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# Child Pornography and Child Molestation: One and the Same or Completely Separate Crimes?

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## **Child Pornography and Child Molestation: One and the Same or Completely Separate Crimes?**

### **I.**

#### **Introduction**

Fifteen years ago, in developing the Child Pornography Prevention Act of 1996, Congress found that, “child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites.”<sup>1</sup> The acts of possession of child pornography and child molestation are seemingly distinct crimes; however, recent studies have highlighted the adjunctive nature of the underlying behavior of both crimes.<sup>2</sup> Three recent Circuit Court of Appeals decisions have created a division that is inconsistent with these studies.<sup>3</sup>

These three court of appeals decisions affect the federal circuits by blurring the threshold used to determine when probable cause is established.<sup>4</sup> The Eighth Circuit held in *United States v. Colbert* that a magistrate judge reasonably approved a search of defendant’s home in order to locate child pornography when there was evidence the defendant attempted to entice a young girl.<sup>5</sup> The court found that probable cause existed because “individuals sexually interested in children frequently utilize child pornography to reduce the inhibitions of their victims.”<sup>6</sup> Contrary to the decision in *Colbert*, the Sixth Circuit found in *United States v. Hodson* that approval of a search warrant was not justified and therefore, the search for child pornography was not supported by probable

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<sup>1</sup> Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 121, 110 Stat. 3009, 3009-26 (1996).

<sup>2</sup> See Michael L. Bourke, Andres E. Hernandez, *The ‘Butner Study’ Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 J. Fam. Violence 183 (2009).

<sup>3</sup> See *United States v. Colbert*, 605 F.3d 573 (8th Cir. 2010) *cert. denied*, 131 S.Ct. 1469, 179 L.Ed. 2d 312 (U.S. 2011); *United States v. Hodson*, 543 F.3d 286 (6th Cir. 2008); *United States v. Falso*, 544 F.3d 110 (2d Cir. 2008).

<sup>4</sup> *Id.*

<sup>5</sup> *Colbert*, 605 F.3d at 577 (8th Cir. 2010).

<sup>6</sup> *Id.*

cause.<sup>7</sup> The affidavit used in *Hodson* was based on defendant's online confession to an undercover officer that he had an attraction to children and that he had sexually molested a seven-year-old boy.<sup>8</sup> Similarly, the Second Circuit held in *United States v. Falso* that a search for child pornography was not supported by probable cause where the affidavit was based in part on evidence that defendant had previously been arrested for sexually abusing a minor.<sup>9</sup>

These cases illustrate an important issue: the absence of a bright line rule to determine when evidence of child molestation can be used to support probable cause to search a defendant's home for child pornography. While the totality of the circumstances could, *in some instances*, allow a magistrate judge to find probable cause, there are many other instances where probable cause might not be found.<sup>10</sup> The inherent dangerous nature of these two crimes present a compelling dilemma in those events where probable cause cannot be established to directly link these two crimes. On the other hand, by adopting a bright line rule to link the crimes of child molestation and child pornography, the Court gives in to their precedential reluctance of interfering in "private" spheres. Grappling with and reconciling these two conflicting issues defines the underlying theme of this Comment.

Two increasingly problematic issues for law enforcement are the growing technology of the Internet and the ever-increasing ways that child pornographers can hide

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<sup>7</sup> *Hodson*, 543 F.3d at 292.

<sup>8</sup> *Id.* at 287-88.

<sup>9</sup> *Falso*, 544 F.3d at 124 (2d Cir. 2008).

<sup>10</sup> Compare *United States v. Adkins*, 169 F. App'x 961 (6th Cir. 2006) ("[s]tanding alone, a high incidence of child molestation by persons convicted of child pornography crimes may not demonstrate that a child molester is likely to possess child pornography.") with *United States v. Haynes*, 160 F. App'x 940 (11th Cir. 2005) (Officers' belief that probable cause of child molestation supported a search for child pornography was objectively reasonable, based on no more than "common sense.").

images.<sup>11</sup> Traditional investigative techniques are no longer useful to prevent the victimization of innocent children. Additionally, child pornographers do not fit neatly into any existing, traditional Fourth Amendment category. Consequently, the best response the judiciary has been able to muster to combat the societal danger of child pornography has been to engage in a balancing test. However, as evidenced by the current circuit split, an unguided judicial balancing test is too subjective to serve as a reliable decision-making formula. To determine whether probable cause exists to support a search for child pornography, courts, law enforcement, and society as a whole need a more lucid standard.

Therefore, the proposed solution is to emulate the broadened probable cause standard used in obtaining search warrants relating to drug crimes.<sup>12</sup> In certain cases, courts have expanded the probable cause standard and considered the background and training of the affiant, the severity of the crime, readily available, reliable statistics, and a development of the nexus between the crimes and the particular place to be searched. If law enforcement officers are able to use certain evidence of crimes dealing with the sexual exploitation of children as a way to infer the necessity of a search for child pornography, then every member of society may be subject to a search on exactly the same grounds. This broadened standard will serve as a concrete guidepost for the judiciary, law enforcement personnel, and society in general. Such a standard has the potential to be used as *prima facie* evidence that a questionable search is reasonable under the Fourth Amendment.

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<sup>11</sup> National Center for Missing & Exploited Children, *Child Molesters: A Behavioral Analysis*, Lanning, Kenneth V. (5th Ed. 2010), available at [http://www.missingkids.com/en\\_US/publications/NC70.pdf](http://www.missingkids.com/en_US/publications/NC70.pdf) (last visited Oct. 22, 2011).

<sup>12</sup> See *supra* note 153 and accompanying text.

This comment will proceed in three parts. Part II will begin by detailing the history of the growth of child pornography and sexual abuse of children. This section will also discuss the historical development of child pornography laws, as well as the historical progression of the Fourth Amendment. Part III will provide a discussion of the current debate on the correlation between child pornography and child molestation and how this problem affects the federal circuit courts. By focusing on an in depth analysis of recent circuit court cases, this Comment will specifically target issues in developing probable cause to search for child pornography.

Part IV identifies a potential solution to this problem: child pornography is a form of child abuse and as such, a different, more expansive probable cause standard should be developed. By building on Parts II and III, this section will suggest a new, expanded approach to determining probable cause in situations involving evidence of child exploitation. Part IV will also examine the practical ramifications of implementing the proposed broadened probable cause standard. This section will argue that by mildly conflating child exploitation crimes, it will alleviate confusion and inconsistencies regarding the process of determining probable cause.

## **II.**

### **Background**

#### *A. History of Pornography in General*

The first, full-length, English language pornographic novel, "*Memoirs of a Woman of Pleasure*," also known as "*Fanny Hill*," was published in 1748.<sup>13</sup> Despite the reticent public attitudes toward sex at that time, pornographic novels left little to the

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<sup>13</sup> The History of Pornography No More Prudish Than the Present, available at <http://www.foxnews.com/health/2010/10/13/history-pornography-prudish-present/>.

imagination.<sup>14</sup> The author of “*Fanny Hill*” managed to cover bisexuality, voyeurism, group sex, and masochism, among other topics.<sup>15</sup> With the advent of photography in 1839, pornographers were exposed to unparalleled innovation in the pornography genre.<sup>16</sup> Video followed a similar groundbreaking path.<sup>17</sup> By 1896, filmmakers in France were exploring pornography with short, silent clips like “*Le Coucher de la Marie*,” in which an actress performed a strip tease.<sup>18</sup>

The cultural and sexual revolution of the 1960’s and 1970’s led to changing social mores, which opened the door for public showing of explicit films.<sup>19</sup> The subsequent development of the Internet and the invention of the digital camera lowered the barriers to making, viewing and distributing pornography.<sup>20</sup> Today, while pornography continues to inundate the Internet, the actual size of the industry remains a mystery.<sup>21</sup>

#### *B. Setting the Stage for Conflict: Efforts to Criminalize Child Pornography*

In 1973 the United States Supreme Court, faced with competing interests, ruled that obscene material was not protected under the First Amendment’s guarantee of Freedom of Speech.<sup>22</sup> In *Miller v. California*, the Court acknowledged the “inherent dangers of undertaking to regulate any form of expression,” and said, “state statutes designed to regulate obscene materials must be carefully limited.”<sup>23</sup> In an attempt to set such limits, the Court defined obscene material as that which, when taken as a whole,

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> The History of Pornography No More Prudish Than the Present, available at <http://www.foxnews.com/health/2010/10/13/history-pornography-prudish-present/>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607 (1973).

<sup>23</sup> *Id.* at 23-24.

appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value.<sup>24</sup>

Congress's first step toward protecting children from child pornography occurred with the passage of the Protection of Children Against Sexual Exploitation Act of 1977.<sup>25</sup> This legislation prohibited the use of children under the age of sixteen in making sexually explicit material to be distributed in interstate commerce.<sup>26</sup> However, this bill only regulated the commercial sale of child pornography, not the trading of such material.<sup>27</sup>

Five years later, the Court in *New York v. Ferber* held that the distribution and sale of even non-obscene child pornography could be criminalized.<sup>28</sup> The Court found that child pornography could be banned without first being deemed "obscene" under *Miller* for five reasons: (1) The government has a very compelling interest in preventing the sexual exploitation of children; (2) distribution of visual depictions of children engaged in sexual activity is intrinsically related to the sexual abuse of children;<sup>29</sup> (3) advertising and selling child pornography provides an economic motive for producing child pornography; (4) visual depictions of children engaged in sexual activity have negligible artistic value; and (5) recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with the Court's earlier decisions.<sup>30</sup>

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<sup>24</sup> *Id.* at 24.

<sup>25</sup> Pub. L. No. 95-225, 92 Stat. 7 (codified as amended at 18 U.S.C. §§ 2423, 2251-53 (1994 & Supp. IV 1998)).

<sup>26</sup> *Id.*

<sup>27</sup> Amy E. Wells, Comment, *Criminal Procedure: The Fourth Amendment Collides with the Problem of Child Pornography and the Internet*, 53 Okla. L. Rev. 99, 102 (2000).

<sup>28</sup> *New York v. Ferber*, 458 U.S. 747, 756 (1982).

<sup>29</sup> The images serve as a permanent reminder of the abuse, and it is necessary for government to regulate the channels of distributing such images if it is to be able to eliminate the production of child pornography.

<sup>30</sup> *Id.* at 756-64.

In 1984 Congress passed the Child Protection Act,<sup>31</sup> which went a step further, eliminating the need for a commercial transaction and raising the statutory age of a minor to eighteen.<sup>32</sup> Finally, in 1988, the first law concerned with the nexus between computers and child pornography was passed.<sup>33</sup> The Child Protection and Obscenity Enforcement Act prohibited the use of computers to distribute child pornography.<sup>34</sup>

In *Osborne v. Ohio*, the Supreme Court extended its holding in *Ferber* and upheld state criminal sanctions for the private possession of child pornography.<sup>35</sup> By outlawing the possession of child pornography, the government sought to eradicate legitimate harms by diminishing the market for child pornography.<sup>36</sup> With the advent of the Internet and increasing technologies, the Child Pornography Prevention Act of 1996<sup>37</sup> (“CPPA”) was developed to restrict child pornography on the Internet, including virtual child pornography.<sup>38</sup> In the words of one court, “[t]he regulation . . . shifted from defining child pornography in terms of the harm inflicted upon real children to a determination that child pornography was evil in and of itself, whether it involved real children or not.”<sup>39</sup>

However, in *Ashcroft v. Free Speech Coalition*, the Court considered whether the CPPA’s provisions regarding virtual pornography abridged the constitutional guarantees

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<sup>31</sup> Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §§ 2251-53 (1994 & Supp. IV 1998)).

<sup>32</sup> Wade T. Anderson, *Criminalizing “Virtual” Child Pornography Under the Child Pornography Prevention Act: Is It Really What It “Appears to Be?”* 35 U. Rich. L. Rev. 393, 396 (2001).

<sup>33</sup> *Id.*

<sup>34</sup> Pub. L. No. 100-690, 102 Stat. 4485 (codified as amended at 18 U.S.C. §§ 2251A-2252 (1994 & Supp. IV 1998)).

<sup>35</sup> *Osborne v. Ohio*, 495 U.S. 103, 111, 110 S. Ct. 1691, 1697, 109 L. Ed. 2d 98 (1990).

<sup>36</sup> *Id.* at 103.

<sup>37</sup> Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121(1), 110 Stat. 3009-26 (codified at 18 U.S.C. § 2251 note (Supp. IV 1998)).

<sup>38</sup> 18 U.S.C. § 2252A (Supp. V 1999).

<sup>39</sup> Sarah Sternberg, *The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antithesis*, 69 Fordham L. Rev. 2783 (2001) (citing *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1089 (9th Cir. 1999), cert. granted sub nom. *Holder v. Free Speech Coalition*, 121 S. Ct. 876 (2001)).



of the First Amendment.<sup>40</sup> While the Court recognized that Congress was free to pass valid laws to protect children from abuse,<sup>41</sup> they also noted that it was well established that speech may not be prohibited because it concerns subjects offending our sensibilities.<sup>42</sup> The CPPA statute at issue included provisions that covered materials beyond the categories recognized in *Ferber* and *Miller*.<sup>43</sup> Thus, the Court held that the prohibitions of CPPA §§ 2256(8)(B) and 2256(8)(D) were overbroad and unconstitutional.<sup>44</sup>

More recently, in a 2011 Washington University Law Review Article, Carissa Byrne Hessick notes that the legislative and judicial responses to the modern increase in child pornography have been uniformly draconian.<sup>45</sup> State and federal governments have drastically increased the criminal penalties for crimes involving child pornography.<sup>46</sup> The underlying dialogue adjoining the push for increased sentences suggests an assumption that those who possess child pornography are indistinguishable from those who actually abuse children.<sup>47</sup> This rhetoric takes several forms:

Some argue that penalties for possession of child pornography should be increased because it is a crime that is equivalent to, or worse than, the act of sexually abusing a child. Others contend that possession of child pornography

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<sup>40</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239, 122 S. Ct. 1389, 1396, 152 L. Ed. 2d 403 (2002).

<sup>41</sup> *E.g.*, 18 U.S.C. §§ 2241, 2251.

<sup>42</sup> *Ashcroft*, 535 U.S. at 245 (see also *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997) (“In evaluating the free speech right of adults, we have made it perfectly clear that ‘[s]exual expression which is indecent but not obscene is protected by the First Amendment.’”))

<sup>43</sup> *Id.* 535 U.S. at 256.

<sup>44</sup> *Id.* at 258 (The CPPA expands the federal prohibition on child pornography to include not only pornographic images made using actual children, 18 U.S.C. §2256(8)(A), but also “any visual depiction, including any photograph, film, video, picture, or computer or computer generated image or picture” that “is, or appears to be, of a minor engaging in sexually explicit conduct,” §2256(8)(B), and any sexually explicit image that is “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” it depicts “a minor engaging in sexually explicit conduct,” §2256(8)(D)).

<sup>45</sup> Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 Wash. U.L. Rev. 853, 855 (2011).

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

<sup>47</sup> *Id.*

must be punished severely because possession creates an increased risk that an individual will sexually abuse children. And still others seem to treat prosecutions for possession of child pornography as a proxy for prosecuting those who sexually abuse children; in other words, because those who possess child pornography are assumed also to sexually abuse children, the punishment for child pornography possession ought to be calibrated to punish child sex abuse as opposed to merely possession of child pornography.<sup>48</sup>

The common thread throughout this underlying dialogue is that regardless how these two separate crimes are punished, they are highly intertwined because of the inherently dangerous risk they both present to innocent children.

Finally, the ever-changing ways that new technologies operate create new and harder to detect opportunities for possessors of child pornography to avoid apprehension. Law enforcement personnel and potential child pornography possessors face a highly problematic issue when this form of secrecy intersects with the Fourth Amendment of the United States Constitution. This issue can be resolved by mildly conflating the crimes of child sexual abuse and child pornography. By doing so, the ability to establish probable cause is slightly expanded without infringing on an individual's Fourth Amendment rights.

### *C. Evolution of the Fourth Amendment*

The Fourth Amendment of the United States Constitution protects a citizen from unreasonable searches and seizures.<sup>49</sup> It reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

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<sup>48</sup> *Id.*

<sup>49</sup> U.S. Const. amend. IV.

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>50</sup>

The United States has seen a major evolution of the Fourth Amendment and, more specifically, the probable cause standard over the course of the past century. Beginning in 1933, the Court announced, “mere affirmance of belief or suspicion is not enough” to support probable cause to obtain a warrant to search a private dwelling.<sup>51</sup> The Court required more in order to protect the individual from potentially zealous law enforcement agents entering a home without probable cause.<sup>52</sup> The point of the Fourth Amendment is not to deny law enforcement the support of usual inferences that reasonable men might draw from evidence.<sup>53</sup> Instead, the protection requires that those inferences be drawn by a neutral and detached magistrate instead of being drawn by the officer engaged in the often-competitive enterprise of ferretting out crime.<sup>54</sup>

With regard to the responsibilities of the neutral and detached magistrate, the Court in *Illinois v. Gates* stated that, “[t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place.”<sup>55</sup> The Court’s precedent has established that probable cause is not a standard formally set in stone. Instead, probable cause is a fluid concept that focuses on “the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.”<sup>56</sup> The fact that the probable cause standard *is* such a fluid and nebulous concept can lead to a multitude of

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<sup>50</sup> *Id.*

<sup>51</sup> *Nathanson v. United States*, 290 U.S. 41, 47, 54 S.Ct. 11, 13, 78 L.Ed. 159 (1933).

<sup>52</sup> *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Illinois v. Gates*, 462 U.S. 213, 214, 103 S.Ct. 2317, 2320, 76 L. Ed. 2d 527 (1983).

<sup>56</sup> *Id.* at 231.

problems in trying to obtain a search warrant. Inconsistency and uncertainty abound when a law enforcement agent can submit an affidavit to one magistrate and obtain a search warrant, yet be denied a search warrant by a different magistrate evaluating the same affidavit.

### III.

#### ANALYSIS

##### *A. Intersection of Child Molestation and Child Pornography*

A scholarly and legal debate exists as to whether there is simply a correlation between child molestation and child pornography or whether there is actual causation between these two crimes. This Comment seeks to determine whether this debate really matters. Even without evidence to support causation, if these two crimes are so highly correlated that they are almost one and the same, should not evidence of one support probable cause to locate evidence of the other? In response to a 2009 American Bar Association article written by Mark Hansen about the sentencing laws for child pornography offenders, the Department of Justice suggested that, “setting aside whether there is a causal connection or even a correlation between child pornography and child molestation, those who collect child pornography exploit and victimize the children in those images, and create a demand for the production of more child pornography, regardless of whether they have ever personally molested a child.”<sup>57</sup>

A study done by Michael L. Bourke of the United States Marshals Service and Andres E. Hernandez of the Federal Correction Institution located in Butner, North

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<sup>57</sup> Alexandra Gelber, U.S. Dep’t of Justice, *Response to “A Reluctant Rebellion”* 8-9 (2009), available at <http://www.usdoj.gov/criminal/ceos/ReluctantRebellionResponse.pdf>; Mark Hansen, American Bar Association Journal, *A Reluctant Rebellion, Laws are tough on child pornography. But some federal judges think the time isn’t fitting the crime*, (2000), available at [http://www.abajournal.com/magazine/article/a\\_reluctant\\_rebellion/](http://www.abajournal.com/magazine/article/a_reluctant_rebellion/).

Carolina, gathered further empirical evidence of the debate over the link between these two categories of crime.<sup>58</sup> The study compared two groups of child pornography offenders who were participating in a voluntary treatment program: men whose known sexual offense history at the time of sentencing involved child pornography, but did not include any “hands-on” sexual abuse, and men convicted of similar child pornography offenses, but who had documented histories of hands-on sexual offenses against at least one child victim.<sup>59</sup> The goal was to determine whether the former group’s offenders were “merely” collectors of child pornography at little risk for engaging in hands-on sexual offenses, or if they were contact sex offenders whose criminal sexual behavior involving children, with the exception of Internet crimes, went undetected.<sup>60</sup>

The findings of the study showed that the Internet offenders in the sample were significantly *more likely than not* to have sexually abused a child via a hands-on act.<sup>61</sup> This study also reported a 2,369% increase in the number of contact sexual offenses acknowledged by the treatment participants from the time of their Pre-Sentence Investigation Report to the time of the study.<sup>62</sup> As the authors stated:

This dramatic increase . . . challenges the often-repeated assertion that child pornography offenders are ‘only’ involved with ‘pictures.’ It appears that these offenders are far from being innocent, sexually ‘curious’ men who, through naiveté or dumb luck, became entangled in the World Wide Web. [L]ess than 2% of subjects who entered treatment without known hands-on offenses were verified to be ‘just pictures’ cases.<sup>63</sup>

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<sup>58</sup> Michael L. Bourke, Andres E. Hernandez, *The ‘Butner Study’ Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 J. Fam. Violence 183 (2009), available at <http://bcsdcybercrimes.com/Documents/Hernandez%20Study.pdf>.

<sup>59</sup> *Id.* at 183.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 188.

<sup>63</sup> *Id.*

The Butner Study calls into question whether it is pragmatically and theoretically useful to discriminate between child pornographers and child abusers.<sup>64</sup> The authors of the study believe that a complex and reciprocal interaction between the two crimes exists.<sup>65</sup> Likewise, the results of the study suggest that our society may be faced with a new category of offending; that is, that many Internet child pornography offenders may be undetected child molesters and that their use of child pornography is indicative of their paraphilic orientation.<sup>66</sup>

### *B. How This Problem Affects the Federal Circuits*

The leading cases that attempt to answer the question of whether evidence of child molestation can be used to support probable cause to obtain a search warrant to locate child pornography have wholly different factual bases.<sup>67</sup> But, the difficult balancing act between the protection of innocent minors and the privacy of the individual is the common theme throughout all of the cases heard by the circuit courts.<sup>68</sup>

#### *1. United States v. Colbert - Eighth Circuit*

In *United States v. Colbert*<sup>69</sup>, which was denied certiorari by the Supreme Court in February 2011, detectives of the Davenport, Iowa police department drove to Vandever Park to investigate a complaint of suspicious activity related to a young girl.<sup>70</sup> The detectives spoke to the child's uncle who had become concerned after observing a man interacting with his five year old niece, pushing her on a swing, and talking to her

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<sup>64</sup> Michael L. Bourke, Andres E. Hernandez, *The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 J. Fam. Violence 183, 188 (2009), available at <http://bcsdcybercrimes.com/Documents/Hernandez%20Study.pdf>.

<sup>65</sup> *Id.* at 189.

<sup>66</sup> *Id.* at 190.

<sup>67</sup> *See supra* note 3.

<sup>68</sup> *Id.*

<sup>69</sup> *United States v. Colbert*, 605 F.3d 573 (8th Cir. 2010) *cert. denied*, 131 S.Ct. 1469, 179 L.Ed. 2d 312 (U.S. 2011).

<sup>70</sup> *Id.* at 575.

about movies and videotapes he had at his home.<sup>71</sup> The police obtained a description of what was later determined to be the defendant Donald Gene Colbert's vehicle.<sup>72</sup> While the detectives were still at the park, two patrol officers identified the vehicle and stopped Colbert.<sup>73</sup> He consented to a search of his car and agreed to speak with the detectives.<sup>74</sup> Inside the car, the detectives found a police scanner, handcuffs, and a hat bearing the phrase "New York PD."<sup>75</sup> Colbert told the officers that he had the handcuffs because he had been employed as a security guard four years earlier.<sup>76</sup> He then admitted to speaking to the young girl at the park about movies that he had at his apartment.<sup>77</sup>

The detectives relayed this information to another detective who drafted a warrant application seeking permission to search Colbert's residence for books, photos, videos, and other electronic media depicting "minors engaged in a prohibited sexual act or in the simulation of a prohibited sexual act."<sup>78</sup> All of the facts relating to the incident in the park, as well as the detectives' interaction with the defendant, were summarized in the warrant application.<sup>79</sup> An Iowa District Court judge issued a search warrant for Colbert's apartment.<sup>80</sup> The subsequent search resulted in the discovery of a number of children's movies, a computer, and numerous CD's containing child pornography.<sup>81</sup> Colbert appealed the denial of his motion to suppress the evidence.<sup>82</sup> As stated in the case, the issue the court attempted to answer was whether the facts set forth in the affidavit,

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Colbert*, 605 F.3d at 575.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 576.

<sup>81</sup> *Colbert*, 605 F.3d at 576.

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

detailing evidence of enticement of a minor, establish a link supporting probable cause to search a defendant's home to locate child pornography.<sup>83</sup>

The United States District Court for the Southern District of Iowa concluded that the information regarding enticement established probable cause to search defendant's apartment because "individuals sexually interested in children frequently utilize child pornography to reduce inhibitions of their victims."<sup>84</sup> More specifically, the court felt that sexual depictions of minors could be logically related to the crime of child enticement, particularly when defendant had referred to movies and videos that he wanted the child to view at his apartment.<sup>85</sup>

The Eighth Circuit Court of Appeals affirmed the district court's holding that notwithstanding the affidavit's lack of detail the reviewing magistrate could have reasonably concluded that the search of Colbert's home was justified.<sup>86</sup> The majority's rationale was that there is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography.<sup>87</sup> The circuit court also noted that for individuals seeking to obtain sexual gratification by abusing children, possession of child pornography may very well be a logical precursor to physical interaction with a child: the relative ease with which child pornography may be obtained on the internet make it a simpler and less detectable way of satisfying pedophilic desires.<sup>88</sup>

Judge John Gibson dissented and was wary of the majority's opinion, stating, "The majority relies upon a dangerous assumption in reaching its conclusion that the

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<sup>83</sup> *Id.* at 576-77.

<sup>84</sup> *Id.* at 577.

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

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

<sup>87</sup> *Colbert*, 605 F.3d at 578.

<sup>88</sup> *Id.*



affidavit satisfies the requirements of the Fourth Amendment.”<sup>89</sup> Judge Gibson asserted that, at best, the affidavit established probable cause to believe that Colbert was involved in the crime of child enticement.<sup>90</sup> The dissent also noted that even if a relationship did exist between child enticement and child pornography, “it was unreasonable for the magistrate judge . . . to infer such a nexus without further evidence to support that inference.”<sup>91</sup> The dissent heavily relied on two cases, *United States v. Hodson*<sup>92</sup> and *United States v. Falso*.<sup>93</sup>

## 2. *United States v. Hodson* – 6th Circuit

On October 7, 2005, Detective Juan Passano of the Passaic County, New Jersey Sheriff’s Department Internet Crimes Section, in his search for online sexual predators, logged onto America Online (“AOL”) as “kidlatino12” and represented himself as a twelve year-old boy.<sup>94</sup> Once online, he encountered a user by the name “WhopperDaddy” and conversed with him for one hour.<sup>95</sup> During the conversation, “WhopperDaddy” confided that he was a forty-one year-old married man with two sons.<sup>96</sup> He also shared that he was a homosexual who favored young boys, that he liked looking at his nine and eleven year-old sons naked, and that he even had sex with his seven year-old nephew.<sup>97</sup> Detective Passano subpoenaed AOL for information, which

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<sup>89</sup> *Id.* at 579.

<sup>90</sup> *Id.* at 580.

<sup>91</sup> *Id.* at 580-81.

<sup>92</sup> *United States v. Hodson*, 543 F.3d 286 (6th Cir. 2008).

<sup>93</sup> *United States v. Falso*, 544 F.3d 110, 124 (2d Cir. 2008).

<sup>94</sup> *Id.* at 287.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

revealed that Michael Hodson of Middlesboro, Kentucky was registered to that screen name.<sup>98</sup>

Three weeks later, Passano contacted Detective Jacqueline Pickrell of the Kentucky State Police Internet Crimes Against Children Task Force to inquire about Hodson.<sup>99</sup> Pickrell verified the information she received from Passano, but discovered that he had only one son and no known nephews.<sup>100</sup> Pickrell subsequently prepared an affidavit, based entirely on the AOL information and the Internet conversation between Hodson and Passano, and petitioned a magistrate judge for a warrant to search Hodson's residence.<sup>101</sup> The affidavit's depiction of the places to be searched and the things to be seized described and directed a search for evidence of child pornography, not child molestation.<sup>102</sup> The statement of probable cause in the affidavit did not contain information with regard to Hodson engaging in any aspect of child pornography or any basis for believing that individuals who engage in child molestation are likely to also possess child pornography.<sup>103</sup> Nonetheless, the magistrate judge issued the warrant and a search was performed on Hodson's residence.<sup>104</sup> Buried in the hard drives of Hodson's computers, the police located between ten and fifty pictures of child pornography. No evidence was seized or subsequently discovered that would support any charge against Hodson of child molestation.<sup>105</sup>

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

<sup>99</sup> *Hodson*, 543 F.3d at 287.

<sup>100</sup> *Id.*

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

<sup>102</sup> *Id.* at 288-89.

<sup>103</sup> *Id.* at 289.

<sup>104</sup> *Id.*

<sup>105</sup> *Hodson*, 543 F.3d at 289.

Hodson was indicted on charges of receiving and possessing child pornography.<sup>106</sup> Hodson moved to suppress the evidence seized during the search.<sup>107</sup>

The motion was submitted to a magistrate judge, who stated:

At best, the evidence in the Affidavit connecting Hodson to child pornography is limited and indirect. There is a weak inference that Hodson indulges in child pornography because its visual quality is consistent with Hodson's interest in simply seeing his children unclothed. Any additional link between Hodson and child pornography, however, would require an assumption, by the issuing judicial officer, that a person suspected of child molestation or an illicit online chat involving a child also possesses child pornography.<sup>108</sup>

The magistrate declined to make that assumption. The judge was not convinced that, standing alone, evidence of child molestation demonstrated probable cause to believe that Hodson possessed child pornography.<sup>109</sup> In reaching this conclusion, the magistrate judge noted:

Certainly, a reviewing magistrate judge may make reasonable inferences based on common sense. But, as loathsome as Hodson's chat content was, the magistrate judge is not equipped to supply an *empirical* link between sexual deviance, or even sexual attraction, and pornography possession. Such a link depends on expertise...to support the warrant application.<sup>110</sup>

Having decided that the affidavit did not establish probable cause, the reviewing magistrate proceeded to the second argument, namely whether the officer's reliance on the search warrant was made in good faith.<sup>111</sup> The reviewing magistrate judge accepted the government's argument, finding that Detective Pickrell's "failure to include her

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 290.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 291 (internal alterations omitted).

<sup>111</sup> *Hodson*, 543 F.3d at 291.

opinion as the critical link to establish probable cause does not reduce the affidavit to mere suspicion or belief because “[t]hese suspected crimes are not as ‘unrelated’ to child pornography as [Hodson] contends; both the cited conduct and the sought evidence involve sexual exploitation of minors.”<sup>112</sup>

Both parties submitted objections to the magistrate’s findings and the district court conducted a hearing.<sup>113</sup> The district court deemed the warrant defective for its lack of probable cause, finding that Pickrell had failed to offer the expertise necessary to establish a “link between sexual deviance. . . and pornography possession.”<sup>114</sup> Additionally, the district court applied the *Leon* good faith exception, concluding, among other things, that “the affidavit contains information demonstrating that, at the very least, [Hodson] was engaged in child molestation and illicit online activity. These activities are related to the possession of child pornography in that both involve sexual exploitation of minors.”<sup>115</sup> The district court denied Hodson’s motion to suppress the evidence and sentenced Hodson to seventy-one months in prison.<sup>116</sup> Hodson appealed the denial of his motion to suppress.<sup>117</sup>

The Sixth Circuit Court of Appeals reversed the district court’s denial of the motion to suppress, vacated Hodson’s conviction, and remanded the case for further proceedings.<sup>118</sup> In so doing, the court of appeals held that:

It was unreasonable for the magistrate judge in this case, when confronted with the request for the warrant, to infer such a nexus without further evidence to support that inference. It is similarly unreasonable for the officer

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

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

<sup>115</sup> *Id.* at 292.

<sup>116</sup> *United States v. Hodson*, 2006 U.S. Dist. LEXIS 93490 (E.D. Ky., Dec. 27, 2006).

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

<sup>118</sup> *Hodson*, 543 F.3d at 293.

executing the warrant either to infer that nexus herself or to rely on her own subjective knowledge to claim reasonable reliance on the warrant.<sup>119</sup>

In reversing the lower court, the Court of Appeals relied on dicta in another Sixth Circuit case, *United States v. Adkins*.<sup>120</sup> *Adkins* held that, “standing alone, a high incidence of child molestation by persons convicted of child pornography crimes may not demonstrate that a child molester is likely to possess child pornography.”<sup>121</sup>

### 3. *United States v. Falso* – Second Circuit

*United States v. Falso* is yet another circuit court case that further blurs the probable cause standard in relation to child molestation and child pornography.<sup>122</sup> The lower court denied Falso’s motion to suppress evidence seized from his home on the grounds that probable cause for the search did not exist.<sup>123</sup> The issue presented on appeal to the Second Circuit was

Whether a substantial basis for the district court’s finding of probable cause exists where the law enforcement affidavit supporting the search warrant alleged that Falso appears to have gained or attempted to gain access to a website that distributed child pornography and had been convicted eighteen years earlier of a misdemeanor based on sexual abuse of a minor.<sup>124</sup>

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

<sup>120</sup> *United States v. Adkins*, 169 F.App’x 961, 967 (6th Cir. 2006).

<sup>121</sup> *Id.* (citing *United States v. Adkins*, 169 F.App’x 961, 967 (6th Cir. 2006) (“Standing alone, a high instance of child molestation by persons convicted of child pornography crimes may not demonstrate that a child molester is likely to possess child pornography. But, the affidavit set forth other information on the likelihood of a molester’s possessing pornography, namely the FBI’s “institutional knowledge[.]” This “institutional knowledge” included the information that preferential offenders devote time, money, and energy to the pursuit of child pornography or sexual contact with children; that they typically keep collections of child pornography or “child erotica”; and that they have well-developed techniques for gaining access to child pornography or child victims. This information, in conjunction with Agent Vito’s determination that Mr. Adkins is a preferential offender, supports a finding that Adkins was reasonably likely to possess child pornography.”)).

<sup>122</sup> *United States v. Falso*, 544 F.3d 110, 124 (2d Cir. 2008).

<sup>123</sup> *Id.* at 112.

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

More specifically, because the court found that Falso was not alleged to be a member of the child pornography website, but rather only that he attempted to gain access to the site, the question on appeal hinged on whether Falso's eighteen-year old conviction involving the sexual abuse of a minor provided a sufficient basis to believe that evidence of child pornography crimes would be found in his home.<sup>125</sup> The majority opinion held that probable cause was lacking.<sup>126</sup>

In evaluating whether probable cause existed in the affidavit in this case, the court first looked to the illustrated nexus between child pornography and child molestation.<sup>127</sup> While the affidavit in this case represented that "the majority of individuals who collect child pornography are persons who have a sexual attraction to children" the Second Circuit stated that this reasoning fell victim to logic.<sup>128</sup> The court relied on Judge Pooler's dissenting opinion in *United States v. Martin*<sup>129</sup> that "it is an inferential fallacy of ancient standing to conclude that, because members of group A" (those who collect child pornography) "are likely to be members of group B" (those attracted to children), "then group B is entirely, or even largely composed of, members of group A."<sup>130</sup> Thus, the court concluded that "while the district court undoubtedly had the safety of the public in mind, an individual's Fourth Amendment right cannot be vitiated based on fallacious inferences drawn from facts not supported by the affidavit."<sup>131</sup>

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<sup>125</sup> *Id.* at 113-14.

<sup>126</sup> *Id.* at 114.

<sup>127</sup> *Falso*, 544 F.3d at 114

<sup>128</sup> *Id.* at 122.

<sup>129</sup> *United States v. Martin*, 426 F.3d 82 (2d. Cir. 2005).

<sup>130</sup> *Falso*, 544 F.3d at 122 (quoting *Martin*, 426 F.3d at 82 (Pooler, J., dissenting) (In *Martin*, Judge Pooler criticized the majority's inference that because collectors of child pornography are likely to be subscribers of e-groups, that the inverse also is true: namely, that subscribers are likely to collect child pornography.).

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

The court then discussed whether Falso's prior sex-crime conviction was relevant to the probable cause analysis.<sup>132</sup> The court determined that no such evidence of ongoing impropriety existed in this case to bridge the temporal gap between Falso's eighteen-year old sex offense and the suspected child pornography offense.<sup>133</sup> Further, the court stated that although Falso's prior conviction involved the sexual abuse of a minor, it did not relate to child pornography.<sup>134</sup> It is not enough that the law criminalizes both of the aforementioned crimes; they are separate offenses and nothing in the affidavit in Falso drew the necessary correlation between a person's propensities to commit both types of crimes.<sup>135</sup> The Second Circuit found no substantial basis for probable cause.<sup>136</sup>

#### IV.

##### Potential Solution

##### *Expanded Probable Cause Standard Limited to Child Exploitation Situations*

In order to resolve the murky waters of this issue, the Supreme Court should develop an expanded probable cause standard limited to child exploitation situations when certain requirements are met. This type of expansion would not be earth shattering,

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 123.

<sup>134</sup> *Id.*

<sup>135</sup> *Falso*, 544 F.3d at 123. *But see United States v. Brand*, 467 F.3d 179 (Second Circuit affirmed District Court's evidentiary ruling permitting the government, in its prosecution of a defendant for traveling in interstate commerce for the purpose of engaging in illicit sexual contact with a minor, to present the jury with images of child pornography found on the defendant's computer. The court explained that the defendant's collection of child pornography indicated an "abnormal sexual attraction to children," and thus was relevant to the offense for which the defendant stood trial, which involved the same abnormalcy. The court then went on to say that a direct connection exists between child pornography and pedophilia. The Second Circuit partially drew their conclusion from congressional testimony of the FBI, which noted "a strong correlation between child pornography offenders and molesters of children and that the correlation between collection of child pornography and actual child abuse is too real and too grave to ignore. *Id.* at 198 n. 17 (quoting *Enhancing Child Protection Laws After the April 16, 2002 Supreme Court Decision, Ashcroft v. Free Speech Coalition: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 107th Cong. (2002) (statement by Michael J. Heinbach, Crimes Against Children Unit, Criminal Investigative Division, FBI)).

<sup>136</sup> *Id.* at 124.

as it is already used consistently and analogously in cases where law enforcement seeks to find evidence in the home of an individual suspected of association with drugs.<sup>137</sup> Likewise, because of the severity of crimes dealing with child endangerment, an expanded probable cause standard allowing evidence of certain child exploitation crimes to support probable cause for a search for child pornography is warranted by societal norms.

*A. Existing Judicial Precedent of Probable Cause Standard as a Foundation*

This new standard should not be analyzed in a vacuum and reviewing magistrates should continue to take into account judicial precedent on ascertaining whether the probable cause standard has been met. One important aspect that cannot be overlooked is the notion developed in *Johnson v. United States*,<sup>138</sup> requiring a neutral and detached magistrate to draw the usual inferences that a reasonable man could draw from the evidence provided. This does not deny law enforcement the support of reasonable inferences; it simply places that control in the hands of the magistrate as opposed to the potentially zealous police officer engaged in the often-competitive enterprise of ferretting out crime.<sup>139</sup>

Additionally, magistrates should continue to abide by the ‘totality of the circumstances’ approach used in *Gates* to determine when probable cause exists.<sup>140</sup> By rejecting the rigid *Aguilar-Spinelli*<sup>141</sup> two-pronged test, the Supreme Court in *Gates*

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<sup>137</sup> See *infra* note 153 and accompanying text.

<sup>138</sup> *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 392, 92 L.Ed. 436 (1948).

<sup>139</sup> *Id.*

<sup>140</sup> *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983).

<sup>141</sup> *Aguilar v. State of Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) abrogated by *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969) abrogated by *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).



adopted an all-encompassing “totality of the circumstances” standard.<sup>142</sup> The standard states that the issuing magistrate’s task is “simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place.”<sup>143</sup> The Supreme Court hoped that this flexible, easily applied standard would better achieve the equilibrium of public and private interests that the Fourth Amendment requires.<sup>144</sup>

*B. Analogous Situations of an Expansion of the Probable Cause Standard*

There are many examples of situations in which courts have allowed a loose interpretation of the probable cause standard in evaluating affidavits related to drug activity.<sup>145</sup> For example, the search warrant affidavit in *United States v. Pace* included the police officer’s contention that drug dealers normally keep records at their homes.<sup>146</sup> *Pace* dealt with a situation where police officers obtained a search warrant for a barn located on defendant’s property that officers had knowledge was being used to grow and store marijuana.<sup>147</sup> On the basis of the information obtained from the search of the barn, warrants were issued for Pace’s residence.<sup>148</sup> During the subsequent search of Pace’s residence, officers seized a triple beam balance scale, a small quantity of marijuana, and various business and phone records.<sup>149</sup>

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<sup>142</sup> *Gates*, 462 U.S. at 238.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 239.

<sup>145</sup> See *infra* note 161.

<sup>146</sup> *United States v. Pace*, 955 F.2d 270, 276 (5th Cir. 1992).

<sup>147</sup> *Id.* at 272.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

The court discussed the application of the holding of *United States v. Freeman*<sup>150</sup>, which stated that “facts must exist in the affidavit which establish a nexus between the house to be searched and the evidence sought.”<sup>151</sup> The affidavit must connect the residence to be searched with the illegal activity, but this nexus may be established “through normal inferences as to where the articles sought would be located.”<sup>152</sup> In *Pace*, the court posited that the affidavit described a sufficient connection between the illegal activity at the barn and the expectation of what would be found at Pace’s residence to give rise to probable cause to search Pace’s home.<sup>153</sup> This case clearly illustrates the importance of the affiant expressly explaining the connection between drug trafficking and the drug records that drug dealers often keep in their residences. In essence the affiant must clearly delineate the nexus between specific criminal activity and the particular location to be searched.

*United States v. Feliz* presents a similar analogous situation in which the probable cause standard was expanded to find a sufficient nexus between the probable criminal activity described in the search warrant and the evidence to be found at the particular location.<sup>154</sup> In *Feliz*, officers submitted an affidavit containing substantial, detailed information indicating that the defendant, Feliz, had engaged in illegal drug trafficking.<sup>155</sup> Feliz argued that none of the drug sales occurred at or near his apartment, and that the law enforcement agent’s experience in drug trafficking cases and his opinions regarding

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<sup>150</sup> *United States v. Freeman*, 685 F.2d 942 (5th Cir. 1982).

<sup>151</sup> *Id.* at 276 (citing *United States v. Freeman*, 685 F.2d 942 (5th Cir. 1982)).

<sup>152</sup> *Id.* at 277.

<sup>153</sup> *Pace*, 955 F.2d at 277.

<sup>154</sup> *United States v. Feliz*, 182 F.3d 82, 88 (1st Cir. 1999).

<sup>155</sup> *Id.* at 86.

the habits of drug traffickers with regard to retention of drug trafficking records and proceeds are inadequate to supply the required nexus.<sup>156</sup>

The First Circuit Court of Appeals disagreed with this contention.<sup>157</sup> The court stated that interpreting a search warrant affidavit in the proper “commonsense and realistic fashion” may result in the inference of probable cause to believe that criminal objects are located in a particular place, such as a suspect’s residence, to which they have not been tied by direct evidence.<sup>158</sup> The most analogous reasoning in *Feliz* came from a previous First Circuit case, *United States v. Charest*, which held that:

The nexus between the objects to be seized and the premises searched need not, and often will not, rest on direct observation, but rather “can be inferred from the type of crime, the nature of the items sought, the extent of an opportunity for concealment and normal inferences as to where a criminal would hide [evidence of a crime].”<sup>159</sup>

Ultimately, the *Feliz* court held that it was not unreasonable for the issuing judge to have relied upon her common sense, buttressed by the affiant’s opinion as a law enforcement officer, that Feliz would likely have proceeds and records from his drug trafficking transactions at his apartment.<sup>160</sup>

The preceding cases demonstrate that courts have loosely interpreted the probable cause standard in certain situations relating to drug trafficking crimes. The magistrates issued warrants to locate evidence of a crime without any direct proof that the evidence would be located in the defendants’ homes. Subjective testimony from law enforcement officials based on their experience and training, as well as, common sense inferences

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<sup>156</sup> *Id.* at 87.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 88.

<sup>159</sup> *Id.* (citing *United States v. Charest*, 602 F.2d 1015, 1017 (1st Cir. 1979)).

<sup>160</sup> *Feliz*, 182 F.3d at 88.

made by the neutral and detached magistrates allowed for these search warrants to be approved.<sup>161</sup> If the probable cause standard can be broadened to account for these specific drug related crimes, this Comment serves to defend the notion that it should be broadened for inherently dangerous crimes involving child exploitation.

*C. The Uniqueness of Child Pornography Offenders and Why the Probable Cause Standard Should be Broadened in Relation to Child Exploitation Crimes*

The effect of sweeping technological advances on modern American society has forced the law to adapt. Like all other areas, criminal law is no exception and must adjust to keep pace with advancing technology. While the market for child pornography unfortunately is not new, the advent of the Internet and increasing sophistication of computer technology in general has made child pornography a global industry.<sup>162</sup> Additionally, the Internet provides sheer anonymity to all users. The success of law enforcement officials in tracking and apprehending child pornographers depends on their ability to stay up to date with cutting edge technological advances.<sup>163</sup> However, the efficacy of law enforcement officials also hinges on the reign given to them by legislative and judicial decisions.<sup>164</sup> Furthermore, all three branches of government must take great efforts to ensure the equilibrium between the sacred individual privacy interests and the concern over the dangers surrounding the exploitation of innocent children.

Typically, defendants who engage in child pornography present a complex and unique barrier to law enforcement discovery. Detecting child pornography is difficult

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<sup>161</sup> See *Pace*, 955 F.2d 270 (5<sup>th</sup> Cir. 1992); *Feliz*, 182 F.3d 82 (1<sup>st</sup> Cir. 1999); *Freeman*, 685 F.2d 942 (5<sup>th</sup> Cir. 1982); *Charest*, 602 F.2d 1015 (1<sup>st</sup> Cir. 1979).

<sup>162</sup> Amy E. Wells, *Criminal Procedure: The Fourth Amendment Collides with the Problem of Child Pornography and the Internet*, 53 Okla. L. Rev. 99 (2000).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

because those who actively possess and/or distribute the material take great pains to conceal their crimes.<sup>165</sup> Often time's child pornography is not discovered until after an individual has been arrested for a far more serious offense involving a child.<sup>166</sup> In this same regard, the law has been reactive as opposed to proactive about responding to this burgeoning social crisis.

The judiciary's willingness to adopt a broadened probable cause standard in drug related crimes might be a result of the global 'War on Drugs' and law enforcement efforts to reduce the illegal drug trade. While nothing in this Comment attempts to lessen the severity and importance of reducing or eliminating the illegal drug trade, there is no reason why this expanded probable cause standard cannot be extended to crimes involving child exploitation. The history outlined in detail in Part II of this Comment presents a common theme across all branches of government that crimes that victimize children are considered abhorrent and unconscionable acts for the vast majority of people.<sup>167</sup> Furthermore, the single most distinctive characteristic of habitual child molesters is a compelling interest in collecting child pornography.<sup>168</sup> Thus, for many child molesters, child pornography serves as a facilitator of this heinous crime.<sup>169</sup>

The two competing interests in this debate are the all-American sanctity of the individual's privacy in the home versus the overwhelming concern for the exploitation of innocent, defenseless children. This is a hard balancing act because of the high value that American citizen's place on their individualized privacy interests. The privacy of one's home is a sacred interest that United States citizens cherish and value. In weighing these

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<sup>165</sup> Law Enforcement Training Network, *Sex Crimes, Part I: Child Pornography*, 18 (2009).

<sup>166</sup> *Id.*

<sup>167</sup> *See supra* Part II.

<sup>168</sup> *Id.* at 6.

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

two sides carefully, the judiciary's decisions must tip in favor of protecting the innocent child. Child pornography presents a severe danger to innocent, defenseless children with diminished decision-making capacities.

This expansion of the probable cause standard cannot be interpreted as providing carte blanche freedom to law enforcement officials in obtaining search warrants. But, when a search warrant affidavit provides (1) clear history and examples of training and experience of the affiant in establishing and determining probable cause; (2) a detailed description of reliable statistical data reflecting the strong correlation between specific child exploitation crimes; and (3) a delineated nexus between the first two elements and the particular place to be searched, in addition to the common sense, practical application of the neutral and detached magistrate, probable cause has been established to search for child pornography in an individual's home with or without direct evidence.

*D. Practical Ramifications of Implementing a Broadened Probable Cause Standard*

Implementing this broadened standard has the potential to create more efficiency within the law enforcement arena, as well as provide a more manageable standard to combat a highly secretive and extremely dangerous crime. Because of the exceptionally high level of danger child molesters and child pornographers pose to our society, this expansion is appropriate.

The courts are not new to altering and expanding the probable cause standard. For example, in *Terry v. Ohio*, the Court denounced the suggestion of a rigid, all-or-nothing model of justification and regulation under the Fourth Amendment.<sup>170</sup>

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<sup>170</sup> *Terry v. Ohio*, 392 U.S. 1, 17, 88 S.Ct. 1868 (1968).

Furthermore, the majority opinion in *Terry* perfectly described the underlying notions of the requirement of probable cause in general.<sup>171</sup> In assessing the probable cause standard:

It is necessary to first focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen, for there is 'no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails. And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'<sup>172</sup>

The Court stated that an inflexible approach obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation.<sup>173</sup> *Terry* announced a new standard allowing a reasonable search for weapons for the protection of the police officer where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.<sup>174</sup> As Justice Harlan stated in his concurrence, the Majority's opinion would serve as initial guidelines for law enforcement authorities and courts throughout the land.<sup>175</sup> This 'stop and frisk' standard allows police officers with articulable suspicion, something less than probable cause, to forcibly frisk and disarm individuals thought to be carrying weapons.<sup>176</sup>

On the other hand, the potential danger of this broadened approach to the determination of probable cause in situations limited to crimes dealing with child exploitation could open the floodgates for similar treatment for other types of crimes.

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 28.

<sup>175</sup> *Id.* at 31.

<sup>176</sup> *Terry v. Ohio*, 392 U.S. 1, 31, 88 S.Ct. 1868 (1968).

This type of multifarious balancing of crimes in regards to the weight of societal interests could easily result in a weakening of the safeguards envisioned by the framers of the Fourth Amendment. This potential danger could also be exacerbated in the event that the balancing is done in the first instance by well-intentioned, but perhaps over-zealous, police officers as opposed to a reviewing magistrate judge. But, if this expanded approach to determining probable cause is safeguarded in sync with the Supreme Court's consistent refusal to intrude upon constitutionally guaranteed rights then this limited expansion for inherently dangerous child exploitation crimes is warranted.

## V.

### Conclusion

While it remains true that child molestation and child pornography are two separate crimes and that the seriousness of one crime should never be primarily based on evidence of the other, there is overwhelming evidence that these two types of crimes are strongly correlated. One detective in the Los Angeles Police Department estimated that of the 700 child molesters arrested over ten years, more than half had child pornography in their possession at the time of arrest, and roughly 80% owned either child or adult pornography.<sup>177</sup> Additionally, a statement made by then Senator Joe Biden during a congressional hearing was captured in a Columbia Law Review article as saying, "At the heart of the analysis...is a very straightforward idea: Children who are used in the production of child pornography are victims of abuse, plain and simple. And the pornographers, also plainly and simply, are child abusers."<sup>178</sup> The growing technology of

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<sup>177</sup> Michael Reagan, *Child Porn is Child Abuse. I Know Because it Happened to Me*, 2010, available at: <http://www.foxnews.com/opinion/2010/12/09/michael-reagan-child-pornography-child-abuse-know-happened/#ixzz1Zeyr1pEG>.

<sup>178</sup> Amy Adler, *The Perverse Law of Child Pornography*, 101 Colum. L. Rev. 209, 273 (2001).



the Internet and the ever-increasing ways that child pornography possessors can hide images and deceive law enforcement creates an impossibly difficult issue of which traditional investigative techniques are no longer useful to prevent the victimization of innocent children.

Thus, while child pornographers do not fit precisely into any existing, traditional Fourth Amendment category, a response by the judiciary in formulating a broadened probable cause standard in order to search for child pornography is this nation's best attempt at combating the societal danger created by this type of crime. The probable cause standard is not being broadened to interfere with sexual activity between two consenting adults in the privacy of their own home. This Comment concerns a unique area of the law where society has already drawn special, protective boundaries in order to safeguard innocent child victims. While this modest expansion of the probable cause standard may appear contrary to Fourth Amendment jurisprudence, the Court has constantly attempted to strike a balance between compelling government interests and individual privacy rights. Inevitably, with every solution there may be a slight invasion of privacy; however, in order to combat the inherently dangerous category of crimes involving child exploitation, this limited expansion is the fair and just result. By emulating the already approved application of the probable cause standard for drug related crimes, the judiciary can create an efficient and more uniform conception of determining probable cause for crimes relating to child exploitation.