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ESTABLISHING THE NEXUS: THE DEFINITIVE RELATIONSHIP BETWEEN CHILD MOLESTATION AND POSSESSION OF CHILD PORNOGRAPHY AS THE SOLE BASIS FOR PROBABLE CAUSE

*Megan Westenberg**

I. INTRODUCTION

Child sexual offenders often sexually exploit children through the collection, creation, or distribution of child pornography. Up to one quarter of child molesters collect child pornography.[1] This number increases each day as the Internet continues to make collection of child pornography more readily accessible. Accordingly, "[c]hild pornography, especially that produced by the offender, is one of the most valuable pieces of evidence of child sexual victimization any investigator can have."[2]

In the last half decade, federal courts of appeals have issued a handful of conflicting opinions as to whether evidence of child molestation, alone, creates probable cause for a search warrant for child pornography. Part II of this Comment paves a background of Fourth Amendment jurisprudence necessary for this discussion. Part II also elucidates two lines of cases that address the foregoing issue. First, one circuit, as well as concurring and dissenting judges in other circuits, have concluded that given the intuitive relationship between child molestation and child pornography, evidence of child molestation is sufficient probable cause for a search for child pornography. Second, other circuits have split with the foregoing interpretation and have held that, because child molestation and possession of child pornography are separate, distinct crimes, evidence of one cannot be used as the sole probable cause to acquire a search warrant for the other.

Part III examines the innate and definitive relationship between child molestation and child pornography. With support from recent studies and other scholarly and governmental sources, Part III argues that child sexual offenders possess the means and predisposition to possess child pornography. Accordingly, in applying a fluid concept of probable

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1. KENNETH V. LANNING, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 108 (5th ed. 2010), *available at* http://www.missingkids.com/en_US/publications/NC70.pdf [hereinafter Lanning, *Child Molesters*]. In the inverse, a collection of studies reveals that about 20% of child pornography collectors molest children. *Id.* Lanning reconciles these low numbers by concluding that many investigations of child molestation do not pursue the possibility of child pornography collection—precisely the topic of this Comment. *See id.*

2. *Id.* at 59.

cause, the narrow connection between the two crimes allows evidence or an affirmed incidence of child molestation to be adequate probable cause for a warrant to search for child pornography. An affidavit read in its totality and in a common sense manner justifies the search and reinforces the need to combat child sexual exploitation. Finally, Part IV concludes that because studies have shown a definitive correlation between child molestation and a child molester's possession of child pornography, evidence of child molestation behavior should serve as an adequate basis for a warrant to search for child pornography.

II. BACKGROUND

A brief overview of the Fourth Amendment and cases pertinent to this Comment is warranted. Accordingly, Subpart A of this Part discusses the Fourth Amendment and the basis for probable cause. Subpart B addresses a brief history of the criminalization of child pornography. Finally, Subparts C and D examine the dichotomous opinions that address whether child molestation can be the sole probable cause basis for a search for child pornography.

A. The Fourth Amendment and Probable Cause Standard

The Fourth Amendment to the U.S. Constitution prohibits "unreasonable searches and seizures" and requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."[3] The first step in the warrant application process is for the investigating law enforcement officer to prepare an application to be submitted to a magistrate judge. To be valid, "a warrant application must demonstrate probable cause to believe that (1) a crime has been committed" (the "commission" element), "and (2) enumerated evidence of the offense will be found at the place to be searched" (the so-called "nexus" element).[4] The law enforcement officer then drafts an affidavit in which, under oath or by affirmation, the officer sets out the facts that he believes justifies the warrant. A magistrate judge then examines the affidavit and, if the affidavit is approved, issues the search warrant.

Evidence obtained in violation of the Fourth Amendment invokes the exclusionary rule, whereby evidence collected in violation of one's constitutional rights generally becomes inadmissible in a criminal proceeding.[5] However, in *United States v. Leon*,[6] the Supreme Court

3. U.S. CONST. amend. IV.

4. *E.g.*, United States v. Ribeiro, 397 F.3d 43, 48 (1st Cir. 2005).

5. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); *see also* United States v. Leon, 468 U.S. 897,

held that the exclusionary rule barring illegally obtained evidence from the courtroom does not apply to evidence seized in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate judge, even where the warrant is later found to be invalid.[7]

Illinois v. Gates[8] is the leading case for determining whether or when probable cause exists. There, the Supreme Court declared that probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."[9] Given that affidavits are usually drafted by law enforcement officers in the midst of a criminal investigation, the Court found that the need for an immediate warrant does not require elaborate technicality or specificity within the affidavit.[10] Thus, the magistrate issuing the warrant must use mere common sense to determine whether, given the totality of the circumstances set forth in the affidavit, there is a mild probability that evidence of a crime will be found in a particular place.[11] Ultimately, so long as the magistrate possessed a "'substantial basis for . . . [concluding]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more."[12]

B. The Criminalization of Child Pornography

The Supreme Court has long recognized the compelling and legitimate interest in protecting the psychological, emotional, and physical development of children from the harmful effects of child pornography. To illustrate, in *New York v. Ferber*,[13] the Supreme Court held that the distribution and sale of even non-obscene child pornography could be criminalized because, *inter alia*, "a [s]tate's interest in 'safeguarding the physical and psychological well-being of a

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909–10 (1984) (noting that the rule applies "only where it result[s] in appreciable deterrence" and, even when it results in deterrence, the benefits of deterrence must outweigh the costs).

6. 468 U.S. 897 (1984).

7. *Id.* at 922. The Court reasoned that, "even assuming that the [exclusionary] rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id.* at 918–19. Accordingly, so long as evidence is obtained with a reasonable reliance on a magistrate-issued warrant, evidence will be admissible notwithstanding whether or not the search violated one's privacy rights. *See id.* at 922. This is known as the "good faith" exception to the exclusionary rule.

8. 462 U.S. 213 (1983).

9. *Id.* at 244 n.13.

10. *Id.* at 235.

11. *Id.* at 238. The magistrate's determination of probable cause should be paid great deference. United States v. Kelley, 482 F.3d 1047, 1050 (9th Cir. 2007) (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)).

12. *Gates*, 462 U.S. at 246 (quoting Jones v. United States, 362 U.S. 257, 271 (1960)).

13. 458 U.S. 747 (1982).

minor' is compelling."[14] Moreover, in *Osborne v. Ohio*,[15] the Court upheld criminal sanctions for the private possession of child pornography.[16]

Whether the criminalization of child pornography conflicts with First Amendment jurisprudence is outside the scope of this Comment.[17] Rather, this Comment seeks to show that because there is such an instinctive and definitive relationship between child molestation and possession of child pornography, evidence of the former is an adequate basis for probable cause for a search warrant for the latter. That the Supreme Court has long recognized the repugnance and criminality of child pornography suggests that states and their law enforcement officers must strive to achieve the compelling interest of protecting the safety and physical and psychological well-being of children.

C. The Holding in United States v. Colbert[18] *that Child Molestation Creates Probable Cause for a Search for Child Pornography*

In *United States v. Colbert*, the Eighth Circuit found that a commonsense link between child molestation and child pornography exists such that evidence of the former suffices as probable cause for the latter.[19] The court reasoned that "[t]here is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography."[20]

In this case, detectives investigated a complaint of suspicious activity when the defendant was seen pushing a young girl on a swing and talking about certain "videos" he had at home for her to watch.[21] While detectives questioned the defendant, other law enforcement officers drafted an affidavit to search for child pornography in the defendant's home, primarily because he "attempted to lure a five year old female to go to his apartment."[22] The district judge issued the warrant.[23] Upon

14. *Id.* at 756–57 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

15. 495 U.S. 103 (1990).

16. *Id.* at 111. The current statute criminalizing possession of child pornography is 18 U.S.C. § 1466A (2006).

17. Nevertheless, it is worth mentioning that, in criminalizing possession of child pornography, the Supreme Court justified its departures from its First Amendment jurisprudence on the grounds that images of child pornography are the product of child sex abuse, that the state has an important interest in protecting the victims of child sex abuse, and that reducing demand for child pornography by prosecuting possessors of child pornography could thus reduce the instances of child sex abuse. *Osborne*, 495 U.S. at 130–32.

18. 605 F.3d 573 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1469 (2011).

19. *Id.* at 576–77.

20. *Id.* at 578.

21. *Id.* at 575.

22. *Id.*

searching, law enforcement officers uncovered numerous computer discs containing child pornography.[24] The district court found the warrant was supported with ample probable cause to uncover child pornography because "individuals sexually interested in children frequently utilize child pornography to reduce the inhibitions of their victims."[25]

The Eighth Circuit affirmed, reasoning that "sexual depictions of minors could be logically related to the crime of child enticement."[26] Further, the Eighth Circuit awarded deference to the district judge who issued the warrant, concluding that it was reasonable for him to believe that the defendant was enticing the young child to come back to his house to watch "videos," thereby establishing a reasonable link between potential child molestation and possession of child pornography.[27]

The Eighth Circuit rejected other circuits' conclusions that there is a categorical distinction between child pornography and other types of sexual exploitation of children, such as child molestation.[28] Instead, it found that "that distinction seems to be in tension both with common experience and a fluid, non-technical conception of probable cause."[29] The court then illustrated the link between child pornography and child molestation, emphasizing that suspicion of child molestation suffices as probable cause for child pornography partly because computers have been increasingly characterized as "tools of the trade for those who sexually prey on children."[30] The court continued:

> 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

23. *Id.* at 576.

24. *Id.*

25. *Id.* at 577.

26. *Id.* Judges in other circuits have reached similar conclusions. *See* United States v. Falso, 544 F.3d 110, 132 (2d Cir. 2008) (Livingston, J., concurring) (in finding ample probable cause, Judge Livingston reasoned that, since child porn is often used to entice young victims, "a person of reasonable caution would take into account predilections revealed by past crimes or convictions as part of the inquiry into probable cause." (quoting United States v. Wagers, 452 F.3d 534, 541 (6th Cir. 2006))); United States v. Adkins, 169 Fed. App'x 961, 967 (6th Cir. 2006), *cert. denied*, 549 U.S. 854 (2006), 549 U.S. 856 (2006) (since preferential offenders, meaning those whose sexual gratifications focus exclusively on children, devote a lot of time, money, and energy to the pursuit of child pornography or sexual contact with children, evidence that one is a preferential offender will generally constitute probable cause for child pornography).

27. *Colbert*, 605 F.3d at 578–79.

28. *Id.* at 578.

29. *Id.* (citing Illinois v. Gates, 462 U.S. 213, 230–32 (1983)). The court continued: "[e]vidence adduced to support probable cause must be 'weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.'" *Id.* (quoting *Gates*, 462 U.S. at 232).

30. *Id.*; *See also, e.g.*, United States v. Paton, 535 F.3d 829, 836 (8th Cir. 2008) (reaching a similar conclusion).

> pornography may be obtained on the internet might make it a simpler and less detectable way of satisfying pedophilic desires.[31]

Because child pornography is often an "electronic record of child molestation,"[32] then "common sense would indicate that a person who is sexually interested in children is likely to also be inclined, i.e., predisposed, to order and receive child pornography."[33]

D. Opinions Holding that Child Molestation Does Not Create Probable Cause to Search for Child Pornography

Most recently, the Third Circuit has split with the Eighth Circuit and concluded that the Fourth Amendment does not allow evidence of child sexual abuse to confer probable cause for a search for child pornography.[34] In *Virgin Islands v. John*, allegations that the defendant, a middle school teacher, sexually abused many of his young female students at school were "not sufficient to establish—or even to hint at—probable cause as to the wholly separate crime of possessing child pornography."[35] Nor did the good faith exception apply.[36] The majority reasoned that because the question of whether there exists a child sexual assault–pornography correlation is "one that can be resolved only through the evaluation of evidence, it must be alleged on the face of the affidavit in order to be considered for purposes of determining probable cause."[37] Thus, the court hinted that evidence of child molestation might, in some cases, be sufficient probable cause for child pornography. Given that a court "demand[s] nothing more than that an officer seeking a warrant explain why she is justified in entering a person's home and searching through his belongings,"[38] perhaps a more

31. *Colbert*, 605 F.3d at 578.

32. *Id.*

33. *Id*. (citing United States v. Byrd, 31 F.3d 1329, 1339 (5th Cir. 1994)). Judge Gibson dissented in *Colbert*. Judge Gibson maintained that, "[p]erhaps it is true that all or most people who are attracted to minors collect child pornography . . . [however,] an individual's Fourth Amendment right cannot be vitiated based on fallacious inferences drawn from facts not supported by the affidavit." *Id.* at 579 (Gibson, J., dissenting). Judge Gibson concluded that, even if a relationship exists 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." *Id.* at 580–81. Thus, for Judge Gibson, an affidavit that explicitly explained the nexus between child molestation and possession of child pornography may have proven sufficient to support probable cause. *See infra* notes 37–39 and accompanying text and note 121.

34. V.I. v. John, 654 F.3d 412 (3d Cir. 2011).

35. *Id.* at 419. In this case, although no child pornography was found at the defendant's home during the search, evidence was seized that would support charges of rape, unlawful sexual conduct, child abuse and child neglect. *Id.* at 414.

36. *Id.* at 413; *see also supra* note 7 and accompanying text.

37. *V.I*, 654 F.3d at 419.

38. *Id.* at 420.

detailed affidavit explaining why a teacher who had been repeatedly accused of sexually molesting his students would possess child pornography would have sufficed.[39]

Judge Fuentes wrote a strongly worded dissent, asserting first that the majority should have applied the good faith exception.[40] Judge Fuentes wrote that suppressing the evidence "offends basic concepts of the criminal justice system,"[41] and that "'suppression would do nothing to deter police misconduct in these circumstances . . . because it would come at a high cost to both the truth and the public safety.'"[42] Judge Fuentes maintained that given the circuit split and differing expert opinions, it was not unreasonable for the investigating officer to deem that probable cause to search for evidence of child molestation provided probable cause to search for child pornography.[43] He further avowed that it was reasonable for the investigating officer to believe that "there was a fair probability that a man accused of molesting children and recording his crimes in one medium—a written journal—might also record them in another—photographs."[44] Judge Fuentes concluded by reiterating the progeny of *Illinois v. Gates*:

> [E]vidence must be "seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement . . . [P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[45]

Similarly, in *Dougherty v. Covina*,[46] a Ninth Circuit case, the

39. That is, would have sufficed to the majority panel of the Third Circuit in *Virgin Islands*. That the judiciary here was so lenient with this defendant is appalling. Given that there exists a common sense possibility that the teacher—an affirmed molester—would document his fantasies and encounters with children and utilize child pornography to drive and supplement his molestations, it was not unreasonable for the magistrate issuing the affidavit, or the law enforcement officers executing the search, to reason that a child molester would possess child pornography.

40. *See id.* at 423 (Fuentes, J., dissenting).

41. *Id.* (quoting United States v. Leon, 468 U.S. 897, 908 (1984)).

42. *Id.* (quoting Davis v. United States, 564 U.S. __, 131 S. Ct. 2419, 2428 (2011)).

43. *V.I*, 654 F.3d at 425–26. Judge Fuentes continued:

> While [a well-trained] officer would have the benefit of several court of appeals opinions discussing the issue of whether probable cause to believe that someone has molested a child automatically provides probable cause to believe that someone will possess photographic evidence of that crime (or photos used to facilitate the crime—tools of a despicable trade), those opinions provide conflicting guidance.

Id. at 425.

44. *Id.* at 426.

45. *V.I*, 654 F.3d at 426 (Fuentes, J., dissenting) (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)).

46. 654 F.3d 892 (9th Cir. 2011).

defendant, a middle school teacher, was accused several times of looking up the skirts and down the shirts of female students in his sixth grade classroom.[47] In the affidavit for a search warrant, the drafting investigator, a Sex Crimes and Juvenile Detective, requested a warrant to search for child pornography because, based upon his training and experience in child sex crimes, he knew subjects involved in this type of criminal behavior tend to possess child pornography.[48] Despite the investigator's extensive training and expertise in child sex crimes, the court held that "the affidavit contain[ed] no facts tying the acts of [the defendant] as a possible child molester to his possession of child pornography."[49] The court concluded that, while the "totality of the circumstances" could allow a court to find probable cause to search for child pornography, here, the investigator's "conclusory statement tying this 'subject,' alleged to have molested two children and looked inappropriately at others, to 'having in [his] possession child pornography' [was] insufficient to create probable cause."[50]

Judge Brewster, concurring in *Dougherty*, found that there was adequate probable cause to issue a search warrant for child pornography.[51] In agreeing with the Eighth Circuit's opinion in *Colbert*,

47. *Id.* at 896. The Assistant Superintendent of the school investigated the allegations, and her report yielded that Dougherty had inappropriately touched the bra straps of several girls in his classroom. *Id.* These accusations were corroborated. *Id.* Another student recalled Dougherty touching her bare breast while they were alone in the classroom, with Dougherty calling her a "special girl." *Id.*

48. *Id.*

49. *Id.* at 898. Although no child pornography was found during the search of the defendant's home, *id.*, that does not underscore the fact that child molesters often possess child pornography. The investigator in this case based his assessment on a fourteen-year career devoted to investigating child sex crimes, *id.* at 896, so it was reasonable for him to purport that the defendant likely possessed child pornography. Moreover, the context of the allegations against the defendant cannot be disregarded. He was a teacher of a sixth grade classroom, and several female students said that the defendant had touched them in inappropriate ways. *Id.* Thus, this is not a simple case of a one-time child molester who may or may not continue his pattern of behavior in the future. The defendant spent several hours, five days a week, with young girls in his classroom. That he had continually been accused of inappropriately touching his female students, *id.*, should send a red flag to the judiciary that his continual worshiping of sexual gratification of children could translate into him having documented these encounters or sexual gratifications at home. Likewise, it would not be unreasonable for an investigator or law enforcement officer to determine that a child molester would possess child pornography along with his documentation of his sexual encounters with and sexual fantasies of children. *See supra* notes 30–33 and accompanying text; *see also infra* Part III.

50. *Id.* at 899. Perhaps the officer needed to make a more detailed connection between the defendant's inappropriate behavior and his likelihood of possessing child pornography in order for the court to find probable cause. *See supra* notes 37–38 and accompanying text and *infra* note 121. This is because, in the Ninth Circuit, a magistrate must keep in mind that "all data necessary to show probable cause for the issuance of a search warrant must be contained within the four corners of a written affidavit given under oath." United States v. Anderson, 453 F.2d 174, 175 (9th Cir. 1971).

51. *Dougherty*, 654 F.3d at 901 (Brewster, J., concurring). Judge Brewster's opinion reads more like a dissent for purposes of this Comment, but his concurrence was based on the fact that he agreed that the police officers in this case were entitled to qualified immunity. *Id.* at 902. Thus, while Judge Brewster completely disagrees with the majority's probable cause analysis, he was nonetheless

Judge Brewster found that "it is a common sense leap that an adult male, who teaches sixth graders, engaged in this type of inappropriate conduct [and] would likely possess child pornography."[52] In awarding deference to the magistrate judge and experience and training of the investigating officer, Judge Brewster reasoned that the defendant's pattern of affirmative and inappropriate misconduct with several sixth grade students is "closely related to an interest in looking at sexual images of minors."[53] The facts suggested to the investigating officer, a highly trained and experienced Sex Crimes and Juvenile Detective, that a potential child predator had moved "along the continuum of looking and into the realm of touching."[54]

Further, the Sixth Circuit refused to apply the good faith exception in *United States v. Hodson*.[55] The court reasoned that a well-trained law enforcement officer in the field, upon looking at the warrant authorizing a search of the defendant's residence and computers for child pornography images, would have realized a disconnect between the probable cause and crime described.[56] Specifically, a law enforcement officer would have realized that the search for evidence of the crime of child pornography described in the warrant did not match the probable cause described, which was that evidence would be found of a different crime, that of child molestation.[57] Noteworthy, however, is the court's indication that a more specific affidavit, explicitly showing a relation or nexus between child molestation and child pornography, may have been sufficient to issue the warrant based on probable cause.[58] The court reasoned that, since magistrates are not equipped to deduce "an *empirical* link between sexual deviance, or even sexual attraction, and pornography possession," the affidavit must be supported with expert analysis linking the two together.[59] Because standing alone, a "high

compelled to concur rather than dissent. *See id.*

52. *Id.* at 901.

53. *Id.*

54. *Id.* at 901–02. Judge Brewster also added that the defendant's "active misconduct distinguishes his case from the cases involving defendants who may have passively received unsolicited child pornography." *Id.* at 902.

55. 543 F.3d 286, 293 (6th Cir. 2008).

56. *See id.* at 289.

57. *See id.*; *But see* United States v. Haynes, 160 Fed. App'x 940, 944 (11th Cir. 2005) (court applied the good faith exception because "common sense dictates that there is a reasonable probability that an adult male who has expressed an interest in engaging in sexual activity with a minor . . . would possess child pornography or child erotica.").

58. *Hodson*, 543 F.3d at 290; *see also supra* notes 37–39 and accompanying text. For instance, it would be reasonable for the officers executing a search warrant to believe that a suspected child molester would possess child pornography and that one's suspected status as a child molester could be probable cause for seizing the child pornography. *See Haynes*, 160 Fed. App'x at 944 (basing analysis on United States v. Leon, 468 U.S. 897, 922 (1984)).

59. *Hodson*, 543 F.3d at 291.

incidence of child molestation by persons convicted of child pornography crimes may not demonstrate that a child molester is likely to possess child pornography," a request for a warrant must explicitly spell out—with evidence—an inference to support the nexus.[60]

III. DISCUSSION

Since *Colbert*,[61] federal courts have curtailed the allowance of investigators and law enforcement officers to seize child pornography when searching for evidence of child molestation. Whether it is due to a tightening of Fourth Amendment rights, a bolstering of Due Process rights, or a decline in the "crime control" paradigm,[62] the judiciary must reconsider its current path and cease from sacrificing the safety and well-being of children for a greater allocation of constitutional rights. Often, seizing child pornography may be the only way to link the defendant to child molestation.[63] If the only documentation that exists is child pornography of children that he has molested, then seizing the child pornography is vital for conviction not only of possession of child pornography but also of the child molestation.[64] Given the definitive relationship between child molestation and child pornography, courts must stop raising the Fourth Amendment ceiling if they want to alleviate the sexual exploitation of children.

Part A of this discussion references numerous studies which show a definitive relationship—and, thus, more than a commonsense nexus—between child molesters and those who possess child pornography. Parts B and C explicate the government's and U.S. Supreme Court's recognition of this nexus. Part D concludes that this nexus is definitive enough to allow probable cause for a search warrant for child molestation to be adequate probable cause for a search warrant for child pornography. Finally, Part E proposes a solution that courts should adhere to when deciding these cases—a solution that harmonizes Fourth Amendment jurisprudence with the concerns and societal interests in protecting the safety and well-being of potential child sexual victims.

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60. *Id.* at 293–94; *see also supra* notes 37–39 and accompanying text; United States v. Falso, 544 F.3d 110, 123 (2d Cir. 2008) (probable cause for child pornography does not lie where the affidavit alleged that the defendant had a conviction—eighteen years prior—of sexual abuse on a minor).

61. *See supra* Part II(C).

62. For the original discussion of the "crime control" paradigm, *see* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

63. *See infra* Part III(A), (B), and (C).

64. *See supra* notes 2, 29 and accompanying text.

A. Studies Indicate a Nexus Between Child Molesters and Viewers of Child Pornography

Since the dawn of the Internet led to a rapid increase in child pornography, a number of studies have illustrated the link between child molestation and possession of child pornography.[65] For instance, the Mayo Clinic published studies and case reports which indicated that up to 80% of individuals who viewed child pornography and 76% of individuals who were arrested for online child pornography had molested a child.[66]

For another example, a widely discussed study recently conducted at the Federal Corrections Facility in Butner, North Carolina, revealed that child pornography offenders are almost always child molesters as well—they were just not caught.[67] A shocking 85% of the child

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65. *See, e.g.*, Candice Kim, *From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children*, 1 CHILD SEXUAL EXPLOITATION PROGRAM UPDATE 1 (2004), *available at* http://www.ndaa.org/pdf/Update_gr_vol1_no3.pdf (noting that, of a study based on 1,400 cases of child molestation over a four year period, pornography was connected with every incident of molestation, and child pornography was used in a majority of those cases); Neil Malamuth & Mark Huppin, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773, 794 (2007); *but see, e.g.*, Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 875 (2011) [hereinafter Hessick, *Disentangling*] ("empirical literature is unable to validate the assumption that there is a causal connection between possession of child pornography and child sex abuse."). While Hessick's article asserts there is a lack of causation between the two child sex crimes, this Comment seeks to show that the mere *correlation* between child molestation and child pornography is the determinative factor for a probable cause analysis.

66. Ryan C.W. Hall & Richard C.W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82(4) MAYO CLINIC PROCEEDINGS 457, 460 (2007), *available at* http://www.drryanhall.com/Articles/pedophiles.pdf. However, the authors note that it is difficult to know how many people progress from computerized child pornography to physical acts against children and how many would have progressed to physical acts without the computer being involved. *Id*.

67. 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. FAMILY VIOLENCE 183, 189 (2009) [hereinafter "Bourke & Hernandez, *Butner Study*"]; *see also* Julian Sher & Benedict Carey, *Debate on Child Pornography's Link to Molesting*, N.Y. TIMES, July 19, 2007, *available at* http://www.nytimes.com/2007/07/19/us/19sex.html?pagewanted=all (commentary from the Butner study's researchers); Andres E. Hernandez, Position Paper, *Psychological and Behavioral Characteristics of Child Pornography Offenders in Treatment*, (2009), http://www.iprc.unc.edu/G8/Hernandez_position_paper_Global_Symposium.pdf. The Butner study was conducted from 2002 to 2005. Bourke & Hernandez, *Butner Study*, at 186. Even prior to the dot com boom, child molestation and possession of child pornography went hand-in-hand. *See* OKLAHOMANS FOR CHILDREN AND FAMILIES, OCAF WHITE PAPER ON INTERNET PORNOGRAPHY 9 (1997), *available at* http://walrustalk.com/3/wp-content/uploads/2008/09/agincourt1.pdf (in a 1994 study of convicted child molesters, 77 percent of those who molested boys and 87 percent of those who molested girls admitted to the habitual use of pornography in the commission of their crimes). Even more problematic is that child pornography offenders with a prior history of contact sexual offenses are more likely to sexually reoffend. Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 SEXUAL ABUSE 201, 207 (2005).

pornography offenders said they had committed acts of sexual abuse against minors, which ranged from inappropriate touching to rape.[68] Of the offenders who admitted to molesting children in some way, the average number of victims per perpetrator was 13.56.[69] The chief psychologist of the study, Michael L. Bourke, stated:

> There is this assumption—in the treatment context, in courtrooms, in investigative circles and in the assessment literature—that [child pornographer users and child molesters] are dichotomous groups. However, in the course of treatment, these men would disclose to us that their use of the Internet was not the limit of their sexual acting out—it was in fact an adjunctive behavior.[70]

Although criticism surrounds the study,[71] many scholars have concluded that there exists a complex and reciprocal interaction between viewing child pornography and perpetrating sexual offenses with children.[72] Bourke concluded that although child pornography use and child molestation were previously "seemingly distinct forms of criminality," the study now highlights the co-morbidity and strong relationship between the two child sexual crimes.[73]

Furthermore, child molesters use child pornography in at least four primary ways: (1) to sexually arouse and gratify themselves,[74] (2) to

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68. Bourke & Hernandez, *Butner Study*, *supra* note 67, at 187. Similarly, since child pornography is often used to entice young victims, "a person of reasonable caution would take into account predelictions revealed by past crimes or convictions as part of the inquiry into probable cause." United States v. Wagers, 452 F.3d 534, 541 (6th Cir. 2006) (internal quotations omitted).

69. Bourke & Hernandez, *Butner Study*, *supra* note 67, at 187.

70. Tori DeAngelis, *Porn Use and Child Abuse*, 40 MONITOR ON PSYCHOLOGY 56, 56 (2009) (internal quotations omitted), *available at* http://www.apa.org/monitor/2009/12/child-abuse.aspx.

71. For instance, the head of the Sexual Disorders Clinic at Johns Hopkins felt that the study would generalize too much and would have conflicting implications for community safety and individual liberties. *See* Matt Anderson, *Controversial Study Strongly Links Child Porn Use and Child Abuse*, LIFE SITE NEWS, Dec. 11, 2009, http://www.lifesitenews.com/news/archive/ldn/2009/dec/09121109; *see also* Hessick, *Disentangling*, *supra* note 65, at 875 ("empirical literature is unable to validate the assumption that there is a causal connection between possession of child pornography and child sex abuse").

72. To illustrate, a longitudinal study of 341 convicted child molesters found that pornography use correlated significantly with their rate of sexually re-offending. Drew A. Kingston, Paul Fedoroff, Philip Firestone, Susan Curry, & John M. Bradford, *Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography Use on Recidivism Among Sexual Offenders*, 34 AGGRESSIVE BEHAVIOR 1, 1 (2008), *available at* http://www.ccoso.org/library%20articles/aggressivebehavior.pdf. Frequency of pornography use was primarily a further risk factor for higher-risk offenders, or those that show a stronger association between child pornography and child sexual aggression. *Id.*

73. *See* Matt Anderson, *Controversial Study Strongly Links Child Porn Use and Child Abuse*, LIFE SITE NEWS, Dec. 11, 2009, http://www.lifesitenews.com/news/archive/ldn/2009/dec/09121109.

74. "Even if some of them never go on to sexually victimize a child, it is reasonable to view and treat arrested [child pornography] possessors as at high risk for victimizing children." JANIS WOLAK ET AL., CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY 3 (2005), *available at*

lower children's inhibitions,[75] (3) to blackmail the child by seducing him or her into sexual activity,[76] and (4) to allow other offenders access to other children.[77] These uses alone illustrate the link between child pornography possessors and child molesters. Because possessors of child pornography often use the pornography as a medium and aid to sexually prey upon children, there is room for conflicting affirmation in the argument that child molestation and possession of child pornography are "separate crimes" not worthy of joint probable cause.

Consequently, the foregoing data cannot be ignored: there exists at least a general correlation between child molesters and possessors of child pornography.[78] Therefore, crime control must strengthen to seize child pornography, given that possessors of child pornography utilize the pornography to entice and sexually exploit children.

B. The Government's Recognition of the Nexus

Government entities have long recognized the harm of child pornography and have recently emphasized the link between child molestation and child pornography.[79] In a congressional statement by

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http://www.missingkids.com/en_US/publications/NC144.pdf.

75. For example, "individuals sexually interested in children frequently utilize child pornography to reduce the inhibitions of their victims." United States v. Colbert, 605 F.3d 573, 577 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1469 (Feb. 22, 2011).

76. Lanning, *Child Molesters*, *supra* note 1, at 90; *see also* Michael Medaris & Cathy Girouard, *Protecting Children in Cyberspace: The ICAC Task Force Program*, U.S. DEP'T OF JUSTICE JUVENILE JUSTICE BULLETIN, Jan. 2002, at 2 [hereinafter *Protecting Children in Cyberspace*], *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/191213.pdf (by exposing children to pornographic images of other victims with the intention of building a sense of comfort and by using pictures of the victim to coerce them into keeping quiet, offenders are ultimately able to use these pornographic images as a tool to exert power over their victims).

77. Lanning, *Child Molesters*, *supra* note 1, at 90; *see also* 149 Cong. Rec. S2573, S2584 (daily ed. Feb. 24, 2003) (statement of Sen. Hatch) ("Congress has long recognized that child pornography produces three distinct and lasting harms to our children. First, child pornography whets the appetites of pedophiles and prompts them to act out their perverse sexual fantasies on real children. Second, child pornography is a tool used by pedophiles to break down the inhibitions of children. Third, child pornography creates an immeasurable and indelible harm on the children who are abused to manufacture it.").

78. *See, e.g.*, Michael C. Seto, James M. Cantor & Ray Blanchard, *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, 115 JOURNAL OF ABNORMAL PSYCHOLOGY 610, 613 (2006) (child abuse image possession may be a "stronger indicator of pedophilia than is [previously] sexually offending against a child."); *id.* at 611 (in one recent study, roughly half of a sample of child pornography offenders had also been charged with a child sexual offense); Bourke & Hernandez, *Butner Study*, *supra* note 67, at 183 ("Internet offenders in our sample were significantly more likely than not to have sexually abused a child via a hands-on act.").

79. *See supra* note 78; *see also Protecting Children in Cyberspace*, *supra* note 76 (strong anecdotal evidence exists among those involved in prosecuting child pornography cases that there is a strong correlation between those who collect child pornography and those convicted of child molestation in seeking out potential victims). Further, the Child Pornography Prevention Act of 1996, which has since been repealed on First Amendment grounds, details that Congress finds:

the Federal Bureau of Investigation, for instance, a member of the Crimes Against Children Unit stated that there is "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."[80] Similarly, Congress has found that "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children."[81] For example, one congressionally-adopted study found that up to 90% of pedophiles reported using child pornography, often immediately before committing an act of child molestation.[82] Further, "a significant portion of child pornography offenders have a criminal history that involves the sexual abuse or exploitation of children . . . ."[83] Law enforcement officers have confirmed to Congress that child sexual predators almost always collect

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> [C]hild pornography is often used as part of a method of seducing other children into sexual activity . . . child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children; such use of child pornography can desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer . . . the existence of and traffic in child pornographic images creates the potential for many types of harm in the community and presents a clear and present danger to all children . . . [child pornography] inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials . . . [and] prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children.

Child Pornography Prevention Act of 1996, PUB. L. NO. 104-208, § 121, 110 Stat. 3009, 3009–26 (1996) (repealed 2002 on First Amendment grounds).

80. *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 Sec. of the Homeland Sec. Comm. on the Judiciary*, 107th Cong. (2002) (statement of Michael J. Heimbach, Crimes Against Children Unit, Criminal Investigative Div, Fed. Bureau of Investigation), *available at* http://judiciary.house.gov/legacy/heimbach050102.htm; *see also* United States v. Brand, 467 F.3d 179, 198 (2d Cir. 2006) (noting that "possession of child pornography . . . shares a connection . . . with pedophilia.").

81. *Brand*, 467 F.3d at 198; *see also* David B. Johnson, *Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited*, 4 ALB. L.J. SCI. & TECH. 311, 327–28 (1994) (citing U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT 649–50 (1986)) (concluding there is evidence that child pornography may induce viewers to commit sex crimes on children).

82. *See* 149 Cong. Rec. H9735 (daily ed. Oct. 20, 2003) (statement of Rep. Osborne).

83. UNITED STATES SENTENCING COMMISSION, SEX OFFENSES AGAINST CHILDREN i (1996), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/199606_RtC_Sex_Crimes_Against_Children/SCAC_Executive_Summary.htm.

child pornography or child erotica.[84]

C. The Supreme Court's Recognition of the Nexus

The Supreme Court has long recognized the relationship of child pornography and child molestation.[85] As early as 1982, the Supreme Court, in criminalizing child pornography[86] in *New York v. Ferber*,[87] reasoned that child pornography "is intrinsically related to the sexual abuse of children" because "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."[88] Thus, the Supreme Court "approved as narrowly tailored the banning of child pornography, including its possession, in part because of the causal link between child pornography . . . and the sexual abuse and exploitation of children."[89]

Additionally, in *United States v. Byrd*,[90] the Supreme Court, in finding the defendant's pedophilic behavior was properly used to show his predisposition to order and receive child pornography, reasoned:

> Pedophiles use child pornography for gratifying their own sexual desires, reducing the inhibitions of their victims and instructing their victims on proper sexual performance. In addition to citing the case law and expert testimony that links pedophilia to child pornography, we also note that common sense would indicate that a person who is sexually interested in children is likely to also be inclined, i.e., predisposed, to order and receive child pornography.[91]

Finally, that the Supreme Court refused to grant certiorari in *United States v. Colbert*[92] ostensibly illustrates that the Court does not wholly disagree with the Eight Circuit's conclusion that the link between child

84. United States v. Lebovitz, 401 F.3d 1263, 1271 (11th Cir. 2005) (quoting S. REP. NO. 104-358, at 12–13 (1996)); *see also* Lara N. Strayer, *Ambiguous Laws Do Little to Erase "Kiddieporn,"* 5 TEMP POL. & CIV. RTS. L. REV. 169, 178 (1996) (citing 137 Cong. Rec. S10322-04 at S10323 (daily ed. July 18, 1991) (statement of Sen. Helms) (police officer estimated that fifty percent of child molesters at the time of their arrest had in their possession numerous "kiddie-porn" videotapes and magazines)). While this latter statement is over two decades old, such a trend is nonetheless true—and even more true today—given the explosion of child pornography on the Internet.

85. *See, e.g.*, Osborne v. Ohio, 495 U.S. 103, 111 (1990) ("evidence suggests that pedophiles use child pornography to seduce other children into sexual activity."); *see also supra* notes 13–14 and accompanying text.

86. *See supra* Part II(B).

87. 458 U.S. 747 (1982).

88. *Id.* at 759.

89. United States v. Mento, 231 F.3d 912, 920 (4th Cir. 2000), *rev'd on other grounds*, 535 U.S. 1014 (2002).

90. 31 F.3d 1329 (5th Cir. 1994).

91. *Id.* at 1339.

92. 605 F.3d 573 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1469 (Feb. 22, 2011).

molestation and child pornography allows evidence of child molestation behavior to serve as an adequate basis for a search warrant for child pornography.

D. The Nexus in Conjunction with the Fourth Amendment: The Exclusionary Rule is Meant to be a Rare Exception

In the cases in which defendants have argued that law enforcement officers infringed upon their constitutional rights in searching for child pornography when the warrant authorized a search only for evidence of child molestation, the success of the argument has hinged on the exclusionary rule. Specifically, defendants have successfully suppressed evidence of child pornography because the searches for child pornography were outside the scope of the search warrants for evidence of child molestation. Courts' overuse of the exclusionary rule conflicts not only with the original intent of the rule,[93] but also with public policy in applying the rule in cases like the ones discussed in this Comment, where the safety and well-being of children are at stake.

The primary purpose of the judicially created exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures[.]"[94] However, the exclusionary rule is not intended to prevent all police misconduct or to be a remedy for all police errors because it is "an exceptional remedy typically reserved for violations of constitutional rights."[95] Accordingly, the exclusionary rule's application in the circumstances described by this Comment is, as elucidated below, misplaced.

A recent Supreme Court case discusses the social costs of the exclusionary rule that coincide with this Comment; that is, that the exclusionary rule exists does *not* mean the judiciary should enforce it when doing so sacrifices public safety and well-being. The Supreme Court in *Davis v. United States*[96] emphasized:

> Real deterrent value is a necessary condition for exclusion of evidence, but it is not a sufficient one. The analysis must also account for the substantial social costs generated by the [exclusionary] rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community

93. *See infra* notes 95–98 and accompanying text.
94. United States v. Calandra, 414 U.S. 338, 347 (1974).
95. United States v. Smith, 196 F.3d 1034, 1040 (9th Cir. 1999).
96. 564 U.S. ___, 131 S. Ct. 2419 (2011).

> without punishment . . . . [S]ociety must swallow this bitter pill when necessary, but only as a last resort. For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.[97]

Correspondingly, whatever minimal deterrence effect the exclusionary rule may possess is outweighed by the need to not let those who sexually exploit children by means of child molestation or child pornography go free. If a warrant for a search for evidence of child molestation is proper, then deterrence will have little impact on a law enforcement officer searching an alleged child molester's home for supplemental evidence of child pornography. Because searches must only be reasonable,[98] it would not be unreasonable for a law enforcement officer to suspect that a presumed child molester would document his child sexual encounters in some form of medium on a computer.[99] Nor would it be unreasonable for a law enforcement officer to suspect that a presumed child molester would have taken pictures of his encounter and have them loaded to his computer. Nor would it be unreasonable for a law enforcement officer to suspect that a presumed child molester would have engaged in online chats in an underage chat room to search for potential victims.[100] In any of these probable hypothetical situations, it would be reasonable for the law enforcement officer to conduct his search for child molestation on the computer.[101] And, accordingly, there is little—if any—deterrent effect if the law enforcement officer who, already searching the computer, conducts a search for child pornography. Ultimately, it would not be unreasonable for a law enforcement officer—a public servant to her community—to

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97. *Id.* at 2427 (internal citations omitted).

98. *See supra* Part II(A). Furthermore, the standards for determining probable cause for a search warrant apply to a search for child pornography on a computer. United States v. Kelley, 482 F.3d 1047, 1048, 1055 (9th Cir. 2007).

99. For instance, in United States. v. Hodson, 543 F.3d 286 (6th Cir. 2008), the magistrate issuing the warrant found that the detective's:

> Failure to include her 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 [the defendant] contends; both the cited conduct and the sought evidence involve sexual exploitation of minors.

Id. at 291. However, the Sixth Circuit rejected the magistrate's justification for admitting the child pornography as evidence. *Id.* at 292.

100. All of the foregoing examples would be in violation of 18 U.S.C. § 1466A, which relates to prohibiting child pornography, or 18 U.S.C. § 2422(b), which prohibits a person from "knowingly [attempting to] persuade, induce, entice and coerce a minor to engage in prohibited sexual activity. 18 U.S.C. § 1466A (2006); 18 U.S.C. § 2422(b) (2006).

101. *See, e.g.*, United States v. Colbert, 605 F.3d 573, 579 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1469 (Feb. 22, 2011) ("even if we were to hold that the affidavit failed to establish probable cause [for a search for child pornography], suppression of the evidence would not be appropriate because [the defendant] has not shown that the officers acted unreasonably in carrying out the search.").

want to seize a child molester's child pornography collection to alleviate the incidence of child sexual exploitation, especially since child sexual abusers are more likely than others in the general population to possess child pornography.[102]

E. Solutions

Given that there is *at least* an intuitive relationship between child molestation and possession of child pornography, both law enforcement officers and the judiciary cannot ignore that relationship when determining whether probable cause for a search warrant for child pornography exists on the basis of child molestation. First, a fluid probable cause standard, coupled with the expertise of the investigating officer and deference to the magistrate, will prove sufficient to authorize a valid search warrant. Likewise, a detailed affidavit that explicitly explains the connection between child pornography and child molestation will also prove sufficient to authorize a valid search warrant. Conversely, if a magistrate finds a detailed affidavit drafted by the investigating officer insufficient, then expert analyses cited within the affidavit, corroborating the nexus between child pornography and child molestation, will also be enough to validate a search warrant. Finally, if a magistrate refuses to authorize a search warrant notwithstanding the foregoing solutions and notwithstanding the definitive relationship between child molestation and possession of child pornography, then the good faith exception to the Fourth Amendment will prohibit suppression of child pornography evidence because suppression would impose great societal costs and would prove counterproductive in the effort to combat child sexual exploitation. The foregoing solutions are examined in depth below.

1. Fluid, Non-Technical Probable Cause Standard and Deference to Investigators

Probable cause for a search exists when the facts and circumstances within an officer's knowledge, and of which he has reasonably trustworthy information, convince the officer to believe that sufficient evidence will be found in the place to be searched.[103] Further, neither "certainty nor a preponderance of the evidence is required[,]" but rather

102. *See, e.g.*, United States v. Brand, 467 F.3d 179, 198 (2d Cir. 2006) (quoting Child Pornography Prevention Act of 1996, PUB. L. NO. 104-208, § 121, 110 Stat. 3009, 3009–26 (1996) (repealed 2002 on First Amendment grounds)).

103. *See, e.g.*, Brinegar v. United States, 338 U.S. 160, 175–76 (1949); Carroll v. United States, 267 U.S. 132, 162 (1925).

a "fair probability" that the evidence will be found is sufficient.[104] Thus, there need not be direct evidence of solicitation of child pornography to create probable cause.[105]

Moreover, in determining whether there is a fair probability that evidence will be found in a particular place, the experience and training of the investigating officer should be taken into consideration. Evidence must be "seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."[106] Probable cause is thus a fluid concept that depends on the probabilities in particular factual contexts.[107] The factual determinations made by investigators in the field need not be correct, they just must be reasonable.[108] Accordingly, law enforcement officers who have worked for years in combating child molestation and child pornography have seen the link between the two crimes first-hand. Great deference should be awarded to the initial, on-the-scene determination that probable cause has been established.[109] Likewise, notwithstanding the expertise of the investigating officer, the touchstone of the Fourth Amendment search warrant cannot be forgotten: deference to the magistrate.[110] It is not wholly unreasonable for a magistrate judge to assume that probable cause based on sexual activity with a minor would support a search for child pornography.[111] A combination of the investigating officer's specialized experience in child exploitation crimes, coupled with a magistrate's legal knowledge of Fourth Amendment jurisprudence, provides an adequate basis to search for child pornography on the basis of child molestation suspicions.[112]

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104. United States v. Kelley, 482 F.3d 1047, 1050 (9th Cir. 2007) (quoting Illinois v. Gates, 462 U.S. 213, 246 (1983)).

105. *Id.* at 1055.

106. United States v. Cortez, 449 U.S. 411, 418 (1981).

107. *Kelley*, 482 F.3d at 1050.

108. *See* Illinois v. Rodriguez, 497 U.S. 177, 183–84 (1990).

109. *See* United States v. Maxim, 55 F.3d 394, 397 (8th Cir. 1995).

110. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 236 (1983).

111. United States v. Baker, 2:04-CR-00427-RCJ-RJJ, 2006 U.S. Dist. LEXIS 58021, at *14–15 (D. Nev. Aug. 3, 2006), *aff'd*, 281 Fed. App'x 705 (9th Cir. 2008); *see also* Tex. v. Brown, 460 U.S. 730, 742 (1983) (the probable cause standard does not demand any showing that such a belief be correct or more likely true than false).

112. *See, e.g.*, United States v. Lebovitz, 401 F.3d 1263, 1271 (11th Cir. 2005) ("[l]aw enforcement investigations have verified that pedophiles almost always collect child pornography or child erotica.") (quoting S. REP. NO. 104-358, at 12–13 (1996)). For instance, in United States v. Burdulis, No. 10-40003-FDS, 2011 U.S. Dist. LEXIS 53612 (D. Mass. May 19, 2011), the court found that the affidavit contained a sufficient "nexus"; specifically, "the affidavit provided sufficient information to infer a rational nexus between the enumerated crimes and 'pornographic materials,' including . . . child pornography." *Id.* at *31–32. Thus the court denied the defendant's motion to suppress the seizure of child pornography. *Id.* at *49; *see also* United States v. Grimmett, 439 F.3d 1263, 1267, 1270 (10th Cir. 2006) (warrant authorizing search for child pornography as evidence of

Additionally, courts may also apply a "sliding scale" to probable cause determinations. Under a sliding scale approach, the degree of suspicion required to constitute probable cause would depend on the individual and societal interests implicated in the specific case.[113] Here, as elucidated above, the public interests in the safety and well-being of children are beyond compelling. However, this is not to say that someone has limited Fourth Amendment protection merely because society has an interest in assuring that children are not exposed to child sexual exploitation. Rather, law enforcement officers and child sex crimes investigators will, under this approach, be able to link the crimes of child pornography possession and child molestation together in a more direct manner. For example, assume a man is suspected of molesting children and such accusations have been corroborated by his victims. Such accusations would impact the man's individual interests. However, the societal interests of the safety and well-being of children—especially the man's victims—would significantly outweigh any of his individual interests. Accordingly, the corroborated accusations of repeated child molestation behavior could serve as adequate probable cause for a search not only for evidence of the child molestation, but also child pornography, given the definitive relationship between the two.

Likewise, without discussion of the good faith exception at this point,[114] some of the federal courts of appeals' decisions suggest that the "totality of the circumstances" paradigm could, in some instances, allow courts to find probable cause to search for child pornography.[115] For instance, the Ninth Circuit suggested that, if there is evidence that an alleged child molester had actually enticed a child to come into his apartment, then probable cause for child pornography would also lie, given the totality of the circumstances surrounding the search.[116]

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crime of "sexual exploitation of a child" was valid).

113. *See* United States v. Chaidez, 919 F.2d 1193, 1197 (7th Cir. 1990) (favoring a sliding-scale approach, the court observed that "circumstances defy . . . simple categorization, and if a [probable cause] line must . . . be drawn it will be arbitrary, with nearly identical cases on opposite sides."); *see also* Wayne R. LaFave, *"Case-By-Case Adjudication" versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 141 (1974) (preference for sliding-scale approach because a "highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions" would be unfeasible).

114. *See supra* note 7 and accompanying text.

115. *See, e.g.*, Dougherty v. Covina, 654 F.3d 892, 899 (9th Cir. 2011). The Supreme Court merely requires that an affidavit be read in its totality and in a commonsense manner. *See* Illinois v. Gates, 462 U.S. 213, 231–32 (1983); *see also* United States v. Syphers, 426 F.3d 461, 465 (1st Cir. 2005) ("[s]earch warrants and affidavits should be considered in a common sense manner, and hyper-technical readings should be avoided.") (quoting United States v. Bonner, 808 F.2d 864, 868 (1st Cir. 1986)).

116. *See Dougherty*, 654 F.3d at 899; *see also* United States v. McBurnette, 382 Fed. App'x 813, 815 (11th Cir. 2010) (in finding the affidavit for search warrant not stale, the court reasoned that the

Moreover, at least for cases like *Dougherty* and *John*,[117] it is a common sense leap that an adult male, a teacher who has been accused of inappropriately touching his female students on several occasions, would likely possess child pornography.[118] Ultimately, the nexus element can and should "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 the crime in question."[119] However, for the courts that will not jump to such a nexus based on inferences, perhaps a more detailed affidavit that explicitly clarifies the connection between child pornography and child molestation would suffice.[120] Because such a definitive relationship exists,[121] an extra step in the application for a warrant process could prove crucial in prosecuting those who prey on children with both child molestation and possession of child pornography.

2. The Use of Experts to Corroborate the "Nexus"

Notwithstanding the foregoing analysis, if a court finds that standing alone, a high incidence of child molestation does not demonstrate probable cause for a search for child molestation, then use of expert analysis to draw the nexus will suffice.[122] The use of an expert might also be necessary in cases where the warrant was based on the law enforcement officer's experience in child sexual crimes; specifically, since the Fourth Amendment requires an objective reasonableness

victim detailed incidents that occurred two years prior, including incidents that the defendant made her watch child pornography with him and that the officers—with their knowledge that pedophiles never dispose of their child pornography—had reason to believe that the pornography would still be in the house even though the sexual molestation occurred two years prior).

117. *See supra* Part II(D).

118. *See supra* notes 52–54 and accompanying text; *see also Dougherty*, 654 F.3d at 901 (Brewster, J., concurring); United States v. Kelley, 482 F.3d 1047, 1051 (9th Cir. 2007).

119. United States v. Walker, 145 Fed. App'x 552, 555 (7th Cir. 2005) (citing United States v. Charest, 602 F.2d 1015, 1017 (1st Cir. 1979)).

120. *See supra* notes 37–39 and accompanying text; *see also* V.I. v. John, 654 F.3d 412, 419 (3d Cir. 2011) ("Because the question is one that can be resolved only through the evaluation of evidence, it must be alleged on the face of the affidavit in order to be considered for purposes of determining probable cause."); United States v. Falso, 544 F.3d 110, 123 (2d Cir. 2008) (given that child molestation and child pornography are separate offenses, the affidavit must draw a correlation between a person's propensity to commit both types of crimes for the search warrant to cover a search for child pornography); *Dougherty*, 654 F.3d at 898 (the affidavit must contain facts tying a defendant as a possible child molester to his possession of child pornography); United States v. Hodson, 543 F.3d 286, 289 (6th Cir. 2008) (suggesting that if the affidavit for a warrant established, alleged, or suggested that the defendant, a purported child molester, would be involved with child pornography, then the nexus will be seen by the magistrate and thus probable cause will lie for a search for child pornography).

121. *See supra* Part III(A).

122. *See, e.g.*, *Hodson*, 543 F.3d at 289 (suggesting that expert testimony of a relational nexus between child molestation and child pornography could establish probable cause).

standard, a law enforcement officer's subjective expertise may not be enough. For instance, in *United States v. Adkins*,[123] the court found that:

> [An] affidavit [that] set[s] forth other information on the likelihood of a molester's possessing pornography, namely the FBI's "institutional knowledge," [will suffice] . . . . 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 [the officer's] determination that [the defendant] is a preferential offender, supports a finding that [the defendant] was reasonably likely to possess child pornography.[124]

Since magistrates often cannot deduce the definitive link between child molestation and possession of child pornography, a warrant under these circumstances must also contain an expert's analysis. Specifically, given the instinctive and now definitively confirmed relationship between the two crimes, probable cause for a search for evidence of child molestation will equally suffice as probable cause for a search for possession of child pornography.

3. The Good Faith Exception[125]

Although the preceding solution is the ideal one given the definitive relationship between child molestation and possession of child pornography, a discussion of invoking the good faith exception is warranted. Consequently, the failure to state explicitly the connection between child molestation and child pornography in an affidavit does not support a contention that the law enforcement officers were unreasonable or grossly negligent as to warrant exclusion of evidence. For example, even the Second Circuit, which found the connection between child molestation and child pornography to be nothing more than an "inferential fallacy of ancient standing,"[126] could not come to the conclusion that a police officer acting on a warrant based on such an assumption was entirely unreasonable.[127] Excluding evidence where the law enforcement officers did not act recklessly or with gross negligence, such as excluding the evidence in child pornography cases, would impose great costs and would "offend[] basic concepts of the criminal

123. 169 Fed. App'x 961 (6th Cir. 2006), *cert. denied*, 549 U.S. 854 (2006), 549 U.S. 856 (2006).
124. *Id*. at 967.
125. *See supra* note 7 and accompanying text.
126. United States v. Falso, 544 F.3d 110, 122 (2d Cir. 2008).
127. *See id.* at 125–28.

justice system."[128] Suppression is necessary "only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause."[129] None of the cases discussed in this Comment indicate that the investigating officers were dishonest or reckless in preparing their affidavits. Accordingly, in the very least, the good faith exception should have been applied in each case to keep the evidence of child pornography from being suppressed.

Likewise, if an affidavit that states, for example, that "individuals who exploit children use computers to locate, view, download, collect and organize images of child pornography found through the Internet," and that connection is substantiated by a citation to studies outlining the definitive relationship between child molestation and possession of child pornography, then it would not be unreasonable for a law enforcement officer executing the search with a warrant based on that affidavit to reasonably believe that inference to be true. Similarly, it would not be unreasonable for an officer executing a search warrant based on an affidavit that explicitly states, with supportive expert data, that the defendant's "contemporaneous attempt[s]" to molest children predisposes him to possess child pornography, to assume that the child molester indeed likely possesses child pornography.[130] And again, there must only be a "fair probability"[131]—not a substantial or significant likelihood—that the child pornography will be found. Consequently, so long as the officers deem there is a fair probability that child pornography will be found in the home of a suspected child molester, then no Fourth Amendment rights will be violated.

Furthermore, there is no doubt that "[t]he good faith exception may be applied to a search conducted pursuant to an overly broad warrant."[132] As a result, an overly broad search warrant for a search for

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128. United States v. Leon, 468 U.S. 897, 908 (1984); *see also* V.I. v. John, 654 F.3d 412, 417 (3d Cir. 2011) ("Suppression of valuable evidence imposes social costs by hindering the courts' truth-seeking function . . . .").

129. *See, e.g.*, United States v. Martin, 297 F.3d 1308, 1313 (11th Cir. 2002) (citing United States v. Leon, 468 U.S. 897, 926 (1984)).

130. United States v. Colbert, 605 F.3d 573, 577 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1469 (2011). Further:

> If even the experts cannot agree on whether probable cause to search for evidence of child molestation provides probable cause to search for child pornography, it [is] not objectively unreasonable—let alone, *entirely unreasonable*—for [the detective drafting the affidavit] to take one side of the controversy over the other . . . .

V.I. v. John, 654 F.3d at 425 (Fuentes, J., dissenting).

131. United States v. Kelley, 482 F.3d 1047, 1050 (9th Cir. 2007) (quoting Illinois v. Gates, 462 U.S. 213, 246 (1983)).

132. United States v. Travers, 233 F.3d 1327, 1330 (11th Cir. 2000) (citing United States v.

child pornography, when supported only by facts of child molestation, might nonetheless be a "reasonable" search and seizure if the officer executing the search acted reasonably and in a good faith reliance on the facts of the affidavit.[133] Such a reliance on the affidavit would be more than a mere "unsupported hunch[]" in which officers base their warrant assessment on unexamined biases and stereotypes.[134] Rather, the officers would conscientiously assess the facts supporting the affidavit and, with their expertise in child exploitation crimes and reasonable reliance on the magistrate's decision to issue the warrant, the search would be deemed "reasonable" based on the good faith exception.

IV. CONCLUSION

In light of *Colbert*,[135] other similar cases, and the dissents and concurrences in opinions opposing the *Colbert* decision,[136] there exists at least a commonsense link between child molestation and possession of child pornography. Moreover, recent studies now also illustrate a definitive relationship between child molestation and a molester's collection of child pornography. Accordingly, given this established relationship, evidence of child molestation behavior should confer probable cause for a warrant to search for child pornography. The substantiated link between these two child sexual exploitative crimes elucidated in the recent studies will now serve as a source for investigators who ask a magistrate judge to authorize a search warrant for child pornography. The link will also serve as an affirmation to judges during suppression hearings who will now be able to rely on such studies without fear of trampling on the Fourth Amendment. Ultimately, now that the relationship between child molestation and possession of child pornography has been definitively established, the judiciary will be more adept to serve society's interests in combating the pervasiveness of child sexual exploitative crimes.

Accardo, 749 F.2d 1477, 1481 (11th Cir. 1985)).

133. "[A]pplicable precedent requires us to determine the culpability of a police officer's conduct in an objective fashion, asking whether 'a reasonably well trained officer would have known that the search was illegal in light of all the circumstances.'" *John*, 654 F.3d at 424 (quoting United States v. Leon, 468 U.S. 897, 922 n.23 (1984)).

134. *Id.* at 421.

135. *See supra* Part II(C).

136. *See supra* Part II(D).