

**NOTE: PROPRIETY OF INTERNET RESTRICTIONS FOR SEX OFFENDERS
CONVICTED OF POSSESSION OF CHILD PORNOGRAPHY: SHOULD WE
PROTECT THEIR VIRTUAL LIBERTY AT THE EXPENSE OF THE SAFETY OF
OUR CHILDREN?**

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Text

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Introduction

The Internet has become an indispensable tool in today's society; so much so, that it is almost impossible to imagine what life would be without it. We depend on the Internet to pay our bills and keep track of our financial records, keep in touch with friends and family, find our way around certain locations, and stay connected with what is going on in the world. With the Internet making information readily accessible, while at the same time providing its users with anonymity, it is not hard to imagine how some individuals can abuse its power and use it to harm others. With such a powerful tool comes responsibility and anyone who exploits the Internet at the expense of others should forfeit the privilege of being able to use it.

This is the reality plaguing many sex offenders convicted of using the Internet to receive and distribute pornographic images involving children. The propriety of conditions restricting a convicted sex offender's Internet and computer use, imposed as a condition of supervised release or a conditional release, is a topic of controversy among the federal courts of appeals, which are currently split on this issue. On one end, certain circuits have held that the Internet is such an integral part of our lives that it is unreasonable to impose Internet and computer restrictions on sex offenders convicted of merely possessing child pornography, as opposed to those offenders who use the Internet to prey on children; whereas, other circuits consider these restrictions to be an appropriate measure of protecting the [*124] public by preventing sex offenders from using the Internet to perpetuate the victimization of children.

This Note takes the position that Internet restrictions are necessary to fulfill the purpose of the Sentencing Guidelines to protect children from victimization, and to deter convicted sex offenders from engaging in similar conduct during the term of supervised release imposed by the court, but proposes that these restrictions be tailored to the offender's particular circumstances through the use of technology.

Part I provides a historical overview of child pornography, the attempt of the United States to eradicate its proliferation by enacting specific legislation, and the role the Internet plays in promoting it.

Part II discusses the psychological, physical, and social effects that the production and dissemination of these materials have on the victims of child pornography. Part II also discusses the correlation between viewing child pornography and the perpetration of sex-related crimes against children beyond viewing the pornography.

Part III describes the relevant sections of the Sentencing Guidelines that courts rely on to determine the length of a convicted sex offender's sentence and the conditions of probation or supervised release the judges are allowed to impose.

Part IV discusses the different approaches taken by the federal courts of appeals and illustrates the current split among jurisdictions.

Part V addresses the implication of imposing a total restriction on a convicted sex offender's access to the Internet in a world that heavily relies on technology and the Internet to carry out their daily activities. In addition, Part V examines the consequences of a partial Internet ban in the context of the Fourth Amendment.

Lastly, Part VI explains the current surveillance software available for law enforcement personnel to monitor the online activity of sex offenders and discusses which software best serves the goals of the Guidelines.

I. Child Pornography

A. Historical Overview of Child Pornography

"Child pornography is a form of child sexual exploitation." ¹ The sexual objectification of children is a problem that has persisted throughout the years, along with the production and dissemination of sexually suggestive [*125] materials involving children. ² However, it was not until the mid-nineteenth century, as a result of the invention of the camera and photography that we began to see an emergence of the production, collection, and exchange of pornographic material depicting children. ³ Even with the invention of the camera, producing and reproducing child pornography continued to be censored through most of the twentieth century as these images were usually produced at the local level, were costly and of poor quality, and were difficult to acquire. ⁴ By the 1960's, censorship standards became relaxed leading to an increase in the accessibility of child pornography. ⁵ By 1977, there were approximately 250 magazines circulating in the United States that depicted pornographic images of children. ⁶

¹ Child Exploitation & Obscenity Section U.S. Dep't of Justice, <http://www.justice.gov/criminal/ceos/subjectareas/childporn.htm> (last visited Oct. 30, 2012).

² Richard Wortley & Stephen Smallbone, *Internet Child Pornography: Causes, Investigation, and Prevention* 1 (2012). There is a long history of children being sexually exploited by adults. *Id.* at 9. For example, in ancient Greece, it was common for twelve-year-old boys to engage in sexual relationships with adult men until their twenties. *Id.* Once that relationship ended, the adult men would marry young girls between twelve and fourteen, while the boys, now twenty, repeated the vicious cycle. *Id.*

³ *Id.* at 1.

⁴ Richard Wortley & Stephen Smallbone, U.S. Dep't of Justice, *Child Pornography on the Internet* 5 (2012), available at <http://www.cops.usdoj.gov/Publications/e04062000.pdf>.

⁵ *Id.*

⁶ *Id.*

Up until the spring of 1977, only six states had specific provisions criminalizing the portrayal of children in erotic material.⁷ In 1978, the first federal law to address the issue of child pornography was enacted.⁸ Later, the law was amended in 1988 to incorporate the use of computers to promote child pornography.⁹ As it stands today, child pornography is defined under federal law as:

Any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or **[*126]** produced by electronic, mechanical, or other means, of sexually explicit conduct, where - (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.¹⁰

Most states have addressed the issue of child pornography by enacting their own specific legislation, "allowing state police to join federal agencies in the fight against child pornography."¹¹ However, defining who is considered to be a child and which materials qualify as pornographic in nature differs significantly from state to state.¹² Therefore, for research purposes, "child pornography is often defined broadly as any record of sexual activity involving a prepubescent person."¹³

B. The Role of the Internet in Promoting Child Pornography

By the mid-1980's, a series of successful anti-child pornography operations conducted by law enforcement in the United States left the child pornography industry on the brink of extinction.¹⁴ During this time, the production and reproduction of child pornography was problematic and costly.¹⁵ Pedophiles found it challenging to find and interact with other pedophiles,¹⁶ and obtaining child pornography "required a measure of physical exposure of the person involved to being identified, in that a visit to a specialised sex shop was required, or a name and address

⁷ Tina M. Beranbaum et al., *Child Pornography in the 1970s*, in *Child Pornography and Sex Rings* 7, 8 (Ann Wolbert Burgess & Marianne Lindeqvist Clark eds., 1984).

⁸ Protection of Children Against Sexual Exploitation Act of 1977, [Pub. L. No. 95-225](#), [92 Stat. 7](#) (1978); see also Wortley & Smallbone, *supra* note 4, at 7 tbl.1 (stating that the act "prohibited the manufacture and commercial distribution of obscene material involving minors under 16"). President Jimmy Carter signed the law on February 6, 1978 as an amendment to the U.S. Code concerning the use of children in pornographic material. Beranbaum et al., *supra* note 7, at 8. The law's main goal was to prohibit "the use of children in obscene performances; the transportation, for the purpose of sale, of materials depicting children in sexual conduct; and the interstate transport of children for purposes of prostitution or obscene performances." *Id.* at 10.

⁹ Child Protection and Obscenity Enforcement Act of 1988, **Pub. L. No. 100-690**, ch. 1, sec. 7511, § 2251(c), **102 Stat. 4485** (codified as amended at [18 U.S.C. §§2251-2252](#) (1988)). See also Wortley & Smallbone, *supra* note 4, at 7 tbl.1 (prohibiting the use of a computer for portrayal or advertisement of child pornography).

¹⁰ [18 U.S.C. § 2256\(8\)](#) (2011).

¹¹ Wortley & Smallbone, *supra* note 4, at 8.

¹² *Id.* For example, under Missouri law a child is considered to be any person under the age of fourteen, while in Idaho it means a person who is under eighteen years of age. [Mo. Ann. Stat. § 573.010](#) (Westlaw through 2013 First Reg. Sess.); **Idaho Code Ann. § 18-1507** (LEXIS through 2013 Sess.).

¹³ Wortley & Smallbone, *supra* note 4, at 8.

¹⁴ U.S. Dep't of Justice, *supra* note 1; see also Wortley & Smallbone, *supra* note 2, at 12 (noting that importation of child pornography into the U.S. became restricted during the 1980s as a result of efforts by the Postal Service, Customs, and agencies such as the FBI in policing the domestic distribution of these materials).

¹⁵ U.S. Dep't of Justice, *supra* note 1.

¹⁶ *Id.*

had to be given to a mail order organisation." ¹⁷ Individuals also privately exchanged images with one another, but the danger of being recognized was still present. ¹⁸ Not **[*127]** only was it difficult to find sources of child pornography, it was also expensive to acquire because even if it was not prohibited, any indication of a sexual attraction to children was not socially accepted, and vendors used this to their advantage by charging large sums of money for their merchandise. ¹⁹

Circumstances have changed drastically due to the development of the Internet and advanced digital technology, which has greatly increased the availability of child pornography. ²⁰ The Internet has been instrumental in facilitating the creation, access, and transfer of child pornography worldwide without requiring much effort. ²¹ Today, pornographic images of children are readily available through every Internet forum imaginable including websites, email, newsgroups, chat rooms and bulletin boards, and social networking sites such as Facebook and MySpace. ²² Specifically, the Internet:

- . Permits access to vast quantities of pornographic images from around the world[;]
- . Makes pornography instantly available at any time or place[;]
- . Allows pornography to be accessed (apparently) anonymously and privately[;]
- . Facilitates direct communication and image sharing among users[;]
- . Delivers pornography relatively inexpensively[;]
- . Provides images that are of high digital quality, do not deteriorate, and can be conveniently stored[;]
- . Provides for a variety of formats (pictures, videos, sound), as well as the potential for real-time and interactive experiences[;]
- . Permits access to digital images that have been modified to create composite or virtual images (morphing)[.] ²³

Sex offenders in search of child pornography can easily use the Internet to connect to networks and forums to discuss their interests and experiences abusing children in addition to selling and exchanging images. ²⁴ **[*128]** Furthermore, online forums have made it easier for child pornographers to communicate with each other, "both normalizing their interest in children and desensitizing them to the physical and psychological damages inflicted on

¹⁷ Max Taylor & Ethel Quayle, *Child Pornography: An Internet Crime* 9 (2003).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ U.S. Dep't of Justice, *supra* note 1. "In 1980, the biggest-selling child pornography magazine in the United States was estimated to sell about 800 copies; 20 years later, one ICP company was found to have more than a quarter of a million subscribers from around the world." Wortley & Smallbone, *supra* note 2, at 25 (citations omitted).

²² Wortley & Smallbone, *supra* note 2, at 27-29 ("Specific child pornography websites may be created or child pornography images may be embedded in general pornography sites... . Professional distributors may sometimes send child pornography via email attachments... . Specific child pornography bulletin boards and newsgroups may be used to host discussions that provide advice to seekers of child pornography Chat rooms may be used ... as well as to locate potential child victims.").

²³ Wortley & Smallbone, *supra* note 4, at 9.

²⁴ U.S. Dep't of Justice, *supra* note 1.

child victims." ²⁵ These online communities also pose a great risk because they may attract or encourage new individuals to become engrossed in the sexual manipulation of children. ²⁶

II. Impact of Child Pornography

A. Effects of Child Pornography on the Children Depicted

Victimization of children involved in child pornography cases can have damaging "physical, social, and psychological effects" on the children portrayed in these materials. ²⁷ While the anguish and sexual abuse of the children depicted in some of these pornographic images is undeniable, other images may portray children that appear unfazed by the acts being perpetrated against them. ²⁸ However, the apparent complacency of a child in the material portrayed does not negate the occurrence of sexual abuse. ²⁹ Most unfortunate is the fact that sexual abuse in cases of child pornography rarely occurs once, but in fact tends to recur and intensify over a period of months or years. ³⁰ Individuals engaged in the production of child pornography often rely on grooming practices to draw victims into relationships that are gradually sexualized over time and maintained in secrecy. ³¹ "The grooming process fosters a false sense of trust and authority [*129] over a child in order to desensitize or break down a child's resistance to sexual abuse." ³²

Little information exists regarding the impact child pornography can have on its victims in the long run, but the immediate effects of sexual abuse on the children depicted in these images is palpable and well documented. ³³ Victims of child pornography not only suffer from the victimization inflicted upon them by their abuser, but also from knowing that the images of their abuse can be indefinitely distributed at a worldwide scale, long after the abuse is perpetrated. ³⁴ Once an image is disseminated on the Internet, it cannot be recovered and can continue to spread

²⁵ Id.

²⁶ Id. See, e.g., Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet* 23 (2001). A particular message posted on a child pornography board illustrates just how risky the Internet can be in encouraging individuals to become involved in child pornography:

I remember one day I done a search for teen girls on the net, I expected to find girls of 18+, ye know the usual. But this one time I found a girl-love site, ... it was wonderful. One girl in particular, Laika, the "Internet Princess." Then I started to search for loli on the various engines and got the usual rubbish, ... soon I found out about news [newsgroups] and went from there, that was three years ago If it wasn't for the Internet I would have never known. I think as the Internet grows, more people will find out their sexual desires just as I did.

Id. (grammatical and spelling errors in original).

²⁷ Wortley & Smallbone, *supra* note 4, at 15.

²⁸ U.S. Dep't of Justice, *supra* note 1.

²⁹ Id.

³⁰ Id.

³¹ See Michael Welner, *Child Sexual Abuse: 6 Stages of Grooming*, Oprah, <http://www.oprah.com/oprahshow/Child-Sexual-Abuse-6-Stages-of-Grooming> (last visited Sept. 6, 2013). As part of the grooming process, offenders often use child pornography to lower the inhibitions of a child who is reluctant to engage in the sexual activity attempted by the offender. Kenneth V. Lanning, *Collectors*, in *Child Pornography and Sex Rings*, *supra* note 7 at 83, 86. An unwilling child "can sometimes be convinced by viewing other children having 'fun' participating in the activity. Peer pressure has a tremendous effect on children: if other children are involved, maybe it is all right, the child thinks." Id.

³² U.S. Dep't of Justice, *supra* note 1.

³³ Eva J. Klain, Heather J. Davies & Molly A. Hicks, *Child Pornography: The Criminal Justice-System Response* 10 (2001), available at http://www.popcenter.org/problems/child_pornography/PDFs/Klain_etal_2001.pdf.

in perpetuity.³⁵ The longevity of these images can have adverse effects on the lives of the victims.³⁶ As one psychologist testified in a child pornography case, "victims are constantly anxious, they walk around anxious ... when they go into the street they look at everyone they pass and say, 'Did you see the pictures?' ... They are constantly ruminating about who have seen those pictures."³⁷

Because pornographic material involving children presents an obvious record of child sex abuse, its victims tend to "experience the same emotional and physical consequences in addition to any harm resulting from the pornography."³⁸ Victims of child pornography manifest symptoms of distress while the sexual exploitation is taking place, when the abuse is exposed, and in the "post-traumatic phase."³⁹ In addition to any physical injuries inflicted during the sexual abuse, these children become depressed, angry, and express feelings of helplessness, fear, humiliation, worthlessness, and lack of control as a result of their images being circulated.⁴⁰

[*130] Many child victims also feel guilty and believe they are responsible for the abuse, and exhibit low self-esteem.⁴¹ Child victims often express these feelings through "increased fearfulness and changes in sleep patterns including re-occurring memories, flashbacks, dreams, and nightmares associated with post-traumatic stress."⁴² For younger children, re-enacting sexual activities through play is the manner in which they externalize the stress associated with the sexual abuse, while for adolescents, these inappropriate early sexual experiences negatively impact their developing sexuality.⁴³

The effects of child pornography on young victims may continue well into adulthood. In the later years, victims reported that the feelings of shame and anxiety they felt following the abuse did not dwindle with time, but in fact "intensified to feelings of deep despair, worthlessness, and hopelessness."⁴⁴ Victims also reported that as a result of the abuse they were left with a "distorted model of sexuality," which affected their ability to establish and maintain healthy emotional and sexual relationships.⁴⁵ Moreover, "women abused as children have statistically significantly higher rates of nightmares, back pain, headaches, pelvic pain, eating binges, and other similar symptoms."⁴⁶

B. Correlation Between Exposure to Child Pornography and the Perpetration of Sex Crimes Against Children Beyond Pornography

Although the reasons why certain individuals collect child pornography cannot be illustrated with certainty, studies and police investigations have identified certain uses for the material.⁴⁷ Pedophiles use child pornography for the

³⁴ U.S. Dep't of Justice, *supra* note 1. See also H.R. Rep. No. 112-638 (2012), available at http://thomas.loc.gov/cgi-bin/cpquery/?&sid=cp1127CgNX&r_n=hr638.112&dbname=cp112&&sel=TOC_18602&.

³⁵ U.S. Dep't of Justice, *supra* note 1.

³⁶ *Id.*

³⁷ H.R. Rep. No. 112-638.

³⁸ Klain, Davies, & Hicks, *supra* note 33, at 10.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Wortley & Smallbone, *supra* note 4, at 15.

⁴⁵ *Id.*

⁴⁶ Klain, Davies, & Hicks, *supra* note 33, at 10.

⁴⁷ Lanning, *supra* note 31, at 86.

purpose of sexual arousal and gratification, "the same way other people use adult pornography - to feed sexual fantasies." ⁴⁸ However, some individuals only collect these materials to satisfy their fantasies without trying to emulate any of the activities depicted, while for others, the "arousal and fantasy fueled by the pornography is only a prelude to actual sexual activity with children." ⁴⁹

[*131] Researchers believe that a causal relationship exists between exposure to child pornography and the perpetration of sexual victimization against children. ⁵⁰ According to Dr. Diana Russell, there are three causal factors that explain how exposure to child pornography leads some individuals, men in particular, to sexually abuse children. ⁵¹ Russell's theory concludes that viewing child pornography causes men to sexually victimize children with these materials. Russell notes the following causal factors to support her conclusion: "(1)(a) viewing child pornography predisposes some males, not previously so disposed to sexually desire children," ⁵² or "(1)(b) viewing child pornography intensifies the desire of some males who are already sexually aroused by children"; ⁵³ (2) "viewing child pornography undermines some males internal inhibitions against acting out their desires to ... sexually victimize children"; ⁵⁴ and (3) "viewing child pornography undermines some males' social inhibitions against acting out their desires." ⁵⁵

A great illustration of the correlation between viewing child pornography and sexual victimization discussed in Russell's theory is the case of Jeremy Strohmeyer. In the early morning of May 25, 1997, 18 year-old Jeremy Strohmeyer encountered 7 year-old Sherrice Iverson playing with another **[*132]** boy at the Primadonna Resort & Casino in Primm, Nevada. ⁵⁶ A game of tag ensued between them after Sherrice accidentally struck Jeremy with a wadded-up paper. ⁵⁷ Shortly thereafter, Sherrice ran into the ladies bathroom and Jeremy ran after her, where they

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Diana E. H. Russell & Natalie J. Purcell, Exposure to Pornography as a Cause of Child Sexual Victimization, in Handbook of Children, Culture, and Violence 59, 59 (Nancy E. Dowd, Dorothy G. Singer & Robin Fretwell Wilson eds., 2006).

⁵¹ Id. at 60.

⁵² Id. at 66-68 (explaining that under factor (1a), these pornographic materials can lead men to develop an interest in children by sexually objectifying them, by "merging sexual images of girls and women thereby increasing male viewers' propensity to use girls as sexual substitutes for women," or providing men who have become habituated to adult pornography with a more extreme form of pornography).

⁵³ Id. at 68-71 (explaining that under factor (1b), these pornographic materials can lead men to develop an interest in children by increasing their "masturbatory activity thereby reinforcing their desires for sex with children," by suggesting new ideas for sexually abusing children, by providing images and models of child sexual abuse for them to enact, and by "creating a desire for increasingly more extreme forms of child pornography").

⁵⁴ Id. at 72-76 (explaining that under factor (2), these pornographic materials can lead men to develop an interest in children by sexualizing and/or depersonalizing girls, by challenging the prohibition against sexual victimization of children, by "minimizing or trivializing the harm of adult-child sex/victimization," by "creating and/or reinforcing myths about child sexuality and/or adult-child sex victimization," by "desensitizing male viewers to the pathology of desiring children and to the pain and trauma for victims," by "advocating, legitimizing, and/or normalizing adult-child sex/victimization," and by "providing specific instructions on how to sexually victimize a child") [Editor's note: Quoted material taken from headings in source. As a result, capitalization has been altered.].

⁵⁵ Id. at 76-77 (explaining that under factor (3), these pornographic materials can lead men to develop an interest in children by diminishing fear of disapproval and of legal and social sanctions, and by "providing them with a means of making money") [Editor's note: Quoted material taken from headings in source. As a result, capitalization has been altered.].

⁵⁶ Nora Zamichow, The Fractured Life of Jeremy Strohmeyer, L.A. Times (July 19, 1998), <http://articles.latimes.com/1998/jul/19/news/mn-5552>.

⁵⁷ Id.

continued playing until Sherrice grazed Jeremy's arm with a yellow Wet Floor sign causing him to snap.⁵⁸ Jeremy then picked up Sherrice with his right arm and put his left hand over her mouth as he carried her into the handicapped stall where he proceeded to molest her, then ultimately choked her until she stopped breathing.⁵⁹ Jeremy's computer would later reveal his extensive collection of child pornography and his sexual interest in young girls.⁶⁰ Two days prior to the murder, Jeremy wrote in an Internet chat room that he liked little girls and would fantasize about them all the time.⁶¹

III. Sentencing in the Federal Courts

A. Probation and Supervised Release Under the United States Sentencing Guidelines

The United States Sentencing Guidelines provide the "framework under which the judiciary imposes all sentencing in the federal criminal system."⁶² Furthermore, the Guidelines play an important role in determining the length of a defendant's prison sentence, however, they also permit the imposition of terms of supervised release to immediately follow any prison sentence.⁶³ The length of the supervisory term is contingent upon the underlying crime, but cannot be greater than five years in major cases or no greater than three or even one year in other cases.⁶⁴ Certain conditions of the release are [*133] compulsory, while others, such as the imposition of restrictions as a condition of an offender's supervised release are discretionary in nature, as long as the "judge comports with general requirements."⁶⁵

"It is this discretionary special condition outlined in [18 U.S.C. § 3583](#) that district courts rely on to impose Internet restrictions."⁶⁶ Pursuant to the aforementioned federal statute, supervised release for a violation of [18 U.S.C. § 2252](#)⁶⁷ is authorized to be any term of years not less than five, or life, and requires that supervised release

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ See Id. Jeremy would spend hours on his computer visiting pornography sites and downloading photos, stories, and videos. Id. More than 800 files were found on his computer - most of them were pornographic images of children. Id.

⁶¹ Id.

⁶² Krista L. Blaisdell, Note, Protecting the Playgrounds of the Twenty-First Century: Analyzing Computer and Internet Restrictions for Internet Sex Offenders, [43 Val. U. L. Rev. 1155, 1167 \(2009\)](#).

⁶³ Christopher Wiest, Comment, The Netsurfing Split: Restrictions Imposed on Internet and Computer Usage by Those Convicted of a Crime Involving a Computer, [72 U. Cin. L. Rev. 847, 849 \(2003\)](#).

⁶⁴ Id. See also [18 U.S.C. § 3583\(b\)](#) (2010). The statute provides in pertinent part:

(b) Authorized Terms of Supervised Release. - Except as otherwise provided, the authorized terms of supervised release are -

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

Id.

⁶⁵ Wiest, *supra* note 63, at 849.

⁶⁶ Id.

⁶⁷ [18 U.S.C. § 2252](#) (2012). The statute states:

(b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this

conditions be reasonably related to: (1) the nature and characteristics of the offense and the history and characteristics of the defendant, (2) the deterrence of criminal conduct, (3) the protection of the public from further crimes of the defendant, and (4) the provision of needed educational or vocational training, medical care, or other correctional treatment to the defendant.⁶⁸ The condition cannot impose any greater deprivation of liberty on the defendant than is reasonably necessary to carry out the goals of the Sentencing Guidelines.⁶⁹

B. Disagreement Among the Circuit Courts

The Supreme Court of the United States has yet to grant certiorari to resolve the tension among various appellate courts regarding the reasonableness of imposing restrictions on computer use and Internet access for a defendant who has been convicted for merely possessing child pornography, as opposed to those offenders that have gone beyond the [*134] Internet to solicit minors for sexual activity.⁷⁰ The refusal of the Court to take up this issue and provide some guidance regarding this matter has led to a substantial split in the federal courts of appeals as to whether it is appropriate to impose broad Internet bans on defendants who possess child pornography as opposed to those who use the Internet to initiate or facilitate the victimization of children. "The result has been divergent case law and differing results under circumstances that, on their face, appear strikingly similar."⁷¹

1. Approval of Broad Internet and Computer Restrictions

Appellate courts in multiple jurisdictions have upheld broad Internet bans as a condition of supervised release for sex offenders convicted of possessing child pornography.⁷² These courts did not require evidence of actual sexual contact with a minor in order to impose such a broad restriction on Internet use, but found that the mere possession of child pornography was sufficient to uphold an Internet ban.

a. Fifth Circuit

In *United States v. Miller*, the Fifth Circuit affirmed a district court's sentencing order.⁷³ Miller pled guilty to knowingly transporting or shipping child pornography in violation of federal law.⁷⁴ Miller had 495 images of child pornography on his computer and cellular phone, which he attempted to trade for child pornography possessed by others.⁷⁵ The district court sentenced Miller to eighteen years and four months of imprisonment and also imposed

chapter, section 1591 [[18 USCS § 1591](#)], chapter 71, chapter 109A, or chapter 117 [[18 USCS §§2251 et seq.](#), [§§1460 et seq.](#), [2241 et seq.](#), or [2421 et seq.](#)], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

Id.

⁶⁸ Id. §§3553, 3583.

⁶⁹ Id. § 3583.

⁷⁰ See, e.g., [United States v. Rearden](#), 349 F.3d 608 (9th Cir. 2003), cert. denied, 543 U.S. 822 (2004); [United States v. Holm](#), 326 F.3d 872 (7th Cir. 2003), cert. denied, 540 U.S. 894 (2003); [United States v. Zinn](#), 321 F.3d 1084 (11th Cir. 2003), cert. denied, 540 U.S. 839 (2003); [United States v. Crandon](#), 173 F.3d 122 (3d Cir. 1999), cert. denied, 528 U.S. 855 (1999).

⁷¹ John L. Sullivan, III, Note, Federal Courts Act as a Toll Booth to the Information Super Highway-Are Internet Restrictions Too High of a Price to Pay?, [44 New Eng. L. Rev. 935, 949 \(2010\)](#).

⁷² See, e.g., [United States v. Lantz](#), 443 F. App'x 135, 145 (6th Cir. 2011) (affirming ban on computer use and access as a result of defendant's child pornography possession); [United States v. Boston](#), 494 F.3d 660, 668 (8th Cir. 2007) (upholding a computer and Internet access restriction because defendant printed images of child pornography).

⁷³ [United States v. Miller](#), 665 F.3d 114, 117 (5th Cir. 2011).

⁷⁴ [18 U.S.C. § 2252\(a\)\(1\)](#) (2011).

a twenty-five-year term of supervised release, with conditions that included a restriction on Internet and computer use.⁷⁶ Specifically, the restriction prohibited Miller from using any computer or possessing any **[*135]** electronic device with access to the Internet without the prior permission of the probation officer.⁷⁷

The Fifth Circuit refused to strip the district court of its authority to limit Internet access when there is no evidence that sex offenders relied on it to solicit sex with minors.⁷⁸ Instead, the court recognized the district court's broad discretion in determining conditions for supervised release.⁷⁹ In Miller, the court held that the prohibitions on computer and Internet access were appropriate because the record showed that Miller used the Internet to victimize minors.⁸⁰ The court was not persuaded by other circuits,⁸¹ which had held that broad Internet bans were unreasonable for defendants who possess or distribute child pornography, but may be appropriate for those who use the Internet to initiate or facilitate the victimization of children.⁸²

b. Ninth Circuit

In 2000, Chance Rearden and another individual began corresponding via e-mail regarding ways to hunt for children, and Rearden e-mailed the individual a series of images containing pornographic images of children.⁸³ On February 23, 2001, Rearden was arrested for shipping images containing child pornography to another individual with whom he maintained contact via e-mail.⁸⁴ Rearden was sentenced to fifty-one months in prison⁸⁵ and was restricted from computer and Internet usage without prior approval of the probation officer.⁸⁶

The Ninth Circuit recognized the importance of the Internet for communication and information, but determined that Rearden's condition of supervised release was not unreasonable or overbroad.⁸⁷ The court looked to **[*136]** other circuits where similar restrictions were upheld⁸⁸ and held that Rearden's condition did not involve a greater

⁷⁵ [Miller, 665 F.3d at 117.](#)

⁷⁶ [Id. at 118.](#)

⁷⁷ [Id. at 126.](#)

⁷⁸ [Id. at 132.](#)

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See, e.g., [United States v. Love, 593 F.3d 1, 12 \(D.C. Cir. 2010\)](#) (The "distinction [between defendants who possess child pornography and those who use the Internet to initiate victimization of children] is grounded in the simple proposition that when a defendant has used the internet to solicit sex with minors, 'the hazard presented by recidivism' is greater than when the defendant has traded child pornography." (citation omitted)).

⁸² [Miller, 665 F.3d at 131.](#)

⁸³ [United States v. Rearden, 349 F.3d 608, 611-12 \(9th Cir. 2003\).](#)

⁸⁴ [Id. at 612.](#)

⁸⁵ *Id.*

⁸⁶ [Id. at 620.](#)

⁸⁷ *Id.*

⁸⁸ See, e.g., [United States v. Paul, 274 F.3d 155, 169-70 \(5th Cir. 2001\)](#) (upholding complete ban); [United States v. Ristine, 335 F.3d 692, 695-96 \(8th Cir. 2003\)](#) (affirming restriction of defendant's use of a computer and access to the Internet because defendant had possessed and exchanged pornographic images with other Internet users); [United States v. Zinn, 321 F.3d 1084,](#)

deprivation of liberty than reasonably necessary for the purpose, because it allowed for prior approval by the probation officer.⁸⁹ Additionally, the court found Rearden's Internet restriction was reasonably related to the offense that "involved e-mail transmissions of quite graphic child pornography, and to the important goal of deterring him during the period of supervision from reverting to similar conduct, and thus, to rehabilitation and protecting the public."⁹⁰

c. Eleventh Circuit

In *United States v. Zinn*, the Eleventh Circuit affirmed the defendant's conditions for supervised release.⁹¹ Karl Zinn pled guilty to possessing child pornography that had been mailed, shipped, or transported in interstate commerce, after he was arrested for contacting an undercover Website of the United States Customs Service. He had expressed interest in purchasing two pornographic videotapes depicting girls between the ages of six and thirteen years old.⁹² When Customs agents searched his house and computer they found over 4000 images of child pornography.⁹³

The district court sentenced Zinn to thirty-three months of imprisonment, and following his release he was restricted from using the Internet for a period of three years.⁹⁴ The Eleventh Circuit, like the Ninth Circuit,⁹⁵ recognized the importance of the Internet for communication, commerce, and information, but felt that Zinn's case brought to light the dangers associated with the Internet and the interest in protecting the public and even sex [*137] offenders themselves from its potential abuses.⁹⁶ In its opinion, the court also acknowledged the opposing views of the Third and Second Circuits,⁹⁷ which had held that these restrictions on Internet and computer usage created a greater deprivation of liberty than was necessary. Nevertheless, the court held that a limited restriction on a sex offender's Internet use is a necessary and reasonable condition of supervised release.⁹⁸

2. Disapproval of Broad Internet and Computer Restrictions

The Second, Third, and Tenth Circuits disagree with the Fifth, Ninth, and Eleventh Circuits in upholding Internet restrictions for convicted sex offenders whose conduct involved only possession of child pornography. Instead, in order to consider Internet and computer bans as appropriate, these circuits require that defendants engage in

[1093 \(11th Cir. 2003\)](#) (stating that limited restriction on child pornography offender's Internet usage was reasonably related to legitimate sentencing considerations). The court noted that these courts in upholding restrictions reasoned that there is a "strong link between child pornography and the Internet, and the need to protect the public, particularly children, from sex offenders." [Rearden, 349 F.3d at 620-21.](#)

⁸⁹ [Rearden, 349 F.3d at 621.](#)

⁹⁰ *Id.*

⁹¹ [Zinn, 321 F.3d at 1085.](#)

⁹² [Id. at 1086.](#)

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See *Rearden*, discussed *supra* Pt. III.B.1.b (recognizing the indispensability of the Internet but upholding the defendant's condition of supervised release restricting him from having access to a computer and the Internet).

⁹⁶ [Zinn, 321 F.3d at 1093.](#)

⁹⁷ See [United States v. Freeman, 316 F.3d 386, 387, 392 \(3d Cir. 2003\)](#) (vacating a condition of supervised release prohibiting a defendant's Internet use); [United States v. Sofsky, 287 F.3d 122, 127 \(2d Cir. 2002\)](#) (concluding that a restriction on Internet use was invalid).

⁹⁸ [Zinn, 321 F.3d at 1093.](#)

conduct that goes beyond mere possession and actually results in contact with and subsequent victimization of a child.

a. Second Circuit

In *United States v. Sofsky*, the Second Circuit vacated a condition of supervised release prohibiting the defendant from using a computer or the Internet.⁹⁹ Gregory Sofsky was arrested after the police discovered over 1000 images of pornographic material including children on his home computer.¹⁰⁰ Sofsky pled guilty to receiving child pornography and was sentenced to ten years and one month of imprisonment, to be followed by a three-year term of supervised release with a prohibition on use of a computer or the Internet without the approval of his probation officer.¹⁰¹ The court in Sofsky's case was not persuaded by the Government's argument that access to a computer and the Internet would make it easier for him to continue receiving pornographic images of children.¹⁰² Instead, the court noted that an absolute ban on Internet access "prevents use of e-mail, an increasingly widely used form of communication and, as the Tenth Circuit noted,¹⁰³ **[*138]** prevents other common-place computer uses such as "doing any research, getting a weather forecast, or reading a newspaper online."¹⁰⁴ Ultimately, the Second Circuit held that even though the condition prohibiting Sofsky from using the Internet was reasonably related to the purposes of his sentencing - possession of child pornography - the condition was too broad and inflicted a greater deprivation on Sofsky's liberty than was reasonably necessary.¹⁰⁵

b. Third Circuit

In *United States v. Albertson*, the Third Circuit struck down an Internet restriction it considered to be overbroad.¹⁰⁶ Albertson was charged with receipt and possession of child pornography after over 700 images were found on the family computer in his home.¹⁰⁷ Albertson was sentenced to five years of imprisonment and twenty years of supervised release with special conditions banning him from using a computer with access to the Internet without a probation officer's prior approval, and a requirement that he submit to inspections of his computer and installation of monitoring or filtering software.¹⁰⁸

The court found Albertson's Internet restriction to be sweepingly broad because it was too restrictive and there was no evidence presented that suggested Albertson used the Internet to actively contact a child and solicit sexual activity.¹⁰⁹ In instructing the district courts, the Third Circuit stated that "where the child porn offense does not involve a 'live' component (that is, direct involvement or communication, including the attempt or demonstrated

⁹⁹ [Sofsky, 287 F.3d at 127.](#)

¹⁰⁰ [Id. at 124.](#)

¹⁰¹ [Id. at 122.](#)

¹⁰² [Id. at 126.](#)

¹⁰³ For a full discussion of *White*, see *infra* Pt. III.B.2.c.

¹⁰⁴ [Sofsky, 287 F.3d at 126.](#)

¹⁰⁵ *Id.*

¹⁰⁶ [United States v. Albertson, 645 F.3d 191, 193-94 \(3d Cir. 2011\).](#)

¹⁰⁷ [Id. at 193.](#)

¹⁰⁸ [Id. at 194.](#)

¹⁰⁹ [Id. at 199.](#)

willingness to have direct involvement or communication, with a putative victim via the internet), the district courts should consider whether a tailored internet limitation is feasible." ¹¹⁰

c. Tenth Circuit

In *United States v. White*, the Tenth Circuit did not uphold a condition of supervised release, which prohibited the defendant from accessing a **[*139]** computer with Internet connectivity. ¹¹¹ In 1996, Robert E. White was arrested for receiving child pornography after he responded to an advertisement from a United States Customs officer selling videos of young girls engaged in fondling and sexual intercourse with adult men. ¹¹² The district court sentenced White to six months in jail and two years of supervised release under special conditions, which prohibited him from possessing a computer with Internet access throughout this period. ¹¹³

The court held that under the circumstances of the supervised release, the special condition was greater than necessary to protect the public and failed to balance the competing interests the sentencing court must consider, and should reflect the realities of the Internet and its rapidly changing technology. ¹¹⁴

Thus, it is evident that a current split exists among the circuits regarding the permissibility of imposing Internet restrictions as a condition of supervised release or probation. On one end of the spectrum, the Fifth, Ninth, and Eleventh Circuits have upheld broad Internet restrictions for sex offenders convicted of possessing child pornography. On the other end, the Second, Third, and Tenth Circuits favor Internet restrictions only for those offenders convicted of engaging in contact offenses with a minor.

IV. Enforcement of Restriction: Total vs. Partial Ban on Internet Access

As the courts are divided over what the proper conditions of supervised release should be for convicted sex offenders, the question becomes: which type of restrictions achieves the goals of the Guidelines to protect the community and deter the offender without depriving him of his civil liberties?

A. Implications of a Total Ban

Offenses involving pornographic images depicting children are unquestionably some of the most horrific offenses in the scope of crimes against children. Because of its offensive and egregious nature, it would seem logical that the punishment for this crime should include incarceration as well as a sweeping ban on the offender's Internet access as a condition of probation. However, while imposing a period of incarceration is appropriate **[*140]** and has been approved by Congress, ¹¹⁵ implementing a total Internet restriction could involve a greater deprivation of an offender's liberty than is reasonably necessary to deter the illegal activity and protect the public from further victimization. ¹¹⁶ Such a blanket prohibition could prevent the offender from performing daily activities such as

¹¹⁰ [Id. at 198.](#)

¹¹¹ [United States v. White, 244 F.3d 1199, 1201 \(10th Cir. 2001\).](#)

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ [Id. at 1206.](#)

¹¹⁵ [18 U.S.C. § 2252\(b\)\(1\)](#) (2012). See *supra* note 67 for the statute's text.

¹¹⁶ Sullivan III, *supra* note 71, at 956.

online banking, checking the weather, staying informed on current events, staying in touch with friends and family, or employment-related matters. ¹¹⁷

Computers and Internet access have become so indispensable and commonplace in today's society that prohibiting their use seems nearly impossible. ¹¹⁸ "The ease of online accessibility creates a huge burden on law enforcement when both the public and private sectors offer Internet access so readily - nearly every public library and airport offers computers with Internet access, and most cellular phones now have online capability." ¹¹⁹ Moreover, public venues such as hotel rooms, coffee shops, and educational institutions afford knowledgeable offenders with opportunities to violate a sweeping prohibition on Internet access. ¹²⁰

The goal of those circuits that permit blanket prohibitions on an offender's Internet access is certainly praiseworthy given the egregiousness of child pornography; however, it fails to account for the impracticality of enforcing such conditions. ¹²¹ This type of ban also fails to recognize the importance of the Internet as a source of communication, information gathering, and commerce. These restrictions would impose on the offender a greater deprivation than is necessary to carry out the goals of the Sentencing Guidelines.

B. Implications of a Partial Ban

Several courts have acknowledged the significant role the Internet plays in today's society, and as a result, they have been reluctant to implement conditions of supervised release that restrict an offender's access to the **[*141]** Internet, absent aggravating conditions. ¹²² Although the Federal Sentencing Guidelines are not compulsory in nature, they dictate that conditions of supervised release or probation should involve no greater deprivation of an offender's liberty than is reasonably necessary to carry out the goals of the guidelines. ¹²³ "The availability of less restrictive means to carry out the purpose of supervised release indicates that restrictions on Internet access constitute a greater deprivation of liberty than is reasonably necessary." ¹²⁴

Under a partial ban, concerns of deprivation of liberty are reduced for those subjected to it because probationary conditions can be adjusted by the judiciary depending on situational need, and it allows the offender to reintegrate into society while taking into account society's ever-growing dependability on technology and the Internet. ¹²⁵

1. Implications of the Fourth Amendment's Right to Privacy

Although circuit courts are split regarding the permissibility of imposing Internet restrictions for sex offenders convicted of distributing child pornography, such a restriction does not infringe on the offender's Fourth Amendment

¹¹⁷ [White, 244 F.3d at 1206](#) (asserting that a condition of probation that completely restricts the offender from any Internet and computer use is greater than necessary because it would prevent the offender from "using a computer at a library to do any research, get a weather forecast, or read a newspaper online").

¹¹⁸ Jane Adele Regina, Comment, Access Denied: Imposing Statutory Penalties on Sex Offenders Who Violate Restricted Internet Access as a Condition of Probation, [4 Seton Hall Cir. Rev. 187, 198 \(2007\)](#).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See, e.g., [United States v. Holm, 326 F.3d 872, 878 \(7th Cir. 2003\)](#) (noting that life without the Internet would be "exceptionally difficult"); [United States v. Crandon, 173 F.3d 122, 128 \(3d Cir. 1999\)](#) (noting that the Internet has become an "omnipresent aspect of American life").

¹²³ Sullivan III, *supra* note 71, at 961.

¹²⁴ *Id.*

¹²⁵ Regina, *supra* note 118, at 204.

rights against unreasonable searches and seizures. ¹²⁶ This practice is acceptable because judges possess the ability to tailor each restriction based on the particular circumstances of the offender. ¹²⁷ Additionally, the Court's decisions suggest that searches based only on the probationary status of an offender are not likely to violate Fourth Amendment privacy rights. ¹²⁸

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V. Alternative Means of Furthering the Purpose of the Sentencing Guidelines Without Risking Deprivation of Liberty of the Offender

A variety of computer management tools have been designed over the last ten years to aid probation and parole agencies in monitoring the computer and Internet use of offenders in compliance with the conditions of their supervised release. ¹²⁹ The employment of this technology, in lieu of imposing sweeping bans on Internet use, will supply the courts with an alternative means of protecting the public from sexual offenders while protecting the civil liberties of those same offenders in a computer and Internet dependent society.

A. Software Technology Available to Monitor the Online Activity of Sex Offenders

1. Computer Forensics

Computer forensic software enables law enforcement personnel to collect and later analyze evidence of suspected criminal activity from an offender's computer. ¹³⁰ Computer forensics allows law enforcement agencies to thoroughly examine an offender's computer to determine its current state and usage. ¹³¹ However, this type of software requires investigators to physically seize the computer to conduct their investigation. ¹³² Once the computer has been confiscated, the process of data retrieval and examination could take anywhere from days to weeks to complete. ¹³³ The amount of time expended in data analysis coupled with a savvy offender's ability to

¹²⁶ [Id. at 196.](#)

¹²⁷ *Id.*

¹²⁸ See [Griffin v. Wisconsin, 483 U.S. 868 \(1987\)](#); [United States v. Knights, 534 U.S. 112 \(2001\)](#); [Samson v. California, 547 U.S. 843 \(2006\)](#). In *Griffin*, the Supreme Court upheld the warrantless search of a probationer's home. [Griffin, 483 U.S. at 880](#). The Court held that probationers did not enjoy the "absolute liberty to which every citizen is entitled," [id. at 874](#) (internal quotation marks omitted), and acknowledged the special role of probation officers: "We deal with a situation in which there is an ongoing supervisory relationship - and one that is not, or at least not entirely, adversarial - between the object of the search and the decisionmaker." [Id. at 879](#). The *Samson* Court relied on its decision in *Griffin* in holding that the Fourth Amendment did not prohibit a police officer from conducting a suspicion-less search of a parolee based solely on his parolee status. [Samson, 547 U.S. at 854-55](#). These decisions suggest that a "condition of supervised release can eliminate an offender's reasonable expectation of privacy." Regina, *supra* note 118, at 197.

¹²⁹ Richard C. LaMagna & Marc Berejka, Remote Computer Monitoring: Managing Sex Offenders' Access to the Internet, *The J. of Offender Monitoring* 11, 13 (2009), available at <https://www.justnet.org/pdf/REMOTE-COMPUTER-MONITORING-JOM-ARTICLE-2009.pdf>.

¹³⁰ Regina, *supra* note 118, at 201.

¹³¹ LaMagna & Berejka, *supra* note 129, at 13. See also Art Bowker, A High Tech Synergy to Managing the Cyber-sex Offender, *Corrections.com* (Mar. 15, 2010), <http://www.corrections.com/news/article/23722-a-high-tech-synergy-to-managing-the-cyber-sex-offender-> (explaining that this method of examination is time-consuming in that it "involves making a duplicate image of the [hard] drive" and examining it to retrieve "deleted files and data from unallocated space and examining protected storage areas").

¹³² Jim Tanner, Beyond Prosecution: Improving Computer Management of Convicted Sex Offenders 1 (2007), available at <http://www.kbsolutions.com/beyond.pdf>.

circumvent the software by encrypting files, wiping utilities, or using a [*143] steganography program renders computer forensic software as an ineffective method for sex offender management.¹³⁴

On the other hand, field forensic software represents the most fundamental of the software technology available to probation and parole officers because it utilizes many of the techniques already employed by law enforcement agencies, therefore enabling computer searches to be conducted with more frequency during home and field visits.¹³⁵

2. Filtering Software

Filtering software can be used by supervisory agencies to filter or restrict an offender's access to sites, newsgroups, and chat rooms predetermined by a probation officer based on the terms of the offender's probation.¹³⁶ A probation officer can limit an offender's access to certain sites by compiling a list of restricted URLs and newsgroups; a list of keywords, which characterize the inappropriate material; or combining the rated contents of sites "into a profile that characterizes, for a given [offender], an envelope for acceptable sites."¹³⁷ This filtering tool provides an "alternative software method by interrupting Internet data at the ISP source rather than via screenshot monitoring or pre-access blocking methods."¹³⁸ However, filtering software also proves to be an ineffective method of managing offenders because the software only works on the computer on which it is installed, allowing offenders to avoid supervision through the use another computer.¹³⁹

3. Computer Management Systems

Computer management software is used by supervisory agencies to ensure that offenders comply with their conditions of supervision, to improve the safety of the public, and lessen the risk to potential victims.¹⁴⁰ Unlike computer forensic and filtering software, management software makes it possible for probation and parole agencies to avoid the periodic search of an offender's computer because it is directly installed on the computer and [*144] collects relevant information regarding the offender's activities while the computer is in use.¹⁴¹ Once installed, the management software conducts ongoing inspections of how an offender's computer is being used and in some cases restricts how it can be used.¹⁴² These systems normally include "control as well as monitoring capabilities,"

¹³³ Bowker, *supra* note 131.

¹³⁴ *Id.*

¹³⁵ LaMagna & Berejka, *supra* note 129, at 13.

¹³⁶ See R.S. Rosenberg, Controlling Access to the Internet: The Role of Filtering, 3 *Ethics & Info. Tech.* 35, 36 (2001); see also Regina, *supra* note 118, at 202.

¹³⁷ Rosenberg, *supra* note 136, at 36-37.

¹³⁸ Regina, *supra* note 118, at 202-03.

¹³⁹ Sullivan III, *supra* note 71, at 962.

¹⁴⁰ LaMagna & Berejka, *supra* note 129, at 13.

¹⁴¹ *Id.* This software addresses issues associated with an offender's usage of wiping utilities, encryption, and steganography by recording the offender's activities in their entirety, including the suspected criminal activity and efforts to destroy or conceal it. Art Bowker, Managing the Risks Posed by Offender Computer Use, *Perspectives* 40, 45 (2011), available at http://appaweb.csg.org/Perspectives/Perspectives_V35_N4_P40.pdf. See also Bowker, *supra* note 131.

¹⁴² LaMagna & Berejka, *supra* note 129, at 13. Certain management software allow investigators to block an offender's access to pornographic materials and social networking sites, while also restricting their use of the Internet to specific times of the day. Bowker, *supra* note 131.

which can be "precisely configured to set monitoring and alert parameters, detect violations, and avoid infringing on the offender's privacy in his legitimate computer use." ¹⁴³

The time required for probation and parole agencies to review information extracted from the offender's computer could take mere minutes to several hours depending on the amount of notifications received and user activity. ¹⁴⁴ Management software addresses some of the deficiencies associated with forensic software, but suffers from shortcomings of its own. Any noncompliance that occurred prior to installation cannot be detected and it only regulates the computer on which it is installed. ¹⁴⁵ In addition, an offender must be connected to the Internet in order for an officer to receive alerts and notifications regarding an offender's noncompliance. ¹⁴⁶

4. Remote Computer Management Systems

Remote computer management technology integrates the advanced features of the computer management software with the ability to remotely monitor and control an offender's computer use via the Internet on a real time basis. ¹⁴⁷ Remote management software relies on "forced gateway techniques" to transmit alerts and monitoring reports for immediate review. ¹⁴⁸ The Internet server processes data of the offender's computer and Internet activities against "rules and parameters set up by the agency" and notifies the officer of instances of noncompliance. ¹⁴⁹

[*145] Prior to installing the monitoring software on the offender's computer, the supervising officer may use forensic software such as Field Search ¹⁵⁰ to learn and gather enough information about the offender's online activities to be able to detect any potential deviation from the prescribed conditions of supervised release. ¹⁵¹ Through these examinations officers can identify "key words and phrases that can be used by the computer management software to trigger alerts and establish control parameters to mitigate risk of re[-]offense." ¹⁵²

At the culmination of the information gathering stage, the officer removes any inappropriate material from the offender's hard drive and installs the monitoring software. ¹⁵³ Once the software is installed, it automatically runs in the background whenever the computer is started and usage reports are forwarded to the officer. ¹⁵⁴ To manage

¹⁴³ LaMagna & Berejka, supra note 129, at 13.

¹⁴⁴ Bowker, supra note 141, at 45; see also LaMagna & Berejka, supra note 129, at 13.

¹⁴⁵ Bowker, supra note 131.

¹⁴⁶ Id.

¹⁴⁷ LaMagna & Berejka, supra note 129, at 13.

¹⁴⁸ Id. With this software, "officers can receive timely notification of problem behaviors within minutes of their occurrences instead of depending on the next scheduled search." Bowker, supra note 131.

¹⁴⁹ LaMagna & Berejka, supra note 129, at 13-14.

¹⁵⁰ Field Search, JUSTNET, https://www.justnet.org/fieldsearch/fs_main.html (last visited Jan. 14, 2013) ("Field Search is a suite of software products developed by the National Law Enforcement and Corrections Technology Center (NLECTC) ... for use in the field by non-technical criminal justice personnel to allow them to quickly and efficiently search a target computer and create a detailed report of findings."). In conducting their initial investigation of an offender's computer, officers should focus on three primary targets: the Internet History Records, which stores the URLs of all visited pages; image and media searches; and text searches based on specific key words. Tanner, supra note 132, at 4-6.

¹⁵¹ LaMagna & Berejka, supra note 129, at 14.

¹⁵² Id.

¹⁵³ Jim Tanner, Rethinking Computer Management of Sex Offenders Under Community Supervision 4 (2007), available at <http://www.kbsolutions.com/rcm.pdf>. Officers can rely on wiping or overwriting software like Eraser, CyberScrub, BCWipe, or SecureClean to completely destroy the illicit files from the offender's computer. Id.

computer use remotely, supervising officers can access data pertaining to the offender's activities by logging into the vendor's Internet server from an Internet-enabled computer.¹⁵⁵ Most remote management software can be installed without changing the offender's computer, but, in some instances, "security software residing on the offender's computer may need to be modified." However, even an inexperienced officer can easily achieve this by calling the vendor for guidance.¹⁵⁶

[*146]

[SEE FIGURE IN ORIGINAL]

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B. Remote Monitoring Best Serves the Purpose of the Guidelines While Safeguarding the Offender's Liberties

Remote monitoring proves to be the best method available for probation officers to enforce conditions of supervised release for convicted sex offenders. Although the software is not without limitations, supervising officers should apply this method in combination with forensic software to overcome its shortcomings and make the software more effective. Remote monitoring will enable officers to conduct ongoing examinations of an offender's computer to ensure compliance, while forensic software will allow them to inspect an offender's computer for evidence of noncompliance prior to installing the monitoring software. For the courts, embracing monitoring technology will be instrumental in striking a balance on the Internet restrictions dilemma while comporting with the purpose of the Guidelines.

[*147] The enthusiastic response from the law enforcement community regarding the use of remote monitoring in carrying out their supervisory duties serves as a testament to the effectiveness of the software in monitoring computer and Internet activity and preventing further victimization.¹⁵⁸ In discussing the software's effectiveness, one officer stated, "I review the data to get valuable insight into my cases' risk. If I see things that concern me about a particular case, I shuffle my field visits such that I make certain I get to that case first."¹⁵⁹ Another officer's application of the software aided him in preventing a child from being victimized by an offender:

Several years ago, Officer Brian Kelly, a Senior U.S. Probation Officer ... took advantage of having remote access to monitor the computer activities of a convicted sex offender in his mid-20s. It was 11:00 p.m. on a Friday evening and he found that the offender had been instant messaging and was planning to rendezvous with a 13 year-old girl the following day... . The next morning, Officer Kelly conducted an analysis of the most recent data being captured from the offender's computer... . He found the offender had recently posted messages on the board and that the messages weren't coming from the offender's home computer (another violation)... . Officer Kelly and his colleagues responded to that location, but when they arrived the offender had already left. They found the offender at his home and intervened before the 13 year-old child's safety was jeopardized. Officer Kelly asserts, "Without computer monitoring, we wouldn't have even known about that meeting!"¹⁶⁰

¹⁵⁴ *Id.*

¹⁵⁵ *Id. at 5.* Once the officer has access to the server, he can "generate reports, spot check offenders' activities on demand or in response to alerts, and conduct near real time review of ongoing computer and Internet use." LaMagna & Berejka, *supra* note 129, at 13-14.

¹⁵⁶ *Id. at 14.*

¹⁵⁷ *Id. at 15* fig.1 (Report generated from IPPC's Impulse Control remote computer management software).

¹⁵⁸ *Id. at 18.*

¹⁵⁹ *Id. at 14* (internal quotation marks omitted).

¹⁶⁰ *Id.*

Conclusion

Uniformity among the circuit courts is a necessity in order to effectively deal with the issue of child pornography. Internet restrictions for sex offenders convicted of crimes against children are necessary to prevent the further dissemination of pornographic material involving children and to deter the offender from potential abuses. The courts should impose Internet restrictions on convicted sex offenders that are specifically tailored to the offender's particular circumstances and computer knowledge. To safeguard against a deprivation of the offender's liberties, the courts should only restrict access to materials and websites of a pornographic nature to afford the offender the ability to function within modern society.

[*148] In order to ensure that convicted sex offenders follow the conditions of their supervised release, the court should also attempt to police, through the probation office, the online activity of these offenders. Remote computer management software exists that will allow probation officers to: monitor offenders' computer and Internet use and alert officers of violations on a close to real-time basis; restrict the nature and extent of offenders' Internet activities; deter high-risk computer and Internet use behavior because the offender knows that their activities will be detected; and configure the software to protect the rights of the offender.

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