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A World Without Internet: A New Framework for Analyzing a Supervised Release Condition That Restricts Computer and Internet Access

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A WORLD WITHOUT INTERNET: A NEW FRAMEWORK FOR ANALYZING A SUPERVISED RELEASE CONDITION THAT RESTRICTS COMPUTER AND INTERNET ACCESS

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This Note explores whether a condition of supervised release that restricts computer and Internet access violates the doctrine of unconstitutional conditions. Although a circuit split has developed regarding the scope of a permissible restriction, as Courts of Appeals have been inundated with cases challenging the validity of these technology restrictions, no court has yet viewed these limits through the lens of the doctrine of unconstitutional conditions. This Note begins with a discussion of the First Amendment and the theory of unconstitutional conditions, tracing their respective developments in cases relating to prisoners, speech, and the Internet age. Next, it synthesizes the oft-criticized idea of unconstitutional conditions into a new three-prong framework, judging the propriety of a condition based on the government's coerciveness in making the offer, the purpose for pursuing the condition, and the condition's effect on protected speech. Then, this Note surveys cases where courts have ruled on the validity of a computer or Internet restriction, and recasts their reasoning to discuss whether such a condition may be constitutional, using the coercion-purpose-effect framework. Finally, this Note concludes that a condition is constitutional where it is accepted knowingly and voluntarily, is intended to protect the public rather than regulate speech indirectly, and where computer-monitoring and Internet-filtering technology is maximized to minimize First Amendment infringement.

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INTRODUCTION

Paul R. Thielemann had the support of his family, a history of employment, and had never had run-ins with the law;[1] Thielemann, however, was a predator who trafficked in child pornography.[2] After America Online (AOL) detected transmissions of child pornography from Thielemann's account, it reported the activity to the Delaware State Police.[3] On February 23, 2007, law enforcement executed a search warrant, based on AOL's tip, and seized Thielemann's computer.[4] Stored on the computer, the officers found hundreds of pornographic images of children, explicit online conversations describing sexual encounters with minors, and transcripts of Thielemann encouraging others to exploit and victimize children.[5] Thielemann was indicted on eighteen counts of child

1. United States v. Thielemann, 575 F.3d 265, 271 (3d Cir. 2009), *cert. denied*, 130 S. Ct. 1109 (2010).
2. *See id.* at 268.
3. *Id.*
4. *Id.*
5. *Id.* at 268, 269 n.4.

pornography-related crimes, and pleaded guilty to one count of receiving child pornography.[6] The trial court sentenced him to twenty years in prison followed by a ten-year term of supervised release, which included a condition preventing him from "own[ing] or operat[ing] a personal computer with Internet access in a home or at any other location, including employment, without prior written approval of the Probation Office."[7]

Thielemann appealed the computer condition, arguing it was unrelated to the offense and overly restrictive.[8] The U.S. Court of Appeals for the Third Circuit disagreed, finding the condition "clearly and properly imposed . . . to deter future crimes via the [I]nternet and to protect children."[9] Thielemann's case became the fifth time in a decade that the Third Circuit had faced a similar challenge—three times accepting the condition as constitutional, because it related to the crime and did not unnecessarily deprive the convict of liberty,[10] and twice finding the condition unconstitutional, because it was unduly restrictive and an overbroad regulation of speech.[11]

The Third Circuit's experience is emblematic of the struggle of federal courts across the country to balance the need to protect the public from released sex offenders without unduly restricting the constitutional rights of convicts that are no longer incarcerated.[12] As child pornography crimes on the Internet have become increasingly prevalent,[13] more and more courts are ruling on the legality of a condition of supervised release that limits access to a computer or the Internet. Every United States Court of Appeals, save the Federal Circuit, has dealt with the issue.[14] On one hand, allowing

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6. *Id.* at 268–69.

7. *See id.* at 270 (alterations in original).

8. Opening Brief for Appellant Thielemann at 29–31, *Thielemann*, 575 F.3d 265 (No. 08-2335).

9. *Thielemann*, 575 F.3d at 278.

10. *See id.*; United States v. Harding, 57 F. App'x 506, 508 (3d Cir. 2003); United States v. Crandon, 173 F.3d 122, 127–28 (3d Cir. 1999).

11. *See* United States v. Voelker, 489 F.3d 139, 144 (3d Cir. 2007); United States v. Freeman, 316 F.3d 386, 391–92 (3d Cir. 2003).

12. *See* Recent Case, *Criminal Law—Supervised Release—Third Circuit Approves Decade-Long Internet Ban for Sex Offender*—United States v. Thielemann, *575 F.3d 265 (3d Cir. 2009)*, 123 HARV. L. REV. 776, 779 (2010); *see generally* Krista L. Blaisdell, Note, *Protecting the Playgrounds of the Twenty-First Century: Analyzing Computer and Internet Restrictions for Internet Sex Offenders*, 43 VAL. U. L. REV. 1155 (2009) (outlining circuit split on the issue).

13. Amir Efrati, *Making Punishments Fit the Most Offensive Crimes*, WALL ST. J., Oct. 23, 2008, at A14 (noting cases of child exploitation via computer have more than doubled in five years, to 2211 federal cases in 2008); *The Steady Stream of Child Porn Sentencings*, SENT'G L. & POL'Y (May 2, 2009, 12:13 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2009/05/the-steady-stream-of-child-porn-sentencings.html (lamenting that "seemingly upstanding citizens" consume child pornography).

14. *See* United States v. Stults, 575 F.3d 834, 855–56 (8th Cir. 2009); United States v. Perazza-Mercado, 553 F.3d 65, 69–74 (1st Cir. 2009); United States v. Sullivan, 451 F.3d 884, 895–96 (D.C. Cir. 2006); United States v. Balon, 384 F.3d 38, 43–46 (2d Cir. 2004); United States v. Granger, 117 F. App'x 247, 248–49 (4th Cir. 2004); United States v. Rearden, 349 F.3d 608, 620–22 (9th Cir. 2003); United States v. Taylor, 338 F.3d 1280, 1284–85 (11th Cir. 2003); United States v. Holm, 326 F.3d 872, 877–79 (7th Cir. 2003);

a rehabilitating prisoner to use the Internet affords him[15] the chance to communicate with millions of people and "access vast amounts of information from around the world."[16] Nevertheless, Internet access also provides the offender the means to seek new victims and the opportunity to prey on society's weakest members.[17]

While courts have frequently ruled on the propriety of limiting computer and Internet access as a condition of supervised release, they have not discussed the issue using the theory of unconstitutional conditions.[18] This Note will harness the relevant cases and theories to develop a new framework to examine whether such a restriction may be an unconstitutional condition. It will do so by looking at this legal question through the prism of cases that have not explicitly addressed unconstitutional conditions, despite the opportunity. Part I.A introduces the U.S. Constitution's First Amendment right to free speech and its adaptation in the technological age, which is crucial to understanding the backdrop of disputes over a restriction that limits access to technology. Then, Part I.B recounts the history and theory of unconstitutional conditions, including the theory's application in First Amendment and prisoner contexts. Part I.C offers a new three-prong framework, gleaned from the reasoning of courts and commentators, to analyze the constitutionality of a condition that limits computer and Internet use. These prongs judge whether the government coerces a beneficiary into accepting a conditional offer, whether the government's purpose for a condition is proper, and whether a condition's effect on speech is overly restrictive. Finally, Part I.C explains why imposing a computer or Internet restriction as a condition of supervised release for a sex offender may create an unconstitutional conditions problem. Part II surveys cases where courts have ruled on the validity of a computer condition, and recasts their reasoning to discuss whether or not such a condition may be constitutional, using this Note's coercion-purpose-

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United States v. Suggs, 50 F. App'x 208 (6th Cir. 2002) (imposing condition in fraud case); United States v. Walser, 275 F.3d 981, 987–88 (10th Cir. 2001); United States v. Paul, 274 F.3d 155, 167–70 (5th Cir. 2001); *supra* notes 10–12 (discussing Third Circuit cases); *see also* David Kravets, *U.S. Courts Split on Internet Bans*, WIRED THREAT LEVEL BLOG (Jan. 12, 2010, 5:11 PM), http://www.wired.com/threatlevel/2010/01/courts-split-on-internet-bans/.

15. This Note uses third-person masculine pronouns because almost all defendants in child pornography cases are men. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS, 2006, at 5 (2007) (compiling statistics indicating that, in 2006, 98.7% of child pornography defendants were male).

16. Reno v. ACLU, 521 U.S. 844, 850 (1997).

17. *See* James Brooke, *Sex Web Spun Worldwide Traps Children*, N.Y. TIMES, Dec. 23, 2001, at A12 ("[T]he Internet . . . explosion has been a boon to adults who prey on young people for sex . . . ."); Jerry Markon, *Tracking Sex-Crime Offenders Gets Trickier*, WASH. POST, Nov. 23, 2009, at A1.

18. *See infra* Part I.C. *See generally* Doug Hyne, *Examining the Legal Challenges to the Restriction of Computer Access as a Term of Probation or Supervised Release*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 215 (2002) (discussing sentencing for Internet crimes, but not mentioning unconstitutional conditions); Emily Brant, Comment, *Sentencing "Cybersex Offenders": Individual Offenders Require Individualized Conditions When Courts Restrict Their Computer Use and Internet Access*, 58 CATH. U. L. REV. 779 (2009) (same).

effect framework. Finally, Part III argues that a condition that limits computer and Internet access is constitutional where the convict is not compelled to accept release, the government does not intend to regulate speech indirectly, and the condition protects children while minimizing First Amendment infringement.

I. UNDERSTANDING A TECHNOLOGY RESTRICTION ON SUPERVISED RELEASE: THE FIRST AMENDMENT, PRISONERS, AND THE THEORY OF UNCONSTITUTIONAL CONDITIONS

Part I of this Note introduces the First Amendment and the elements needed to determine the validity of a condition on supervised release. First, it lays out the right to freedom of speech as it relates to prisoners, pornography, and the Internet, because a computer and Internet restriction as a condition of supervised release operates at the nexus of these issues. Next, it describes the "doctrine" of unconstitutional conditions, including the theoretical foundation and case law related to a condition that circumscribes speech or prisoner rights. Then, it synthesizes various frameworks for analyzing a condition to offer a new model for judging the validity of a condition. Finally, this part explains why a restriction on computer and Internet access as a condition of supervised release may create an unconstitutional condition.

A. The Scope and Limits of First Amendment Freedom of Speech

The First Amendment is implicated because it underlies concerns about the effect of computer and Internet restrictions on the speech of convicts on supervised release. The First Amendment prohibits the federal government from "abridging the freedom of speech."[19] The right to free speech was enshrined in the Constitution to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[20] It has since been credited as the foundation upon which American democracy thrives.[21] Despite the broad guarantee of freedom of speech in the text of the First Amendment, the government is not affirmatively obligated to provide citizens the means to exercise those rights,[22] and the

19. U.S. CONST. amend. I. The guarantee of freedom of speech originally only applied to the federal government, but has since been incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

20. Roth v. United States, 354 U.S. 476, 484 (1957).

21. *See* GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 3–8 (3d ed. 2008); THE FIRST AMENDMENT, FREEDOM OF SPEECH: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE 13–20 (Vikram David Amar ed., 2009); *see also* DAVID G. POST, IN SEARCH OF JEFFERSON'S MOOSE: NOTES ON THE STATE OF CYBERSPACE 187–92 (2009) (detailing Thomas Jefferson's view on the critical importance of the First Amendment).

22. *See* U.S. CONST. amend. I. (stating the right to free speech as a prohibition on government activity); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 115 (1995) ("Government is under no obligation to *subsidize* speech. It can refuse to fund any and all speech-related activities. If it does not want to fund expression at all, it is free to do so."); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1324–25 (1984).

U.S. Supreme Court has consistently held the government may stifle speech in appropriate situations.[23] By way of example, this part discusses how the government may limit speech for prisoners at various stages of incarceration, and may also restrict obscene speech that the First Amendment does not protect. If the government may regulate speech in the tangible world, it also may regulate similar speech occurring online.

1. A Convict's Enjoyment of First Amendment Speech Rights Depends on His Level of Incarceration

The government's power to regulate prisoner speech is commensurate with the level of incarceration along a continuum of severity of punishment, and is at its apogee for incarcerated prisoners. In *Procunier v. Martinez*,[24] the Supreme Court established that the government need only show that a regulation reasonably relates to maintaining prison order to comply with the First Amendment.[25] *Procunier* also empowered the government to impose a speech regulation within prison where it rationally advanced the state interest in security or rehabilitation, and did not limit speech more than necessary.[26] This justified restrictions on speech between prisoners in different institutions and limits on an inmate's right to access speech from outside prison where the government showed its actions related to prison safety and security.[27] The *Procunier* line of cases has been adapted in modern times to substantiate regulations that curb Internet access inside prison,[28] though electronic communication may have a positive impact on inmate rehabilitation and ease reintegration into society after a sentence is completed.[29] Thus, the Court found that a prisoner in lockup has a more limited right to free speech than a person outside the prison walls.

While the government may regulate speech for a prison inmate, it has much less power to restrict the First Amendment rights of a released convict on parole or probation. Parole is a system where the government decides to release the prisoner before he serves the full sentence, often

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23. *See* STONE ET AL., *supra* note 21, at 3 (comparing Justice Hugo Black's absolutist view of the First Amendment, which rejects all speech limits, with Court precedent upholding restrictions).

24. 416 U.S. 396 (1974).

25. *See id.* at 412–13; *see also* Thornburgh v. Abbott, 490 U.S. 401, 408–14 (1989) (reviewing prison speech regulations under a reasonableness standard).

26. *See Procunier*, 416 U.S. at 413–14.

27. *See id.*; *see also Thornburgh*, 490 U.S. at 403–04, 415; Turner v. Safley, 482 U.S. 78, 91–94 (1987).

28. *See* Karen J. Hartman, *Prison Walls and Firewalls: H.B. 2376—Arizona Denies Inmates Access to the Internet*, 32 ARIZ. ST. L.J. 1423, 1430 (2000); Titia A. Holtz, Note, *Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 BROOK. L. REV. 855, 860–66 (2002) (scrutinizing regulations prohibiting inmate Internet access).

29. *See, e.g.*, Michael James, *Learning Behind Bars*, BALT. SUN, Feb. 12, 2001, at C1. Internet access may also help a detained prisoner pursue his case in court. *See* Michael Rothfeld, *Texas Prison is Technology Vortex, Allen Stanford Says*, WALL ST. J. L. BLOG (Aug. 13, 2010, 4:21 PM), http://blogs.wsj.com/law/2010/08/13/texas-prison-is-technology-vortex-allen-stanford-says/.

because of good behavior.[30] It is typically given to a convict who is not yet ready for freedom, and often requires the parolee to report regularly to a parole officer.[31] Even less severe is probation, a court-imposed sentence given in lieu of a prison term.[32] In either case, the government maintains leverage to enforce the condition by retaining power to alter the condition or return the convict to prison.[33] A released convict's conditional liberty affords him greater speech rights than an inmate, but only to the extent that the state's interest in public safety or prisoner rehabilitation is not implicated.[34] For example, the government may restrict speech for penological reasons, but may not universally require a parolee to obtain permission before speaking publicly,[35] or prevent a released convict from profiting by publishing details of a crime.[36] In essence, the government must prove a more rational connection between limiting parolee or probationer speech and public safety to comport with the First Amendment.

Supervised release is a hybrid penalty, which creates an intermediate burden for the state to justify burdens on convict speech. Supervised release, "in contrast to probation [or parole], is 'meted out in addition to,

30. BLACK'S LAW DICTIONARY 1227 (9th ed. 2009); *see also* Morrissey v. Brewer, 408 U.S. 471, 477 (1972) (stating parole is given to reintegrate prisoners into society while cutting incarceration costs). *See generally* JUDITH GREENE & MARC MAUER, THE SENTENCING PROJECT, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES (2010), *available at* http://sentencingproject.org/doc/publications/publications/inc_DownscalingPrisons2010.pdf (charting early release trends); ILYANA KUZIEMKO, GOING OFF PAROLE: HOW THE ELIMINATION OF DISCRETIONARY PRISON RELEASE AFFECTS THE SOCIAL COST OF CRIME (2007), *available at* http://faculty.chicagobooth.edu/workshops/AppliedEcon/archive/pdf/Kuziemko-GoingOffParole.pdf (suggesting that parole lowers long-term prison costs and reduces recidivism).

31. *See* Samson v. California, 547 U.S. 843, 854 (2006). Federal parole decisions are made by the U.S. Parole Commission, a Justice Department agency. U.S. DEP'T OF JUSTICE: ANSWERING YOUR QUESTIONS, http://www.justice.gov/uspc/questions.htm (last visited Sept. 23, 2010).

32. BLACK'S LAW DICTIONARY 1322 (9th ed. 2009); *infra* note 37 and accompanying text.

33. *See Morrissey*, 408 U.S. at 478–80; *see also* LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULL. , PROBATION AND PAROLE IN THE UNITED STATES, 2008, at 1 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus08.pdf (counting, as of 2007, more than five million probationers and parolees in the United States); Solomon Moore, *Struggling to Keep Tabs on Paroled Sex Offenders*, N.Y. TIMES, Sept. 27, 2009, at A14 (highlighting parole's impact on state prison systems).

34. *See* Griffin v. Wisconsin, 483 U.S. 868, 874 (1987) ("[I]t is always true of probationers . . . that they do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'" (alteration in original) (quoting *Morrissey*, 408 U.S. at 480)); *Morrissey*, 408 U.S. at 482; United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 & n.14 (9th Cir. 1975) (noting a condition on probationer and parolee speech is not per se suspect).

35. *See* United States v. Richards, No. 09-10324, 2010 U.S. App. LEXIS 13133, at *6–7 (9th Cir. June 25, 2010); Porth v. Templar, 453 F.2d 330, 334 (10th Cir. 1971); Hyland v. Procunier, 311 F. Supp. 749, 750–51 (N.D. Cal. 1970).

36. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 108–15, 120–23 (1991).

not in lieu of, incarceration.'"[37] This places it in the middle of the continuum because it is more lenient than jail time, but more harsh than parole or probation.[38] The United States Probation Office, an arm of the judicial branch, oversees a convict on supervised release.[39] To deter recidivism, a court has independent power to impose conditions of release, alter the conditions after confinement, and hold a convict in contempt for any violation.[40] Following the logic of *Procunier* and its progeny, the government has less power to restrict the liberty and speech of a convict on supervised release precisely because it is a less harsh punishment than prison.[41] However, the government may restrict the speech of a convict on supervised release where it has a legitimate state interest.

2. The Government's Power To Limit Enjoyment of Sexually Explicit Material Depends on the Type of Content

Just as the government's authority to constrain prisoner speech differs based on the severity of the punishment, its power to regulate non-prisoner speech also varies based on the nature of the content. Despite the Supreme Court's holding that states could regulate sexually explicit speech for minors,[42] the line between pornography and obscenity as it related to adults remained unclear until *Miller v. California*.[43] In that case, a jury convicted the owner of a mail-order business, which sold erotic photos and drawings, of a misdemeanor after he sent unsolicited advertising brochures to potential customers.[44] In a landmark ruling, the Supreme Court held that "obscene material is not protected by the First Amendment."[45] However, due to the danger of speech regulation, it found that obscenity was "carefully limited" to sexual content that met the following standard:[46]

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37. United States v. Reyes, 283 F.3d 446, 461 (2d Cir. 2002) (quoting United States v. Cardona, 903 F.2d 60, 63 (1st Cir. 1990)).

38. United States v. Lifshitz, 369 F.3d 173, 181 n.4 (2d Cir. 2004) (citing *Reyes*, 283 F.3d at 461)).

39. *See Reyes*, 283 F.3d at 455 (recounting the history, structure, and purpose of supervised release); *see also* 18 U.S.C. §§ 3602–3603 (2006) (describing appointment and duties of probation officers). The judicial branch oversees parolee supervision. U.S. COURTS, THE SYSTEM AND ITS OFFICERS, http://www.uscourts.gov/FederalCourts/ProbationPretrialServices/Supervision.aspx (last visited Sept. 23, 2010).

40. *See* United States v. Reese, 71 F.3d 582, 588 (6th Cir. 1995); *see also* 18 U.S.C. § 3583(d) (listing criteria for imposition of supervised release); Gozlon-Peretz v. United States, 498 U.S. 395, 407–08 (1991) (discussing the history of supervised release).

41. *See supra* notes 24–27, 34–36 and accompanying text; *cf. Reyes*, 283 F.3d at 462 (clarifying, in search context, the validity of curbing constitutional rights based on continuum of punishment).

42. Ginsberg v. New York, 390 U.S. 629, 631–33 (1968).

43. 413 U.S. 15, 16 (1973) (re-examining precedent on "the intractable obscenity problem" (quoting Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting))).

44. *Id.* at 16–18.

45. *Id.* at 36.

46. *Id.* at 23–24.

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[47]

While *Miller* established that the government may have the power to regulate obscene material within the strictures of the First Amendment, it failed to provide guidance on whether obscene content was the only regulable speech under the First Amendment.

Nine years after *Miller*, the Supreme Court found that the government may regulate child pornography, whether deemed obscene or not. In *New York v. Ferber*,[48] a jury convicted a bookstore owner of violating a law that outlawed sales of material depicting sexual conduct by minors.[49] The New York Court of Appeals struck down the law, saying its failure to include a standard for obscenity violated free speech.[50] The Supreme Court, which granted certiorari to decide if child pornography must be regulated as obscenity,[51] found it "evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"[52] The Court went on to state that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment."[53] Therefore, states have a paramount interest in preventing child sexual exploitation, and the limited artistic value of child pornography justified regulating such content outside the *Miller* obscenity standard.[54] This made *Miller*'s inquiry into the average person's prurient interest, the material's portrayal of patently offensive sexual conduct, and the value of the work as a whole irrelevant in the child pornography context.[55] As a result, consistent with the First Amendment, the government may regulate obscene speech that satisfies the *Miller* standard, and depictions of child pornography under *Ferber*.

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47. *Id.* at 24 (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)).
48. 458 U.S. 747 (1982).
49. *See id.* at 751–52.
50. *Id.* at 752.
51. *Id.* at 753.
52. *Id.* at 756–57 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).
53. *Id.* at 758.
54. *Id.* at 756–64 (enumerating five reasons to allow states more leeway to regulate child pornography than obscenity).
55. *Id.* at 764–65; *see also* Ashcroft v. Free Speech Coal., 535 U.S. 234, 249–50 (2002) (reaffirming the tenets of *Ferber*).

3. Freedom of Speech and the State's Authority To Regulate Sexually Explicit Content Are Evolving in the Internet Age

Precedent from *Miller* and *Ferber* has been strained as the contours of freedom of speech have shifted alongside the development and mass adoption of computer and Internet technology. Like the telegraph, radio, telephone, and television in previous eras, the growth of the Internet as a "forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" has revolutionized mass communication and information systems.[56] Nearly three-fourths of Americans are now online,[57] and the federal government continues to take measures to expand Internet access across the country.[58] Recent scholarship indicates that Americans of all ages are online between ten and fourteen hours per week.[59] Each hour one hundred thousand new websites join the more than two billion pages already on the Internet;[60] the U.S. Government alone maintains more than twenty-four thousand websites and resources online.[61] Computers and the Internet are such prolific information sources and ubiquitous features of life that one expert claimed "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."[62]

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56. 47 U.S.C. § 230(a)(3) (2006); *see* BRUCE BIMBER, INFORMATION AND AMERICAN DEMOCRACY: TECHNOLOGY IN THE EVOLUTION OF POLITICAL POWER 75–88 (2003); CARLA G. SURRATT, THE INTERNET AND SOCIAL CHANGE 1–5 (2001). For an interesting discussion of the future of the Internet, see generally Symposium, *Notes from the New World: The Future of the Internet*, 78 FORDHAM L. REV. 2751 (2010) (introducing "an exchange on theories of Internet governance").

57. *Internet Users (per 100 people)*, THE WORLD BANK, http://data.worldbank.org/indicator/IT.NET.USER.P2 (last visited Sept. 23, 2010). In 2009, seventy-seven million people, including forty-four percent of people living in poverty, used a public library to facilitate Internet access. *Nearly One-Third of Americans Use Library to Access Internet*, MEDIA ACCESS PROJECT (Mar. 26, 2010), http://www.mediaaccess.org/2010/03/nearly-one-third-of-americans-use-library-to-access-internet/.

58. *See* Stephanie Condon, *Stimulus Bill Includes $7.2 Billion for Broadband*, CNET NEWS (Feb. 17, 2009, 9:40 AM), http://news.cnet.com/8301-13578_3-10165726-38.html. *See generally The National Broadband Plan: Connecting America*, FCC, http://www.broadband.gov (last visited Sept. 23, 2010) (lauding the benefits of broadband Internet).

59. *See* VICTORIA RIDEOUT ET AL., THE HENRY J. KAISER FAMILY FOUNDATION, GENERATION M^2: MEDIA IN THE LIVES OF 8- TO 18-YEAR-OLDS 2 (2010), *available at* http://www.kff.org/entmedia/upload/8010.pdf; Lance Whitney, *Average Net User Now Online 13 Hours Per Week*, CNET NEWS (Dec. 23, 2009, 7:30 AM), http://news.cnet.com/8301-1023_3-10421016-93.html.

60. STONE ET AL., *supra* note 21, at 345.

61. FED. WEB MANAGERS COUNCIL, PUTTING CITIZENS FIRST: TRANSFORMING ONLINE GOVERNMENT 1 (2008), *available at* http://www.usa.gov/webcontent/documents/Federal_Web_Managers_WhitePaper.pdf.

62. Matt Richtel, *Barring Web Use After Web Crime*, N.Y. TIMES, Jan. 21, 2003, at A1; *see* U.S. DEP'T OF COMMERCE, A NATION ONLINE: ENTERING THE BROADBAND AGE 3 (2004), *available at* http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.pdf; JEFFREY I. COLE ET AL., THE UCLA INTERNET REPORT: SURVEYING THE DIGITAL FUTURE 4–5 (2000), *available at* http://www.digitalcenter.org/pdf/InternetReportYearOne.pdf.

Additionally, the Internet has become an important tool for political and civic engagement. Technology has driven democracy as millions of people have used the Internet to educate voters, contribute time and money to political candidates, and even cast a ballot.[63] The Internet now functions as a modern public square, empowering each user with a virtual printing press and megaphone to disseminate their views.[64] Scholar Lawrence Lessig described the Internet as "the most important model of free speech since [America's] founding," and noted that "the Net has taught us what the First Amendment means."[65] He also remarked that "[t]he model for speech that the framers embraced was the model of the Internet—distributed, noncentralized, fully free and diverse."[66] Floyd Abrams, a legendary First Amendment lawyer, has gone so far as to suggest that the Internet obviates the need for constitutional protection of speech because prior restraint on publication is no longer viable.[67] Like speech in the material world, the government may not broadly regulate Internet speech without contravening the First Amendment, but it may regulate online the same obscene speech that it could regulate in the tangible world.[68]

As the Internet has exploded in scope and importance, the Supreme Court has sought to adapt its precedent to the technological age. The Supreme Court first ruled on government regulation of electronic content in *Reno v. ACLU*,[69] where it invalidated, on First Amendment grounds, sections of a law that regulated online speech.[70] To protect children online, Congress passed the Communications Decency Act of 1996,[71] which made it a crime to transmit an obscene or indecent message that, like *Miller*, "depicts or describes, in terms patently offensive as measured by contemporary

63. *See* Reno v. ACLU, 521 U.S. 844, 868 (1997) (expounding on "the vast democratic forums of the Internet"); AARON SMITH ET AL., PEW INTERNET & AM. LIFE PROJECT, THE INTERNET AND CIVIC ENGAGEMENT 3–12 (2009), *available at* http://www.pewinternet.org/~/media//Files/Reports/2009/The_Internet_and_Civic_Engagement.pdf; Kristen E. Larson, *Cast Your Ballot.com: Fulfill Your Civic Duty Over the Internet*, 27 WM. MITCHELL L. REV. 1797 (2001); Claire Cain Miller, *How Obama's Internet Campaign Changed Politics*, N.Y. TIMES BITS BLOG (Nov. 7, 2008, 7:49 PM), http://bits.blogs.nytimes.com/2008/11/07/how-obamas-internet-campaign-changed-politics. States retain the power to restrict convicted felons, including child pornographers, from voting, online or otherwise. *See* Caron v. United States, 524 U.S. 308, 316 (1998).

64. *See Reno*, 521 U.S. at 870 (using "chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages . . . the same individual can become a pamphleteer"); LAWRENCE LESSIG, CODE: VERSION 2.0, at 236 (2006) (noting the Internet has eroded barriers to publication).

65. LESSIG, *supra* note 64, at 237. Though extolling the Internet's virtues, Lessig also believes it can and must be regulated. *See id.* at 27–28.

66. *Id.*, at 275.

67. *See id.* at 237–41. The recent controversy over publication by Wikileaks of classified documents related to the war in Afghanistan may buttress this assertion. *See* Brian Baxter, *Lawyers Emerge from Wikileaks Shadows*, AM. L. DAILY (July 26, 2010, 7:58 PM), http://amlawdaily.typepad.com/amlawdaily/2010/07/wikileaks.html.

68. 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.61(n) (4th ed. 2007).

69. 521 U.S. 844 (1997).

70. *See id.* at 849.

71. Pub. L. No. 104-104, 110 Stat. 133 (codified as amended at 47 U.S.C. § 223 (1994)).

community standards, sexual or excretory activities or organs."[72] The Court distinguished Internet speech from other communication, and held the law unconstitutional because it shielded minors by "suppress[ing] a large amount of speech that adults have a constitutional right to receive."[73]

Five years later, the Supreme Court again ruled on Internet speech regulation in *Ashcroft v. Free Speech Coalition*,[74] where it rejected a ban on "virtual" child pornography. The case arose when Congress passed the Child Pornography Prevention Act of 1996 (CPPA),[75] which regulated computer generated images the Court defined as "virtual child pornography,"[76] as well as images that implied a minor was engaged in a sexual act.[77] The Supreme Court agreed with the erotic entertainers who had challenged the law,[78] and found that the CPPA unduly restricted "the freedom to engage in a substantial amount of lawful speech."[79] Thus, the Court applied *Ferber* in the Internet context, and simultaneously reaffirmed the government's sweeping power to regulate real child pornography but limited power to regulate online speech that is neither obscene nor child pornography.

Later in 2002, in *Ashcroft v. ACLU* (*Ashcroft I*),[80] the Supreme Court temporarily sidestepped the question of the breadth of the government's power to regulate Internet content. In response to *Reno*,[81] Congress had enacted the Child Online Protection Act (COPA),[82] which criminalized commercial Internet postings deemed "harmful to minors"[83] as defined by the three-part *Miller* standard.[84] Reversing the Third Circuit, the Supreme Court held that COPA's use of "community standards" to identify illicit content, without reference to a specific geographic area, did not alone render the law in violation of the First Amendment.[85] However, the Court declined to rule whether COPA was overbroad for other reasons, and remanded the case to the Third Circuit to adjudicate those issues before the law would take effect.[86]

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72. 47 U.S.C. § 223(d)(1) (1994). In 2003, this language was removed from the statute and replaced by "is obscene or child pornography." Pub. L. No. 108-21, 117 Stat. 650, 687 § 603(2) (2003) (codified as amended at 47 U.S.C. § 223 (2006)).

73. *Reno*, 521 U.S. at 874; *see also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.").

74. 535 U.S. 234 (2002).

75. Pub. L. No. 104-208, 110 Stat. 3009, 3026 (codified as amended in scattered sections of 18 U.S.C. (1996)).

76. *See Free Speech Coal.*, 535 U.S. at 241–42 (citing 18 U.S.C. § 2256(8)(b) (1994)).

77. *See id.* at 242–43 (citing 18 U.S.C. § 2256(8)(d) (1994)).

78. *Id.* at 243.

79. *Id.* at 256.

80. 535 U.S. 564 (2002).

81. *See supra* notes 68–73 and accompanying text.

82. Pub. L. No. 105-277, 112 Stat. 2681, 2736 (codified at 47 U.S.C. § 231 (1998)).

83. 47 U.S.C. § 231(a)(1).

84. *See Ashcroft I*, 535 U.S. at 569–70 (citing 47 U.S.C. § 231); *supra* notes 46–47 and accompanying text.

85. *See id.* at 585–86.

86. *See id.*

The Supreme Court finally settled the issue in 2004 by reaffirming the central holding in *Reno*, namely that the government has only limited authority to restrict online speech. In *Ashcroft v. ACLU* (*Ashcroft II*),[87] the Supreme Court affirmed the Third Circuit's ruling,[88] on remand from *Ashcroft I*,[89] that COPA was unconstitutional because it did not use the least restrictive means to protect a minor from harmful online speech.[90] The Court found that the government may encourage parents and schools to limit Internet access,[91] but that it may not directly regulate Internet content without showing that the alternative filtering software was less effective in preventing harmful material from reaching children.[92] In sum, the government could not take steps to block unprotected speech until it effectively determined how to separate it from protected speech.[93] *Ashcroft II* set the standard for when the government may regulate the Internet, but left open the issue of when the government may entice Americans to consent to Internet speech regulations in exchange for a voluntary government benefit.

B. The Theory of Unconstitutional Conditions

While there is agreement that the unconstitutional conditions theory is needed to "constrain[] indirect governmental pressure on the exercise of constitutional rights, no easy or perhaps single rationale" exists to explain when a condition becomes unconstitutional.[94] The idea has been a part of American jurisprudence for many years, and "has for just as long suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law" equally applied to individual rights and governmental powers.[95] Among varied formulations, the gist of the theory is that the government may not voluntarily offer a benefit that requires a citizen to forego a constitutional right in order to take advantage of that

87. 542 U.S. 656 (2004).

88. *Id.* at 660–61.

89. *See Ashcroft I*, 535 U.S. at 585–86; *supra* notes 80–86 and accompanying text.

90. *See Ashcroft II*, 542 U.S. at 660–61.

91. *See id.* at 669–670; United States v. Am. Library Ass'n, 539 U.S. 194 (2003) (plurality opinion).

92. *See Ashcroft II*, 542 U.S. at 668–69.

93. JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 83 (2006) ("[T]he problem for government's efforts to control pornography is that it's hard to distinguish it from stuff the U.S. government doesn't want blocked, like artistic expression, sexual education, and news.").

94. La. Pac. Corp. v. Beazer Materials & Servs., Inc., 842 F. Supp. 1243, 1248–49 & n.12 (E.D. Cal. 1994); *see also* Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1186 (1990) ("Despite wide acknowledgement of the doctrine's importance in modern constitutional law, attempts to explain how it arises or what it does have been largely unsuccessful."); Kathleen M. Sullivan, *Unconstitutional Conditions and the Distribution of Liberty*, 26 SAN DIEGO L. REV. 327, 327–30 (1989) (surveying the leading but flawed theories and proposing an alternative framework).

95. Dolan v. City of Tigard, 512 U.S. 374, 407 n.12 (1994) (Stevens, J., dissenting).

benefit.[96] The doctrine pertains to an offer or conferral of a benefit by a state actor, including a federal court.[97]

Though the unconstitutional conditions doctrine is centuries old, it remains difficult to predict when it applies, and, if it applies, when it is violated. Part I.B of this Note reviews the development and theory of unconstitutional conditions to discern a method for evaluating the validity of computer and Internet restrictions as a condition of supervised release. First, it examines the foundation of unconstitutional conditions theory in commercial and employment cases. Next, it explores the doctrine's development in free speech and prisoner rights cases. Finally, it distills the leading theories to posit a new framework whereby a condition is unconstitutional if it too stringently restricts protected speech and if the government's offer is coercive or intended to regulate protected speech indirectly.

1. Unconstitutional Conditions "Doctrine" Arose in Economic Cases and Developed to Encompass Speech and Individual Rights

The theory of unconstitutional conditions was first articulated around the dawn of the twentieth century. The Supreme Court gave life to the ideas behind the theory in *Insurance Co. v. Morse*,[98] where it struck down a Wisconsin statute that prohibited insurance companies from transacting business in the state unless they agreed not to use the federal courts.[99] The term "unconstitutional conditions" debuted two years later in a case re-affirming *Morse*, when Justice Joseph P. Bradley wrote in dissent that, "Though a state may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so."[100] The doctrine then laid dormant until the era of *Lochner v. New York*,[101] when the Supreme Court repeatedly rejected state attempts to implement restrictive conditions on businesses.[102] The

96. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1598–1608 (6th ed. 2009); Richard Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 7–8 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421–22 (1989).

97. *See supra* note 96 and accompanying text; *cf.* United States v. Loy, 237 F.3d 251, 261 (3d Cir. 2001) (noting importance of judicial review of conditions of supervised release).

98. 87 U.S. (20 Wall.) 445 (1874).

99. *See id.* at 450–51.

100. Doyle v. Cont'l Ins. Co., 94 U.S. 535, 543 (1876) (Bradley, J., dissenting). Justice Bradley supported the affirmation of Morse, but noted that the reasoning of the majority in Doyle, that "if the State may exclude [a company] without any cause, it may exclude them for a bad cause, is not sound." *Id.* at 54344.

101. 198 U.S. 45 (1905).

102. *See* Frost & Frost Trucking Co. v. R.R. Comm'n of Cal., 271 U.S. 583, 593–95 (1926) (collecting cases rejecting state business regulations that required the "surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold"). *See generally* 2 ROTUNDA & NOWAK, *supra* note 68, § 15.3 (discussing *Lochner* and economic liberty jurisprudence).

Court initially grounded unconstitutional conditions theory in economic freedom, but would later dramatically expand the scope of the doctrine.

Two decades after the demise of *Lochner*, the Supreme Court broadened the reach of unconstitutional conditions theory to cover individual rights and free speech. In *Speiser v. Randall*,[103] California offered a property tax exemption to World War II veterans who signed an oath of loyalty to the state and federal governments.[104] Veterans challenged the exemption on First Amendment grounds, saying the oath restricted their freedom of speech.[105] The Supreme Court agreed, finding that the exemption was a government benefit and that the condition improperly infringed on their cognizable speech rights.[106] Thus, the unconstitutional conditions doctrine became relevant to analyze a government benefit given in exchange for a personal waiver of an individual's constitutional right.

In subsequent years, the Supreme Court continued expanding the breadth of the unconstitutional conditions doctrine. The Court utilized the theory to strike down conditions on public employment,[107] takings of property,[108] and receipt of federal funds.[109] It also found a condition unconstitutional where receiving government unemployment benefits burdened religious exercise[110] and where accepting public employment limited procedural due process.[111] Nonetheless, the Court found the government complied with the doctrine in cases involving federalism,[112] the tax code,[113] and public financing of abortion.[114] The Court also found unconstitutional conditions theory inapposite where a law conditioned the receipt of welfare benefits on

103. 357 U.S. 513 (1958).

104. *Id.* at 514–17.

105. *Id.* at 517.

106. *See id.* at 518–19 ("[T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech.").

107. *See, e.g.*, Rutan v. Republican Party of Ill., 497 U.S. 62, 78–79 (1990) (firing based on political patronage); Lefkowitz v. Cunningham, 431 U.S. 801, 805–07 (1977) (retaining position conditioned on waiving right against self-incrimination).

108. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (finding right-of-way exaction non-germane to building permit).

109. *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 398–99 (1984) (limiting editorializing by public grant recipients).

110. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 717–18 (1981) (striking requirement that pacifist Jehovah's Witness work in armaments factory to receive unemployment benefits); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (rejecting welfare benefits conditioned on working Saturday).

111. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985); Perry v. Sindermann, 408 U.S. 593, 596–97 (1972).

112. *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987) (conditioning highway funds on raising state drinking age).

113. *See FCC*, 468 U.S. at 400; Regan v. Taxation with Representation of Wash., 461 U.S. 540, 545 (1983) (upholding spending restrictions on non-profit corporations).

114. *See* Rust v. Sullivan, 500 U.S. 173, 192 (1991) (banning use of federal funds for abortion-related activities); Harris v. McRae, 448 U.S. 297, 312, 315 (1980) (prohibiting use of Medicaid funds for abortion).

a beneficiary consenting to a home visit by a state agency employee.[115] In these varied holdings, however, the Court failed to delineate the circumstances that would make a condition pass constitutional muster.

2. If Not All Fundamental Criminal Protections May Be Waived, When Does Offering Early Release from Prison Create an Unconstitutional Condition?

As unconstitutional conditions doctrine expanded, its analysis became pertinent in situations where the government offered a convict a more lenient punishment, such as supervised release, in exchange for the waiver of a constitutional right. This section discusses how courts have also examined a bargain that circumscribes the rights of a criminal or prisoner to determine whether it presents an unconstitutional condition. The government may offer a benefit in exchange for a guilty plea,[116] but it is difficult to predict whether it may offer a benefit conditioned on the waiver of a constitutional right.

a. Waiver of Constitutional Rights in Criminal Cases

The Supreme Court has permitted the waiver of constitutional criminal protections without becoming entangled in unconstitutional conditions analysis. As the Court articulated in *United States v. Mezzanatto*,[117] "a criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution."[118] For example, a defendant may receive the benefit of a plea bargain in exchange for waiving, among other things, the right to trial by jury, right against self-incrimination, and right to confront accusers.[119] This may allow the government to trade a benefit for a right, even if there is unequal bargaining power, so long as the offer is similar to another choice the beneficiary faces.[120] It is black letter law that "Waivers of constitutional rights not only

115. *See* Wyman v. James, 400 U.S. 309, 326 (1971). *But see* Schneckloth v. Bustamonte, 412 U.S. 218, 288 n.12 (1973) (Marshall, J., dissenting) (interpreting consent search and waiver of right to trial as an unconstitutional condition).

116. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978). *See generally* Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801 (2003) (questioning dichotomy whereby some bargains are treated as criminal waivers and others as unconstitutional conditions).

117. 513 U.S. 196 (1995).

118. *Id.* at 201; *see also* Peretz v. United States, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are . . . subject to waiver.").

119. *See* United States v. Ruiz, 536 U.S. 622, 628–29 (2002) (citing Boykin v. Alabama, 395 U.S. 238, 243 (1969)).

120. *See* McKune v. Lile, 536 U.S. 24, 42 (2002) (listing common choices facing inmates); *Mezzanatto*, 513 U.S. at 209–10; *see also* Dada v. Mukasey, 128 S. Ct. 2307, 2322 (2008) (Scalia, J., dissenting) ("Litigants are put to similar voluntary choices between the rock and the whirlpool all the time . . . . It happens, for example, whenever a criminal defendant is offered a plea bargain that gives him a lesser sentence than he might otherwise receive but deprives him of his right to trial by jury and his right to appeal. It is indeed utterly commonplace that *electing* to pursue one avenue of relief may require the surrender of certain other remedies.").

must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[121] Importantly, though, the knowingness, intelligentness, and voluntariness that are required for a bona fide waiver are each a complicated legal idea subject to a separate standard; "the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[122] Where a convict is aware of the ramifications of his conduct and acts voluntarily, courts will often uphold the waiver of constitutional criminal rights outside the reach of unconstitutional conditions doctrine.

However, not all waivers of constitutional rights are acceptable; the government may not force a prisoner to choose between rights and death. In *United States v. Jackson*,[123] the Supreme Court held the government acted improperly to force a choice between exercising the right to trial and risking capital punishment.[124] Congress had passed the Federal Kidnapping Act,[125] which authorized a jury to recommend the death penalty but made no such provision for someone who pleads guilty or waives the right to trial.[126] The Court affirmed the district court's holding that the provision was invalid because "it makes 'the risk of death' the price for asserting the right to jury trial."[127] The Court noted that no matter what the government's objective in inducing the waiver, it "cannot be pursued by means that needlessly chill the exercise of basic constitutional rights."[128] Since *Jackson*, the Supreme Court has found other limits on the state's ability to bargain for a citizen's constitutional rights, noting that some protections "are so fundamental to the reliability of the factfinding process that they may never be waived."[129] For example, the government may not offer a benefit in exchange for a waiver of the right to have conflict-free counsel,[130] or the right to a speedy trial,[131] because such a waiver may irreparably tip the scales of justice in the government's favor. Thus, the

121. Brady v. United States, 397 U.S. 742, 748 (1970) (internal citations omitted).

122. Moran v. Burbine, 475 U.S. 412, 421 (1986) (discussing waiver in *Miranda* warning context).

123. 390 U.S. 570 (1968).

124. *Id.* at 571–72.

125. Pub. L. No. 72-189, 47 Stat. 326 (codified as amended at 18 U.S.C. § 1201(a) (2006)).

126. *Jackson*, 390 U.S. at 571.

127. *Id.* at 571–72 (quoting United States v. Jackson, 262 F. Supp. 716, 718 (D. Conn. 1967)). The Court later clarified that a guilty plea in the shadow of the death penalty is not invalid per se, but that the waiver of a constitutional right must be done knowingly, intelligently, and voluntarily. *See* Brady v. United States, 397 U.S. 742, 747–48 (1970) (internal citations omitted); *supra* note 121 and accompanying text.

128. *Jackson*, 390 U.S. at 582.

129. United States v. Mezzanatto, 513 U.S. 196, 204 (1995).

130. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 151–52 (2006) (citing Wheat v. United States, 486 U.S. 153, 159–60 (1988)).

131. *See, e.g.*, Zedner v. United States, 547 U.S. 489, 500–01 (2006); United States v. Gambino, 59 F.3d 353, 359–60 (2d Cir. 1995) (joining other circuits in so holding).

Court has insisted that there are limits on the waiver of a constitutional right, but has thus far declined to lay down a clear line for determining when that waiver becomes an unconstitutional condition.

b. Waiver of Constitutional Rights in Prisoner Cases

Just as the Court has set limits on the waiver of constitutional criminal rights, it has also found a prisoner's ability to waive constitutional rights varies based on the level of incarceration. Like criminal defendants, prisoners subject to harsher punishment have an ascending ability to waive constitutional rights, which gives the government greater power to offer conditions on release. While an incarcerated prisoner retains some constitutional protection, the government may induce an inmate to waive a right where its penological interest in rehabilitation outweighs the impact on a convict's liberty.[132] For example, the government may offer leniency to someone on probation, parole, or supervised release on condition that the convict waive protection against warrantless searches, where the search would likely expose evidence of criminal activity.[133] A condition may also be constitutional where the government has a strong interest in mitigating recidivism and using probation to help a prisoner reintegrate into society.[134] The prisoner's limited power to consent does not taint the condition so long as it is assented to freely, and the option to reject the condition and remain in jail is preserved.[135] Accordingly, the government's power to entice waiver of a constitutional right is at its peak when dealing with an incarcerated convict, and decreases as the convict is given additional freedom.

The government may also offer a benefit in exchange for a prisoner waiving his right not to speak without creating an unconstitutional condition. In *Ohio Adult Parole Authority v. Woodard*,[136] an incarcerated prisoner faced the difficult choice between foregoing parole by exercising his right to remain silent, or incriminating himself.[137] The appellate court found the condition unconstitutional but the Supreme Court reversed, holding the doctrine not violated because the condition gave the prisoner a

132. *See* McKune v. Lile, 536 U.S. 24, 36 (2002) (citing O'Lone v. Estate of Shabazz, 482 U.S. 342, 348, 351 (1987)); *see also supra* notes 24–29 and accompanying text.

133. *See* Samson v. California, 547 U.S. 843, 847 (2006); United States v. Knights, 534 U.S. 112, 119 (2001); Griffin v. Wisconsin, 483 U.S. 868, 872–73 (1987); United States v. Reyes, 283 F.3d 446, 457 (2d Cir. 2002).

134. *See Samson*, 547 U.S. at 849, 853 (reminding the government that it need not ignore the likelihood of recidivism to protect constitutional rights); *Knights*, 534 U.S. at 118 (upholding waiver condition because of state interest in effective probation system).

135. *See Knights*, 534 U.S. at 118; *Reyes*, 283 F.3d at 461. *See generally* 5 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.10(b) (4th ed. 2004) (explaining and criticizing the "act of grace" theory granting government absolute power to set release conditions).

136. 523 U.S. 272 (1998).

137. *See Woodard*, 523 U.S. at 279, 285–86; *see also* U.S. CONST. amend. V. ("[N]or shall [a person] be compelled in any criminal case to be a witness against himself.").

choice, albeit a tough one.[138] As the Court noted, the prospect of voluntary parole did not create an expectation of release; requiring completion of a full prison term is not a per se unconstitutional condition.[139] While the government may condition a convict's release on waiving a constitutional right, it may not compel a waiver by using force or threatening to revoke the release.[140] In the Fifth Amendment context, the government may offer a prisoner a voluntary benefit in exchange for waiving his right to remain silent without creating an unconstitutional conditions problem.

3. Even the Supreme Court Cannot Decide When a Speech Restriction Is an Unconstitutional Condition?

Though silence under the Fifth Amendment is not the same as speaking under the First Amendment, courts have inconsistently applied the doctrine of unconstitutional conditions in both prisoner and speech cases. While limitations on speech by indigents, public employees, and protestors may present unconstitutional conditions, restrictions on speech as a condition of funding are often acceptable. Though the Supreme Court rarely applies unconstitutional conditions theory outside the First Amendment context,[141] predicting the outcome of a case remains difficult because there is no clear demarcation between constitutional and unconstitutional conditions.

a. Unconstitutional Conditions in Free Speech Cases

Measures that curb speech by people in poverty, based on their economic status, may violate unconstitutional conditions doctrine. In *Legal Services Corp. v. Velazquez*,[142] the Supreme Court relied on unconstitutional conditions theory to strike down a condition that restricted indigent access to an attorney.[143] Congress had funded a program to provide lawyers to assist poor clients in determining their eligibility for welfare benefits, on condition that those lawyers not challenge the statute underlying the state welfare regime.[144] The Court rejected the restriction as an unconstitutional condition, reasoning that the government could not offer a vulnerable person a benefit that distorted the role of attorneys and the proper functioning of the judicial system by immunizing the law against legal challenge.[145] Though Congress claimed that the restriction simply defined

138. *See Woodard*, 523 U.S. at 279, 285–86; *see also* McKune v. Lile, 536 U.S. 24, 41–43 (2002) ("[W]hat constitutes unconstitutional compulsion involves a question of judgment."); *supra* note 120 and accompanying text (noting difficult choices).

139. *Compare Woodard*, 523 U.S. at 282–83 ("[D]enial of clemency merely means that the inmate must serve the sentence originally imposed."), *with* Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 11–12 (1979) (holding that a statutorily-mandated early release provision created inmate expectation).

140. *See McKune*, 536 U.S. at 41; Minnesota v. Murphy, 465 U.S. 420, 437–38 (1984).

141. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10–8 (2d ed. 1988).

142. 531 U.S. 533 (2001).

143. *See id.* at 548–49.

144. *Id.* at 537–39.

145. *See id.* at 544.

the scope of the program, the Court concluded, "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."[146]

The Supreme Court has also rejected public employment conditioned on limited exercise of free speech as an unconstitutional condition. In *Pickering v. Board of Education*,[147] where a public high school fired a teacher after he criticized its funding decisions,[148] the Court "unequivocally" and "uniformly" rejected the idea that the government could condition public employment on free speech.[149] Four years later, in *Perry v. Sindermann*,[150] a state junior college failed to renew a professor's employment contract after he criticized the school administration.[151] In dicta, the Supreme Court noted that the government need not provide the benefit of public employment, but it could not deny the benefit by infringing freedom of speech because if "government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited [which would] allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible."[152] It took more than a century, but the Supreme Court has now firmly and explicitly rejected Justice Oliver Wendell Holmes' famous dicta that the "petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[153] While the government is not required to employ everyone, it may not employ only those people willing to accept limits on their First Amendment rights.

Additionally, a condition may be unconstitutional where the government promulgates it to stifle dissent. In *National Endowment for the Arts v. Finley*,[154] the Court upheld a federal appropriations law[155] that prohibited grants to support artwork deemed obscene and without cultural value, including depictions of sexual conduct by children.[156] The Court stressed that the government may not be required to subsidize all speech protected by the First Amendment, and that choosing to support one type of art, but not another, may not operate as an unconstitutional condition.[157] However,

146. *Id.* at 547.
147. 391 U.S. 563 (1968).
148. *Id.* at 564.
149. *See id.* at 568.
150. 408 U.S. 593 (1972).
151. *Id.* at 594–95.
152. *Id.* at 597 (alteration in original) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)); *see also* Connick v. Myers, 461 U.S. 138, 143–44 (1983) (explicating the history of unconstitutional burdens on speech in public employment cases).
153. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892); *see* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 716–17 (1996) (rejecting Homes' dicta); Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (same).
154. 524 U.S. 569 (1998).
155. Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, 103 Stat. 701, 741 (codified as amended at 20 U.S.C. § 954(d) (2006)).
156. *See Finley*, 524 U.S. at 572, 575.
157. *See id.* at 586–88; *see also supra* note 22 and accompanying text.

Justice Sandra Day O'Connor, writing for the majority, warned that "in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas,'"[158] or take affirmative steps "calculated to drive 'certain ideas or viewpoints from the marketplace.'"[159] In those unique situations where the right to speak freely is most important, such as indigence, public employment, and protest, the government's offer of a voluntary benefit in exchange for limited speech would be an unconstitutional limitation on the First Amendment.

b. Constitutional Conditions in Free Speech Cases

However, the Supreme Court has allowed the government to limit speech as a condition of receiving federal funds without finding it created an unconstitutional condition. In *Rust v. Sullivan*,[160] the Court upheld a provision that restricted recipients of federal family planning funds, under Title X of the Public Health Service Act,[161] from engaging in abortion-related activities.[162] While the doctors who provided services under the program contended the condition violated their right to free speech, the Court instead noted that the law did not deny a benefit but merely required recipients to comply by segregating abortion-related activities from permissible activities using federal funds.[163] The Court distinguished the case from other unconstitutional conditions because the restriction was on a program rather than on the individual receiving the benefit, which preserved the individual's right to speak out without jeopardizing the group's public funding.[164] Following prior precedent, which permitted certain restrictions on speech by recipients of federal funds—though without consistent reasoning—the *Rust* Court upheld the limitation in the face of an unconstitutional conditions challenge.[165]

Most recently, in *United States v. American Library Ass'n*,[166] a plurality of the Court agreed that requiring libraries to install Internet content filters before receiving federal subsidies complied with the unconstitutional

158. *Id.* at 587 (alteration in original) (quoting Regan v. Taxation with Representation of Wash., 461 U.S. 540, 550 (1983)).

159. *Id.* (quoting Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

160. 500 U.S. 173 (1991).

161. 42 U.S.C. § 300–300a-6 (2008).

162. *Rust*, 500 U.S. at 177–78; *see also* Harris v. McRae, 448 U.S. 297, 326–27 (1980) (finding no right to government-funded abortion).

163. *See Rust*, 500 U.S. at 196–200.

164. *See id.* at 197.

165. *See id.* at 178; *see also, e.g.*, South Dakota v. Dole, 483 U.S. 203, 211–12 (1987) (upholding funding condition where money could be rejected); Grove City Coll. v. Bell, 465 U.S. 555, 575 (1984) (same); SUNSTEIN, *supra* note 22, at 115; *cf.* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131 (2009) (discussing Free Speech Clause's inapplicability to government speech). *But see* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 837 (1995) (rejecting selective use of funds to deny support to religious newspaper); *supra* notes 142–46 and accompanying text (reviewing the Court's rejection of funding restrictions in *Legal Servs. Corp.*).

166. 539 U.S. 194 (2003) (plurality opinion).

conditions doctrine.[167] The district court found a condition on federal subsidies, included in the Children's Internet Protection Act,[168] to be unconstitutional because it required libraries to limit patron access to constitutionally protected speech.[169] However, a plurality of Justices reversed, noting that libraries traditionally did not offer all protected content, including pornography, and therefore the law did not induce a First Amendment violation.[170] Furthermore, libraries remained free to provide unfiltered Internet access without federal funds, and the government had plenary authority to add conditions to programs it had created.[171] While resolving the issue of the day, the Court did not address the framework to be used to determine when a technology restriction becomes an unconstitutional condition.

4. Offering a New Framework for Unconstitutional Conditions Analysis: Applying Coercion-Purpose-Effect to a Condition That Restricts Access to Technology

As courts developed the theory of unconstitutional conditions through commercial and individual rights cases, they failed to create a clear line for determining when a condition was constitutional in both the prisoner and speech contexts. Confronted with these inconsistent rulings, scholars have devised a number of theories to reconcile the cases. While there is agreement that an unconstitutional conditions problem may occur when the government conditions the receipt of a voluntary benefit on the waiver of a constitutional right,[172] efforts to create a coherent doctrine to explain the theory have long been controversial.[173] This section proposes a novel structure for determining when a condition is unconstitutional by first discussing various modes of reasoning in unconstitutional conditions cases, and then proposing a new three-prong framework for evaluating a specific condition. The first prong, coercion, ascertains whether a convict is fully empowered to accept or reject the condition. The second prong, purpose,

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167. *See id.* at 214.

168. Pub. L. No. 106-554, 114 Stat. 2763A-335 (codified as amended at 47 U.S.C. § 254(h) (2000)).

169. *See Am. Library Ass'n*, 539 U.S. at 199–200.

170. *See id.* at 211–12.

171. *See id.* (citing Rust v. Sullivan, 500 U.S. 173 (1991)); *see also supra* note 165 and accompanying text.

172. *See supra* note 96 and accompanying text.

173. *See, e.g.*, Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989 (1995); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990). Professor Sunstein has all but dismissed the theory of unconstitutional conditions, saying, "all constitutional cases are really unconstitutional conditions cases. Whenever the government penalizes speech, it is conditioning a right that it has granted." SUNSTEIN, *supra* note 22, at 117–18. A century ago, Justice Oliver Wendell Holmes described unconstitutional conditions as a "fallacy." W. Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U.S. 1, 54 (1910) (Holmes, J., dissenting); *see supra* note 153 and accompanying text (spurning Holmes' narrow view of speech rights afforded to public employees).

scrutinizes whether the government had a legitimate security or rehabilitative reason for offering the condition. The third prong, effect, evaluates the cost to societal speech rights incurred because of the condition. Part II then uses this Note's framework to do what courts have not done: analyze whether a limit on computer and Internet use as part of supervised release is an unconstitutional condition.

a. Existing Theories for Understanding Unconstitutional Conditions

Unconstitutional conditions analysis first focused on the inalienability of constitutional rights. The Supreme Court relied on this reasoning in its first unconstitutional conditions case,[174] and more recently, Justice William O. Douglas argued the position in dissent, stressing that the government should not be permitted "to 'buy up' rights guaranteed by the Constitution."[175] Using traditional contract principles, commentators argued that because a citizen could not forfeit constitutional rights, they were invalid as consideration in a contract.[176] In this context, a speech condition may be unacceptable even if the waiver occurs knowingly, intelligently, and voluntarily.[177] Though initially viable, the inalienability theory of unconstitutional conditions is now uncommon outside conditions involving private actors.[178]

An alternative theory for analyzing the constitutionality of a condition focused on the type of benefit offered. This approach "separat[ed] denials of benefits that 'penalize' speech (unconstitutional conditions) from those that merely refrain from subsidizing speech (constitutionally valid conditions)."[179] However, the paradigm became untenable once the Court engaged in the same unconstitutional conditions inquiry whether it considered a benefit to be a privilege or a right.[180] Scholars noted the inconsistency of these distinctions, and endeavored to explain the Court's rulings on unconstitutional conditions.

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174. *See* Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) (stating that a citizen cannot "barter away" life, freedom, or rights).

175. Wyman v. James, 400 U.S. 309, 328 (1971) (Douglas, J., dissenting); *see supra* notes 98–99 and accompanying text (discussing *Morse*).

176. *See* Sullivan, *supra* note 94, at 330 (hypothesizing a theory that "treat[s] constitutional rights as inalienable: some reason keeps them off the government benefits 'market.'"); *see also* Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403 (2009) (offering framework for adjusting inalienability rules); Steven G. Gey, *Contracting Away Rights: A Comment on Daniel Farber's "Another View of the Quagmire"*, 33 FLA. ST. U. L. REV. 953 (2006) (disputing the extent of rights alienability).

177. *Cf.* Dear Wing Jung v. United States, 312 F.2d 73, 75–76 (9th Cir. 1962) (rejecting suspension of prison sentence on condition of leaving United States despite option to choose prison); *supra* notes 121–22 and accompanying text.

178. *See* Sullivan, *supra* note 96, at 1477.

179. CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 241 (3d ed. 2009).

180. *See* Sherbert v. Verner, 374 U.S. 398, 404–05 (1963); *see also* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

Modern commentators have focused on different elements of unconstitutional conditions theory. Some have highlighted the doctrine's use in restricting the government's power to coerce citizens into giving up rights, which prevents indirect regulation of protected rights and mitigates the government's monopoly power.[181] Critics, however, emphasized that judging coercion depends on the baseline because a benefit with a condition is usually better than no benefit, whereas an unconditional benefit is usually superior to a conditional benefit.[182] Meanwhile, others used contract law and cases in the waiver context to explain that a condition may be constitutional where the government need not offer the benefit, and the recipient nevertheless accepted it freely.[183] This Note draws on all three camps to develop a new three-prong framework for evaluating the validity of conditions.

b. A New Three-Prong Framework: Coercion-Purpose-Effect

The first prong of this Note's framework looks to whether the government's offer of a conditional benefit is coercive. Black's Law Dictionary defines coercion as "Compulsion by physical force or threat of physical force,"[184] but much ink has been spilled in seeking to pinpoint the tipping point of governmental influence in the unconstitutional conditions context.[185] This is partly because, first, a baseline for judging governmental pressure must be identified, and second, the effect that pressure had on decision making must be determined.[186] The government may be acting coercively when it voluntarily offers a conditional benefit as a means for changing how a private actor would have otherwise behaved.[187] For example, an offer may be coercive where the benefit is so valuable, or condition so harmful, that the putative beneficiary is faced with a Hobson's choice, with no real choice but to accept.[188] In contrast, the state may not be acting coercively, according to traditional contract law, where the beneficiary is not compelled to accept the conditional offer but rather

181. *See, e.g.*, RICHARD EPSTEIN, BARGAINING WITH THE STATE 12–16 (1993); Kreimer, *supra* note 22, at 1296–97; Sullivan, *supra* note 96, at 1419–22.

182. *See, e.g.*, STONE ET AL., *supra* note 96, at 1605; Baker, *supra* note 94, at 1191–92; Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 15–20 (2001). Professor Berman's three dimensions for viewing unconstitutional conditions are purpose, effects, and conduct. *See id.* at 15–42.

183. *See* Epstein, *supra* note 96, at 10; Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913, 924–26 (2006); Sullivan, *supra* note 96, at 1417.

184. BLACK'S LAW DICTIONARY 294 (9th ed. 2009).

185. *See* Berman, *supra* note 182, at 12 (explaining that "[t]he scholarship has concluded that coercion is a dead end"); Sullivan, *supra* note 96, at 1420 ("Neither the Court nor the commentary . . . has developed a satisfying theory of what is coercive about unconstitutional conditions.").

186. *See* Berman, *supra* note 182, at 12–19; Sullivan, *supra* note 94, at 328; Sullivan, *supra* note 96, at 1428–56; Sunstein, *supra* note 173, at 601–04.

187. *See* SUNSTEIN, *supra* note 22, at 115–16.

188. *See* Sullivan, *supra* note 96, at 1433–43; *supra* notes 117–31 and accompanying text (illustrating coercion in waiver cases).

chooses to accept it under his own free will after thoughtful consideration.[189] The difficulty of defining coercion in each case necessitates additional prongs to more precisely decipher when a condition is unconstitutional.

The second prong of this Note's proposed framework for evaluating unconstitutional conditions looks to whether the government has a valid purpose behind its offer of a conditional benefit. The state's purpose may be illegitimate where it induces the waiver of a constitutional right when it could not directly regulate that right.[190] This focuses the inquiry "not on whether the beneficiary is free to refuse an offer, but on whether government should be free to make it."[191] As such, the State may not bargain for a constitutional right where it lacks a germane, neutral, and non-censorial interest in the condition.[192] However, the government may offer a bargain where it has a penological, public safety, or rehabilitative interest, and the condition shows the government is acting to advance one of those interests.[193] The coercion and purpose prongs work in tandem; coerciveness will decrease as the government's purpose becomes more proper, and, conversely, a showing of a proper purpose may aid the government in disproving claims of undue coercion.[194]

Finally, the third prong of this Note's framework looks to a condition's effect on the aggregate level of speech available to society. A condition may be unconstitutional where the government's use of monopoly power creates a collective action problem, whereby its burden on one right limits the power to exercise another right.[195] For example, while the government may exact a waiver from one citizen, collecting waivers from many citizens reduces society's ability to exercise that right.[196] Examining the effect of a

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189. *See* Farber, *supra* note 183, at 937 (hypothesizing about voluntary consent to be searched); *supra* notes 160–71 and accompanying text (discussing *Rust*, *Am. Library Ass'n*, and government funding conditions); *see also* JOHN CALAMARI & JOSEPH PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 2.11 (6th ed. 2009) (outlining elements of voluntary acceptance of a contract).

190. *See* Epstein, *supra* note 96, at 6–7; Sullivan, *supra* note 96, at 1415 ("The doctrine of unconstitutional conditions . . . reflects the triumph of the view that government may not do indirectly what it may not do directly . . . ."); *see also* Berman, *supra* note 182, at 23–27 & n.100 (remarking that the government's power to constrain rights may depend on its purpose for acting).

191. Sullivan, *supra* note 94, at 329.

192. *See* SUNSTEIN, *supra* note 22, at 115–16 (describing conditions on job-related speech of public employees for national security or government efficiency); Sullivan, *supra* note 96, at 1457–68 (featuring germaneness).

193. *See supra* notes 136–40 and accompanying text (discussing *Ohio Adult Parole Auth.* and penological interest).

194. *See* Sullivan, *supra* note 96, at 1420 ("[T]he less germane, the more like manipulation or extortion a condition is said to be . . . .")

195. *See* EPSTEIN, *supra* note 181, at 50–54; Baker, *supra* note 94, at 1248 & n.240 (pointing out that the Court has rejected conditions that "might deter or entirely prevent the poor" from exercising a right on which the state has a monopoly).

196. *See* STONE ET AL., *supra* note 96, at 1603–04; SUNSTEIN, *supra* note 22, at 115; Thomas W. Merrill, Dolan v. City Of Tigard*: Constitutional Rights As Public Goods*, 72 DENV. U. L. REV. 859, 879 (1995); *supra* note 195 accompanying text (discussing collective action problems).

condition also prevents the government from using its advantage to restrict rights for a particular group of citizens, which would create a lower class of rights-holders,[197] or enforcing a waiver that harms a third party.[198] Consequently, like in the government funding cases,[199] a condition's effect may be satisfactorily narrow where the government offers a benefit in exchange for a condition, within its regulatory powers, that it could instead have imposed directly.[200] The third prong is necessary but not sufficient; a condition that has an acceptable effect will not automatically be constitutional, but may be if the condition also passes the coercion and purpose prongs of this Note's framework.

To summarize this Note's new three-prong framework, a condition is unconstitutional where the government coerces a beneficiary into accepting its offer, or where the government has an improper purpose for pursuing a condition. However, because the government is less likely to act coercively where it has a legitimate motive, and vice-versa, the effect prong judges whether a condition overly restricts protected speech as a backstop for invalid conditions that satisfy the coercion and purpose prongs. While this framework is new, courts have already discussed the theory of unconstitutional conditions in prison and free speech cases. However, courts have not considered the doctrine in hybrid cases where the government offers a convict supervised release with a restriction on computer and Internet access.

c. Using This Note's New Three-Part Framework To Analyze a Supervised Release Condition That Limits Access To Technology

Though courts have not so scrutinized a supervised release condition that circumscribes computer and Internet access, this Note posits that such a limitation may present an unconstitutional condition because the government is offering a voluntary benefit conditioned on the waiver of a constitutional right.[201] The government benefit comes in the form of an offer of supervised release, which it is not obligated to provide because a criminal conviction forfeits one's right to liberty until the sentence is completed.[202] Moreover, that offer is a benefit because freedom is

197. *See* Sullivan, *supra* note 96, at 1498–99.

198. *See* EPSTEIN, *supra* note 181, at 69–71.

199. *See supra* note 165 and accompanying text.

200. *See supra* note 190 and accompanying text.

201. There is no standard condition, but a common version states that the convict "shall not have[,] possess or have access to computers [or] the Internet" during the release term. United States v. Paul, 274 F.3d 155, 160 (5th Cir. 2001) (alteration in original) (quoting the district court's conditions); *see also* United States v. Holm, 326 F.3d 872, 877 (7th Cir. 2003) ("[Holm] shall not possess or use a computer that is equipped with a modem, that allows access to any part of the Internet, e-mail service, or other 'on-line' services."); United States v. Peterson, 248 F.3d 79, 81 (2d Cir. 2001) (per curiam) ("[Peterson] shall not possess, purchase, or use a computer or computer equipment . . . .").

202. Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1, 7 (1979); United States v. Woods, 547 F.3d 515, 519 (5th Cir. 2008) ("It is axiomatic that the infringement of constitutional liberties occurs concomitantly with conviction of a crime . . . .")

valuable, and accepting supervised release affords a convict more freedom than incarceration.[203] The conditional waiver creates an unconstitutional conditions concern when the government requires that the convict choose between accepting the benefit and retaining the free speech rights to which he is entitled while on supervised release.[204] A condition that restricts Internet speech may violate that right where it needlessly prevents a convict from accessing the principal modern means for communication and participation in public life.[205] To complete this analysis, Part II reframes the reasoning of courts that assessed the validity of a computer and Internet restriction on other grounds to answer the question not yet asked: does an offer of supervised release with a condition that curbs computer and Internet use create an unconstitutional condition?

II. APPLYING THE COERCION-PURPOSE-EFFECT FRAMEWORK: IS A SUPERVISED RELEASE RESTRICTION ON COMPUTER AND INTERNET ACCESS AN UNCONSTITUTIONAL CONDITION?

Since the dawn of the Internet, courts have wrestled with how to punish criminals convicted of computer crimes related to child pornography. Many of these cases present similar facts: law enforcement, whether via tip or sting operation,[206] catches a male possessing or distributing child pornography.[207] Threatened with harsh punishment,[208] he pleads guilty and submits himself for sentencing before a judge.[209] The trial judge, with input from the Probation Office, prosecutor, and defendant, sentences the convict to serve jail time, followed by a term of supervised release, with a

(internal citations omitted); *see* Sullivan, *supra* note 96, at 1422–26; *supra* note 34 and accompanying text.

203. *See Greenholtz*, 442 U.S. at 9–11 (juxtaposing level and value of liberty in a variety of early release contexts).

204. *See* Sullivan, *supra* note 96, at 1426–28; *supra* notes 41, 187–88 and accompanying text.

205. *See supra* notes 62, 64–66 and accompanying text; Ashcroft v. ACLU (*Ashcroft II*), 542 U.S. 656, 666 (2004) (describing potentially permissible restrictions on Internet speech).

206. *See, e.g.*, United States v. Thielemann, 575 F.3d 265, 268 (3d Cir. 2009), *cert. denied*, 130 S. Ct. 1109 (2010); *Paul*, 274 F.3d at 158.

207. *See, e.g.*, United States v. Freeman, 316 F.3d 386, 387 (3d Cir. 2003); *Paul*, 274 F.3d at 158; *see also supra* note 15 (noting men commit most child pornography crimes).

208. *See* Mike Scarcella, *Prosecutors in Child Pornography Case To Seize Residence*, NAT'L L.J. (July 7, 2009), http://www.law.com/jsp/article.jsp?id=1202432025815; *Eighth Circuit Affirms Big Real Property Forfeiture For Child Porn Offense*, SENT'G L. & POL'Y (May 26, 2010, 12:24 pm) http://sentencing.typepad.com/sentencing_law_and_policy/2010/05/eighth-circuit-affirms-big-real-property-forfeiture-for-child-porn-offense.html (discussing United States v. Hull, 606 F.3d 524 (8th Cir. 2010)). *But see* United States v. Paull, 551 F.3d 516, 533 (6th Cir. 2009) (Merritt, J., dissenting) (comparing child pornography sentencing trends to "witchcraft trials and burnings"), *cert. denied*, 130 S. Ct. 187 (2009); Efrati, *supra* note 13 (reporting on reevaluation of sentencing guidelines for computer child pornography crimes); Lynne Marek, *Sentences for Possession of Child Porn May Be Too High, Judges Say*, NAT'L L.J. (Sept. 10, 2009), http://www.law.com/newswire/cache/1202433693658.html.

209. *See, e.g.*, *Thielemann*, 575 F.3d at 269; United States v. Holm, 326 F.3d 872, 874 (7th Cir. 2003); *Paul*, 274 F.3d at 158.

condition that restricts computer and Internet access.[210] Then the convict appeals, contending that the trial court abused the discretion allowed by the sentencing guidelines, and asks the appellate body to strike the supervised release condition.[211]

Building on the discussion of the First Amendment and unconstitutional conditions theory in Part I, Part II analyzes whether a condition of supervised release that restricts computer and Internet access creates an unconstitutional condition. It does so first by analyzing the cases that have considered these conditions, then, second, by recasting these decisions to fit this Note's three-prong framework to determine whether a condition is unconstitutional. First, Part II.A takes up the coercion prong, considering cases where the government's conditional offer compelled a convict to waive a constitutional right and where it did not. Next, Part II.B evaluates the purpose prong, discussing where the government's intent in offering a condition was valid and where it was not. Then, Part II.C assesses the effect prong, explaining where the condition's consequence was acceptable and where it was overbroad.

A. Prong One: When Is a Condition Coercive?

This section discusses the divergent views regarding the coerciveness of a condition of supervised release that restricts computer and Internet access. First, it explains that some courts find that the government acts coercively where a convict cannot realistically reject its conditional offer of freedom with limited computer and Internet use. Then, it refashions the reasoning of these courts to fit the coercion prong of this Note's framework. Next, it explores the opposing view—that the government does not act coercively where a convict voluntarily agrees to accept its conditional offer as the price for liberty, and then again reframes the logic of these latter courts in terms of the coercion prong of this Note's framework.

1. A Condition May Be Coercive If the Government Leaves a Convict No Choice but To Accept the Offer and Restriction

Courts have found that the government may be acting coercively when it offers a convict a condition of supervised release that restricts all access to Internet and computer technology. The government purports to offer the convict a voluntary choice between accepting a lifetime term of supervised release, without computer or Internet access, and spending more time in jail.[212] However, courts have rejected such absolute limitations, even where a condition included an exception that allowed computer use for word processing,[213] because a convict may be incapable of balancing his

210. *See, e.g.*, United States v. Sofsky, 287 F.3d 122, 124–25 (2d Cir. 2002); *Paul*, 274 F.3d at 159–60; *see also supra* note 201 and accompanying text.

211. *See supra* note 8 and accompanying text.

212. *See* Doe v. Marion Cnty., 566 F. Supp. 2d 862, 878–79 (S.D. Ind. 2008).

213. *See* United States v. White, 244 F.3d 1199, 1205 n.7 (10th Cir. 2001) (finding a modem inside a standard computer may render a restriction absolute). *But see Thielemann*,

inherent liberty interest with the impact of "lifetime cybernetic banishment" that forfeits access to the critical technology that has permeated daily life.[214] For example, in *United States v. White*,[215] the U.S. Court of Appeals for the Tenth Circuit overturned a condition that restricted all Internet and computer use because it would have made modern life functionally impossible.[216] The court found the condition placed the convict in a no-win situation where he would no longer be incarcerated but would gain freedom in a Potemkin village, without the ability to visit a library, café, or airport.[217] Other circuits have followed this reasoning, rejecting a similar condition because it would have rendered life outside of prison "exceptionally difficult" by preventing a convict from filing taxes electronically, engaging in online commerce, and accessing government resources on the Internet.[218] Moreover, the length of a term of supervised release magnifies the prohibition's impact, leading courts to reject a lifetime condition but approve a similar condition of limited duration.[219] The prospect of trading a prison term for life without the use of important technology has given courts reason to reject a restrictive condition on supervised release.

A condition that completely restricts computer and Internet access may be coercive and fail the first prong of this Note's framework for unconstitutional conditions. A condition that leaves a convict no functional choice but to accept is the archetype of altered decision making, as few would voluntarily choose to forego access to Internet and computer technology.[220] Though the prisoner does get the valuable benefit of freedom in exchange, the state's threat to keep a convict imprisoned may be sufficiently powerful to entice him to agree to give up the modern day mailbox, telephone, bank, storage cabinet, and key to the world's combined knowledge.[221] This makes the condition arguably similar to pleading guilty to avoid the threat of capital punishment, where a convict cannot rationally weigh the true costs, benefits, and impact of a fundamentally life-altering

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575 F.3d at 278 (approving condition that permitted word processing on computer unconnected to the Internet).

214. United States v. Voelker, 489 F.3d 139, 148 & n.8 (3d Cir. 2007) (describing computers in cars, automatic teller machines, televisions, appliances, and temperature controls); *see* United States v. Silvious, 512 F.3d 364, 371 (7th Cir. 2008) ("[A] total ban on the use of computers with access to the Internet is in most cases an overbroad condition of supervised release."); United States v. Scott, 316 F.3d 733, 736–37 (7th Cir. 2003) (rejecting complete Internet ban); *cf. Doe*, 566 F. Supp. 2d at 879 (rejecting illusory choice between consenting to condition and being prosecuted).

215. 244 F.3d 1199 (10th Cir. 2001).

216. *See id.* at 1205–06 (reading release condition as absolute).

217. *See id.* at 1205; *Doe*, 566 F. Supp. 2d at 879.

218. United States v. Holm, 326 F.3d 872, 877–78 (7th Cir. 2003); *see, e.g.*, United States v. Heckman, 592 F.3d 400, 402, 408 & n.10 (3d Cir. 2010); *Scott*, 316 F.3d at 736; United States v. Peterson, 248 F.3d 79, 83–84 (2d Cir. 2001) (per curiam).

219. *See, e.g.*, *Heckman*, 592 F.3d at 405–09 (distinguishing Third Circuit precedent); United States v. Walser, 275 F.3d 981, 985, 988 (10th Cir. 2001).

220. *See supra* notes 187–88 and accompanying text; *cf. Doe*, 566 F. Supp. 2d at 879.

221. United States v. Lifshitz, 369 F.3d 173, 183 (2d Cir. 2004) (emphasizing the multifaceted nature of a computer); *see supra* notes 186–87 and accompanying text.

choice.[222] Some courts would likely find that a condition would be unconstitutional where a convict's will would be overborne by the state's alluring offer, leaving him powerless to reject a lifetime condition and constructively coerced into accepting it.

2. However, a Condition May Not Be Coercive If a Convict Knowingly and Voluntarily Accepts the Bargain

Under other circumstances, courts have upheld the government's offer of conditional release where the convict made an informed decision about whether to remain incarcerated or accept freedom with a restriction on computer and Internet use. For example, in *United States v. Daniels*,[223] the U.S. Court of Appeals for the Ninth Circuit accepted a lifetime term of release that limited computer and Internet use because the government had offered the convict the choice of either remaining in lockup or gaining freedom with a condition, and the convict expressly, knowingly, and voluntarily accepted.[224] The court noted that using contract principles to evaluate a condition would protect a convict because a voluntary agreement would be ineffective unless the government fully informed the convict about the agreement's details and assent was not forced.[225] Moreover, understanding the terms of a condition had put the convict on notice, and vindicated the imposition of a technology condition as punishment for violating more lenient terms of release.[226] Other circuits have approved an absolute restriction for a limited duration, finding a convict could reject the benefit because, though "computers and the Internet 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."[227] While a convict could not easily reject the offer of a valuable conditional benefit, courts have found meaningful distinctions between voluntary and coerced acceptance.

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222. *See supra* notes 124, 188–89 and accompanying text.

223. 541 F.3d 915 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1600 (2009).

224. *See id.* at 923–24; *see also Heckman*, 592 F.3d at 407 n.9 (surveying acceptance of lifetime bans in other circuits); United States v. Stolte, 357 F. App'x 943, 944 (9th Cir. 2009) (citing *Daniels*, 541 F.3d at 922–24). *But see* United States v. Voelker, 489 F.3d 139, 148 (3d Cir. 2007) (noting that as of 2007, no circuit had, in a precedential opinion, approved a lifetime term of supervised release without computer and Internet access).

225. *See, e.g.*, United States v. Cope, 527 F.3d 944, 949–55 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 321 (2008); United States v. Scott, 316 F.3d 733, 734–36 (7th Cir. 2003); United States v. Freeman, 316 F.3d 386, 391 (3d Cir. 2003) (remanding case where reason for condition not explained).

226. *See, e.g.*, United States v. Tome, No. 09-16486, 2010 U.S. App. LEXIS 16239, at *4 (11th Cir. July 27, 2010); United States v. Yuknavich, 419 F.3d 1302, 1309–11 (11th Cir. 2005) (imposing condition after probation violation). *But see* United States v. White, 244 F.3d 1199 (10th Cir. 2001) (rejecting technology condition imposed after convict violated prior condition barring alcohol consumption).

227. United States v. Brigham, 569 F.3d 220, 234 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009); *see Scott*, 316 F.3d at 736–37; United States v. Paul, 274 F.3d 155, 170 (5th Cir. 2001).

Recasting the reasoning of courts that have upheld a limit on computer and Internet use in light of this Note's framework, and relying on contract law, a voluntary waiver would likely pass the coercion prong where a convict has the power to reject the benefit and condition. This would allow the convict to choose the option he deems in his best interest, which could be conditional release, and permits a convict to trade speech rights for liberty while saving taxpayers the cost of incarceration.[228] Following this paradigm, the court best protects a prisoner's rights by ensuring he is fully informed and understands the potential long-term impacts of any agreement. In this vein, a knowledgeable convict who voluntarily chose to accept the benefit of release and corresponding burden may be more like an organization electing to accept conditional federal funds, and the court may determine coercion was not involved.[229] This analogy justifies courts that have analyzed a supervised release condition from a contract perspective, and found no coercion in a voluntary agreement between the state and prisoner.

B. Prong Two: When Is the Government's Purpose Improper?

Like the coercion issue, courts have split on analyzing the government's motive for offering a condition of release. This section highlights the decisions of courts that have ruled on the validity of the government's purpose for offering a condition of supervised release that limits technology access. First, it explains that some courts find the government's purpose may be improper where a condition is unrelated to the crime and shows the government intends to regulate speech indirectly. Then, it reframes the reasoning of these courts to fit the purpose prong of this Note's framework. Next, it addresses the opposite view, juxtaposing the position that the government's purpose may be valid where it acts to boost public safety and offers exceptions to a condition. Finally, it recasts the reasoning of courts that have upheld a condition to fit the second prong of this Note's unconstitutional conditions framework.

1. The Government May Have an Inappropriate Motive Where It Uses a Condition To Regulate Protected Speech Indirectly

Courts have found that the government has an improper purpose for restricting computer and Internet use where the condition regulates activity unrelated to the underlying crime. The government bears a high burden to articulate a legitimate reason for pursuing an expansive condition, and must fully explain the basis for the condition such that it does not leave the convict speculating about the state's intention.[230] Courts have found this

228. *See Scott*, 316 F.3d at 736–37; *supra* notes 189, 193 and accompanying text; *see also Budget Woes Have States Rethinking Prison Policy*, WASH. POST, Dec. 20, 2009, at A3.

229. *See Daniels*, 541 F.3d at 923–24; *supra* notes 164–71 and accompanying text.

230. *See* United States v. Miller, 594 F.3d 172, 183–84, 188 (3d Cir. 2010); United States v. Voelker, 489 F.3d 139, 144 (3d Cir. 2007); United States v. Holm, 326 F.3d 872, 879 (7th Cir. 2003).

standard unmet where there was an insufficient nexus between the condition and the child pornography crime for which it was imposed.[231] For example, in *United States v. Peterson*,[232] the U.S. Court of Appeals for the Second Circuit, in a bank larceny case, rejected a condition that prevented a convict from purchasing, using, or possessing a computer because the condition pertained to a previous sex offense.[233] The court reasoned that the failure to pursue a condition in an earlier case did not excuse its irrelevance in a later case where it regulated a convict's employment that was unrelated to the reason for the sentence of supervised release.[234] Other circuits have used similar reasoning, finding the government had an improper motive where a supervised release condition given for a child pornography crime sought to limit access to legal adult pornography,[235] where technology was not an integral part of the crime,[236] or where the ban would prevent the convict from securing employment.[237] While the government may pursue supervised release for a variety of reasons, it must narrowly tailor the condition to the crime that gives rise to the particular punishment.

A lifetime term of supervised release that limits computer and Internet access but does not include an exception might also show the government has an improper purpose for pursuing the condition. For example, courts have been uncomfortable with a lifelong condition imposed as part of supervised release because of the unknown future consequences and potential to limit the speech of a convict who is later rehabilitated.[238] As a result, some courts have found the government evinced an invalid purpose by not including an exception that would allow a probation officer, at her discretion, to grant the convict computer and Internet access in the

231. *See Miller*, 594 F.3d at 187–88 (explaining distinctions in Third Circuit cases based on whether the Internet was used to solicit sexual contact with a child); United States v. Bender, 566 F.3d 748, 751 (8th Cir. 2009) (noting Eighth Circuit allows expansive condition where physical contact with minor was sought, but not for receipt or possession of child pornography).

232. 248 F.3d 79 (2d Cir. 2001) (per curiam).

233. *See id.* at 81–83.

234. *See id.* at 82–83; *see also* United States v. T.M., 330 F.3d 1235, 1240–41 (9th Cir. 2003) (vacating condition imposed in drug case related to sex crimes committed twenty and forty years prior); United States v. Scott, 270 F.3d 632, 636 (8th Cir. 2001) (rejecting condition for bank robbery crime due to convicted rape fifteen years earlier).

235. *See, e.g.*, United States v. Perazza-Mercado, 553 F.3d 65, 76–77 (1st Cir. 2009); *Voelker*, 489 F.3d at 150–53; United States v. Antelope, 395 F.3d 1128, 1141–42 (9th Cir. 2005); United States v. Loy, 237 F.3d 251, 263, 266–67 (3d Cir. 2001); *see also* United States v. Weatherton, 567 F.3d 149, 154 & n.4 (5th Cir.), *cert. denied*, 130 S. Ct. 300 (2009) (clarifying the approach of other circuits); United States v. Wilkinson, 282 F. App'x 750, 754 (11th Cir. 2008) (highlighting circuit split on the issue).

236. *See, e.g.*, United States v. Silvious, 512 F.3d 364, 371 (7th Cir. 2008) (castigating Internet ban as overbroad in mail fraud case where defendant merely corresponded over e-mail); United States v. White, 244 F.3d 1199 (10th Cir. 2001) (rejecting technology condition imposed when convict violated parole by drinking alcohol).

237. *See, e.g.*, United States v. Russell, 600 F.3d 631, 637–38 (D.C. Cir. 2010) (stressing that McDonald's and PETCO require computer use to complete job application and duties, respectively); United States v. Holm 326 F.3d 872, 877–78 (7th Cir. 2003).

238. *See Voelker*, 489 F.3d at 148; *supra* notes 214, 218–19 and accompanying text (describing reasons to reject lifetime conditions). *But see infra* notes 247–49, 251–53 and accompanying text (noting approval of lifetime conditions).

future.[239] Though including a Probation Office exception could create concerns about the court's power to delegate sentencing,[240] it may also show that the government is pursuing the condition in good faith and not seeking to limit speech indirectly.[241] Incorporating an exception that allows a convict computer and Internet access may not make a condition per se acceptable, but may ease a court's reluctance to find the government harbored a valid purpose for pursuing a condition.

Recasting the reasoning of courts that have rejected a technology access condition to fit the second prong of this Note's framework, a condition that restricts activity unrelated to the crime, or lacks an exception, may fail because it indicates an illegitimate government purpose. Such a condition may show that the government seeks to restrict protected speech it could not limit directly, especially where a condition would not be likely to uncover evidence of a crime, or enhance the effectiveness of the prison release system.[242] This could make the government's purpose for promulgating a condition invalid because it would not show a connection between the state interest in the restriction and the crime.[243] Likewise, a condition that relates to the crime, or includes an exception, would show that a restriction is constitutional because it is germane to the need for supervised release and not an attempt to censor speech.[244] Other courts have found, however, that the state has a valid purpose for a condition that restricts access to technology and enhances public safety.

2. But, the Government's Intent May Be Valid Where It Offers a Condition To Protect the Public and Provides Exceptions To Allow Computer and Internet Use

Some courts have found the government's purpose is proper where a condition of supervised release is meant to protect the public and assist in a convict's rehabilitation. For example, a speech-limiting condition has been upheld where it related to the crime and where the government showed how it would enhance public safety or assist reintegration into society.[245] Much like the reasoning in *Ferber*,[246] those courts allowed an incidental burden

239. *See, e.g.*, *Russell*, 600 F.3d at 638 (emphasizing rarity of approval of unconditional ban); United States v. Sullivan, 451 F.3d 884, 895–96 (D.C. Cir. 2006) (noting circuit split on need for exceptions).

240. *See* United States v. Pruden, 398 F.3d 241, 250–51 (3d Cir. 2005) (noting impermissibility of judicial delegation of sentencing terms to probation officer); United States v. Scott, 316 F.3d 733, 736 (7th Cir. 2003) (highlighting danger that Probation Office exception facilitates censorship).

241. *See, e.g.*, United States v. Crandon, 173 F.3d 122, 127 (3d Cir. 1999).

242. *See* United States v. Knights, 534 U.S. 112, 118 n.4 (2001) (arguing valid condition furthers interest in probation).

243. *See supra* notes 193, 230–37 and accompanying text.

244. *See supra* notes 192, 230–37 and accompanying text.

245. *See, e.g.*, United States v. Weatherton, 567 F.3d 149, 155 (5th Cir.), *cert. denied*, 130 S. Ct. 300 (2009); United States v. Paul, 274 F.3d 155, 170–72 (5th Cir. 2001); 173 F.3d at 122, 127–28. *See generally* 18 U.S.C. § 3553(a) (2006) (listing public safety among valid reasons for supervised release).

246. *See supra* notes 48–55 and accompanying text.

on the First Amendment because of the damage inflicted on society by child pornography, and the frequency of offender recidivism.[247] This danger also justified a lifetime term of release,[248] and restricted access to adult pornography, where the government showed a relationship between the offense, the condition, and protecting children.[249] Where the government can rationally connect the crime and punishment, it can likely show a valid purpose for offering a condition of supervised release.

Courts have also found that the government's motivation for a condition was proper where it provided an exception to the restriction that limited its scope or duration. For example, the Third Circuit has rejected a lifetime term of supervised release with computer and Internet restrictions, but has accepted a substantially similar condition as part of a shorter term of release.[250] The court reasoned that a condition of limited duration left open the possibility that a rehabilitated convict may regain speech rights.[251] Additionally, courts have found the government had a proper purpose where it offered an exception that allowed the Probation Office to give prior approval for a convict to use a computer and the Internet, even for a lifetime condition, reasoning that the exception showed that the government did not intend to restrict speech unnecessarily.[252] Similar to the Probation Office exception, other courts have supported a condition that allowed a convict to view Internet content that had passed through a filter because the exception showed that the government's purpose was to restrict inappropriate speech, rather than prevent speech.[253] Including an exception to a supervised

247. *See* United States v. Brigham, 569 F.3d 220, 232–35 (5th Cir.), *cert. denied*, 130 S. Ct. 1013 (2009); *Crandon*, 173 F.3d at 127; *cf.* McKune v. Lile, 536 U.S. 24, 41 (2002) (weighing rights and preventing recidivism). For a disagreement about the rates of recidivism, see United States v. Russell, 600 F.3d 631, 640 (D.C. Cir. 2010) (Henderson, J., concurring).

248. *See* United States v. Cope, 527 F.3d 944, 952 (9th Cir.), *cert. denied*, 129 S. Ct. 321 (2008); United States v. Hayes, 445 F.3d 536, 537 (2d Cir. 2006).

249. *Compare* United States v. Thielemann, 575 F.3d 265, 274 (3d Cir. 2009) (noting adult pornography led to contact with minors), *cert. denied*, 130 S. Ct. 1109 (2010), *and* United States v. Bee, 162 F.3d 1232, 1235 (9th Cir. 1998) (finding speech condition would curb sexual urges), *with* United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002) (per curiam) (concluding ban on any pornography was unrelated to child pornography crime); *see also supra* note 235 and accompanying text. A condition that limits Internet use may relate to the crime even if a computer was not used in its commission. *See, e.g.*, United States v. Moran, 573 F.3d 1132, 1139–41 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1879 (2010).

250. *Compare* United States v. Voelker, 489 F.3d 139, 148 (3d Cir. 2007) (rejecting lifetime term of supervision) *with Thielemann*, 575 F.3d at 277–78 (allowing ten-year term) *and Crandon*, 173 F.3d at 125, 127–28 (allowing three-year term). *See also* United States v. Heckman, 592 F.3d 400, 409 (3d Cir. 2010) ("We do not hold that limited Internet bans of shorter duration can never be imposed as conditions of supervised release for this type of conduct.").

251. *See Thielemann*, 575 F.3d at 278.

252. *See, e.g.*, *Russell*, 600 F.3d at 638–39 (surveying Parole Office exception cases); United States v. Stults, 575 F.3d 834, 855–56 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 1309 (2010); United States v. Rearden, 349 F.3d 608, 620–21 (9th Cir. 2003) (collecting earlier cases including Probation Office exception).

253. *See, e.g.*, United States v. Lifshitz, 369 F.3d 173, 193 (2d Cir. 2004); United States v. Holm, 326 F.3d 872, 878 (7th Cir. 2003); United States v. White, 244 F.3d 1199, 1206–07 (10th Cir. 2001).

release condition allows the government to show that it is pursuing the condition in good faith to protect the public, rather than regulating protected speech indirectly.

Refashioning the reasoning of courts that have upheld a limit on computer and Internet use in light of this Note's framework, a condition of supervised release promulgated to protect the public, which includes an exception, may indicate valid government intent and satisfy the purpose prong. The government has the authority to regulate activity that harms the public, and it is empowered to maintain the prison release system.[254] The government may also add a condition to assist in the regulation of child pornography where it can show it possesses a germane, neutral, and non-censorial interest in the restriction.[255] Therefore, where the government acts pursuant to this authority, its purpose is likely proper because its primary intent is not regulating speech. Additionally, the government may harbor multiple bona fide motives for offering supervised release with a technology restriction,[256] and the potential for a hidden improper purpose may not automatically render a condition unconstitutional.[257] As a result, a condition may be constitutional where the government, by including an exception to permit speech on terms it deems not harmful to the public, demonstrates intent beyond suppressing unpopular speech.[258]

C. Prong Three: When Is a Condition's Effect Overly Restrictive?

As courts have split on the propriety of the government's motivation for pursuing a restrictive condition, so too have they diverged on whether a condition limits speech too strictly. This section focuses on the opinions of courts that have discussed when a supervised release condition that limits computer and Internet access has the effect of too broadly restricting speech. It first outlines the view that a condition may be unconstitutional where it indiscriminately limits access to protected speech. Then, it molds the reasoning of courts that have rejected such a condition to fit the effect prong of this Note's framework. Next, it examines the opposing viewpoint that a condition may be constitutional where it harnesses technology to minimize First Amendment intrusion and protect the public. Finally, it recasts the reasoning of these courts to fit the third prong of this Note's framework for unconstitutional conditions.

254. *See supra* notes 32–36, 193 and accompanying text.

255. *See supra* notes 192, 245–49 and accompanying text.

256. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 758 & n.9 (1982) (protecting children); Morrissey v. Brewer, 408 U.S. 471, 477 (1972) (saving taxpayer dollars).

257. *See* United States v. Am. Library Ass'n, 539 U.S. 194, 211 (2003) (plurality opinion) (approving condition where censorship was allegedly intended); Rust v. Sullivan, 500 U.S. 173, 178 (1991) (upholding condition purported to limit abortion access).

258. *See supra* notes 158–59, 252 and accompanying text.

1. A Condition's Effect May Be Too Restrictive If It Broadly Limits Access to Protected Speech

Some courts have held that the effect of a condition of supervised release is too restrictive where it proscribes access to protected speech, especially where the limitation has potentially infinite breadth. As the Tenth Circuit found in *United States v. White*,[259] a condition that restricts computer and Internet access, in order to limit a convict's access to online child pornography, may also prevent him from obtaining a weather forecast, reading a newspaper, or taking advantage of the Internet's vast wealth of knowledge.[260] Other circuits have found the reasoning in *White* persuasive, noting that such a condition may slow a convict's rehabilitation by vitiating his opportunity to engage in appropriate online speech or obtain an education.[261] In the extreme, an inartfully worded condition could prevent the convict "from watching any movie on his computer that had children in it . . . [or using] a computer to send his own young relatives birthday cards."[262] Additionally, courts have rejected a condition that restrains access to technology because its scope may expand over time and become unnecessarily harsh as society increases its adoption of Internet and mobile computing technology.[263] They have also noted that, following current trends, future content may only be available online and avenues for civic participation would be foreclosed for a convict who cannot access the Internet.[264] Moreover, a condition that limits technology because of a child pornography crime may have a relatively more restrictive effect than a similar condition imposed for another crime. For example, where a fraud is committed over the telephone or through the mail, a condition would be invalid where it restricted subsequent use of the telephone or postal

259. 244 F.3d 1199 (10th Cir. 2001); *see supra* notes 215–17.

260. *See White*, 244 F.3d at 1206; *see also* United States v. Richards, No. 09-10324, 2010 U.S. App. LEXIS 13133, at *6–7 (9th Cir. June 25, 2010) (striking as invalid under the First Amendment a condition that limited ability to criticize a public official).

261. *See* United States v. Bender, 566 F.3d 748, 753 (8th Cir. 2009) (noting importance of access to learning); United States v. Scott, 316 F.3d 733, 737 (7th Cir. 2003); United States v. Freeman, 316 F.3d 386, 392 (3d Cir. 2003); James, *supra* note 29 (noting online education for prisoners).

262. United States v. Riley, 576 F.3d 1046, 1048–49 (9th Cir. 2009) (invalidating condition that convict "shall not access via computer any material that relates to minors").

263. *See, e.g.*, United States v. Russell, 600 F.3d 631, 636, 638 (D.C. Cir. 2010) (disallowing condition that Russell "shall not possess or use a computer for any reason"); United States v. Perazza-Mercado, 553 F.3d 65, 73 (1st Cir. 2009); *Freeman*, 316 F.3d at 392; *White*, 244 F.3d at 1206; *supra* notes 57–62 and accompanying text (noting growth of Internet use).

264. *See White*, 244 F.3d at 1206; *see also* Quinn Bowman, *Economy, Online Trends Threaten Newspaper Industry*, PBS NEWSHOUR EXTRA, (May 8, 2009), http://www.pbs.org/newshour/extra/features/arts/jan-june09/newspapers_05-08.html. For an overview of economics driving news online, see Hal Varian, *Newspaper Economics: Online and Offline*, GOOGLE PUB. POL'Y BLOG (Mar. 9, 2010, 9:00 AM) http://googlepublicpolicy.blogspot.com/2010/03/newspaper-economics-online-and-offline.html.

service.[265] Likewise, where a publication violates an obscenity law, a condition that limited access to printed material would also be invalid because of the impact on free speech;[266] as courts have noted, the government may not limit access to online speech any more than it could limit access to speech in the tangible world.[267] Where a condition indiscriminately and disproportionately prevents a convict from accessing protected speech, the condition's effect may be impermissibly broad.

An expansive condition that prevented access to a bevy of protected speech without concomitant benefit to public safety would most likely have an overbroad effect and fail the third prong of this Note's unconstitutional conditions framework. Even where the condition was circumscribed with narrowly tailored restrictions, the effect of a technology restriction may increase as the condition becomes more commonplace and more released convicts accept a world without Internet.[268] This would reduce the aggregate amount of online speech and could provide dangerous precedent with potential to harm society's collective ability to exercise free speech rights,[269] minimize exposure to different opinions, and potentially remove controversial viewpoints from the marketplace.[270] Moreover, a limit on computer and Internet use could drive a wedge between people excluded from modern technology and those who use it, which could exacerbate differences in living conditions over the duration of the condition.[271] Such a restriction may also undermine opportunities to participate in a vibrant online community, whether dedicated to social change, shopping, or simply playing games.[272] Where a supervised release condition broadly restricts access to modern technology, a court may find the condition unconstitutional.

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265. *See, e.g.*, United States v. Voelker, 489 F.3d 139, 145 & n.3 (3d Cir. 2007); *Scott*, 316 F.3d at 737; United States v. Peterson, 248 F.3d 79, 83 (2d Cir. 2001) (per curiam). *But see Russell*, 600 F.3d at 640 (Henderson, J., concurring) (comparing computer ban to revocation of driver's license for vehicular homicide).

266. *See, e.g.*, *Voelker*, 489 F.3d at 145; United States v. Sofsky, 287 F.3d 122, 126 (2d Cir. 2002); *supra* notes 43–47 and accompanying text (reviewing *Miller* and speech regulations).

267. *See, e.g.*, *Voelker*, 489 F.3d at 145; *Sofsky*, 287 F.3d at 126; *Peterson*, 248 F.3d at 83; *see also supra* note 68 and accompanying text (noting coterminous limit on online and printed speech regulation).

268. *See supra* note 195 and accompanying text.

269. *See* United States v. Holm, 326 F.3d 872, 878 (7th Cir. 2003); *supra* notes 195–98 and accompanying text.

270. *See supra* notes 154–59 and accompanying text (discussing danger of speech suppression).

271. *See Holm*, 326 F.3d 872, 878 (7th Cir. 2003); *supra* notes 197–98 and accompanying text (highlighting constitutional castes). An analogous, though non-invidious, rift occurs as a younger generation adopts new technology that an earlier generation finds difficult to comprehend.

272. *See* RIDEOUT ET AL., *supra* note 59 (categorizing online activities); Whitney, *supra* note 59 (same); *supra* note 63 and accompanying text (examining political engagement trends).

2. Nevertheless, a Condition's Effect May Be Permissibly Restrictive If It Minimally Limits Speech While Enhancing Public Safety

Even where a condition constrained a convict's ability to avail himself of protected speech, courts have found the limitation justified because of the need to protect the public from egregious offenders. For example, in *United States v. Paul*,[273] the U.S. Court of Appeals for the Fifth Circuit explicitly rejected the Tenth Circuit's reasoning in *United States v. White*,[274] which had held that a condition was invalid where it inhibited access to online news, weather, and research.[275] Instead, the Fifth Circuit found that a condition may be acceptable where the convict had used the Internet to solicit physical contact with a minor and the condition's deterrent effect justified proscribing online content; on balance the public benefit from reduced recidivism and enhanced safety, combined with a sufficient connection between the crime and punishment, outweighed First Amendment concerns.[276] Other courts have found the reasoning in *Paul* persuasive, upholding a limit on computer and Internet access where a convict used those technologies to facilitate direct child exploitation.[277] Thus, infringement on First Amendment rights may be permissible where necessary to ensure the public is safe from sex offenders.

Courts have also supported a supervised release condition that adopts exceptions to add precision and narrow the scope of its limitations. As discussed earlier, including an exception that authorizes the Probation Office to supervise a convict's access to the Internet shows good faith while mitigating the heavy-handed effect of a ban and minimizing First Amendment intrusions.[278] Going a step further, courts have favored a condition that employed computer-monitoring or Internet-filtering technology to perforate a condition, thereby affording a convict online access without abetting illegal activity.[279] In some cases, courts have even required the convict to pay the subsequent monitoring and filtering cost.[280]

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273. 274 F.3d 155 (5th Cir. 2001).

274. *See supra* notes 215–17, 259–60 and accompanying text.

275. *See Paul*, 274 F.3d at 167–70; *see also* United States v. Brigham, 569 F.3d 220, 234 (5th Cir.), *cert. denied*, 130 S. Ct. 1013 (2009) (following *Paul*).

276. *See Paul*, 274 F.3d at 170; *see also Brigham*, 569 F.3d at 234.

277. *See* United States v. Rearden, 349 F.3d 608, 620–21 (9th Cir. 2003); United States v. Zinn, 321 F.3d 1084, 1092–93 (11th Cir. 2003); *supra* note 231 and accompanying text.

278. *See* United States v. Perazza-Mercado, 553 F.3d 65, 71–72 (1st Cir. 2009) (approving condition because of ban's limited effect); *supra* note 252 and accompanying text (addressing Probation Office exception).

279. *See* United States v. Lifshitz, 369 F.3d 173, 192 (2d Cir. 2004); United States v. White, 244 F.3d 1199, 1206 (10th Cir. 2001) (enumerating content control using a whitelist or blacklist). *See generally* GOLDSMITH & WU, *supra* note 93, at 58–63, 65–104 (2006) (postulating potential for Geo-ID tracking and additional opportunities for governmental control of the Internet and its content); LESSIG, *supra* note 64, at 54–59, 253–59 (articulating tracking, monitoring and filtering options respectively); JONATHAN L. ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 109–16 (2008) (detailing methods for Internet surveillance and monitoring).

280. *See, e.g.*, United States v. Miller, 594 F.3d 172, 178 (3d Cir. 2010); United States v. Heckman, 592 F.3d 400, 409 & n.12 (3d Cir. 2010).

While acknowledging that filtering or monitoring may be no more effective or enforceable than prohibiting Internet access,[281] courts have noted that harnessing technology may enhance a condition's deterrent effect and facilitate a subsequent search of the content he accessed by enabling the government to view and inspect, remotely or in person, a convict's computer activity.[282] Technology could also be used to revise the condition later to ensure it remains effective and narrowly tailored.[283] These measures may also help bridge the gap between protecting the public and fostering normal participation in the modern world.[284] As Justice John Paul Stevens noted, filters may succeed at "protecting minors from sexually explicit Internet materials as well or better than attempting to regulate the vast content of the World Wide Web at its source, and at a far less significant cost to First Amendment values."[285] Courts favorably view efforts to utilize technology to narrowly tailor a condition's effect such that it limits encroachment on a convict's protected speech and prevents electronic excommunication.

Recasting the reasoning of courts that have upheld a limit on computer and Internet use to fit this Note's new framework, the effect prong may be satisfied where a condition utilizes technology to reduce First Amendment infringement, and enhance public safety. A narrowly tailored condition that uses technology to constrain improper activity may be acceptable simply because it strengthens public safety and protects children from exploitation.[286] Further, using technology to filter and monitor Internet content may be the most efficient method of restricting content without creating an unconstitutional condition,[287] and strikes the optimal balance

281. *See* United States v. Holm, 326 F.3d 872, 878 (7th Cir. 2003); United States v. Sofsky, 287 F.3d 122, 126 (2d Cir. 2002); *see also* United States v. Johnson, 446 F.3d 272, 282–83 (2d Cir. 2006) (suggesting special considerations for restrictions on a tech savvy offender). At first blush, a convict could evade a prohibitive condition by using the Internet at a public library, and elude a restrictive condition if the content is unfiltered. *See supra* notes 57, 166–71 and accompanying text (recognizing Internet use and optional content filters at public libraries).

282. *See Miller*, 594 F.3d at 187–89; *Lifshitz*, 369 F.3d at 191–92 & nn.9–10; United States v. Taylor, 338 F.3d 1280, 1285 (11th Cir. 2003); *Sofsky*, 287 F.3d at 126. *See generally 'Monitoring' the Sex Offender*, TECH BEAT (Nat'l L. Enforcement & Corr. Tech. Ctr., Rockville, Md.), Winter 2005, at 1, *available at* http://www.kbsolutions.com/MonitorSexOffender.pdf (reporting on a course teaching parole and probation officers to manage computer use by sex offenders).

283. *See* United States v. Russell, 600 F.3d 631, 638 (D.C. Cir. 2010); United States v. Perazza-Mercado, 553 F.3d 65, 73 (1st Cir. 2009).

284. *See Lifshitz*, 369 F.3d at 179; *Holm*, 326 F.3d at 878; *White*, 244 F.3d at 1206. *See generally* Frank E. Correll, Jr., Note, *"You Fall Into Scylla in Seeking To Avoid Charybdis": The Second Circuit's Pragmatic Approach to Supervised Release for Sex Offenders*, 49 WM. & MARY L. REV. 681 (2007) (favoring filtering); Anton L. Janik, Jr., Note, *Combating the Illicit Internet: Decisions by the Tenth Circuit To Apply Harsher Sentences and Lessened Search Requirements to Child Pornographers Using Computers*, 79 DENV. U. L. REV. 379 (2002) (praising consent to search); Jane Adele Regina, Comment, *Access Denied: Imposing Statutory Penalties on Sex Offenders Who Violate Restricted Internet Access as a Condition of Probation*, 4 SETON HALL CIRCUIT REV. 187 (2007) (supporting monitoring).

285. Ashcroft v. ACLU (*Ashcroft II*), 542 U.S. 656, 674 (2004) (Stevens, J., concurring).

286. *See supra* notes 48–55, 200 and accompanying text.

287. *See Lifshitz*, 369 F.3d at 192; *supra* notes 166–71 and accompanying text.

between ensuring safety and allowing speech.[288] Including an exception to allow for future modification of the condition can also prospectively prevent an unconstitutional condition from developing later. Moreover, tailoring in each case could facilitate government evenhandedness that equalizes the ability of convicts and non-convicts to exercise freedom of speech without harming society.[289] Finally, instituting a monitoring regime to search a convict's computer would follow unconstitutional conditions precedent in prisoner cases, where courts have upheld a condition of release that required a convict to consent to a search aimed at exposing evidence of criminal activity.[290] A condition of supervised release equipped with measures to minimize potential over-regulation of speech would likely have a restrained effect and satisfy the effect prong of this Note's framework for unconstitutional conditions.

Part II illuminated the cases where courts have ruled on a condition of supervised release that restricted access to technology without discussing unconstitutional conditions theory. Then it recast the reasoning of those courts to evaluate this Note's framework for unconstitutional conditions, examining in turn the arguments as they corresponded to the coercion, purpose, and effect prongs. Part III takes up this Note's framework to resolve the conflict in Part II, articulating when a restriction on computer and Internet access, as part of supervised release, is a constitutional condition.

III. THE GOVERNMENT MAY OFFER SUPERVISED RELEASE, WITH A CONDITION THAT RESTRICTS TECHNOLOGY ACCESS, WITHOUT CREATING AN UNCONSTITUTIONAL CONDITION

A condition of supervised release that restricts computer and Internet access will often pass this Note's unconstitutional conditions framework. First, rejecting traditional tests for coercion and evaluating it according to contract principles, a condition fulfills the first prong if a convict knowingly and voluntarily accepts the government benefit and the corresponding rights burden. Second, a condition passes the purpose prong if the restriction relates to the crime, and an exception to the condition shows the government's intent goes beyond regulating speech. Finally, a condition satisfies the effect prong by using defense as good offense; a constitutional condition employs filtering and monitoring technology to minimize First Amendment infringement and enhance the deterrent effect of a condition, rather than limiting technology use.

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288. *See* Kreimer, *supra* note 22, at 1347–51. This balance could be struck by modifying a convict's Internet hardware to make it more like an information appliance than a personal computer. *See generally* ZITTRAIN, *supra* note 279, at 57–60 (contrasting centralized control and what Professor Zittrain terms generative platforms).

289. *See supra* notes 197–98 and accompanying text.

290. *See supra* notes 133, 282 and accompanying text; *see also* United States v. Miller, 594 F.3d 172, 188 n.10 (3d Cir. 2010) (declining to challenge search condition).

A. A Condition Fulfills the Coercion Prong, Viewed Through Contract Law, Where a Convict Knowingly and Voluntarily Accepts the Conditional Offer

Taking up the first prong of this Note's framework, the difficulty of discerning when a government offer of a voluntary benefit becomes coercive undermines the value of the analysis. For many years, courts and scholars have sought to delineate when a government offer is unconstitutionally coercive.[291] However, despite numerous efforts, there remains no clear test.[292] For example, past attempts failed at categorizing a valid condition based on a right/privilege or penalty/nonsubsidy distinction,[293] or describing an invalid condition as one that is improperly coercive.[294] As a result, the task of demarcating when a convict constructively cannot reject a government offer of supervised release, though he is actually empowered to reject that offer, is exceedingly difficult and unworthy of the effort. Moreover, incorporating a court's subjective understanding of the underlying ability of a convict to reject an offer creates an opportunity for inconsistency, allowing a judge to identify coercion using Justice Potter Stewart's famous line for spotting pornography: "I know it when I see it."[295] If that takes place, case law precedent will become more muddled, while a definition for coercion will be no clearer, and judges will still lack a tool for determining when a condition is constitutional.

To avoid ends-oriented analysis, and the thorny problem of defining coercion, it is best to evaluate the first prong of this Note's framework using contract law principles. Though contract theory cannot fully capture the special power imbalance that occurs when the government offers a convict a voluntary benefit, it does offer a cogent and doctrinally consistent lens for viewing the acceptance of an offer.[296] Unlike issues with indentifying coercion, there is agreement that a contract is valid where both parties assent knowingly, intelligently, and voluntarily.[297] Courts have consistently used contract law to analyze agreements between the government and a criminal, including situations where the government offered a more lenient punishment in exchange for a convict waiving a constitutional right.[298] Courts have also used the concepts of knowingness, intelligentness, and voluntariness to separate cases where the government improperly forced a convict to accept an offer from cases where the government merely made it hard for the convict to reject the offer.[299] Similarly, courts should have no problem using these principles to evaluate

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291. *See supra* notes 182, 184–86 and accompanying text.
292. *See supra* notes 182, 184–86 and accompanying text.
293. *See supra* notes 179–80 and accompanying text.
294. *See supra* note 181 and accompanying text.
295. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). It was not until *Miller* that the Supreme Court identified a clear line for obscenity. *See supra* notes 43–47 and accompanying text.
296. *See supra* note 189 and accompanying text.
297. *See, e.g.*, *supra* notes 117–22, 165 and accompanying text.
298. *See supra* Part I.B.2 (explicating prisoner case precedent).
299. *See supra* notes 120–22 and accompanying text.

whether the government is coercive when it voluntarily offers supervised release in exchange for a convict waiving some of his right to free speech.[300] Therefore, contract principles can be applied effectively to evaluate the government's offer of supervised release and determine when a condition becomes unconstitutionally coercive.

Analyzing a condition through the contract paradigm creates a meaningful test for resolving whether the government's offer of supervised release with a technology restriction presents an unconstitutional condition. As a threshold matter, the government must fully apprise a convict of the consequences of accepting release, including the details and length of a condition, to mitigate the risk that a convict's wishes will be overborne and decision-making process altered.[301] An informed convict is thus empowered to reject any government benefit, no matter how valuable, once he can rationally weigh the options and determine his best interest.[302] While the restriction may be harsh, the vast body of contract and unconstitutional conditions case law protects a convict by rendering unenforceable any agreement that harms a third party or where assent was forced.[303] Therefore, a condition passes the coercion prong of this Note's framework where an informed convict knowingly and voluntarily accepts a government benefit and burden.

Finally, courts can minimize concerns of an unduly coercive condition by drafting and interpreting a technology-limiting condition to comport with modern life. For example, where the notion of Internet "access" once meant the ability to take one of the relatively few on-ramps to the "information superhighway," in today's ubiquitous Wi-Fi world, "access" should mean an actual connection to the Internet. This would resolve the *White* court's fears of a convict being restricted from entering a library, coffee shop, or airport, while rejecting the premise that Internet use is a modern convenience that may be restricted merely because it is inessential to life.[304] Moreover, modern technology may be powerful, but many people are able to live without convenient access to a computer or the Internet, and a lifetime jail term remains distinguishable from capital punishment.[305] A convict should be similarly entrusted to choose to live without such technology by exchanging access to it for increased liberty. However, to bolster protection against the government coercing a convict into accepting a condition that broadly limits technology access, the government must also show it does not seek to regulate speech indirectly.

300. *See supra* note 189 and accompanying text.
301. *See supra* notes 187–88 and accompanying text.
302. *See supra* notes 189, 222 and accompanying text.
303. *See supra* notes 198, 225 and accompanying text.
304. *See supra* notes 215–17, 226–27 and accompanying text.
305. *See supra* notes 28, 57–61 and accompanying text.

B. A Condition Satisfies the Purpose Prong Where the Government Seeks To Boost Public Safety and Includes Exceptions To Allow Access to Technology

A condition that restricts computer and Internet access satisfies the purpose prong of this Note's unconstitutional conditions framework where the government intends to protect the public rather than indirectly regulate protected speech. There is no doubt that production, distribution, and possession of child pornography inflicts tremendous and lasting harm on children and society.[306] The damage is so severe that the Supreme Court held the First Amendment does not protect material that depicts sexual conduct by minors and permitted content regulation outside the *Miller* obscenity standard.[307] Especially as modern technology has made it easier for deviants to spread injurious content, the government deserves deference when it promulgates a condition of supervised release that aims to curb trafficking in such destructive material.[308] Accordingly, courts should allow the government to offer a condition which it deems necessary to reduce recidivism by a released convict, a foundational state charge,[309] and should presume that a condition that limits access to technology is constitutional where it relates to a child pornography crime that was committed using a computer.

Presuming the government acts with a proper purpose squares with the approach taken by courts to date. While some courts have scrutinized the government's reason for a condition,[310] more often courts have made conclusory statements approving a condition because the government said it sought to improve public safety.[311] However, by specifically stating that it is deferring to the government because protecting children from online predators is paramount, a court can follow First Amendment precedent related to Internet speech.[312] This also allows the court to bless the state's purpose without giving short shrift to unconstitutional conditions doctrine.

However, courts should not operate as a rubber stamp when the government acts with an improper purpose by seeking a condition unrelated to the crime. To minimize potential coercion in these situations, the government should shoulder the burden to articulate some reason why a condition will enhance the safety of the public vis-à-vis a convict released from prison.[313] As the Second Circuit has stated, the government will satisfy this burden, and demonstrate it acts with proper purpose, where it can make a logical connection between the condition, public safety, and the child pornography crime.[314] Other circuits have found this approach

306. *See supra* note 17 and accompanying text.
307. *See supra* notes 48–55 and accompanying text.
308. *But see supra* note 230 and accompanying text.
309. *See supra* Part I.B.2 (balancing prisoner rehabilitation, early release, and public safety).
310. *See supra* Part II.B.
311. *See supra* notes 69–93 and accompanying text.
312. *See supra* notes 48–60 and accompanying text.
313. *See supra* note 230 and accompanying text.
314. *See supra* notes 232–34 and accompanying text.

persuasive, adding the important caveat that the government will fail to meet its burden, even where it expresses a public safety rationale, where a condition restricts employment, speech, or association that bears minimal relationship to the crime.[315] The government's purpose will also be suspect where it seeks a condition because of a prior offense, or a crime committed without utilizing the Internet.[316] In practice, this will confine the government to pursuing a condition where it has a valid interest in protecting the public or maintaining the prison release system.

To ensure a court finds that the government's desired condition is constitutional, in part because it meets the purpose prong, the government should show good faith by including an exception that affords a convict computer and Internet access in controlled situations. Of course, a court could interpret a condition that restricts access to technology as an attempt by the government to regulate free speech indirectly.[317] However, the government can indicate that it aims for more than indirect regulation by authorizing the Probation Office to permit a convict to engage in appropriate online speech,[318] limiting the duration of the condition,[319] or employing methods of Internet filtering or computer-monitoring to allow reasonable access to technology.[320] This hews closely to the Second Circuit's approach, which protects minors, offers a convict hope for the future, and expands the body of speech available to all Internet users.[321] Even if the government has a proper purpose for a condition and does not coerce a convict, its offer must still be evaluated under the third prong of this Note's framework for unconstitutional conditions.

C. A Condition Meets the Effect Prong Where It Protects Children While Using Technology To Maximize Free Speech

A condition passes the effect prong where its impact safeguards children from online predators without unnecessarily restricting access to constitutionally protected speech. There is little doubt that a condition that restricts computer and Internet use might inhibit access to legitimate content including online news, weather, and financial data.[322] That condition is also apt to restrict a convict from discussing topics unrelated to his crime and reduce his ability to participate in a vibrant forum for modern speech.[323] However, a criminal convict forfeits his full complement of constitutional rights and empowers the government to enact regulations to prevent recidivism.[324] Given an all-or-nothing choice, courts would be better to continue following the Fifth Circuit's approach, expressed in

315. *See supra* notes 235–37 and accompanying text.
316. *See supra* note 234 and accompanying text.
317. *See supra* notes 242–43 and accompanying text.
318. *See supra* note 252 and accompanying text.
319. *See supra* note 250 and accompanying text.
320. *See supra* note 253 and accompanying text.
321. *See* Correll, *supra* note 284; *supra* notes 279–85 and accompanying text.
322. *See supra* notes 259–60 and accompanying text.
323. *See supra* notes 261–64 and accompanying text.
324. *See supra* notes 132, 202 and accompanying text.

United States v. Paul: restricting the internet access of an online child pornography convict is a necessary consequence to guarding against another offense.[325] This makes the condition pass the third prong because its primary effect provides a prophylactic against illegal activity that outweighs the harm of reduced First Amendment rights.

However, the government should simultaneously adopt the Second Circuit's approach to supervised release by harnessing Internet-filtering technology to minimize the infringing effect of a condition.[326] This system could use whitelisting to permit access to news, weather, finance, education, and other valuable websites, and simultaneously blacklist obviously inappropriate content, such as websites that feature underage subjects.[327] It could also take advantage of rapidly emerging technologies such as Geo-ID and next generation filtering methods,[328] and follow the trend toward appliancization that is changing the online experience.[329] This would create an intermediate zone where a convict would have the opportunity to participate in the electronic public square, but the government would simultaneously be able to prevent him from using that access to recidivate.[330] The government could update technology as it develops, ensuring that the filters are revised to have the least possible impact on protected speech,[331] and tweak the condition as the vagaries of the communications and technology industries play out while the convict is serving his prison term.

To complement a content filter, which leaves open the possibility that a convict will ignore or evade a condition,[332] the government should follow the Tenth Circuit by requiring a convict to register computer and Internet devices and give prior consent to electronic searches.[333] This would allow the government to execute the search in person, or use electronic search technology, and vary the level of intrusiveness depending on the needs of law enforcement.[334] Requiring consent would be consistent with the line of unconstitutional conditions cases which permit the government to offer conditions that are likely to uncover evidence of criminal activity.[335] Just as parole offers a convict the opportunity to prove he is ready for release

325. *See supra* notes 273–77 and accompanying text.

326. *See, e.g.*, United States v. Johnson, 446 F.3d 272 (2d Cir. 2006); United States v. Balon, 384 F.3d 38 (2d Cir. 2004); United States v. Lifshitz, 369 F.3d 173 (2d Cir. 2004); United States v. Sofsky, 287 F.3d 122 (2d Cir. 2002); United States v. Peterson, 248 F.3d 79 (2d Cir. 2001) (per curiam). *See generally* Correll, *supra* note 284 (noting Second Circuit's approach).

327. *See supra* note 279 and accompanying text.

328. *See supra* note 279 and accompanying text.

329. *See supra* note 288 and accompanying text.

330. *See supra* notes 64, 284 and accompanying text.

331. *See supra* notes 92, 283 and accompanying text.

332. *See supra* note 281 and accompanying text.

333. *See, e.g.*, United States v. Vinson, 147 F. App'x 763 (10th Cir. 2005); United States v. Walser, 275 F.3d 981 (10th Cir. 2001); United States v. White, 244 F.3d 1199 (10th Cir. 2001). *See generally* Janik, *supra* note 284 (describing Tenth Circuit's approach).

334. *See supra* note 282 and accompanying text.

335. *See supra* note 290 and accompanying text.

from prison, these exceptions would allow a convict to prove he is capable of abstaining from cavorting in the Internet's darkest corners.[336] Instituting random electronic checks would also add redundancy to the system and facilitate filter revisions.[337] While enforcement will be difficult no matter what method is used, affording a convict a supervised means for accessing the Internet is more likely to encourage appropriate use, and discourage the convict from viewing the unfiltered Internet at a library.[338] Further, funneling the convict's Internet access into places where law enforcement can oversee the activity provides real-time feedback to ensure the condition remains tailored to enhance public safety, aid rehabilitation, and ease reintegration—the ultimate goal of supervised release.[339] This rejection of broad limits without exception also acknowledges the multifaceted nature of human beings online;[340] while sex offenders who remain focused on destroying young lives should be monitored closely and punished severely, others with a divertible interest in a diversity of topics should be allowed to use computers and the Internet to partake in the positive change and previously inconceivable advances that technology has achieved throughout the world. Therefore, implementing a regime of supervised release that builds on technology to allow a convict appropriate access to the Internet without risking the safety of children has a sufficiently limited effect to comply with the third prong of this Note's framework for unconstitutional conditions.

CONCLUSION

Modern technology and the Internet have brought the world closer together by providing the means for inexpensive and instantaneous communication. However, the incredible power of these tools has wrought serious consequences—some segments of the Internet have become havens for child pornographers who traffic in the exploitation and victimization of children. As the number of individuals charged with producing, possessing, or distributing this illicit material has increased, courts and law enforcement have more frequently faced difficult questions about how to best protect the next generation of Americans without giving short shrift to the protection of freedom of speech enshrined in the Constitution's First Amendment. In response, many courts have coupled a harsh prison term with an offer of supervised release, on condition that a convict agrees to give up computer and Internet access while outside of prison.

Though the many circuit courts that have addressed challenges to these punishments have not relied on unconstitutional conditions theory in their rulings, the doctrine is relevant in this situation. Unconstitutional conditions theory posits that if the government is not obligated to provide a benefit, *viz.* supervised release, the government may not offer that benefit

336. *See supra* notes 17, 30 and accompanying text.
337. *See supra* note 283 and accompanying text.
338. *See supra* notes 57, 281 and accompanying text.
339. *See supra* notes 281–85 and accompanying text.
340. *See supra* note 272 and accompanying text.

on condition that the recipient must forfeit a constitutional right, *viz.* freedom of speech, in order to accept the offer. While courts and commentators have failed to agree on a unified doctrine through which to apply the theory, this Note takes up the challenge and offers an organizational framework to judge the constitutionality of a condition based on its coerciveness, the government's purpose, and the condition's effect.

When this framework is applied to an offer of supervised release with a condition that limits computer and Internet access, the condition passes as constitutional. Viewing the coercion prong of this framework according to contract principles, a condition passes the test where a convict knowingly and voluntarily agrees to accept a term of supervised release with the concomitant restriction on speech. However, because the government so rarely compels acceptance of supervised release, the purpose prong of this Note's framework ensures the government is not offering the conditional benefit to regulate speech indirectly, and that a condition that restricts technology actually relates to the child pornography crime. Finally, a condition satisfies the effect prong where the restriction protects minors and harnesses Internet-filtering and computer-monitoring technology to minimize infringement of a convict's First Amendment rights. Where a condition passes all three elements of this Note's framework, it is a constitutional condition.