The Fourth Amendment and the Intuitive Relationship Between Child Molestation and Child Pornography Crimes

"The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are 'unreasonable.'"[1]

I. INTRODUCTION

Due to the ambiguous language of the Fourth Amendment, courts have been unable to agree on a strict test as to what constitutes a reasonable search and seizure.[2] For example, in *United States v. Falso*,[3] the court held that evidence of child molestation, by itself, did not create probable cause for a search warrant for child pornography.[4] In its reasoning, the court concluded that a crime involving the sexual abuse of a minor does not relate to child pornography.[5] Therefore, officers lacked sufficient probable cause when executing the search warrant issued by the magistrate.[6]

Likewise, in *United States v. Hodson*,[7] the court held that evidence of child molestation, without more, was insufficient to create probable cause for a search warrant for child pornography.[8] The court reasoned that when "probable cause [is established] for one crime (child molestation) but [the warrant is] designed . . . for evidence of an entirely different crime (child pornography)" the warrant lacks probable cause.[9] Therefore, because there was no relation between the two crimes and no reasonable inference could be made to link the two for sufficient probable cause, the court held the search warrant to be

1. California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring).

2. *See* U.S. CONST. amend. IV (limiting government's power to conduct searches and seizures); *see also* Richard A. Gambale, Case Comment, United States v. Green*, 560 F.3d 853 (8th Cir. 2009)*, 44 SUFFOLK U. L. REV. 973, 974-75 (2011) (illustrating different interpretations of Fourth Amendment). An interpretation of the two Fourth Amendment clauses as being connected, with the second clause limiting the first, lends supports to older Supreme Court precedent that applied a per se unreasonableness test and focused more on the need for probable cause in order to ascertain a search warrant. *See id.* at 975 n.20. An interpretation of the two clauses as being separate, however, lends support to the more recent Supreme Court decisions that use a reasonableness determination. *See id.*

3. 544 F.3d 110 (2d Cir. 2008).

4. *See id.* at 123-24.

5. *See id.* at 123.

6. *See id.* at 123-24.

7. 543 F.3d 286 (6th Cir. 2008).

8. *See id.* at 292-93.

9. *See id.* at 292.

defective.[10]

The court took a different approach in *United States v. Colbert*,[11] however, and held there to be sufficient evidence to give officers probable cause for a search warrant.[12] In that case, the court reasoned that there is an "intuitive relationship" between the crimes of child molestation and child pornography and that it was reasonable for the court to infer that this relationship existed.[13] Therefore, the court held that evidence of child molestation alone could create probable cause for a search warrant for child pornography.[14]

This Note will first explore the background of the Fourth Amendment and the impact of the competing interpretations of its two clauses.[15] Next, it will discuss the evolution in Fourth Amendment law from a more probable cause, search-warrant-centered analysis to the reasonableness approach used by courts today.[16] Thereafter, it will provide a brief history of both child pornography and child molestation in the law.[17] It will then outline the arguments made by the Second, Sixth, and Eight circuits in *Falso*, *Hodson*, and *Colbert*, respectively, and the reasoning and methodology employed in arriving at their final conclusions.[18]

In Part III, this Note will detail why, with the reasonableness and totality-of-the-circumstances standards used by courts today in Fourth Amendment cases, the Eighth Circuit has adopted the best approach to resolving the issue of whether evidence of child molestation alone can create probable cause for a search warrant for child pornography.[19] This Note will argue that a reasonable inference can be made that links the two crimes, thus fulfilling the reasonableness requirement and giving judges probable cause to issue a search warrant for child pornography.[20] Moreover, this Note will argue that given the totality of the circumstances, a judge can take into account the dangers these crimes—child molestation and child pornography—pose to society, and therefore can issue search warrants for the benefit of society.[21] In concluding, this Note will examine potential repercussions of not allowing judges this leniency and why courts should adopt the more sound Eighth Circuit approach.[22]

10. *See id.*
11. 605 F.3d 573 (8th Cir. 2010).
12. *See id.* at 578-79.
13. *See id.*
14. *See id.*
15. *See infra* Part II.A.1.
16. *See infra* Part II.A.2.
17. *See infra* Part II.B-C.
18. *See infra* Part II.D.
19. *See infra* Part III.
20. *See infra* Part III.C.
21. *See infra* Part III.D.
22. *See infra* Part IV.

II. HISTORY

A. Brief History of the Fourth Amendment

1. Evolution of the Fourth Amendment

In order to understand the meaning of the Fourth Amendment today, one must appreciate the historical background of the Fourth Amendment and why the Founding Fathers decided to include it in the Bill of Rights.[23] One reason for the Amendment's inclusion might be because it embodies a quintessential American freedom that finds its roots in the colonial days when the original colonies battled ruthless British law enforcement methods.[24] Another, more concrete, reason might be to protect citizens from the complete discretionary power used by governments in issuing general warrants for searches and seizures.[25] A third reason may be to stop government actors from taking away a citizen's most important liberty interest: personal security.[26]

Although many scholars have identified sound reasons for the inclusion of the Fourth Amendment, there remains a contentious and divisive debate over the obscure wording of the Amendment, and particularly, what it actually

23. *See* Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 926 (1997) (discussing need to analyze history of Fourth Amendment); *see also* U.S. CONST. amend. IV.

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

U.S. CONST. amend. IV.

24. *See* JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 19 (1966) (stating Fourth Amendment created in response to events immediately preceding Revolutionary War); *see also* Warden v. Hayden, 387 U.S. 294, 312 (1967) (Fortas, J., concurring) (explaining American Revolution fought, in part, over types of searches prohibited by Fourth Amendment); Maclin, *supra* note 23, at 926 (observing Fourth Amendment had roots in American colonists' battle against British law enforcement).

25. *See* Payton v. New York, 445 U.S. 573, 583 (1980) (claiming Framers intended Fourth Amendment to protect against indiscriminate general warrants); *see also* Stanford v. Texas, 379 U.S. 476, 481-82 (1965) (asserting British general-warrant system inspired colonies' need for independence); Boyd v. United States, 116 U.S. 616, 625 (1886) (indicating Constitution protects against general-warrant system's abuse of power); LANDYNSKI, *supra* note 24, at 20 (asserting Fourth Amendment protects against general warrants); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13-78 (Da Cappo Press 1970) (1937) (stating Fourth Amendment protects against general warrants and providing history of Amendment's development); TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 23-44 (1969) (maintaining Fourth Amendment protects against British general-warrant system).

26. *See* Gouled v. United States, 255 U.S. 298, 303-04 (1921) (claiming personal liberty, personal security, and private property as essence of U.S. Constitution); *see also* Interstate Commerce Comm'n v. Brimson, 154 U.S. 447, 479 (1894) (stating protection against government invasion of privacy as essence of constitutional liberty); *In re* Pac. Ry. Comm'n, 32 F. 241, 250 (N.D. Cal. 1887) (explaining without personal-security right, "all other rights would lose half their value").

requires.[27] Some argue that the first clause, the "reasonableness clause," merely requires all searches and seizures to be reasonable.[28] Others, however, argue that the second clause, the "warrant clause," requires there be a warrant for every search and seizure.[29]

Supporters of the "reasonable" requirement point to history, noting not only that government officials were held liable for unreasonable intrusions into the private lives of citizens, but also suggesting that there are parts of the U.S. Constitution that outline and define constitutional reasonableness.[30] Furthermore, state constitutions prior to the passage of the Fourth Amendment

27. *See* Craig M. Bradley, *Two Models of the Fourth Amendment,* 83 MICH. L. REV. 1468, 1468-69 (1985) (observing Fourth Amendment contradicts itself because of two competing clauses); *see also* Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 202 n.9 (1993) (reciting interpretation of both clauses); Maclin, *supra* note 23, at 927 (observing vacillation in meaning and implications created by two Fourth Amendment clauses); Gambale, *supra* note 2, at 974-75 (discussing competing Fourth Amendment interpretations); Christopher Lee, Comment, *The Viability of Area Warrants in a Suspicionless Search Regime*, 11 U. PA. J. CONST. L. 1015, 1020 (2009) (stating different interpretations have stimulated debate over what Fourth Amendment requires). Maclin further notes that two contrasting models exist when interpreting the text of the Fourth Amendment—one that explains the independence of the clauses and the other explaining the interdependence of the two clauses. *See* Maclin, *supra* note 23, at 927; *see also* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 881-83 (1991) (claiming inconsistencies exist in Fourth Amendment). *Compare Payton*, 445 U.S. at 584-85 (arguing Fourth Amendment makes it perfectly clear officers need warrants), *with id.* at 610 (White, J., dissenting) (noting Framers had great concerns with respect to warrants).

28. *See* Maclin, *supra* note 23, at 927-28 (asserting reasonableness only required for searches); *see also* Whren v. United States, 517 U.S. 806, 817 (1996) (stating every case "turns upon a 'reasonableness' determination"); California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (maintaining Fourth Amendment does not require warrant, but rather prohibits unreasonable searches); *Payton*, 445 U.S. at 583 (declaring Fourth Amendment drafted to cure "immediate evils" of general warrant); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) ("There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."); Carroll v. United States, 267 U.S. 132, 150-53 (1925) (arguing statutes minimize basis of warrant requirement). *See generally* Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53 (1996). Amar explains that the Fourth Amendment does not require a warrant for every search; rather, every search simply needs to be reasonable. Amar, *supra*, at 55. Furthermore, he argues that nowhere in the Fourth Amendment does it state that warrantless searches and seizures are prohibited. *See id* at 55-56. Moreover, he claims that many state constitutions had adopted similar Fourth Amendment language, but none of these expressed an explicit warrant requirement. *See id.* at 55; *see also* James A. Adams, *Search and Seizure as Seen by Supreme Court Justices: Are They Serious or Is This Just Judicial Humor?*, 12 ST. LOUIS U. PUB. L. REV. 413, 420 (1993) (claiming warrant clause as "virtual nullity").

29. *See* Maclin, *supra* note 23, at 927-28 (stressing police need warrant prior to searches and seizures); *see also* Mincey v. Arizona, 437 U.S. 385, 390 (1978) (labeling searches without judicial approval per se unreasonable); Katz v. United States, 389 U.S. 347, 357 (1967) (deeming warrantless searches per se unreasonable); Camara v. Mun. Court, 387 U.S. 523, 528-29 (1967) (characterizing warrantless searches of premises as "governing principle" of Fourth Amendment jurisprudence); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (1999) (asserting Framers understood warrant as "the operative content" of Fourth Amendment); Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 481 (1991) (pointing to warrant requirement as essence of Fourth Amendment interpretation).

30. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994). Amar argues that the Fourth Amendment does "not require warrants, probable cause, or exclusion of evidence;" rather, there is merely a requirement that all searches be reasonable. *See id.*

contained language much like that of the Fourth Amendment; those constitutions, however, did not contain any warrant requirement at all.[31] Also, nineteenth-century precedent supports the notion that the Fourth Amendment did not require a warrant for a search and seizure.[32]

On the other hand, supporters of the "warrant" requirement likewise look to history for support, but come to a different conclusion, stating that warrantless searches and seizures were almost unheard of when the Framers drafted the Fourth Amendment.[33] Furthermore, supporters argue that the Founders drafted the Fourth Amendment to protect against the broad, overreaching powers that Britain exerted over the colonies during the Colonial Era.[34] Moreover, supporters maintain that the second clause of the Fourth Amendment (the "warrant clause") modifies the first clause (the "reasonableness clause").[35]

31. *See id.* at 763. Amar suggests that although many states encompassed language like the Fourth Amendment, none had a "textual warrant requirement." *See id.* at 763 & n.10; *see also* MD. CONST. of 1776 art. XXIII (characterizing all warrants without oaths or affirmation as grievous and oppressive); MASS. CONST. of 1780 art. XIV (requiring formalities in warrant); N.H. CONST. of 1784 art. XIX (asserting oaths needed to support warrant); N.C. CONST. of 1776 art. XI (declaring general warrants dangerous to liberty); PA. CONST. of 1776 art. X (considering general warrants contrary to right of freedom from searches and seizures); VT. CONST. of 1786 art. XII (asserting need of evidentiary foundation and particularity in warrant); VA. CONST. of 1776 § 10 (labeling general warrants grievous and oppressive). Amar continues by stating that one may attempt to argue that states presumptively required warrants; many leading cases during the nineteenth century, however, suggest otherwise. *See* Amar, *supra* note 30, at 763; *see also* Rohan v. Sawin, 59 Mass. (5 Cush.) 281, 284-85 (1850) (noting warrant not absolute requirement under Federal or Massachusetts Constitutions); Mayo v. Wilson, 1 N.H. 53, 60 (1817) (asserting New Hampshire Constitution does not restrain arrests without warrants where strong guilt evidenced); Wakely v. Hart, 6 Binn. 316, 318 (Pa. 1814) ("[I]t is no where [sic] said, that there shall be no arrest without warrant.").

32. *See* Amar, *supra* note 30, at 763 (asserting nineteenth-century decisions commonly concluded warrants not required for proper arrest); *see also, e.g.*, Johnson v. State, 30 Ga. 426, 430 (1860) (claiming warrant not required for arrest of felons or suspected felons); Balt. & O. R. Co. v. Cain, 31 A. 801, 805 (Md. 1895) (deciding conviction upheld without warrant); Reuck v. McGregor, 32 N.J.L. 70, 74 (1866) (asserting warrant not needed for proper arrest); Holley v. Mix, 3 Wend. 350, 353 (N.Y. Sup. Ct. 1829) (holding warrantless arrest of felon proper even with time to obtain warrant); Wade v. Chaffee, 8 R.I. 224, 225 (1865) (upholding arrest without warrant).

33. *See* Bookspan, *supra* note 29, at 518 (explaining warrantless searches and seizures "were almost unheard of" during drafting of Fourth Amendment); *see also* Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389, 1392 (1989) (contending warrantless searches and seizures not of concern during drafting of Fourth Amendment).

34. *See* Davies, *supra* note 29, at 551 (claiming Fourth Amendment intended to forbid use of general warrants); *see also* Entick v. Carrington, 19 Howell's State Trials 1029, 1074 (C.P. 1765) (holding search warrant invalid due to lack of specificity); LASSON, *supra* note 25, at 13-78 (explaining Founders intended to ban general warrants); 4 WILLIAM BLACKSTONE, COMMENTARIES *291 (asserting general warrant "is illegal and void for it's [sic] uncertainty"). According to Davies, Lasson highlighted three key events prior to the formation of the Fourth Amendment, all of which involved general warrants. *See* Davies, *supra* note 29, at 561-67. These events, as Davies concludes, not only helped the Founders in drafting the Fourth Amendment, but also helped the Framers use the Amendment as a way to limit overreaching governmental powers. *See id.*

35. *See* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 203-04 (1993) (explaining "warrant preference rule"); *see also* Arizona v. Gant, 556 U.S. 332, 337-38 (2009) (stating warrant required for reasonable search of car when no safety or spoliation concerns); United States v. Rabinowitz, 339 U.S. 56, 70-71 (1950) (Frankfurter, J., dissenting) (claiming warrants necessary precondition of reasonable search); Harris v. United States, 331 U.S. 145, 156-67 (1947) (Frankfurter, J., dissenting)

2. Adoption of the Reasonableness Standard

Although a debate lingers between the two sides, Fourth Amendment jurisprudence has embraced the reasonableness standard.[36] The Supreme Court began its reformation in 1914 when it decided *Weeks v. United States*.[37] The *Weeks* Court created an exclusionary rule that disallowed admission of evidence obtained during a warrantless search.[38] Through the evolution of the exclusionary rule, the Court transitioned from a textual-analysis approach to a procedural-rule approach, reading a remedy into the Fourth Amendment that does not explicitly exist in its text.[39] This shift in analysis has inadvertently limited the Fourth Amendment by reading out its warrant and probable-cause requirements.[40]

The Court further expanded the scope of Fourth Amendment in *Katz v. United States*.[41] In that case, the Court held that warrantless searches without approval by a judge or magistrate are per se unreasonable.[42] This holding, however, is "subject only to a few specifically established and well-delineated exceptions."[43] Although *Katz* held that exceptions would allow police officers to avoid the warrant requirement, there were no standards to follow, and exceptions and justifications to the requirement began flooding the courts.[44]

(explaining warrant necessary for reasonable search); Davis v. United States, 328 U.S. 582, 605 (1946) (Frankfurter, J., dissenting) (stating warrant required for reasonable search); Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1409 (2010) (reiterating need for warrant in reasonable searches); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 846-57 (1994) (defending preference for warrants clause interpretation).

36. *See* Gambale, *supra* note 2, at 974 & n.19 (discussing recent readings of Fourth Amendment leads to courts' more recent reasonableness determinations); *see also* O'Connor v. Ortega, 480 U.S. 709, 719-26 (1987) (using reasonableness approach); New Jersey v. T.L.O., 469 U.S. 325, 337-43 (1985) (earmarking reasonableness as standard); Bookspan, *supra* note 29, at 477, 503 (claiming Supreme Court pays greater attention to reasonableness clause found in Fourth Amendment).

37. *See generally* 232 U.S. 383 (1914) (instituting exclusionary rule).

38. *See id.* at 398. This exclusionary rule has existed unchallenged since 1914. *See* Bookspan, *supra* note 29, at 482-83 ("[E]xclusionary rule remains a thorn in the side of the present Supreme Court."); *see also* Mapp v. Ohio, 367 U.S. 643, 655-57, 660 (1961) (applying exclusionary rule to decide state cases).

39. *See* Bookspan, *supra* note 29, at 484-85 (noting courts after *Mapp* followed procedural-rules approach to Fourth Amendment).

40. *See id.* at 485.

41. *See* 389 U.S. 347, 359 (1967) (requiring judicial sanction prior to searches).

42. *See id.* at 357 (holding warrantless searches per se unreasonable).

43. *Id.* (requiring prior approval by judge or magistrate or else per se unreasonable); *see* Mincey v. Arizona, 437 U.S. 385, 390 (1978) (requiring exception for warrantless search); South Dakota v. Opperman, 428 U.S. 364, 381 (Powell, J., concurring) (1976) (maintaining warrantless search disallowed unless exception exists); Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971) (stating exception needed for warrantless search); Vale v. Louisiana, 399 U.S. 30, 34 (1970) (explaining clear exception needed for warrantless search); Terry v. Ohio, 392 U.S. 1, 20 (1968) (stating warrantless search disallowed unless exception such as exigent circumstances); Trupiano v. United States, 334 U.S. 699, 705 (1948) (claiming warrantless search illegal unless not practically reasonable).

44. *See* Bookspan, *supra* note 29, at 501-03 (observing courts began allowing warrantless searches or searches without probable cause); *see also* United States v. Martinez-Fuerte, 428 U.S. 543, 560-64 (1976)

The mounting exceptions to the Fourth Amendment's warrant clause helped begin the eradication of the warrant requirement completely.[45] In turn, the Court replaced the warrant requirement with the reasonableness test that is still employed by courts today.[46]

The reasonableness approached began with the decision in *Terry v. Ohio*.[47] In *Terry*, a police officer believed the defendant was armed.[48] Because of that belief, the officer patted the defendant down and seized the weapons he was carrying.[49] The Court held that an officer could "patdown" a suspect without probable cause or a search warrant if the officer had a reasonable belief that the suspect was armed and dangerous.[50] Ultimately, this decision not only relaxed the standards for probable cause by merely requiring reasonableness, but also

(holding border searches do not need warrants); Texas v. White, 423 U.S. 67, 68-69 (1975) (creating exception for delayed probable cause); United States v. Matlock, 415 U.S. 164, 171-72 (1974) (explaining third party's consent as exception to warrant requirement); *Coolidge*, 403 U.S. at 466 (holding evidence seized in plain view does not necessitate warrant); Frazier v. Cupp, 394 U.S. 731, 740 (1969) (allowing third-party consent as exception); *Terry*, 392 U.S. at 30-31 (creating stop-and-frisk exception); Schmerber v. California, 384 U.S. 757, 770-72 (1966) (carving out exception for search incident to lawful arrest).

45. *See* Bookspan, *supra* note 29, at 503. Bookspan analogizes the exceptions created in each case to threads in a fabric, claiming that each time the Supreme Court created another exception to the warrant requirement, the Court unraveled the Fourth Amendment's warrant clause further. *See id.*

46. *See id.* at 503-04 (asserting exceptions helped replace warrant requirement with reasonableness test). Bookspan analyzes the reasonableness test used by courts, saying that the first clause of the Fourth Amendment (the reasonableness clause) can be read separately from the second clause (the warrant clause). *Id.* at 503. Therefore, because both clauses can be read separately, a warrant is only one element of a reasonable search and is no longer a necessary prerequisite to conducting a proper search under the Fourth Amendment. *See id.* at 503-04. According to Bookspan, because courts read the two clauses separately, the focus has shifted from a preservation of individual rights towards a reasonableness approach that assesses the conduct of the police given the specific facts of each case. *See id.* at 504; *see also* United States v. Cortez, 449 U.S. 411, 418 (1981) (stating evidence "must be . . . understood by those versed in the field of law enforcement"); *Terry*, 392 U.S. at 21 (holding use of "rational inferences" to surrounding facts makes search reasonable); Camara v. Mun. Court, 387 U.S. 523, 539 (1967) ("But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."); Beck v. Ohio, 379 U.S. 89, 91 (1964) (concluding reasonable search if facts surrounding arrest indicate so); Okla. Press Pub. Co. v. Walling, 327 U.S. 186, 218 (1946) (claiming valid public interest upholds search); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) (requiring each case decided on own facts and circumstances); Carroll v. United States, 267 U.S. 132, 162 (1925) (asserting facts can help determine reasonableness of search). Although the Court made its intentions clear to shift towards a reasonableness standard, whether the effects are positive remains a debatable issue. *See Terry*, 392 U.S. at 37-38 (Douglas, J., dissenting) (acknowledging probable cause has its roots in history); Henry v. United States, 361 U.S. 98, 100 (1959) ("The requirement of probable cause has roots that are deep in our history."); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 384-85 (1988) (claiming reasonableness approaches undermines probable cause and its expansion has no limits).

47. 392 U.S. at 39 (Douglas, J., dissenting) (articulating reasonableness approach); *see also* Bookspan, *supra* note 29, at 504-05 (observing *Terry* majority moved away from strict probable-cause standard prior to search).

48. *See Terry*, 392 U.S. at 4-7.

49. *See id*.

50. *See id.* at 30-31 (holding reasonable belief enough for search even though search warrant not obtained).

paved the way for future cases.[51]

The Supreme Court's shift toward the reasonableness approach is also evidenced in *Camara v. Municipal Court*.[52] In that case, inspectors acting without a warrant attempted to make a routine inspection of a building to ensure it complied with city housing code.[53] The defendant, however, refused the inspectors entry onto his premises and the inspectors, in turn, sought a right of entry to the building and arrested the defendant for refusing to permit a lawful inspection of his premises.[54] First, the Court held that these types of administrative searches intrude upon those interests protected by the Fourth Amendment.[55] After acknowledging the personal interests at stake, the Court relaxed the standards of obtaining an administrative warrant for administrative searches by holding probable cause exists if the inspection is based on reasonable legislative or administrative standards.[56] Ultimately, this decision had the effect of "eliminat[ing] the particularity requirement of the warrant clause."[57]

Lastly, the Court solidified its reasonableness stance in *New Jersey v. T.L.O.*[58] In *T.L.O.*, a school conducted a warrantless search of the defendant based on a suspected violation of a school rule.[59] The case analyzed the warrantless search of the defendant's purse.[60] The Court, in holding the search did not violate the defendant's Fourth Amendment rights, reasoned that in some circumstances, neither a search warrant nor probable cause are required for a search.[61] Moreover, the Court reasoned that in balancing the interests between the defendant's expectation of privacy and the school's equally legitimate interest in maintaining a safe learning environment, the school should be able

51. *See* Bookspan, *supra* note 29, at 505 (arguing *Terry* unintentionally laid foundation for future cases by requiring only reasonableness). Furthermore, Bookspan claims the decision highlights the importance for officers to act quickly in the face of a crime rather than require them to obtain probable cause for a search warrant. *See id.*

52. 387 U.S. 523 (1967).

53. *See id.* at 526-27.

54. *See id.*

55. *See id.* at 534 (recognizing warrant requirement imposed on administrative searches); *see also* Bookspan, *supra* note 29, at 506. Bookspan stated that because these inspections presented the potential for abuse, the Court imposed a warrant requirement. *See id.*

56. *See Camara*, 387 U.S. at 535-40; *see also* See v. City of Seattle, 387 U.S. 541, 545-46 (1967) (extending "case-by-case" reasonableness analysis to Fourth Amendment cases involving business and residential searches); Bookspan, *supra* note 29, at 506 (noting effect of relaxed standard for obtaining warrant). Bookspan also notes that the reasonableness standard imposed on these administrative searches allowed inspectors greater flexibility in conducting their searches. *See id.*

57. Bookspan, *supra* note 29, at 506.

58. *See* 469 U.S. 325, 337 (1985) (balancing individual's privacy rights against government's need for efficiency).

59. *See id.* at 328.

60. *See id.* at 347-48.

61. *See id.* at 340-41 (reasoning search warrant and probable cause not required for all searches); *see also* Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring) (maintaining neither search warrant nor probable cause needed in certain circumstances).

to conduct a warrantless search when reasonable.[62]

The *Terry* and *Camara* decisions helped shape the Court's reasonableness approach that it employs today in Fourth Amendment search and seizure cases.[63] The new probable-cause standard allowing reasonableness to determine whether probable cause has been met without a warrant represents a broad doctrine that balances governmental and individual interests.[64] This broad balancing concept that is encompassed within the reasonableness balancing test allows for many exceptions that undercut the warrant and probable-cause requirements.[65] Moreover, *T.L.O.* helped solidify the reasonableness standard that permeates through courts' analyses today.[66] Ultimately, these cases helped to eliminate the warrant and probable-cause requirements and replaced them with a broad and ill-defined balancing test of reasonableness, making it much easier to escape the once-rigid confines of the Fourth Amendment.[67]

B. Brief History of Child Pornography Crimes

In 1996, Congress enacted the Child Pornography Prevention Act, which firmly criminalized any person's possession of or connection with child pornography.[68] This Act broadened the definition of the child-pornography

62. *See T.L.O.*, 469 U.S. at 340-41 (explaining under what circumstances warrantless search appropriate and reasonable). The Court explained that the warrant requirement is "unsuited to the school environment," concluding that the time needed to obtain a search warrant would unnecessarily interfere with the school's ability to discipline its students. *Id.* at 340. *But see id.* at 369-70 (1985) (Brennan, J., concurring in part and dissenting in part) (asserting balancing test makes warrant requirement meaningless).

63. *See supra* notes 47-57 and accompanying text (discussing *Terry* and *Camara's* impact on Fourth Amendment cases).

64. *See* Bookspan, *supra* note 29, at 507 (concluding reasonableness standard allows for balancing interests); *see also* Sundby, *supra* note 46, at 385 (claiming *Terry* and *Camara* produced an "ill-defined balancing test").

65. *See* Bookspan, *supra* note 29, at 508 (asserting reasonableness test allows many exceptions). Bookspan argues that the reasonableness standard establishes a balance that "too easily can be tipped by the heavy hand of [the] government" because the Court has yet to define exactly how to balance the competing interests within a given case. *See id.* Furthermore, Bookspan suggests that the reasonableness standard is not even a standard because there can be disagreements regarding what an individual person thinks is reasonable. *See id.* at 511; *see also* Bradley, *supra* note 27, at 1472-73 (claiming reasonableness balancing test creates confusion within Fourth Amendment analysis); H. Richard Uviller, *Reasonability and the Fourth Amendment: A (Belated) Farewell to Justice Potter Stewart*, 25 CRIM. L. BULL. 29, 30 (1989) (stating reasonableness test too lenient, loosening commitment to enforcement of privacy); Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 126-30 (1989) (suggesting balancing test creates confusion).

66. *See* Bookspan, *supra* note 29, at 508 (arguing *T.L.O.* illuminated Court's current trend of "reasonableness now dominat[ing] the . . . inquiry").

67. *See supra* notes 36-66 and accompanying text (discussing evolution from strict Fourth Amendment requirements to reasonable, interest-balancing searches).

68. *See* 18 U.S.C. § 2252A(a) (2012) (codifying crimes associated with child pornography). Some of the provisions for conviction include: any person who knowingly transports child pornography; receives or distributes child pornography; reproduces child pornography; sells child pornography; accesses with the intent to view books, films, or other materials containing child pornography. *Id.*; *see Protection of Children From*

crime, making it much easier for a potential criminal to violate the Act.[69] In regards to the Fourth Amendment and child pornography cases, courts have incorporated the *Illinois v. Gates*[70] totality-of-the-circumstances analysis to determine whether or not probable cause exists.[71] This standard includes a common-sense analysis of the facts presented in a given case and helps determine whether the evidence provided to the magistrate supports a fair probability of a crime.[72] Thus, even when the evidence is relatively weak,

Computer Pornography Act of 1995: Hearing on S. 892 Before the S. Comm. on the Judiciary, 104th Cong. 111 (1995) [hereinafter *Protecting Children*] (statement of Dee Jepsen, President, "Enough is Enough!") (encouraging adoption of legislation). Dee Jepsen supported the Protecting Children From Pornography Act of 1995 because:

> [Pornography] plays a major role [in the] molestation of children, serving as an instruction manual for these crimes; it exposes children at an impressionable age to attitudes and behaviors that warp and twist their view of human dignity and sexuality . . . encourages the rape myth that . . . they like violence; it erotizes violence and then fuels sexual violence; it holds and [sic] addictive and fatal attraction for many men and teenage boys, it invades their thoughts and manipulates their behavior . . . and it lowers community standards, which has a denigrating affect [sic] upon our entire culture.

Protecting Children, *supra.*

69. *See* Sarah Sternberg, Note, *The Child Pornography Prevention Act of 1996 and the First Amendment*: *Virtual Antitheses*, 69 FORDHAM L. REV. 2783, 2798 (2001) (claiming broadened definition with passing of Act); *see also* 18 U.S.C. § 2256(8) (2012) (defining child pornography); *Child Pornography Prevention Act of 1995*: *Hearing on S. 1237 Before the S. Comm. on the Judiciary*, 104th Cong. 17 (1996) (statement of Kevin V. Di Gregory) ("Soon it will not be necessary to actually molest children to produce child pornography . . . . All that will be necessary will be an inexpensive computer, readily available software, and a photograph of a neighbor's child shot while the child walked to school or waited for the bus.").

70. 462 U.S. 213 (1983).

71. *See* Jacob D. Bashore, *Probable Cause in Child Pornography Cases: Does It Mean the Same Thing?*, 209 MIL. L. REV. 1, 23 (2011). In *Gates*, police received a tip that the defendant possessed drugs. *See* 462 U.S at 225-26. An officer verified much of the substance of the tip through his own independent observations before signing an affidavit setting forth the facts of the case and submitted it to a judge, who thereafter granted a search warrant of the defendant's house. *Id.* at 226. The Illinois Supreme Court held that the substance of the tip itself was insufficient to support a finding of probable necessary for the issuance of search warrant, and held the search involved. *Id.* at 227. The Supreme Court, however, employed a totality-of-the-circumstances analysis, and held the tip along with the officer's corroboration gave rise to the requisite probable cause. *Id.* at 230-31. For other cases employing a totality of the circumstances test, see United States v. Cortez, 449 U.S. 411, 418 (1981) (indicating probable cause formed by "common sense conclusions about human behavior"); United States v. Harris, 403 U.S. 573, 577-83 (1971) (asserting merely substantial basis needed for issuing search warrant); Brinegar v. United States, 338 U.S. 160, 176 (1949) ("Probable cause . . . deal[s] with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."); United States v. Sundby, 186 F.3d 873, 875-76 (8th Cir. 1999) (stating judge needs only substantial basis for probable cause); United States v. Mahler, 141 F.3d 811, 813 (8th Cir. 1998) (claiming warrant supported by probable cause if fair probability found); United States v. Fahsi, 102 F.3d 363, 365 (8th Cir. 1996) (allowing officers to make reasonable inferences for probable cause); United States v. Sherrill, 27 F.3d 344, 347 (8th Cir. 1994) (permitting reasonable inferences by officer to support probable cause); United States v. Callison, 577 F.2d 53, 54-55 (8th Cir. 1978) (asserting officer may make reasonable inferences in support of probable cause). There are numerous reasons why a court utilizes the totality-of-the-circumstances test in child-pornography cases, some of which are listed in *New York v. Ferber*. *See* 458 U.S. 747, 756-65 (1982).

72. *See* Bashore, *supra* note 71, at 23 (explaining practical approach used by courts in determining probable cause). Moreover, the probability of an event warranting probable cause is less than the probability

probable cause may still be found because the standard allows an officer to compile all the facts in a given case to make a reasonable assessment and inference about whether a crime was or will be committed.[73]

C. Brief History of Child Molestation Crimes

Child molestation is an intentional tort.[74] Each state has its own statute outlawing child molestation, including its own specific provisions regarding child molestation.[75] Generally child molestation involves any indecent act committed by one person against a child who fulfills the statutory age requirement.[76]

that represents the preponderance-of-the-evidence standard, which is fifty percent. *See* Texas v. Brown, 460 U.S. 730, 742 (1983) (asserting officer need not show evidence more likely true than false); Samos Imex Corp. v. Nextel Commc'ns, Inc., 194 F.3d 301, 303 (1st Cir. 1999) (claiming standard less demanding than "more probable than not").

73. *See* Bashore, *supra* note 71, at 23-24; *see also* United States v. Macomber, 67 M.J. 214, 219 (C.A.A.F. 2009) (considering whether facts as whole support probable cause); United States v. Henley, 48 M.J. 864, 869 (A.F. Ct. Crim. App. 1998), *aff'd*, 53 M.J. 488 (C.A.A.F. 2000) (outlining factors magistrate can consider). *See* Bashore, *supra* note 71, at 24-63 (discussing staleness, nexus to place searched, guilt by association, among others), for a more thorough analysis on child pornography crimes and the various types of evidence that a court will and will not allow in a given case.

74. *See* Jed D. Manton, Case Note, *Calling on the Legislature:* Dixon v. State *and Georgia's Statutory Scheme to Protect Minors from Sexual Exploitation*, 56 MERCER L. REV. 777, 780-81 (2005) (noting child molestation not strict liability; state needs proof); *see also* James L. Rigelhaupt, Jr., Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured*, 31 A.L.R. 4TH 957, § 5(b) (Supp. 2013) (naming child molestation as intentional tort).

75. *See* GA. CODE ANN. § 16-6-4(a) (West 2014) (defining child molestation for any immoral act on child under sixteen); MASS. GEN. LAWS ANN. ch. 265, § 13B (West 2014) (stating child molestation for indecent assault on child under fourteen); R.I. GEN. LAWS ANN. § 11-37-8.1 (West 2013) (asserting child molestation for indecent act on child under fourteen); *see also* Vicki J. Bejma, Case Note, *Protective Cruelty:* State v. Yanez *and Strict Liability as to Age in Statutory Rape*, 5 ROGER WILLIAMS U. L. REV. 499, 499-500 (2000) (noting third-degree child molestation law provides age of consent for child aged sixteen).

76. *See supra* note 75 and accompanying text (describing child molestation as indecent or immoral act on child of specified age). See R.P. Davis, Annotation, *Admissibility, in Prosecution for Sexual Offense, of Evidence of Other Similar Offenses*, 77 A.L.R. 2D 841 (1961), for a detailed and thorough analysis on the admissibility of evidence in child molestation cases . Society has a strong interest in punishing child molesters and preventing child molestation because of the corollary effects it has on society, the child, and the adult the child will grow up to be. *See* Doe v. City of Lafayette, 377 F.3d 757, 783 (7th Cir. 2004) (claiming high rate of recidivism for child molesters); United States v. Allery, 526 F.2d 1362, 1366 (8th Cir. 1975) ("[A] serious crime against a child is an offense . . . to society . . . ."); United States v. Martinez, 44 F. Supp. 2d 835, 837 (W.D. Tex. 1999) (concluding society has strong interest in protecting sexually molested children); Naomi Harlin Goodno, *Protecting "Any Child"*: *The Use of the Confidential-Marital-Communications Privilege in Child-Molestation Cases*, 59 U. KAN. L. REV. 1, 27 (2010) (stating child molestation as serious crime against child and society); Jonathan J. Hegre, Comment, *Minnesota "Nice"? Minnesota Mean: The Minnesota Supreme Court's Refusal To Protect Sexually Abused Children in* H.B. ex rel. Clarke v. Whittemore, 15 LAW & INEQUALITY 435, 440-41 (1997) (showing higher tendency of crime among molested children); Melissa R. Saad, Note, *Civil Commitment and the Sexually Violent Predator*, 75 DENV. U. L. REV. 595, 605 (1998) (asserting molested child more likely to commit crime than ordinary child); Debra Sherman Tedeschi, Comment, *Federal Rule of Evidence 413: Redistributing* "*The Credibility Quotient*", 57 U. PITT. L. REV. 107, 112 (1995) (recognizing child molestation as sexually deviant crime).

D. The Circuit Split

In light of the discussion above, there remains a contentious debate between circuits regarding whether evidence of child molestation alone establishes probable cause for a search warrant for child pornography.[77] Some circuits claim that no sufficient nexus exists between child molestation and child pornography crimes, and therefore evidence of child molestation alone does not create probable cause for a search warrant for child pornography.[78] The Eighth Circuit, however, has held that an intuitive sexual relationship exists between the two crimes, thus evidence of child molestation would establish probable cause for a search warrant for child pornography.[79]

1. The Second Circuit

In *United States v. Falso*, the Second Circuit held that evidence of child molestation alone does not establish probable cause for a search warrant for child pornography.[80] In that case, an officer requested a search warrant for the home of the defendant based on information regarding the defendant's possible use of computers to view child pornography, the characteristics of child-pornography collectors, and the defendant's prior conviction of sexual abuse.[81] The officer, however, provided nothing in the warrant affidavit supporting a connection between the propensity of being a child molester and viewing child

77. *See* Dougherty v. City of Covina, 654 F.3d 892, 899 (9th Cir. 2011) (acknowledging circuit split and outlining arguments of each court).

78. *See infra* notes 80-91 (examining arguments made by Second and Sixth Circuits).

79. *See infra* notes 92-96 (considering arguments made by Eighth Circuit); *cf.* Warden v. Hayden, 387 U.S. 294, 307 (1967) (requiring nexus between item seized and criminal behavior); United States v. Vesikuru, 314 F.3d 1116, 1122 (9th Cir. 2002) (holding anticipatory warrant valid because of nexus between crimes); United States v. Jiminez, 224 F.3d 1243, 1247 (11th Cir. 2000) (allowing warrant because nexus between contraband and location established with requisite probability); Touchton v. State, 437 S.E.2d 370, 372 (Ga. Ct. App. 1993).

> There is no requirement that the prior crime or transaction be absolutely identical to the crime charged. If sufficient similarity exists such that proof of the prior act tends to prove the charged act, evidence of similar crimes is admissible to show the accused's lustful disposition and to corroborate the victim's testimony that the accused acted in the manner charged.

Touchton, 437 S.E.2d at 372; *see* McGowan v. State, 402 S.E.2d 328, 330 (Ga. Ct. App. 1991) (allowing evidence of previous crime if sufficient similarity exists); Mims v. State, 348 S.E.2d 498, 500 (Ga. Ct. App. 1986) (asserting evidence of prior crime admissible if connection exists); Millwood v. State, 296 S.E.2d 239, 241 (Ga. Ct. App. 1982) (explaining identical crimes not necessary for admissibility); *Overview of Fourth Amendment*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 3, 13-14 (2005) (claiming nexus needed for probable cause under Fourth Amendment). *But cf.* Greenstreet v. Cnty. of San Bernardino, 41 F.3d 1306, 1309 (9th Cir. 1994) (holding warrant invalid because affidavit created "very weak link"); United States v. Schultz, 14 F.3d 1093, 1097-98 (6th Cir. 1994) (holding warrant invalid because affidavit lacked evidence of nexus between crimes).

80. *See* 544 F.3d 110, 123 (2d Cir. 2008) ("That the law criminalizes both child pornography and the sexual abuse (or endangerment) of children cannot be enough.").

81. *See id.* at 113-14.

pornography.[82] Based on the information provided, the judge issued the search warrant and the officers arrested the defendant, taking his computer and some boxes from his home, both of which contained child pornography.[83] According to the four-corner affidavit test, the court held that the affidavit could not support the search warrant for child pornography, reasoning that child molestation and child pornography are two separate crimes unrelated to one another.[84] Therefore, because the affidavit contained nothing supporting the correlation between the two crimes, the court found no basis for probable cause.[85]

2. The Sixth Circuit

Likewise, in *United States v. Hodson*, the Sixth Circuit held that evidence of child molestation alone does not establish probable cause for a search warrant for child pornography.[86] In *Hodson*, an officer requested a search warrant to search the home of the defendant based on America Online (AOL) information and the officer's conversation she had with the defendant over the internet.[87] The officer, however, proffered nothing in the warrant affidavit that suggested

82. *See id.*

83. *See id.* at 114.

84. *See id.* at 122-23 (illustrating reasoning of court); *see also* Illinois v. Gates, 462 U.S. 213, 238 (1983) (stating probable cause assessments made from circumstances set forth in affidavit); *Falso*, 544 F.3d at 121-22 ("'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.'" (quoting United States v. Martin, 426 F.3d 68, 82 (2d. Cir. 2005) (Pooler, J., dissenting))); United States v. Gourde, 440 F.3d 1065, 1067-68 (9th Cir. 2006) (assessing probable cause from information contained within four corners of affidavit); United States v. Anderson, 453 F.2d 174, 175 (9th Cir. 1971) (holding everything necessary to show probable cause must appear in affidavit); Durham v. United States, 403 F.2d 190, 194 & n.5 (9th Cir. 1968) (disregarding probable cause determination because information known to officer, but not in affidavit).

85. *See Falso*, 544 F.3d at 124 (holding no probable cause exists). Although the court claimed probable cause was not supported by a substantial basis, the court affirmed the defendant's conviction by applying the good-faith exception when the court denied the defendant's motion to suppress the evidence obtained through the search warrant. *See id.* at 129. Ultimately, because the court found that the district court properly applied the good-faith exception and circumstances did not exist that would undermine its validity, the court upheld the defendant's conviction. *Id.* at 125-29. The exclusionary rule can bar evidence from being admitted into court, while the good-faith exception does not apply to evidence seized "in 'objectively reasonable' reliance on the search warrant," even when that warrant is determined to be invalid. *See id.* (Livingston, J., concurring) (quoting United States v. Leon, 468 U.S. 897, 922 (1984)); *see also Leon*, 468 U.S. at 922-23 (describing good-faith exception). There are four circumstances where the good-faith exception does not apply and therefore the evidence will not be allowed because the exception to the exclusionary rule would not be applicable: where the judge issuing the warrant was knowingly misled, where the judge issuing the warrant abandoned his or her judicial role, where the evidence is so lacking in probable cause that it is deemed unreasonable, and where the warrant is facially deficient. *See Leon*, 468 U.S. at 922-23; *see also Falso*, 544 F.3d at 125 (quoting United States v. Moore, 968 F.3d 216, 222 (2d Cir. 1992)); United States v. Cancelmo, 64 F.3d 804, 807 (2d Cir. 1995) (recounting four ways good-faith exception does not apply); *Moore*, 968 F.2d at 222 (describing ways good-faith exception does not apply).

86. *See* 543 F.3d 286, 293 (6th Cir. 2008).

87. *See id.* at 289 (outlining evidence officer used in support of affidavit).

the defendant, who engaged in child molestation, was likely to possess child pornography.[88] Thereafter, the magistrate granted the warrant and officers searched the defendant's home, taking multiple items, including DVDs, webcams, and computers, all of which contained child pornography.[89] The court held that the affidavit could not support the search warrant for child pornography, reasoning that the warrant established probable cause for one crime, but its execution exacted a search for evidence of a different crime.[90] Thus, the court concluded that the evidence obtained during the search must be omitted from trial.[91]

3. The Eighth Circuit

In *United States v. Colbert*, however, the Eighth Circuit held that evidence of child molestation alone does establish probable cause for a search warrant for child pornography.[92] In that case, police officers requested a search warrant based on a conversation the officers had with the defendant, the defendant's conversation with a young girl, and the items found in the defendant's car during a consensual search.[93] The judge granted the search, and officers discovered many movies, discs, and a computer, all of which contained child pornography.[94] The court held that the affidavit the officer provided did support probable cause because the magistrate could have reasonably concluded and inferred from the facts provided by the officer that there would

88. *See id.* at 289 (indicating affidavit lacked sufficient link between child molestation and child pornography).

89. *See id.*

90. *See id*. at 292 ("At this point, it is beyond dispute that the warrant was defective for lack of probable cause—Detective Pickrell established probable cause for one crime (child molestation) but designed and requested a search for evidence of an entirely different crime (child pornography).").

91. *See Hodson*, 543 F.3d at 292. The court ultimately held that the good-faith exception to the exclusionary rule could not be applied here, striking all evidence obtained from the search warrant completely. *See id.* at 293-94. The defendant argued that, under the defenses to the good-faith exception where the evidence is completely lacking in probable cause, the warrant should be deemed unreasonable. *See id.* at 292; *see also* United States v. Helton, 314 F.3d 812, 824 (6th Cir. 2003) (asserting defendant needs to show officer had no reasonable ground for believing warrant properly issued); *Leon*, 468 U.S. at 922-23 ("[I]t is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued."). The court in *Hodson* concluded that the issuing of the warrant was unreasonable since the warrant was based on the officer's subjective knowledge and no facts were given to support his contentions. *See* Hodson, 543 F.3d at 293-94; *see also* Groh v. Ramirez, 540 U.S. 551, 564 (2004) (stating officer cannot rely on judge's assurances of validity of statements for valid warrant); Whiteley v. Warden, 401 U.S. 560, 564 (1971) (requiring officer to provide enough information to demonstrate probable cause exists); Nathanson v. United States, 290 U.S. 41, 47 (1933) (noting officer needs to show adequate facts to support probable cause); United States v. Weaver, 99 F.3d 1372, 1377 (6th Cir. 1996) (claiming officer needs particular facts to show existence of probable cause); United States v. Schauble, 647 F.2d 113, 115-16 (10th Cir. 1981) (explaining particular facts in affidavit necessary for probable-cause search warrant).

92. *See* United States v. Colbert, 605 F.3d 573, 578-79 (8th Cir. 2010).

93. *See id.* at 575-76.

94. *See id.*

be child pornography at the defendant's residence.[95] Therefore, the court deemed the evidence admissible and affirmed the defendant's conviction.[96]

III. ANALYSIS

A. Reasonableness and the Warrant Requirement

As stated above, the standard for determining whether probable cause exists in a Fourth Amendment search and seizure case is reasonableness.[97] This reasonableness test has not only trumped the warrant requirement in recent years, but has also rendered the warrant requirement virtually null and void.[98]

95. *See id.* at 577 (inferring defendant's possession of child pornography from child-molestation evidence). The court used the district court's reasoning, noting that "individuals sexually interested in children frequently utilize child pornography to reduce the inhibitions of their victims." *Id.* Moreover, the court explained that the facts, taking them in their totality, suggest that the defendant was "an older male attempting to entice a young girl into sexual activity." *Id.* Furthermore, the court disagreed with both the *Falso* and *Hodson* courts' "categorical distinction" between possession of child pornography and child molestation. *Id*. at 578. ("[To the courts' suggestion] that evidence of a defendant's tendency to sexually abuse or exploit children is irrelevant to the probable cause analysis, we respectfully disagree."). The court cites *Gates*, claiming that probable cause for the purposes Fourth Amendment's purposes is a practical, common-sense concept, not one that is technical in nature. *See id*. (citing Illinois v. Gates, 462 U.S. 213, 230-32 (1983)). Moreover, the court explains that probable cause is not a neat set of rules, but rather a concept that is understood by those in law enforcement. *Id.* (citing *Gates*, 462 U.S. at 232); *see* Osborne v. Ohio, 495 U.S. 103, 111 (1990) ("[E]vidence suggests that pedophiles use child pornography to seduce other children into sexual activity."); United States v. Paton, 535 F.3d 829, 836 (8th Cir. 2008) (claiming common use of computers and internet by those who sexually prey on children); United States v. Byrd, 31 F.3d 1329, 1339 (5th Cir. 1994) ("[C]ommon 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."); Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1695-96 (2012) (stating G8 symposium reports international consensus exists for equating child pornography possessors with child molesters); Kristin Carlson, Comment, *Strong Medicine: Toward Effective Sentencing of Child Pornography Offenders*, 109 MICH. L. REV. FIRST IMPRESSIONS 27, 32-33 (2010) (identifying child pornography consumers as sexually deviant and noting correlation to child molestation); Phillippa Ibbotson, *The Hidden Offenders*, THE GUARDIAN, Sept. 3, 2008, http://www.theguardian.com/society/2008/sep/03/childprotection (discussing study of Federal Correctional Institute confirming relationship between child pornography possessors and child molesters); Karen Thomas, *Who Are the Child Molesters Among Us?*, USA TODAY, Mar. 12, 2002, http://usatoday30.usatoday.com/life/2002/2002-03-12-pedophilia.htm (calling link between child pornography and child molestation "strong"); Andres E. Hernandez, *Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons', Sex Offender Treatment Program: Implications for Internet Sex Offenders*, TEX. OFFICE OF VIOLENT SEX OFFENDER MGMT. (Nov. 2000), http://www.ovsom.texas.gov/docs/Self-Reported-Contact-Sexual-Offenses-Hernandez-et-al-2000.pdf (noting strong correlation between child-pornography offenders and sexual molestation); Candice Kim, *From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children* 1, AM. PROSECUTORS RES. INST. (2004), http://www.ndaa.org/pdf/Update_gr_vol1_no3.pdf (explaining watching child pornography represents past, present, and future acts); *see also* ANDREW G. OOSTERBAAN, U.S. DEP'T OF JUSTICE, REPORT TO LEPSG ON THE "GLOBAL SYMPOSIUM FOR EXAMINING THE RELATIONSHIP BETWEEN ONLINE AND OFFLINE OFFENSES AND PREVENTING THE SEXUAL EXPLOITATION OF CHILDREN," 9 (May 2009), *available at* http://www.justice.gov/criminal/ceos/downloads/SymposiumReport20090519.pdf (noting connection between child pornography and child molestation).

96. *See Colbert*, 605 F.3d at 579.

97. *See supra* notes 36-66 and accompanying text (discussing development of reasonableness approach).

98. *See supra* notes 36-66 and accompanying text (explaining reasonableness replaced and eliminated warrant requirement); *see also* California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (stating

Therefore, in approaching a Fourth Amendment case, the key question is whether, given the facts of the case, the search appeared to be reasonable at the time the officer conducted the search.[99] This test allows officers the ability to use their own intellect and common sense when analyzing the totality of the circumstances in a given case.[100]

Moreover, in conjunction with the reasonableness test, courts interpreting the Fourth Amendment have moved away from focusing on the preservation of individual liberties and approach each case from a totality-of-the-circumstances perspective.[101] The totality-of-the-circumstances test allows officers to balance the rights of the individual with the potential need for the intrusion of those rights.[102] Thus, if an officer feels that public safety outweighs the potential risk of not searching the suspect's home, then the officer may conduct a lawful search.[103] Ultimately, this standard not only allows for officers to use their best judgment at the time of the search, but also allows judges and magistrates to draw reasonable inferences from the facts surrounding the case at the time of the search.[104]

B. The Circuit Split

In regards to the current circuit split over whether evidence of child molestation alone is sufficient to establish probable cause for a search warrant for child pornography, a nexus between the crimes must be established to show the judge that there is probable cause.[105] According to the Fourth Amendment, officers need probable cause in order to conduct a legal and valid search of an individual.[106] When determining if there is probable cause to issue a search

Fourth Amendment merely prohibits unreasonable searches and seizures); Adams, *supra* note 28, at 420 (arguing warrant clause "virtual nullity").

99. *See supra* notes 46-66 and accompanying text (discussing reasonableness approach given facts of case).

100. *See supra* notes 70-73 and accompanying text (claiming totality-of-the-circumstances test allows practical and common-sense analysis).

101. *See Gates*, 462 U.S. at 230-31 (stating totality-of-the-circumstances approach far more consistent with prior treatment of probable cause); *see also* Bookspan, *supra* note 29, at 503-04 (observing courts use totality-of-the-circumstances approach).

102. *See* Bookspan, *supra* note 29, at 507 (noting current Fourth Amendment balancing test).

103. *See id*. Bookspan uses *Terry* as an example, explaining that if an officer has reason to believe a suspect has engaged in or will engage in criminal activity, "the officer's need to investigate outweighs the intrusion on the individual." *Id.*; *see* Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (holding patdown without warrant reasonable given circumstances); Camara v. Mun. Court, 387 U.S. 523, 539 (1967) ("But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."); Okla. Press Pub. Co. v. Walling, 327 U.S. 186, 213 (1946) (maintaining valid public interest can uphold search).

104. *See supra* notes 71-73 and accompanying text (discussing allowance of reasonable inferences by officers and judges given circumstances of case).

105. *See supra* note 78-79 (stressing nexus between crimes sufficient for probable cause search warrant).

106. *See* U.S. CONST. amend. IV; *see also supra* Part II.A (outlining development of Fourth Amendment and case history).

warrant, the search-warrant requirements of the Fourth Amendment constrain judges to the four corners of the affidavit.[107] This four-corner analysis requires a judge to consider only evidence that an officer has explicitly incorporated into the affidavit.[108] The judge must determine—from only those facts stated—whether or not it is reasonable to issue a search warrant for the given crime.[109] Any fact not mentioned in the affidavit, therefore, cannot be considered by the judge no matter how relevant or probative the fact may be for the purposes of issuing the search warrant.[110] Thus, because the two crimes could be considered separate and unrelated, an argument could be made that the Fourth Amendment would require more than just evidence of child molestation for a search warrant for child pornography.[111]

Because child molestation and child pornography have historically been considered separate crimes, one may argue no sufficient link exists between the two crimes.[112] Research suggests that people who collect child pornography are likely to molest children, yet the connection for child molesters possessing child pornography is far more tentative, and research has not been able to show as close a connection.[113] When a judge armed only with evidence of child

107. *See* United States v. Anderson, 453 F.2d 174, 175 (9th Cir. 1971) ("[A]ll 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.").

108. *See supra* note 84 and accompanying text (explaining four-corner approach to probable cause). Within the affidavit, officers must include particularized and specific facts about the connection between the two crimes; other information will not be recognized by judges. *See* Whiteley v. Warden, 401 U.S. 560, 564 (1971) (asserting officers need to provide enough information to demonstrate probable cause exists); Nathanson v. United States, 290 U.S. 41, 47 (1933) (declaring officer needs to show adequate facts to support probable cause); United States v. Weaver, 99 F.3d 1372, 1377 (6th Cir. 1996) (stressing need for particular facts in affidavit to establish probable cause); United States v. Schauble, 647 F.2d 113, 116 (10th Cir. 1981) (reasoning particular facts in affidavit necessary for probable-cause search warrant).

109. *See* Illinois v. Gates, 462 U.S. 213, 238 (1983) (declaring magistrates should use common-sense approach when considering sufficiency of facts in affidavit);; *Anderson*, 453 F.2d at 175 (holding everything necessary to show probable cause must appear in affidavit); Durham v. United States, 403 F.2d 190, 194 n.5 (9th Cir. 1968) (disregarding information not attested to in affidavit, but known to officer).

110. *See Anderson*, 453 F.2d at 175 (claiming probable cause assessments made from information contained within four corners of affidavit).

111. *See supra* notes 106-07 and accompanying text (discussing affidavit requirements for valid probable-cause search).

112. *See* United States v. Falso, 544 F.3d 110, 123 (2d. Cir. 2008) (holding search warrant invalid because crimes not related); *see also id.* at 122 ("'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.'" (quoting United States v. Martin, 426 F.3d 68, 82 (2d. Cir. 2005) (Pooler, J., dissenting))); United States v. Hodson, 543 F.3d 286, 292 (6th Cir. 2008) ("At this point, it is beyond dispute that the warrant was defective for lack of probable cause—Detective Pickrell established probable cause for one crime (child molestation) but designed and requested a search for evidence of an entirely different crime (child pornography).").

113. *See* Hamilton, *supra* note 95, at 1695-96 (noting "international consensus" exists for equating child pornography consumers with child molesters); Ibbotson, *supra* note 95 (reporting Correctional Institute Studies confirm relationship between child pornography possessors and child sex offenders); Hernandez, *supra* note 95, at 6 (stating strong correlation between child pornography and child molestation offenders); OOSTERBAAN, *supra* note 95, at 10-13 (finding connection between child pornography and child molestation).

molestation considers whether or not to provide a search warrant for child pornography, the argument can be made that no link exists, and therefore, a reasonable judge would not issue a search warrant under those circumstances.[114]

Nevertheless, because Fourth Amendment analysis has shifted, judges should be allowed to employ the reasonableness concepts that are now the touchstone of the Fourth Amendment when issuing search warrants.[115] The reasonableness standard markedly reduces the evidentiary requirement for proving the existence of probable cause.[116] Moreover, the flexibility encompassed within the totality-of-the-circumstances test allows officers to utilize their own intuitive senses, thereby expanding the types of information they can rely on when deciding whether probable cause exists.[117] Therefore, a judge, like an officer, should be able to make practical and logical inferences given the totality of the circumstances in a given case.[118] Because cases have determined that public safety can be a helpful factor in determining whether an officer had probable cause to search a suspect, judges should be afforded the ability to consider the serious threats these crimes—child molestation and child pornography—pose to the public and society at large in their determination as well.[119]

114. *See supra* notes 112-13 (illustrating connection between child pornography consumption and child molestation; but not child molestation and child pornography consumption).

115. *See supra* notes 46-66 and accompanying text (emphasizing courts' shifting to broad-based reasonableness approach).

116. *See supra* notes 63-66 and accompanying text (discussing relaxed standard due to reasonableness approach); *see also* Bookspan, *supra* note 29, at 508 (arguing reasonableness test allows many exceptions). Bookspan asserts that the reasonableness standard establishes a standard that "too easily can be tipped by the heavy hand of government." *Id.* Furthermore, Bookspan states that the reasonableness standard is not even a standard because people can define reasonableness in their own subjective way. *See id.* at 511; *see also* Uviller, *supra* note 65, at 30 (claiming reasonableness test too lenient).

117. *See supra* note 71 and accompanying text (illustrating leniency when considering totality of circumstances); *see also* United States v. Macomber, 67 M.J. 214, 219 (C.A.A.F. 2009) (asking whether facts, in whole, support probable cause); United States v. Henley, 48 M.J. 864, 869 (A.F. Ct. Crim. App. 1998), *aff'd*, 53 M.J. 488 (C.A.A.F. 2000) (outlining factors magistrate can consider); Bashore, *supra* note 71, at 23-24 (advocating for consideration of entirety of evidence in reasonableness determination, even when single piece weak). Probable cause is a flexible, common-sense standard, requiring only that facts at the time, as they appear to the officer, would permit a reasonable man to believe criminal activity is afoot. *See* Texas v. Brown, 460 U.S. 730, 742 (1983) (asserting officer need not show evidence more likely true than false); Samos Imex Corp. v. Nextel Commc'ns, Inc., 194 F.3d 301, 303 (1st Cir. 1999) (holding standard less demanding than "more probable than not").

118. *See supra* notes 71-74 and accompanying text (discussing officers' ability to use practical, common-sense approach in determining reasonableness of search).

119. *See* Bookspan, *supra* note 29, at 503-04 (examining Supreme Court's reasonableness test). Bookspan argues that the reasonableness approach assesses the conduct of the police given the specific facts of each case. *Id.* at 504; *see* Camara v. Mun. Court, 387 U.S. 523, 539 (1967) ("But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."); Beck v. Ohio, 379 U.S. 89, 91 (1964) (claiming reasonable search if facts surrounding arrest indicate so); Okla. Press Pub. Co. v. Walling, 327 U.S. 186, 213 (1946) (validating search with public-interest exception); Carroll v. United States, 267 U.S. 132, 162 (1925) (allowing officers'

C. Linking Child Molestation and Child Pornography Offenses

With respect to the two crimes involved in the circuit split—child molestation and child pornography—a clear connection has been realized for many reasons.[120] Although many have noted the strong tendency of possessors of child pornography to molest children, no such equivalent tendency on the part of child molesters to possess child pornography exists; this apparent disconnect, however, should not bar judges from inferring the connection.[121] For example, some research shows that child molesters do, in fact, use pornography as a gateway or precursor to possessing child pornography.[122] Also, both child molestation and child pornography have been described as sexually deviant crimes.[123] Furthermore, both involve the obscene exploitation of children.[124]

Additionally, the two crimes encompass some sort of violence or violent mindset toward children that can affect their lives in the future.[125] For example, studies have shown that victims of child molestation are not only more likely to commit crimes and be placed in prison later in life, but are also more likely to suffer mental health issues.[126] Meanwhile, child pornography

reasonable perception of facts).

120. *See infra* notes 121-23 and accompanying text (discussing relationship between child molesters and child pornography possessors).

121. *See* Touchton v. State, 437 S.E.2d 370, 372 (Ga. Ct. App. 1993) (asserting no identical requirement for prior crime and crime charged); McGowan v. State, 402 S.E.2d 328, 330 (Ga. Ct. App. 1991) (allowing admission of evidence of previous crime if sufficient similarity exists). *But see supra* note 84 (quoting language from Justice Pooler's dissenting opinion in *Falso* regarding equating child pornography collectors and child molesters).

122. *See* United States v. Byrd, 31 F.3d 1329, 1339 (5th Cir. 1994) ("[C]ommon 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."); Carlson, *supra* note 95, at 32-33 (supporting link between child pornography and child molestation); Hamilton, *supra* note 95, at 1695-96 (noting international consensus exists for equating child pornography consumers with child molesters); Kim, *supra* note 95, at 17 (claiming watching child pornography represents past, present, and future acts); *see also* OOSTERBAAN, *supra* note 95, at 9 (noting connection between child pornography and child molestation).

123. *See* Carlson, *supra* note 95, 32-33 (establishing child pornography as sexually deviant crime); *see also* Tedeschi, *supra* note 76, at 112 (identifying child molesters as sexually deviant).

124. *See* 18 U.S.C. § 2252A(a) (2012) (discussing provisions for conviction, all of which include exploiting children in some manner); *see also supra* notes 74-76 (describing child molestation as sexual, tortious, immoral act against child).

125. *See Protecting Children*, *supra* note 68 ("[Child pornography] like violence; it eroticizes violence and then fuels sexual violence; it holds an addictive and fatal attraction for many men and teenage boys, it invades their thoughts and manipulates their behavior . . . and it lowers community standards, which has a denigrating affect upon our entire culture."); *see also* Doe v. City of Lafayette, 377 F.3d 757, 783 (7th Cir. 2004) (claiming child molesters likely to reoffend); Saad, *supra* note 76, at 605 (asserting molested child more likely to commit crime than non-molested child).

126. *See* Saad, *supra* note 76, at 605.

> Sexually abused children stand a 55% greater chance of being arrested later in life, a 500% greater chance of being arrested for sex crimes, and a 3,000% greater chance of being arrested for adult prostitution. Victims of child sexual abuse often evolve into adult child molesters themselves, avoid

transforms depraved individuals' sexual fantasies into violent realities where they can act upon and carry out those fantasies, thereby bringing down the moral compass of society.[127] Therefore, because a logical nexus and an intuitive relationship between child pornography possession and child molestation exists, a judge with evidence of child molestation alone could properly issue a search warrant for child pornography.[128]

D. Public Safety Considerations

Furthermore, because it is reasonable to infer an intuitive relationship exists between child molestation and child pornography crimes, a judge should be able to take into account the totality-of-the-circumstances balancing test to conclude that the dangers imposed on society by a child molester potentially having child pornography greatly outweigh the individual rights of the suspect.[129] Like an officer, a judge should have the ability to balance the individual's rights and the public safety risk in determining whether to conduct an immediate search of a suspect.[130] These public safety interests are no more important when considering the impact these crimes have on the health and safety of children, and the future of our society.[131] Thus, when confronted with two crimes involving violence, exploitation, and deviance in regards to children, a judge would be reasonable in issuing a search warrant for child pornography given evidence of child molestation without more.[132]

> adult intimacy or sexual relationships altogether, develop eating disorders, and experience severe marital distress.

Id. Saad also notes the high rate of recidivism among child molesters and the lifetime effect on victims, including depression, anxiety, and substance abuse. *See id* at 604-05.

127. *See Protecting Children*, *supra* note 68 (noting negative effects child pornography has on society).

128. *See supra* notes 120-27 and accompanying text (discussing intuitive relationship between child molestation and child pornography).

129. *See* Illinois v. Gates, 462 U.S. 213, 230-31 (1983) (using totality-of-the-circumstances approach in Fourth Amendment cases); *see also* Bookspan, *supra* note 29, at 503-04 (noting courts use totality-of-the-circumstances approach).

130. *See* Camara v. Mun. Court, 387 U.S. 523, 539 (1967). "But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *See id.*; *see also* Bookspan, *supra* note 29, at 506. Bookspan argues that if an officer has reason to believe a suspect is engaged in or has engaged in criminal activity, "the officer's need to investigate outweighs the intrusion on the individual." *Id.* at 507.

131. *See* United States v. Martinez, 44 F. Supp. 2d 835, 837 (W.D. Tex. 1999) (claiming society has strong interest in protecting sexually molested children); *see also* United States v. Allery, 526 F.2d 1362, 1366 (8th Cir. 1975) ("[A] serious crime against a child is an offense . . . to society . . . ."); Goodno, *supra* note 76, at 27 (explaining child molestation as serious crime against child and society); *Protecting Children*, *supra* note 68 (describing societal decay due to child pornography).

132. *See, e.g.*, United States v. Byrd, 31 F.3d 1329, 1339 (5th Cir. 1994) ("[C]ommon sense would indicate that a person who is sexually interested in children is likely to . . . receive child pornography."); Touchton v. State, 437 S.E.2d 370, 372 (Ga. Ct. App. 1993) (finding evidence of child pornography sufficiently similar to child molestation); McGowan v. State, 402 S.E.2d 328, 330 (Ga. Ct. App. 1991) (noting admissibility of similar previous acts in sex offense cases); Hamilton, *supra* note 95, at 1695-96 (acknowledging connection

IV. CONCLUSION

The lack of clarity in the Fourth Amendment has lead to competing interpretations of its text. A reasonableness test and a totality-of-the-circumstances approach, however, have emerged to lessen the evidentiary requirements, affording police officers and judges more leniency when considering relevant information. In the circuit split discussed in this Note—whether evidence of child molestation alone creates probable cause for a search warrant for child pornography—courts are faced with a difficult question: whether to stick by the rigorous requirements of the four-corner affidavit approach or to lessen the standards and allow a more practical, common-sense approach to the issue. By following the more practical approach, courts would be protecting many children who are suffering the lifelong, and potentially fatal, side effects of child molestation. Furthermore, courts would be remiss in overlooking the logical connections between the two crimes due to the sexually perverted nature of each and the inherent, violent exploitation of children. Thus, by deciding evidence of child molestation alone creates probable cause for a search warrant for child pornography, courts not only would be taking the broad-based approach recognized within the text of the Fourth Amendment, but also would be protecting the societal interests at large.

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between child pornography and child molestation); Saad, *supra* note 76, at 605 (outlining effects of child sexual abuse over span of victims' life); Kim, *supra* note 95, at 1 (explaining connection between child pornography and child molestation and effect on victim's life).