient to warrant imposition of monitoring software — create a static "reasonable suspicion" that is always attached to the defendant. This latter approach would have precarious consequences, as the free-floating existence of reasonable suspicion, according to *Knights*, would justify a police officer's search at any time.

<sup>328</sup> One may argue that the offender consents to the suspicionless search to obtain Internet privileges. This may be a viable claim; however, because the Supreme Court has remained silent on the voluntariness of consent by probationers and parolees, there exists cause to believe that such consent is not voluntary if failure to consent yields a complete Internet ban. *Cf. United States v. Crawford*, 323 F.3d 700, 717 (9th Cir. 2003), *vacated pending rehearing en banc*, \_\_\_ F.3d \_\_\_, No. 01-50633, 2003 WL 22061604 (9th Cir. Sept. 2, 2003).

best, filtered access, and no access at all, many courts may be reluctant to permit online activity without some reliable method of supervising and responding to high-risk behaviors. When the court is offered a third choice of effective supervision of Internet use, the necessity for an outright prohibition becomes more questionable.

## VI. CONCLUSION

Many aspects of the Internet and the nation's computerization have implications for the supervision of sexual offenders. As technology enables a user to easily and secretly store away a few pictures, amass a large collection of child pornography, or network with others to facilitate the abuse of children, effective supervision techniques should prevent this technology from being used to facilitate higher levels of risk. Courts should endorse the permissibility of suspicionless computer searches by probation and parole agencies when conducted in compliance with a valid court order or administrative regulation and performed in a reasonable manner. Additionally, when determining the acceptability of supervision conditions prohibiting Internet access, courts should consider the public safety and individual liberty interests in depth, taking into consideration the dangers sought to be avoided and the alternatives available to the offender. To do otherwise would permit sex offenders to escape accountability for their online behaviors that impact sexual offending. More importantly, it would threaten to undermine the efficacy of community supervision and unnecessarily risk public protection.

*Brian W. McKay\**

---

\* J.D. Candidate, May 2004, University of Tulsa College of Law. B.A., 1994, Baylor University; M.A., 1996, Sam Houston State University. Sincere appreciation is expressed to Professors Christen Blair and Lyn Entzeroth for their comments that have undoubtedly improved this article. Any omissions or errors are, of course, my own.

