

**In the Thames Magistrates Court
Case No: 011700940001**

**COMMISSIONER OF POLICE FOR THE METROPOLIS
(Applicant)**

and

**LEO GARETH ADAMSON
(Respondent)**

**Child pornography, pedophilia, and contact offending: the
empirical research.**

Expert report by Dr. William Thompson PhD.

Introduction

I have been asked to give an opinion regarding the scientific basis, for or against, the prohibition of private possession of 'virtual child pornography' such as drawings, as opposed to photographs of children. In particular, I was asked to address two issues:

- (a) is there any evidence of a correlation, positive or negative, between the levels of availability of pornography and rates of contact offending;
- (b) is there any evidence, for or against, the use of pornography to facilitate contact offending.

Given the original question, I have concentrated on the evidence concerning child pornography, and I have included other forms of evidence concerning the behavior of child pornography offenders (CPOs) that are relevant to the question.

I am capable and qualified to offer an opinion having undertaken similar commissions in the past. Between 1990 and 2006, while resident in the UK, I was a practicing associate of the British Academy of Experts, and a forensic criminologist. My main areas of expertise were: child sexual assault allegations and investigative methods; the history of pornography, pornography effects studies, and related paraphiliaóóhomosexuality, pedophilia, and sadomasochism. I supervised postgraduate research and taught courses on these subjects to undergraduates at Reading University. I was a guest lecturer on the post qualifying courses for social workers at Portsmouth University; and was frequently engaged as a lecture and/or seminar leader on these subjects at conferences for police and probation officers. I was invited to submit evidence to the Orkney Inquiry and was a member of the experts panel in the Home Affairs Committee review of the conduct of the investigations regarding historical sexual assault allegations in Care Homes. Between 1990 and 2005, I was the primary independent expert on pornography generally, and homosexual, pedophile, and sadomasochistic pornography in particular. I conducted numerous reviews of pornographic materials, including narrative fiction and cartoons, that were subject to legal proceedings for defense counsel, and when required offered testimony in criminal trials regarding obscene and indent material subject to the 1959 and 1964 Obscene Publications Acts, the Customs Consolidation Act 1976, and the Protection of Children Act 1978. I will reference some of my related publications during the following review when relevant.

In order to offer an opinion, I have to address four interrelated issues, and have organized this report into four sections to do so:

- (i) the four 'link' studies cited as demonstrating proof that the possession of child pornography is associated with contact offending against children, and the legal context in which they emerged, as this explains why possession of pornography featuring children became what is known as a 'signal crime' and was regarded as a

proxy for child sexual assault prosecutions in the USA and the EU. Although this section concentrates on the USA, it does so because the proxy policy was official and was subjected to detailed legal scrutiny, whereas the UK has adopted an unofficial policy that has avoided scrutiny to date; and the issues raised in the USA are equally pertinent to the UK, they will inform my opinion, and the issues raised by US judges and legal scholars have also influenced UK legal commentaries.

(ii) the current consensus in the research community regarding the risk posed to children by child pornography Offenders (CPOs). It is now agreed that the pre-Internet assumption that there were links between possession of child pornography, pedophilia, and contact offending is no longer viable. In particular, I will explain how that consensus was constructed in answer to the 'link' studies, and has been built around the clear implications of reviews covering the differences between possession only CPOs, mixed offenders, and contact offenders. I will also reprise the related research concerning the availability of pornography and sex crime rates, including child pornography.

(iii) the latest research developments covering the role and nature of sexual fantasy exhibited by possession only CPOs. I will explain why fantasy has become the focal point of research and appears to account for the differences in recidivism rates and psychometric characteristics of CPOs compared to contact offenders, and addresses another common misunderstanding: that the more 'severe' the possessed material is, the greater the risk the possessor poses to children. I will also consider the similarities between possession only CPOs and other paraphiliacs who utilize the web.

(iv) legal scholarship regarding the status of the UK law prohibiting virtual child pornography *viz a viz* ECHR Art. 8 and 10. The two leading commentators, who also refer to US case law and the research addressed in this review, have suggested the current UK law on possession of virtual pornography would not be able to withstand a legal challenge on privacy grounds as the government has failed to offer any viable justifications that CPOs pose a risk to individuals (children) or the community.

Given that the Crown Prosecution Service commenced 20,373 prosecutions for image offenses in the UK during 2014 [Meridian, et al, 2016 at 2]; it is important that UK courts base any decisions regarding possession in light of the empirical data concerning the nature of the offences and offenders, and avoid making the same mistakes that plagued US courts because of the four 'link' studies.

Declaration and Statement of Truth

I understand and have complied with my duty to the court, and I am aware of the requirements of Part 35 of the Civil Procedure Rules and the accompanying Practice Direction, and of the Guidance for the Instruction of Experts in Civil Claims 2014.

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinion on the matters to which they refer.

A handwritten signature in black ink, appearing to read 'W. Thompson', with a stylized flourish at the end.

William Thompson PhD

Opinion

Given the evidence I have reviewed, I would conclude that:

- There is no scientific basis for the prohibition of private possession of 'virtual' child pornography such as drawings.
- There is evidence of a correlation between the levels of availability of pornography and rates of contact offending, and the correlation is negative: i.e. an increase in availability of material has been found to lead to a decline in contact offenses, especially against children.
- There is some self-report evidence that suggested pornography may be used to facilitate contact offending, but this evidence has been questioned by other evidence that demonstrates that those most likely to do so exhibit psychopathology whereas possession only CPOs do not.

I have based this opinion on the following evidence:

The wide spread belief that possession of child pornography, pedophilia, and contact offending are synonymous may have been appropriate before the Internet [see 2.2-2.3], but the policies based upon those beliefs [1.6; 4.3-4.5] have become increasingly untenable as more material became available across the Internet [2.3-2.5].

Criminalizing possession and increasing the definition of a minor to 18 years reflected attempts to make law enforcement easier rather than prevent a real threat posed by the Internet [1.13-1.14; 4.3], and has led to criminalizing groups that pose no threat to minors. These include older people who possess 40 year old photographs taken with Polaroid cameras during the 1970s; and minors who downloaded material that was age appropriate for them or sent images of themselves to partners using smart phones [2.6; 4.4].

Rather than demonstrate that possession only CPOs posed a serious threat to children, government Ministers have asserted that a link between possession of child pornography exists and has been proven [1.19; 1.22-1.23; 1.29-1.31; 1.35], although the studies cited to justify their policies and reinforce pre-Internet assumptions [1.24; 1.32; 1.38-1.39; 1.40; 1.43] either offered no evidence that possession only offenders were undetected contact offenders [1.20; 1.33-1.34], or proved that the majority were not [1.36], or were so flawed that their conclusions were suspect [1.27-8]; and, in one case, did not even exist [4.6]. There is some evidence that the US Department of Justice engineered the study most commonly cited because it did not have the evidence to justify its policies [1.50]

The belief that those possessing child pornography should be regarded as undetected contact offenders [1.11] has been counter productive. It has led to

unnecessary punishments than can be more severe than those given to contact offenders [1.9-1.10; 1.45-1.46], can violate due process [1.15], civil liberties [1.14-1.45] and the Human Rights of privacy and freedom of expression [4.7-4.10]; even although most CPOs in the internet age do not fit the pre-Internet profile of likely offenders [2.9; 4.5] and the lack of threat they pose is evidenced by the parallel decline in the number of contact offences [2.11].

Governments have also shown a complete disregard for the evidence that contradicts their justifications for criminalization [1.40; 2.45-2.46; 4.7-4.8; 4.13-4.14]. Contrary to the claims that availability of child pornography on the Internet posed a threat to children by the consumers of that material, it could have been predicted that availability would lead to a fall in offending for two reasons. An increase in the availability of pornography reduces juvenile offending which accounts for approximately a third of contact offences against minors [2.13; 2.19-2.20]; and research has consistently found that the availability of child pornography also reduces adult offending against minors [2.15; 2.17-2.19]. The belief, and policies based upon them, that CPOs pose a threat to children as CPOs are pedophiles and use pornography to engage in contact offending and distorted thinking regarding offending [2.22; 2.30], is belied by the constant finding that possession only CPOs: rarely reoffend or commit contact offences [2.23-2.28]; they exhibit completely different psychometric characteristics to mixed and contact offenders that led to offending, they do not engage in distorted thinking and they are extremely compliant individuals [2.32-2.38]. Indeed, CPOs affective deficits, and lack of anti-social traits and offense supportive beliefs makes them unlikely contact offenders [2.39-2.40; 3.23; 3.25-3.27; 3.29].

Possession only CPOs' low risk can be accredited to the nature of their fantasy life, the reasons for their online activities, and lack of psychopathology [2.43-2.44; 3.4-3.8; 3.16-3.20], which undermines the common fear that CPOs use pornography for contact offending [3.1-3.2; 3.8]. There is considerable evidence to demonstrate that consumption by possession only CPOs is used as a substitute for contact offending rather than to prepare for contact offending [2.10], and does not encourage the 'distorted thinking' used by conduct offenders to justify their crimes [2.8; 3.23-3.24]. This evidence has led to the belief in the research community that CPOs may represent a new form of offender [2.47-2.48; 3.30]. It can also be demonstrated that possession only CPOs have far more in common with other paraphiliacs who exploit the Internet to indulge their proclivities including bestiality and vorarephilia that would be illegal off line, but do not pose a threat to society rather than contact offenders [3.11-3.15; 3.26; 3.30], irrespective of the size or content of their collection of child pornography [2.8; 3.23].

Unlike the US courts which maintained the integrity of the legal system and protected defendants' rights by: questioning the validity of the 'link' studies used by the DOJ to justify the proxy policy [1.25; 1.53]; adopting a case specific approach and questioning automatic enhancements for possession only CPOs

[1.49-1.52; 1.54-57]; recognizing that the justifications offered for mandatory and/or enhanced penalties and regulations failed meet the requirements for the retributive, utilitarian, or preventative models of justice [1.46.3], and were contrary to the concepts of a defendant's right to due process and the court's 'neutral endeavor' when sentencing those guilty of a crime [1.9]; the UK judicial system displays a lack of interest in the implications of the Government's failure to justify its policies and the empirical evidence that undermine them [4.17].

This failure has led to criticism by UK legal scholars [4.7-4.8; 4.16], who share US legal scholars' fears that the use of generic labels [1.46.7; 4.6] is being used to mask the lack of evidence regarding harm posed by possession only CPOs [1.46.2], especially when contact offending by strangers is less than 10% of the total of contact offending against children [1.46.5; 2.13].

In particular, UK scholars are concerned that the criminalization of virtual pornography, declared unconstitutional in the USA, may be in violation of ECHR Art 8 and 10; and the government would be unable to withstand a challenge [4.7-4.8; 4.16]. This is more than likely for two reasons. Despite the frequent recourse to the claims that consumption encourages contact offending in some offenders and/or the material is used to groom children; the government has offered no empirical evidence for either claim. The empirical evidence presented in *R v Sharpe* will no longer suffice as later research has revealed its errors [4.13-2.14]; and the Government would have a difficulty justifying its policy, especially against virtual pornography, as the empirical evidence now not only undermines all the justifications that have been offered, it clearly suggests that virtual pornography would provide a substitute for contact offending [2.10; 2.27; 2.44; 4.14; 4.16].

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Issue 1: The alleged link between possession of child pornography and contact offending.

Introduction

1.1. It is widely believed that possession of child pornography, pedophilia, and contact offending are synonymous; and this belief is common amongst policy makers and law enforcement agencies as well as the public. It has led policy makers and law enforcement agencies to treat possession of child pornography as a proxy for undetected contact offences against children, and to criminalize possession of any and every type of image that shows any form of sexual behavior involving minors including nude images perceived to be lewd and lascivious

1.2. The proxy criminalization policy can be official as it is in the USA or 'informative' as it is in the EU including the UK. What ever form it takes, the proxy policy has been justified by citing studies that allegedly offer evidence that those possessing child pornography are undetected contact offenders.

1.3. A review of the content of the studies and the context in which they have been cited demonstrates that those citing the studies are either unaware of their contents or have deliberately misrepresented the contents in an attempt to conform to legal imperatives that otherwise could not be met.

1.4. This is merely more obvious in the USA than in the UK because the proxy policy is official and as a consequence been publicly criticized by defense attorneys, legal scholars and in the courts; however, although the US and UK legal systems differ, the criticisms that have been raised regarding the proxy policy are also relevant to the UK as they concern basic rights common to all legal systems based on English common law, which is why they have also informed the two authoritative commentaries on UK legal practice [see Gillespie, 2011; Ost, 2009]

The US legal context

1.5. The US laws regarding the possession of child pornography are similar to the UK. Although the majority of CPOs are charged under state jurisdictions, the federal government sets national policy and practice through the Department of Justice (DOJ), and as the crime often crosses state lines also holds jurisdiction.

1.6 The commercial production of obscene visual images involving minors, then defined as persons under the age of sixteen was criminalized by the Protection of Children Against Sexual Exploitation Act of 1977, on which the UK's law was based. The use of computers to create images was criminalized by the Child Pornography Prevention Act 1996, although the clause outlawing the creation of 'virtual' images declared unconstitutional by *Ashcroft v Free Speech Coalition* [2002] which ruled that as the images recorded no crime and did not create

victims, images were protected speech [at 250]. The obscenity and commercial requirements were removed by the Child Protection Act of 1984 which also raised the age of a minor to eighteen years, but maintained the necessity of an indication of sexually explicit conduct in an image, such as the lascivious exhibition of the genitals. The Child Protection and Obscenity Enforcement Act of 1988 extended the law to cover the use of a computer to transport, distribute, or receive material; and mere possession was criminalized by the Crime Control Act 1990. The PROTECT Our Children Act 2008, including the Providing Resources, Officers, and Technology to Eradicate Cyber Threats to Our Children Act proscribed the production and distribution of a pornographic image that was adapted (morphed) from a picture of an identifiable minor. Other relevant laws will be addressed on a needs basis.

1.7. The legal definition of sexually explicit conduct does not require that an image depict a child engaging in sexual activity, a picture of a naked child will constitute illegal material if it is sufficiently sexually suggestive [see *The Citizen's Guide*]; on the other hand illustrations appearing in learned journals are unlikely to be prosecuted. Like the material covered by *Ashcroft*, much depends upon the totality of the circumstances. In short, the law is similar to the UK, save the law is much clearer on self produced material and academic or political publications that address the issues of pedophilia and child pornography and may contain illustrative material that does not contravene the definitions of sexually suggestive. These protections do not extend to downloading material [see *People v. Kent*, 2012]

Sentences for child pornography

1.8. The punishments for possession of child pornography, like those on production and distribution are very strict. They are based on the US Sentencing Guidelines (USSGs) overseen by the US Sentencing Commission (USSC). The USSC is an independent body, part of the judicial branch of government, with a remit of adjusting sentencing in line with research and experience. USSC amendments to the guidelines take force after 6 months if Congress does not change or reject them; and the USSC has to enact any directives set by Congress, the legislative branch of government. For example: in 1995, the Sex Crimes Against Children Prevention Act directed the USSC to penalize those using computers, with the intention of preventing commercial web sites and Bulletin Boards disseminating material; and in 2000 the USSC recommended extending trafficking material to include any transfer of an image to penalize anyone using an image to groom a minor.

1.9. The system worked well until 2003 when Congress passed a last minute amendment to the Protect Act initiated by the executive branch which established mandatory sentences for all child pornography offenses despite being opposed by the judicial branch—the USSC, the Chairman of the House Committee on the Judiciary, the Judicial Conference of the United States, the American Bar Association, and individual judges—which had not been consulted, and the

amendment threatened to undermine the concept of 'neutral endeavor,' whereby courts determine the appropriate sentences based on the circumstances of the crime and the particular defendant. Due to the nature of computers, the amendment had the effect, amongst others, of making possession akin to producing and trafficking, the first time offender akin to a persistent offender [see Stabenow, 2009 at 20-29], and sentences akin to civil commitment. Before the courts had adjusted to the new requirements, the Adam Walsh Child Protection and Safety Act, 2006 which established three tiers of offender based on risk and made registration of offenders public also imposed mandatory bail restrictions on CPOs [see Hynes, 2013; Thompson & Greek, 2010]. This led to a dispute between the executive branch in the form of the DOJ and the judicial branch regarding basic principles of law and the viability of the empirical evidence used to justify the mandatory sentences and other regulations.

Making possession a proxy for child sexual assault.

1.10. The 2003 amendment led to a dramatic increase in penalties for possession of child pornography. They increased from an average mean sentence of 21 months in 1997 to 118 months in 2010, which was higher than the mean sentence for contact offenses against minors at 108.6 months [see US Sentencing Commission, 2011]. This can be accredited to prosecutors asking for a higher than minimum sentence for those found in possession on the grounds that they were undetected contact offenders; the same argument used to justify demanding possession offenders be detained while awaiting trial, sentencing hearings, and appeals.

1.11. The prosecutors were following the proxy policy of the DOJ. Although not made official until 2010, when it publicly announced that CPOs would become the main focus of its national strategy to combat child sexual assault, the DOJ had pursued the policy for over a decade. The FBI, the DOJ's primary investigative agency, had been concentrating on CPOs through its Innocent Images National Initiative since 1995; and the Internet Crimes Against Children task force, established three years later in 1998 (and now includes over 3500 federal, state and local law enforcement agencies) followed suit. Despite its title, Operation Predator, run by the Immigration and Customs Enforcement agency also focuses on possession rather than solicitation offences. As a result, CPOs amounted to 75% of all child sex crime cases, and 75% of CPO cases consisted of non production charges, by 2007 [Hamilton, 2011 at 1689-1692].

1.12. The DOJ, and prosecutors demanding maximum mandatory sentences and bail regulations in the courts, justified the proxy policy on the grounds that targeting CPOs would reduce contact offending as it had been proven that CPOs were pedophiles and undetected contact offenders.

The legal imperatives behind the proxy policy and the link studies

1.13. The key difference between the Republican and other democratic systems of governance concerns the way the checks and balances are designed to protect the individual from Government intrusion by testing each law against the Bill of Rights irrespective of the will of the majority exercised through legislation. The courts, the judicial branch, is specifically charged with ensuring that the laws created by Congress, the legislative branch and implemented by the DOJ, part of the executive branch, do not infringe on the rights of individuals unless it can be shown that there is an overriding interest and/or the behavior it seeks to restrict would cause public harm. Although specific courts in countries that have adopted the UNDHR or the ECHR are now charged with performing the same task, every court in the USA considers the issue either at the federal level or at state level by reference to the state's constitution and Bill of Rights that are sometimes even more protective of an individual's rights than the amendments to the US Constitution. The proxy policy based on the 'link' studies was a means to circumvent those rights, by arguing the threat to public harm by CPOs was proven.

1.14. The Fourth Amendment which prohibits unreasonable searches and seizures requires that magistrates and judges must ensure that the information and belief contained in affidavits supporting an application for a warrant is sufficiently reliable to constitute probable cause; and this created an imperative to identify a connection between allegations of contact offending and the possession of child pornography when seeking warrants to seize and search the computer of anyone accused of a contact offense [Weissler, 2013 at 1504-1505]

1.15. The Bail Reform Act of 1984 reinforced the due process clause of the Fifth Amendment and the excessive bail clause of Eighth Amendment which gives defendants the right to bail when charged with federal offenses, or awaiting appeal, or a sentencing hearing, unless there are exceptional circumstances, primarily endangering the safety of another person or the community [see McBath, 2010; Yung, 2010]. The introduction of mandatory pretrial confinement or extremely restrictive bail conditions for those charged with possession offences undermined a defendant's right to bail as prosecutors moved for incapacitation or maximum bail conditions on the grounds that possession offenders posed a threat to children as they were undetected contact offenders [see Dearinger, 2011].

1.16. Given the US judicial approach to the use of uncharged crimes, be it at trial or during sentence hearings, it was inevitable that demands made by prosecutors that the court impose the statutory maximum mandatory sentence for possession offenders as they were undetected contact offenders would be scrutinized by the courts.

1.17. The disputes over search warrants, bail conditions, and sentencing ensured

that the four studies being cited as proof that those who possessed child pornography were undetected contact offenders became subject to increasing scrutiny by defense attorneys, legal scholars, and the courts; and became a major issue between 2008-2011 in the courts [e.g. *United States v. King*, 2010], and led to the USSC holding public hearings about the evidence in 2010.

The viability of the 'link' studies

1.18. The justifications for the 2003 and 2006 Acts, imposing mandatory sentences and bail conditions for CPOs, and the DOJ's focus on detecting CPOs as a proxy for prosecuting contact offenders relied on four research studies, all of which had serious flaws.

The USSC sample

1.19. The Sex Crimes Against Children Prevention Act [1995] required the USSC to present a report and make recommendations to Congress. The report, covering 112 CPOs, stressed that a significant proportion had a history of contact and/or production offences, and given the risk that these offenders posed recommended increasing sentencing for some CPOs, especially those involved in production; and the report continues to be cited as evidence of the threat CPOs pose to children, although the contents suggests otherwise.

1.20. The sample was drawn from Federal prosecutions between 1994-5, and represented the most egregious offenders, including those who had assaulted children in the production of material and/or transported children across state lines for the purpose of prostitution, as the federal authorizes rarely prosecuted possession only cases at the time [Stabenow 2009 at 12-13]. Consequently, as the report covered mixed offenders who had been engaged in making child pornography and other contact offenses; it did not demonstrate that possession only CPOs posed a threat to children or were undetected contact offenders.

The Butner Federal Prison Studies

1.21. The Butner studies were the most widely cited source of the evidence of a direct correlation between CPOs and child sexual assault, having reported that the majority of CPOs in the prison's residential sex offender program had admitted that they had committed one or more contact offenses against children that were unknown to the authorities [Hernandez, 2000; Bourke & Hernandez, 2009]

1.22. The initial report, presented at a conference in 2000, was never published, but was widely circulated amongst treatment specialists, policy makers, and law enforcement personnel. It explained how the sample were assigned a group based on their offense: (a) possession offences or traveling to meet a minor for sex; (b) contact offenders, involving either a child or an adult; and (c) nonsexual offenders [Hernandez, 2000 at 3]. Group 'a' consisted of 62 offenders, 26 who were known

to have committed 55 contact sex offenses before entering the program and 36 who were not known to have committed a contact offense. It was reported that during treatment, 21 of the 36 subjects not known to have committed an offense admitted to "at least one" contact victim [Hernandez, 2000 at 5]. When the number of their victims was added to the further admissions made by the 26 known offenders, the number of contact offenses in group 'a' rose to 1434, an average of 30.5 victims per offender [Hernandez, 2000 at 5]. The author argued that this provided evidence that 67% of internet child pornography offenders were also contact offenders, and that they were as "predatory" and potentially "dangerous" as extra-familial contact offenders [Hernandez, 2000 at 6].

1.23. The 2009 study consisted of a review of 155 CPOs from the same treatment sample, but did not provide any details of the type of offenses. The reported results were similar to the first study. Whereas only 26% of the sample were known to be contact offenders when they entered the program, that number reached 85% following admissions of unknown crimes; an average of 13.56 victims per offender. The authors argued that these results demonstrated that CPOs were not merely consuming material; they *were* contact offenders [Bourke & Hernandez, 2009 at 186-190].

The influence of the Butner studies

1.24. The studies were cited uncritically at law enforcement conferences and in research journals as providing evidence that CPOs: had pathological paraphilic tendencies [Aiken and Berry, 2011]; would molest children whenever the opportunity arose [Marsh, 2011]; and posed a direct risk to children [Winder & Gough, 2010 at 139]. The results were also referenced in congressional debates and hearings by policy makers and law enforcement personnel to justify further measures and/or existing policies. For example, Senator Hatch cited the 2000 study to argue that those possessing material were sexual predators and deserved tougher penalties [149 Cong. Rec. 5126 Apr. 10, 2003]. The FBI and Marshalls Service cited the studies at hearings before the Subcommittee on Crime, Terrorism and Homeland Security in 2002 and 2011 respectively [cited Hamilton, 2012, at 1690 and 1700]. The DOJ alluded to them when justifying placing the core focus on detecting CPOs rather than contact offenders in its 2010 official declaration [DOJ, 2010 at 19].

1.25. Although some courts continued to rely on the generalized belief that child pornography was indicative of pedophilia and that all pedophiles collected child pornography to groom children [see *United States v. Falso*, 2008 at 122 n18], and/or the belief that child pornography may induce viewers to commit sex crimes on children [see *United States v Brand* 2006 at 198]; the studies were frequently cited in pleadings before other courts. Prosecutors used them to argue that: those found guilty of possession should receive the maximum sentence as they were 'statistically' more likely than not to have committed a contact offence [e.g. *United States v. Camiscione* 2010 at 829]; courts should not accept

defendant's claims that they did not have a sexual interest in children and would not pose a danger to the community [e.g. *United States v Apodaca*, 2011 at 1087]. The studies were also used to justify pretrial detention of defendants. For example, in *United States v Blankenship* [2008], the local Probation Office argued that as the studies proved a high percentage of CPOs were contact offenders, the court should not conclude that the defendant's lack of a history of offenses indicated that he posed no danger to children [at 2-3]. Likewise, an FBI agent cited the 2000 study to boost his expert testimony that the defendant would be a high risk if released on bail in *United States v. Thomas* [2006 at 24, 33]. The studies were also considered by judges when making their decisions [e.g. *United States v. Campbell*, 2010 at 965-8]; and they has the desired effect. The judge in *United States v Cunningham* expressed the belief that the 2009 study "challenges the often-repeated assertion that child pornography offenders are only involved with pictures" and used it to justify imposing a guideline sentence [2010 at 859].

1.26. By concentrating on the reported admissions to contact offending, those citing the studies appeared oblivious to their inherent shortcomings.

The inherent problems with the Butner studies

1.27. The presentation of the data obscured more than it revealed about its reliability:

1.27.1. Placing possession only CPOs with those travelling to engage in a contact offense with a minor they met through the Internet in the same group would prevent any assessment of the risk posed by possession only offenders.

1.27.2. Averaging the admissions per offender rather than stating the mean, masked the potential effects of any 'outliers' whose large number of admissions would inflate the average, and as the admissions ranged from 0 to 202 contact offenses this had clearly occurred [Hernandez, 2000 at 5]. The same problem was evident in the second study where the standard deviation from the average 13.56 contact offenses was 30.11 which meant that individual admission could have been 0 or 44 or more [Bourke & Hernandez, 2009 at 187]. As averaging is not acceptable for this very reason; doing so not only undermined the validity of the data and the conclusions based upon it; it raised the possibility that the report was deliberately misleading.

1.27.3. The failure to differentiate between the number of admissions concerning child, juvenile, and adult contact offenses made it impossible to infer that the offenders posed a specific threat to children.

1.27.4. As the data regarding the contact offences was limited to the gender and age of the victim; it was impossible to place the contact offences in their context, although there were two good reasons to do so. First, a paper by Dr. Hernandez presented at the G8 Global Symposium revealed that in a subset (n=42) of the

2009 sample, the *median* age for the onset of contact sexual offenses was sixteen years of age, while the *median* age of first child pornography consumption was 24 [Hernandez, 2009]; and that suggests an unknown number of the admitted contact offenses could have occurred when a significant number of CPOs were minors and the contact may not have been an offense at the time it occurred, making the inference that the admissions all related to adult-on-child sexual offenses misleading. Second, the operationalization (the definitions) of the contact offenses changed between the studies. The original was reported as "any type of sexual assault or molestation of an adult or child" [Hernandez, 2000 at 2], whereas the second referenced "any fondling of the genitals or breasts over clothing, as well as skin-to-skin contact" [Bourke & Hernandez, 2009 at 186]; a very different definition. As a result, the offenses could range from the least to the most serious forms of offense, and those in the second could have included nonviolent statutory rape with a consenting partner and consensual touching with a legal partner. This possibility was reinforced by several treatment counselors who complained that the studies' definition (singular) was so elastic that it covered incidents such as a college freshman dating a high school junior, which the average person may not consider an offense [see Wollert et al., 2011].

1.27.5. The psychosexual history questionnaire used at Butner raised two issues. Without inter-coder reliability statistics it is impossible to ascertain the quality of the coding of answers for the contact-offenses [see Fulda, 2005 at 70]; and as Hamilton observed, the implausibility of every participant being able to accurately report the precise age of every victim in their offending history raises a question about the viability of the self reports [Hamilton, 2012 at 1710]

1.27.6. There are several reasons to believe that the methodology employed at Butner exacerbated the standard problem with 'selection effects.' Studies based on samples of convicted offenders have to be used with caution as they do not necessarily reflect the behavior of non offenders [see Malamuth & Huppin, 2007]; and reports from sex offender treatment programs increase the need for caution. The advantages residents can gain from participating in treatment programs, from prison relocation to favorable parole decisions, can influence their behavior; and it is not unusual for residents to make admissions and statements that they perceive will please the clinicians and lead them to believe that the residents who admit to unknown offences are more honest, treat them accordingly, and furnish positive reports [see & Webster, 2011 at 167]. Likewise, program rules often carry a strong suggestion that offenders have an incentive to admit to sexual contacts even if untrue, and/or that staff expect all treatment participants to make new disclosures on an ongoing basis [Seto, 2009]. And the Butner program appears to have been particularly prone to these potential problems. The program consisted of eighteen months of cognitive-behavioral programming, with fifteen hours of group therapy a week [Bourke & Hernandez, 2009 at 185]; and evidence emerged in a court case that fear of expulsion may have contributed to over reporting. Dr. Rogers attested that the program was highly coercive. Unless the offenders continued to admit to further sexual crimes, whether or not they actually

committed those crimes, they were discharged from the program, and that explained why the study did not report on the 23% (46/201) of residents who withdrew or were expelled from the program; which was why the study's whole approach was rejected by the treatment and scientific community. He also testified that that the subjects were not randomly selected from those who only possessed child pornography, making it representative of *that* group, and that was why the data and statistics could not support the conclusions drawn [*United States v. Johnson*, 2008 at 1006607]. It has also been suggested that fear of possible expulsion was enhanced by the Federal Bureau of Prisons' memorandum on the program which warned that anyone expelled from the program faced "transfer and other consequences," forcing residents to suffer the deliberate use of peer pressure in the group therapy sessions to secure admissions in front of Dr. Hernandez who was on record as believing that any Internet offender who refused to admit to contact offenses were either lying or did not have access to potential victims [Hamilton, 2012 at 1708].

1.27.7. The claim made by former residents in the press that the program's emphasis on admissions led them to "remember" crimes that never happened [Aviv, 2013 at 43], has been confirmed by Wollert who reported that several former Butner patients told him that they were expected to disclose new offenses on an ongoing basis as part of their treatment participation. The fact that one claimed that "when I got into the SOTP program I was instructed to count all incidents of sexual contact regardless of my age or the age of my 'victim,'" reinforces the possibility that that many of the 'offenses' really referred to early sexual experiences. Wollert was also concerned that Butner patients were expected to pass the full disclosure polygraph [Bourke and Hernandez 2009 at 186], as it is known that one method to ensure one passes is "overestimating the number of possible victims" [Wollert et al. 2011, s2-13-2-14, citing Abrams, 1991, at 259].

1.27.8. Given these reports, the admissions appear to have been artifacts of the 'demand characteristics' of the methodology used, whereby residents quickly learnt what was required to be considered a treatment success. Having been told that they did not have to "reveal any identifying information listing their victims" [Bourke & Hernandez, 2009 at 186], the residents would also know that their claims would never be questioned. Although the authors justified doing so on the grounds that anonymity ensured more honesty as the lack of details protected the residents from prosecution [Bourke & Hernandez, 2009 at 186]; the lack of verification raises an obvious problem relying on the rate of admissions to contact offenses in an incentive driven atmosphere.

1.27.9. The above weaknesses delayed the publication process of the 2009 study for years; and the controversy was widely covered in the media. An official from the Federal Bureau of Prisons was reported in the *NY Times* as having objected to publication unless it included comments about the limited ability to generalize from the specific sample, as the results might be misinterpreted [see Sher and

Carey, 2007 at A20]; and the authors' response, published in the *Monitor*, should have raised further questions given the authors argued: "we felt it would have been scientifically incorrect to say the findings are not generalizable; we simply don't know the degree to which the results are generalizable to other child pornography offenders" [DeAngelis, 2009 at 56].

1.27.10. Even if one took the self reports at face value; they would still not support the authors' claim that they demonstrate CPOs harbor pervasive and enduring pedophilic interests that cause them to access child pornography on the Internet, that this access reinforces the paraphilic lifestyle of CPOs, and leads to behavioral disinhibition that made them likely to commit more child molestations [Bourke & Hernandez, 2009 at 189]. On the contrary, it would appear that the admissions were deliberately sought to offer evidence for those long standing beliefs.

1.28. In short, the methodological problems, the inclusion of different offender types in the same sample, the paucity of data regarding the contact offenses, the statistical calculations, and the situational issues at Butner made the two reports completely unreliable as empirical evidence; and that may explain why the DOJ did not directly cite them when claiming that there were "A number of studies indicate a strong correlation between child pornography offenses and contact sex offenses against children [DOJ, 2010 at 19].

The Canadian Phallometric tests

1.29. The third source cited as offering empirical support for a link between child pornography consumption and contact offending is the Seto, Cantor, and Blanchard study [2006], although its authors only claimed to have demonstrated that child pornography offenses were a valid diagnostic indicator of pedophilia. The sample consisted of those referred by parole/probation officers, lawyers, or correctional authorities for evaluation at the Clinic for Sexual Addictions in Toronto, Canada. The sample's sexual offense histories, including contact offenses and child pornography charges, both known and self-reported, were used to create three subsamples: child pornography offenders (n=100); child contact offenders, under 14 years (n=178); adult-victim offenders, 17 years or older (n=215); and a control group (n=191) was created from private patients [Seto et al, 2006 at 611].

1.30. Phallometric tests were used to provide data on sexual preferences as the groups were exposed to slides with audio tape narratives depicting neutral, non sexual activity, and several categories of sexualized stories involving prepubescent children, pubescent children, and adults; and the results used to assign the participants a pedophilic 'index' score: the difference between their sexual response to stimuli featuring adults and stimuli featuring children.

1.31. The reported results of the number in each sample reaching the threshold of

the index score were: child pornography offenders, 61%; child-victim, 35%; adult-victim, 13%; non offenders, 22%. As a review of the average pedophilic 'indices'óóhow much the penile blood volume changed with child sex and then with adult stimulióówithin the groups also revealed that the child-pornography group's response was significantly higher; the authors concluded that a history of child pornography offenses was a salient predictor of pedophilic interest [Seto et al, 2006 at 613]

1.32. Although the study merely demonstrated that CPOs had the highest pedophile index and indices scores, the report's reception was similar to the Butner studies. It was seen as: documenting the link between pornographic images and pedophilic *behavior* [Dillon, 2008]; proof that child pornography and contact offending were linked [Davidson 2011, at 9]; and was cited by a speaker at a national educational conference for judges as proving that child pornography possession was a ðmarkerö for prior contact offending and pedophilia [see Hamilton, 2012 fn 183 at 1712]. However, those doing so were not only making the assumption that pedophiles are *de facto* contact offenders; they had not evaluated the data.

1.33. In this case, it would appear that the prestige of the researchers masked some elementary errors in presentation, methodology, and in the analysis.

1.33.1. As 43% of the CPO sample had also been charged with a sexual offense involving a child, the results could not support any proposition about possession only offenders as the authors admitted [Seto et al, 2006 at 614].

1.33.2. Conflating slides and narratives, without conducting separate tests featuring slides and narratives separately and comparing all three results made it impossible to discern what aspect of the stimuli encouraged the recorded arousal. Although the narratives could explain the higher scores of the CPOs, narratives present their own analytical problems on more than one dimension. For example, those with sadistic and masochistic proclivities could be aroused by the *theme* of forced sex acts irrespective of the age depicted, and for completely different reasons, as they may 'identify' with different participants. However, in this case, it would appear that the relatively high pedophilia index scores exhibited by all the groups were related to the slides [see 1.33.7].

1.33.3. As I pointed out in my critique of heterosexual pornography 'effect' studies; it is impossible to identify the reason for a subject's reaction to any stimuli unless they have been psychometrically tested first, and the results of the test used in the analysis of the effect indices [Thompson 1994a, at 140-150]

1.33.4. At only 61%, the results did not establish a link between possession only CPOs and pedophilia, as the percentage of mixed offenders could explain the difference between the CPOs scores and the control group. At only 35%, the index level in the child-victim group undermined any connection between

pedophilia *per se* and contact offending. The authors' explanation, that some non pedophiles victimize 'children' below the legal age of consent [Seto et al, 2006 at 613] was an understatement that has been masked outside the research community by the generic label 'pedophile' to describe molesters [see Gillespie, at 13]. Indeed, the offender group's relative lack of arousal suggests that pedophilia is not a 'marker' for contact offences.

1.33.5. The results for the CPOs may also reflect another reason, not considered by the researchers. Males who have spent long periods accessing child pornography images and masturbating to them because it is visually stimulating may demonstrate a greater effect than others who use private fantasies or actual children as their focus of arousal [see Quayle, 2008 at 78].

1.33.6. Hamilton [2012] and other critics have drawn attention to the operationalisation (definition) of pedophilia used by the researchers, which was not entirely consistent with the definition of pedophilia in the DSM-IV-TR [2000]. However, I would suggest that this is less important than the authors' failure to clearly demarcate between prepubescent and pubescent minors in the images involving 'children up to and including 15 years of age', reflecting Seto's lack of recognition that hebephilia is a separate paraphilia. Subsequent studies have demonstrated that it is possible to separate subjects into separate groups with different responses to pre and post pubescent imagery [see Blanchard et al., 2009] and that there are differences in the risk-relevant personal attributes between pedophiles and hebephiles [Clegg & Fremouw, 2009 at 118].

1.33.7. I would suggest that the fact that every group demonstrated a response to the stimuli involving 'children,' should have drawn attention to the neglected finding that the maximum phallometric responses to 'children' across all the groups occurred with the slides labeled 'juvenile' by the researchers [Seto et al, 2006 at 613], as that raises two questions about the conclusions drawn from the study. Although it is impossible to determine without seeing the slides that were used what caused that maximum effect, it is also impossible to discount the possibility that there may have been as many hebephiles as pedophiles in the CPO group, and/or that the exhibition of images of attractive pubescent girls in their mid teen secured the reactions they did across all groups as it is the age at which females attract the attention of males irrespective of legal classification as a result of an evolutionarily adaptive trait. Historically and cross-culturally, males have been sexually attracted to pubescent and post-pubescent youth for their health and beauty as Seto is well aware [2008 at 13]. This need not be considered abnormal either, given that it represents the peak of reproductive fertility [Franklin, 2010 at 755; Franklin 2009], and reflects the popularity of numerous pin up magazines of the *Barely Legal* ilk in the pre-Internet age [Jenkins, 2001 at 27-8]. Some of those conducting research appear to forget that as sexual fantasies and preferences tend to be shaped by experiences and desires formed in adolescence, the continuing arousal at the sight of an attractive mid teens will remain with 'normal' males throughout their lifetime, and does not reflect an 'abnormal or 'unhealthy' interest.

1.33.8. If this natural tendency in males is labeled pedophilia, it is inevitable that groups exposed to such images will record arousal in large numbers. This is why it is vital to check the methods and definitions used in the group of studies that reported large numbers of males have sexual fantasies about 'children' [see Ahlers et al., 2011; Nagayama Hall, et al., 1995]; which exhibit other problems, as the definitions and scores employed by Briere and Runtz demonstrate [1989]. Their survey of 193 male undergraduate students regarding 'sexual interest' in children was based on responses to a statement "Little children sometimes attract me sexually." No matter what score on a seven point scale was recorded apart from 'completely false' it was added in a running total to conclude that "21% of subjects reported sexual attraction to some small children," which is not the same thing as the original question. Moreover, no attempt was made to discover what it was that led to the attraction in the question, although it could have reflected anything from the child's hairstyle to another association based on the clothing being worn. So, it was no surprise to discover that a much lower number (5%) of the sample admitted to having masturbated to fantasies of having sex with small children, and this indication of a real sexual interest was associated with negative early sexual experiences, self-reported likelihood of raping a woman, and sexual conflicts, amongst other negative traits [at 68-69].

1.33.9 The use of phallometry in diagnosing paraphilia is also controversial. There is no standardized procedure for conducting the test, or consensus concerning its validity or reliability [see Howitt, 1995 at 110-123]. Other studies have found no correlation between phallometric tests and the DSM-based diagnosis for pedophilia [see Wilson, 2011 at 270; Kingston 2007; Odeshoo, 2004 at 10-12]; and the admissibility of penile plethysmography results has been challenged in the courts [e.g. *United States v Weber*, 2006 at 564-5]

1.34. In short, far from supporting a link between CPOs and contact offending; the study suggested the opposite. As almost 40% of child pornography consumers did not reach the 'index' and less than 40% of contact offenders did; the central premise held by policy makers, law enforcement agencies, prosecutors and the public alike regarding a link between child pornography consumption, pedophilia, and contact offences against children is mistaken. As I will demonstrate in the next section, these were not counter intuitive results, and could have been predicted by others working in this field.

The N-JOV Study

1.35. The fourth study cited as offering evidence of the link between possession of child pornography and contact offending, and the one named in the DOJ's justification for making CPOs the national priority [DOJ, 2010, at 19], is commonly referred to as the N-JOV study; short for the National Juvenile Online Victimization Study [Wolank et al., 2005]. Consisting of interviews with 429 investigators of internet sex crimes, it reported that although 87% of the CPOs had no known criminal history prior to their case, 55% of the cases involved

mixed offenders who had sexually victimized children or had attempted to do so [Wolank et al., 2005 at 15].

1.36. However, as 55% of the cases followed from an allegation regarding a contact offence, the percentage of mixed offenders is not that remarkable; and it is more pertinent to note that despite extensive inquiries, only 14% of the cases that began as a child pornography investigation uncovered a content offense [Wolank et al., 2005 at 17]. In other words, only 1 in 6 of the initial possession only CPOs were proven to be dual offenders, and that figure also includes adolescents who had produced images of themselves and were being treated as child pornography makers and distributors [see Wolak et al. 2011 at 189]

Summary of link study review

1.37. Despite being promoted as providing empirical support for the link between possession of child pornography, pedophilia, and contact offending, none of the four 'link' studies demonstrated that possession only CPOs were undetected contact offenders, that that possession only CPOs were pedophiles, or that consumption of child pornography encourages those without a preexisting disposition to become a contact offender. The review also reinforces two observations I have made before concerning the promotion of research papers by public policy makers, law enforcement, the public, and even researchers [Thompson, 2004a]. First, as the presentation of conclusions in the abstract can be highly misleading, no conclusion should be accepted without checking the data. Second, in order to assess the result and meaning of any study it has to be considered in relation to other critically assessed reports. The obvious need to do so was demonstrated by the N-JOV report, where one had to read another report to discover the status of some of the offenders.

Promoting the 'link': the G8 summit

1.38. Despite the 'link' studies' lack of reliability or relevance, the belief that there was now empirical proof that possession only CPOs were undetected contact offenders who posed a risk to children became the received wisdom and was spread to other countries by the 2009 G8 Ministers' Declaration: The Risk to Children Posed by Child Pornography Offenders, G8 Justice and Home Affairs Ministers [Rome 20th May, 2009].

1.39. When the Declaration referred to "what we learned about this growing threat to children," "taking steps to update and improve" the law because of the "new concerns and challenges" the internet posed, it was alluding to the 'link' studies, evidence by its further reference to "an important step to address this gap":

Last month, at the University of North Carolina at Chapel Hill, in the United States, experts from around the world met at a G8 sponsored symposium *to discuss and assess the risk to children posed by child pornography offenders*. Psychologists, medical doctors, criminologists, professors, sociologists, and computer scientists, among others,

from G8 and non G8 countries met to share the findings from their research and develop consensus on the risks to children associated with child pornography.

The work of this body will be published and, we hope, disseminated worldwide in due course. Today we express our appreciation to all the participating experts and take note of their findings, which are included in the final report of the symposium attached to this Declaration [my emphasis -ed.].

However, the findings of the symposium were never published, the papers presented there are no longer readily accessible on the University's web site, and there is a disagreement regarding what emerged.

1.40. The DOJ's version was evident in it's report to Congress:

Among the most notable points of consensus developed include a finding that *there is sufficient evidence of a relationship between possession of child pornography and the commission of contact offenses against children to make it a cause of acute concern* [DOJ, 2010 at 19];

whereas a report of the session at which the 'link' studies were discussed suggests the opposite:

Participants noted that pedophilia is not always a characteristic of contact offenders or child pornography offenders, and noted that there is a possibility that child related fantasies might be statistically more common than is appreciated. While acknowledging a relationship, there was a feeling of uncertainty among participants about which individuals who commit child pornography offenses will go on to commit a contact offense against a child [Oosterbann & Ibrahim, 2009 at 19]

1.41. That was an understatement. The four 'link' studies' short-comings were not only raised at Chapel Hill, they were conceded by the studies' authors. One of the authors of the Butner studies cautioned against using them to promote the claim that there was a link between the possession of child pornography and contact offending:

Some individuals have misused the results to fuel the argument that the majority of [CPOs] are indeed contact sexual offenders and, therefore, dangerous predators. This simply is not supported by the scientific evidence. The incidence of contact sexual crimes among [CPOs], as we reported in our studies, is important and worthy of considerable empirical examination. However, it is not a conclusive finding that can be generalized to all [CPOs]. Notwithstanding, some individuals in law enforcement are tempted to rely on a biased interpretation of our study [that CPOs are child molesters] [Hernandez 2009 at 465]

More importantly, it was also admitted that the study did not address the questions of how, and under what circumstances, exposure to Internet child pornography affects individuals [Hernandez, 2009 at 10]. Seto's paper argued that CPOs who were pedophiles were relatively unlikely to have sexual contact with a child, especially if they had no history of doing so before [Seto, 2009], and he subsequently argued that an intent to engage in a contact offense is not the only explanation for possessing child pornography [see Seto et al., 2010 at 170], and that there was a need to differentiate child pornography consumers from mixed

offenders in terms of the criminogenic risk of contact offending [see Seto et al., 2011].

1.42. A paper by Hanson and Babchishin [2009], which pointed out half of the possession offenders at Butner had not admitted to a single contact offence, also argued that there had to be a change in direction, and their subsequent collaboration with Seto [Seto, et. al 2011] has proven influential.

The influence of the Butner studies in the UK

1.43. Although the UK research community had always been more skeptical of a direct link between CPOs, pedophilia, and contact offending than the US research community, and had already moved in other directions; UK policy makers had already begun to treat possession as a proxy for contact offending citing research that did not even exist [see 4.6]; and the *Guardian* newspaper had published a feature on the second Butner report, which was in circulation before its publication, and informed readers the report "shatters the myth" that CPOs were merely viewing images and had established that that they were contact offenders:

In an attempt to gain some insight, psychologists conducted a study two years ago at the Federal Correctional Institution in America. Michael L Bourke and Andres E Hernandez compared two groups of men taking part in a voluntary treatment programme for sex offenders at a medium security prison. All 155 had been sentenced for the possession, distribution or receipt of child-abuse images. Only 40 of these men were known to have committed any hands-on sexual offences previously, averaging 1.88 victims each. The remaining men claimed never to have committed any such offences: their activities, they said, had been restricted to the viewing of images.

But after participating in an 18-month intensive therapeutic programme, a very different picture emerged. It was a picture that not only belied the normal, law-abiding lives depicted by most of these men prior to their arrest, but one that also contrasted starkly with the frequent assertion that child pornography offenders are "only" involved with images.

Shock findings

After the treatment it emerged that the number of men admitting to hands-on sexual abuse increased from 40 to 131. Their average number of disclosed victims rose to 13.56 (8.7 for the 115 men who had previously denied any offences). Overall, the number of admitted contact sexual offences increases by 2,369%.

Far from being innocent or sexually "curious" bystanders whose interest was reserved to internet images, the vast majority of these men emerged as hands on offenders with longstanding sexual interest. Not only were they significantly likely to have sexually abused more than one child, they were also likely to have experimented with both genders, and a variety of age groups [Ibbotson, 2008]

As the author was a professional musician and 'freelance writer' and therefore in no position to assess the validity of the study, the report was reckless and exemplified confirmation bias the reports' had initially enjoyed. However, by the time the same study was cited in an official EU report as *the* evidence of the threat posed by CPOs to children [Davidson, 2011 at 9], it had been rejected in the US courts.

The legal reaction to the Link studies.

1.44. After the Adam Walsh Act, defense attorneys, legal scholars, and judges began to question the viability of the proxy policy and the mandatory sentencing and regulation being applied to possession only offenders.

1.45. Troy Stabenow from the Federal Public Defender Office published a comprehensive review of the sentencing guidelines demonstrating that they were full of anomalies. An individual who swapped a single picture, opened a handful of video clips, and engaged in viewing and receiving child pornography for a few hours on one occasion, would receive a sentence of at least 210 months; whereas a man who had convinced a thirteen year-old girl on the internet to meet regularly for sex could receive a mandatory minimum of 37 months [Stabenow, 2009, at 26629]

1.46.1. Legal scholars raised numerous issues, which can be summarized by those made by Professor Hessick, who also demonstrated how Stabenow's analysis worked in practice. An Arizona defendant was sentenced to two hundred years imprisonment for the possession of 20 images of child pornography under that state's mandatory minimum sentence of ten years for each image, whereas a priest who molested an altar boy received twenty-two-months, and a man who kidnapped and sexually assaulted a fourteen-year-old girl received one year under the same guidelines [Hessick, 2011 at 862].

1.46.2. The justifications for using possession as a proxy for contact offending—possessing and viewing child pornography increases an individual's risk of committing child sex abuse, and/or possession is highly correlated with a history of contact offenses—were not supported by empirical evidence [Hessick, 2011 at 864].

1.46.3. The proxy policy which was a form of preventative punishment did not confirm to either the limiting principles of the retributive model or the empirically based utilitarian models of justice. The retributive model requires both harm and blameworthiness to justify preventive punishment to reduce the risk of harm to others, and is limited by how serious the harm to others is and how likely that harm is to occur. The harm must be serious and the probability of the harm must be relatively high to justify criminal sanctions; and has to ensure that those who never actually present a risk of the ultimate harm are not subject to sanctions. Preventative punishment on a utilitarian crime-control model also requires evidence that the preventative punishment would reduce contact offending by increasing sentences for those who possess child pornography [Hessick, 2011 at 873-874]. However, there was no empirical data proving that anyone in possession of child pornography had a high probability of committing a future contact offense, or that the increased sanctions for possession would decrease the number of individuals who engage in contact offenses. It had yet to be proven that

registration had any effect on the number of new contact offenses. Consequently, imposing maximum sentences on individuals because two studies averaged the total number of offenses across the sample group amounts to imposing civil commitment without due process [Hessick, 2011 at 882].

1.46.4. Unlike preventative punishment, which is common in the modern criminal justice systems, there are few other examples of proxy punishments, precisely because it subverts the basic principles of the rights of criminal defendants, including the presumption of innocence and proof beyond a reasonable doubt [Hessick, 2011 at 884].

1.46.5. The risk to children from a stranger viewing or collecting pictures or videos of children on a computer rather than from the children's own circle of family and acquaintances is relatively small. Strangers account for only 7% of all cases of child sex abuse compared to family members (34%) and acquaintances (59%) [Hessick, 2007 at 356657]. Over half (52.3%) of federal defendants convicted of producing child pornography in 2008 had their sentences increased because they were a parent, relative, or legal guardian of the minor depicted, or the minor was otherwise in the custody, care, or supervisory control of the defendant [Hessick, 2011 at 888].

1.46.6. The internet undermined the assumptions of the past that had provided the basis of previous decisions, such as *Osborne v. Ohio* [1990], which excluded private possession of lewd material from free speech protections [Hessick, 2011 at 901]. The government was using the proxy policy to effectively circumvent *Ashcroft* where the court rejected the arguments that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct and/or the images may be used to seduce children [Hessick, 2011 at 867].

1.46.7. Hessick was also concerned that that government was using the generic term 'child sexual exploitation,' and referring to those arrested for possession as predators or pedophiles, to encourage the public to believe that all offenders posed the same threat to children, that every offense was of the same magnitude, and mislead the public regarding law enforcement's success in combating contact offenses [Hessick, 2011 at 890-891].

The courts

1.47. The belief that CPOs were likely to be undetected contact offenders quickly found its way into the federal district courts, and eventually on to the higher Circuit courts which hear appeals from the lower courts. In 2010, the 8th Circuit ruled that as there was no distinction between possession and sexual contact offending, disparate treatment in terms of risk assessment could not be justified in *United States v Colbert* [at 578]; although it also endorsed a subsequent decision in the South Dakota district that the lack of a distinction did not automatically

create probable cause for a search warrant for child pornography when someone was accused of a contact offense [*US v Houston*, 2010 at 1062663]

1.48. However, the 8th circuit proved to be an exception. Other circuits were more sympathetic to defense objections to the mandatory bail conditions and sentences. The First and Second circuits restricted use of multiple counts of conviction for a defendant with a single collection [*US v Polouizzi*, 2010 at 394] and decided the guidelines were harsher than necessary [*US v. Stone*, 2009 at 97]

1.49. District courts adopted a case-specific approach to sentencing, and maintained a distinction between consumers and contact offenders [*US v Johnson*, 2008 at 1006-7], following rulings that sexual assault and child pornography were separate offenses and should be treated as such [*United States v Falso*, 2008; *United States v Hodson*, 2008 at 292], and a Supreme Court ruling that mandatory sentencing guidelines were 'guidelines' [*Gall v United States*, 2007 at 596698].

1.50. A growing number of judges also questioned the viability of the research being cited. *United States v Phinney* [2009 at 1045 n.10] dismissed the prosecutor's attempt to use the Butner studies on the grounds that courts should not assume that a defendant has or will commit additional crimes without a reliable basis; implying that the studies had failed to reach that standard. As early as 2008, the judge in *United States v Johnson*, rejected the prosecution's argument that the defendant's lack of a prior record should not be given substantial weight, as Butner had demonstrated that the defendant was statistically more likely than not to have committed a previous offense. The court dismissed the inference as distasteful and prohibited by law as uncharged criminal conduct can only be considered in sentencing if proven by a preponderance of the evidence:

The Court finds these results highly questionable given the extraordinarily high percentages, as well as the fact that the researchers saw a 2,369% increase in the number of contact sexual offenses acknowledged by the treatment participants during the course of the Study. These astronomical figures lead the Court to question whether this unvetted prison Study, conducted by the former chief of the federal sexual offender treatment program and distributed by the Department of Justice to prosecutors, is, in actuality, a product of the tremendous political pressure applied to researchers in this research field [*United States v. Johnson*, 2008 n9 at 1007]

This recognition that the studies' findings were political and the inference that they had been had been engineered deliberately to justify the proxy policy was rare, but no less pertinent for that.

1.51. An increasing number of judges openly defied the sentencing guidelines where the material possessed did not warrant their use. In *Campbell* [2010], the judge was concerned that the mandatory sentence did not appear to fit the crime as none of the videos involved prepubescent minors, there was no intercourse, fellatio, cunnilingus or masturbation shown, or sadism, masochism, bestiality or other 'perversions.' Although the Butner research was a cause for caution, there

were questions about its scientific validity; and as the defendant's two forensic evaluations had ameliorated legitimate concerns about hands-on sexual abuse, the judge concluded Campbell was not a risk, and sentenced him to 5 years probation [at 968].

1.52. Justice Ann Aldrich was so determined to consider the totality of the circumstances in *Camiscione* [2010] that she imposed the same sentence after it had been remanded in the higher court. The case is informative for its insights into the regime at Butner. The defendant, Camiscione had developed an obsession for 'child' pornography featuring elder teens, which was confirmed by half a dozen psychiatrists, psychologists and psycho therapists. As the case, which involved one count of "knowingly possessing visual depictions that had been transported in interstate commerce depicting persons under the age of eighteen engaged in sexually explicit conduct," dragged on; Camiscione sought out a diagnosis and therapy by himself. While awaiting the result of the appeal lodged by the prosecutor who objected to the first lenient sentence—three years of supervised release, and 180 hours of community service—Camiscione also successfully completed a two years of sex offender treatment program. However while awaiting re-sentence, the prosecutor insisted Camiscione be evaluated at Butner, where he was characterized by Dr. Hernandez as "a typical sex offender;" and at the sentencing hearing the prosecution repeated the argument that Camiscione had an 85 percent likelihood of having committed a hands-on offense. Fortunately for Camiscione, the judge was not impressed as the study "doesn't tell you how many hundreds of thousands of people looked at child pornography that didn't ever molest a child," and re-imposed the original sentence, noting that Camiscione had complied with every condition of his supervised release, had not reoffended, and that there was no evidence that Camiscione had made, distributed, or profited from child pornography, or posed a threat to children [at 829].

1.53. *Cossey* [2009] was typical of many cases heard on Appeal which considered whether or not the mandatory bail conditions were unconstitutional. Although, in this case, the court ruled that the lower court had taken the defendant's individual circumstances into consideration when setting the conditions, it questioned the "two unstated assumptions that cut against the presumption of innocence"—that possession offenders are more likely to reoffend while on pretrial release and present a risk to the community by committing hands-on sexual offenses against children—and ruled the evidence offered inadequate to show that the assumptions holds true in every case [at 887].

1.54. *Apodaca* [2011] questioned whether lifetime supervised release for a defendant with a single count of possession was necessary, and demonstrated the growing consensus in the courts by dismissing the Butner studies and ruling that: the sentencing provisions for possession were not developed pursuant to the Sentencing Commission's normal processes and were not based on empirical data and expertise' the guideline enhancements ensured that routine offenses often approached or exceeded the statutory maximums; there was a growing body of

empirical literature indicating that there are significant differences between possession and contact offenders; and sentencing individuals who pose little risk to society to a lifetime term of supervised release could violate the prohibition on imposing sentences that are "greater than necessary." However, the scientific literature had not reached a standard whereby the court could alter the present requirements [at 1084].

1.55. In a widely publicized criticism, NY Judge, Jack Weinstein, who sought an independent review of the studies offered by the prosecution, opined that the data was being misused, and described the mandatory minimums based upon it as a "cruel and unusual punishment" in a case involving a youth. Although his ruling was overturned on a government appeal, given the specific circumstance of the case [see *United States v C.R.* 2011]; it had a salutary effect.

1.56. Another NY district court in *United States v. Polouizzi* [2010], undermined the Adam Walsh Amendment to the Bail Reform Act of 1984, by ruling the Act's requirement that all defendants charged with possession or receipt of child pornography must have their freedom of movement restrained in order to protect children from sexual attacks, as it had failed to offer any supporting facts, and cases should be decided on their merits. In this case, the court ruled that the requirements were excessive, as the images were on a computer, in a double locked room, in the privacy of defendant's garage, and the prosecution had not shown the defendant posed a risk to society in general, or to children specifically [at 394-5]. The following year the amendment and mandatory conditions were declared unconstitutional in *United States v. Karper* [2011] in a case involving possession 179 images. The NY court ruled that the 29 year old male who had attended college, was regularly employed, had no history of mental illness, drug use, abuse of alcohol and only one petty juvenile offense, was deprived of his due process rights and had been subjected to excessive bail by the imposition of mandatory conditions without a hearing; as any determination of dangerousness must be supported by clear and convincing evidence [at 355]. Moreover, the assumption that a defendant was more likely to commit crimes than other members of the public, effectively dilutes the presumption of innocence, and "provides near certainty of erroneous deprivation of defendant's liberty interests" by creating an "irrebuttable presumption" that does not even apply in cases of murder; and undermines the principle of an independent judicial review and exercise of discretion [at 358].

Summary

1.57. Although the legal system in the US is different; the issues raised by legal scholars defense attorneys, and judges regarding the proxy policy and the evidence used to justify it are equally applicable to the UK. They concern whether possession offences warrant the penalties they attract, whether the assumptions behind the policy are warranted or deprive defendants of inalienable rights, whether possession offenders pose a risk to children, and whether there is enough

empirical evidence to draw a clear distinction between possession and other offences.

Issue 2: The differences and similarities between child pornography offenders and contact offenders

Introduction

2.1. Although the literature does not always define what offences the CPOs being discussed and/or assessed have committed [Henshaw et al. 2015, at 2], and generic terms like 'online abuse' or 'child sexploitation' includes production, distribution, online grooming offences, and child sexual tourism activities; as most child pornography offenses involve downloading and swapping material with others [Calder, 2004]; that could and should have raised questions about the threat posed by the majority of CPOs before Chapel Hill for three reasons: the nature of the internet, research concerning the association between the availability of pornography and sexual offences; and reviews of recidivism amongst CPOs.

Pre and post Internet assumptions

2.2. The belief that those possessing child pornography may be contact offenders was a viable proposition in the pre-Internet when it could be argued that those possessing child pornography that they had not produced themselves were likely to be pedophiles, given the amount of effort and financial resources it could take to acquire a collection of child pornography.

2.3. Commercially produced and distributed child pornography was difficult to obtain even in Europe, precisely because of the lack of demand. The major publishing house quickly abandoned their line of child pornography, although this led to a thriving cottage industry [see Hebditch and Anning, 1988, at 265-336], and any one outside the small pedophile networks would have to go to extensive effort to secure material.

2.4. This changed in the early years of the internet. Bulletin Boards had been available through *CompuServe* since the 1980s and were used by all forms of 'deviant groups' to network, including those seeking child pornography; although any boards that came to the attention of the service providers were quickly closed [Jenkins, 2001 at 41, 43-44]. Most child pornography, as the authorities would define it, could be found on the *alt.* (alternative) news groups, offering material at addresses such as *alt.binaries.pictures.erotica.pre-teen*; which were located outside UK and USA. For a period, material was also available on Egroups hosted by *Yahoo* hiding behind *nudist* titles, although these groups did not last long either. Apart from legal textual fantasies, appearing on story boards, most sites that remained open were law enforcement strings [Jenkins, 2001 at 52-54, 60-63].

2.5. Jenkins estimates that, at most the traffic involved 50-100 thousand individuals, whereas the authorities have always exaggerated the numbers [Jenkins, 2001 at 74]. Whatever the truth of that, the Internet ensured that the 'common sense' approach, linking possession to pedophilia and to contact

offending became less relevant the more child pornography became available [Malamuth and Huppin, 2007 at 790]. The introduction of the first graphical browser, Mosaic, in 1995, allowed users to quickly download, view, and discreetly store pornographic photos and moving images on their home computers. This led to significant increases in the consumption of all forms of pornography, especially amongst younger age groups [Kendall 2006 at 11], who developed the habit of systematically copying and redistributing every imaginable form of material from music to pornography, including copying and distributing pictures of young teens and uploading increasing numbers of pictures of themselves [Hessick, 2011 at 895]. This habit has led to more than one US scholar to note that the proxy policy led to an increasing number of juveniles being prosecuted for distribution and possession of child pornography [Quayle, et al. 2008 at 2; Kamin, 2011 at 422629; Kimpel, 2010 at 310; Hamilton, 2012]; and juveniles accounted for 10% of child pornography offenses as early as 2000 when they were using computers [Finkelhor & Ormrod, 2004 at 6 Table 3].

2.6. This percentage continues to increase due to the popularity of 'sexting;' teens sending suggestive images of themselves through social media on their smart phones. Although the images being downloaded on computers and now being sent by phone are age appropriate for the 'offender;' as 'sexting' involves taking a risqué selfie and sending it to a friend, anyone doing so is now guilty of making and distributing child pornography, and anyone answering a message is now classified as receiving and possessing child pornography. Although estimates differ, sexting is widespread. Surveys have reported: 22% of teenage girls and 18% teenage boys had produced and distributed nude pictures of themselves, and 40% of teens have received sexually suggestive text messages or e-mails [*CosmoGirl*, 2008]; 20% of teens, thirteen to eighteen, had sent, received, or forwarded sexually suggestive photos through text or e-mail [Cox, 2009]; 24% of teens, between fourteen and seventeen, have engaged in naked sexting [AP-MTV, 2009]. Whether or not the Pew Research survey is more reliable, its findings suggest that a minimum of 4% of teen mobile phone owners had sent a sexually suggestive nude or nearly nude image of themselves to someone via a text, and 15% had received a sexually suggestive nude or nearly nude image of someone they knew; and the rate increases with age. Some 8% of seventeen year olds had sent, and 30% received sexually provocative images [Lenhart, 2009]. As an increasing number of young adult males, eighteen to twenty-five years, have also been criminalized having downloaded pictures of teen females [Forbes, 2011 at 1743644; Sherman, 2011 at 159]; it is apparent that an increasing number of CPOs are not pedophiles, will not have engaged in contact offending, and are probably unlikely to do so as their behavior reflects the way the younger generation use the web. Consequently although legislatures have increased sentences for possession in direct response to the dramatic increase in availability, the 'widening of the net' raises questions about blameworthiness at the heart of English common law.

2.7. The same question could be raised about the automatic ascribing risk to those

in possession on the basis of the size of the collections due to the nature of computers:

the massive storage capacity of the average personal computer presents challenges in terms of assessing risk. Prior to the Internet, a large child pornography collection would have been indicative of an enthusiast of long-standing, somebody who devoted much time, effort and money to amassing his collection. But the Internet allows an individual to download a huge amount of material in a very short space of time. In other words, a collection of 5,000 images possibly reflects the quality of an individual's Internet connection rather than the effort they expended to painstakingly build a collection [O'Donnell and Milner, 2007 at 57658]

2.8. Jenkin's research into the online community of devotees of pictures of minors also makes it difficult to assume that everyone accessing material online, or networking, was doing so to reinforce beliefs that would encourage contact offending. The community on the BBs and newsgroups was no different from any other sociological subculture with its own argot, rules, and practices that novices would have to learn to become members [Jenkins, 2001 at 90-95; 106-110; 113-114]. However, while the message boards could be and were used by some to promote techniques of neutralization; others participating in the discussions claimed to be attracted to adolescent girls, and/or that they were opposed to contact offending and/or opposed to forceful behavior and depictions where coercion was evident, and/or were opposed to hard core material, and even 'consensual sex' (sic) between children and adults. Members would often engage in real debates which revealed divisions amongst CPOs, who could not be treated as a homogeneous group [Jenkins, 2001 at 115-131, 133, 137-141]

2.9. In short, an increasing number of CPOs in the Internet age simply do not fit the pre-Internet profile of the pedophile offender with a collection of child pornography who wished to molest children. Indeed, by arbitrarily increasing the age of a definition of a minor, turning every download into 'making' an image, the law increased the risk profile of possession offenders although downloading is clearly not comparable to making a pornographic movie or taking photographs of a contact offense in progress; and the same applies to turning everyone swapping files into the equivalent of a commercial distributor. Prosecutors continue to dismiss the possibility of accidental possession as well. Whereas this used to occur via visible 'ad attacks' whereby someone viewing pornography online would find their screen full of unsolicited pop up adverts appearing faster than they could close them, leaving images on their hard drive; the methods by which unsolicited images can appear today are less obvious, but are equally common, but are for some reason beyond the knowledge of police 'experts' who frequently testify in court as to its impossibility in court:

"Redirection chains" and "click-trading" were unheard of [by police experts]. There was no discernible grasp of the dizzying arithmetic. The first click on an adult site (in the first second of a one-hour "porn session") can produce a 200 image page crammed with thumbnails, many off screen. Click Two may summon another 200 images. By Click Three (in the first ten seconds of the session) there may already be 600 images on the disc-drive: only a fraction of them seen and only two selected, if that. The viewer might

already be on a different site without knowing it
What counts as a downloaded "image" is, every front page, and every other page, and, every individual image on every one of those pages, including every unenlarged thumbnail, and every graphic, and every advertisement, and every border decoration, clicked or no, wanted or no, enlarged or no, requested or no, visible or no, seen or no, down to 1 cm x 1 cm, from sites the viewer did not enter, sites he was redirected to, whether he knew what would be there or not, sites he deleted the moment they appeared and any other source [Saltrese, 2014, at 29].

2.10. One of the first indications that there had been a substantial change in offending due to the Internet was that many of the those accessing paid sites online and exposed by the US Candyman investigation had no record of contact offending [Thompson and Williams, 2004 at 151]. However, the 'common sense' approach persisted because the 'link' between consumption and contact offending came from studies reporting that contact offenders had seen child pornography, although studies considering a direct causal link, by recording whether offenders had looked at images of children immediately before engaging in contact revealed that adult pornography was more frequently used [Malamuth & Mark Huppini, 2007 at 790, 800; Kingston et al., 2008 at 347].

The negative correlation between possession of child pornography and contact offending

2.11. The fear that the increasing availability of child pornography would inevitably lead to contact offences replicated previous fears that the legalization of hard copy pornography would lead to an increase in sexual offences; even though the proxy policy in the USA was adopted when it was already evident that the increase in availability of child pornography had run parallel with a significant decline in reported cases of contact offenses against children in the USA: 62% nationwide from 1992 to 2010 [see Finkelhor et al. 2011 at 1 Fig.1].

2.12. Although, the official statistics would not cover offenses that are not reported at the time and may emerge many years later, most unreported contact offenses occur in the familial context or by others known to the victim, rather than the 'stranger danger' CPOs would pose [see Quayle, 2008 at 78]; and, as the N-JOV study suggested, despite the authorities making extensive inquiries, only 14% of the cases that began as a possession offences uncovered a content offense.

2.13. The fear of 'stranger danger' by CPOs also ignores the fact that almost a third of juvenile victims are victimized by other juveniles [Finkelhor et al., 2010 at 240]; and over a third of contact offenses against prepubescent minors are committed by juveniles, who are also more likely to target victims under 12 years of age than adults are (59% of juvenile offenders: 39% of adult offenders), and more likely to offend in groups than adults are (24% of juvenile offenders: 14% of adult offenders) [Finkelhor et al., 2009 at 1-4]. A large minority of those soliciting sex from minors online are also minors (40%); and 31% of minors contacted online by adults have initiated offline contact [see Wolak et. al., 2006].

Pornography and sex offences

2.14. Detailed studies have consistently demonstrated an inverse relationship between the availability of pornography and sex crime, and that includes child pornography and contact offending against children; which is why the alleged link between pornography and sex crimes has never been accepted by non aligned criminologists, psychologists, and behavioral scientists. Far from leading to an increase in sex crime, an increase in the availability of pornography tends to lead to a decline in offending.

2.15. The most comprehensive study was Kutchinsky's 20 year review of the prevalence of rape, non violent sex crimes, and violent crime in four countries where pornography, including violent images, had become widely available in the early 1960s [Kutchinsky, 1991 at 59]. The West German rape rate remained steady throughout the period, and although there were moderate increases in Denmark and Sweden after ten years, these reflected a change in the definition of the crime and an increase in the reporting and registration of incidents [Kutchinsky, 1985, at 323]. Other sex crimes decreased by 11% in Germany between 1972 and 1980; when offenses against minors (under 14) fell by 10%, and the decrease in victims under six years was by more than 50 percent [Kutchinsky, 1985 at 319].

2.16. In contrast, the USA saw a marked increase in incidents of reported rape, although that increase reflected an increase in reporting [Kutchinsky, 1983, at 1084; 1985, at 22]; an interpretation supported by victim survey data covering the same period which revealed an overall decrease from 74 cases per 100,000 population in 1973, to 87 in 1979, 68 in 1984, and 54 in 1986 [Kutchinsky, 1991 at 51-2]. In other words, while there was an increase in reported cases, the rate of offences declined with the availability of material; which is why the findings of Baron and Straus [1984] and Scott and Schwalm [1988] that there was a statistically significant correlation between the circulation of pin up magazines, like *Penthouse* and *Playboy*, and the official rape rates at state level were always questionable. As I also demonstrated in my review of their research data, the conclusions ignored a large number of anomalies, the increase in official reporting was a metropolitan phenomena where fewer magazines were sold, and the majority of crimes were committed by a group not known for consuming the indexed magazines [Thompson, 1994 at 134-6].

2.17. The first study that addressed the availability of pornography and child sexual assault was Kutchinsky's study of sex crimes in the city of Copenhagen during the decade after legalization of pornography in Demark, 1959-1970. This reported a considerable decrease in all types of sexual offenses except rape and incest: Rape 0%; Exhibitionism 58.2%; Peeping 79.8%; Coitus with minors 62.7%; Verbal indecency 71.1%; Incest 0%; Other offenses against women 56.2%; Other offences against girls 69.1% [Kutchinsky, 1973, at 166, Table 1]. As there were no other legislative changes, the study also surveyed: a

representative sample of the city's population regarding changes in attitudes to definitions of, and the reporting of, sex crimes; police officers' attitudes to sex crimes and registration of reports; and the investigative files held on reported crimes [Kutchinsky, 1973, at 167]. Apart the tendency of women under 20 not to consider or report incidental touching there were no major changes in attitudes amongst the public or the police [Kutchinsky, 1973, at 170]. Indeed, the police treated sex crimes more seriously than the general population, and reports were carefully registered and investigated [Kutchinsky, 1973, at 172]. As a result, the author concluded that the reduction in cases of child molestation probably reflected the way picture pornography had served as a means of sexual stimulation for people most likely to offend against children who were not classified as pedophiles [Kutchinsky, 1973, at 176-177].

2.18. Professor Diamond (John A. Burns School of Medicine at the University of Hawaii) has conducted several studies and reached similar conclusions to Kutchinsky. His first covered sex crimes in Japan between 1972 and 1995 when sexually explicit video tapes, books, and magazines including Manga became freely available, catered to every possible proclivity, and included depictions of those under 18 years. The incidence of rape decreased from 4677 reported cases (5464 offenders) in 1972 to 1500 cases (1,160 offenders) in 1995. Gang rapes, once common became rare; and the rapes committed by juveniles fell from 33% to 18%. The incidence of sex assault decreased from 3,139 cases in 1972 to 3,000 per year between 1975 and 1990, but had increased to 3,644 in 1995, although the population increase of 20% during that period, ensured the per capita rate continued to decline. Incidents of public indecency fell by a third, and when adjusted for the population increase amounted to a 50% reduction [Diamond and Uchiyama 1999]. As the rate of convictions for rape increased from 85% to more than 95% over the same period; the decline in sex crime could not be accounted for by any change in policy. On the contrary, special police rape investigation units encouraging reporting were established in 1983; and sex education, K-12, covered rape theory, prevention, and reporting [Diamond and Uchiyama 1999]. The most dramatic decreases occurred amongst the younger age groups. Juvenile offending fell 85%, from 1,803 perpetrators to 264; and crimes against children under 13 years fell from 8.3% of female victims to 4.0% between 1972 and 1995; replicating the trend found in Denmark and West Germany by Kutchinsky [1995]

2.19. Diamond's study of the Czech Republic, covered two periods. One under the communist regime, and the second after liberalization in 1989, when the possession of child pornography was not illegal. (It was criminalized in 2007). This study reported a significant decrease (approx. 60%) in the incidence of child sex abuse. Cases of adult rape remained steady after a brief rise despite an increase in the male population. 'Lesser' offenses, such as indecent exposure also decreased by approximately 40% [Diamond et al, 2010]. Similar results have been reported in Shanghai [Diamond, 1999], Hong Kong [Ng & Ma, 2001], Croatia [Landripet, et al, 2006], and Finland [Diamond & Kontula, 2009].

2.20. A paper 'Pornography, Rape, and the Internet' presented at Stanford Law School by Professor Kendall from the John E. Walker Department of Economics, Clemson University in September, 2006, may also be pertinent [Kendall 2006]. Using state-level panel data from 1998-2003, Kendall demonstrated that a correlation existed between the arrival of, and increase in, internet usage and the level of rape in each state; and when the data was disaggregated by offenders' age groups, it became apparent that the decline in rape offences was concentrated among male offenders, between 15 and 19 years of age; the age group for whom pornography was most restricted before the internet. Professor Kendall calculated that a 10% point increase in internet access was associated with a decline in reported rape victimization of 7.3% [Kendall 2006 at 2]. States that adopted the internet faster saw larger declines in rape incidence than other states, and the effect was most apparent in states with a high ratio of male to females, which suggests that young men were substituting pornography for rape [Kendall 2006 at 4-5, 22-23]. Unlike the previous US studies which did not control for location-specific effects and other factors, like the age distribution of the population; Kendall's is noteworthy for the extent to which the author went to test and control for a wide variety of other factors including alcohol consumption, unemployment rates, police force size, and prison populations. The study also found correlations between internet adoption rates and declines in teen birth rates, prostitution arrests, and an increase in divorce rates, suggesting that internet usage has had significant effects on sexual behavior generally [Kendall 2006 at 3]. Although the issue of offenses against children was not addressed, as we know that up to a third of offences against minors are committed by this age group, this study may offer one of the reasons for the declines in the number of reported offenses against children.

CPOs and risk assessment research

2.21. The belief that all CPOs pose a direct threat to children and are undetected contact offenders also runs counter to the extensive empirical evidence offered by risk assessment reviews, which consistently suggest that the vast majority of CPOs are *not* undetected contact offenders.

2.22. The standard measures used in risk assessment (Static-2002, Risk Matrix 2000) have constantly overestimated the risk posed CPOs without a history of contact offences [Meridian et al., 2016; Henshaw, et al., 2015; Wakeling, et al., 2011; Webb, et al. 2007; Middleton, et al., 2005]. This can be accredited to the common assumptions that CPOs are pedophiles and all pedophiles are be contact offenders, and the failure to heed the warning that the proven predictive factors for contact offenders had never been validated for CPOs [Howitt & Sheldon, 2007].

2.23. Reviews of recidivism rates have consistently demonstrated CPOs rarely reoffend despite being given elevated risk profiles [Osborn, et al. 2010], which follow maintaining pre-Internet assumptions, and designating downloading

'making' and swapping files online 'distribution,' making the nature of the offense more serious than it may warrant. An early Canadian review of recidivism records of 201 CPOs on the Ontario Sex Offender Registry reported that during the 2.5 year follow up period those known to be mixed offenders (24%) were more likely to reoffend, either sexually or generally, compared to possession only offenders. CPOs who *had* been convicted of contact sex offenses either prior to, or simultaneous with, the index offense committed more new contact sex offenses during the follow-up period (9.2%) than those whose who had committed a child pornography offense (1.3%) or a child pornography offense and a nonsexual offense (2.0%). CPOs with no history of offending did not progress to any contact offenses [Seto and Eke, 2005].

2.24. A Meta-analysis of published and unpublished recidivism rate reviews by Seto, Hanson, Babchishin after Chapel Hill confirmed the previous finding. The reviews which ranged from 1.5 to 6-year follow up periods, reported an average recidivism rate of 2% for contact offenders, 3.4% for child pornography offenses, and 4.2% for violent offenders [Seto et al. 2011 at 135]. It was also reported that official records for 4,464 online sexual offenders indicated that 12.2% had prior contact sex offenses; and that although the proportion of prior contact offenses was significantly lower in official reports than self-report studies, the 2009 Butner study *was* an outlier [Seto et al. 2011 at 132-3]. Otherwise, the authors concluded the results suggested there is a distinct group of online offenders prosecuted for possession who rarely commit a contact sexual offense [Seto et al. 2011 at 136]. This finding reinforced those reported earlier by Goller [et al., 2010] and Graf and Dittmann [2011] These reports of the low level risk possession only offenders pose can be contrasted with a meta-analysis covering 45,398 contact offenders from 118 samples in 16 countries which reported recidivism rates ranged from 11% to 20% [Hanson, and Morton-Bourgon, 2009 cited Merdian, et al. 2016 at 3].

2.25. A major UK review, which reported that none of the CPOs designated high risk reoffended in a four year follow up period, found that the major reason for over prediction was classifying the images the CPOs possessed as 'victims not know to the offender' [Osborn, et al., 2010]. Although sexually assaulting a stranger is an established high risk factor for a contact offender, by failing to consider that anyone downloading illegal images of minors in any form from the web would inevitably include children the CPO does not know, CPOs were being subjected to false comparisons when being assessed for risk.

2.26. These observations should not detract from the fact that, relatively speaking, the recidivism rate of mixed offenders is also low. 30% of the sample of 541 CPOs had had contact with the police regarding a contact offense over the course of their lives: 18% had committed an offense before using child pornography and 8% concurrently; however, only 3.9% were found to have engaged in a contact offense over the six year follow up period. The most viable factors found to be predictors was a prior history of any form of violent offending including contact offenses (50.5% of re-offenders) and a prior history of any non violent offence

including non-violent contact offending (40.2% of re-offended); i.e. the same factors found to be viable predictors for general, non sexual offending [see Eke et al. 2011].

2.27. These findings were similar to an early UK review of 1,326 offenders followed for one or two years [Wakeling et al, 2001], which used a modified version of Risk Matrix 2000. Although it claimed to be able to predict sexual recidivism in CPOs, its factors demonstrated that it was more pertinent to mixed offenders: age at first offense, a sexual offense, other sentencing history, and male victim. The one year follow up reported a 2.1% recidivism rate, and the 994 offenders followed for two years had a rate of 3.1%. It should also be noted that as 75% of the new offenses were for Internet crimes, it would appear that child pornography was being used as a substitute for offending.

2.28. The first attempt to test predictors for CPOs, the Seto and Eke 'Child Pornography Offender Risk Tool' (C-PORT), proved effective in its predictive capacity for known mixed offenders, but still failed to predict reoffending by CPOs with no known offences. The risk factors included: age of first offence, prior criminality, prior breaches of supervision, sexual interests, and the content of the child pornography possessed. Tested on a sample of 286 CPOs followed for 5 years, the review reported it could predict general (.66) and sexual recidivism (.74), but not recidivism among CPOs who did not have a history of general or sexual offenses. The highest predictive value was for mixed offenders (.80) [Seto and Eke, 2015; Merdian et al. 2016 at 3].

Accounting for the difference between CPOs, mixed offenders and contact offenders

2.29. Although recidivism rates have established that possession only CPOs do not present the same risk to children as mixed or contact offenders do, suggest that possession only offending can not be used as a proxy for undetected contact offending, and have demonstrated the availability of child pornography is not directly linked to contact offending; the failure of the risk assessment community to consider the need for a reassessment on the basis of this research [Long, et al. 2013] delayed the search for an answer to why CPOs poses such a low risk; although it may be found in related but neglected research.

Pedophilia and risk assessment

2.30. One obvious possibility for why CPOs are low risk is that designating CPOs pedophiles, and pedophilia a risk factor, runs counter to other reviews that have consistently suggested that a pedophilia diagnosis, whatever method is used, is not predictive of sexual recidivism even in known contact offenders, and is of limited use in assessing or treating offenders [Kingston, et al. 2007 at 424; Odesho, 2004 at 10612; Moulden et al., 2009 at 693696]. This finding was inevitable as it has long been established that the majority of child contact offenders are not pedophiles, not all pedophiles engage in contact offending

[Blanchard, 2010 at 309610], and pedophilia is only one among many explanations for possession of child pornography [Surjadi, et al., 2010 at 54-56]. The 'common sense' assumption that pedophilia is related to contact offending is a product of labeling contact offenders pedophiles, in the same way that devotees of sadomasochistic sex were believed to be dangerous because sexual-murderers were labeled 'sadomasochistic' [Thompson, 1994b]. One can not even rely on simple correlations, given that correlations have been found between pedophilia and: an episode of unconsciousness as a result of an early childhood accident, having a mother with psychiatric problems [Blanchard et al., 2002 at 552], and left-handedness [Cantor, et al., 2005 at 457]

Psychometric characteristics

2.31. The most likely explanation for the differences in recidivism rates and risk values between CPOs, mixed offenders and contact offenders, and the related finding that CPOs have always proven to be better prospects for post conviction rehabilitation and exhibit far better rates of compliance during treatment and post release supervision [Webb, et al., 2007 at 459], are the differences revealed in the results of psychometric tests. The research community has been aware that CPOs are not a homogeneous group, and do not exhibit the same psychometric attributes associated with known contact offenders since 2010 [Bates & Metcalf, 2007 at 17; Webb et al., 2007; Elliott et al., 2009]; and this is especially true for CPOs caught in sting operations, or youths 'texting' images of themselves [see Mitchell et al., 2010 at 429; Endrass et al., 2009].

2.32. The findings of the study by Webb [et al. 2007] is typical. This compared the demographic variables, offense-related characteristics, and the results of psychological testing between 90 CPOs and 120 contact offenders drawn from three counseling programs in London in which 4% of the CPOs had previous sex offense convictions involving a child, and 20% of the contact offenders had more than once offense [Webb, et al. 2007 at 456]. An 18 month follow up review revealed that one CPO was convicted of a general offense, and two for further internet sexual offences; whereas 3% of the contact offenders were charged for further violent offenses, and 2% for further contact sexual offenses. While 17% of contact offenders were also recalled for, or found in breach, of their conditions; none of the CPOs were recalled [Webb, et al. 2007 at 459]. Compared to the contact offenders, the CPOs were extremely compliant with community treatment and supervision sessions, and exhibited a very low risk of sexual recidivism [Webb, et al. 2007 at 462-463].

2.33. When Elliot administered a number of psychological tests to 505 Internet CPOs (11% mixed offenders) and 526 contact sex offenders in the UK who were divided into those samples using pre-sentence reports; he found that the contact offenders could be differentiated from the CPOs by their greater number of empathy distortions, cognitive distortions, and favorable self-descriptions; whereas the CPOs had fewer pro-offending attitudes and beliefs that serve to legitimize and maintain sexually abusive behavior [et al. 2009 at 87-88]. This

finding confirmed previous studies, and was itself confirmed by subsequent studies, all of which reported finding CPOs had different personal characteristics, different motives, and exhibited different cognitions concerning children and sexual relations with children than contact offenders, who consistently demonstrated higher levels of 'antisociality' [Middleton, et al., 2006 at 598-600; Reijnen, et al., 2009, at 618; Wolak, et al., 2009 at 1-2; Henry, et al., 2010 at 41; Babchishin, et al, 2010; Babchishin, et al., 2015].

2.34. Similar results were reported from two Swiss studies that conducted exhaustive studies into the backgrounds of those reported to the authorities for accessing a pornographic Web site in the United States. The first [Frei, et al. 2005] analyzed the criminal histories and demographic characteristics of 33 Lucerne men and reported that none of them had had any prior convictions for child molestation [Frei, et al. 2005 at 491], or psychiatric histories, apart from one who was believed to be a pedophile by his relatives [Frei et al. 2005 at 492]. Otherwise they did not fit the profile of the average Swiss sex offender; and the report concluded that the Internet may have facilitated a new crime, the possession and consumption of illegal pornography. The second report [Endrass, et al. 2009] covered a sample of 231 men from Zurich; two of whom (1%) had prior convictions for contact offending and 8 (3.5%) had prior convictions for illegal pornography [Endrass, et al. 2009 at 4]. A six year followed-up review revealed that nine (3.9%) were investigated for illegal pornography possession, and two (.8%) for a contact offense [Endrass, et al. 2009 at 4]. The authors concluded that the consumption of child pornography did not appear to represent a risk factor for contact offending, at least in those without prior convictions [Endrass, et al. 2009 at 5-6].

2.35. It has been suggested that the variance in psychometric characteristics between possession only CPOs and other offenders may reflect the demographic differences. The former tend to be Caucasian males, 25-50 years of age, have no prior criminal history, are more educated, have higher IQs, are more likely to be employed, and be in a relationship [see Webb et al., 2007], although the last finding has not been established. Later studies reported that CPOs are more likely than contact offenders to identify as 'single,' and have not engaged in co-habiting relationships [Seto, et. al. 2012 at 12; Elliott, et al 2013]. Babchishin has suggested this may reflect the fact that younger CPOs having higher levels of educational and occupational attainment which provides them with the ability to access the technology required to engage in child pornography offending [et al. 2015]; although it could just as easily reflect the increasing number of younger people caught in the net. Whatever the reason; it is indisputable that the majority of CPOs do not share the psychometric characteristics of contact offenders.

Anti-social and offense supportive beliefs

2.36. The most important findings, when it comes to risk of contact offending, is that CPOs and contact offenders differ on their antisocial and offense-supportive

beliefs.

2.37. The fact that tests on CPOs reveal that they consistently demonstrate fewer offense-supportive beliefs, exhibit more empathy toward victims, exhibit less distorted thinking regarding offending, and lower levels of emotional identification with children compared with contact offenders who consistently display higher levels of anti-sociality, aggression, and psychopathic traits measured by both clinical personality inventories; suggests that when CPOs justify their activity on the grounds that child pornography offenses are less harmful than contact offenses they may be offering the real reason for their behavior rather than merely a neutralization [Merdian, et al 2014; Elliott et al., 2009; Margareta, et al. 2014; Tomak et al., 2009]. As previous research had established that the most salient factor in contact offending was not pedophilia but 'anti-sociality' [Blanchard, 2010, at 309; Looman et al., 2008, at 276]; the findings that CPOs score low on anti-social tendencies is also significant and suggests they are not likely to imitate the pornographic scenes they are viewing with real children [Seto, 2009 at 7-8].

Interpersonal and affective deficits.

2.38. Two other consist findings regarding CPOs interpersonal and affective characteristics and levels of fantasy proneness and sexual deviancy might explain the low level risk, and provide a vital insight into the nature of online offending.

2.39. CPOs lower levels of self-esteem and interpersonal assertiveness compared with contact offenders, and the subsequent passivity in their approach to interpersonal relationships not only offers a possible explanation for CPOs tendency to be single [Babchishin, et al., 2015]. As they tend to be more socially isolated [Laulik et al. 2007, at 531], have a marked tendency towards avoiding real life [Surjadi, et al. 2010 at 54656], and are less likelihood to engage in sexually risky behaviors [Webb, et al., 2007, at 460], they do not appear to possess the attributes associated with offending.

2.40. A sample, consisting of 505 CPOs and 526 contact sex offenders, assessed by Elliott may help explain why [et al. 2009]. Having subjected the sample to a battery of psychological measures covering offense-supportive beliefs, empathic concern, interpersonal functioning, and emotional management, it was reported that CPOs could be separated from contact offenders on 7 out of 15 measures. Contact offenders were found to have significantly more victim empathy distortions and cognitive distortions, and cognitive impulsivity than CPOs, and scored higher on standard measures such as locus of control and over assertiveness required for offending. CPOs, on the other hand, were found to have significantly higher levels of identification with fictional characters and general fantasy scales, and higher scores on under assertiveness. Confirmation of the obvious inferences came from Babchishin's study which concluded that mixed offenders posed a higher risk of offending having displayed higher levels of

sexual interest in children than either CPOs or contact offenders along with high levels of antisociality, offense-supportive beliefs, and deliberately sought access to children (whereas contact offenders tend to be more opportunistic - ed.) [see Babchishin, et al. 2015].

Passivity, fantasy, and CPO motivation

2.41. The report that CPOs lower levels of antisocial beliefs and higher fantasy proneness explained 80.9% of the variance in scores between CPOs, mixed, and contact offenders [see Elliott et al. 2013] suggests that many CPOs may intend to confine themselves to online offending, and have little interest in contact offending; and the common finding that CPOs are highly sexualized individuals, have higher levels of sexual preoccupation, higher levels of fantasy engagement including identifying emotionally with fictional characters, higher levels of deviant sexual fantasy generally and appear to use their sexual activities as a coping strategy compared with contact sexual offenders, may have greater significant than has been recognized to date [Babchishin et al., 2015; Elliott et al., 2009].

2.42. Whether or not those downloading and collecting material are pedophiles, hebephiliacs, young or older men with a natural attachment to images of mid teens; the results of psychometric tests supports the suggestion that CPOs are not solely motivated to engage in contact offences [Lanning, 2010], and justifies paying closer attention to research that suggested online activities serve different functions including a means to avoid real-life problems, and provided collectors and validation seekers with sexual gratification in and of itself [McCarthy, 2010a, 2010b, 2012]. McCarthy, 2010a,

2.43. McCarthy's analysis [2010a], based on the contents of self-report questionnaires covering internet use and the sexual histories of 247 CPOs at the New York Center for Neuropsychology and Forensic Behavioral Science [McCarthy, 2010a at 66], including both known contact offenders (n=71) and non contact offenders (n=176) [McCarthy, 2010a at 55] found less than half (48%) were diagnosed as pedophiles [McCarthy, 2010a at 92] and only 15% of the contact offenders were exclusively attracted to children [McCarthy, 2010a at 75]. There appeared to be no causal relationship between the possession of child pornography and the contact offences, and 82% of the contact offenders had engaged in an offense prior to possessing child pornography [at 101-2]. McCarthy argued that CPOs could be divided into at least five groups (collectors, validations seekers, traders, producers, and contact offenders) and concluded that there appeared to be a CPO subgroup that could be considered low risk as there was no evidence that their behavior extended beyond engagement with the material they had collected [McCarthy, 2010a at 102]; reinforcing the findings of previous research that also included 'facilitating social relationships on line' [Taylor and Quayle 2003 at 82-93; Quayle and Taylor, 2002, at 345], and even 'curiosity' [Seto, et al. 2010 at 175].

2.44. This research not only increases the possibility that a subgroup of CPOs are using material as a substitute for, rather than a means to engage in, contact offending [Seto, et al., 2010 at 170]; it suggests that the report by Riegel that the 83.8% of 290 self identified 'Pedosexual Males' who claimed viewing 'erotica' depicting boys acted as a substitute for contact offending may not have been completely self-serving [Riegel, 2004]. When added to the reports from psychometric tests, the claims that the material is being used for self gratification would explain: the lack of evidence that CPOs have engaged in a contact offenses; the low rate of recidivism amongst CPOs; and why the dramatic rise in the availability of material through the Internet run parallel with a decline in recorded offences. It might also explain why most mixed offenders were found to have committed their offences prior to accessing child pornography rather than afterwards, and tend to possess images of a similar-age to their prior victims [McManus & Almond, 2014, cited Henshaw, et al. 2015 at 17].

2.45. Unfortunately, although the COPINE project suggested that the types of images possessed by CPOs could be used to conduct research into their psychological characteristics and motivations to help assess risk levels, and the project developed a scale of the range of material available to do so [Taylor, Holland, and Quayle, 2001]; rather than being used to pursue research, the scale was adopted and adapted as a means to impose sentence enhancements in Australia, the UK and the USA [Mizzi, et al. 2010; Sentencing Council, 2015; US Sentencing Commission, 2009; cited Henshaw, et al. 2015 at 20] on the assumption that the more severe the material the greater the risk posed by those collecting them, although McManus has reported that the non-contact offenders who could be identified by the greater amount and wider range of material collected [et al, 2014].

2.46. As attempts to determine if online time provided a means to distinguish risk levels between CPOs and dual offenders produced mixed results, although it confirmed CPOs had larger collections [Long et al. 2013; Lee et al, 2012]; and higher levels of boys to girls in collections did help predict recidivism [Seto and Eke, 2015]; it is becoming more difficult to ignore that the CPOs lower anti-social scores and higher fantasy scores provides a more fruitful avenue of research than any based on previous assumptions.

A New form of Offender?

2.47. This review of the extensive research into the risk posed by CPOs to children reveals three incontrovertible facts regarding the current state of knowledge:

2.47.1. When the existing empirical research is considered as a whole, the findings do not support the studies commonly cited to assert that CPOs are undetected contact offenders; and that conclusion is widely accepted in the research community.

2.47.2 The consistent findings that CPOs who are not mixed offenders do not progress to commit contact offences, strongly suggests that a large number of CPOs are not undetected contact offenders and present a low risk of contact offending; and that conclusion is widely accepted in the research community.

2.47.3. Rather than improve our knowledge of CPOs, the Butner studies are responsible for delaying the widespread recognition of the implications of empirical findings concerning: the correlation between the availability of material and rates of offending; the implications of low recidivism rates; the implications of psychometric test results; and the possibility that the internet has revealed a new form of offender: the passive consumer who, whether or not they are pedophiles, has not engaged in, does not engage in, and has no intent of engaging in contact offending [Beech et al., 2008 at 219; Surjadi et al., 2010; Middleton, 2008 at 54]; and that possibility is widely accepted in the research community.

2.48. At the very least the Meta analysis offered at Chapel Hill by Hanson and Babchishin, and the subsequent collaboration with Seto suggests that as half of CPOs did not engage in a contact offense there is no direct link between possession and offending; and the consistent findings of psychometric tests may explain why. Support for that proposition comes from Australia in the form of a PhD covering CPOs from state of Victoria (n=1,205) convicted between 2004 and 2014. Possession only offenders demonstrated significantly fewer offences, lower recidivism rates, and were less likely to engage in child contact sexual offences compared to mixed and contact offenders. Although the CPOs demonstrated that they are capable of child pornography reoffending, Henshaw concluded that: the research supports the characterization of possession only CPOs as a distinct type of sexual offender who is primarily defined by low levels of antisocial behavior and high levels of sexual deviance [Henshaw, 2017].

Issue 3: CPOs, Fantasy and sexual offending

Introduction

3.1. There is no doubt that child pornography is used to stimulate sexual fantasies for arousal purposes. However, it has always been assumed that arousal was to facilitate or would facilitate contact offending despite the lack of evidence that it always was, and the possibility that the images were solely used for masturbatory purposes and a substitute for contact offending was frequently dismissed as an excuse and/or an example of distorted thinking [see Taylor and Quayle 2003, at 6, 11, 80-81]

3.2. The consistent results of recidivism reviews and psychometric tests suggested that it was time to reconsider the possibility that child pornography was being used by a large number of CPOs as fantasy material for immediate gratification rather than a means to facilitate contact offending be it through arousal before an offense, or as a means to groom children. This alternative possibility may be as simplistic if not as erroneous as its predecessor.

Howitt's fantasy study

3.3. It is well known that before the onset of the Internet, pedophiles used any and every form of material involving children as a means to fantasize about children; however the insights offered by the only study to address the nature of those fantasies has tended to be ignored although they provide a possible explanation of why so many CPOs collect vast amounts of material, and of every available kind.

3.4. The study consisted of a group of contact offenders from the Gracewell Clinic in the UK, whom Howitt characterized as somewhat immature with strong dependency needs, displaying high levels of anxiety about their physical features and functioning, and who when under stress became withdrawn and isolated [Howitt, 1995 at 42]. While these are similar to the results of CPOs psychometric tests, in Howitt's case they helped explain why his sample held idealized beliefs about their 'relationships' with children, which reflected their real beliefs rather than distortions or excuses [Howitt, 1995 at 74].

3.5. The sample had engaged in the low level kind of offending that is rarely reported, but is the most common form of contact offending; and which Howitt illustrated by reference to one of the rare studies to report the nature of offences, those committed by inmates of the Minnesota Security hospital. In cases involving females under ten, 34% of offenders had engaged in fondling, 17% in vaginal contact, 15% performed oral sex on the child, 12% had encouraged the child to perform oral sex. Of the offences committed on females between 11-13, 35% consisted of included fondling, 23% vaginal contact, 13% oral sex on offender, 10% oral sex on child, and 5% had attempted vaginal intercourse. Of the offences involving males under 10 years, 28% included anal contact, 24%

fondling, 7% oral contact on child, and 4% oral sex on offender. Of the offences against males between 11 and 13 years, 29% consisted of oral sex on the offender, 27% fondling, 14% anal contact, and 14% anal contact on child. In these cases 'contact' did not necessarily include penetration [Howitt, 1995 at 77-78].

3.6. The nature of this type of offending emerged during in-depth interviews and detailed discussions about the samples fantasies, which included the discovery that, like masochists, the offenders often fantasized about actions that they would never carry out:

The fantasy exists in a separate domain from overt actions despite having a synthesis based on experience. It does not require acting out in reality in order to be satisfactory, since it functions effectively as an accompaniment to masturbation or sexual intercourse (with an adult - Ed) to maximize pleasure [Howitt, 1995 at 160]

These low level offenders' fantasy histories suggested that while the sexual impulse may be channeled by pornography it was not determined by it. Most subjects had used non pornographic imagesóclothing and toy catalogues. TV adverts, Disney movies, and TV showsóas personal 'pornography;' and like everyone else, their preferences, including features like hair color, remained constant once they had been formed by childhood or adolescent experiences around which their core fantasies were built. As a result, it transpired, many of their offences were *not* directed towards obtaining sexual gratification at the time, but were effectively 'collected' and utilized to shape a later fantasy in private which provided sexual satisfaction.

Much pedophilic sexual offending involves acts that do not require sexual arousal for their execution, and penetrative sex is not typical of the offences. Thus the offence itself may provide imagery for later masturbation. Conceived in this way, the offense does what pornography is thought to do by someóthat is provide sexual arousal [Howitt, 1995 at 178]

3.7. Moreover, the child need not be the subject of the later fantasy either, as the fantasists frequently placed themselves in the role of the child, regressing back to their preferred age and physical type reflecting their erotic fixations based on their own experiences. In other words, offending like non pornographic images were collected for their fantasy value and utilization [Howitt, 1995 at 174-5].

3.8. This dynamic form of fantasy questions the assumption that, because pornography can amplify arousal and fantasy, the consumer will carry out the fantasized behavior. This model was always based on the self-reports of violent offenders whose sexual fantasies are specific to their offenses and claimed that their fantasies precipitated their criminal behavior [see Williams, 2009 at 199-200]; rather than the non violent child molester. And it is more than possible that since explicit material became available on the internet and replaced the non pornography 'pornography' utilized in the pre-Internet age, CPOs with similar psychological profiles are collecting material for the same reason Howitt's sample fondled actual children, it is fantasy fodder, and the arousal obtained by sorting

and selecting is used for subsequent fantasies leading to sexual release; and the same could apply to those who make their own pornography.

3.9. This possibility would not be unusual, as it common amongst other highly sexed deviant groups. As I have demonstrated elsewhere, sadomasochism was essentially a solitary fantasy based activity when it was erroneously associated with flagellation and subjected to theory driven diagnosis that did not reflect the motivations, activities and fantasies of non offenders, who could also be differentiated from offenders by their lack of psychoticism [Thompson, 1994b at 100-103]. This common feature can also be seen in the activities of other potentially criminal paraphiliacs on the Internet.

Fantasy, the Internet, and sexual deviance

3.10. The reports that a significant number of CPOs have higher scores on scales of fantasy generally and identification with fictional characters [Babchishin, et al. 2015; Elliott et al. 2013] reinforces earlier suggestions that there may be no direct link between sexual fantasy and contact offending amongst CPOs [Howitt, 2008 at 152; Elliott et al. 2009 at 84]; and the reason why can be demonstrated by the existence and popularity of web sites catering to other forms of sexual deviancy whose members exhibit similar patterns of behavior.

3.11. Paraphiliacs exploit popular web sites like *Tumblr* and *Deviant Art* to network with other people who share their proclivities; and both web sites are utilized by groups with sexual tastes that are not only deviant, but would constitute a criminal offense if conducted in real life, off line. *Deviant Art*, for example, contains hundreds of images of bestiality and vorarephilia: being sexually aroused by the idea of being eaten, eating another person, and/or observing someone else doing so. Like CPOs, the members of these groups engage in: validation seeking; social networking; downloading extensive collections of images; swapping images with others; and constructing images and narrative fantasies to share with others.

3.12. The 'Vore' section on *Deviant Art* reveals that devotees indulge in 'fan fiction'—projecting their proclivity onto characters from popular TV shows and movies; but other subsections include images and narratives involving incest such as *Getting Inside Mother's Belly* and *Come on Sis*; and images and narratives involving unwilling minors such as *Slumber Party Snacks*, and *The Girl Scout Vore*, a graphic story about consuming a Girl Guide who knocks on the door selling cookies. The illustrations—which include cartoons and other forms of illustration, and 'mashed' photographs culled from advertisements or online pornography ranging from nude to sadomasochistic poses using Photoshop and other programs, and other forms of viral images—are frequently downloaded from the internet for home consumption and sharing on other sites. Figures 1 and 2 reflect the most innocuous images I observed when accessing the site for this section:



Fig 1. A commissioned drawing on the Vore section of *Deviant Art*.



Fig 2. an extract from "Trick or Treat" on *Deviant Art*

3.13. Some of the members of these groups act out their proclivity in real life. For example, there are thousands of posts on *Tumblr* that include pornographic images of members engaging in sexual acts with others dressed for bestial 'cosplay,' acting out scenes seen on other web sites.

3.14. Though rare, progression to contact offending is not unknown. In 2014, Dale Bolinger, a 57-year old nurse obsessed with 'vore' was convicted of online grooming a 14-year-old girl whom he arranged to meet with the intent to murder and eat. He was reported to have frequented the online forum, *Dark Fetish Network*, and discussed beheading and eating women and girls for his sexual gratification [Mark Griffith, *Independent*, Tuesday 22 July 2014].

3.15. Unlike CPOs who access, collect, and utilize material made during the commission of a crime to indulge their fantasies; other online groups appear to confine themselves to utilizing self made pornography, images and illustrations created by using Photoshop and similar programs, or created by artists who can be

commissioned to draw or paint one's fantasy about sexual or sexual related acts that would be illegal. However, there is no difference between the nature of many of the images produced, distributed, and collected by these deviant groups on the Internet, and those criminalized by the Coroners and Justice Act 2009 as the anthropomorphic or otherworldly characters engaged in bestial and other sexual acts are created in the same style of Manga and Hentai commix books, with the heroes and heroines depicted as mid teen in appearance. The activities depicted in these widely distributed images can also be categorized and rated using the COPINE Project scale designed for child pornography, including as they do "indicative, nudist, erotica, posing, erotic posing, explicit erotic posing, explicit sexual activity, assault, gross assault, sadistic or bestiality" material [see Quayle 2008, at 14-15].

Sexual fantasies, paraphilia and behavior

3.16. Although the correlation between sexual fantasies and sexual orientation is well established; as the rate at which people act out their fantasies was not, Williams conducted two studies on non offender samples to fill the gap following the landmark Canadian judgment *R. v Sharpe* [2001], in which private possession of self-created pedophilic stories and drawings was ruled to be constitutionally protected as a matter of freedom of expression.

3.17. The first study, designed to determine the relative frequencies and inter-correlations of fantasies and behaviors, and the relationship between fantasy and pornography use, found that deviant fantasies occur more frequently than deviant behavior: 95% of respondents reported at least one sexually deviant fantasy, and 74% reported engaging in at least one sexually deviant behavior, although only 38% reported acting out their fantasies [See Table 1]. The mean rate for fantasies (52%) was significantly higher than rate for behavior (21%). The most common fantasies were frotteurism, object fetishes, and voyeurism; while the least common were pedophilia and transvestism; and as the behavior followed the same pattern. 63% also reported pornography use; and as the mean fantasy score for users (9.9) was significantly higher than the mean (6.1) for the nonusers, and the mean behavior score for users (7.9) was significantly higher than the mean for non users (3.1); it was found that pornography use was correlated with more deviant fantasies and behavior [Williams, 2009 at 204].

3.18. These rates are lower than those found in prison samples and it is pertinent to note that only a minority (38%) of those reporting fantasies also carried out the behavior; and the results are in line with previous non offender samples regardless of whether the behavior was measured via self-reports, records of actual behavior, or the expression of a willingness to commit such an act. What the study could not determine is whether the fantasies encouraged the behavior or followed from the behavior, or a third variable; or whether pornography led to the deviant behavior which then promoted the deviant fantasies, or the deviant fantasies led to pornography use which then led to deviant behavior, or whether a desire to

engage in deviant behavior led to fantasizing and use of pornography.

TABLE 1: Prevalence Rates and Intercorrelations Between Deviant Fantasies and Behaviors
Prevalence (% of Sample)

Deviance Category	Fantasies		Behavior		Fantasy-Behavior Intercorrelation	
	Study 1	Study 2	Study 1	Study 2	Study 1	Study 2
Object fetishism	58	55	23	27	.43**	.39**
Transvestism	10	4	10	10	.41**	.45**
Sadism	62	65	22	39	.79**	.78**
Bondage	62	52	14	23	.45**	.53**
Voyeurism	83	71	18	22	.38**	.55**
Exhibitionism	39	36	25	19	.51**	.54**
Frotteurism	72	76	44	42	.26*	.35*
Pedophilia	13	11	5	5	.13	.28
Sexual assault	68	65	25	20	.34**	.38**
Mean of 9 categories	52	48	21	23	.44**	.47**
Any of above	95	93	74	75	.71**	.72**

Note. Study 1 N = 103, Study 2 N = 88. Prevalence percentages are the percentages of individuals reporting endorsement greater than zero. *p < .05; **p < .01 (both two tailed)

3.19. The second study, which subjected a similar sample to personality tests to evaluate the role of personality traits both as predictors and moderators of the relationship between deviant behavior and deviant fantasies using standard measures found that two personality variables, neuroticism and psychopathy, were correlated, significantly with overall deviant sexual fantasies, and the aggression-related subtypes bondage, sadism, and sexual assault in particular [Williams, 2009 at 209-10, Tables 2 and 3]. The influence of deviant fantasies on behavior was stronger for individuals high in psychopathy; and the association between pornography use and deviant sexual behavior scores only applied to those individuals [Williams, 2009 at 211-213]. This replicates the findings in pornography 'effect' studies where adverse effect scores could be accounted for by those exhibiting high psychoticism [See Thompson 2004a at 137-150].

3.20. Least it be misunderstood, Williams drew attention to the way fantasies associated with neuroticism would be experienced quite differently from those associated with psychopathy; for example, in bondage fantasies neurotics would envision themselves as the hapless victims whereas the psychopaths would picture themselves in control. This confirmation that fantasies can take different paths, and that psychopathology explains the link between deviant fantasies and deviant sexual behavior, reinforces the importance of the CPOs' psychometric characteristics and their low risk of contact offending. It offers a means to predict which CPOs are more likely to engage in contact offending, suggests that using pornographic images for fantasies need not lead to contact offending especially amongst CPOs exhibiting a lack of a sense of sexual entitlement when it comes to children, and questions the assumption that the more severe the content collected,

the greater the risk when those doing so do not exhibit psychotic traits. And this is precisely what the latest research from New Zealand has uncovered.

The Meridian study

3.21. Having theorized that previous results suggested that there might be two groups of CPOs, the 'contact-driven' and the 'fantasy-driven' who used the imagery for self gratification; Meridian and colleagues meticulously designed a means to empirically test for differences in the psychological profiles of fantasy and contact driven CPOs, and avoid the methodological weaknesses apparent in previous tests [Meridian et al. (2016) at 3]. The study sought to establish whether (a) the offending profiles of CPOs and contact offenders was demonstrably distinct, (b) if it was possible to differentiate subgroups in CPO samples; and (c) if they could differentiate between subgroups, what conventional risk predictors were viable.

3.22. The sample consisted of 68 participants drawn from community sex offender treatment centers and prisons in New Zealand: CPOs (n=22), contact offenders (n=29), mixed offenders (n=17) who completed a previously piloted survey consisting of 211 potential risk relevant items covering: (a) personal life, (b) work and spare time activities, (c) Internet behavior, (d) general offending behavior, (e) content of images (Labeled CSEM, child sex exploitation material), (f) level of engagement with CSEM, and (g) cognitive beliefs relating to children and sex. The results, were subjected to an extensive range of statistical measurements, which produced significant differences between offender types that confirmed and extended previous findings.

3.23. The CPOs were significantly more likely to have higher scores on scales of: social exclusion; intimacy deficits (relative difficulties in establishing and maintaining interpersonal relationships); escapism; and were more strongly immersed in, and emotionally attached to, their online activities compared to contact and mixed offenders, describing more frequent and dynamic engagement with child sex exploitation material. They also spent more time searching for and sorting material. As well as collecting a broad variety of material (from every COPINE category - ed.); they also collected far more fantasy-based material such as fiction and narratives. Although the severity of some of the material they collected would have led to sentence enhancement in numerous jurisdictions, the CPOs collecting this material were less likely to view children as competent sexual agents, and they had stronger internal inhibitions toward engaging in contact offending than contact and mixed offenders.

3.24. In contrast, mixed offenders: were more likely to report social exclusion and escapism than contact offenders, but at lower levels than CPOs; had much lower levels of engagement online and networking with other users than the CPOs; were more likely than CPOs to justify their sexual behavior, endorse cognitive distortions concerning the sexual agency of children, and had a sense of sexual

entitlement, making them comparable with contact offenders in their propensity to justify and rationalize child directed sexual behavior. The mixed offenders use of child sex exploitation material appeared to be an occasional outlet for sexual interest or exploration; and only 20% reported they found CSEM sexually arousing.

3.25. The theorized distinction between fantasy-driven and contact-driven CPOs was verified by an 80% correct classification rate for the contact driven offenders; a figure comparable to the verification rate which determines the use of variables in risk assessments. This findings reinforce previous studies that suggested CPOs have a distinct psychological profile compared to contact offenders, and that it is also possible to identify viable differences between fantasy orientated and contact orientated CPOs. It also suggested that the inclusion of mixed offenders in previous samples is the most likely explanation for the anomalies between elevated risk scores and low CPO recidivism rates in the past [Merdian, et al. 2016 at 12]

3.25. Although the fantasy driven group could be subdivided into two groups on the basis of the amount of more severe material in their collections, the fact that neither groups' consumption of or engagement with the material led to endorsing the belief that children are sexual agents or led to a sense of sexual entitlement undermines the assumption that collecting material and other on line activities encourages beliefs that lead to contact offending.

3.26. What remained unexplained to and by the authors was the ambiguous finding that almost half of the fantasy-driven users had also engaged in online contact with a minor at one time or another. While this could be considered an indication of a desire for direct contact; given the other findings, it is more likely to reflect the way that members of other sexual communities, such homosexuals, bisexual men attracted to homosexuals, and heterosexual men attracted to the transgendered often use online 'live chat' facilities for fantasy functions rather than a prelude to arranging an off line meeting. Although the lack of information regarding the nature of the online contacts in this study, as the authors noted, prevented any conclusive statements [Merdian, et al. 2016 at 20]; the possibility that the online contacts were fantasy enhancements rather than an indication of intending off line contact is supported by an unrelated study that came to a similar conclusion from the USA.

3.27. A review of the chat room transcripts and the clinical and behavioral data from the mandated evaluations of 51 online contact offenders convicted of attempting to entice a minor into a sexual relationship using an Internet chat room in Colorado led the authors to report that a significant number of the offenders, 90% of whom were apprehended in an 'sting' operation, may not have been contact offenders after all. The assessments and the content of the transcripts revealed that the majority tended to avoid social relationships, so much so that the time spent online, in chat rooms reflected the fact that it was their primary source

of social contact and they were using the contact as a fantasy sexual outlet. The authors concluded that there was a contact-driven group, and a fantasy-driven group motivated to engage an adolescent in online cybersex without an express intent to meet offline [Briggs, et al. 2011].

An enhanced understanding of CPOs, pedophilia, and fantasy

3.28. The Merdian study not only reinforces the need to distinguish between the motives and beliefs of possession only CPOs, mixed offenders and contact offenders as Taylor and Quayle and Sheldon and Howitt suggested over a decade ago; it reported two other findings that suggest more research into the role of fantasy in online offending is necessary.

3.29. First, in contrast to contact sex offenders, CPOs (including the dual offenders) appeared to be more reliant on indirect means for achieving sexual and social stimulation indicated by the elevated scores on the Social Exclusion and Escape variables, including their level of interest in 'second-life' or 'third-person' gaming on line, which contributed to their excessive and problematic Internet use. This could indicate that these offenders would be satisfied by virtual pornography in the same way that they obtain vicarious satisfaction from online games. Second, as the fantasy subgroup that possessed the more extreme material including higher levels of sexual explicitness, had less cognitive distortions regarding children's sexuality, did not have a sense of sexual entitlement, and offered no justifications for their behavior, being well aware that their actions were illegal; this suggests that they may not be interested in contact offending at all, as they appear to have strong moral qualms against doing so, and already exhibit a sense of guilt about their on line activities [Merdian et al. 2016, at 17-18].

3.30. These findings offer strong support for the belief that the internet has revealed a new form of offender. First, they reinforce the possibility that collecting explicit material serves the same function for this 'new' group of online offenders in the Internet age that low level molestation appeared to do so for Howitt's sample given that the 'new' group clearly do not engage in contact offending that would lead to idealized concepts of relationships with children. Second, this group supports Jenkin's observation that debates on pedophile Bulletin Boards and News Groups mitigate against the belief that online activities merely serve to reinforce attitudes that lead to offending and/or offer techniques of neutralization to offenders. Third, all the indications identified by the fantasy group reflect the behavior of other online deviant groups.

3.31. While this evidence is may not appear substantial, that reflects the way the research community has yet to consider and incorporate the findings of related research and plan their own research designs accordingly, especially engaging in comparative analysis. However, despite its limitations, this evidence amounts to far more than the evidence to the contrary. Indeed, there is no evidence

demonstrating that possession only CPOs, whether or not they are designated pedophiles, pose a risk to children. And when these explanatory insights are considered in the light of the overwhelming evidence offered by recidivism studies, the consistent findings concerning the role of psychopathology in sex offending, and CPOs psychometric characteristics; they justify questioning the way possession of child pornography has been used as a proxy for contact offending and the assumption behind it: pedophiles only collect child pornography to pursue contact offending.

Issue 4: Legal scholarship regarding the status of the UK law prohibiting virtual child pornography *viz a viz* ECHR Art. 8 and 10.

Introduction

4.1. The last issue that I need to address is UK legal scholarship regarding the laws regarding possession in the UK, as they address similar issues covered in my review of the USA.

UK Government policy

4.2. Although the sentencing policy in the UK is no where near as draconian as the mandated sentencing policy introduced the USA [but see 4.17]; the UK policy regarding possession offences appears to rely on the same erroneous beliefs that led to criminalization in the USA: as possession is synonymous with pedophilia and reinforces beliefs that are associated with contact offending, everyone found in possession is likely to be an undetected contact offenders.

4.3. Possession was criminalized by §160 of the CJA, 1988 when Scotland Yard made child pornography a priority and claimed the new measure was needed as they could not always prove that possession was for the purpose of distribution. The government justified criminalization on the grounds that the original crime would not have occurred but for the demand, although the belief that possession was a proxy for contact offending was also evident in the debates [Ost, 2009 at 85-90]; and no one questioned the possibility that the police could not always prove possession was intended for distribution was because those possessing the material were using it for fantasy material.

4.4. The 1992 Sexual Offences Amendment Act increased the amount of material that could be designated child pornography by changing the definition of a minor to those under the age of 18; and while the government may not have intended to prosecute 16 to 18 year olds who were married or were in an enduring relationship [Ost, 2009 at 63], it widened the net, without ever justifying criminalizing a large number, possibly millions, of men who once owned and used a Polaroid© instant camera during the 1970s to make legal images of their contemporary girl friends that became illegal overnight, and teens using smart phones to display their attributes to others they may have hoped to convince to begin an enduring relationship.

4.5. 'Pseudo-photographs', whether or not based on real children, were criminalized by §84 of the Criminal Justice and Public Order Act, 1994, and was justified on three grounds: the ability of the 'pornography industry' to use computer technology to exploit children; the possible use of computers to morph images of real children without their consent; and research by Dr. Catherine Itzin which suggested using the material would incite pedophiles to seek stronger stimuli and might lead them closer to committing indecent acts [Ost, 2009, at 87-88]. In 2009, §62 Coroners and Justice Act criminalized possession of a

prohibited images of a child, making cartoon images involving a minor in situations which are pornographic and "grossly offensive, disgusting or otherwise of an obscene character" illegal.

4.6. In other words, the criminalization of possession in the UK ran parallel with criminalization in the USA, it was justified by questionable legal imperatives, and questionable research, which in Dr. Itzin's case did not even exist, consisting as it did of repeating speculations made by Ray Wyre who discredited himself, as did Dr. Itzin, by promoting the satanic abuse debacle [see Itzin, 2000, at 58-59]. It may be pertinent to note that the most recent government publication on its policy has also adopted the generic term 'child sexploitation,' replicating the US tendency to suggest that every offense is of the same magnitude and poses the same threat to children [see HM Government, 2017]

4.7. The criminalization of possession has been criticized by two authoritative commentators, concerned about the lack of evidential justifications for doing so. Ost's criticism concentrates on the concept of harm that has been used to justify the policy. It questions whether third party possession maintains the original harm of production, permanently objectifies the subject of the image, and produces harmful beliefs about children that encourage contact offending [Ost, 2009 at 104], given the lack of evidence demonstrating that possession incites individual to commit contact crimes or utilize the material to 'groom' children [Ost, 2009 at 113], and that possession policy has led to a reduction in offending [Ost, 2009 at 91-96]. Having commented on the US situation; Ost argues that the UK should follow the approach adopted in *R v Sharpe*, which offered two exemptions from possession charges where the material is created and kept by the individual alone, and *Ashcroft* which dismissed the US government's argument that virtual pornography leads to harm [Ost, 2009 at 196]. Ost concluded by suggesting that while the rights afforded by ECHR Art. 8 and 10 are limited by a state's right to protect public morals; it is questionable whether private possession would undermine public morality [Ost, 2009 at 217-218].

4.8. Professor Gillespie, who adopts a more neutral approach, was concerned that that the Government would not be able to justify its policy towards virtual child pornography for two reasons. The justifications offered for prohibiting possession, generally were superficial masks for moral decisions unsupported by any real evidence of harm [Gillespie, 2011 at 34, 39]; and the same applied to the Coroners and Justice Act as the only justifications offered were that the material had been found alongside real child pornography, and the argument that the images may be used to entice children [Gillespie 2011 at 104-5, 113], which the 8th Report of the Human Rights Joint Committee suggested did not amount to proof of true harm, would make it difficult for the government to meet the 'necessity and proportionate' requirements of the ECHR [Gillespie 2011 at 163].

4.9. The situation may be more critical than these commentators alluded to.

The right to privacy and freedom of expression

4.10. Article 8 and 10 of the ECHR are not directly comparable to the US First Amendment, and contain more caveats than the issue of morality referenced by Ost and Professor Gillespie.

Article 8

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right *except* such as is in accordance with the law and is necessary in a democratic society in the *interests of national security, public safety* or the economic well-being of the country, *for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Article 10

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, *may be subject* to such formalities, conditions, *restrictions or penalties as are prescribed by law and are necessary* in a democratic society, in the interests of national security, territorial integrity or *public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others,* for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

However, as UK policy has always relied on beliefs about the relationship between child pornography and contact offending that have never been justified by empirical research, and ignored the increasing amount of research to the contrary; the government would face a serious problem trying to justify dismissing an appeal against a conviction for possession of virtual child pornography on a violations of privacy contrary to Art. 8 and freedom of expression contrary to Art 10 on at least four grounds.

4.11. First, it would have to justify why it had singled the paraphilia of pedophilia when it had not taken equal measures against other paraphiliacs who openly produce and distribute their fantasy material involving equally illegal acts on the web. As the 2009 Act was specifically introduced to target Manga Commix books [Gillespie 2011 at 20-21], and the 1994 Act includes images that 'look like children'; the Government would not be able to suggest that the other groups material was merely fictional cartoons or virtual imagery as the illustration are clearly influence by Manga including those teen looking heroes and heroines.

4.12. Second, the Government has demonstrated that it can maintain public morality and safety while ensuring the right to privacy by way of its sex offender registration program [Sex Offender Act, 1997, as amended Sexual Offences Act 2003] to comply with the European policy that sex offender registration data is not to be made public. Although the Scheme to Protect Children enables parents

to request the sex offender status of an individual who has regular, unsupervised contact with their children; the UK's Supreme Court decision in *R and Thompson v Secretary of State for the Home Department* [2011] reinforced the right to privacy pursuant to ECHR Art. 8 [at 348]; and *H and L v A City Council* [2011] held that any disclosure must be determined on a case-by-case basis [at 67] as a blanket disclosure violates an offender's Art. 8 privacy rights [at 29] [see discussion Hynes, 2013, 364-370]

4.13. Third, the UK government would be faced with the same problem the US government had in *Ashcroft*: justifying a complete prohibition on the vague possibility that someone might use a virtual image to groom a child when there are other laws that could be used if anyone did, including §67 of the Serious Crime Act 2015, which made sexual communication with a child a criminal offense. Having relied on assertions and research that did not exist in the past, the government would also have a difficulty proving that using the material to generate personal and private sexual arousal would encroach on the rights of others by encouraging contact offending. As it has not done so in the past, it is unlikely to be able to demonstrate that pedophiles show children sexually explicit depictions of children with adults in order to lower inhibitions. It could not rely on the evidence used by the Hon. J. Shaw in the *R. v Sharpe Voir Dire* ruling [2001]. Detective Noreen Waters' testimony that "children are abused when they are exploited in the production of filmed or videotaped pornography" [at #11] would not apply to virtual material. Like Dr. Collins, the government would have to admit that there is no evidence to show that child pornography augments or reinforces the "cognitive distortions" that pedophiles use to justify their aberrant behavior [at # 13]; and would now be faced with the extensive evidence that CPOs do not endorse the standard "cognitive distortions" alleged to facilitate contact offending no matter level of material they possessed, and that most contact offenders are not pedophiles. The evidence offered by Dr. Collin's at the time to support his claim that pornography excites some child molesters to commit offences [at #13]—Marshall's (1988) and Carter's (1987) studies—suffer from limitations identified by later research. Neither pretested the subjects' psychometric characteristics to help them distinguish between what type of offenders and what type of offense was associated with the minority that reported use of material for incitement; and it is significant that when Carter alluded to pornography 'effect' research, he did not recognize that the 'aggressive' effects were only associated with high psychotics in the samples [see # 14-19]

4.14. Forth, the Government would not only be faced with a considerable amount of evidence that suggests child pornography can act as a substitute for contact offending, that CPOs recidivism histories belie their high risk diagnosis based on turning downloading into 'making' and swapping files with others into 'distribution,' and that there is a negative correlation between the availability of the material and the number of recorded contact offenses; it would also be faced with far more and stronger empirical evidence undermining its justifications than existed when *Sharpe* and *Ashcroft* were decided. In some cases, the government

would be have to admit the 'evidence' on which justifications were based was anecdotal at best; and may be forced to explain other embarrassing facts, including why UK police officers appear to be the only people incapable of telling the difference between a pseudo photograph and a real one, or a 3D graphic film clip from a real one, although they were used to justify §7(7) of the CJPOA, 1994.

4.15 In short, if the Government faced a determined appeal, it would be confronted with far more difficulties than raised by Ost and Professor Gillespie, because the existing empirical evidence undermines its justifications for criminalizing possession, let alone virtual pornography.

4.16. Whether or not the 'market' argument that demand for material generates production and thereby contact offenses was ever valid; it is easy to see why many people found the idea of anyone enjoying images and movies of children being encouraged or forced to engage in sex acts with adults repugnant. However, whether or not the public also find the idea of people enjoying virtual images and movies of similar sex acts equally reprehensible, there is no reason, scientific or otherwise, for criminalizing virtual images. They do not involve real children and do not produce victims; and if the 'market' argument is valid, virtual images may well promote public good by reducing demand for material depicting contact offenses. Otherwise, as Gillespie has argued, criminalization of virtual material transgresses the right of an individual to possess material that may offend, shock, and disturb another person [2011 at 98-116]

4.17. However, despite the consensus in the research community, the Sentencing Council's new guide lines in 2013 introduced a maximum sentence of 5 years for possession of an indecent photograph. It did so by reducing the previous 5 x 5 factors involving explicitness and the offender's proximity to the contact offense to a new set of 3 x 3 factors by collapsing the previous categories and turning the size of collections into an aggravating factor along with moving images, use of search terms amongst others. Consequently, while downloading is to be treated as possession, the end result will be an increase in sentences for possessing less material depending on the content and online activity engaged in. For example, a handful of short moving clips of penetrative sex which would have fallen within a range of 4 weeks to 18 months custody, would now fall within the 26 weeks to 3 years range *before* the addition of the aggravating search terms and moving images [Bryan, 2014].

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