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"You Fall Into Scylla in Seeking to Avoid Charybdis": The Second Circuit's Pragmatic Approach to Supervised Release for Sex Offenders

Frank E. Correll Jr.

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**“YOU FALL INTO SCYLLA IN SEEKING TO AVOID
CHARYBDIS”: THE SECOND CIRCUIT’S PRAGMATIC
APPROACH TO SUPERVISED RELEASE FOR SEX
OFFENDERS**

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INTRODUCTION

In the past decade, Americans' access to communications technology has grown significantly.¹ The number of U.S. homes with computers grew from about 36 percent in October of 1997 to over 61 percent in October of 2003.² A more recent report concludes that 68 percent of all Americans own a desktop computer, while 30 percent own a laptop.³ Meanwhile, U.S. households with Internet access grew from under 45 percent in 2000 to over 60 percent in early 2007.⁴ The use of high-speed and broadband connections similarly increased, growing from 5 percent in 2000 to over 45 percent in early 2007.⁵ The growth of Internet access has led to corresponding growth in Internet use: tens of millions of Americans now use the Internet for everything from communicating through e-mail and instant messaging⁶ to shopping and conducting bank transactions.⁷

Although the advent of the Internet has allowed for the many benefits of increased and eased communication, the Internet has also facilitated additional criminal activities.⁸ Aside from providing a new avenue for confidence men and snake oil peddlers,⁹ the

1. See generally U.S. DEP'T OF COMMERCE, A NATION ONLINE: ENTERING THE BROADBAND AGE (2004), <http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.pdf>.

2. *Id.* at 4-5.

3. JOHN B. HARRIGAN, PEW INTERNET & AMERICAN LIFE PROJECT, A TYPOLOGY OF INFORMATION AND COMMUNICATION TECHNOLOGY USERS 2 (May 7, 2007), http://www.pewinternet.org/pdfs/PIP_ICT_Typology.pdf.

4. *Id.* at 3.

5. *Id.* at 5.

6. U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2003, at 11-13 (Oct. 2005), <http://www.census.gov/prod/2005pubs/p23-208.pdf> (noting the growth of e-mail use among adults from 12 percent in 1997 to over 50 percent in 2003).

7. *Id.* at 13 (finding that over 17 percent of people used the Internet for banking purposes in 2003, whereas almost 5 percent of the U.S. population used the Internet to trade stocks).

8. For a general discussion of various aspects of sexual crimes and the Internet, see PAUL BOCIJ, CYBERSTALKING: HARASSMENT IN THE INTERNET AGE AND HOW TO PROTECT YOUR FAMILY (2004); DOT.CONS: CRIME, DEVIANCE, AND IDENTITY ON THE INTERNET (Yvonne Jewkes ed., 2003); Christa M. Book, Comment, *Do You Really Know Who Is on the Other Side of Your Computer Screen? Stopping Internet Crimes Against Children*, 14 ALB. L.J. SCI. & TECH. 749 (2004).

9. See, e.g., Andrew Leckey, *Fraud Dresses Up on Web, but It's Still Crime*, CHI. TRIB., Apr. 2, 2006, at C6 (discussing, among other web nuisances, Nigerian fraud scams that feature pleas for advance payment from the e-mail recipient in return for part of a vast

Internet has created new spawning grounds for prostitution,¹⁰ child exploitation, and child pornography.¹¹ The interplay of these two developments—the great benefits to society and the great benefits to criminals—has created a split among American courts over how to deal with access to the Internet for sexual offenders after their release from the correctional system.¹² In an effort to promote rehabilitation, federal law requires a sentence of supervised release following imprisonment for certain crimes.¹³ As part of that sentence, the courts may impose various conditions on offenders, some mandatory—such as a prohibition on the use of controlled substances—and others discretionary.¹⁴ The court may impose discretionary conditions as it sees fit, subject to certain restrictions.¹⁵ Peddlers and users of child pornography often receive such discretionary conditions that restrict their access to the Internet or to computers in general.¹⁶

This Note examines how the circuit courts of appeals have approached the issue of Internet restrictions for sexual offenders on supervised release, both the courts that have upheld them and the courts that have vacated them. This Note argues that the approach utilized by the Second Circuit most effectively addresses the primary goal of supervised release: rehabilitation of the offender. The Second Circuit Court of Appeals has taken the pragmatic middle ground in its approach to the question of restrictions on sexual offenders' use of computers and the Internet. This approach allows lower courts and probationary officers to harness technologi-

fortune). See generally Miriam R. Albert, *E-Buyer Beware: Why Online Auction Fraud Should Be Regulated*, 39 AM. BUS. L.J. 575 (2002).

10. See Keith Sharp & Sarah Earle, *Cyberpunters and Cyberwhores: Prostitution on the Internet*, in DOT.CONNS, *supra* note 8, at 36, 36-41.

11. See Yvonne Jewkes, *Policing the Net: Crime, Regulation and Surveillance in Cyberspace*, in DOT.CONNS, *supra* note 8, at 15, 21-22.

12. See, e.g., *United States v. Sullivan*, 451 F.3d 884, 896 (D.C. Cir. 2006) (discussing circuit split); see also *infra* Part IV.

13. 18 U.S.C. § 3583(d) (2006). For additional detail on the requirements of supervised release, see *infra* Part II.

14. 18 U.S.C. § 3583(d) (2006).

15. See Harold Baer, Jr., *The Alpha and Omega of Supervised Release*, 60 ALB. L. REV. 267, 270 (1996) (providing an excellent overview of the details of the supervised release statute).

16. See *infra* Part IV.

cal advances for effective and reasonable monitoring of sexual offenders' computer use. Like negotiating between the mythological perils Scylla and Charybdis,¹⁷ this type of monitoring avoids the opposing extremes: the Scylla of prohibiting computer and Internet use altogether—a truly draconian restriction given the significance of the computer in everyday life—and the Charybdis of not placing any restrictions on the use of the Internet or computers by sexual offenders. This Note argues that, by negotiating between these two extremes, the Second Circuit most effectively advances the purpose of supervised release as pronounced by Congress.

I. THE ROLE OF THE COMPUTER AND THE INTERNET IN MODERN LIFE

The ubiquity of computer and Internet access in America today has transformed the computer's role in Americans' lives. Once considered a luxury or even a device only practical for business use,¹⁸ the computer and the Internet now enjoy widespread use among all segments of society.¹⁹ The courts have recognized this phenomenon in their discussions of supervised release.²⁰ Although

17. Scylla and Charybdis were two terrors of Greek mythology, situated on opposing sides of a narrow strait near Sicily. Sailors had to navigate between the sheer rockface of Scylla and the whirlpool of Charybdis in order to safely make their journey. See EDITH HAMILTON, MYTHOLOGY 174, 310 (1942). While attempting to steer clear of one, sailors would run the risk of coming too close to the other. Jason and the Argonauts, as well as Odysseus, faced this danger during their travels in the Mediterranean. *Id.*; see also Jamie Darin Prenkert & Julie Manning Magid, *A Hobson's Choice Model for Religious Accommodation*, 43 AM. BUS. L.J. 467, 470 n.10 (2006).

18. As Ken Olsen, president of Digital Equipment Corporation, said in 1977: "There is no reason for any individual to have a computer in their home." RANDOM HOUSE WEBSTER'S QUOTATIONARY 134 (Leonard Roy Frank ed., 2001).

19. See, e.g., JOHN B. HERRIGAN, PEW INTERNET & AMERICAN LIFE PROJECT, HOME BROADBAND ADOPTION 2006, at 3 (2006), http://www.pewinternet.org/pdfs/PIP_Broadband_trends_2006.pdf (showing over one-third growth of home broadband connections to the Internet between 2005 and 2006); see also Bruce Lambert, *Suffolk County Plans To Offer Free Wireless Internet Access*, N.Y. TIMES, Apr. 28, 2006, at B1 (discussing city's plan to offer free wireless Internet access to its residents).

20. See, e.g., *United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005) (referring to the Internet as an "important medium of communication, commerce, and information-gathering"); *United States v. Zinn*, 321 F.3d 1084, 1093 (11th Cir. 2003) (stating that the Internet is "an important resource for information, communication, commerce, and other legitimate uses"); *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002) (commenting that the Internet and

these statements reveal a widespread belief in the growth of the Internet, the full extent of the Internet's impact is often difficult to discern without an examination of some of the available statistics and trends.

Recent surveys have indicated that Internet usage among American consumers has reached an all-time high, with over 70 percent of respondents reportedly using the Internet on a regular basis.²¹ Those who used the Internet stated that it improved their overall satisfaction with many daily activities, including shopping, pursuing hobbies or other recreation, job searching, and finding health information.²² Additionally, the more often and the longer individuals used the Internet, the greater the benefit they tended to perceive.²³

Perhaps the most striking way in which the Internet has affected American daily life is how both state and federal governments have embraced the technology and used it to share information and allow more efficient access to government services.²⁴ American citizens can now file and pay income taxes online,²⁵ research available federal job openings,²⁶ and review current legislation or the upcoming legislative calendar.²⁷ Federal courts have posted argument schedules, bench memoranda, and opinions online.²⁸ With these sources available today, an average American with an Internet

e-mail are "an increasingly wide[ly] used form of communication").

21. See MARY MADDEN, PEW INTERNET & AMERICAN LIFE PROJECT, DATA MEMO—INTERNET PENETRATION AND IMPACT 3 (Apr. 2006), http://www.pewinternet.org/pdfs/PIP_Internet_Impact.pdf [hereinafter MADDEN, INTERNET PENETRATION] (based on studies conducted in February through April, 2006).

22. *Id.* at 1-2.

23. *Id.* at 2.

24. See, e.g., Akira Tsuchiya, "The Politics of Information": Toward Effective eGovernment Implementation: Examining Characteristics of U.S. Internet Users, 10 GEO. PUB. POLY REV. 41 (2004) (providing an overview of government use of the Internet's capabilities).

25. See Internal Revenue Service, IRS e-file for Individual Taxpayers, <http://www.irs.gov/efile/article/0,,id=118508,00.html> (last visited Oct. 19, 2007).

26. See USAJOBS, <http://www.usajobs.gov> (last visited Oct. 19, 2007) (billing itself as the Federal Government's official "one-stop source for Federal jobs").

27. See THOMAS, <http://www.thomas.gov> (last visited Oct. 19, 2007) (U.S. government website maintained by the Library of Congress).

28. See, e.g., United States Court of Appeals for the Federal Circuit: Opinions, Decisions, & Orders, <http://www.fedcir.gov/dailylog.html> (last visited Oct. 19, 2007).

connection has access to more government information than at any point in the past.²⁹

As this brief discussion has shown, computers and the Internet play an integral role in the lives of most Americans today. The Internet supports communication, research, job-seeking, and access to government information; together, these activities form part of the social network a sexual offender must reenter.³⁰ Cutting released offenders off from access to that social network and its benefits would necessarily run against the basic reasoning behind supervised release enunciated by Congress—that of rehabilitation and successful reentry into society.³¹

II. THE GOALS AND RATIONALE OF SUPERVISED RELEASE

The use of supervised release as a penological tool began with the passage of the Sentencing Reform Act of 1984.³² Akin to probation in many respects, supervised release is nevertheless a different creature.³³ Unlike probation, which a court cannot give if it orders a term of imprisonment, supervised release “is a form of government supervision after a term of imprisonment.”³⁴ At the time of its passage, Congress viewed supervised release as “a separate part of the defendant’s sentence, rather than being the end of the term of imprisonment.”³⁵ The release period begins the day the offender leaves prison and lasts as long as the court deems necessary.³⁶ If an

29. See John C. Reitz, *E-Government*, 54 AM. J. COMP. L. 733, 733 (2006) (“With just a few mouseclicks, one can find a link to just about any unit of government at any level.”).

30. See, e.g., *Web Community Can Widen Social Network, Study Says*, CHI. TRIB., Jan. 28, 2006, at C4 (discussing how use of the Internet increases social contacts in addition to providing information).

31. S. REP. NO. 98-225, at 125 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3308.

32. See Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3673 (2006)); see also Baer, *supra* note 15.

33. See Baer, *supra* note 15, at 269-70.

34. *Id.* at 269.

35. See S. REP. NO. 98-225, at 123 (1983), *reprinted in* 1984 U.S.C.C.A.N. at 3306.

36. Baer, *supra* note 15, at 270. An officer from the U.S. Probation Office will supervise the offender to ensure that the offender abides by the conditions laid out by the sentencing court. 18 U.S.C. § 3583(f) (2006) (stating that “the probation officer [will] provide the defendant with a written statement that sets forth all the conditions ... of supervised release”).

offender violates the conditions of supervised release, the sentencing court, at its discretion, may return the offender to prison.³⁷

When determining the appropriate length of supervised release, the courts must look at many of the same factors as they would when giving a sentence of imprisonment.³⁸ For the mandatory conditions, the court must order domestic violence convicts to attend certain rehabilitative programs, and the law requires the court to order certain sex offenders to register pursuant to the Sex Offender Registration and Notification Act.³⁹ Offenders on supervised release must also abstain from use of controlled substances and undergo drug tests.⁴⁰

For the discretionary conditions, the statute allows the court to order conditions of supervised release to the extent that they: (1) are “reasonably related” to the sentencing provisions of 18 U.S.C. § 3553,⁴¹ (2) involve “no greater deprivation of liberty than is reasonably necessary” for purposes of § 3553,⁴² and (3) are consistent with the relevant policy statements of the Sentencing Commission.⁴³ The factors listed under § 3553 include the need for the restrictions to accommodate the character of the offense and of the offender, to deter future criminal conduct, to protect the public from any additional crimes by the defendant,⁴⁴ and to provide the defendant

37. § 3583(e).

38. § 3583(c) (citing several sections of § 3553(a)). Title 18 U.S.C. § 3583(d) lays out both mandatory and discretionary supervised release conditions.

39. § 3583(d) (referring to the Sex Offender Registration and Notification Act, Pub. L. No. 109-248, 120 Stat. 587 (2006)). The Sex Offender Registration and Notification Act requires that the offender provide, among other things: his name, address of residence, social security number, name and address of employment, and license plate number and vehicle description. *See* Sex Offender Registration and Notification Act § 114(a).

40. § 3583(d) (stating that such requirement may be waived by the court pursuant to § 3563).

41. § 3583(d)(1); *see* § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D).

42. § 3583(d)(2).

43. § 3583(d)(3).

44. Contrary to the popular view, however, the criminal justice and social science literature appears mixed on whether any recidivism disparity exists between sexual offenders and other types of criminals. As one researcher said about the controversy, “heat too often prevails over light.” TERENCE W. CAMPBELL, *ASSESSING SEX OFFENDERS: PROBLEMS AND PITFALLS* 4 (2004). Studies of recidivism rates often produce contradictory results. *See, e.g.,* Lisa Munoz, *California School Under Fire over Volunteer’s Sex Record*, N.Y. TIMES, Feb. 5, 2007, at A15 (quoting proponents on both sides of the debate). For the pro-disparity view, *see*,

with needed training or medical and correctional treatment.⁴⁵ The text of § 3583 also implies that any discretionary conditions imposed by the sentencing judge should meet both the needs of the offender—represented by the provisions of § 3553(a)(2)(D) and the instructions of § 3583 requiring conditions “reasonably related” to the minimization of any deprivation of the offender’s liberty—and the interests of the government.⁴⁶

The principal goal of supervised release appears in the legislative history of the Sentencing Reform Act. In a 1983 Senate Judiciary Committee Report, the Committee noted that:

The sentencing purposes of incapacitation and punishment would not be served by a term of supervised release ...; the primary goal of such a term is to ease the defendant’s transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison ... but still needs supervision and training programs after release.⁴⁷

The courts have applied these goals in an effort to ensure that the conditions of supervised release have a meaningful bearing on the crime committed and that the conditions serve to help the offender reenter society. The circuit courts of appeals have also allowed restrictions on the use of alcohol or other intoxicants,⁴⁸ driving,⁴⁹

for example, *Doe v. Poritz*, 662 A.2d 367, 374 n.1 (N.J. 1995) (noting higher relative recidivism rates for sex offenders); Daniel L. Feldman, *The “Scarlet Letter Laws” of the 1990s: A Response to Critics*, 60 ALB. L. REV. 1081, 1105 n.131 (1997) (citing a California study finding recidivism rates for sexual offenders six times higher than that of other criminals). For the anti-disparity view, see David P. Bryden & Roger C. Park, *Other Crimes Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 572-73 (1994) (stating that “no study has demonstrated that sex offenders have a consistently higher or lower recidivism rate than other major offenders”); Carol L. Kunz, Comment, *Toward Effective Control of Sexual Offenders*, 47 AM. U. L. REV. 453, 473-75 (1997) (discussing reasons for belief in greater recidivism for sexual offenders).

45. § 3553(a)(2)(B)-(a)(2)(D).

46. § 3583(d)(3) (citing § 3553(a)(2)(B) and (a)(2)(C)).

47. S. REP. NO. 98-225, at 125 (1983), reprinted in 1984 U.S.C.A.N. 3182, 3307.

48. See, e.g., *United States v. Brown*, 235 F.3d 2, 5-7 (1st Cir. 2000) (upholding a restriction preventing alcohol consumption because the record reflected a relationship between the defendant’s acts and his alcohol use).

49. See, e.g., *United States v. Kingsley*, 241 F.3d 828, 837-38 (6th Cir. 2001) (stating that the driving restriction was related to the defendant’s prior history of violence and dangerous

and the incurrance of debt.⁵⁰ Although broad, the above factors “do impose a real restriction on the district court’s freedom to impose conditions on supervised release.”⁵¹ At other times, the appeals courts have found conditions of supervised release too broad or unsupported, overruling conditions restricting possession of any (legal or illegal) pornography,⁵² linking supervised release to deportation,⁵³ and lacking proper factual findings.⁵⁴ Over the past several years, the federal circuit courts have taken different approaches to the question of supervised release and the sexual offender,⁵⁵ especially concerning the issue of the offender’s access to the Internet and other computer technology.

III. THE INTERNET AND THE SEX OFFENDER

The Internet allows users to create new identities and engage in new and different modes of expression and presentation.⁵⁶ Criminals on the Internet use this anonymity to commit a wide variety of crimes, from the mundane and relatively harmless⁵⁷ to the

alcohol use).

50. See, e.g., *United States v. Ervasti*, 201 F.3d 1029, 1046 (8th Cir. 2000) (upholding debt restriction when linked to defendant’s obligation to pay over \$5.7 million in restitution).

51. *United States v. Pruden*, 398 F.3d 241, 248 (3d Cir. 2005) (finding no reasonable relation between requirement of mental health treatment and defendant who illegally purchased a weapon).

52. See, e.g., *United States v. Loy*, 237 F.3d 251, 265-66 (3d Cir. 2001) (holding the condition to be unconstitutionally vague and potentially infringing on First Amendment rights).

53. See, e.g., *United States v. Sanchez*, 923 F.2d 236, 237 (1st Cir. 1991) (disallowing condition of release that would result in deportation without hearing).

54. See, e.g., *United States v. Zanghi*, 209 F.3d 1201, 1205 (10th Cir. 2000) (rejecting condition of home confinement because the district court failed to explain its reasoning).

55. See *infra* Part IV.

56. See Yvonne Jewkes & Keith Sharp, *Crime Deviance and the Disembodied Self: Transcending the Dangers of Corporeality*, in DOT.CON.S, *supra* note 8, at 1-4. See generally Jay Krasovec, Comment, *Cyberspace: The Final Frontier, for Regulation?*, 31 AKRON L. REV. 101 (1997) (discussing methods by which users may remain anonymous on the Internet).

57. The Internet remains a bastion of intellectual property infringement, especially in the areas of music and video entertainment. See, e.g., James M. Sellers, Comment, *The Black Market and Intellectual Property: A Potential Sherman Act Section Two Antitrust Defense?*, 14 ALB. L.J. SCI. & TECH. 583 (2004).

exploitive and dangerous.⁵⁸ The ease of communication—through e-mail, discussion boards, or chatrooms—allows those engaging in potentially criminal or deviant behavior to meet others with the same interests.⁵⁹ These new identities aid the goals of the sexual offender and hinder the investigative tools of police: anonymous figures on the Internet and in cyberspace are difficult to track down and attach to a physical person at a physical address.⁶⁰ Distributors of child pornography and other illegal material can mask their identities from each other and from law enforcement with the use of passwords and encrypted data.⁶¹ The dangers of the Internet's anonymity, however, often go beyond the mere transmittal of harmful images and into the area of physical abuse and exploitation.⁶²

Child sexual abuse allegations are prevalent on our televisions and in our newspapers.⁶³ The plotline of each story follows the same

58. The Internet has assisted in the various sexual offenses discussed in this Note, as well as in potentially more dangerous terrorist activity. See, e.g., Seth R. Merl, Note, *Internet Communication Standards for the 21st Century: International Terrorism Must Force the U.S. To Adopt "Carnivore" and New Electronic Surveillance Standards*, 27 BROOK. J. INT'L L. 245 (2001).

59. See BOCIJ, *supra* note 8, at 105 (discussing Bocij's research on how the Internet has allowed pedophiles to work together online, "encourag[ing] each other and shar[ing] resources"); see also *United States v. Paul*, 274 F.3d 155, 169 (5th Cir. 2001) (noting that the defendant conversed with and encouraged other sexual offenders on the Internet prior to committing his crimes).

60. See Meiring de Villiers, *Free Radicals in Cyberspace: Complex Liability Issues in Information Warfare*, 4 NW. J. TECH. & INTELL. PROP. 13, 39 (2005) (noting that the degree of anonymity on the Internet "embolden[s] cybercriminals to commit crimes they would otherwise not consider").

61. See Kelly M. Doherty, Comment, *www.obscenity.com: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 AKRON L. REV. 259, 263-64 (1999). For a recent article discussing the breadth of child pornography on the Internet and the efforts by law enforcement to stop it, see Candace Rondeaux, *Va. Officer Key in Hunt for Nation's Pedophiles*, WASH. POST, Oct. 1, 2006, at C1.

62. See Robyn Forman Pollack, Comment, *Creating the Standards of a Global Community: Regulating Pornography on the Internet—An International Concern*, 10 TEMP. INT'L & COMP. L.J. 467, 478-80 (1996) (discussing several cases in which sex offenders used the Internet to select their rape or kidnap victims).

63. *Id.* (describing several cases that follow this pattern); see also Charles Babington & Dan Balz, *Foley Lawyer Cites Alcohol, Childhood Abuse; Attorney Says Lawmaker Never Tried To Have Sex with a Minor*, WASH. POST, Oct. 4, 2006, at A1 (discussing recent scandal involving former Rep. Mark Foley of Florida, who engaged in sexually explicit instant message conversations with congressional pages).

path: a child or young teenager participates in an online chat room, discussion board, or e-mail conversation wherein he or she makes virtual acquaintance with an offender who has assumed the identity of a similarly aged child. The child and offender develop their "friendship" and eventually the two arrange a face-to-face meeting. At this meeting, the offender rapes or molests the child. In each of these cases, the computer provides the initial and essential connection between the child victim and the offender.⁶⁴

One implication of these incidents is that such crimes would most likely not have happened had the offender not used his computer to initiate the exchange with the child victim.⁶⁵ Because sexual offenders can find their victims anonymously and with minimal fear of capture while operating on the Internet,⁶⁶ computer access itself allows sexual offenders to expand their potential victim pool. When attempting to navigate through these problems presented by sexual offenders, sentencing courts have used the supervised release statute⁶⁷ to craft release conditions that both satisfy its rehabilitative goals and ideally prevent future wrongdoing by the now-released offender.

Sentencing courts have frequently constructed conditions that prevent or minimize the released offender's access to the Internet.⁶⁸ The circuit courts of appeals have taken different approaches to the question of whether computer and Internet restrictions are permissible under § 3583. The appellate courts' approaches tend to differ regarding the level of access sexual offenders may have upon release, varying from those that deem restrictions overly broad and strike them down, to the courts that prohibit any Internet or computer access. This Note will argue that the more measured approach of the Second Circuit is the most effective.

64. See Pollack, *supra* note 62, at 478-80.

65. See, e.g., *United States v. Paul*, 274 F.3d 155, 169 (5th Cir. 2001) (describing how defendant used the Internet to find other sex offenders and encourage their exploitation of children).

66. See Doherty, *supra* note 61, at 263-64.

67. 18 U.S.C. § 3583(d) (2006).

68. See *infra* Part IV.

IV. THE CIRCUIT SPLIT

A. Supervised Release Conditions Vacated

Appellate courts have reversed supervised release conditions that restrict Internet access in multiple jurisdictions. In 2002, the Second Circuit vacated a supervised release restriction that banned Internet and computer access completely.⁶⁹ One year later, the Third Circuit vacated a comparable restriction on similar grounds.⁷⁰ Likewise, in 2001, the Tenth Circuit found such broad prohibitions on computer and Internet use impermissible.⁷¹ As this Note shows, these courts have charted a path leading them close to Charybdis and the dangers of completely unregulated access to computers and the Internet for released sexual offenders.

1. Second Circuit (Take One): No Total Ban

The Second Circuit vacated the supervised release terms of Gregory Sofsky in March 2002.⁷² Sofsky pled guilty to receiving child pornography in violation of federal law;⁷³ Sofsky had collected over one thousand images of child pornography on his computer and had also used the Internet to transmit those images to other individuals.⁷⁴ The district court sentenced Sofsky to 121 months in prison accompanied by three years of supervised release.⁷⁵ Under his supervised release terms, Sofsky could not use a computer or the Internet without prior approval from his probation officer.⁷⁶

On appeal, the Second Circuit viewed the restriction in light of § 3583(d)⁷⁷ and found that it “inflict[ed] a greater deprivation on Sofsky’s liberty than is reasonably necessary.”⁷⁸ The court likened

69. *United States v. Sofsky*, 287 F.3d 122, 127 (2d Cir. 2002).

70. *United States v. Freeman*, 316 F.3d 386, 391-92 (3d Cir. 2003).

71. *United States v. White*, 244 F.3d 1199, 1207-08 (10th Cir. 2001).

72. *Sofsky*, 287 F.3d at 127.

73. See 18 U.S.C. § 2252A(a)(2)(A) (2006).

74. *Sofsky*, 287 F.3d at 124.

75. *Id.*

76. *Id.*

77. See *supra* Part II.

78. *Sofsky*, 287 F.3d at 126.

use of the Internet to use of the telephone: both have benign uses, and using either one to commit a crime does not necessitate a complete prohibition on their future use.⁷⁹ The court held that because of the importance of Internet access in today's wired society, imposing such a "total ban" would fruitlessly deprive Sofsky of the many legal uses of the Internet.⁸⁰

2. Third Circuit: Restrictions Must Be Focused

In January 2003, the Third Circuit vacated the district court's sentencing order in the case of *United States v. Freeman*.⁸¹ Government officials arrested Freeman after he accepted images of child pornography from an undercover agent.⁸² At his sentencing hearing,⁸³ the district court sentenced Freeman to seventy months in prison and five years of supervised release.⁸⁴ As in *Sofsky*, the conditions of Freeman's supervised release prohibited him from owning or accessing a computer with Internet capability without the prior approval of his probation officer.⁸⁵

The appellate panel found this restriction to constitute "a greater deprivation of liberty than is reasonably necessary to deter future criminal conduct and to protect the public."⁸⁶ The court also cited *Sofsky*⁸⁷ to support its holding and relied upon very similar reading: a total Internet ban would prevent access to harmless materials from weather reports to simple e-mail.⁸⁸ Instead, the court determined that it could use "a more focused restriction," through other

79. *Id.* (citing *United States v. Peterson*, 248 F.3d 79, 82-84 (2d Cir. 2001)).

80. *Id.*

81. 316 F.3d 386, 391-92 (3d Cir. 2003).

82. *Id.* at 387-88 (noting that Freeman was charged under 18 U.S.C. § 2252(a)(2) and § 2252(a)(4)(B)).

83. This was his resentencing; the Third Circuit rejected Freeman's initial sentencing order as being inconsistent with federal sentencing guidelines in place at the time. *See id.* at 389-90.

84. *Id.* at 389.

85. *Id.* at 389-90.

86. *Id.* at 392.

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

88. *See Freeman*, 316 F.3d at 391-92.

means, such as surprise inspections of Freeman's computer devices.⁸⁹

3. Tenth Circuit: Limited Monitoring Only

In *United States v. White*,⁹⁰ the Tenth Circuit found that sweeping bans on computer use were "neither reasoned nor reasonable."⁹¹ Robert White responded to an online advertisement for video tapes of young girls engaged in sexual activities with adult men.⁹² The advertisement was part of a sting operation run by U.S. Customs officers who subsequently arrested White after he took possession of the incriminating tapes.⁹³ White pled guilty to receiving child pornography and received a prison term of two years followed by three years of probation.⁹⁴ White's probation conditions stated that he could not possess any sexually explicit material or a computer with Internet access.⁹⁵

On appeal, the Tenth Circuit held that such a term of White's release was both "potentially too narrow and overly broad."⁹⁶ White could easily circumvent the restriction by using an Internet-capable computer at a library or a cybercafé, and, thus, the restriction was too narrow.⁹⁷ Alternatively, an interpretation that did not allow for White to use any computer device at all was overly broad. Like the *Sofsky* court, the Tenth Circuit likened the Internet and the communication it allowed to a telephone—no simple way existed to prevent people from using it.⁹⁸ The court ultimately ruled that any restriction on computer or Internet use by a defendant must allow for some sort of monitoring by a probation officer.⁹⁹

89. *Id.* at 392.

90. 244 F.3d 1199 (10th Cir. 2001).

91. *Id.* at 1207.

92. *Id.* at 1201.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 1206.

97. *Id.*

98. *Id.* at 1207.

99. *Id.*

These circuits have indicated a dislike for sweeping restrictions on released offenders' access to computers and the Internet. As the courts in *Sofsky* and *Freeman* noted, such broad restraints prohibit access to even the most harmless information, such as weather reports or stock quotes.¹⁰⁰ These courts vacated the restrictions for their lack of tailoring to the released offender, such as the "more limited restriction" desired by the Third Circuit.¹⁰¹ Not all of the circuits, however, have such a dislike for broad restrictions.

B. Internet and Computer Restrictions Permitted by Courts

Although several circuits have disapproved of computer restrictions for offenders on supervised release, others, including the Fifth, Ninth, and Eleventh Circuits, have taken the opposite approach. In 2001, the Fifth Circuit upheld a supervised release restriction that prohibited the offender from possessing or using computers because the restriction was necessary to serve the goals of the release program.¹⁰² The Ninth Circuit similarly found that restrictions on a released offender met the release program's statutory goals.¹⁰³ In 2003, the Eleventh Circuit affirmed the lower court's ban on computer and Internet access as being consistent with the requirements of the release statute.¹⁰⁴ In seeking to avoid the hazards of uncontrolled access of released offenders to the Internet, these courts steer too far from the threat of Charybdis and run the risk of colliding with Scylla instead.

1. Fifth Circuit: Internet Bans Meet Statutory Goals

In *United States v. Paul*,¹⁰⁵ the Fifth Circuit upheld a supervised release condition that prohibited the defendant from possessing or accessing computers, the Internet, and various devices capable of

100. Indeed, Yahoo's website contains weather reports, stock quotes, and free e-mail. See Yahoo!, <http://www.yahoo.com> (last visited Oct. 19, 2007).

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

102. *United States v. Paul*, 274 F.3d 155, 169-70 (5th Cir. 2001).

103. *United States v. Rearden*, 349 F.3d 608, 620-21 (9th Cir. 2003).

104. *United States v. Zinn*, 321 F.3d 1084, 1093-94 (11th Cir. 2003).

105. 274 F.3d 155 (5th Cir. 2001).

creating photographic or visual images.¹⁰⁶ Paul had pled guilty to charges of possessing child pornography, which he had downloaded from the Internet.¹⁰⁷ He received a sentence of five years imprisonment and three years of supervised release.¹⁰⁸

Upon later review by the appellate panel, the court focused on the nature of the defendant's crime and how his Internet use facilitated his criminal activities.¹⁰⁹ The court specifically cited to Paul's use of the Internet to "encourage exploitation of children by seeking out fellow [pedophiles] and providing them with advice" on how to find potential child victims.¹¹⁰ Based on these actions, the Fifth Circuit upheld the condition of release, citing its dual purpose of both furthering public safety and preventing more criminal activity in the future.¹¹¹ Additionally, the *Paul* court held that complete Internet bans are not "per se an unacceptable condition of supervised release ... [and] that such a supervised release condition can be acceptable if it is reasonably necessary to serve the statutory goals outlined in 18 U.S.C. § 3583(d)."¹¹²

2. Ninth Circuit: Limitations Do Not Deprive Liberty

In *United States v. Rearden*,¹¹³ the defendant appealed the terms of his supervised release prohibiting him from using a computer with Internet access at any location without his probation officer's approval.¹¹⁴ A bench trial convicted Rearden of shipping child pornography across state lines and sentenced him to fifty-one months in prison with a period of supervised release to follow.¹¹⁵ When examining this specific provision of his release, the Ninth Circuit looked at other circuits' decisions in similar cases¹¹⁶ and held

106. *Id.* at 160.

107. *Id.* at 158.

108. *Id.* at 159.

109. *Id.* at 169.

110. *Id.*

111. *Id.* at 169.

112. *Id.* at 169-70.

113. 349 F.3d 608 (9th Cir. 2003).

114. *Id.* at 620.

115. *Id.* at 612.

116. *Id.* at 620-21.

that limiting access to the Internet met the statutory requirements of § 3583 without creating the dangers of unnecessarily depriving the defendant of his liberty.¹¹⁷ Similar to *Paul*, the Ninth Circuit took no issue with limiting released offenders' access to the Internet.

3. Eleventh Circuit: Computer Use Prohibited

As a result of a government sting operation, Karl Zinn pled guilty to possessing materials that contained child pornography images.¹¹⁸ The district court sentenced Zinn to thirty-three months in prison and three years of supervised release.¹¹⁹ One condition of his release was that Zinn could not own or use a computer with Internet access unless he had prior approval from his probation officer.¹²⁰ The Eleventh Circuit's review of this condition was one of first impression.¹²¹

When evaluating this question, the Eleventh Circuit focused on the "strong link between child pornography and the Internet."¹²² Although recognizing the importance of the Internet in today's society, the court found the benefits of the restriction to both the public and Zinn met the statutory requirements of § 3583.¹²³ While noting the contrary rulings of the *Sofsky* and *Freeman* courts, the Eleventh Circuit stated that Internet restrictions such as those required for Zinn represent "a necessary and reasonable condition of supervised release."¹²⁴ Like the Fifth and Ninth Circuits, the Eleventh Circuit held that restrictions on computer access and Internet use—even stringent ones—fit within the statutory framework of the supervised release program.

117. *Id.*

118. *United States v. Zinn*, 321 F.3d 1084, 1086 (11th Cir. 2003) (noting that Zinn was charged with violating 18 U.S.C. § 2252A(a)(5)(B)).

119. *Id.*

120. *Id.* at 1087.

121. *Id.* at 1092.

122. *Id.* at 1092-93 (citing *United States v. Paul*, 274 F.3d 155, 169 (5th Cir. 2001)).

123. *Id.* at 1093-94 (noting that the Internet is an "important resource for information, communication, commerce, and other legitimate uses ... [but that] the need exists to protect both the public and sex offenders themselves").

124. *Id.* at 1093.

In contrast to the approach taken by the Second Circuit in *Sofsky* and by the Third and Tenth Circuits, the *Paul*, *Rearden*, and *Zinn* courts took the view that broad Internet and computer restrictions are permissible for released sexual offenders. In weighing the statutory factors, these courts in effect determined that the safety needs of the public surpass the need of the released offender to transition back into a normal life within the community and begin reintegration into society. While recognizing these different views of treating sexual offenders, the approach taken by the Second Circuit aims to allow the released offender to participate in society and enjoy the benefits of the Internet and at the same time make sure that his actions do not endanger the public.

C. The Second Circuit Approach: Using Technology To Avoid Scylla and Charybdis

The Second Circuit has recently taken a more measured approach to the question of Internet restrictions on sexual offenders by examining the role of technological solutions to the problem. In cases such as *United States v. Lifshitz*¹²⁵ and *United States v. Balon*,¹²⁶ the court focused explicitly on the technology available and how it might serve to best help the offender reenter society. This approach recognizes that courts can use technology to allow offenders on supervised release to use the Internet while still remaining under some correctional supervision. Such an approach best encapsulates the goals of the supervised release program—more so than the approaches taken by the other circuits.

1. United States v. Lifshitz: Analyzing Technological Solutions

Government agents arrested Brandon Lifshitz after investigating his home computer and finding pornographic images of children.¹²⁷

125. 369 F.3d 173 (2d Cir. 2004). The Second Circuit also hinted at this approach in its analysis of supervised release in *United States v. Sofsky*, 287 F.3d 122, 126-27 (2d Cir. 2002) (discussing the possibility of performing unannounced searches on Sofsky's computer or an online sting operation to entice Sofsky to respond to an ad for pornography).

126. 384 F.3d 38 (2d Cir. 2004).

127. *Lifshitz*, 369 F.3d at 175.

Lifshitz pled guilty to one count of receiving such illegal images.¹²⁸ At sentencing, Lifshitz requested a noncustodial sentence from the court because of his diagnoses from several doctors that he suffered from a variety of mental illnesses, including depression, obsessive-compulsive disorder, and schizoid personality disorder.¹²⁹ Upon review of this material, the court released Lifshitz to his grandmother's care and sentenced him to three years of supervised release.¹³⁰ During this time, the court ordered that Lifshitz "shall consent to the installation of systems that will enable the Probation office ... to monitor and filter computer use on a regular or random basis and any computer owned or controlled by [Lifshitz]."¹³¹

In its analysis of this restriction,¹³² the Second Circuit addressed three main issues in the context of monitoring Lifshitz's computer use: 1) the government's interest in the particular probation restriction; 2) the expectation of privacy of the offender; and 3) the "scope and efficacy" of the condition.¹³³ The court's analysis of these factors closely parallels the analysis required under § 3583(d)¹³⁴ for determining the validity of the conditions of supervised release.

As mentioned by Congress in the legislative history of the supervised release program,¹³⁵ the government's main interest lies in the area of rehabilitation.¹³⁶ In Lifshitz's case, the court held that limitations and monitoring of Lifshitz's computer use would enhance the rehabilitative goals of the state.¹³⁷ The Second Circuit

128. *Id.* at 176. Prosecutors charged Lifshitz under 18 U.S.C. § 2252A(a)(2)(A). *Id.* at 175.

129. *Id.* at 176.

130. *Id.* at 176-77.

131. *Id.* at 177.

132. The court in *Lifshitz* spent some time discussing the nature of probationary restrictions and how they fit into the "special needs" exception to the Fourth Amendment's prohibition on searches without warrants or probable cause. *See id.* at 178-88. This area is not a focus of this Note, and, therefore, it is mentioned only as required for a full analysis of the issue discussed here.

133. *Id.* at 190.

134. *See supra* Part II.

135. *See supra* note 47 and accompanying text.

136. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987) ("These restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large.").

137. *Lifshitz*, 369 F.3d at 189-90. At sentencing, U.S. District Judge Patterson stated that he did not feel that imprisonment would further Lifshitz's mental disorder treatment. *Id.* at 177.

also implicitly considered the welfare of the public as part of these goals.

As for the issue of Lifshitz's expectation of privacy, the Second Circuit recognized that any monitoring regime would endanger and restrict that privacy.¹³⁸ Intrusions into one's home are generally looked upon with disfavor, but the court accorded less privacy to the communications Lifshitz made electronically with the outside world.¹³⁹ The court summarized its analysis by noting that, "While the extent to which a probationer's privacy interests are implicated depends on the type of monitoring implemented ... they are, in any event, reduced by the very fact that he remains subject to federal probation."¹⁴⁰

The court then addressed the third and final factor in its analysis: the "[s]cope and [e]fficacy of the [supervised release] [c]ondition."¹⁴¹ The court held that any monitoring program must be "narrowly tailored, and not sweep so broadly as to draw a wide swath of extraneous material into its net."¹⁴² Comparing computer monitoring to prior cases on drug testing, the court emphasized the importance of a monitoring regime's exact targeting and the necessity of disregarding collected information that falls outside of that exacting range.¹⁴³ With this standard, the court then proceeded to survey various types of computer monitoring software and equipment available at the time.¹⁴⁴ The willingness to examine what software was available indicates the Second Circuit's move from an anti-Internet restriction stance in *Sofsky*¹⁴⁵ to a willingness to embrace technological solutions to the problems facing both the government and the offenders. This embrace of technology most

138. *Id.* at 190.

139. *Id.* (citing examples of courts holding that individuals have a reasonable expectation of privacy in their home computers; also citing *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (holding that Internet users would have a diminished expectation of privacy in their electronic communications)).

140. *Id.* (citing *United States v. Reyes*, 283 F.3d 446, 457 (2d Cir. 2002)).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 190-93.

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

effectively allows the supervised release program to meet its rehabilitative goals.

2. *United States v. Balon: Efficiency of Technological Solution Is Vital*

In *Balon*,¹⁴⁶ the Second Circuit again decided a case questioning the use of computer monitoring as a condition of a sexual offender's supervised release. Unlike *Lifshitz*, however, the *Balon* court explicitly reviewed the statutory factors laid out in § 3553 and § 3583(d) when examining Stephen Balon's sentencing restrictions.¹⁴⁷ Balon's conditions of release included providing advance notice to the probation office of his use of computers or computer services, as well as allowing the government to install software applications on and randomly monitor his computer.¹⁴⁸ Balon received this sentence after pleading guilty to one count of transmitting child pornography by means of a computer in violation of 18 U.S.C. § 2252A(a)(1).¹⁴⁹

On review, the Second Circuit focused the bulk of its analysis on the remote monitoring condition and its implications for Balon's expectation of privacy.¹⁵⁰ Following *Lifshitz*, the *Balon* court held that offenders on supervised release must endure a "diminished expectation of privacy that is inherent in the very term 'supervised release.'"¹⁵¹ Given that the government may employ such techniques to monitor Balon without harming his—very limited—expectation of privacy, the court turned its attention to the efficacy of the monitoring program as a way of measuring the deprivation of liberty that such a condition would entail.¹⁵² Following the lead of the *Lifshitz* court, the *Balon* court held that such an analysis "is governed by technological considerations."¹⁵³ With those considerations in mind, the Second Circuit dismissed Balon's appeal on the issue of remote monitoring for lack of ripeness and ordered that the

146. *United States v. Balon*, 384 F.3d 38 (2d Cir. 2004).

147. *Id.* at 42.

148. *Id.*

149. *Id.* at 41.

150. *Id.* at 43-46.

151. *Id.* at 44 (quoting *United States v. Reyes*, 283 F.3d 446, 457 (2d Cir. 2002)).

152. *Id.* at 45.

153. *Id.* at 46.

district court review the conditions of supervised release at a time closer to Balon's entry into the supervised release program.¹⁵⁴ Thus, after following the general approach of *Lifshitz*, the *Balon* court took the further step of requiring examination of the effectiveness and precision of technological solutions, recognizing that even the potential advantages of such programs must be weighed against any likely downsides.

D. The Middle Ground of the Second Circuit

As this review of cases examining the question of supervised release for sexual offenders indicates, the opinions of the Second Circuit in both *Lifshitz* and *Balon* represent a middle ground between the all-or-nothing extremes espoused by other circuits.¹⁵⁵ The earlier Second Circuit decision of *Sofsky*, as well as the decisions from the Third and Tenth Circuits, exhibit a tendency towards permissive supervised release with little if any limitation on Internet and computer usage.¹⁵⁶ The Fifth, Ninth, and Eleventh Circuits, conversely, permit much more restrictive conditions that control released sexual offenders' access to the Internet and computers.¹⁵⁷

Lifshitz and *Balon* indicate a movement towards a compromise between the extremes of little restriction on released sexual offenders' computer usage and total restriction. This middle ground allows released sexual offenders to access the computer and use the Internet, but with the safeguard of monitoring such usage using the technological tools currently available.¹⁵⁸ The Second Circuit's middle ground approach offers a pragmatic solution to supervised release that most efficiently meets the program's goals and purposes.

154. *Id.* at 47.

155. In fact, consider the Second Circuit itself in *Sofsky*. See *supra* Part IV.A.1.

156. See *supra* Part IV.A.

157. See *supra* Part IV.B.

158. See *United States v. Lifshitz*, 369 F.3d 173, 190-93 (2d Cir. 2004); *Balon*, 384 F.3d at 45.

V. THE PRAGMATISM OF THE SECOND CIRCUIT

Although briefly discussed in decisions from other courts,¹⁵⁹ the Second Circuit has taken the lead in examining technology's impact on the future of Internet and computer restrictions. By embracing the power of computer filtering and monitoring technology, the Second Circuit has laid the groundwork for restrictions that sail between the Scylla of absolute prohibitions and Charybdis of unfettered access by sexual offenders. This approach better serves the primary goal of supervised release as discussed in the Sentencing Reform Act's legislative history: the rehabilitation of the released offender.¹⁶⁰

As the Sentencing Reform Act's legislative history indicates, Congress viewed offender rehabilitation as the primary goal of supervised release.¹⁶¹ Supervised release would not act as a form of "punishment or incapacitation since those purposes will have been served ... by the term of imprisonment."¹⁶² Indeed, as commentators have noted, the ultimate purpose of supervised release is its eventual end and the offender's return to society without any governmental supervision or controls whatsoever.¹⁶³ The goals and objectives of supervised release imply that the value of a release program as a rehabilitative tool mirrors the extent to which the conditions of supervised release simulate life after the program's end. Following such reasoning, unduly harsh conditions would not facilitate an offender's transition back into the everyday life of the community, but would more likely serve as a continuation of prison, or perhaps prison-lite. Because of the importance of the computer and the Internet in daily life in the United States, as explained

159. See, e.g., *United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005) (stating that "[the court is] confident that the district court can impose a more narrowly-tailored restriction ... on computer use through a prohibition on accessing certain categories of websites and Internet content").

160. See *supra* Part II (discussing the primary goal of the Sentencing Reform Act and supervised release).

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

162. See *id.* at 125, *reprinted in* 1984 U.S.C.C.A.N. at 3308.

163. See Edward R. Becker, *Guideline Amendments*, 2 FED. SENTENCING REP. 238, 241 (1990).

below, extensive prohibitions on the use of either represents a significant barrier to a full reentry into society.¹⁶⁴ Compared to the all-or-nothing approaches taken by other courts,¹⁶⁵ the Second Circuit's pragmatic approach allows the sexual offender on supervised release to participate in an ever-growing and ever-prevalent aspect of American life.

The wide variety of ways in which Americans today use the Internet demonstrates how integral it is to everyday life. The decision to uphold severe supervised release restrictions on Internet usage by sexual offenders in cases such as *United States v. Paul*,¹⁶⁶ however, prohibits those offenders from participating in this ever-more important aspect of American society. This outcome directly contradicts the primary goal of supervised release—rehabilitation.¹⁶⁷ As commentators have noted, knowledge and use of computer skills is of great importance for those attempting to reenter society after a term of imprisonment.¹⁶⁸ This argument is a logical extension of the reasoning behind the many prison industry programs in place today: “meaningful, realistic prison industry programs can equip ... prisoners with productive works habits and skills.”¹⁶⁹ Not unlike the prisoners participating in prison work programs, sex offenders on supervised release, while still under the watch of probation officers and the courts, are attempting to fit into society as law-abiding citizens. Having access to the Internet and being able to participate in the many benefits it provides—from looking for jobs to being able

164. Internet restrictions appear to arise from the public's concern over the allegedly higher recidivism rates of sexual offenders. See, e.g., *The Toxic Offender*, N.Y. TIMES, Mar. 4, 2007, at LI14 (noting “the widespread public perception that sex offenders pose a unique threat that deserves special attention from law enforcement”). It is unclear, however, if such a higher recidivism rate exists. See *supra* note 44.

165. See *supra* Parts IV.A-B (discussing *United States v. White*, 244 F.3d 1199 (10th Cir. 2001) (vacating restrictions on Internet use) and *United States v. Paul*, 274 F.3d 155 (5th Cir. 2001) (upholding ban on Internet and computer use)).

166. 274 F.3d 155.

167. See *supra* Part II.

168. See Karen J. Hartman, *Prison Walls and Firewalls: H.B. 2376—Arizona Denies Inmates Access to the Internet*, 32 ARIZ. ST. L.J. 1423, 1434-35 (2000) (discussing how Internet access would help prepare prison inmates for the transition back into the community).

169. Sharon Goodman, Note, *Prisoners and Entrepreneurs: Developing a Model for Prisoner-Run Industry*, 62 B.U. L. REV. 1163, 1164 (1982) (also noting that successful prison work programs minimize prisoner recidivism).

to research and educate themselves online¹⁷⁰—allows offenders on supervised release to be involved in the world around them. The Second Circuit's approach to supervised release takes these benefits into account.

As discussed above, instead of prohibiting Internet use altogether, the Second Circuit considers the technology available and how it will impact the sexual offender's ability to access non-prohibited information compared to restricted material.¹⁷¹ In *Lifshitz*, the court even took the time to review the available technology to determine how the available monitoring programs worked and what effect those programs would have on the offender.¹⁷² Ultimately, the *Lifshitz* court held that the district court should review the available monitoring programs' privacy and efficacy implications and fashion a supervised release condition consistent with the Second Circuit's view that "the monitoring condition must be narrowly-tailored, and not sweep so broadly as to draw a wide swath of extraneous material into its net."¹⁷³

Software programs available today may meet this requirement.¹⁷⁴ Potential software programs are divided into two categories: filtering and monitoring.¹⁷⁵ Filtering technology allows the probation officer to limit the material the offender sees on the Internet or receives through e-mail, whereas monitoring technology allows a probation officer to track the offender's Internet usage.¹⁷⁶ In the case of sexual offenders, the filtering software could disable access to certain sites that may be linked to child pornography or meet criteria indicative of a site related to such illegal activities.¹⁷⁷ The monitoring programs can record all of a user's activities while on the

170. See Hartman, *supra* note 168, at 1434-35 (referring to the Internet as a "powerful educational tool").

171. See *United States v. Lifshitz*, 369 F.3d 173, 190-93 (2d Cir. 2004) (discussing how the court looks at the "[s]cope and [e]fficacy of the [supervised release] [c]ondition").

172. *Id.*

173. *Id.* at 190.

174. See Dane C. Miller et al., *Conditions of Supervision that Limit an Offender's Access to Computers and Internet Services: Recent Cases and Emerging Technology*, 42 CRIM. L. BULL. 3 (July-Aug. 2006).

175. *Id.*

176. *Id.*

177. *Id.* For example, Spector Pro 5.0 can block access to specific websites or instant messaging altogether as well as monitor computer usage. *Id.*

computer—not just his Internet usage—and log it by time and activity for later review by probation officials.¹⁷⁸ These programs, which are constantly changing and updating to better utilize the available technology and meet customer demand,¹⁷⁹ provide the sentencing court and probation officials with options regarding how extensively to monitor, what to monitor, and how much access to legal and non-prohibited material the offender should receive.¹⁸⁰

With such monitoring capabilities in place, the Second Circuit's approach to supervised release allows the sexual offender to use the Internet and in effect allows the offender to be one step closer to a full transition back into society.¹⁸¹ Such a program could allow sexual offenders access to the mundane activities of the Internet, such as reading the news, looking up reference information, and checking the weather. Additionally, a monitoring program would allow more substantive Internet activities, such as online shopping, e-mail (for both personal and business use), and job hunting, all of which contribute to the offender's transition back into law-abiding society.

Courts cannot underestimate the significance of using the Internet either to access job information¹⁸² or to perform work as part of a job. The transition of an offender back into society aims to reconnect him with various social institutions, most importantly the workplace.¹⁸³ The generally disadvantaged work histories and below average education of most felons compound the problem of success-

178. *Id.*

179. The latest version of Spector Pro was released in September 2006. See David LaGessee, *How To Invade Their Space*, U.S. NEWS & WORLD REP., Sept. 18, 2006, at 60 (discussing use of Spector Pro to monitor children's online activities).

180. For product description and specifications, see Spector Pro 6.0, <https://www.spectorsoft.com/products/> (last visited Oct. 19, 2007).

181. Cf. Nancy A. Ozimek, *Reinstitution of the Chain Gang: A Historical and Constitutional Analysis*, 6 B.U. PUB. INT. L.J. 753, 755 (1997) (discussing how prison work programs serve a rehabilitative goal for inmates by creating realistic work environments and simulating the private sector).

182. Multiple companies now use the Internet to post job openings. See, e.g., Monster, <http://www.monster.com> (last visited Oct. 19, 2007) (allowing users to post resumes and search through job openings).

183. Christopher Uggen, Sara Wakefield & Bruce Western, *Work and Family Perspectives on Reentry*, in PRISONER REENTRY AND CRIME IN AMERICA 209 (Jeremy Travis & Christy Visher eds., 2005).

ful reintegration into society through job placement.¹⁸⁴ Studies have shown, however, a negative correlation between offender recidivism and placement in a job offering high-quality work.¹⁸⁵ Similarly, the rehabilitative goal of supervised release is to place offenders back into the community and also to make them a productive part of it.¹⁸⁶ Prohibitions on Internet use do not serve this goal.

Severe restrictions on Internet usage, like those upheld in *Paul*,¹⁸⁷ only serve to minimize the beneficial effect of supervised release. Instead of taking full advantage of immersion back into society, released offenders remain sheltered and closed off from the dramatic changes going on in the world around them.¹⁸⁸ Furthermore, they must operate at a disadvantage because they cannot seek employment through the Internet and are limited in the type of work that they can perform.¹⁸⁹ With reduced chances for employment, released offenders may not fully realize the benefits they would otherwise receive from employment, including greater connections to society.¹⁹⁰ In addition to these particular benefits, steady work is also linked to increased public safety and deterrence of future crime.¹⁹¹

As a result, the approach of the circuits that uphold stricter supervised restrictions¹⁹² prohibiting Internet use minimizes these benefits and, consequently, cannot serve the rehabilitative goals of supervised release, or the approach of the Second Circuit. The circuit courts of appeals that have vacated restrictions relating to the Internet would appear to avoid these problems; in attempting to

184. *Id.* at 211 (stating that “convicted felons often enter prison with a history of unemployment, low educational attainment, and few marketable job skills”).

185. *Id.* at 213.

186. *See supra* Part II.

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

188. *See supra* Part I.

189. Prohibiting access to websites such as Monster reduces the offender to more traditional job sources—want ads, flyers, and the like. Lack of Internet access may also limit offenders on supervised release from engaging in jobs that would be available had they remained in the correctional system: for example, call center operators. *See Roman Prison Call Center Raises Ruckus*, CALL CTR. MAG., Sept. 1, 2006, at 12 (noting that almost every state runs such call centers). Such positions would require some type of Internet or e-mail access.

190. *See Uggen et al.*, *supra* note 183, at 213, 215.

191. *Id.* at 215.

192. *See supra* Part IV.B.

work around the problems associated with Internet supervised release conditions,¹⁹³ however, these courts risk failing to meet the rehabilitative goal.¹⁹⁴

The Second Circuit recognized that a complete lack of Internet restrictions for the offender on supervised release could potentially result in additional imprisonment.¹⁹⁵ In such a circumstance, sentencing judges might worry that a released sexual offender would commit further crimes if not properly supervised; if appellate courts prohibit Internet monitoring as a condition of release, the sentencing court might instead choose to keep the offender in prison and away from the public altogether.¹⁹⁶ When examining later amendments to the supervised release statute, Congress expressed concern that inadequate release conditions might lead “some courts to impose a longer period of imprisonment than otherwise would be needed to punish the violation, in order to maintain criminal justice control since post-release supervision would not be available.”¹⁹⁷

Commentators have noted that long periods of imprisonment may not even serve a rehabilitative purpose; if anything, they may tend to harden a criminal.¹⁹⁸ The Second Circuit approach explicitly addresses the potential problem of longer prison terms by allowing sentencing courts to impose Internet and computer use restrictions for sexual offenders, thus minimizing the potential for judges to

193. See *supra* Part IV.A.

194. “You fall into Scylla in seeking to avoid Charybdis.” JOHN BARTLETT, *FAMILIAR QUOTATIONS* 181 n.2 (Justin Kaplan ed., 16th ed. 1992).

195. *United States v. Lifshitz*, 369 F.3d 173, 179 (2d Cir. 2004) (stating that “the alternative facing Lifshitz in the absence of a computer monitoring probation condition might well be the more extreme deprivation ... wrought by imprisonment”); see also *United States v. Balon*, 384 F.3d 38, 44 (2d Cir. 2004) (quoting same passage from *Lifshitz*).

196. See 18 U.S.C. § 3553(a)(2) (2006) (allowing for discretion by the district court as to the length of the defendant’s sentence based on the need to protect the public from further criminal activity by the defendant).

197. 136 CONG. REC. 28228, 28229 (1990).

198. See Joan Petersilia, *From Cell to Society: Who Is Returning Home?*, in *PRISONER REENTRY AND CRIME IN AMERICA* 15, 42-46 (Jeremy Travis & Christy Visser eds., 2005). Rehabilitation does not appear to be the norm for most prisoners, as Petersilia concludes her article by stating that offenders’ “prison record[s] will have created new barriers to work, housing, and social relationships. Now more embittered, alienated, and prone to violence than before, many ex-convicts return to crime.” *Id.* But see Shadd Maruna & Hans Toch, *The Impact of Imprisonment on the Desistance Process*, in *PRISONER REENTRY AND CRIME IN AMERICA*, *supra*, at 139, 158-72 (discussing several successful rehabilitative initiatives within prisons).

over-imprison defendants. Already steering away from the Scylla of total prohibitions on Internet usage, the Second Circuit now avoids the Charybdis associated with the lack of Internet restrictions altogether.

CONCLUSION

Internet restrictions as a part of a sexual offender's term of supervised release aim to minimize the possibility that the offender will recommit the same type of crime that landed him in prison in the first place. At their most extreme, however, Internet restrictions work against the basic premise of supervised release—rehabilitation of the offender. Appellate courts that allow absolute bans on Internet access unintentionally prevent the offender from participating in the entirety of the community into which he is trying to reenter. Alternatively, appellate courts that deny sentencing judges the ability to use Internet restrictions during supervised release risk over-imprisoning offenders to compensate for the lack of any Internet restrictions.

The Second Circuit's approach as developed in *Lifshitz* and *Balon* recognizes that the Internet is a critical part of the daily life of America. This approach's look at the available technology as the solution to the question of Internet restrictions during supervised release allows the courts to craft release terms that maximize the offender's potential for rehabilitation and reentry into society. The offender can take part in all activities for which law-abiding citizens would use the Internet, while having his access monitored or filtered to minimize the chance of recidivism.

*Frank E. Correll, Jr.**

* J.D. Candidate 2008, William & Mary School of Law; B.A. 2000, *magna cum laude*, The College of William & Mary. Special thanks to my parents and family for their continued encouragement and support, as well as to the editors and staff of the William and Mary Law Review for their help preparing this Note.