

UNFRIENDED FELONS: REEVALUATING THE INTERNET’S ROLE FOR THE PURPOSE OF SPECIAL CONDITIONS IN SENTENCING IN A POST-FACEBOOK WORLD

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INTRODUCTION

Since its inception, the Internet has progressively changed the way individuals carry out many of their daily tasks. However, recent technological developments have taken Internet dependency to a new

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level. These advances allow individuals to access the Internet more frequently and from more locations than ever before. Additionally, banks, news outlets, and schools now offer many of their services exclusively online. Beyond these services, individuals now look to the Internet to communicate and interact with each other. Large social networking sites have seen escalated levels of interaction among Internet users, increasing the appeal of the Internet and drawing millions of individuals to their sites every day. As individuals begin to abandon traditional forums of social interaction for the convenience of social networking sites, the implications for those unable to access the Internet become substantial.

Increasingly, being connected to society means being connected to the Internet. However, when called upon to determine whether access to the Internet can be denied to convicted criminals as a provision of supervised release, many courts have been unwilling to recognize the magnitude of the Internet's role in the average citizen's life. In light of recent developments, the question of whether courts should continue to restrict access to the Internet as a term of probation or parole needs to be reexamined.

This article will address whether the courts' restrictions on Internet use have become too burdensome in light of society's gravitation to the Internet, which has recently been boosted, in part, by the popularity of social networking sites. Part I of the article will provide a brief overview of where the circuits have come out on the issue and examine their treatment of the Internet's role in general. Part II will address many of the relevant changes that have taken place in the years since this issue was decided in the circuits and analyze their implications. Part III will provide an introduction to social networking sites and discuss their effect on Internet users. Part IV will discuss social networking sites as part of a larger trend toward Internet-based applications as an alternative to localized computing. Lastly, Part V will examine whether the role of the Internet should be reassessed in light of these recent changes in determining whether the Internet can be restricted as a provision of supervised release.

I. DIVERGENCE AMONG THE CIRCUITS

Federal law permits courts, at sentencing, to impose special conditions of supervised release, provided such conditions are reasonably related to factors set forth in sentencing guidelines, involve no greater deprivation of liberty than is reasonably necessary, and are consistent with policy statements issued by the sentencing commission.¹ This

1. 18 U.S.C. § 3583(d) (2006).

affords the courts broad discretion in making such determinations. Since the Internet is a relatively new resource in terms of its availability to the general public, its status and potential for abuse have only recently been considered by the United States judicial system. Between the years of 2000 and 2005, many precedent-setting cases were decided which established each circuit's stance on whether the Internet can be restricted as a term of supervised release and under what circumstances.

Despite the extensive changes brought about by the Internet, not all jurisdictions have been willing to recognize the use of the Internet as a necessity. Rather, many courts have seemingly viewed the Internet as a novelty and convenience. As a result, some courts have upheld broad restrictions on Internet use.² Others have held that outright bans on Internet use are excessive and should not be upheld. Most circuits, however, fall somewhere in the middle, holding that restrictions are permissible where they are reasonably related to the goals of the relevant sentencing guidelines and/or allow a defendant to seek exceptions through permission from his or her probation or parole officer.³

A. *The Fifth Circuit Upholds Broad Restrictions*

In *United States v. Paul*, the Fifth Circuit was called upon to determine whether a restriction on Internet use as a term of supervised release was overreaching.⁴ The defendant in that case pleaded guilty to possession of child pornography on his hard drive in violation of 18 U.S.C. § 2252A.⁵ At sentencing, the district court imposed a number of special conditions, including a provision that the defendant not “possess or have access to computers, the Internet, [or] photographic equipment.”⁶ In evaluating the hardship caused by the restriction, the court trivialized the reasoning of a Tenth Circuit decision that had found a ban on Internet use overly restrictive because it prevented a defendant from using a computer to check weather forecasts or read newspapers during the term of supervised release.⁷ The Fifth Circuit ultimately concluded that an absolute ban on Internet access is not *per se* unacceptable and should be upheld as long as it is reasonably necessary to meet the statutory goals of the guidelines for setting the terms of

2. See generally Emily Brant, *Sentencing ‘Cybersex Offenders’: Individual Offenders Require Individualized Conditions When Courts Restrict Their Computer Use and Internet Access*, 58 CATH. U.L. REV. 779 (2009) (providing a more exhaustive analysis on the different approaches taken by the courts).

3. See, e.g., *United States v. Rearden*, 349 F.3d 608 (9th Cir. 2003).

4. 274 F.3d 155, 169-70 (5th Cir. 2001).

5. *Id.* at 157.

6. *Id.* at 160.

7. *Id.* at 169-70 (disagreeing with the reasoning from *United States v. White*, 244 F.3d 1199 (10th Cir. 2001)).

supervised release.⁸

The reasoning from *Paul* was upheld in a more recent Fifth Circuit decision involving a similarly broad Internet restriction.⁹ In that case, the defendant challenged two special conditions of his supervised release after having violated them following his conviction of possession of child pornography.¹⁰ The first condition was that he not possess any pornographic or otherwise sexually-oriented material, and the second was the broad condition that he not possess or utilize a computer or Internet connection device during the term of supervised release.¹¹ The court held that given the defendant's risk of recidivism, a "complete prohibition from such a powerful tool . . . is not unreasonable."¹² The court reaffirmed the *Paul* decision, holding that "an absolute ban on computer and [I]nternet use is acceptable if it is reasonably necessary to serve the statutory goals set forth in [sentencing guidelines]."¹³ More revealing, however, was the court's conclusory statements about the role the Internet plays: "[T]hough [the defendant] is correct that computers and the [I]nternet have become significant and ordinary components of modern life as we know it, they nevertheless still are not absolutely essential to a functional life outside of prison."¹⁴

B. *The Second Circuit is Unwilling to Enforce Any Broad Internet Ban*

In contrast, the Second Circuit has been less willing than any other circuit to restrict the use of the Internet as a term of probation or parole. In its standout decision in *United States v. Peterson*, the court held that the possibility that a criminal defendant might use a computer to commit crimes in the future did not justify an absolute ban on Internet use.¹⁵ In *Peterson*, a criminal defendant pleaded guilty to writing a bad check.¹⁶ Due in part to the defendant's prior incest conviction, the court imposed a special condition of probation that prohibited him from using or owning a computer with a modem. The restriction did come with the exception that allowed the defendant to use a computer to the extent necessary for his employment.¹⁷ Not persuaded by the reasoning behind the restriction, the court likened the restriction on Internet use to one

8. *Id.* at 170.

9. *United States v. Brigham*, 569 F.3d 220 (5th Cir. 2009).

10. *Id.* at 222.

11. *Id.* at 223–24.

12. *Id.* at 234.

13. *Id.* (citing *Paul*, 274 F.3d at 170).

14. *Id.*

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

16. *Id.* at 81.

17. *Id.*

denying the use of other tools for communication saying, “[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.”¹⁸ The court went on to reason that the mere possibility of future abusive use did not justify a complete ban on Internet access.¹⁹ Even though this case was decided in 2001—before many of the changes that have caused individuals to rely heavily on the Internet—the *Peterson* court was willing to recognize the Internet’s fundamentality.²⁰ Noting that the technology had become “virtually indispensable in the modern world of communications and information gathering,” the court held that such a broad Internet restriction was excessive.²¹

In a later decision, the Second Circuit further clarified its disapproval of Internet restrictions by holding invalid a less restrictive ban that allowed a defendant to access the Internet only by seeking the permission of his probation officer.²² There, the defendant was convicted of possession of child pornography.²³ At sentencing, the judge imposed a number of special conditions of supervised release, including a condition that “the defendant may not ‘access a computer, the Internet, or bulletin board systems at any time, unless approved by the probation officer.’”²⁴ The court relied upon much of the reasoning in *Peterson*, but also indicated that a ban on Internet access would not be upheld as long as a more tailored alternative existed, reasoning that “a more focused restriction, limited to pornography sites and images, can be enforced by unannounced inspections of [the defendant’s] premises and examination of material stored on his hard drive or removable disks.”²⁵ Thus, while the court conceded that the restriction was reasonably related to the purposes of the defendant’s sentencing, it held that such a restriction inflicted a greater deprivation of liberty than was reasonably necessary.²⁶

In a more recent case, the Second Circuit demonstrated its willingness to allow the use of less restrictive means in sentencing. In *United States v. Balon*,²⁷ the court upheld a special condition that allowed probation officers to control a defendant’s Internet use via the use of monitoring software and random inspections, as well as the removal of hardware for the purposes of a more thorough inspection.²⁸ The court

18. *Id.* at 83.

19. *Id.*

20. *See id.*

21. *Id.*

22. *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002).

23. *Id.* at 124.

24. *Id.*

25. *Id.* at 127.

26. *Id.* at 126.

27. 384 F.3d 38 (2d Cir. 2004).

28. *Id.* at 49.

held that conditions allowing the removal of the defendant's hardware were not contrary to the holdings in *Peterson* and *Sofsky* because they did not indefinitely deprive the defendant of the use of the Internet.²⁹ However, in considering the defendant's challenges to off-site monitoring, the court made the interesting observation that determining the level of deprivation of such a restriction is based on technology considerations.³⁰ Because the condition would not be exercised for three years, rapidly changing technology made it impossible to know whether monitoring Internet access would involve a greater deprivation of liberty than necessary.³¹ Therefore, the provisions relating to the off-site monitoring were left to be considered at a later date.³²

C. *Other Courts Conduct a More Fact-Intensive Inquiry*

Other circuits have been willing to recognize that criminal defendants have a legitimate interest in using the Internet but have held that it can be restricted under the proper circumstances. These courts have weighed a defendant's interest in using the Internet against the public's interest in safety by engaging in an examination of the facts of each case.

In *United States v. Zinn*, the Eleventh Circuit recognized the increasing importance of the Internet, but held that the defendant's interest in using the Internet was outweighed by the need to protect the public.³³ After the defendant in that case was convicted of possession of child pornography, he was sentenced to a prison term and three years of supervised probation.³⁴ Among other special conditions imposed by the judge at sentencing, the defendant was prohibited from accessing the Internet without permission from his probation officer.³⁵ The court was willing to concede that "the Internet has become an important resource for information, communication, commerce, and other legitimate uses, all of which may be potentially limited to [the defendant] as a result of our decision."³⁶ However, in evaluating the particular circumstances of the case—namely the high level of need to protect young people from the defendant and the provision allowing the defendant to seek an exception—the court held that the trial court's restriction was not overly broad.³⁷

29. *Id.* at 48.

30. *Id.* at 46.

31. *Id.*

32. *Id.* at 49.

33. 321 F.3d 1084, 1093 (11th Cir. 2003).

34. *Id.* at 1086.

35. *Id.* at 1087.

36. *Id.*

37. *Id.* at 1093.

Similarly, the Seventh Circuit refused to impose what amounted to a complete ban on Internet use in *United States v. Holm*.³⁸ Once again, this case involved a defendant convicted of possessing child pornography.³⁹ However, the court did not feel that the offense justified a ban on Internet use, which was apparently devoid of any exceptions or procedures for “necessary” use.⁴⁰ The court viewed the Internet’s role as essential, noting that a total ban renders modern life too difficult. For example, the court noted that “the government strongly encourages taxpayers to file their returns electronically, . . . more and more commerce is conducted on-line, and . . . vast amounts of government information are communicated via website.”⁴¹ Given this hardship, the court felt that the state’s interests could be served with a less restrictive condition such as monitored use.⁴²

The Seventh Circuit remained true to this fact-specific analysis in *United States v. Scott*.⁴³ There, the court indicated that a record of “extensive abuse” of digital communications, as opposed to only a few images of child pornography stored on a computer, might justify an outright ban on the Internet.⁴⁴ However, the *Scott* court was not willing to do away with broad Internet bans altogether, noting that “because the Internet is a medium of communication[,] a total restriction rarely could be justified.”⁴⁵ In dealing with the defendant’s claim that a restriction on Internet access can never be upheld, the court held that the Internet may be restricted because of its potential for future misuse.⁴⁶ The court noted that without such restrictions, a court might be forced to impose longer sentences where the risk of recidivism was present, and that most defendants would prefer conditioned freedom to a longer prison sentence.⁴⁷

The Third Circuit, looking to the specific details of a defendant’s criminal history, also overturned a restrictive ban on Internet use because it lacked exceptions or procedures for the defendant to obtain permission to use the Internet.⁴⁸ In a case that involved an exception-free ban similar to that in *Holm*, the court seemed more willing to recognize at least some of the Internet’s utility.⁴⁹ In doing so, the court recognized that a

38. 326 F.3d 872 (7th Cir. 2003).

39. *Id.* at 873–74.

40. *Id.* at 874.

41. *Id.* at 878–79.

42. *Id.*

43. 316 F.3d 733.

44. *Id.* at 737.

45. *Id.*

46. *Id.* at 736.

47. *Id.*

48. *United States v. Freeman*, 316 F.3d 386, 391–92 (3rd Cir. 2003).

49. *Id.* at 392.

defendant has a legitimate interest in using increasingly popular Internet-based services such as e-mail, news, and weather forecasts.⁵⁰ Additionally, the court held that, where the defendant's criminal conduct was limited to pornography sites and images, banning the defendant's use of legitimate Internet services imposed a greater deprivation than necessary to protect the public where suitable and more focused alternatives were available such as unannounced computer inspections.⁵¹

The Ninth Circuit has indicated its willingness to uphold broad Internet restrictions where the restriction was reasonably related to a goal of the sentencing guidelines, and where exceptions are made for necessary use.⁵² That case involved an Internet restriction imposed on a defendant convicted of sending child pornography to another via e-mail.⁵³ Noting that while the Internet had become an important means of information and communication, the court held that the restriction of the use of the Internet is permissible in cases where the restriction leaves open the opportunity for appropriate access.⁵⁴ The court indicated its willingness to uphold restrictions, provided they are reasonably related to the goal of protecting children and deterring the defendant from reverting to similar conduct,⁵⁵ but held that, under the circumstances of the particular case, the "condition does not plainly involve a greater deprivation of liberty than is reasonably necessary . . . because it is not absolute; rather, it allows for approval of appropriate online access by the Probation Office."⁵⁶

D. At Least One Court Considered the Impact of Future Internet Advances

Even where courts have upheld broad bans on the Internet, some have notably remained open to the idea that the Internet might one day become so indispensable to modern life that banning its use would be unduly restrictive. The Fourth Circuit held in a 2004 decision that an Internet use restriction imposed upon a defendant who pled guilty to possessing child pornography did not impose a greater deprivation than reasonably necessary.⁵⁷ The court justified its decision by noting that the restriction would not interfere with the defendant's employment because his work history was mainly comprised of positions of manual labor, and

50. *Id.*

51. *Id.*

52. *United States v. Rearden*, 349 F.3d 608 (9th Cir. 2003).

53. *Id.* at 611.

54. *Id.* at 621.

55. *Id.* at 611.

56. *Id.* at 621.

57. *United States v. Granger*, 117 F. App'x 247, 249 (4th Cir. 2004).

that the condition provided a procedure to seek modification to the terms of supervised release.⁵⁸ In doing so, the court also noted that the status of the Internet may change in the future: “It is not possible to anticipate with any precision the extent to which computer technology 15 years from now will impact a worker of [the defendant’s] skills and training.”⁵⁹ However, because the ban allowed for modification if the Internet became a necessity for the defendant, the court held that the restriction was permissible.⁶⁰

Lastly, it is important to note that, beyond the broad discretion given to the courts in determining which special conditions to impose at sentencing, some states have taken the next step and enacted legislation that requires judges to impose Internet restrictions upon certain offenders.⁶¹ Such restrictions are more rigid, as they do not afford judges the discretion to make restrictions conditional or provide for exceptions based upon the specific facts of each case or needs of the defendant.

E. What Accounts for the Varied Outcomes?

While the courts involved in the above cases were dealing with restrictions of varying stringency, the underlying issue remained constant: what exactly is the role the Internet plays in modern daily life? Varying perceptions of this role are likely the reason for the varying conclusions among the circuits. It stands to reason that if one perceives the Internet as a recreational distraction or convenience, one will be much more willing to restrict its use than one who believes the Internet is fundamental to modern daily life.

If this is what happened when these cases were decided, the courts need to take a second look at the Internet, particularly in light of recent advancements. For, in the years since, the Internet has taken an increasingly central role in the way people do business, make purchases and travel plans, and interact with one another. Therefore, prohibiting the use of the Internet as a term of supervised release necessarily raises a number of implications not present with other restrictions.⁶²

58. *Id.*

59. *Id.*

60. *Id.*

61. Brant, *supra* note 2, at 796-97 (detailing a New Jersey statute requiring judges to impose Internet restrictions on convicted sex offenders).

62. *Id.* at 799. Brant has claimed that these implications include an inability to access ATMs, start a business, and find a job. While these concerns may be valid, there are a number that are more widely applicable and more pressing. These are the implications that will be addressed in this article.

II. WHY A RESTRICTION ON INTERNET USE IS DIFFERENT FROM OTHER RESTRICTIONS

One might argue that, even if the Internet is fundamental to our way of life, restricting it is permissible based on the restrictions imposed on many other important rights for the purposes of supervised release. While it is true that such restrictions are commonplace, the Internet is distinguishable because there are no longer any suitable alternatives. For example, an individual who loses driving privileges due to a DUI conviction is not confined to the walls of his or her own home. Instead, such an individual can rely on a plethora of public transportation options, rides from family and friends, and alternative modes of transportation like walking or riding a bicycle. By contrast, an individual banned from cyberspace often will not be able to enjoy many important aspects of modern life. The reason is twofold.

First, many online services that were offered ten years ago have become more prevalent and have undergone significant upgrades. For example, online banking now allows customers to closely monitor accounts and transfer money without leaving their homes. The usefulness of the ability to closely monitor bank accounts should not be overlooked, as fraud and identity theft have become increasingly rampant. Additionally, some banks are willing to pay higher interest rates on online savings accounts due to their lower maintenance costs.⁶³ Thus, online banking is a great example of an increasingly common occurrence: those willing to conduct business online are given access to benefits not offered to those who are not. This means that even though a defendant may have an alternative means of accessing the services offered online, doing so may cause him more hardship than mere inconvenience.

Second, many services that were once offered as alternatives to more traditional methods have now become the standard and—in many instances—are now offered exclusively online. As features like college registration, job applications, and many state-offered services move exclusively into the realm of the Internet, their impact on convicted felons who are denied access to the Internet becomes palpable.⁶⁴ Additionally, large retailers like Target and Wal-Mart now offer an array

63. For example, HSBC offers an online savings account with an interest rate that exceeds the rate it is willing to pay for most other savings accounts. *Personal Savings Products*, HSBC, <http://www.us.hsbc.com/1/2/3/personal/savings> (last visited Oct. 1, 2010). One possible reason banks are willing to do this may be because online accounts can be maintained with less overhead.

64. For example, attendance at the University of Colorado requires Internet access to register for classes, view grades, and, in most instances, receive course information like syllabi and reading assignments. *Courses and Registration*, UNIVERSITY OF COLORADO LAW SCHOOL, <http://www.colorado.edu/law/academics/registration/> (last visited Oct. 1, 2010).

of products online which are not offered in their stores.⁶⁵ As the number of services being offered exclusively online increases, the greater the effect of depriving people of the use of the Internet becomes.

In *United States v. White*, the Tenth Circuit evaluated the usefulness of the Internet and recognized that a defendant banned from the Internet might necessarily be restricted from using it for legitimate purposes such as “using a computer at a library to do any research, get a weather forecast, or read a newspaper online.”⁶⁶ Under those circumstances, the court overturned the broad restriction, holding that it failed to properly balance the competing interests of the state and defendant.⁶⁷

The court in *White* was probably not in a position at that time to foresee the possibility that those services might one day soon be offered exclusively online. However, in the years since, others have observed the demise of traditional newspapers and now predict a future of revolutionized journalism that will be found primarily online.⁶⁸ Their words have proven prophetic in recent months as many large newspapers, once thought to be permanent fixtures in large metropolitan areas, have closed their doors for good.⁶⁹ While television remains a viable alternative for obtaining information, it is still deficient in at least one regard: television does not provide access to local headlines, weather, and traffic updates, as does the Internet, at a time of the user’s convenience. Instead, those restricted from the Internet are forced to wait for scheduled television programming to be provided this information. Of course, those without time to wait must necessarily go without. This puts individuals into the position they were in before the Internet existed. The problem with that is that now they are there alone.

A. *The Internet, Version 2.0: Wireless*

This drastic shift toward online services can be attributed in part to a change in how the Internet is accessed. At the time of the *Paul* and

65. A product search at Target.com, for example, reveals a large number of products which include the caveat, “This item is available online, but is not available in stores.” *Best Sellers in Kitchen + Dining*, TARGET <http://www.target.com> (click Kitchen; then click Kitchen + Dining Furniture; then click Bestsellers; then click on the various displayed products) (last visited Oct. 1, 2010). *See also*, Emily Fredrix, *Wal-Mart Offering Low-Cost Caskets, Urns On Its Website*, THE HUFFINGTON POST, Oct. 28, 2009, http://www.huffingtonpost.com/2009/10/28/wal-mart-caskets-urns-off_n_337366.html (describing how Walmart now sells caskets online at a discounted price).

66. *White*, 244 F.3d 1199, 1206 (10th Cir. 2001).

67. *Id.*

68. Paul Gillin, *How the Coming Newspaper Collapse will Reinvent Journalism*, (Dec. 15, 2006), http://www.gillin.com/Collapse_of_newspapers.pdf.

69. The Rocky, *Goodbye Colorado*, THE ROCKY MOUNTAIN NEWS, Feb. 27, 2009, at A1 (publishing its last daily just 55 days shy of its 150th anniversary).

Peterson decisions, the Internet was accessed exclusively by computers through telephone lines. This meant that most access took place at home or work. The fact that the Internet was accessed only from a machine tethered to a wall limited the frequency and the amount of time most people were able to spend surfing the Web.

Now, thanks to technological advancements like wireless routers and smartphones, the Internet goes where we go. Today, iPhones, BlackBerries, and Androids are objects of worship, allowing people to access a world of information while riding on a bus, waiting to pick up their children from soccer practice, or lying on a beach during a vacation. Not only are more people accessing the Internet, but they are doing it more often, for longer periods of time, and from wherever they happen to be at that moment. This increased mobility makes Internet applications like e-mail and instant messaging a more desirable and necessary form of communication than they were before this technology existed. For example, before the Internet went “mobile,” those whose lifestyle afforded little time to sit at a desktop computer and type out an e-mail would likely find cell phone conversations or text messages a preferable form of communication to any Internet medium.

If wireless technology alone was not sufficient to drastically increase the Internet’s popularity, the fact that it may soon be offered for free certainly is. Various cities across the United States have either implemented or are currently considering initiatives that would provide free wireless access to their citizens.⁷⁰ Such publicly owned services further distinguish Internet service from other media. In a world where virtually all other forms of communication—whether telephone service, postal service, or even face-to-face contact—require at least some form of monetary expenditure, the prospect of a free medium must necessarily create substantial gravitation.

Now that the Internet can be accessed wirelessly via cellular phone or laptop computer, as will be discussed below, there are a number of reasons that people who are pressed for time might elect to communicate via Internet rather than any other medium.

III. THE RISE OF SOCIAL NETWORKING

Of all the changes that have occurred since the circuit courts first analyzed the necessity of the Internet, the proliferation of social networking sites is the most noteworthy. The most popular social networking sites, currently Facebook and MySpace, have hundreds of

70. Hannibal Travis, *Wi-Fi Everywhere: Universal Broadband Access as Antitrust and Telecommunications Policy*, 55 AM. U.L. REV. 1697, 1700-01 (2006) (noting that San Francisco, Philadelphia, New York City, and New Orleans are among the first to pursue city-wide Wi-Fi access).

millions of active account holders worldwide, and their usage statistics are astounding.⁷¹ As we shall see, social networking sites have created a surge in Internet popularity, and—at least among some age groups—have become more popular than any other type of website.⁷² However, to understand the impact these sites have had on the way people use the Internet, it is necessary first to understand what they are. One researcher defines social networking sites as

Web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.⁷³

In other words, social networking sites are those that allow users to create a profile that can be viewed by other users, the extent of which is typically controlled by each individual user. The profile allows other site users to locate and identify others whom they may or may not already know. Profiles vary from site to site but usually include photographs uploaded by the user and certain personal information posted at the user's discretion. Once users find one another on the site, they can begin communicating by posting messages (both publicly and privately), viewing one another's photographs, and establishing contacts with mutual friends. Many social networking sites such as Facebook, allow users to create "groups" where like-minded individuals can join and exchange ideas about matters of common interests.⁷⁴ While there are hundreds of social networking sites available online, some of the more well-known include Facebook, MySpace, Twitter, Bebo, and Classmates.⁷⁵ While the term "networking" implies that people use these sites to make new connections, which is certainly possible, the sites are

71. Bianca Bosker, Google Ranks Top 13 Most Visited Sites on the Web, THE HUFFINGTON POST BLOG (Aug. 28, 2010, 5:12 AM), http://www.huffingtonpost.com/2010/05/28/most-visited-sites-2010-g_n_593139.html#s94487&title=7.%20Blogspot.com (last visited Dec. 29, 2010) (reporting that Facebook is now the most visited website worldwide).

72. Bill Tancer, *Facebook: More Popular Than Porn*, TIME MAGAZINE ONLINE, Oct. 21, 2007, <http://www.time.com/time/business/article/0,8599,1678586,00.html>.

73. Danah Boyd & Nicole B. Ellison, *Social Networking Sites: Definition, History, and Scholarship* 13 J. OF COMPUTER MEDIATED COMMUN 210, 211 (2007).

74. Political groups, for example, have been particularly popular on Facebook. In many instances, groups form in reaction almost immediately in response to specific actions of elected officials. One of the largest of these groups is named "I bet we can find 1,000,000+ People who disapprove of the Health Care Bill." *Groups*, FACEBOOK, <http://www.facebook.com/search/?flt=1&q=madd&co=69#!/group.php?gid=370668318969&ref=ts> (last visited Oct. 1, 2010).

75. Bosker, *supra* note 71.

more commonly used to maintain relationships created in another forum.⁷⁶

In recent years, social networking has become an increasingly utilized means of social interaction. Founded in February 2004 as a social utility for high school and college students, Facebook's rapid growth is staggering.⁷⁷ Currently the most popular social networking site, there are more than 500 million active Facebook accounts worldwide.⁷⁸ Additionally, Facebook claims that 50 percent of active users access their Facebook accounts on any given day.⁷⁹ In fact, Facebook recently became the most popular website in the United States, accounting for more than seven percent of all U.S. visits.⁸⁰

But Facebook is not the only site with impressive membership statistics. MySpace launched in January 2004 and had one million members within the first month.⁸¹ Currently MySpace claims 122 million active users worldwide, with over 70 million of them residing in the United States.⁸²

More remarkable than the number of people joining the social networking bandwagon are the demographics of the members themselves. Facebook claims that its fastest growing demographic is the age group 55 years of age and older.⁸³ The fact that so many older people are drawn to Facebook seems indicative of a much more significant occurrence: Facebook may be responsible for extending the Internet's appeal to a broader audience, leading to a greater overall level of Internet literacy. If people who once thought that the Internet was the domain of a younger generation, and that the Internet had nothing to offer them, have suddenly found a reason to "surf" in Facebook, then more Internet traffic will likely spill over into other areas of the World Wide Web.

76. *Factsheet*, FACEBOOK, <http://www.facebook.com/press/info.php?factsheet> (last visited Dec. 29, 2010) (explaining that one of the primary purposes of Facebook is to facilitate information sharing within real life social networks).

77. *Id.*

78. *Statistics*, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Dec. 29, 2010).

79. Facebook also claims that more than 200 million of those users access their accounts via their mobile phones. *Id.*

80. Michael Arrington, *Hitwise Says Facebook Most Popular U.S. Site*, TECHCRUNCH (Mar. 15, 2010), <http://techcrunch.com/2010/03/15/hitwise-says-facebook-most-popular-u-s-site>.

81. *Timeline*, MYSPACE, <http://www.myspace.com/pressroom/timeline/> (last visited Oct. 1, 2010).

82. The site also claims that 100,000 people sign up for a MySpace account every day. *Factsheet*, MYSPACE, <http://www.myspace.com/pressroom/fact-sheet> (last visited Oct. 1, 2010).

83. Peter Corbett, *Facebook Demographics and Statistics Report 2010- 145% Growth in 1 Year*, ISTRATEGYLABS (Jan. 4, 2010), <http://www.istrategylabs.com/2010/01/facebook-demographics-and-statistics-report-2010-145-growth-in-1-year>.

Regardless of whether Facebook is responsible for or merely illustrative of an increase in Internet literacy among older people, the fact that the Internet is now being used by a broader audience strengthens the argument that the Internet is now a fundamental aspect of daily life.

Additionally, Facebook's shifting demographic has gained recognition by businesses and others who are beginning to see the social-networking giant for the marketing cash cow it really is.⁸⁴ As Facebook's popularity grows, and the Internet's popularity continues to catch the eye of the business industry, there will likely be a greater drive to ramp up the services that companies are offering online. When that day comes, those unable to access the Internet for one reason or another will truly have a different type of existence than those who are free to explore cyberspace.

Of course, it comes as no surprise that Facebook's popularity among younger generation users appears to know no bounds. Nevertheless, the numbers are remarkable. According to at least one author keeping track, social networking sites are the number one online venue among consumers age 18 to 24.⁸⁵ This means that, at least among the younger demographic, social networking is more popular than search engines, e-mail sites, retailer websites, and Internet pornography.⁸⁶

The social networking phenomenon has also caught the attention of a number of sociologists. According to one sociologist, social networking has become a "critical element" of social interaction among youth.⁸⁷ She contends that traditional forums for youth interaction are being replaced by their online counterpart.⁸⁸ Shopping malls, parks, and other areas governed by adult oversight are apparently being abandoned for the freedom provided by online forums; specifically, social networking sites.⁸⁹

A. What do Social Networking Sites Actually Offer?

If one is unfamiliar with social networking sites like Facebook and MySpace, one might wonder, "why all the hype?" The answer to that question is that these sites have become wildly popular because they allow people to interact and stay connected in a way that previously was not possible. While the services offered by these sites vary to some degree, all networking sites allow people to create a customized profile,

84. See Aaron Ricadela, *Fogey's Flock to Facebook*, BUSINESSWEEK (Aug. 6, 2007, 12:01 AM EST), http://www.businessweek.com/technology/content/aug2007/tc2007085_051788.htm.

85. Bill Tancer, *Facebook: More Popular Than Porn*, TIME MAGAZINE ONLINE (Oct. 21, 2007), <http://www.time.com/time/business/article/0,8599,1678586,00.html>.

86. *Id.*

87. danah boyd, *Friendship*, DIGITAL YOUTH PROJECT, <http://digitalyouth.ischool.berkeley.edu/book-friendship> (last visited Sept. 28, 2010).

88. *Id.*

89. *Id.*

listing as little or as much information as an individual chooses to display. Rather than trying to keep up with all contacts individually (whether in person, by telephone, or even by e-mail), a person using a social networking site can post information on his or her profile and update the information at his or her convenience. Rather than get caught in a lengthy phone conversation, or writing a lengthy e-mail, an individual using a social networking site can communicate with a large number of individuals quickly by posting a generic update on one's own profile page, or by posting a series of small messages to various individuals.

Facebook, for example, allows individuals to list age, marital status, personal interests, favorite quotes, political views, and more.⁹⁰ Users can search for friends by way of the site's search engine or by browsing the profiles of others. Facebook can even find people it thinks a person might know due to their having attended the same school, having worked for the same employer, or having mutual friends and suggest them to the user. The user can then send a "friend" request to other users who can choose to accept or ignore them. If a "friend request" is accepted, the users will be allowed to view each other's profiles, send messages, and post comments.⁹¹ Facebook also include an instant messenger feature that allows friends to communicate in real-time. Additionally, users can create "groups" and invite other like-minded individuals to join. Members of a same group can then mingle, network, and commiserate over the same issues.

With the large number of features offered by these sites, it comes as no surprise that people who use them prefer social networking sites over other forms of communication. As at least one observer to the Facebook craze has pointed out, Facebook is fast replacing other online communication tools like e-mail.⁹² Against this background of seemingly overnight popularity, it is understandable that, at least for some demographics, one must be connected to the virtual superhighway to be a part of one's own social network.

The impact of social networking extends beyond merely the format in which people interact and has begun to affect our language as well. In November 2009, the Oxford New English Dictionary announced its 2009 Word of the Year: "unfriend."⁹³ The word is defined as a verb

90. MySpace profiles include many of the same features but also allow users to customize background displays and upload music to be played whenever the profile is displayed. *See, e.g., Myspace Music*, <http://www.myspace.com/music> (last visited Oct. 25, 2010).

91. *See Controlling How You Share*, FACEBOOK, <http://www.facebook.com/privacy/explanation.php> (last visited Sept. 28, 2010).

92. Tancer, *supra* note 85 (referring to Facebook as "e-mail 2.0").

93. David Coursey, *Top Word of 2009: Unfriend, But Twitterisms Abound*, PCWORLD (Nov. 17, 2009, 9:12 AM)

meaning to remove someone as a ‘friend’ on a social networking site such as Facebook.⁹⁴ According to the Dictionary’s senior lexicographer, the word was at least partially selected because it has both currency and potential longevity,⁹⁵ indicative of a general consensus that social networking is more than a mere temporary fad.

IV. WHAT SOCIAL NETWORKING MEANS FOR THE FUTURE OF INTERNET USE

The impact of Web-based social networking sites is perhaps best understood when viewed as part of a larger trend known as cloud computing. Because cloud computing is a relatively newer concept, it is not surprising that there is still substantial disagreement over the exact definition.⁹⁶ For the purposes of this article, cloud computing refers to Web-based programs that store data and programs on commercial servers, allowing individuals and companies to access their accounts from any device with an Internet connection. Under this broad definition, Web-based e-mail sites like Hotmail, Gmail, and Yahoo Mail⁹⁷ are well established cloud computing websites because they store all e-mail and personal content online rather than on each individual’s computer. Naturally, social networking also fits within this definition because accounts containing all one’s personal information is stored “in the cloud” by commercial servers and can be accessed from any location via the Internet.

This technology appeals to consumers for a number of reasons, not the least of which is that they no longer need to store information on individual hard drives. Large amounts of personal information can now be stored in cyberspace, thus eliminating the need for machines with expansive storage capabilities. Moreover, consumers find the technology more convenient because it eliminates the need to transfer files by e-mail

http://www.pcworld.com/businesscenter/article/182352/top_word_of_2009_unfriend_but_twitterisms_abound.html. A runner up was the term “hashtag;” a word derived from the latest social networking craze, Twitter. Its meaning? “[A] # [hash] sign added to a word or phrase that enables Twitter users to search for tweets (postings on the Twitter site) that contain similarly tagged items and view thematic sets.”

94. *Id.*

95. *Id.*

96. See Eric Knorr & Galen Gruman, *What Cloud Computing Really Means: The Next Big Trend Sounds Nebulous, but It’s Not So Fuzzy When You View the Value Proposition from the Perspective of IT Professionals*, INFOWORLD, <http://www.infoworld.com/d/cloud-computing/what-cloud-computing-really-means-031?page=0,0> (last visited Oct. 25, 2010). This article also includes helpful illustrations which demonstrate the potential value of cloud computing from a practical standpoint.

97. See HOTMAIL, <http://www.hotmail.com> (last visited Dec. 21, 2010); GMAIL, <http://www.gmail.com> (last visited Dec. 21, 2010); and YAHOO, <https://login.yahoo.com> (last visited Dec. 21, 2010).

or flash drive from one computer to the next, a familiar problem for anyone who has ever tried to take files from the office for a weekend of work at home.

The future implications of this technology are virtually limitless, and are currently the topic of much discussion in blogs and chatrooms.⁹⁸ However, for the purposes of demonstrating how it will shape the future of Internet use (and specifically those banned from using it), there are at least two important implications.

First, as the demand for cloud computing technology increases, more and more applications and programs will be made available “in the cloud.” Software manufacturers will, of course, adapt to meet demands for the streamlined computing that the cloud provides. This will necessarily impact the number of software applications that are available for purchase and storage on an individual hard drive. Under such a trend, it is no stretch of the imagination to envision a world where one cannot so much as access a word processing program to draft a letter without connecting to the Internet.

Second, the ability to store large amounts of information “in the cloud” increases the appeal of devices like netbooks; miniature laptops with relatively less power and storage space that were designed to make Internet navigation more convenient.⁹⁹ More recently, thanks to computer giant Apple’s release of the iPad, these services are increasingly available in tablet form.¹⁰⁰ As demand for a mobile Internet rises, it is likely that these devices will become increasingly popular, which—for the reasons described above—will further ostracize individuals burdened by an Internet restriction.

If the proposition that all software will one day be based and stored on the Internet seems speculative or farfetched, the following might come as a surprise: it is already happening. In July of 2009, Internet giant Google announced the release of a new operating system designed with the Internet in mind: Google Chrome OS.¹⁰¹ The new system will facilitate speed by doing away with bulky applications that take up

98. See Oliver, *What Cloud Computing Means for You*, ZETA (Jan. 22, 2009, 4:32 PM), <http://www.zeta.net/industry-news/what-cloud-computing-means-for-you.html>.

99. Currently, all major computer manufacturers offer netbooks. See, e.g., *Dell Inspiron Mini Notebooks*, DELL, <http://www.dell.com/content/topics/segtopic.aspx/laptop-mini-alt?c=us&l=en&cs=19> (last visited Sept. 28, 2010).

100. See Barb Dybwad, *9 Upcoming Tablet Alternatives to the Apple iPad*, MASHABLE, <http://mashable.com/2010/01/27/9-upcoming-tablet-alternatives-to-the-apple-ipad> (last visited Oct. 25, 2010).

101. Sundar Pichai, *Introducing the Google Chrome OS*, THE OFFICIAL GOOGLE BLOG (July 7, 2009, 9:37 PM), <http://www.googleblog.blogspot.com/2009/07/introducing-google-chrome-os.html>. The system is slated to be released in late 2010 and will first be available on netbooks.

valuable hard drive space and store all information on the Web.¹⁰²

V. REASSESSING THE INTERNET'S ROLE

In light of these changes, the time has come for the courts to reevaluate the Internet's role in modern society. The question of whether or not the Internet may or may not be restricted as a term of supervised release is just one of many that cannot be satisfactorily answered unless the courts recognize current trends and understand exactly what the Internet is. While the Internet's exact role will likely always be a point of some disagreement, the decisions of courts like the Fifth Circuit reflect a gross underestimation of the Internet's potential. Even if the Internet is not everything the Second Circuit believed it to be in 2001,¹⁰³ viewed against the background of recent advances like social networking sites, it can no longer be considered the frivolous convenience the Fifth Circuit apparently characterized it to be.¹⁰⁴

A. *The Second Circuit May Have Been Right*

In the wake of the rise in Internet use, at least in part, by the popularity of social networking sites, the Second Circuit's position seems to have been reinforced. If the Internet was not yet "virtually indispensable" in 2001, as the *Peterson* court declared it to be,¹⁰⁵ the advents of the years since surely must have made it so. The Internet now may very well be necessary to ex-offenders to be productively involved in society. It would seem that if a parolee is restricted to the extent that he can no longer function in the very society to which the system is meant to return him, its purpose necessarily becomes suspect.

If current trends continue, it is likely that more and more services will be offered exclusively online, putting banned individuals at a disadvantage. Moreover, as traditional forms of social interaction take a back seat to social networking sites, those banned from their use will be deprived of a valuable resource. Given the utility of the Internet, one must wonder if a broad ban on Internet access is an appropriate course of action where less burdensome means of protecting public interests are available. Certainly, probation officers can monitor Internet usage by making unannounced inspections of an ex-criminal's home or place of work. While this method does not prevent an ex-criminal from creating a safety risk, it does provide a certain level of deterrence. If ex-offenders are aware that their surfing will, or is likely to be, reviewed by an

102. *Id.*

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

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

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

individual with the power to send them back to prison, it stands to reason that they are more likely to behave. Additionally, terms of restrictions can and should be individually tailored to each offender based on individual needs and level of risk posed to avoid restrictions that are overly broad.¹⁰⁶ Undoubtedly, the hardship created by a complete ban on Internet access seems excessive if the goals of protecting the public can be adequately achieved by means of less restrictive monitoring.

B. *An Argument for Restricting the Internet*

While the Internet now plays a more integral part in American life, it does not necessarily follow that it should not be restricted as a term of supervised release in all cases. The fact that the Internet is so fundamental to our day-to-day life may also bolster the argument that convicted felons whose Internet access presents a danger to others should be denied its unrestricted use. There are at least two reasons for this.

First, an Internet restriction's deterrent effect is much more potent now that the Internet has become so vital to our modern way of life. Indeed, some might argue that it is precisely the appeal of the Internet, bolstered significantly by the advent of social networking, which makes the restriction of its use so effective. If the Internet is now actually so fundamental to our existence, perhaps people will think twice before doing anything that might jeopardize their ability to access it in the future. After all, deterrence plays a central role in our legal system's theory of punishment.¹⁰⁷

Second, if social networking sites have extended the Internet's appeal to a broader demographic, it may be that ex-offenders should be denied Internet access because there are now more people online needing protection from predators. The increased Internet traffic brought about by the popularity of social networking sites, especially among a previously "Internet-illiterate" demographic, means a greater danger for Internet crime. Given that social networking sites provide opportunities for Internet predators of all kinds to find potential victims, there is arguably a greater need to keep those who have proven to have such a disposition from accessing them.

It is no secret that social networking sites have been used by predators to commit various types of crime in the past. MySpace was the first to be targeted by law enforcement agencies with accusations that it

106. Such flexibility is also not possible under rigid state statutes which mandate broad bans.

107. *See* 18 U.S.C. § 3553(a)(2) (2006). In considering the need for the sentence imposed, § 3553(a)(2) instructs courts to examine, among other things, its adequacy to deter criminal conduct as well as the need to protect the public from further crimes of the defendant.

does not do enough to protect its users.¹⁰⁸ Recently, Facebook faced similar accusations from the Connecticut Attorney General's Office which complained that registered sex offenders have, in at least three cases, been allowed to create accounts and retrieve "inappropriate images and content."¹⁰⁹ If the proliferation of convicted sex offenders on social networking sites was not painfully evident before, it certainly became so when MySpace announced that it had deleted 29,000 profiles that were found to have been set up by convicted sex offenders during a screening process.¹¹⁰

Logically, since these sites are so popular among younger people, there is a greater need to keep convicted sex offenders from accessing them. The efforts of MySpace and Facebook to screen profiles created on their sites, while admirable, cannot be completely successful absent the necessary resources possessed only by law enforcement. There are simply too many sex offenders for the companies to monitor. Moreover, state law enforcement agencies are, or should be, monitoring these sex offenders already through their probation officers. Regardless of the efforts made by these companies to protect the public, the fact remains that the states are saddled with the responsibility, are best equipped to monitor the activity of felons, and most likely to prevent potential victims from being targeted.

The security concerns brought about by the social networking movement are not limited to those surrounding sexual predators, but extend to hackers as well. Since social networking and other cloud computing sites are proliferating, more sensitive information will be stored by their users online than ever before. While providers must and will certainly take steps to protect user information, the increased opportunity to commit identity theft and other related crimes seems to strengthen the argument that those who have proven themselves willing to commit such crimes should be prevented from accessing the Internet.

CONCLUSION

Together with the many changes that have come to pass since this issue was first addressed by the various circuits, social networking has changed the way people think about and use the Internet. Particular social networking sites may come and go over the next few years,¹¹¹ but

108. Brad Stone, *New Scrutiny for Facebook over Predators*, N.Y. TIMES (July 30, 2007), <http://www.nytimes.com/2007/07/30/business/media/30facebook.html>.

109. *Id.*

110. *Id.*

111. For example, there is good reason to believe that Bebo may be on its way out. See Andre Yoskowitz, *AOL to Sell or Shutdown Bebo Social Networking Site*, AFTERDAWN (Apr. 8, 2010, 12:10),

the overall trend remains constant: people are increasingly abandoning traditional means of communication and embracing social networking sites as their new means of staying connected. Social networking has changed and continues to change the way people communicate with one another and manage their daily lives. Therefore, those burdened by a broad restriction on Internet use are not able to interact in the same way as those who are not.

In examining the current trend, the future becomes apparent. If social networking sites like Facebook and MySpace have not yet catapulted the Internet out of the realm of modern convenience and into that of societal necessity, they have certainly taken it a giant step in that direction. Undoubtedly, other cloud computing applications, together with the popular hardware created to accommodate them, will have an irrevocable effect on the use of the Internet. Moreover, because the Internet has such a sturdy hold on America's youth—a generation that grew up using computers and online resources—restricting access to the Internet will have a fundamentally different meaning and greater impact for them than it does for the current generation of convicted felons—or for current circuit judges for that matter. Against this background, the Second Circuit seems to have been right about broad Internet bans, especially since less restrictive alternatives abound.

The time has come for the Fifth Circuit's statement in *Brigham* that the Internet and computers "still are not absolutely essential to a functional life" to be reexamined. Regardless of whether or not one believes the Internet should be restricted as a term of supervised release, the courts need to reassess the argument, this time recognizing the Internet's elemental role in modern society. No court can reach a valid conclusion about prohibiting Internet access without first acknowledging the significance of what is being prohibited. Due to recent advances which have caused a surge in Internet popularity and utility, the Internet is nothing less than essential to our modern way of life.