

# Cyber Crime and Punishment: Filtering Out Internet Felons

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## INTRODUCTION

On January 21, 2003, Kevin Mitnick once again became a free man.<sup>1</sup> In 1999, the hacker once labeled “the most-wanted computer criminal in U.S. history” by the government<sup>2</sup> pled guilty to “possession of unauthorized access devices with intent to defraud in violation of [18 U.S.C. § 1029(a)(3)].”<sup>3</sup> Mitnick’s prison term ended in January 2000, after which he was subjected to a three-year period of supervised release.<sup>4</sup> During this period, he was denied access to “computers, computer-related equipment and certain telecommunications devices, including cellular telephones,” without the prior approval of his probation officer.<sup>5</sup> The terms of Mitnick’s release prohibited him from using the Internet during this period,<sup>6</sup> a probation condition that has become a controversial issue and has generated disagreement among the

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<sup>1</sup> See Matt Richtel, *Barring Web Use After Web Crime*, N.Y. TIMES, Jan. 21, 2003, at A1.

<sup>2</sup> *Id.*

<sup>3</sup> United States v. Mitnick, No. 97-50365, 1998 U.S. App. LEXIS 10836, at \*1 (9th Cir. May 20, 1998).

<sup>4</sup> See Richtel, *supra* note 1 (noting that Mitnick was released from prison in January 2000 and that he could not use the Internet until January 2003).

<sup>5</sup> *Mitnick*, 1998 U.S. App. LEXIS 10836, at \*2.

<sup>6</sup> See Richtel, *supra* note 1.

courts.<sup>7</sup> According to Mitnick, “[n]ot being allowed to use the Internet is kind of like not being allowed to use a telephone”<sup>8</sup>—an argument that has been embraced by some courts.<sup>9</sup> On the other hand, proponents of banning Internet access by cyber-criminals focus on the Internet’s role in committing the crime and reject the argument that Internet restrictions entail a great hardship.<sup>10</sup>

The abundant data on the extent of Internet use shows that the Internet has become an indispensable tool for a myriad of uses.<sup>11</sup> As such, it has revolutionized information gathering and communication and has transformed the economy.<sup>12</sup> The number of people using online resources has grown rapidly in recent years and continues to proliferate.<sup>13</sup> For these reasons, it seems that supervised release conditions that ban or restrict Internet use would hamper an individual’s access to an extremely valuable medium and, thus, should not be permitted. In fact, several felons have challenged such deprivations as unconstitutional, often based on First Amendment guarantees of freedom of association and of the press.<sup>14</sup> Sentencing courts, however, are granted wide discretion in determining supervised release conditions and must balance the protection of the public with the liberty interests of the convicted individual.<sup>15</sup> In so doing, some courts have given greater weight to the former consideration and have upheld the conditions;<sup>16</sup> others have emphasized the latter in rejecting such sentencing conditions.<sup>17</sup> In light of the broad discretion of the courts, they clearly have the authority to impose such conditions. Courts

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<sup>7</sup> See *id.* (noting that U.S. circuit courts of appeal have reached different conclusions as to the validity of Internet-use restrictions).

<sup>8</sup> Associated Press, *F.C.C. Lets Convicted Hacker Go Back On Air* (Dec. 27, 2002) [hereinafter Associated Press, *Hacker Back On Air*], available at 2003 WL 3734116.

<sup>9</sup> See discussion *infra* Part II.A.

<sup>10</sup> See discussion *infra* Part II.B.

<sup>11</sup> See discussion *infra* Part I.B.

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> E.g., *United States v. White*, 244 F.3d 1199 (10th Cir. 2001); *United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999); *United States v. Mitnick*, No. 97-50365, 1998 U.S. App. LEXIS 10836, at \*1 (9th Cir. May 20, 1998); see also discussion *infra* Part III.B (discussing First Amendment challenges to probation conditions).

<sup>15</sup> See discussion *infra* Part I.A.

<sup>16</sup> See discussion *infra* Part II.B.

<sup>17</sup> See discussion *infra* Part II.A.

determining the appropriateness of such conditions, however, should focus narrowly on the Internet's role in facilitating the crime and whether the restriction will prevent the underlying criminal conduct.

Part I of this Note will introduce the federal guidelines and goals used to determine supervised release conditions and will discuss the extent to which the Internet has become a routine and necessary feature of society. Part II will address the split among courts that have upheld or overturned Internet-use bans as a part of supervised release. Part III will explore the factors that these courts have employed in making their decisions by distinguishing different types of computer crime and comparing the ban on Internet use to other instances where convicts have been deprived of what are normally considered fundamental rights and liberties. This part will argue that given the pervasiveness of Internet use in modern society and the Internet's fundamental role in facilitating communication, courts should tailor supervised release conditions carefully to reflect how the Internet use related to the criminal act.

#### I. SENTENCING DISCRETION VERSUS THE NATURE OF THE INTERNET

At the heart of the controversy surrounding supervised release restrictions on Internet use is the tension between the broad discretion courts may exercise in the area of supervised release conditions and the Internet's pervasiveness in modern society.<sup>18</sup> A court must use its discretion to consider its competing obligations to society and to the convict poised to reenter society, with certain statutory criteria to guide its decisions.<sup>19</sup> These decisions become even more complex if the realities of modern life—in this case, the

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<sup>18</sup> See generally Brian W. McKay, Note, *Guardrails on the Information Superhighway: Supervising Computer Use of the Adjudicated Sex Offender*, 106 W. VA. L. REV. 203, 219–33 (2003) (discussing the split among U.S. circuit courts of appeal with respect to Internet bans).

<sup>19</sup> See U.S. SENTENCING COMMISSION, GUIDELINES MANUAL §§ 5D1.1–.3 (guidelines on imposing a term of supervised release); see also Harold Baer, Jr., *The Alpha & Omega of Supervised Release*, 60 ALB. L. REV. 267, 269–85 (1996) (discussing the requirements for imposing a term of supervised release).

extent to which the Internet has become an essential means of communication—are also considered.

*A. Sentencing Guidelines and Goals*

In general, courts may exercise considerable discretion in determining whether to sentence an offender to a term of supervised release and what the conditions should be, limited by the class of felony.<sup>20</sup> Under 18 U.S.C. § 3583, a court choosing to include such a term must impose on the defendant certain mandatory restrictions, principally addressing the commission of other crimes as well as the use of controlled substances.<sup>21</sup> In addition, the penultimate sentence of section 3583(d) states that a court may order “any other condition it considers to be appropriate,”<sup>22</sup> thus conferring broad discretion upon courts to establish further conditions.

The judgment of the courts is subject to three limitations, however. First, section 3583(d)(1) states that the condition must be “reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D).”<sup>23</sup> These factors are “the nature and circumstances of the offense and the history and characteristics of the defendant”<sup>24</sup> and the need for the sentence, *inter alia*, to deter criminal conduct, protect the public, and provide the

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<sup>20</sup> See generally 18 U.S.C. § 3583(a) (2000) (inclusion of a term of supervised release after imprisonment); 18 U.S.C. § 3583(b) (listing the authorized time periods of supervised release for each class of felony, the longest of which is five years).

<sup>21</sup> See 18 U.S.C. § 3583(d) (conditions of supervised release).

<sup>22</sup> *Id.* The section states, in pertinent part:

The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and *any other condition it considers to be appropriate.*

*Id.* (emphasis added).

<sup>23</sup> 18 U.S.C. § 3583(d)(1).

<sup>24</sup> 18 U.S.C. § 3553(a)(1) (2000).

defendant with educational training or medical care.<sup>25</sup> Several courts have found Internet bans appropriate based on these factors,<sup>26</sup> suggesting that this provision of Section 3583(d) does not significantly limit a sentencing court's discretion.<sup>27</sup>

Second, section 3583(d)(2) sets forth another important limitation, prohibiting the infliction of any "greater deprivation of liberty than reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C) and (a)(2)(D)."<sup>28</sup> This factor has been critical in the decisions of several appeals courts to reject release conditions prohibiting Internet access, based upon their perception of the role of the Internet with respect to everyday activities.<sup>29</sup> The third limitation is that the condition must be "consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)," which generally refers to various provisions and purposes of title 18.<sup>30</sup>

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<sup>25</sup> See 18 U.S.C. § 3553(a)(2).

<sup>26</sup> See *infra* Part II.B.

<sup>27</sup> For example, in *United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999), the U.S. Court of Appeals for the Third Circuit needed only one paragraph to find a district court's Internet restrictions acceptable under the standards of 18 U.S.C. § 3583(d)(1). See *id.* at 127–28. The issue under section 3583(d)(2)—whether the restrictions constituted a greater deprivation of liberty than reasonably necessary—received more extensive analysis. See *id.* at 128.

<sup>28</sup> 18 U.S.C. § 3583(d)(2); see also *supra* notes 24–25 and accompanying text (listing the relevant provisions of 18 U.S.C. § 3553).

<sup>29</sup> See *infra* Part II.A.

<sup>30</sup> 18 U.S.C. § 3583(d)(3). 18 U.S.C. § 994(a) states:

The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

Clearly, courts have the authority to decide that an offender should be banned from using the Internet, as long as this condition comports with the factors described above. The question remains, however, whether this power should be used to fashion such a condition, given the Internet's prevalence in modern society. The difficulty lies in balancing the sentencing goals of protecting the public and the liberty of the individual, in a context where the Internet has become synonymous with the free flow of information, ideas, and communication.

### *B. Internet Use*

Much of the information about Internet use that the courts rely upon seems to be based on anecdotal evidence,<sup>31</sup> but there is a great deal of empirical evidence on the subject as well.<sup>32</sup> Several courts, such as those in *United States v. Sofsky*,<sup>33</sup> *United States v. Peterson*,<sup>34</sup> and *United States v. White*<sup>35</sup> have emphasized the

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(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

<sup>31</sup> See, e.g., *infra* notes 78, 99–101 and accompanying text.

<sup>32</sup> See *infra* notes 39–65.

<sup>33</sup> 287 F.3d 122 (2d Cir. 2002).

<sup>34</sup> 248 F.3d 79 (2d Cir. 2001).

<sup>35</sup> 244 F.3d 1199 (10th Cir. 2001).

ubiquity of the Internet in overturning sentencing conditions that banned Internet use.<sup>36</sup> Courts affirming such restrictions, such as the U.S. Court of Appeals for the Third Circuit in *United States v. Crandon*,<sup>37</sup> have acknowledged the Internet's prevalence, but ultimately justified their rulings on alternative factors.<sup>38</sup>

The Internet's pervasiveness and explosive growth is well described in a 2002 U.S. Commerce Department Report, titled "A Nation Online: How Americans Are Expanding Their Use of the Internet" ("Commerce Department report"): "Few technologies have spread as quickly, or become so widely used, as computers and the Internet. These information technologies are rapidly becoming common fixtures of modern social and economic life, opening opportunities and new avenues for many Americans."<sup>39</sup> Indeed, a significant portion of the population now relies on the Internet to conduct various activities of daily life, as it is a powerful tool with countless practical uses, including communication, education, research, employment, shopping, and entertainment.<sup>40</sup> According to Jeffrey Cole, director of the University of California, Los Angeles ("UCLA") Center for Communication Policy, "The Internet has surpassed all other major information sources in importance after only about eight years as a generally available communications tool."<sup>41</sup> A year-to-year UCLA study found that among Internet users, the Internet ranked above books, newspapers, television, radio, and magazines as a very important or extremely important information source.<sup>42</sup>

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<sup>36</sup> See *infra* Part II.A.

<sup>37</sup> 173 F.3d 122 (3d Cir. 1999).

<sup>38</sup> See *infra* Part II.B.

<sup>39</sup> DEP'T OF COMMERCE, A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET 1 (2002), available at <http://www.ntia.doc.gov/ntiahome/dn> (last visited Mar. 24, 2004). The report, generated with U.S. Census Bureau data, was jointly prepared by two Commerce Department agencies: the Economics and Statistics Administration and the National Telecommunications and Information Administration. See *id.*

<sup>40</sup> See *infra* notes 42–65.

<sup>41</sup> Dawn Kawamoto, *Net Ranks as Top Information Source*, ZD Net News, at <http://zdnet.com.com/2100-1105-982995.html> (Jan. 31, 2003).

<sup>42</sup> See UCLA CTR. FOR COMMUNICATION POLICY, THE UCLA INTERNET REPORT: SURVEYING THE DIGITAL FUTURE 82 (2003) (noting that nearly three-quarters of Internet users consider the Internet to be a very important or extremely important source of information, a ranking higher than for books, television, radio, newspapers, or

Other studies have focused on the types of information gathered on the Internet, demonstrating that its utility as an information source has many aspects.<sup>43</sup> For example, one study concluded that about two-thirds of all Americans, Internet users and non-users alike, expect to find information about health care, government agencies, news, and commerce on the Internet.<sup>44</sup> Among Internet users alone, the study concluded that about eighty percent expected to find such information online.<sup>45</sup> Furthermore, thirty-nine percent of all Americans said that they would first turn to the Internet for government information, and thirty-one percent would first look online for health-care information.<sup>46</sup> Along with underscoring expectations about the accessibility and dependability of this information, this result also indicates that people are willing to rely on the Internet as their initial source of information about two essential, even personal, issues. Indeed, the court in *United States v. White* compared the Internet to books, based on the instant access to the information it provides.<sup>47</sup>

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magazines), available at <http://ccp.ucla.edu/pages/internet-report.asp> (last visited Mar. 19, 2004).

<sup>43</sup> See JOHN B. HARRIGAN & LEE RAINIE, PEW INTERNET & AMERICAN LIFE PROJECT, COUNTING ON THE INTERNET 5 (2002) (“The dissemination of the Internet has transformed how many Americans find information and altered how they engage with many institutions, such as government, health care providers, the news media, and commercial enterprises.”), available at <http://www.pewInternet.org/reports/toc.asp?Report=80> (last visited April 8, 2004).

<sup>44</sup> See *id.* at 2. The study found that sixty-five percent of all Americans expect to find government-agency information or services on the World Wide Web. *Id.* Additionally, sixty-three percent of all Americans expect that a business will have a Web site giving them information about a product they are considering buying; sixty-nine percent expect to find reliable, current news online; and sixty-seven percent expect to find reliable information about health or medical conditions on the Web. *Id.*

<sup>45</sup> See *id.* The study found that eighty-two percent of Internet users expect to find to find government-agency information or services online; seventy-nine percent expect that a business will have a Web site giving them information about a product they are considering buying; eighty-five percent expect to find reliable, current news online; and eighty-one percent expect to find reliable information about health or medical conditions on the Web. *Id.*

<sup>46</sup> *Id.* at 8.

<sup>47</sup> See *United States v. White*, 244 F.3d 1199, 1207 (10th Cir. 2001) (“The communication facilitated by [information technology] may be likened to that of the telephone. Its instant link to information is akin to opening a book.”).

With Internet use expanding across the population—regardless of income, education, race, age, ethnicity, or gender<sup>48</sup>—the Internet also is furthering democratic governance by helping local officials and their constituents communicate.<sup>49</sup> A Pew Internet & American Life Project (“Pew”) survey of 2,000 mayors and city council members concluded that “local officials have embraced the Internet as part of their official lives and most now use email to communicate with constituents,” noting that that eighty-eight percent of local officials use the Internet in the course of their official duties.<sup>50</sup> Among these “online officials,” sixty-one percent use e-mail to communicate with citizens at least weekly, and seventy-five percent use the World Wide Web (“Web”) at least weekly for research in the course of their official duties.<sup>51</sup> Furthermore, the survey indicated that local officials learn about their constituents’ activities and opinions through the Internet, and more local groups are getting recognized or heard in this fashion.<sup>52</sup> Therefore, in addition to learning about government services on the Internet, people are increasingly going online to communicate with their representatives and to participate in civic affairs, while elected officials have turned to the Internet to communicate with their constituents.<sup>53</sup> The Internet is not the exclusive method by which citizens participate in government, but such use will likely

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<sup>48</sup> See DEP’T OF COMMERCE, *supra* note 39, at 1.

<sup>49</sup> See Christopher Swope, *E-Gov’s New Gear*, GOVERNING, Mar. 2004 (noting that states, cities, and counties are “trying out new modes of interactivity, channeling public participation both over the Internet and in face-to-face high-tech town hall meetings”), available at <http://www.governing.com/archive/2004/mar/interact.txt> (last visited April 9, 2004).

<sup>50</sup> ELENA LARSEN & LEE RAINIE, DIGITAL TOWN HALL 1 (2002) (prepared for the Pew Internet & American Life Project), available at <http://www.pewinternet.org/reports/-toc.asp?Report=74> (last visited March 25, 2004).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* The report does caution, however, that “while the use of email adds to the convenience and depth of civic exchanges, its use is not ushering a revolution in municipal affairs or local politics.” *Id.*

<sup>53</sup> See, e.g., Charles Bermant, *E-Mails to Officials Can Help You Blow Off Steam*, SEATTLE TIMES, Jan. 10, 2004 (urging residents to write e-mail messages to local officials and stating that letter writers “should expect an individual look-in-the-eye response”), available at [http://seattletimes.nwsourc.com/html/inbox/2001833798\\_ptinbo10.html](http://seattletimes.nwsourc.com/html/inbox/2001833798_ptinbo10.html) (last visited March 25, 2004).

continue to grow, potentially putting those deprived of Internet use at a disadvantage in these essential matters.

Searching for employment is another rapidly growing type of Internet use.<sup>54</sup> Between March 2000 and May 2002, the number of Americans who looked for employment online increased by sixty percent, according to another Pew study.<sup>55</sup> Although percentages of Internet users looking for jobs online vary by sex, race, age, and class, forty-seven percent of all adult Internet users in the United States have looked online for job information.<sup>56</sup> In addition, the study found that fifty-two million Americans have looked on the Web for information about jobs, “and more than [four] million do so on a typical day.”<sup>57</sup> Furthermore, this study indicates that many have found the Internet useful in obtaining additional job training.<sup>58</sup> These numbers show that the Internet is now widely used for researching employment opportunities. Some obvious reasons for this growth include the efficiency of using online services, such as Vault.com and Monster.com, to research job opportunities throughout the country and distribute résumés, as well as the facility with which users can search online editions of newspapers from other locales.<sup>59</sup>

The Internet is not only widely used to find employment, but also has become ubiquitous in the workplace as well.<sup>60</sup> Employed

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<sup>54</sup> See *infra* notes 55–59; see also Lorraine Farquharson, *The Best Way to . . . Find a Job*, WALL ST. J., Sept. 15, 2003 (discussing different ways to use the Internet to find a job).

<sup>55</sup> ANGIE BOYCE & LEE RAINIE, ONLINE JOB HUNTING 1 (July 2002) (prepared for the Pew Internet & American Life Project), available at <http://www.pewinternet.org/reports/-toc.asp?Report=65> (last visited March 25, 2004).

<sup>56</sup> *Id.* at 2.

<sup>57</sup> *Id.* at 1.

<sup>58</sup> See *id.* at 2 (stating that of the forty-seven million Internet users who had sought additional career education or training in the preceding two years, twenty-nine percent reported that their use of the Internet played an important role in their securing the training).

<sup>59</sup> For example, the *New York Times* Web site provides access to job listings at <http://www.nytimes.com/pages/jobs/index.html>.

<sup>60</sup> See DEP'T OF COMMERCE, *supra* note 39, at 60 (“The workplace provides an important venue for many adults to use computers and the Internet.”); DEBORAH FALLOWS, EMAIL AT WORK: FEW FEEL OVERWHELMED AND MOST ARE PLEASED WITH THE WAY EMAIL HELPS THEM DO THEIR JOBS 5 (2002) (prepared for the Pew Internet &

adults ages twenty-five and over use their computer at work more frequently to access the Internet and e-mail than for any other purpose, including word processing, desktop publishing, spreadsheets, databases, and graphics and design, according to the Commerce Department report.<sup>61</sup> About forty-two percent of these workers used the Internet and e-mail at work by September 2001, up from about twenty-six percent in August 2000.<sup>62</sup> These figures demonstrate that Internet use at work has become prevalent and continues to grow, likely due to the ease with which the Internet allows people to communicate. This is an important consideration with respect to Internet use restrictions, especially since such a restriction could last up to five years under the sentencing guidelines, depending on the class of felony.<sup>63</sup>

As yet another Pew study emphasizes, people increasingly turn to the Internet at “major life moments.”<sup>64</sup> Of those Internet users who had experienced one of the major life moments identified in the survey over a certain period, the greatest proportion said that the Internet played a crucial role in choosing a school or college (thirty-six percent), followed by starting a new hobby (thirty-three percent), obtaining additional career training (twenty-nine percent), buying a new car (twenty-seven percent), helping another person deal with a major illness (twenty-six percent), and changing jobs (twenty-five percent).<sup>65</sup>

These results, as well as the findings discussed above, illustrate the myriad of Internet applications to daily life, in which the quest for information is the common denominator. The growth of Internet use is both rapid and widespread, and the variety of

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American Life Project) (“The use of email has become almost mandatory in most U.S. workplaces.”).

<sup>61</sup> See DEP’T OF COMMERCE, *supra* note 39, at 60.

<sup>62</sup> *Id.* at 57, 60.

<sup>63</sup> See 18 U.S.C. § 3583(b) (2000).

<sup>64</sup> See NATHAN KOMMERS & LEE RAINIE, USE OF THE INTERNET AT MAJOR LIFE MOMENTS 2 (2002) (prepared for the Pew Internet & American Life Project) (stating that information on the Web is important to significant numbers of Americans when they are making important choices related to education and job training, investments and large purchases, and health care), available at <http://www.pewInternet.org/reports/toc.asp?Report=58> (last visited March 21, 2004).

<sup>65</sup> *Id.* at 3. The survey questioned 1,415 Internet users about a total of 15 different major life events. *Id.* at 2.

matters for which people increasingly seek information online—from mundane personal choices to significant life decisions—demonstrate a high level of comfort with the information it has to offer.<sup>66</sup>

The conclusion to the Commerce Department report states in part:

The Internet has become a tool that is accessible to and adopted by Americans in communities across the nation. . . .As a result, we are more and more becoming a nation online: a nation that can take advantage of the information resources provided by the Internet, as well as a nation developing the technical skills to compete in our global economy.<sup>67</sup>

In addition to its many social and other practical uses, the Internet is a necessary tool of economic competition, which begs the question: to what extent does deprivation of its use put people at an economic disadvantage?<sup>68</sup> The numerous surveys and studies regarding Internet usage establish an important backdrop against

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<sup>66</sup> See Toni Fitzgerald, *America's Growing Web Dependence*, MEDIA LIFE (discussing a Pew Internet & American Life Project study and expressing surprise at “how quickly Americans have come to trust the information” found on the Internet), at [http://www.medialifemagazine.com/news2003/jan03/jan20/5\\_fri/news1friday.html](http://www.medialifemagazine.com/news2003/jan03/jan20/5_fri/news1friday.html) (Jan. 24, 2003); Press Release, UCLA Ctr. for Communication Policy, First Release of Findings From the UCLA World Internet Project Shows Significant ‘Digital Gender Gap’ in Many Countries (Jan. 14, 2004) (statement of Director Jeffrey Cole) (stating that most Internet users worldwide “generally trust the information they find online”), available at <http://ccp.ucla.edu/pages/NewsTopics.asp?Id=45> (last visited Apr. 9, 2004).

<sup>67</sup> See DEP’T OF COMMERCE, *supra* note 39, at 91.

<sup>68</sup> See, e.g., *United States v. Peterson*, 248 F.3d 79, 83–84 (2d Cir. 2001) (concluding that restrictions on Internet use and computer ownership constitute “an occupational restriction” and noting that the items prohibited under the conditions “include technology that [the defendant] would likely need to hold any computer-related job”); see also Doug Hyne, Note, *Examining the Legal Challenges to the Restriction of Computer Access as a Term of Probation or Supervised Release*, 28 NEW ENG. J. CRIM. & CIV. CONFINEMENT 215, 216 (2002) (“[O]ne can foresee a future where the majority of occupations will, at least in some way, necessitate that an employee use the internet. In light of this fact, restricting the use of the internet as a term of probation may hamper an individual from gaining employment.”).

which to examine supervised release conditions that may limit access to the Internet's abundant uses.<sup>69</sup>

## II. CONFLICTING APPROACHES TO INTERNET CRIME SENTENCING

There are several key factors that the federal appeals courts have weighed in their consideration of supervised release conditions that ban Internet access, computer use, or both.<sup>70</sup> Outcomes have often turned on a particular court's view of the role of the Internet and whether its use was incidental or necessary to commit the crime.<sup>71</sup> While such cases require the examination of several criteria, the principal factors may be gleaned from these highly fact-specific cases.<sup>72</sup>

### A. Indispensability of the Internet and the Deprivation of Liberty

Some courts have concluded that a member of modern society cannot afford to be without Internet or computer access, and, thus, generally have overturned prohibitions on Internet use during the supervised release period.<sup>73</sup> The Second Circuit, for example, developed a position on the Internet to which it has adhered rather strictly in two such decisions.<sup>74</sup> In *United States v. Peterson*,<sup>75</sup> the court struck down an Internet ban imposed on a felon who had pled guilty to bank larceny, was previously convicted of incest, and had

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<sup>69</sup> See Richtel, *supra* note 1 (statement of Jennifer S. Granick, Director, Stanford Center for Internet and Society) ("The A.T.M. is a computer; the car has a computer; the Palm Pilot is a computer. Without a computer in this day and age, you can't work, you can't communicate, you can't function as people normally do in modern society.").

<sup>70</sup> See discussion *infra* Parts II.A–B.

<sup>71</sup> Compare *Peterson*, 248 F.3d at 82 (holding that restrictions on defendant's computer ownership and Internet access are not reasonably related, *inter alia*, to the nature and circumstances of the offense), with *United States v. Crandon*, 173 F.3d 122, 127–28 (3d Cir. 1999) (noting that defendant used the Internet "as a means to develop an illegal sexual relationship with a young girl" and concluding that a restriction on defendant's Internet access is "related to the dual aims of deterring him from recidivism and protecting the public").

<sup>72</sup> See discussion *infra* Parts II.A–B.

<sup>73</sup> E.g., *United States v. Freeman*, 316 F.3d 386, 391–92 (3d Cir. 2003); *United States v. Sofsky*, 287 F.3d 122, 124 (2d Cir. 2002); *Peterson*, 248 F.3d at 81–84; *United States v. White*, 244 F.3d 1199, 1206–08 (10th Cir. 2001).

<sup>74</sup> See *Sofsky*, 287 F.3d 122; *Peterson*, 248 F.3d 79.

<sup>75</sup> 248 F.3d 79.

accessed legal adult pornography on his home computer.<sup>76</sup> The court found that the prohibition was not “‘reasonably related’” to Peterson’s offense,<sup>77</sup> and clarified its position with respect to the Internet:

Computers and Internet access have become virtually indispensable in the modern world of communications and information gathering. The fact that a computer with Internet access offers the possibility of abusive use for illegitimate purposes does not, at least in this case, justify so broad a prohibition. Although a defendant might use the telephone to commit fraud, this would not justify a condition of probation that includes an absolute bar on the use of telephones. Nor would defendant’s proclivity toward pornography justify a ban on all books, magazines, and newspapers.<sup>78</sup>

In comparing the Internet to commonplace items such as the telephone and newspapers, the court signaled in this instance that the value of the Internet outweighed the potential for abuse.<sup>79</sup> Peterson’s Internet restrictions also prohibited the use of “‘commercial computer systems/services’ for employment purposes without a probation officer’s permission,”<sup>80</sup> in addition to a complete ban on all technology (such as a CD-ROM and other storage devices) necessary to connect to the Internet or even to work at a computer-related job, as the Second Circuit noted.<sup>81</sup> The court noted that the defendant “‘consistently worked in computer-related jobs and, beginning in May 1997, operated his own computer business” and, thus, concluded that the Internet and computer restrictions were not reasonably related to the bank

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<sup>76</sup> *Id.* at 81, 84.

<sup>77</sup> *Id.* at 82 (citing 18 U.S.C. § 3563(b)).

<sup>78</sup> *Id.* at 83 (computer restriction which “would bar [defendant] from using a computer at a library to do any research, get a weather forecast, or read a newspaper online” was excessively broad) (citing *White*, 244 F.3d at 1206).

<sup>79</sup> *See id.*; see also Donna A. Gallagher, Comment, *Free Speech on the Line: Modern Technology and the First Amendment*, 3 *COMMLAW CONSPECTUS* 197, 199 (1995) (arguing that although electronic bulletin board services can facilitate abuse, “the positive impact of the Internet greatly outweighs the negative”).

<sup>80</sup> *Peterson*, 248 F.3d at 83.

<sup>81</sup> *See id.* at 81, 83–84.

larceny conviction.<sup>82</sup> The sentencing condition would unnecessarily hamper such employment during the supervised release period, the court found.<sup>83</sup>

Applying the reasoning in *Peterson*, the Second Circuit reversed an Internet ban in another notable case, *United States v. Sofsky*.<sup>84</sup> Gregory Sofsky pled guilty to receiving child pornography in light of evidence that he downloaded over 1,000 images of child pornography from the Internet and exchanged images with others online.<sup>85</sup> He was sentenced to ten years in prison, to be followed by a term of supervised release during which, *inter alia*, he was not allowed to access the computer or Internet without approval of a probation officer.<sup>86</sup> Sofsky's conduct was more closely related to the Internet than the offense in *Peterson*,<sup>87</sup> and the conditions allowed Sofsky to obtain approved access.<sup>88</sup> In addition, the court acknowledged that Sofsky's access to computers and the Internet could "facilitate . . . his electronic receipt of child pornography."<sup>89</sup> The court relied on its stance in *Peterson* to vacate the ban and remand the case to the district court for a more restricted condition, however, finding that it "inflict[ed] a greater deprivation on Sofsky's liberty than [was] reasonably necessary,"<sup>90</sup> in the language of the federal supervised release guidelines.<sup>91</sup>

The *Sofsky* court expanded upon the statement in *Peterson* that a defendant's use of the telephone to commit fraud would not justify a complete ban on telephone use:<sup>92</sup> "The same could be said of a prohibition on the use of the mails imposed on a defendant

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<sup>82</sup> *Id.* at 84.

<sup>83</sup> *See id.*

<sup>84</sup> *See Sofsky*, 287 F.3d 122.

<sup>85</sup> *Id.* at 124.

<sup>86</sup> *Id.*

<sup>87</sup> *See supra* note 76 and accompanying text (noting that defendant in *Peterson* had pled guilty to bank larceny and was previously convicted of incest, and had accessed legal adult pornography on his home computer).

<sup>88</sup> *Sofsky*, 287 F.3d at 124.

<sup>89</sup> *Id.* at 126.

<sup>90</sup> *Id.*

<sup>91</sup> *See supra* note 28 and accompanying text.

<sup>92</sup> *See Sofsky*, 287 F.3d at 126 (citing *Peterson*, 248 F.3d at 83); *see also supra* note 78 and accompanying text.

convicted of mail fraud. A total ban on Internet access prevents use of e-mail, an increasingly widely used form of communication . . . .”<sup>93</sup> This line of reasoning indicates a reluctance to identify the Internet as the root of the underlying conduct, although in this case the court acknowledged that the Internet could facilitate the continuation of the criminal act for which the defendant was convicted.<sup>94</sup> However, the fact that the Internet was incidental to the commission of the underlying crime—that is, the crime could have been committed without going online—may have made the court less willing to restrict access to the Internet for legitimate purposes.<sup>95</sup> Although Sofsky could seek approval from his probation officer to use the Internet, the court still concluded that the condition was too restrictive, and that the possibility for abuse should not prevent access to such indispensable technology.<sup>96</sup>

Other circuits have relied on similar reasoning. For example, the Tenth Circuit in *United States v. White* was unwilling to uphold an Internet ban in the sentencing of Robert Emerson White, who was caught purchasing child pornography videos online by a government sting operation.<sup>97</sup> The court took issue with the wording of the condition, which stated that White “shall not possess a computer with Internet access throughout his period of supervised release.”<sup>98</sup> The court thought that a restriction on the *possession* of a computer with Internet access “missed the mark” if the district court intended to prevent access to online child pornography, since White could simply access the Internet on a computer he did not own.<sup>99</sup> The court also thought that if

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<sup>93</sup> *Sofsky*, 287 F.3d at 126.

<sup>94</sup> *Id.* at 126, 127.

<sup>95</sup> The distinction between Internet crime and Internet-related crime is discussed further in Part III.A of this Note.

<sup>96</sup> *See Sofsky*, 287 F.3d at 126–27. The court suggested that a more focused restriction, limited to pornography sites and images, could be enforced by unannounced inspections of the defendant’s premises and examination of material stored on his or her computer and software. *Id.* at 127. In addition, the court noted that the government could conduct a sting operation on the defendant—“surreptitiously inviting him [or her] to respond to Government placed Internet ads for pornography.” *Id.*

<sup>97</sup> *United States v. White*, 244 F.3d 1199, 1201 (10th Cir. 2001).

<sup>98</sup> *Id.* at 1205.

<sup>99</sup> *Id.*

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“possess” were to entail “the concept of use,” however, then the condition was overbroad:

That reading would bar White from using a computer at a library to do any research, get a weather forecast, or read a newspaper online. Under these circumstances, the special condition is “greater than necessary,” and fails to balance the competing interests the sentencing court must consider.<sup>100</sup>

The court clearly views the Internet as an essential tool with many basic uses, and, as in *Peterson* and *Sofsky*, associates it with other fundamental resources: “The communication facilitated by this technology may be likened to that of the telephone. Its instant link to information is akin to opening a book.”<sup>101</sup>

In this same vein, the Third Circuit denied an Internet ban where a felon pled guilty to possession and receipt of child pornography,<sup>102</sup> which ostensibly did not involve the Internet.<sup>103</sup> The court relied heavily on *Sofsky* for the proposition that forbidding the felon, Robb Walker Freeman, from possessing a computer or using any online computer service without written permission of his probation officer was too great a deprivation of liberty.<sup>104</sup> Furthermore, the court noted that it was not necessary to prevent “access to email or benign internet usage, when a more focused restriction, limited to pornography sites and images, can be enforced by unannounced inspections of material stored on Freeman’s hard drive or removable disks.”<sup>105</sup>

Evidently, some courts have focused on the nature of the Internet as an indispensable tool with many practical and commonplace uses in rendering their decisions about conditions of supervised release that ban or severely restrict Internet use.<sup>106</sup> Even in situations where the Internet played a role in the commission of the crime, these courts have deemed a ban on

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<sup>100</sup> *Id.* at 1206 (citation omitted).

<sup>101</sup> *Id.* at 1207.

<sup>102</sup> *United States v. Freeman*, 316 F.3d 386, 392 (3d Cir. 2003).

<sup>103</sup> *Id.* at 387.

<sup>104</sup> *See id.* at 391–92.

<sup>105</sup> *Id.* at 392.

<sup>106</sup> *E.g.*, *Freeman*, 316 F.3d 386; *Sofsky*, 287 F.3d 122; *United States v. Peterson*, 248 F.3d 79 (2d Cir. 2001); *White*, 244 F.3d 1199.

Internet use as a greater deprivation of liberty than allowed under the supervised release guidelines.<sup>107</sup> Conversely, other courts have focused on the use of the Internet as essential tool to the commission of the crime in reviewing, and often upholding, Internet use prohibitions instituted by sentencing courts.<sup>108</sup>

*B. The Internet as a Tool of Crime and the Protection of the Public*

When the trial court in *United States v. Mitnick* imposed supervised release conditions on the infamous computer hacker Kevin Mitnick, preventing his use of computers without probation officer approval, he challenged the sentence as restrictive of his First Amendment rights.<sup>109</sup> The U.S. Court of Appeals for the Ninth Circuit upheld the conditions in a terse, unreported opinion, stating simply: “[T]he conditions imposed are reasonably related to legitimate sentencing goals and are no more restrictive than necessary.”<sup>110</sup> Mitnick broke into computer networks of large corporations and stole software, acts that necessitated the use of computers and the Internet.<sup>111</sup> The Ninth Circuit relied on the broad sentencing discretion of the district court to dismiss Mitnick’s challenge, indicating that it viewed his computer use a threat to the public.<sup>112</sup> This leads to the inference that the court considered the Internet an essential tool of Mitnick’s crimes, thus justifying the ban.

In *United States v. Crandon*, another instance of an appellate court upholding an Internet restriction, Richard Crandon pled guilty to one count of receiving child pornography.<sup>113</sup> His crime, however, entailed much more than downloading illicit material; Crandon met a fourteen-year-old girl online, ultimately meeting

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<sup>107</sup> *E.g.*, *Sofsky*, 287 F.3d 122; *White*, 244 F.3d 1199.

<sup>108</sup> *E.g.*, *United States v. Harding*, No. 02-2102, 2003 U.S. App. LEXIS 1371 (3d Cir. Jan. 28, 2003); *United States v. Paul*, 274 F.3d 155 (5th Cir. 2001); *United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999); *United States v. Mitnick*, No. 97-50365, 1998 U.S. App. LEXIS 10836 (9th Cir. May 20, 1998).

<sup>109</sup> 1998 U.S. App. LEXIS 10836, at \*2.

<sup>110</sup> *Id.*

<sup>111</sup> *See Richtel*, *supra* note 1.

<sup>112</sup> *Mitnick*, 1998 U.S. App. LEXIS 10836, at \*2.

<sup>113</sup> *Crandon*, 173 F.3d at 124.

her in person to have sexual relations and take photographs of the encounter.<sup>114</sup> Crandon and the girl repeatedly spoke over the telephone after the visit, discussing the prospect of his return to Minnesota to bring her to his home in New Jersey.<sup>115</sup> Crandon returned to Minnesota the following month, at which time he and the girl departed for New Jersey, although along the way he learned that authorities were looking for them and, thus, he sent her back to Minnesota.<sup>116</sup>

The Third Circuit acknowledged that “computer networks and the Internet will continue to become an omnipresent aspect of American life.”<sup>117</sup> The court, however, rejected Crandon’s argument that the supervised release condition banning access to the Internet or other computer networks without approval of a probation officer was not logically related to his offense, violating his rights of speech and association.<sup>118</sup> The court also rejected the argument that the restrictions preventing “access to any form of computer network”<sup>119</sup> should be vacated because they hindered Crandon’s employment opportunities due to the extent in which businesses have “integrate[d] computers and the Internet into the workplace.”<sup>120</sup> Rather, the court concluded that the restrictions on employment and First Amendment freedoms were acceptable because the special condition “[was] narrowly tailored and [was] directly related to deterring Crandon and protecting the public.”<sup>121</sup>

The court apparently found a direct relationship between the Internet and the crime, unlike in *Peterson*,<sup>122</sup> and was more influenced by the defendant’s use of the Internet to victimize a young girl than by his argument that the restriction would impede his employment opportunities or constitutional rights.<sup>123</sup> Thus, the

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<sup>114</sup> *Id.* at 125.

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

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 128.

<sup>118</sup> *See id.* at 127–28.

<sup>119</sup> *Id.* at 125.

<sup>120</sup> *See id.* at 127–28.

<sup>121</sup> *Id.* at 128.

<sup>122</sup> *See supra* notes 81–82 and accompanying text.

<sup>123</sup> *See Crandon*, 173 F.3d at 128 (rejecting defendant’s argument that “as businesses continue to integrate computers and the Internet into the workplace, the special condition

court emphasized that the Internet was the instrument by which Crandon developed a sexual relationship with the fourteen-year-old girl, from their initial meeting to their continuous communication that resulted in his visit to Minnesota.<sup>124</sup> The fact that the Internet was not merely incidental to the commission of the crime led the court to affirm the sentence as necessary to deter such future conduct and protect the public.<sup>125</sup>

In *United States v. Harding*,<sup>126</sup> the Third Circuit followed its decision in *Crandon* to uphold an Internet ban imposed on Jamie Harding, a man who was found with numerous photographs, computer disks, and videotapes containing pornographic images of children.<sup>127</sup> The district court imposed supervised release conditions banning him from accessing the Internet without the prior approval of his probation officer.<sup>128</sup> Although Harding was apparently permitted to own a computer, the court required him to consent to unannounced inspections of his computer equipment by a probation officer to ensure that he did not connect to an Internet server.<sup>129</sup>

The opinion did not clarify whether the images found on Harding's computer were retrieved from or distributed to others through the Internet;<sup>130</sup> the court did indicate that he possessed a scanner,<sup>131</sup> though that could simply mean that Harding preferred to store the images digitally. Nonetheless, the court compared this instance to *Crandon* to conclude that the ban was justifiable given

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may hamper his employment opportunities upon release, as well as limit his freedoms of speech and association").

<sup>124</sup> See *id.* at 125, 127.

<sup>125</sup> *Id.* at 127–28. The court stated:

In this case, Crandon used the Internet as a means to develop an illegal sexual relationship with a young girl over a period of several months. Given these compelling circumstances, it seems clear that the condition of release limiting Crandon's Internet access is related to the dual aims of deterring him from recidivism and protecting the public.

*Id.*

<sup>126</sup> No. 02-2102, 2003 U.S. App. LEXIS 1371 (3d Cir. Jan. 28, 2003).

<sup>127</sup> *Id.* at \*2.

<sup>128</sup> *Id.* at \*2–\*3.

<sup>129</sup> *Id.* at \*3.

<sup>130</sup> See *id.* at \*2.

<sup>131</sup> *Id.*

the interest in protecting the public and deterring future criminal conduct,<sup>132</sup> although in *Crandon* the Internet was used to contact a future victim directly.<sup>133</sup> Based on this distinction, *Harding* does not seem to fall “within the teachings of *Crandon*,”<sup>134</sup> and seems to contradict the Third Circuit’s decision in *Freeman* (decided the same month as *Harding*) rejecting a ban on Internet use for a defendant who had been convicted of possessing child pornography that he had loaded into his computer.<sup>135</sup> In fact, the Third Circuit distinguished *Freeman* from *Crandon* since there was no evidence that Freeman had used the Internet to contact young children,<sup>136</sup> which also may have been the case in *Harding*.<sup>137</sup> Furthermore, *Harding* contradicts the Second Circuit’s reasoning in *Sofsky*, which the *Freeman* court cited for the proposition that a ban on Internet use would prevent access to “benign internet usage.”<sup>138</sup> In any event, there is some inconsistency within the Third Circuit as to what circumstances support Internet use restrictions as a condition of supervised release.

In *United States v. Paul*, Ronald Scott Paul was restricted from using computers or the Internet in the wake of his prison sentence for knowing possession of child pornography after numerous pornographic images of children were found on his personal computer, in addition to the photographs, magazines, books, and videotapes containing similar images that were found in his home.<sup>139</sup> Paul admitted to having downloaded the computer images from the Internet, but argued that the prohibition was too broad and would restrict his ability to use computers and the Internet for legitimate purposes.<sup>140</sup> The court, however, chose instead to focus on Paul’s use of the Internet and e-mail “to encourage exploitation of children by seeking out fellow ‘boy

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<sup>132</sup> See *id.* at \*4–\*5.

<sup>133</sup> See *supra* text accompanying note 114.

<sup>134</sup> *Harding*, 2003 U.S. App. LEXIS 1371, at \*5.

<sup>135</sup> *United States v. Freeman*, 316 F.3d 386, 391–92 (3d Cir. 2003).

<sup>136</sup> *Id.* at 392.

<sup>137</sup> See *supra* text accompanying notes 130–31.

<sup>138</sup> *Freeman*, 316 F.3d at 392.

<sup>139</sup> *United States v. Paul*, 274 F.3d 155, 158 (5th Cir. 2001).

<sup>140</sup> *Id.* at 168.

lovers' and providing them with advice on how to find and obtain access to 'young friends,'"<sup>141</sup> and to "advise fellow consumers of child pornography how to 'scout' single, dysfunctional parents and gain access to their children and to solicit the participation of like-minded individuals in trips to 'visit' children in Mexico."<sup>142</sup> As in *Crandon*, to which the court in this case analogized, much of Paul's predatory behavior occurred through the Internet, which he used to "initiate and facilitate a pattern of criminal conduct and victimization."<sup>143</sup> Thus, the court reasoned that Paul's crime was, in fact, very closely related to the Internet and affirmed the ban.<sup>144</sup>

The discussion above indicates that the role of the Internet in the commission of the crime is a crucial factor in the determination of whether to uphold a supervised release condition prohibiting its use, although this factor is not necessarily dispositive.<sup>145</sup> For example, the *Sofsky* court overturned the Internet ban for a felon who used the Internet to download child pornography and to exchange it with others, focusing instead on the potential of such a restriction to infringe upon the defendant's liberty.<sup>146</sup> *Sofsky*'s conduct, however, was not as egregious as the use of the Internet to contact potential victims as in *Crandon*,<sup>147</sup> or to teach others how to do the same as in *Paul*.<sup>148</sup> Nonetheless, other factors bearing on whether courts should ban certain offenders from using the Internet altogether must be explored further.

### III. CRITERIA FOR DEVELOPING INTERNET USE RESTRICTIONS

Internet bans only should be permitted in circumstances where they are warranted based upon narrow criteria because they have the potential to inhibit access to a number of resources with respect

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<sup>141</sup> *Id.* at 169.

<sup>142</sup> *Id.* at 168.

<sup>143</sup> *Id.* at 169 (quoting *United States v. White*, 244 F.3d 1199, 1205 (10th Cir. 2001)). Although the *Paul* court quoted the language of *White*, a case that overturned an Internet ban, it distinguished *White* factually and rejected its reasoning. *See id.* at 169–70.

<sup>144</sup> *Id.* at 168–70.

<sup>145</sup> *See, e.g.*, *United States v. Sofsky*, 287 F.3d 122, 124 (2d Cir. 2002).

<sup>146</sup> *See supra* notes 84–96.

<sup>147</sup> *See supra* notes 113–25.

<sup>148</sup> *See supra* notes 139–44.

to many different fundamental uses, such as communication, education, governance, and information gathering.<sup>149</sup> While terms of supervised release tend to last only a few years,<sup>150</sup> restrictions on Internet use may prevent people from further developing important skills, such as those required in the workplace.<sup>151</sup> Such commonplace uses of the Internet are rapidly becoming essential and should not so readily be denied.

As such, courts should consider the manner in which the Internet was employed to commit a crime when fashioning supervised release conditions that restrict Internet use. Attempts have been made to create these distinctions, which focus on the nature of the underlying offense as well as the nature of the Internet use.<sup>152</sup> In addition, comparing the deprivation of Internet use to other types of conditions that implicate certain rights, liberties, and commonplace activities is a useful method of analyzing the way in which courts exercise their sentencing discretion.

#### A. *Internet Crime Versus Internet-Related Crime*

While beneficial in countless ways, the advent of new technologies over recent decades also has given rise to numerous new types of crimes as well as new methods of committing crime in general.<sup>153</sup> Accordingly, there have been attempts to reform

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<sup>149</sup> See discussion *supra* Part I.B.

<sup>150</sup> See, e.g., WILLIAM J. SABOL ET AL., DEP'T OF JUSTICE, OFFENDERS RETURNING TO FEDERAL PRISON, 1986–97, at 2 (2000) (stating that the average term of supervised release imposed during 1998 was forty-one months), available at <http://www.ojp-usdoj.gov/bjs/abstract/orfp97.htm> (last revised Sept. 22, 2000).

<sup>151</sup> See *supra* notes 60–63 and accompanying text.

<sup>152</sup> See discussion *supra* Part III.A.

<sup>153</sup> See Mark D. Rasch, *Criminal Law and the Internet*, in THE INTERNET AND BUSINESS: A LAWYER'S GUIDE TO THE EMERGING LEGAL ISSUES 141, 141 (Joseph F. Ruh, Jr. ed., 1996) (“While computer technology permits business to work more efficiently, communicate more effectively, and become more productive, the computer, as a tool, permits those with less benevolent intention to evade the law. What’s worse, with the advent of new information technologies, more information—and more sensitive information—is stored in a manner which makes it more accessible to more individuals—not all of whom have purely wholesome motives.”).

criminal laws to sufficiently address computer crime.<sup>154</sup> In the process, distinctions between “computer crime” and “computer related crime” have arisen.<sup>155</sup> Similarly, a significant distinction could be drawn between Internet crime and Internet-related crime, based on the respective relationships between the crimes and the Internet.<sup>156</sup>

In attempting to define computer crime, one commentator suggested, “computer crime is a criminal offense for which the knowledge of computers is necessary for the successful commission of the offense.”<sup>157</sup> An analysis of this definition states:

Such a definition distinguishes true *computer crimes* from *computer related crimes* in which computers are used as tools or targets of the criminal offense, but for which knowledge of the workings of a computer is not essential for the successful commission of the offense. Thus, a chain letter typed on a computer’s word processing software and thereafter mailed to victims of a fraudulent solicitation is probably not a computer crime, despite the fact that knowledge of the word processing software facilitated the commission of the offense. A similar chain letter sent out over the Internet, and soliciting electronic funds transfers comes closer to a true computer crime especially if responses are electronically sorted or manipulated.<sup>158</sup>

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<sup>154</sup> DEP’T OF JUSTICE, COMPUTER CRIME & INTELL. PROP. SECTION, THE NATIONAL INFORMATION INFRASTRUCTURE PROTECTION ACT OF 1996: LEGISLATIVE ANALYSIS (1997) (discussing why new computer crime legislation was needed), *available at* [http://www.usdoj.gov/criminal/cybercrime/1030\\_anal.html](http://www.usdoj.gov/criminal/cybercrime/1030_anal.html) (last updated July 31, 2003).

<sup>155</sup> See Rasch, *supra* note 153, at 143.

<sup>156</sup> For instance, Kevin Mitnick’s use of the Internet to hack into computer networks of large corporations should be categorized as an Internet crime, because the crime itself requires Internet technology. See *infra* notes 162–63 and accompanying text. By contrast, Gregory Sofsky’s crime—the receipt of child pornography—did not specifically require the Internet, although the Internet facilitated the crime’s commission. See *United States v. Sofsky*, 287 F.3d 122, 124 (2d Cir. 2002). Thus, such acts should be considered Internet-related crime. See *infra* notes 164–65 and accompanying text.

<sup>157</sup> See Rasch, *supra* note 153, at 143 (citing DONN PARKER, *FIGHTING COMPUTER CRIME* (1983)).

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

Under these criteria, it would seem as if the simple use of the Internet to download illegal material, such as child pornography, would be considered an Internet-related crime. Conversely, a more elaborate scheme requiring use of Internet technology to carry out the crime, such as hacking into protected servers and databases, would rise to the level of direct Internet crime.

Furthermore, in addressing the need to update criminal laws with respect to computers, the Computer Crime and Intellectual Property Section of the U.S. Department of Justice (“DOJ”) has identified the different ways in which computers are connected to crime:

First, a computer may be used as a target of the offense. In these cases, the criminal’s goal is to steal information from, or cause damage to a computer, computer system, or computer network. Second, the computer may be a tool of the offense. This occurs when an individual uses a computer to facilitate some traditional offense such as fraud . . . . Last, computers are sometimes incidental to the offense, but significant to law enforcement because they contain evidence of a crime.<sup>159</sup>

In addition, the DOJ has indicated that “[a]lthough certain computer crimes appear simply to be old crimes committed in new ways (e.g., the bank teller who uses a computer program to steal money is still committing bank fraud), some computer offenses find their genesis in [] new technologies and must be specifically addressed by statute.”<sup>160</sup> Thus, some crimes involving computers are illegal due to underlying criminal conduct, but others arise out of specific use of certain technologies and could not be committed otherwise.<sup>161</sup>

The above analysis regarding computers may be applied to the Internet to demonstrate that there are people who use the Internet to commit crimes that do not require online resources, crimes that

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<sup>159</sup> DEP’T OF JUSTICE, *supra* note 154.

<sup>160</sup> *See id.*; Rasch, *supra* note 153, at 143.

<sup>161</sup> *See* Jo-Ann M. Adams, Comment, *Controlling Cyberspace: Applying the Computer Fraud and Abuse Act to the Internet*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 403, 409–15 (1996) (discussing different categories of crimes committed on the Internet).

they might be predisposed to commit in any case, and there are people who commit crimes that require Internet technology.<sup>162</sup> For example, in Kevin Mitnick's infamous acts of hacking into corporate networks, computers and the Internet would be identified under this analysis as both a target and a tool of the offense.<sup>163</sup> Other cases are less clear on whether the Internet was a necessary tool, or merely incidental to the crime, however. In the Internet child pornography cases such as *Sofsky*, *White*, and *Harding*, in which the defendants used the Internet to download or order illicit materials,<sup>164</sup> computers and the Internet could be viewed either as incidental to the commission of the crime of possessing child pornography, or as tools to facilitate offenses that could have been committed in other ways.<sup>165</sup>

This is a fine distinction, and although courts have broad discretion in imposing supervised release conditions, they should be careful in identifying which type of Internet use has occurred and whether banning Internet use will help deter the conduct underlying the offense, given the Internet's pervasiveness and its many practical functions.<sup>166</sup> For example, the Third Circuit likely would have reached a different result in *Harding*—in which it upheld an Internet ban for a defendant convicted of possessing child pornography on his computer<sup>167</sup>—if it had carefully scrutinized the extent to which the Internet was a required element in the commission of the offense, since child pornography has existed long before the advent of the Internet and surely can be obtained elsewhere.<sup>168</sup> *Crandon* and *Paul* are less clear, but in

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<sup>162</sup> Compare *United States v. Harding*, No. 02-2102, 2003 U.S. App. LEXIS 1371, at \*1 (3d Cir. Jan. 28, 2003) (receiving child pornography), with *United States v. Mitnick*, No. 97-50365, 1998 U.S. App. LEXIS 10836, at \*1 (9th Cir. May 20, 1998) (possession of unauthorized access devices with intent to defraud).

<sup>163</sup> See *supra* notes 109–12 and accompanying text.

<sup>164</sup> *Harding* upheld an Internet ban, while *Sofsky* and *White* overturned the restrictions. See discussion *supra* Part II.

<sup>165</sup> See *supra* text accompanying notes 85, 97, 127 and accompanying text for descriptions of the offenses in these cases.

<sup>166</sup> See discussion *supra* Part I.B.

<sup>167</sup> See *supra* text accompanying notes 126–38.

<sup>168</sup> See Devon Ishii Peterson, Comment, *Child Pornography on the Internet: The Effect of Section 230 of the Communications Decency Act of 1996 on Tort Recovery for Victims Against Internet Service Providers*, 24 U. HAW. L. REV. 763, 766–67 (2002) (discussing

those cases the courts perceived the defendants' respective uses of the Internet to solicit contact with future victims (*Crandon*) or to find others with similar tastes willing to teach them how to target potential victims (*Paul*) as serious threats to public safety—threats uniquely furthered by the Internet.<sup>169</sup> Certainly, these cases come closer to actual Internet crime than the crime in *Harding*, though they do not rise to the level of the crime in *Mitnick*, in which the use of Internet technology was essential to the hacker's illegal breach of secure data systems.<sup>170</sup>

A notable consideration in the analysis of Internet crime and Internet-related crime is that the anonymity, or pseudonymity as it were,<sup>171</sup> afforded by the Internet likely emboldens offenders whose shame or fear of getting caught might otherwise make them more reluctant to commit certain offenses.<sup>172</sup> In *Crandon*, the court identified the Internet as an “omnipresent” part of American life,<sup>173</sup> but upheld the Internet ban due to its role in initiating contact with the victim.<sup>174</sup> As the *Peterson* court noted, however, use of the telephone to commit a crime such as fraud would not justify a condition of probation barring use of the telephone altogether,<sup>175</sup> and other courts have agreed.<sup>176</sup> Interestingly, in *Crandon*, in which the defendant used the Internet to develop a rapport and eventually a sexual relationship with a young girl, the defendant and the girl communicated regularly over the telephone after their

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the history of commercial child pornography); Lesli C. Esposito, Note, *Regulating the Internet: The New Battle Against Child Pornography*, 30 CASE W. RES. J. INT'L L. 541, 542–43 (1998) (naming several child pornographic magazines and noting that child pornography exists in many forms).

<sup>169</sup> See *supra* notes 124–25, 142–44 and accompanying text.

<sup>170</sup> See Greg Miller, *Hacking Legend's Sign-Off*, L.A. TIMES, Mar. 18, 1999, at A1 (discussing Mitnick's crimes).

<sup>171</sup> See Rasch, *supra* note 153, at 143.

<sup>172</sup> See *id.* at 144 (discussing how the anonymity provided by the Internet can impact a user's behavior).

<sup>173</sup> *United States v. Crandon*, 173 F.3d 122, 128 (3d Cir. 1999) (“Unquestionably, computer networks and the Internet will continue to become an omnipresent aspect of American life.”).

<sup>174</sup> See *supra* notes 117–25 and accompanying text.

<sup>175</sup> See *supra* text accompanying note 78.

<sup>176</sup> See, e.g., *United States v. White*, 244 F.3d 1199, 1207 (10th Cir. 2001); *supra* text accompanying note 101.

initial encounter.<sup>177</sup> Nevertheless, the fact that Crandon used the telephone to maintain contact with his young victim did not factor into the sentencing determination, though perhaps it should have in light of the court's justification of the Internet ban.<sup>178</sup> The court either viewed the Internet as the principal and more insidious device with which Crandon preyed on the young girl to solicit sexual contact, or it took for granted the essential nature of the telephone.<sup>179</sup> The role of the Internet in the commission of the crime is an important consideration with respect to sentencing conditions, and courts tending to enforce Internet bans seem to have done so based on the ease with which people can communicate and obtain information online.<sup>180</sup>

Whether the Internet facilitated the crime was a crucial part of the conclusions of the courts, particularly for those courts putting less emphasis on the extent of the Internet's role in modern society.<sup>181</sup> As discussed above, however, the Internet has become an indispensable medium, access to which should not readily be denied.<sup>182</sup> For this reason, courts carefully should distinguish Internet crime from Internet-related crime, as the inquiry with the latter relates more to the underlying offense for which the defendant has been convicted, and craft supervised release conditions more narrowly in order to prevent deprivation of technology whose prevalence and usefulness continues to grow exponentially.

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<sup>177</sup> See *Crandon*, 173 F.3d at 125, 127.

<sup>178</sup> See *id.* at 127–28.

<sup>179</sup> Cf. *United States v. Peterson*, 248 F.3d 79, 83 (2d Cir. 2001) (vacating Internet restrictions and stating that “[a]lthough a defendant might use the telephone to commit fraud, this would not justify a condition of probation that includes an absolute bar on the use of telephones”); *United States v. White*, 244 F.3d 1199, 1207 (10th Cir. 2001) (vacating Internet restrictions and stating that the communication facilitated by Internet technology “may be likened to that of the telephone”).

<sup>180</sup> See discussion *supra* Part II.B.

<sup>181</sup> See, e.g., *United States v. Paul*, 274 F.3d 155, 169–70 (5th Cir. 2001) (“[W]e reject the *White* court’s implication that an absolute prohibition on accessing computers or the Internet is per se an unacceptable condition of supervised release, simply because such a prohibition might prevent a defendant from using a computer at the library to ‘get a weather forecast’ or to ‘read a newspaper online’ during the supervised release term. (quoting *United States v. White*, 244 F.3d 1199, 1201 (10th Cir. 2001))).

<sup>182</sup> See discussion *supra* Part I.B.

*B. Supervised Release Conditions With Respect to Other Rights and Liberties*

A great impediment to calling upon sentencing courts to limit the use of Internet bans, regardless of the role of the Internet in the commission of the crime, is that previous arguments against supervised release restrictions as unconstitutional or as intruding on other perceived liberties have been largely rejected.<sup>183</sup> In the decisions discussed above, which overturned Internet bans, none of the courts rejected the restrictions as unconstitutional, but rather cited to the sentencing guidelines standard that the condition must not involve a “greater deprivation of liberty than reasonably necessary.”<sup>184</sup> In general, First Amendment challenges to probation conditions, such as those in *Mitnick*<sup>185</sup> and *Crandon*,<sup>186</sup> have been unsuccessful. The *Crandon* court cited the U.S. Court of Appeals for the Sixth Circuit’s ruling in *United States v. Ritter* for the proposition that “even though supervised release conditions may affect constitutional rights such as First Amendment protections, most restrictions are valid if directly related to advancing the individual’s rehabilitation and to protecting the public from recidivism.”<sup>187</sup>

1. Freedom of Association

Several cases have addressed restrictions on freedom of association,<sup>188</sup> a right that specifically relates to the function of the Internet as a communication and information-sharing medium.<sup>189</sup>

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<sup>183</sup> See, e.g., *United States v. Crandon*, 173 F.3d 122, 127–28 (3d Cir. 1999); *United States v. Mitnick*, No. 97-50365, 1998 U.S. App. LEXIS 10836, at \*2 (9th Cir. May 20, 1998).

<sup>184</sup> See *supra* note 28 and accompanying text; see also discussion *supra* Part II.A.

<sup>185</sup> *Mitnick*, 1998 U.S. App. LEXIS 10836, at \*2.

<sup>186</sup> *Crandon*, 173 F.3d at 127–28.

<sup>187</sup> *Id.* at 128 (quoting *United States v. Ritter*, 118 F.3d 502, 504 (6th Cir. 1997)).

<sup>188</sup> E.g., *United States v. Bolinger*, 940 F.2d 478 (9th Cir. 1991); *United States v. Showalter*, 933 F.2d 573, 574 (7th Cir. 1991); *Malone v. United States*, 502 F.2d 554 (9th Cir. 1974); see also Stephen S. Cook, *Selected Constitutional Questions Regarding Federal Offender Supervision*, 23 NEW ENG. J. CRIM. & CIV. CONFINEMENT 1, 3–5 (1997) (discussing First Amendment concerns arising in the federal sentencing and probation process).

<sup>189</sup> See Hyne, *supra* note 68, at 239–40 (discussing First Amendment challenges to the restriction of computer access as a condition of probation or supervised release).

Thus, it can be argued that an Internet ban would prevent association with those generally contacted through this medium.<sup>190</sup> The two principal concerns supporting limitations on freedom of association are rehabilitation and public safety.<sup>191</sup> In addition, freedom of association cases relate to supervised release conditions that require filtering Internet use or permitting access subject to probation officer approval, since in both instances the restrictions seek to prevent specific activities or contact related to the offense.<sup>192</sup>

In one case, relied upon by the *Mitnick* court in its rejection of the constitutional challenge presented, a defendant pleaded guilty to “being a convicted felon in possession of a firearm” and was sentenced to a term of imprisonment followed by a period of supervised release during which he could not be involved “in any motorcycle club activities.”<sup>193</sup> The Ninth Circuit rejected the defendant’s freedom of association challenge, referring to the sentencing court’s broad discretion as well as to a judicial articulation of sentencing principles: “Probation conditions may seek to prevent reversion into a former crime-inducing life-style by barring contact with old haunts and associates, even though the activities may be legal.”<sup>194</sup> Similarly, another court upheld the restriction preventing a white supremacist leader who pled guilty to possession of an unregistered firearm from associating with skinheads or any neo-Nazi or white supremacist organization.<sup>195</sup> The defendant did not appeal the condition of not associating with white supremacist organizations, but he did appeal the requirement barring association with other skinheads or neo-Nazis.<sup>196</sup> The sentencing court explained the correlation between the restriction and the crime: ““Because those groups embrace violence and the

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<sup>190</sup> *Crandon*, 173 F.3d at 128.

<sup>191</sup> *See Bolinger*, 940 F.2d at 480 (holding that restriction on defendant’s association rights is valid if primarily designed to meet the ends of rehabilitation and protection of the public, and reasonably related to such ends) (citing *United States v. Terrigno*, 838 F.2d 371, 374 (9th Cir. 1988)).

<sup>192</sup> *See Hyne*, *supra* note 68, at 240 (discussing how Internet use can be considered “associating”).

<sup>193</sup> *Bolinger*, 940 F.2d at 479 (9th Cir. 1991).

<sup>194</sup> *Id.* at 480 (citing *Malone v. United States*, 502 F.2d 554, 556–57 (9th Cir. 1974)).

<sup>195</sup> *See United States v. Showalter*, 933 F.2d 573, 574 (7th Cir. 1991).

<sup>196</sup> *Id.*

threat of violence as a method of advancing their views, [the court found] that [his] association with them would create a high likelihood that [he] would be drawn into that same behavior. . . .”<sup>197</sup> Affirming this part of the sentencing court’s ruling, the appellate court found that “the district court was correct that [the defendant] need[ed] to be separated from other members of white supremacist groups to have a chance of staying out of trouble.”<sup>198</sup>

These cases are relevant in the Internet context because the freedom to use the Internet, while not a constitutional right itself, necessarily implicates freedom of speech and association.<sup>199</sup> These cases make clear, however, that a restriction will be upheld despite a constitutional challenge if it appears likely that a certain forum could lead to future misconduct of the same sort, a consideration underlying the supervised release conditions upheld in *Crandon* and *Paul*.<sup>200</sup> In *Crandon*, for example, the defendant had utilized the Internet in a predatory manner;<sup>201</sup> the *Paul* defendant went online partly to counsel others on victimizing children.<sup>202</sup> Likewise, the *Mitnick* court upheld the restriction on computer-related employment in order to protect the public by preventing the defendant from engaging in his former criminal activities.<sup>203</sup>

Because several of the Internet ban cases discussed above pertain to child pornography, an examination of freedom of association cases of this kind is worthwhile, especially with respect to the public safety element that such cases necessarily

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<sup>197</sup> *Id.* at 575.

<sup>198</sup> *Id.* at 575–76.

<sup>199</sup> See Hyne, *supra* note 68, at 239–40.

<sup>200</sup> See *supra* notes 113–25, 139–44 and accompanying text.

<sup>201</sup> *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir. 1999) (beginning a sexual relationship with a fourteen-year-old girl).

<sup>202</sup> *United States v. Paul*, 274 F.3d 155, 158 (5th Cir. 2001).

<sup>203</sup> See *Mitnick*, 1998 U.S. App. LEXIS 10836, at \*3–\*4. *Mitnick* served five years in federal prison for stealing software and altering data at Motorola, Novell, Nokia, Sun Microsystems, and the University of Southern California. Associated Press, *Hacker Back On Air*, *supra* note 8. Prosecutors accused him of causing tens of millions of dollars in damage to corporate computer networks. *Id.*

implicate.<sup>204</sup> The Ninth Circuit in *United States v. Bee*<sup>205</sup> upheld a supervised release condition whereby a child molester (1) could not have contact with any minors without probation officer approval; (2) could not loiter within a certain distance of schools, parks, playgrounds, arcades, or any other places primarily used by children; and (3) could not possess any sexually stimulating material considered inappropriate or patronize any place where such material is available.<sup>206</sup> The facts in cases such *Bee* and *Crandon* make sympathy for the defendant difficult.<sup>207</sup> Although the defendant in *Bee* claimed that the first two conditions were too broad and that the third condition was a First Amendment violation and unrelated to his offense, the court upheld all three restrictions.<sup>208</sup> As to the conditions barring unapproved contact with children and preventing the defendant from loitering in places primarily used by children, the court quoted the defendant's own acknowledgement that he would be expected to "err on the side of avoiding places that the probation officer or the court might deem unacceptable."<sup>209</sup>

The justification for upholding the association restrictions is easier to grasp than the rationale for affirming the restriction on sexually stimulating material, apparently including legal adult pornography.<sup>210</sup> This relates to the argument that the restriction on Internet usage denies access to legitimate, legal material, an argument to which some courts have been more sympathetic than others, depending in part on the relationship of the Internet use to

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<sup>204</sup> Cook, *supra* note 188, at 4 (stating that restrictions of association rights have been upheld based on the rationale that the association would encourage the individual to repeat criminal conduct).

<sup>205</sup> 162 F.3d 1232 (9th Cir. 1998).

<sup>206</sup> *Id.* at 1234.

<sup>207</sup> In *Crandon*, for example, the defendant initiated a sexual relationship with a fourteen-year-old girl through the Internet. See *supra* notes 113–116 and accompanying text.

<sup>208</sup> *Bee*, 162 F.3d at 1234–36.

<sup>209</sup> *Id.* at 1235–36.

<sup>210</sup> See *United States v. Paul*, 274 F.3d 155, 169–70 (5th Cir. 2001) (rejecting defendant's argument that prohibition on accessing Internet is unacceptable because such a ban might impede legitimate uses of the Internet).

the offense.<sup>211</sup> Furthermore, *Bee* involved overriding public safety concerns, as indicated by the court's expectation that the defendant err on the side of caution by avoiding places that probably would be considered unacceptable, but that had not yet been designated as such.<sup>212</sup> The courts in *Crandon* and *Paul* employed similar reasoning to affirm Internet ban conditions, based on the nature of the defendants' respective Internet uses and the great potential for harm to the public, particularly children, if they were to revert to their former behavior.<sup>213</sup>

The court in *United States v. Loy* reached a different conclusion with respect to legal adult material.<sup>214</sup> In *Loy*, Ray Donald Loy was convicted for possession of child pornography, some of which he had a role in producing, with a sentence that included supervised release conditions prohibiting possession of any pornography and unsupervised contact with minors.<sup>215</sup> The court upheld the contact element of the condition, excluding accidental contact such as in public places from the condition, but overturned the proscription on pornography, holding that it was overbroad.<sup>216</sup> The court condoned a restriction on possession of even legal pornography, as in *Bee*, but it found that the restriction had to be more carefully crafted since, as originally drafted, the policymaking power was granted to the probation officer and the condition failed to put Loy on notice of what material he could or could not access.<sup>217</sup> The court also noted that "[a] probationary condition is not 'narrowly tailored' if it restricts First Amendment freedoms without any resulting benefit to public safety."<sup>218</sup> Thus, while supervised release conditions may restrict fundamental rights

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<sup>211</sup> Compare *United States v. Peterson*, 248 F.3d 79, 80–81 (2d Cir. 2001) (vacating an Internet ban imposed on a felon who had pled guilty to bank larceny, was previously convicted of incest, and had accessed legal adult pornography on his home computer), with *United States v. Crandon*, 173 F.3d 122, 127–28 (3d Cir. 1999) (upholding Internet restrictions in light of fact that defendant used the Internet to develop an illegal sexual relationship).

<sup>212</sup> *Bee*, 162 F.3d at 1234–36.

<sup>213</sup> See *supra* Part II.B.

<sup>214</sup> *United States v. Loy*, 237 F.3d 251, 254 (3d Cir. 2001).

<sup>215</sup> *Id.* at 254–55.

<sup>216</sup> See *id.* at 254, 266–67.

<sup>217</sup> See *id.* at 266–67.

<sup>218</sup> *Id.* at 266.

in some instances, they should not do so unnecessarily.<sup>219</sup> Yet, this is the potential result of imposing Internet bans that only permit use with probation officer approval, particularly where such use does not entail a direct threat to the public. At the same time, however, such arrangements may provide less restrictive alternatives to blanket Internet bans.<sup>220</sup>

Filtering Internet content and subjecting otherwise banned Internet use to probation officer approval are analogous to freedom of association limitations, since such conditions prohibit defendants from associating with certain people or accessing certain types of material.<sup>221</sup> In *Mitnick*, the court rejected the defendant's contention that the requirement of probation officer approval for access to computers and computer-related equipment was too broad: "The fact that Mitnick may engage in otherwise prohibited conduct with the probation officer's approval makes the conditions imposed less restrictive [than] an outright ban on such conduct."<sup>222</sup> Yet, several of the courts emphasizing the pervasiveness of Internet use in modern society to reject blanket Internet bans have not been persuaded that allowing access through probation officer discretion is a mitigating factor justifying the condition.<sup>223</sup> For example, the *Sofsky* court stated that "[a]lthough

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<sup>219</sup> See *id.* at 264 (stating that to avoid First Amendment infirmity, a probation condition must be narrowly tailored and directly related to the goals of protecting the public and promoting a defendant's rehabilitation) (citing *Crandon*, 173 F.3d at 128). The Supreme Court in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), opined on the purpose behind the requirement that laws be reasonably precise:

First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Second, . . . [a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis. . . . Third . . . where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms.

*Id.* at 108–09, noted in *Loy*, 237 F.3d at 262.

<sup>220</sup> See *Richtel*, *supra* note 1 (discussing technologies allowing a probation officer to remotely monitor an offender's computer activity).

<sup>221</sup> See *supra* note 192 and accompanying text.

<sup>222</sup> *United States v. Mitnick*, No. 97-50365, 1998 U.S. App. LEXIS 10836, at \*3 n.1 (9th Cir. May 20, 1998).

<sup>223</sup> See *supra* notes 96, 104–05 and accompanying text.

the condition prohibiting Sofsky from accessing a computer or the Internet without his probation officer's approval is reasonably related to the purposes of his sentencing, in light of the nature of his offense, we hold that the condition inflicts a greater deprivation on Sofsky's liberty than reasonably necessary."<sup>224</sup> Furthermore, the court concluded that alternative methods, such as government sting operations or unannounced inspections of his computer, were available to enforce narrower Internet restrictions relating to Sofsky's offense of downloading child pornography and would prevent the denial of access to legitimate uses of the Internet.<sup>225</sup> Thus, the courts in *Mitnick* and *Sofsky* reached very different conclusions with respect to permitting otherwise forbidden Internet access on the condition of probation officer approval, stemming from their views about the Internet and about the Internet's relation to the offenses.<sup>226</sup>

In a similar consideration of alternative ways to police Internet use, the U.S. Court of Appeals for the Tenth Circuit, in remanding *White* to determine the meaning of a sentencing court's Internet use restrictions, explored the possibility of Internet filtering.<sup>227</sup> The Tenth Circuit found that the sentencing court's conditions were potentially overbroad or too narrow.<sup>228</sup> As part of this analysis, the court stated that installation of filtering software into a defendant's computer appropriately could focus an Internet use restriction, but that such an approach was limited by the effectiveness of the technology and the possibility of circumvention by either the technologically savvy user or the user who simply decided to use a different computer.<sup>229</sup> After cautioning against a blanket ban on computer use and commenting on the ubiquity of cyberspace, the court concluded that "any

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<sup>224</sup> United States v. Sofsky, 287 F.3d 122, 126 (2d Cir. 2002); see also United States v. Freeman, 316 F.3d 386, 391-92 (3d Cir. 2003) (citing *Sofsky* for the propositions that (1) probation officer approval does not make a ban on Internet usage less restrictive and (2) there are alternative methods of enforcing more limited use restrictions).

<sup>225</sup> *Sofsky*, 287 F.3d at 126-27.

<sup>226</sup> See *supra* notes 84-96, 109-12 and accompanying text

<sup>227</sup> See *supra* notes 97-101 and accompanying text (discussing United States v. White, 244 F.3d 1199 (10th Cir. 2001)).

<sup>228</sup> See *White*, 244 F.3d at 1205-07.

<sup>229</sup> See *id.* at 1206-07.

condition limiting White's use of a computer or access to the Internet must reflect these realities and permit reasonable monitoring by a probation officer,"<sup>230</sup> without indicating how this should be achieved.

Freedom of association restrictions largely have been upheld as long as they comport with the sentencing guidelines and goals, under which preventing criminal conduct and protecting the public are primary concerns and must be balanced against the liberty interests of the defendant.<sup>231</sup> These decisions do not bode well for the constitutional challenge to Internet bans, which involve similar balancing due to both the nature of Internet use and its perception as a fundamental part of modern society.<sup>232</sup> For example, the *White* court did not overturn the Internet ban based on the defendant's First and Fourteenth Amendment arguments, but instead focused on the meaning of the condition and its potential for overbreadth, given the numerous legitimate and commonplace functions of the Internet.<sup>233</sup> And as the court in *Crandon* concluded, "in this case the restrictions on employment and First Amendment freedoms are permissible because the special condition is narrowly tailored and is directly related to deterring Crandon and protecting the public."<sup>234</sup> If courts are to reject Internet use bans, they are not likely to do so based on constitutional challenges, but rather on an evaluation of the competing interests of the defendant and the public.<sup>235</sup>

## 2. Driving

Another type of sentencing condition that relates to performing commonplace activities is the revocation of the driver's license of a defendant, particularly with respect to driving under the influence ("DUI") cases.<sup>236</sup> As one article on license suspensions observed,

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<sup>230</sup> *See id.* at 1207.

<sup>231</sup> *See supra* notes 193–213 and accompanying text.

<sup>232</sup> *See* discussion *supra* Part II.A.

<sup>233</sup> *See White*, 244 F.3d at 1207; *see also* discussion *supra* Part II.A.

<sup>234</sup> *Crandon*, 173 F.3d at 128.

<sup>235</sup> *See* discussion *supra* Part II.A.

<sup>236</sup> *See* Carlos F. Ramirez, Note, *Administrative License Suspensions, Criminal Prosecution and the Double Jeopardy Clause*, 23 *FORDHAM URB. L.J.* 923, 923 n.6 (1996).

“the livelihood of the defendant and his or her family may be dependent on the ability to operate a motor vehicle.”<sup>237</sup> The article further states that

“[i]n this society where public transportation is either non-existent or is, at best, inadequate and entire commercial shopping areas are located in suburbs surrounding our cities, [a driver’s license can no longer be viewed] as merely a privilege which is given by the State and which is subject to revocation at any time.”<sup>238</sup>

This correlates to the arguments regarding the ever-increasing use of the Internet for employment-related purposes, since it has become essential to conducting many types of businesses, in addition to its value with respect to communications, research, and commerce.<sup>239</sup> Those denied the use of computers and the Internet may be technologically immobilized, which can hurt their ability to compete, or perhaps even participate, in the modern economy.<sup>240</sup> Although filtering out Web sites related to the defendant’s offense or allowing partial access with probation officer approval may mitigate this effect, courts otherwise averse to blanket Internet bans have not been receptive to such conditions and have deemed them overbroad in any event.<sup>241</sup>

Driver’s license suspensions in DUI cases, however, often have been upheld based on the interests in protecting the public and deference to the power of designated authorities to regulate licensed activities.<sup>242</sup> The first reason for these sanctions, known as Administrative License Suspension (“ALS”),<sup>243</sup> is to protect the

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<sup>237</sup> *Id.* at 943.

<sup>238</sup> *Id.* at 950 (quoting *Ohio v. Gustafson*, No. 94 C.A. 232, 1995 WL 387619, at \*5 (Ill. App. Ct. June 27, 1995) (affirming the trial court’s dismissal of DUI prosecution subsequent to the suspension of the defendant’s drivers license on double jeopardy grounds)). Of course, “for the person living in a city with different modes of transportation, the harm may not be so great. But, for the majority of people in this country, who live in suburbs or rural areas, this can cause substantial or total immobilization.” *Id.* at 950 n.181.

<sup>239</sup> See discussion *supra* Part I.B.

<sup>240</sup> See, e.g., *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002).

<sup>241</sup> See discussion *supra* Part II.A.

<sup>242</sup> See *Ramirez*, *supra* note 236, at 930–36, 951–52.

<sup>243</sup> See *id.* at 923.

public by deterring drunk driving, both by prohibiting the defendant from driving and instilling fear that a license could be suspended as a result such an offense.<sup>244</sup> The prohibition can be analogized to Internet restrictions, since it effectively prevents the defendant from using the tool with which he committed the crime. The DUI offense is the crime itself, however, and cannot be separated into distinct, criminal components, since neither driving a car nor drinking alcohol is by itself a crime.<sup>245</sup> It is the combination of these elements that creates the crime.<sup>246</sup> In contrast, the crimes for which many of the defendants in the Internet cases were convicted did not necessitate the use of the Internet, although it arguably facilitated the behavior in certain instances.<sup>247</sup> Thus, unlike with DUI cases, it is possible with Internet-related offenses to separate the means by which the offense was committed from the crime itself. Moreover, the defendants in the Internet cases, with the exception of *Mitnick*, were guilty of separate, underlying conduct for which there are criminal statutes unrelated to Internet technology.<sup>248</sup>

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<sup>244</sup> See *id.* at 932–33 (noting cases that have concluded that public safety justifies administrative license suspension statutes).

<sup>245</sup> See, e.g., Villarini & Henry, LLP, *So You Have Been Arrested for DWI in New York?*, at <http://villariniandhenry.lawoffice.com/articles.htm> (last visited Apr. 15, 2004) (listing the “critical elements” of a DWI conviction). The above analysis assumes, respectively, that (1) the driver has a valid license and (2) the drinker is over twenty-one years of age.

<sup>246</sup> See, e.g., N.Y. VEH. & TR. LAW § 1192 (McKinney 1996) (operating a motor vehicle while under the influence of alcohol or drugs).

<sup>247</sup> E.g., *United States v. Harding*, No. 02-2102, 2003 U.S. App. LEXIS 1371 (3d Cir. Jan. 28, 2003); *Sofsky*, 287 F.3d 122; *White*, 244 F.3d 1199; see also *supra* text accompanying notes 163–65.

<sup>248</sup> See, e.g., *United States v. Freeman*, 316 F.3d 386, 387 (3d Cir. 2003) (receipt and possession of child pornography); *Harding*, 2003 U.S. App. LEXIS 1371, at \*1 (receipt of child pornography); *Sofsky*, 287 F.3d 122, 124 (receipt of child pornography); *United States v. Paul*, 274 F.3d 155, 157 (5th Cir. 2001) (knowing possession of child pornography); *United States v. Peterson*, 248 F.3d 79, 80–81 (2d Cir. 2001) (bank larceny, with prior conviction for incest); *White*, 244 F.3d at 1201 (receiving child pornography and violation of condition of supervised release); *United States v. Crandon*, 173 F.3d 122, 124 (3d Cir. 1999) (receiving child pornography); see also discussion *supra* Part II.

The second significant reason advanced for the ALS sanction is that a driver's license is considered a privilege and not a right.<sup>249</sup> This argument contends that "the government reserves the power to revoke a license if the licensee fails to act in accordance with set regulations. In an ALS, the government merely exercises the power to revoke the driving privileges it has afforded."<sup>250</sup> Unlike driving, however, Internet use is not a regulated activity or privilege for which state permission is required. It may not rise to the level of a right, but it is also difficult to argue that Internet use is a privilege granted by a certain entity, as it simply entails obtaining a connection from a commercial service provider, or availing oneself of any other connected computer terminal, for example, in a public library or at most educational institutions.<sup>251</sup> In sum, while the similarities between the nature of Internet use and of driving are clear, the reasons for restricting each activity subsequent to a criminal conviction are evidently quite different. Accordingly, it should be more difficult to restrict Internet use as the result of a conviction for an underlying crime that the Internet facilitated than it is to suspend a license due to driving under the influence, although courts apparently possess great discretion in both instances.<sup>252</sup>

The comparison to other activities that have been limited by supervised release conditions offers a different perspective on Internet use restrictions.<sup>253</sup> As demonstrated through the freedom of association challenges to supervised release conditions, the constitutionality of the condition is irrelevant as long as it is consistent with the criteria of the sentencing guidelines, criteria which afford courts broad discretion in determining constraints where the public interest is at stake.<sup>254</sup> The analogy to driver's

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<sup>249</sup> See *supra* notes 237–38 and accompanying text; see also Ramirez, *supra* note 236, at 935–36.

<sup>250</sup> Ramirez, *supra* note 236, at 936 (citing State *ex rel.* Schwartz v. Kennedy, 904 P.2d 1044, 1056 (N.M. 1995) (rejecting double jeopardy challenge to administrative license revocation hearing)).

<sup>251</sup> See generally DEP'T OF COMMERCE, *supra* note 39, at 35–56 (discussing how and when Americans access the Internet and Internet use among young people).

<sup>252</sup> See discussion *supra* Part I.A; see generally Ramirez, *supra* note 236, at 924–43 (discussing conflicting judicial interpretations with respect to ALS proceedings).

<sup>253</sup> See discussion *supra* Parts III.B.1–2.

<sup>254</sup> See discussion *supra* Part III.B.1.

license suspensions in the wake of DUI offenses is not persuasive, as key differences exist in the reasoning and authority behind such conditions.<sup>255</sup> Nonetheless, the courts often have been granted the discretion to make their own decisions.<sup>256</sup>

### *C. The Significance of the Underlying Crime*

Fashioning supervised release conditions entails a great tension between the interests of protecting the public and preventing too great a deprivation of liberty of the individual being sentenced.<sup>257</sup> This same tension applies to the Internet, since it has bestowed numerous benefits upon society as a whole, but also has created new crimes and new manners in which to commit existing crimes.<sup>258</sup> The very sentencing guidelines from which this conflict emerges afford the courts a significant amount of discretion in crafting and reviewing the conditions intended to deter such future criminal conduct.<sup>259</sup> Some courts have used this discretion ostensibly to prevent certain crimes in which the Internet is viewed as essential to their commission, by restricting or altogether forbidding Internet access.<sup>260</sup> Other courts, however, have approached the issue differently, viewing the Internet as a part of everyday life and concluding that its deprivation risks too great an infringement on an individual's liberty.<sup>261</sup>

Courts should take care to limit Internet restrictions to those cases where the Internet was a necessary tool of the offense, without which the underlying crime could not have been committed. The goal of the supervised release condition should be to deter the underlying conduct, not to restrict one of many methods by which the crime has been realized—especially when that method does not involve a weapon, per se, but a technology with abundant legitimate uses.<sup>262</sup> In many cases, there is a fine line

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<sup>255</sup> See *supra* notes 246–48, 250–51 and accompanying text.

<sup>256</sup> See Ramirez, *supra* note 236, at 930–36.

<sup>257</sup> See *supra* notes 24–25, 28 for a description of the factors enumerated by the sentencing guidelines with respect to supervised release conditions.

<sup>258</sup> See *supra* text accompanying notes 159–60.

<sup>259</sup> See discussion *supra* Part I.A.

<sup>260</sup> See discussion *supra* Part II.B.

<sup>261</sup> See discussion *supra* Part II.A.

<sup>262</sup> See discussion *supra* Part I.B.

between the use of the Internet to facilitate the crime and use that is merely incidental to its commission.<sup>263</sup>

The threshold analysis, thus, should be whether the defendant could have committed the crime without going online to do so. For example, with respect to a hacking crime like that in *Mitnick*, the Internet was both a tool and a target of the crime, and could not have occurred otherwise.<sup>264</sup> *Crandon* is a case where the distinction is less clear, as it is not evident that the defendant could have forged a relationship with his young victim without first befriending her anonymously in an online chat room, as such a relationship may have been rebuffed or altogether avoided in the physical world.<sup>265</sup> In cases such as *Sofsky* and *Harding*, in which the crimes involved possession of child pornography, it is clear that while the Internet has certainly made such illicit material easier to come by, the defendants could have obtained it elsewhere. In view of the unique nature and extensive uses of Internet technology, courts should be wary of such distinctions and formulate supervised release conditions accordingly.

#### CONCLUSION

Sentencing determinations entail a difficult balancing act, as they are highly fact-specific endeavors that often involve unsympathetic defendants whose liberty becomes less of an interest depending on the nature of the crime. The willingness of courts to use their broad discretion to carefully examine the relationship of the underlying criminal conduct to the involvement of the Internet will likely depend on the extent to which they view the Internet as a fundamental resource, although, as demonstrated, public safety concerns often override such considerations.<sup>266</sup> As the Internet's importance to modern society continues to increase in the coming years and its relationship to individual liberty interests deepens, it will be interesting to examine the direction

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<sup>263</sup> See *supra* text accompanying notes 163–65, 247.

<sup>264</sup> See *supra* text accompanying notes 159, 163.

<sup>265</sup> See *supra* notes 114–16, 124, 169 and accompanying text.

<sup>266</sup> See discussion *supra* Part II.B.

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courts follow in establishing supervised release conditions that restrict Internet use.