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WHOSE CANDY ARE WE REALLY TAKING?
AN EXPLORATION OF THE CANDYMAN CASES AND THE DIVIDE WITHIN THE SECOND CIRCUIT

Lauren E. Curry*

INTRODUCTION

The Internet, now a ubiquitous and readily accessible means of communication and information seeking, has become a way for people to easily commit crimes with a swift movement of their fingertips. For example, the Internet has made the collection and exchange of child pornography a relatively simple task. Law enforcement agents and the U.S. Supreme Court have struggled to deal with the problem of child pornography, whose perpetrators "[have] evaded repeated attempts to stamp it out." In 1995, the Federal Bureau of Investigation (FBI) implemented a program called the Innocent Images Initiative ("Initiative"), composed of twenty-three task forces in fifty-six FBI field offices around the United States. The purpose of the Initiative is to "investigate and eradicate online sexual exploitation of children and the production and distribution of child pornography." Three e-groups, groups of people communicating via the internet, provided by the Internet service provider Yahoo! Inc. ("Yahoo!"), were found to be involved with "posting, exchanging, and transmitting child pornography." One Web site, named "The Candyman," contained a welcome message for its e-group that stated, "This is a group for People who love kids." In March 2002, the Initiative implemented "Operation

* J.D. Candidate, 2007, Fordham University School of Law. This Note is dedicated to the memory of Salvatore "Tory" Zabatino (1981–2005). His list of important things to do in life was an inspiration to many. We should all make the time to "stay up all night and watch the sun rise; achieve our dreams; walk barefoot on the sand; lie in the grass wearing all white clothing; and read bedtime stories to our children."
1. Free Speech Coal. v. Reno, 198 F.3d 1083, 1087 (9th Cir. 1999).
Candyman," which targeted the Candyman site as well as other similar sites and led to a number of arrests.\textsuperscript{7}

The operation was seemingly a beneficial and important initiative in combating child pornography, but the operation has spurred a controversy within the U.S. Court of Appeals for the Second Circuit.\textsuperscript{8} The controversy centered around whether probable cause still existed to search potential offenders' homes and computers when erroneous information, found to be recklessly and/or knowingly added to the affidavits used to obtain warrants, was excised from those affidavits.\textsuperscript{9} United States v. Martin (Martin I),\textsuperscript{10} United States v. Coreas (Coreas I),\textsuperscript{11} and United States v. Perez\textsuperscript{12} are three of the cases that stemmed from the Operation Candyman investigations. In Martin I, the Court of Appeals for the Second Circuit held that after the erroneous portions of the affidavit were removed, probable cause still existed when a defendant joined an e-group that had a welcome message stating that pictures and videos of children were available for viewing, posting, and trading.\textsuperscript{13} In contrast, in Coreas I, the Second Circuit vehemently rejected a finding of probable cause but held that its decision must follow the precedent set by Martin I.\textsuperscript{14} Similarly, in Perez, the district court held that probable cause did not exist when the erroneous information in the affidavit was removed.\textsuperscript{15}

These three cases, part of a series of cases collectively known as "the Candyman cases," have created a controversy and a three-way tug-of-war between the First Amendment right to free speech, the Fourth Amendment restrictions on search and seizure, and the societal concern of protecting children against exploitation and potential abuse.\textsuperscript{16} In each of these cases,
child pornography was found in the defendants' possession. The Candyman cases all concerned the process ultimately used to find the child pornography, not whether the defendants actually broke the law.

Part I of this Note discusses child pornography, the prevalence of child pornography on the Internet, efforts to combat child pornography, and First and Fourth Amendment concerns. Part II introduces and analyzes the Candyman cases and subsequent appellate decisions. Finally, Part III argues that the Martin I and Martin II decisions were based on a broad generalization of people who choose to join questionable e-groups rather than an individualized finding of probable cause as required by the Fourth Amendment. Part III argues that any case with circumstances similar to the Candyman cases must also be evaluated on an individual basis and that probable cause must be found on the particular facts of each case, rather than on the blanket idea that subscribing to an e-group in and of itself can suffice to establish probable cause. Part III concludes by advocating for a stringent means of monitoring Internet postings to combat child pornography without violating Fourth Amendment rights.

I. CHILD PORNOGRAPHY AND CONSTITUTIONAL CONCERNS

A. Child Pornography: Background

Congress has attempted to address and curb the actions of people who desire to engage in sexual acts with children and commit criminal acts to gratify their impulses.17 "The most expeditious if not the only practical method of law enforcement may be to dry up the market for [child pornography] by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the [pornography]."18 Thus, receiving pornography in interstate commerce consisting of a visual depiction of an actual person less than eighteen years of age is a violation of 18 U.S.C. § 2252(a)(2)(A).19 In Osborne v. Ohio, the Supreme Court ruled that a proximate link between child pornography and child abuse justified a ban on the possession of child pornography.20 The Court held that, "[g]iven the importance of the State's interest in protecting the victims of child pornography," a state is justified in "attempting to stamp out this vice at all levels in the distribution chain."21

21. Id. at 110.
1. Definition of Child Pornography

Child pornography is defined by 18 U.S.C. § 2256(8) as any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

A person who posts a notice on the Internet seeking to receive or exchange images of minors engaged in sexually explicit conduct violates 18 U.S.C. § 2251. Section 2252A governs certain activities relating to material constituting or containing child pornography.


23. The statute provides,

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.


24. In relevant part, 18 U.S.C. § 2252 leads to the prosecution of:

(a) [a]ny person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction in interstate or foreign commerce or through the mails, if—
"Child pornography abuses, degrades and exploits the weakest and most vulnerable members of our society." 25 Children are harmed from both the creation and distribution of child pornography: The children involved suffer emotional and psychological problems, and once the pornography is created, a record of it can feasibly exist forever. 26 The images can also be used as a form of "peer pressure" for sexual abusers to coax children into participating in sexual acts. 27

2. Child Pornography Offenders

According to the National Center for Missing and Exploited Children, prosecutions of child pornographers have increased approximately ten percent annually since 1995. 28 Those who view child pornography, also known as "child pornography offenders," 29 may view child pornography for a variety of reasons. 30 Research has suggested that child pornography offenders demonstrate four characteristics: (1) a predisposition towards sexual contact with children; (2) the ability to overcome their inhibitions; (3) the ability to overcome a victim's resistance to abuse; and (4) the opportunity to offend by viewing and/or trading child pornography. 31 Child pornography offenders are assisted in overcoming their inhibitions or personal moral codes by participating in chat rooms that downplay harm

25. See Farhangian, supra note 5, at 276-77 (internal quotations omitted).
26. Id. at 277.
27. Id.
29. See McCarthy & Gaunt, supra note 22, at 1.
30. Id. at 1-2 ("Some child pornographers will only ever look; some will only ever collect . . . ; some will only ever participate in ‘social networks’ on-line . . . ; some will take photographs of children to trade; some will use child pornography to approach or ‘groom’ children for further abuse; some will blackmail children who participate in making child pornography in order that the child will co-operate in other sexual ways. Some offenders will try to use child pornography instead of abusing a child. Others will already be using it while abusing a child.").
31. Id. at 2; see also David Finkelhor & Sharon Arai, Explanations of Pedophilia: A Four Factor Model, 22 J. Sex Res. 145-61 (1986) (discussing a four-factor model that explains pedophilic behavior).
done to children, stress the acceptability of the behavior, and give rise to the
notion that many others are involved in it as well.32

B. Child Pornography: Its Presence and Efforts to Combat It

1. Child Pornography and the Internet

The Internet is home to a large amount of sexually explicit material that
is readily accessible to almost anyone with access to a computer. Child
pornography used to be found mainly in physical form, such as
photographs, but the advent of the Internet has become a “mechanism for
making, displaying, trading and distributing child pornography” and a
“vehicle for child pornographers to make contact with and ensnare new
victims.”33 Pictures and video can be sent over the Internet in a private
manner—trips to video stores have become unnecessary to some degree.
Someone wanting access to pornography need not give a name or any other
identifying information. Rather, he or she can simply access sexually
explicit material at the click of a mouse. Discussion groups are also
popular sources of pornographic materials.35 There are several groups that
deal with sexual topics, including sexual preferences, stories, and
practices.36 Although adult-oriented Web sites account for a small portion
of all Web sites (approximately 1.5 percent), about seventy million
individuals view at least one adult Web site per week, twenty million of
whom are looking at sites hosted in the United States and Canada.37 There
are approximately ten million subscribers to such sites in the United
States.38 Researchers and law-enforcement officials believe that the
proliferation of the Internet is causing an increase in the possession and
distribution of child pornography.40 The U.S. Department of Justice, in an
effort to combat child pornography, has instituted the CyberTipline, a
national clearinghouse for reports of Internet-related child pornography and
other Internet-related sex crimes against children.41

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32. See McCarthy & Gaunt, supra note 22, at 2.
33. John Carr, Theme Paper for the 2nd World Congress on Commercial Sexual
35. Id.
36. Id.
38. Id. at 73.
computers and users connected to the Internet has increased exponentially in recent years.”).
In 1999, approximately 109 million people in over 159 countries were using the Internet. Id.
40. Janis Wolak et al., Child-Pornography Possessors Arrested in Internet-Related
41. Id.
The United States Code governs the reporting of child pornography by electronic communication services:

Whoever, while engaged in providing an electronic communication service or a remote computing service to the public, through a facility or means of interstate or foreign commerce, obtains knowledge of facts or circumstances from which a violation of [offenses] involving child pornography... is apparent, shall... report [those] facts or circumstances to the [CyberTipline] at the National Center for Missing and Exploited Children... 42

Many Internet providers have a system of monitoring and finding child pornography. However, some savvy posters of child pornography sites evade checks by disguising words. For example instead of “kids” an offender may include “k!d_s” in the title of a Web site so that an automatic checking system would not pick up the word. 43

2. Preferential Sex Offenders: A Profile

Because some of the courts that upheld evidence obtained from adulterated warrants 44 discuss the need to protect children from sex offenders and discuss characteristics of child pornography offenders, it is important to examine characteristics of both people who own child pornography and those who sexually abuse children. People who abuse children, known as “preferential” sex offenders, tend to use erotic imagery and repeated fantasies to satisfy their needs. 45 These needs take precedence over potential risks of getting caught, and any collections of pornography tend to focus on paraphilic preferences. 46 Preferential sex offenders are more likely to view, be aroused by, and collect pornography following a particular theme, such as child pornography. 47 As such, a pedophile, someone who sexually abuses children, would be more likely to collect child pornography. 48 Preferential sexual offenders’ “sexual behavior is

43. Transcript of Record at 24, United States v. Perez, 247 F. Supp. 2d 459 (S.D.N.Y. 2003) (No. 02-854) [hereinafter Perez Transcript].
44. See infra Part II.A.
46. Id. Paraphilia is a psychosexual disorder characterized as “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one’s partner, or 3) children or other non-consenting persons and that occur over a period of at least 6 months.” Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders 522-23 (4th ed. 1994) [hereinafter DSM-IV].
47. See DSM-IV, supra note 46, at 522-23.
rooted in their sexual fantasies and need to turn fantasy into reality."\(^{49}\) Such a person usually has a high verbal level, is not likely to use physical violence to control victims, and is likely to have a history of sex offenses.\(^{50}\)

Preferential sex offenders tend to make "needy" mistakes that can be characterized as "sloppy."\(^{51}\) As a prime example of such a mistake, an offender employed as a teacher had a pornographic videotape sent to the school where he worked and then played the tape at the school rather than waiting until he got home, thereby creating a greater risk of detection.\(^{52}\)

Preferential sex offenders with a definite preference for children have "sexual fantasies and erotic imagery that focus on children" and "have the potential to molest large numbers of child victims."\(^{53}\) For these people, "their problem is not only the nature of the sex drive (attraction to children), but also the quantity (need for frequent and repeated sex with children)."\(^{54}\)

Although there is not a profile that will determine if someone is a child molester, preferential sex offenders tend to engage in highly predictable and recognizable behavior patterns. Law-enforcement investigations have revealed that preferential sex offenders almost always collect theme pornography related to their sexual preferences.\(^{55}\) Enforcement experts have been used to educate the courts about certain behavioral patterns.\(^{56}\) If an investigator identifies a number of patterns, it might be acceptable for him or her to assume remaining ones. Characteristics include long-term pictures of boys exacerbate the tendency for pedosexually inclined males to seek out boys for sexual purposes? The commonly perceived wisdom would answer ‘yes,’ but there are little or no credible data to support this position.” Id. at 321. See also Dennis Howitt, Pornography and the Paedophile: Is It Criminogenic?, 68 Brit. J. of Med. Psychol. 15, 17 (1995) (“No clear-cut causal link has been demonstrated between . . . exposure to pornography and sex crime.”).

\(^{49}\) See Lanning, supra note 45, at 24.

\(^{50}\) Id.

\(^{51}\) See id. at 25.

\(^{52}\) See id.

\(^{53}\) See id. at 27. Some studies, while not proving a causational link between viewing child pornography and child molestation, have pointed to a relationship between child pornography offending and sexual assaults on children. See McCarthy & Gaunt, supra note 22, at 3-4.

\(^{54}\) Lanning, supra note 45, at 27.

\(^{55}\) Id. at 61; see McCarthy & Gaunt, supra note 22, at 3 (“While there is no proven causal link between looking at child pornography and later sexually assaulting a child, it is important to recognise that child pornography is, itself, child sexual abuse. While child pornography offenders may never commit a physical offence on a child, they participate in the sexual abuse of children because the images they desire can only occur through children being sexually assaulted.”).

\(^{56}\) See, e.g., United States v. Romero, 189 F.3d 576, 582-84 (7th Cir. 1999) (holding that an agent could give his expert opinion on characteristics of “preferential” child molesters and the methods they use to attract and/or abuse children); United States v. Cross, 928 F.2d 1030, 1050 (11th Cir. 1991) (holding that an agent could describe the habits of pedophiles and testify that “such persons characteristically derive sexual satisfaction from and collect even such ostensibly non-sexual nude photographs of children . . . [since] [s]uch evidence clearly shed light on one of the critical issues in the case—whether [the defendant] obtained the photos with the intention of using them to produce and distribute child pornography”).
and persistent patterns of behavior, specific sexual interests, well-developed techniques, and fantasy-driven behaviors. Terms such as preferential sex offender, however, are descriptive labels and are not intended to be used for diagnosis.  


The Child Pornography Prevention Act of 1996 (CPPA) expanded the federal prohibition of child pornography to include "[any] visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture," that "is, or appears to be, of a minor engaging in sexually explicit conduct" or any "visual depiction [that] is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." In other words, the CPPA banned images known as virtual child pornography. The Supreme Court ruled in Ashcroft v. Free Speech Coalition, that prohibiting child pornography that does not depict an actual child exceeded New York v. Ferber, which recognized a State's interest in protecting against the exploitation of children by distinguishing child pornography from other sexually explicit speech. Ferber held that pornography with minors can be prohibited whether or not the images are obscene, since the general definition of obscenity "[did] not reflect the State's particular... interest in prosecuting those who promote the sexual exploitation of children." Because the CPPA banned pornography that did not involve "real" minors, the Court ruled it unconstitutional.

The driving force behind the CPPA was that the pornographic images, although not of real children, may "whet [the] sexual appetites" of

57. See Lanning, supra note 45, at 38. Lanning describes sixteen behaviors of preferential sex offenders that fall under four categories. Id. "Long-term and Persistent Pattern[s] of Behavior" include patterns beginning in early adolescence, spending time, money, and energy, committing multiple offenses, and making ritual or need-driven mistakes. Id. "Specific Sexual Interests" include manifesting paraphilic preferences (which can be multiple preferences), focusing on defined sexual interests and victim characteristics, centering life around preferences, and rationalizing sexual interests. Id. "Well-Developed Techniques" include evaluating experiences, lying and manipulating (often skillfully), having a method of access to victims, and being quick to use modern technology (e.g., computer and video) for sexual needs and purposes. Id. "Fantasy-Driven Behavior[s]" include collecting theme pornography, collecting paraphernalia (e.g., souvenirs and videotapes), recording fantasies, and acting to turn fantasy into reality. Id.

58. See id. at 29.

59. 18 U.S.C. § 2256(8)(B), (D) (2000). The language of Section (8)(B) now reads "is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct," and Section 8(D) has been repealed. See 18 U.S.C.A. § 2256(8)(B), (D) (Supp. 2006).


61. Id. at 233.


63. Id. at 761.

64. See Ashcroft, 535 U.S. at 258.
pedophiles and "increas[e] the creation and distribution of child pornography and the sexual abuse and exploitation of actual children."\textsuperscript{65} Even so, the CPPA was ruled to be overbroad and a violation of First Amendment rights.\textsuperscript{66} The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech."\textsuperscript{67} A law imposing criminal penalties on protected speech constitutes speech suppression.\textsuperscript{68}

The battle over the CPPA shed light on the standards needed to suppress speech. In order to prohibit obscenity, the government "must prove that the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value."\textsuperscript{69} The CPPA was struck down because the Act would have prohibited making "a movie depicting the horrors of sexual abuse" even if the images used were not "patently offensive."\textsuperscript{70} In examining the merits of the CPPA, the Supreme Court rejected the argument that the CPPA was necessary since child pornography "whets the appetites of pedophiles and encourages them to engage in illegal conduct."\textsuperscript{71} Rather, the Court held that "the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."\textsuperscript{72} Laws cannot be made to "constitutionally premise legislation on the desirability of controlling a person's private thoughts."\textsuperscript{73}

A recent battle ensued between Google, Inc., ("Google") and the Bush administration.\textsuperscript{74} The Bush administration, seeking to revive the 1998 Child Online Protection Act, which was struck down by the Supreme Court, subpoenaed Google in 2005. Google refused to comply with the subpoena, which required Google to produce details on what its users had been looking for through its search engine.\textsuperscript{75} The Government contended that it

\begin{enumerate}
\item Id. at 241.
\item Id. at 258. The Court noted that the Government failed to show a sufficient connection between the speech, which may encourage thoughts, and any resulting child abuse. Id. Furthermore, the Court rejected the argument that the prohibition of virtual images is necessary to eliminate the market for actual child pornography. Id. at 254. Finally, the Court rejected the argument that virtual images make the prosecution of actual child pornography too difficult. Id. at 254-55.
\item U.S. Const. amend. I.
\item Ashcroft, 535 U.S. at 244.
\item Id. at 246.
\item Id.; see also Ryan P. Kennedy, Ashcroft v. Free Speech Coalition: Can We Roast the Pig Without Burning Down the House in Regulating "Virtual" Child Pornography?, 37 Akron L. Rev. 379 (2004) (explaining why the Supreme Court was correct in ruling the Child Pornography Protection Act of 1996 (CPPA) unconstitutional).
\item Ashcroft, 535 U.S. at 253 (quoting Stanley v. Georgia, 394 U.S. 557, 566 (1969)).
\item Id. The subpoena was "for a broad range of material from its databases, including a request for 1 million random Web addresses and records of all Google searches from any one-week period").
\end{enumerate}
needed the data to determine how often pornography shows up in online searches in order to revive the 1998 law, which would have required adults to register before they could see objectionable material online and would have punished violators with fines of up to $50,000 or jail time. The Supreme Court sided with Google, however, and ruled that technology such as filtering software may better protect children.76

4. National Juvenile Online Victimization Study

In 2001, a study called the National Juvenile Online Victimization Study ("N-JOV Study") found that "there has been little scientific data to track the extent of [child pornography] possession cases . . . and describe their characteristics."77 This study addressed this need by surveying law enforcement agencies within the United States and counted arrests of Internet-related sex crimes.78 The N-JOV Study examined the characteristics of the offenders, the crimes committed, and the victims. Key findings included the following: Almost all arrested offenders were male; 91% were white; 86% were over twenty-five; 83% had images of prepubescent children; 80% had images graphically depicting sexual penetration; 39% had at least one video with moving images of child pornography; and 40% of arrested child pornography possessors were "‘dual offenders,’ who sexually victimized children and possessed child pornography, with both crimes discovered in the same investigation" while "[a]n additional 15% were dual offenders who attempted to sexually victimize children by soliciting undercover investigators who posed online as minors."79

The N-JOV Study found that the vast majority of child pornography possessors had images of explicit sexual acts and not simply suggestive images of children.80 "Most arrested child pornography possessors (79%) also had what might be termed ‘softcore’ images of nude or semi-nude minors, but only 1% possessed such images alone. Further some of those with softcore images only also had sexually victimized children."81

5. Yahoo!’s Reforms to Protect Children

On October 12, 2005, New York Attorney General Eliot Spitzer and Nebraska Attorney General Jon Bruning announced a settlement agreement with Yahoo! that removed and barred the posting of user-created chat

76. Id.
77. See Wolak et al., supra note 40, at ix.
78. Id. at vii.
80. Id. at 4.
81. Id. at 5.
rooms with names that promoted sex between minors and adults. In June 2005, pursuant to discussions with the Attorneys General, Yahoo! removed or barred approximately 70,000 user-created chat rooms whose names suggested that they facilitated illegal conduct, including promoting sex between adults and minors. The removed chat rooms included labels such as "5-13 kiddies who love sex," "girls13 & up for much older men," "8-12 yo girls for older men," and "teen girls for older fat men." Many of the chat rooms were located within the "Schools and Education" and "Teen" chat categories. While the main goal was prevention of children having unfettered access to illegal and explicit materials, the controls also helped to identify groups where adults went to exchange child pornography.

This settlement was the first agreement that instituted system-wide controls over categories of chat rooms that are likely to be frequented by child predators. The agreement instituted the following measures:

Should Yahoo! reinstate such user-created chat rooms, it must pre-screen all user-created chat room names, so that any chat room name encouraging sex acts between adults and minors will not be posted; In the event Yahoo! becomes aware of any such chat room, despite these controls, it must purge the room from its site within [twenty-four] hours; Yahoo! will make it easier to report any threats to child safety, give priority to such complaints, and designate specific employees to do so; Yahoo! will develop education materials and feature them on the Yahoo! network, promoting the safe use of chat rooms . . .


83. See N.Y. Attorney General, supra note 82.
84. See Harrington, supra note 82; Yahoo, supra note 82.
85. See Yahoo, supra note 82.
86. See Harrington, supra note 82.
87. See Yahoo, supra note 82; see also Harrington, supra note 82. Yahoo!-created groups are still operating, except for one called “teens.” Yahoo! requires users to be 18 or over to subscribe to the groups. Id. “We need to be vigilant to protect our children,” Spitzer said. ‘It is imperative that parents, industry, prosecutors and lawmakers all work together to identify and address possible threats, and that we teach our children to protect themselves from those who would do them harm.’” See N.Y. Attorney General, supra note 82.
88. N.Y. Attorney General, supra note 82; see Yahoo, supra note 82 ("[I]t is not clear how the company [will] prevent children from signing up as adults because credit cards aren’t required.").
C. First Amendment Concerns

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”89 Generally, the First Amendment bars the government from controlling what people see, read, speak, or hear. Nevertheless, there are some limits to the freedom of speech.90 The prospect of crime alone does not justify laws suppressing speech, and a statute is unconstitutional if, on its face, it prohibits a substantial amount of protected speech.91 In Ashcroft, the Supreme Court held that “First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”92

The First Amendment has been applied directly to child pornography.93 First Amendment protection is not extended to the “private possession of child pornography” because child pornography is a product of sexual abuse of children.94 In United States v. Ferber, however, the Court held that when speech is neither obscene nor the product of sexual abuse, such as virtual child pornography, the speech still falls within the protection of the First Amendment.95 Congress has, however, enacted legislation specifically targeted at combating child pornography and obscenity on the Internet.96 In a plurality opinion in United States v. American Library Ass'n, the Court upheld the Children’s Internet Protection Act as constitutional because the Court considered requiring public libraries to install pornography-blocking software on computers “as a constitutional refusal by the government to subsidize certain speech, rather than an unconstitutional ‘penalty’ on that speech.”97 The Court also noted that

89. U.S. Const. amend. I.
90. Certain categories of speech, including obscenity, child pornography involving actual children, defamation, and incitement are not protected by the First Amendment. See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring). For a discussion of how the CPPA was ruled unconstitutional because it violated First Amendment rights, see supra Part I.B.3.
92. Id. at 253.
93. See Part I.B.3.
94. See Farhangian, supra note 5, at 249 (citing Osborne v. Ohio, 495 U.S. 103, 139 (1990)). A state can prohibit possession and viewing of child pornography because there is a compelling state interest in “protecting the physical and psychological well-being of minors and in destroying the market for the exploitative use of children.” Osborne, 495 U.S. at 103.
96. See United States v. Am. Library Ass’n, 539 U.S. 194 (2003). The Court upheld the Children’s Internet Protection Act, which was enacted to protect children from harmful Internet content by requiring any public libraries receiving federal funding to install software that blocks obscene and pornographic images on the Internet, as not unduly burdensome on First Amendment rights. Id.
[m]ost libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. We do not subject these decisions to heightened scrutiny; it would make little sense to treat libraries’ judgments to block online pornography any differently, when these judgments are made for just the same reason.98

D. Fourth Amendment Concerns

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”99 The Supreme Court ruled in Franks v. Delaware that a defendant may challenge a search warrant that was issued based on an affidavit containing false information.100 A search warrant must be voided, and evidence suppressed, if a defendant shows, by a preponderance of the evidence: that the affidavit (1) contained deliberately or recklessly false or misleading information and (2) that the remaining content of the affidavit is insufficient to establish probable cause when the false material is excised.101 Although not every statement in an affidavit is required to be true,102 the affidavit must be “‘truthful’ in the sense that the information put forth is believed or appropriately accepted by the affiant as true.”103 By law, a warrant affidavit must include facts and circumstances that show the existence of probable cause and “allow the magistrate to make an independent evaluation of the matter.”104 Furthermore, the Fourth Amendment requires reasonableness as to “whether a search should be ‘conducted at all, [and] also to ensure reasonableness in the manner and scope of searches and seizures that are carried out.’”105

98. Am. Library Ass’n, 539 U.S. at 208.
99. U.S. Const. amend. IV.
101. Id. at 155-56; accord United States v. Canfield, 212 F.3d 713, 717-18 (2d Cir. 2000).
102. See Franks, 438 U.S. at 165; Canfield, 212 F.3d at 717-18; United States v. Trzaska, 111 F.3d 1019, 1027 (2d Cir. 1997). If a defendant can show that false statements were deliberately or recklessly included in a warrant affidavit, a court should ignore the allegedly false statements and determine whether the remaining portions of the affidavit would support probable cause. Franks, 438 U.S. at 171-72. If the remaining portions of the affidavit do not establish probable cause, a court should conduct a hearing to determine whether the statements were actually false and whether they were made knowingly or with reckless disregard for the truth. Id. at 172.
103. Franks, 438 U.S. at 165.
104. Id. Negligence or innocent mistake is not a sufficient basis for a defendant’s challenge of an affidavit. See id. at 171.
105. United States v. Perez, 247 F. Supp. 2d 459, 476 (S.D.N.Y. 2003) (quoting Lauro v. Charles, 219 F.3d 202, 211 (2d Cir. 2000)); see also United States v. Knights, 534 U.S. 112, 118-19 (2001) (“The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined ‘by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’” (quoting Wyoming v. Houghton, 526
Probable cause requires a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."106

Probable cause also requires "the probability, and not a prima facie showing, of criminal activity,"107 and "[o]nce it is established that probable cause exists to believe a federal crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may be the place of concealment of evidence of the crime."108

The Fourth Amendment further requires individualized suspicion for finding probable cause.109

The Internet has posed challenges to the way searches must be executed. As applied to computer use, courts have ruled that there is no reasonable expectation of privacy against government searches of web sites or chat rooms.110 Courts do not recognize a privacy interest where communications have already been received and turned over to law enforcement, and the courts apply this same principle to e-mails.111

There have been instances where the government has been allowed to rely on circumstantial evidence to prove that pornography was obtained through the Internet. For example, in United States v. Dodds, circumstantial evidence was used in the prosecution of a defendant for knowingly taking or receiving images of child pornography.112

U.S. 295, 300 (1999)); Perez, 247 F. Supp. 2d at 483-84 ("The Court must evaluate the reasonableness of a search by engaging in a practical, common-sense analysis, taking into account the particular context in which probable cause is being assessed, and balancing the rights of citizens to be secure in their homes from unwarranted intrusion against the needs of law enforcement.").

106. Illinois v. Gates, 462 U.S. 213, 238 (1983). The Court also noted that "[p]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." Id. at 232. The Fourth Amendment requires no more than the magistrate having a substantial basis for concluding that a search would produce evidence of wrongdoing. Id. at 236.


109. Ybarra v. Illinois, 444 U.S. 85, 91 (1979) ("Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person."); see also Chandler v. Miller, 520 U.S. 305, 308 (1997) (holding that the Fourth Amendment "generally bars officials from undertaking a search or seizure absent individualized suspicion").


111. See, e.g., Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001) (holding that e-mails should be treated as letters, in that once opened, the fate of the letter lies with the recipient and not the sender).

112. United States v. Dodds, 347 F.3d 893, 900 (11th Cir. 2003) ("In this case, the government presented evidence that a number of the photographs on Dodds's computer were actually available and frequently traded on the internet. Some of the children that were in the 66 images entered into evidence were proven to be in locations as varied as Missouri, Florida, Pennsylvania, and the United Kingdom. . . . The government also showed that
If a court rules that an affidavit for a warrant contains erroneous information that was knowingly or recklessly included, the affidavit must be corrected.\textsuperscript{113} To correct the affidavit, a court must "disregard the allegedly false statements," fill in omitted material, and then "determine whether the remaining portions of the affidavit would support probable cause to issue the warrant."\textsuperscript{114} If, upon a subsequent de novo review, a court determines that probable cause exists based on the "corrected" affidavit, then suppression of evidence must be denied.\textsuperscript{115} The question is "whether, after putting aside erroneous information and material omissions, 'there remains a residue of independent and lawful information sufficient to support probable cause.'"\textsuperscript{116} This Note addresses cases in which the warrants obtained were used to search the homes and personal computers of the defendants. The home has a "special status," and courts have emphasized the sanctity of the home.\textsuperscript{117} "In the home, ... all details are intimate details, because the entire area is held safe from prying government eyes."\textsuperscript{118} The Supreme Court has held that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."\textsuperscript{119} However, "[c]rime, even in the privacy of one's own quarters, is ... of grave concern to society, and the law allows such crime to be reached on proper showing."\textsuperscript{120} The cases at issue in this Note, collectively referred to as the Candyman cases, all included searches of defendants' homes and personal computers.\textsuperscript{121}

Dodds had access to the internet and was familiar with using it (he had been 'caught' by his wife viewing adult pornography sites on their home computer). Under our standard of review, we find this evidence sufficient circumstantial evidence to support the contention that Dodds had obtained at least some of the pictures over the internet.

\textsuperscript{113} United States v. Canfield, 212 F.3d 713, 717-18 (2d Cir. 2000).
\textsuperscript{114} Id. at 718 (internal quotations omitted).
\textsuperscript{115} Id.
\textsuperscript{116} Id. (quoting United States v. Ferguson, 758 F.2d 843, 849 (2d Cir. 1985)).
\textsuperscript{117} Lauro v. Charles, 219 F.3d 202, 211 (2d Cir. 2000); see also Wilson v. Layne, 526 U.S. 603, 612 (1999).
\textsuperscript{120} Johnson v. United States, 333 U.S. 10, 14 (1948); see also Terry v. Ohio, 392 U.S. 1, 9 (1968) ("[W]herever an individual may harbor a reasonable 'expectation of privacy,' he is entitled to be free from unreasonable governmental intrusion."); cf. Katz v. United States, 389 U.S. 347, 351 (1967) (holding that "the Fourth Amendment protects people, not places").

THE CANDYMAN CASES

E. The Candyman Cases

The Candyman cases involve defendants who subscribed to Web sites that contained child pornography, and these cases center around whether their subsequent arrests and convictions have implicated First Amendment and Fourth Amendment rights.\(^1\) In 2002, a lead child pornography investigator infiltrated the Candyman e-group, which was advertised as a site “for People who love kids.”\(^2\) The group was located under the “Adult,” “Image Galleries,” and “Transgender” categories on Yahoo! Groups.\(^3\) As part of a multistate child pornography investigation,\(^4\) FBI Special Agent Geoffrey Binney took initiative to crack down on child pornography Web sites in 2000.\(^5\) On January 2, 2001, Agent Binney joined the Candyman Web site.\(^6\) The Web site stated, “You can post any type of messages you like too [sic] or any type of pics and vids you like too [sic]. P.S. IF WE ALL WORK TOGETHER WE WILL HAVE THE BEST GROUP ON THE NET.”\(^7\)

During the course of the Candyman investigation, the FBI observed that some Candyman members had started to exchange information about two new e-groups that also focused on child pornography: “girlsl2-16” and “shangri_la.”\(^8\) Agent Binney told another FBI agent, Austin Berglas, about his experiences with the e-group, and an affidavit was created.\(^9\) The affidavit included a description of the Candyman Web site welcome message and a representation that the group had 3397 members.\(^10\)

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122. See supra note 121.  
123. See Perez, 247 F. Supp. 2d at 462.  
124. See id. at 464. The court noted, “a first-time visitor to the site ... certainly would have had some idea that the site provided access to child pornography.” While there was no explicit reference to child pornography or child erotica, the location of the group within the adult category and its welcome message encouraging posting of pictures and videos alluded to the presence of child pornography. Id. “On the other hand, the page also offered links or tabs to several features that had the appearance of being—and actually were—text-based ... .” Id.  
126. Coreas I, 419 F.3d at 152.  
127. Id.  
128. Id.  
129. Martin I, 426 F.3d 68, 71 (2d Cir. 2005). The welcome pages for the e-groups were solely text-based. There were no visual images on the welcome pages.  
130. See Kunen, 323 F. Supp. 2d at 392.  
131. United States v. Perez, 247 F. Supp. 2d 459, 462, 464 (S.D.N.Y. 2003) (“The affidavit explained that the Candyman Egroup website had several features, including a ‘Files’ section that permitted members to post images and videos for other members to download. It also disclosed that the Candyman site offered a ‘Polls’ feature that permitted members to answer survey questions; a ‘Links’ feature that permitted members to post links to other websites; and a ‘Chat’ section that permitted members to engage in ‘real time conversations with each other.’”). In addition to these text-based features, the site offered members clickable options that potentially contained visual depictions. These included a “Links” option to be transmitted to other Web sites that may or may not contain images as well as a “Messages” option, where images may or may not be attached to messages posted by other members. See id. at 462.
as well as Binney, used these statements in the affidavit as a basis for search warrant applications for the Candyman Web site. 132

Binney’s affidavit included numerous material assertions that two courts deemed knowingly or recklessly false. 133 Specifically, Binney stated that he joined the Candyman group by sending an e-mail to the group’s moderator when he actually subscribed by clicking a button on the Web site. 134 Furthermore, Binney asserted that all members of the Candyman group had to send an e-mail to the group moderator to join the Web site, which was inaccurate. 135 Binney also erroneously stated that all members of the Candyman group automatically received all messages and files sent to the group by any other member. 136 In actuality, all members were given three options regarding receipt of e-mails and files, one of which was not to receive any e-mails at all. 137 Agent Binney himself joined the site by clicking on a “join” button on the site, and he chose the automatic option after he, like all other subscribers, was presented with the option to either (1) receive each e-mail automatically, (2) receive a digest of each day’s e-mails, or (3) receive no automatic e-mails whatsoever. 138 Data showed that “more than 85 percent of the Candyman members elected to receive no automatic e-mails whatsoever.” 139

Between January 2, 2001 and February 6, 2001 (when the Candyman Web site was shut down), Binney received 498 e-mail messages from the group, about 100 of which contained one or more picture or video files. 140 Of the 288 visual files attached, 105 contained child pornography, and the remainder contained child “erotica.” 141 When the site was terminated,

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132. Id. at 461, 463. The court asserted that “all new members [of the Candyman e-group] were immediately added to the Candyman Egrou’s mailing list . . . . Every Candyman Egrou member on the Candyman Egrou e-mail list automatically received every e-mail message and file transmitted to the Candyman Egrou by any Candyman Egrou member.” Id. at 462. This representation, however, turned out to be false, as members of the Candyman Web site could elect not to receive any e-mails at all. Kunen, 323 F. Supp. 2d at 392.


134. See Coreas I, 419 F.3d 151, 152-53 (2d Cir. 2005).

135. Id. The FBI and two courts found that Binney and others joined the Web site by simply clicking a button on the Web site. See Strauser, 247 F. Supp. 2d at 1134-40; Perez, 247 F. Supp. 2d at 466.

136. Coreas I, 419 F.3d at 153.

137. Id.

138. Coreas I, 419 F.3d at 152.

139. Id. at 154 (emphasis omitted).

140. Id. at 152.

141. Id. Almost eighty-five percent of the visual postings e-mailed to Agent Binney were child erotica, which is legal. See Martin II, 426 F.3d 83, 90 (2d Cir. 2005) (Pooler, J., dissenting). For a discussion of the Martin cases and Judge Pooler’s dissents, see infra Part II.A.1-2 and Part II.B.2. Child erotica does not rise to the level of child pornography. See
Yahoo! provided the Government with a list of the 3397 subscribers who were members between January 29, 2001 and January 31, 2001. During that three-day period, Binney had received four e-mails containing child pornography from the Candyman site.

Another affidavit, based on Binney’s flawed affidavit, was submitted to a magistrate judge in the Eastern District of New York in support of a warrant to search the homes of twenty-four persons. This new affidavit, written by Agent Berglas, supported a warrant used to search a number of people’s personal computers, documents, videotapes, cameras, and address books.

The subsequent searches of people’s homes led to a number of prosecutions nationwide. A controversy within the Second Circuit has arisen out of two of the cases based on these erroneous affidavits: Martin I and Coreas I. A third case, United States v. Perez, has played a major role in the conflict surrounding these cases as well. Specifically, Perez set the stage for the conflict within Martin I and Coreas I by holding that the FBI agents recklessly or knowingly included erroneous information in the affidavit used to support the Operation Candyman warrants. In Perez, District Judge Denny Chin ruled that the agents acted with reckless disregard for the truth when they erroneously represented, in paragraphs 8(c)-(d) of the affidavit, that all Candyman members automatically received . . . images of child pornography transmitted to the group . . . [and] recklessly omitted the fact that Candyman members had e-mail delivery options, including the option not to receive any e-mails.

Judge Chin disagreed with the other courts that had previously heard Candyman cases and suppressed the evidence obtained from the defendant. The next part of this Note examines the conflict that has emerged in the Second Circuit over the Candyman cases.

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Coreas I, 419 F.3d at 152. Child erotica may include children posed in provocative ways.  
Id.  
142. Coreas I, 419 F.3d at 152.  
143. Id.  
144. Id. at 151-52.  
145. Id. at 153.  
146. See supra note 121.  
147. Martin II, 426 F.3d 83; Coreas I, 419 F.3d 151.  
149. Id.  
150. Perez, 247 F. Supp. 2d at 480. The court also found that (1) “[w]hen Binney executed the affidavit, he knew that motions to suppress had been filed attacking the validity of the searches,” id. at 467; (2) “he knew also that Yahoo was claiming that members of the groups did have e-mail delivery options,” id; (3) “[h]e knew the issue of the availability of e-mail delivery options was an important one,” id. at 469 n.7; and (4) the vast majority of subscribers had elected to receive no e-mails (2740 out of 3213), id. at 467.  
151. Id. at 485 (“The Government relies on rulings in five other Candyman cases denying other defendants’ motions to suppress based upon identical or similar search warrant affidavits. . . . These cases are not binding on this Court, and are not persuasive . . . .”) (citations omitted)).
Part II of this Note discusses the two main approaches taken by courts that have heard the Candyman cases. *United States v. Perez* was the first and only district court case within the Second Circuit to suppress the evidence obtained from the search warrant, and this argument was later cited by Judge Rosemary Pooler in her dissents in *Martin I* and *Martin II*, as well as by the *Coreas I* and *Coreas II* panels. In the series of *Martin* cases, the district court and the majority in the Second Circuit based the decision to allow the evidence obtained from the search warrant on the idea that probable cause was satisfied by the defendant’s subscription to and sustained membership in the e-group “girls12-16.” Judge Pooler, dissenting in the *Martin* cases, argued that the subscription to the e-group was not enough in and of itself to establish probable cause and that individualized suspicion must be present to amount to probable cause. The *Coreas* panels in the Second Circuit wanted to reverse the district court’s holding for the same reasoning as Judge Pooler.

A. Subscription to the E-Group Established Probable Cause

1. Martin I

At issue in *Martin I* was the defendant’s subscription to an e-group called “girls12-16.” Joseph Martin appealed from a March 2004
amended judgment of the United States District Court for the Eastern District of New York convicting him, after his guilty plea, of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and sentencing him to twenty-seven months of imprisonment. On appeal, Martin challenged the district court’s May 2003 denial of his motion to suppress evidence seized from his home. The search of Martin’s home arose out of Operation Candyman, and the warrant was based on the affidavit that contained the erroneous statement that all members of the e-group received every e-mail and its contents, whether textual, pictorial, or video.

A divided panel in Martin I found that probable cause still existed when the false statements were removed from the affidavits used to search the computer of a defendant who went from the Candyman e-group to a related group called “girls12-16.” The majority, comprised of Judges John Walker and Richard Wesley, ruled that the evidence obtained from Martin’s

choice is all yours. How about a model resource for photographers? It’s all up to you and is only limited by your own imaginations. Membership is open to anyone, but you will need to post something. Mybe [sic] a little bit about yourself/what your interests are (specifically), your age, location . . . and a pic or vid would be good to [sic]. By doing this other members (or potential members) with the same interest may then contact you if you wish them to.

Martin I, 426 F.3d at 71.

159. Id. at 69. Judge Leonard Wexler based his denial of Joseph Martin’s motion on his previous decision in United States v. Coreas, 259 F. Supp. 2d 218 (E.D.N.Y. 2003), and stated, Here, as in Coreas, the facts presented, even without the false statement, support such a finding [of probable cause]. First, the affidavit contains extensive background information regarding subscribers to groups such as the Candyman group and the proclivity of members to use such groups to collect, trade and retain images of child pornography. The affidavit further describes the Candyman group in detail. With the exception of the false statement regarding automatic e-mail receipt, all statements regarding the group and the agent’s receipt of numerous images of child pornography are truthful. It is also without question that the Defendant joined the group. These facts are sufficient to establish probable cause to believe that a search of Defendant’s computer would reveal evidence of criminal activity.

Martin I, 426 F.3d at 72.

160. Martin I, 426 F.3d at 69.

161. See supra notes 129-36 and accompanying text; Martin I, 426 F.3d at 70. The court in Martin I noted,

The Martin affidavit covered the search of different premises and contained facts pertaining to three separate child-pornography e-groups: ‘Candyman,’ as well as ‘girls12-16’ and ‘shangri_la.’ The portions relevant to Martin’s home, and this appeal, alleged that an individual residing there was only a member of girls12-16. But the affidavit incorporated the following description of the Candyman e-group and its features into its general discussion of the girls12-16 e-group.

Id. The affidavit did not specifically state that members of girls12-16 automatically received e-mails, but the court inferred that girls12-16 had “many of the same features as the Candyman” e-group and that the affidavit intended to state that girls12-16 members did receive the automatic e-mails. Id. at 71 n.3. As such, the girls12-16 portion of the affidavit contained the same error as the Candyman portion, and the correction applied to both of the e-groups. Id.

162. Martin I, 426 F.3d at 68.
home should be allowed. Judge Pooler dissented from the holding in a separate opinion where she argued that the majority’s opinion runs counter to the requirement of individualized suspicion required by *Ybarra v. Illinois.*

For a variety of reasons, probable cause was held to exist even after the erroneous information was excised from the affidavit. The majority noted that “the traditional standard for review of an issuing magistrate’s probable-cause determination has been that so long as the magistrate had a ‘substantial basis for . . . conclus[ing]’ that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more.” The majority in *Martin I* held that

> [t]he corrected affidavit provided the magistrate judge with facts sufficient for her to conclude that the overriding, if not the sole, purpose of the *girlsl2-16* e-group was illicit (to facilitate the receipt and distribution of child pornography); that an e-mail address of a *girlsl2-16* member was linked to Martin’s house; that collectors of child pornography overwhelmingly use the internet and computers to distribute and hoard this illegal pornographic material; and that, accordingly, there was a ‘fair probability,’ given the totality of the circumstances and common sense, that evidence of a crime would be found at Martin’s home because membership in the e-group reasonably implied use of the website.

The affidavit included a discussion of the modus operandi of those who use computers for collecting and distributing child pornography, including their reliance on e-groups, e-mail, bulletin boards, file transfers, and online storage, as well as a description of the characteristics and proclivities of child-pornography collectors. The *Martin I* majority held that the *girlsl2-16* group’s illicit purpose of trading child pornography could be inferred from features available to members, including posting and viewing files and messages, taking polls, writing and viewing e-mail, and linking. The affidavit also included a confirmation that the *girlsl2-16* site included child pornography and child erotica, which was accessible to all members. There was evidence in the affidavit that someone at Martin’s residence belonged to the “*girlsl2-16* e-group, whose raison d’être, or

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163. *Id.* at 89-90 (Pooler, J., dissenting); see *Ybarra v. Illinois*, 444 U.S. 85 (1979); see also supra note 109 and accompanying text. For a discussion of Judge Pooler’s dissent, see infra Part II.B.


167. Collectors of child pornography tend to collect such material, store it, and rarely destroy or discard it. *Id.; Bailey*, 272 F. Supp. 2d at 838.

168. *Martin I*, 426 F.3d at 75; see *United States v. Froman*, 355 F.3d 882, 890 (5th Cir. 2004).

primary reason for existence, was the trading and collection of child pornography—a wholly illegal endeavor.\textsuperscript{170} Furthermore, the majority held that the girls12-16 site's essential purpose was evident from the group's welcome message.\textsuperscript{171}

The majority faulted Martin's argument that there was no way to obtain individualized suspicion from the affidavit. First, the majority held that

\[\text{while the affidavit does not explicitly state that Martin accessed child pornography, it ties the girls12-16 website to an individual living in Martin's home, and states child pornography was available to all who joined and was being distributed to some of the group's members, as shown by the agent's receipt of e-mails containing illegal child pornography and his downloading other such material from the website.}\textsuperscript{172}

Although Martin argued that both legal and illegal purposes existed for the Web site, he did not offer evidence to support the claim that he or other members used the e-group for legal purposes.\textsuperscript{173}

Martin I followed rulings of other circuits that also examined the Binney affidavit. In United States v. Froman, the Fifth Circuit concluded that without the false statements, the affidavit supported the finding of probable cause because “[t]he magistrate was entitled to infer from the affidavit that the singular purpose of Candyman was to trade pornography among its members.”\textsuperscript{174} Furthermore, the court held that

it is common sense that a person who voluntarily joins a group such as Candyman, remains a member of the group for approximately a month without canceling his subscription, and uses screen names that reflect his interest in child pornography, would download such pornography from the website and have it in his possession.\textsuperscript{175}

\begin{itemize}
  \item 170. Martin I, 426 F.3d at 75 (finding it to be "common sense" that one who "voluntarily joins" a child-pornography group and "remains a member of the group . . . without canceling his subscription . . . would download such pornography from the website and have it in his possession" (citing Froman, 355 F.3d at 890-91)); see also Bailey, 272 F. Supp. 2d at 824-25 ("[K]nowingly becoming a computer subscriber to a specialized internet site that frequently, obviously, unquestionably and sometimes automatically distributes electronic images of child pornography to other computer subscribers alone establishes probable cause for a search of the target subscriber's computer.").
  \item 171. Martin I, 426 F.3d at 75. Particularly, the court made note of the invitation for members to "chat up," "share," and post videos and pictures. See supra note 158 and accompanying text.
  \item 172. Martin I, 426 F.3d at 76.
  \item 173. Id. at 77. Legal purposes would include discussing or debating child pornography or pedophilia. Although the Web sites at issue were not created for users to view pornography, whether it is legal to simply view child pornography on the Internet is an open question. Id.; see, e.g., United States v. Tucker, 305 F.3d 1193, 1205 (10th Cir. 2002) (finding defendant knowingly possessed child pornography that was saved in his cache after he viewed it online); United States v. Perez, 247 F. Supp. 2d 459, 484 n.12 (S.D.N.Y. 2003) (noting that it remains an open question as to whether 18 U.S.C. § 2252A(a)(5)(B) reaches Internet "browsing").
  \item 174. Froman, 355 F.3d at 890.
  \item 175. Id. at 890-91.
\end{itemize}
The *Froman* case rested on the idea that it is more probable than not that a person joining a group like Candyman will possess child pornography.\textsuperscript{176}

The Tenth Circuit, in *United States v. Hutto*, also ruled that a member of the Candyman group was likely to own child pornography and as such probable cause could be inferred.\textsuperscript{177} *Hutto*, like *Froman*, was based on the idea that there is probable cause to believe that child pornography will be found on the computer of each group member simply based on the nature of the Internet group.\textsuperscript{178}

2. *Martin II*

After Martin was convicted of possession of child pornography, he petitioned for rehearing and argued that the court could not find probable cause because (1) the redacted affidavit ‘contain[ed] no particularized information regarding whether Martin, or the e-mail account registered to his home, possessed child pornography,’ as required by *Ybarra v. Illinois*,\textsuperscript{179} and (2) it is error to conclude that the primary purpose of the ‘girls12-16’ e-group was to trade child pornography because the site also supported the exchange of textual messages and therefore allowed its members to engage in protected speech.\textsuperscript{180}

The panel denied rehearing in *Martin II*, adhering to the previous holding that “probable cause existed because there was a fair probability that contraband or evidence, fruits, or instrumentalities of a crime would be found at Martin’s residence.”\textsuperscript{181}

The *Martin II* majority took notice of the differences between the Candyman e-group and the girls12-16 e-group.\textsuperscript{182} The *Martin II* holding cited to *Coreas I*,\textsuperscript{183} in which another panel determined that the *Martin I* majority did not regard the distinctions between the longer and more explicit welcome message of girls12-16 and the shorter welcome message of Candyman as decisive.\textsuperscript{184} The *Martin II* majority clarified that it did not view the differences as immaterial even though it did state that the “internal

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\textsuperscript{177} United States v. Hutto, 84 F. App’x 6, 8 (10th Cir. 2003). The court stated, [T]he group’s clear purpose was to share child pornography . . . [T]he defendant voluntarily became a member of the group, and the images containing child pornography were available to all members. . . . [T]his evidence provided a sufficient basis . . . to conclude that there was a fair probability that child pornography would be found at the defendant’s residence or on his computer.
\textsuperscript{178} Id.
\textsuperscript{179} 444 U.S. 85 (1979).
\textsuperscript{180} *Martin II*, 426 F.3d 83, 84-85 (2d Cir. 2005).
\textsuperscript{181} Id. at 85.
\textsuperscript{182} Id. at 85-86.
\textsuperscript{183} 419 F.3d 151 (2d Cir. 2005).
\textsuperscript{184} *Martin II*, 426 F.3d at 85.
operational characteristics of the two sites were indistinct.” 185 In fact, in Martin II, the majority held that “the girls12-16 welcome message was an integral component of [the] probable cause determination.” 186

The panel held that the redacted affidavit was sufficient to lead to the conclusion that the primary purpose of the e-group girls12-16 was “to facilitate the generation, inventory, and exchange of child pornography.” 187 The fact that the e-group could have been accessed for protected uses did not sway the panel, as it held that the affidavit supported that individuals who sought membership were presented with a detailed welcome message that “unabashedly announced that the group’s essential purpose was to trade child pornography, and that the e-group’s members were actively uploading and downloading child pornography on the site and exchanging e-mail with illicit attachments.” 188 Although most of the e-mails exchanged were textual, the panel held that the abundance of textual e-mails “[did] not diminish the fact that a significant quantity of e-mail contained image-files of child pornography, and that hundreds of picture- and video-files were readily available for download on the girls12-16 e-group site.” 189 Furthermore, the panel held that “[t]ext-based e-mail that helps others ‘meet,’ ‘chat up,’ and sexually exploit children is not protected speech.” 190 E-mails, which were automatically generated each time a new file was uploaded to the site, “alerted members to new child pornography available for download,” and the Martin II majority concluded that the automatic e-mails were “powerful evidence of criminal activity.” 191

The Martin II majority also held that probable cause existed because Martin joined the e-group after seeing its welcome message and name and because an e-mail address associated with his household remained in membership until Yahoo! suspended the group. 192 The majority compared the e-group to a marijuana collective organization “that may happen to include members who advocate for the legalization of marijuana, but whose creed, which is carefully iterated on a plaque adjacent to the entranceway, provides that the collective is a means to generate, inventory, and barter and exchange marijuana.” 193 In such a situation, the majority held that “a reasonable magistrate would have no difficulty in finding that there is a fair probability that each member’s store within the collective contains

| 185. Id. at 86 (citing Coreas I, 419 F.3d at 157). |
| 186. Id. |
| 187. Id. |
| 188. Id. |
| 189. Id. at 86-87. The opinion looks at United States v. Fama, where the Second Circuit held that “[t]he fact that an innocent explanation may be consistent with the facts alleged, however, does not negate probable cause.” 758 F.2d 834, 838 (2d Cir. 1985). |
| 190. Martin II, 426 F.3d at 87. |
| 191. Id. |
| 192. Id. |
| 193. Id. at 87-88. |
marijuana or evidence, fruits, or instrumentalities of a crime associated with the production or exchange of marijuana.”194

The majority noted that following Judge Pooler’s standard (detailed in her dissent)195 would mean that “a search warrant could only issue where a magistrate is satisfied that the police will necessarily find contraband or evidence, fruits, or instrumentalities of a crime,” which “is plainly not the standard for probable cause.”196

In a denial for rehearing en banc, the majority reiterated the reasoning of the previous Martin I and Martin II holdings.197 Martin then petitioned for a writ of certiorari that the Supreme Court ultimately denied, thereby leaving Martin out of appellate options.198 In an opposition brief to Martin’s petition for writ of certiorari, the Government argued that the fact that there may have been a legal use for Martin’s activities did not negate probable cause.199 Further, the Government asserted that a court is not “precluded from considering conduct susceptible of innocent explanation in determining whether probable cause exists.”200

Other circuits have subsequently cited the Martin I and Martin II holdings. The Ninth Circuit, the Third Circuit, and the Sixth Circuit have all relied on the reasoning in these cases to find probable cause existed to conduct searches.201 As such, all of the circuits that have addressed this issue are currently in agreement that probable cause exists in cases such as the Candyman cases.

194. Id. at 88.
195. Id. at 89 (Pooler, J., dissenting); see infra Part II.B.2.
196. Martin II, 426 F.3d at 88. 
197. Martin III, 430 F.3d 73 (2d Cir. 2005).
199. See Brief for the United States in Opposition at 11, Martin v. United States, No. 05-1073 (U.S. Apr. 26, 2006) [hereinafter Martin Opposition Brief].
201. See United States v. Shields, No. 05-3662, 2006 WL 2361465, at *6 (3d Cir. Aug. 16, 2006) (holding that probable cause existed where an affidavit tied the defendant to two child-pornography Web sites that distributed over 100 images of child pornography while the defendant was a member using an e-mail address that itself was also strongly suggestive of pornographic activity); United States v. Gourde, 440 F.3d 1065, 1071 (9th Cir. 2006) (en banc) (holding that the government is not required to search a suspect’s computer before applying for and executing a search warrant); United States v. Wagers, 452 F.3d 534, 540 (6th Cir. 2006) (“[E]vidence that a person has visited or subscribed to websites containing child pornography supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material.”).
B. Individualized Suspicion Must Be Present to Amount to Probable Cause

1. United States v. Perez

In Perez, the district court held, in an opinion written by Judge Chin, that the FBI agents “acted recklessly” by submitting an affidavit “containing” the false information that all Candyman members automatically received all e-mails, including e-mails that forwarded images of child pornography, for the agents had serious doubt as to the truth of the statements or, at a minimum, they had obvious reasons to doubt their veracity.202 Additionally, the agents were held to have “acted recklessly in omitting the information that Candyman members in fact had e-mail delivery options, including the option of receiving no e-mail at all.”203 The conclusion was based on the fact that Agent Binney was presented with e-mail delivery options when he joined the Candyman group and when he joined other groups as well.204 Binney, in fact, did click a “subscribe” button and in doing so was undoubtedly presented with e-mail options.205 The district court held that “the issue of whether members automatically received all e-mails was ‘clearly critical’ to a finding of probable cause . . . [and] no probable cause exist[ed] without it.”206 After holding that the agents recklessly disregarded the fact that not all members of the Candyman group automatically received every e-mail sent to the Web site, the question left to resolve was whether probable cause existed when the erroneous information was excluded from the affidavit.207

In Perez, the court held that the “‘corrected’ affidavit contain[ed] no representation that the user . . . received any e-mails or that he received or downloaded or viewed any images or files or that he sent or uploaded any images or files.”208 The court noted that the corrected affidavit “contain[ed] no representation as to how long Perez was a member, whether he unsubscribed, or whether he did anything beyond subscribing,” and “contain[ed] no information about what it meant to be a ‘member’ or ‘subscriber.’”209 In addition, the corrected affidavit did not “allege that the

202. United States v. Perez, 247 F. Supp. 2d 459, 478-79 (S.D.N.Y. 2003); see also id. at 462 (“These representations were critical because they advised the magistrate judge that all Candyman members automatically received all e-mails and that therefore all Candyman members must have received e-mails that contained images of child pornography.”).
203. Id. at 479.
204. Id.
205. Id.
206. Id. at 480. The court cited the January 15, 2003 transcript in which the court asked, “If someone in fact did not get e-mails, then there would be no real basis to prosecute such a person?” and Binney responded, “That’s correct . . . .” Id. (citing Transcript of Record at 62, Perez, 247 F. Supp. 2d (No. 02 Cr. 00854)).
207. Id.
208. Id. at 481.
209. Id.
Candyman enterprise was wholly or even largely illegitimate."210 The corrected affidavit also did not include a "primary purpose" of the Candyman e-group, nor was there any assertion that a member would have downloaded any images by being a member of the e-group for any period of time.211 The logs provided by Yahoo! showed that Perez did not post or upload images, and revealed that he, like the majority of subscribers, chose not to receive any e-mails.212 "Hence, a magistrate judge could not conclude, on the face of the 'corrected' affidavit, that a fair probability existed that all subscribers to the site illegally downloaded or uploaded images of child pornography."213 As such, Judge Chin held that, based on the corrected affidavit, a magistrate could not reasonably conclude that the Candyman e-group was "'wholly illegitimate' in the criminal sense."214

The Perez court held that

[i]n the context of this case, a finding of probable cause would not be reasonable. If the Government is correct in its position that membership in the Candyman group alone was sufficient to support a finding of probable cause, then probable cause existed to intrude into the homes of some 3,400 (or even 6,000) individuals merely because their e-mail addresses were entered into the Candyman website. Without any indication that any of these individuals downloaded or uploaded or transmitted or received any images of child pornography, without any evidence that these individuals did anything more than simply subscribe, the Government argues that it had the right to enter their homes to conduct a search and seize their computers, computer files and equipment, scanners, and digital cameras. This cannot be what the Fourth Amendment contemplated.215

The court ruled that "[w]hile the anonymity of the internet empowers those who would break the law, it provides law enforcement with crime-fighting tools, including the ability to go undercover with relative ease and to obtain significant information from third parties such as service providers."216 The agents could have requested Yahoo! logs pertaining to which subscribers received e-mails, which uploaded and/or downloaded images, and subscription and unsubscription dates.217

Because the court held that the magistrate unreasonably issued a search warrant based in the affidavit, the evidence derived from the search was inadmissible. In suppressing the evidence, Judge Chin held that there must

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210. Id. For example, members could have either chosen to actively participate in the group or simply read what others had written.
211. Id.
212. Id. at 483.
213. Id.
214. Id. at 482. Although the affidavit did describe the language of the welcome message, it did not even include that the e-group was found under the category "Adult," "Image Galleries," "Transgender." Id.
215. Id. at 484.
216. Id. at 484-85.
217. Id. at 485.
be "a certain amount of latitude" in law enforcement "to address those who would violate the child pornography laws and sexually exploit and abuse children. Just as there is no higher standard of probable cause when First Amendment values are implicated . . . there is no lower standard when the crimes are repugnant and the suspects frustratingly difficult to detect."

Echoing some of Judge Chin's concerns, the district court in United States v. Kunen held that, "[t]he application for the search warrant, if stripped of the erroneous information, indicates little about [the defendant] beyond [his] membership" to the Candyman group. Aside from the representation that all members of the Candyman group received all e-mails, the information provided to the issuing magistrate judge was limited to a general profile of a "majority" of people "who collect child pornography." The Kunen court held that a warrant issued "solely upon group probabilities, rather than upon individualized information . . . is troubling." The court went further to state that "[e]ven if, arguendo, a 'majority' of Candyman members are more likely than not to have child pornography on their computers at any given time, that does not, standing alone, cause the entire membership to be fair game for search warrants."

218. Id. at 484. The Government did not appeal the Perez verdict after determining that further prosecution was not in the interest of justice. See Nolle Prosequi at 1, United States v. Perez, No. 02 Cr. 854 (S.D.N.Y. 2003).


220. Id. The court went on to state,

No information is contained in the application to indicate that [the defendant] downloaded or transmitted child pornography. It is also apparent from the . . . affidavit that the Candyman website offered members several features, some of which—such as participating in 'survey[s]' and 'engag[ing] in real time chat conversations with each other'—constituted lawful conduct.

Id. (citations omitted) (quoting the search warrant affidavit).

221. Id. (internal quotations omitted).

222. Id.

223. Id. Judge Dennis Hurley, agreeing with Judge Chin in Perez and Judge Catherine Perry in United States v. Strauser, 247 F. Supp. 2d 1135 (E.D. Mo. 2003), held that the application for the search warrant, without the statement that all members automatically received e-mails, was insufficient to establish probable cause. Kunen, 323 F. Supp. 2d at 401. Judge Hurley gave a hypothetical to illustrate this point:

[A]ssume that statistics established that "a majority" of incarcerated pedophiles will return to their criminal ways within the first year following their release from prison; assume further that such individuals invariably take one or more items of personal property from their victims and stash those items in their, the pedophiles' residences. From that, it would seem likely that a randomly selected individual from the group (i.e., pedophiles out of jail for over a year) would have engaged in the described conduct. If group probability alone is the appropriate focal point for determining probable cause, then every pedophile fitting the above description would be subject to the government obtaining a warrant for entry into their homes to search for evidence of a crime. No effort would be required to demonstrate to the issuing judge that the targeted suspect falls within the recidivist majority; simply being a member of the group would suffice. Surely such a result may not be squared with Fourth Amendment jurisprudence; in essence, however, that is the implicit gravamen of the government's argument here.

Id. (citations omitted).
2. Judge Pooler’s Dissent in *Martin I* and *Martin II*

Judge Pooler dissented from the ruling of *Martin I*, calling it “dangerous precedent” and arguing that it ignored the Fourth Amendment’s requirement of individualized suspicion for finding probable cause. In her dissent, Judge Pooler stated that the holding effectively made the decision to visit such Web sites a criminal act, which undermines the First Amendment. She also claimed that the Fourth Amendment was compromised since the decision ignored the requirement for individualized suspicion that a crime has been committed. Judge Pooler stated that “[t]he relevant crime in this case, as indicated in the corrected affidavit, is the knowing transportation, possession, receipt, distribution, or reproduction of visual (not textual) depictions of children engaged in sexually explicit conduct.”

She further cautioned that the majority had improperly held that membership in the e-group alone reasonably implied participation in the Web site’s illegitimate activities. The affidavit did not indicate that Martin was ever active within the e-group during the period of time when he was a subscriber. Pooler noted, “E-group subscription, which requires a few simple clicks on an individual’s personal computer, is simply not enough to indicate that an individual has taken an affirmative step to participate in the E-group’s activities. The majority can cite no case that indicates otherwise.” Furthermore, Judge Pooler concluded that there were legal uses for the e-group; simply because some members of the e-group had engaged in illegal activity does not mean that all members of the group did so. Finally, Judge Pooler stated, “It is an inferential fallacy of ancient standing to conclude that, because members of group A (collectors of illegal visual depictions) are likely to be members of group B

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225. Id. at 81-82 (Pooler, J., dissenting) (citing Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (“Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person.”)).
226. See *Martin I*, 426 F.3d at 78-83 (Pooler, J., dissenting); see also Mark Hamblett, Circuit Rejects In Banc Review of Porn Warrant, N.Y. L.J., Nov. 22, 2005, at 1.
227. See *Martin I*, 426 F.3d at 78-83 (Pooler, J., dissenting).
228. Id. at 78 (Pooler, J., dissenting) (citing 18 U.S.C. §§ 2252A(1)-(3), 2256(8)); see also id. at 79 (“Proper consideration of the limited scope of the relevant crime clearly demonstrates that Agent Binney’s erroneous statements—that all subscribers to the girls12-16 E-group . . . automatically received approximately fourteen illegal visual depictions during the fourteen days that Martin’s e-mail was listed as a subscriber to the E-group—were crucial to the determination that there was a fair probability that evidence of a crime would be found in Martin’s home.”).
229. Id. at 79 n.9. (citing *Martin I*, 426 F.3d at 75).
230. Id. at 79.
231. Id. at 80 (footnote omitted).
232. See id. at 80-81.
Judge Pooler dissented again in Martin II, reiterating the concerns from her original dissent. Judge Pooler discussed the similarities between the girls12-16 Web site and the Candyman Web site, noting that there was no difference in the primary purpose of the Web sites. Her two main points were the same as in her prior dissent: that "probable cause cannot be based on mere group membership" and that "[t]he girls12-16 welcome message [did] not establish that the 'primary purpose' of the group was illegal."

Because members did not all automatically receive e-mails containing visual depictions, Judge Pooler stated that the affidavit supporting the warrant application "contain[ed] no allegation that Martin actually downloaded, or even viewed, any illegal visual depictions." Mere membership in the e-group did not provide enough evidence for probable cause. Citing Ybarra v. Illinois, Judge Pooler discussed the requirement of particularized probable cause "with respect to the person searched." She disagreed with the majority's analogy to a marijuana collective, examining its imprecise language, the fact that the collective would be more similar to a conspiracy, and the difficulty "of line drawing presented by the indecent material at issue here, where some depictions are illegal child pornography, while others are merely child erotica." Judge Pooler asserted that the Martin rulings and subsequently, the Coreas rulings, would allow the government to rely on a weak association with an entity involved in both legal and illegal activity as amounting to probable cause to search an individual's home. Requiring particularized evidence would not impose too heavy a burden on government enforcement of laws against child pornography, Judge Pooler asserted, especially in cases such as Martin in which "the government could easily...obtain[] information about a particular subscriber by obtaining the user's email preferences from Yahoo! or monitoring use of the group."

Judge Pooler's second basis for her dissent was that "the girls12-16 welcome message [did] not establish that the 'primary purpose' of the

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233. Id. at 82 ("The majority's conclusion that E-group subscribers are likely to be collectors of illegal visual depictions is 'common sense' only if one studiously ignores the affidavit's extensive description of the text-based functions of the E-group." (citing Illinois v. Gates, 462 U.S. 213, 238 (1983))).
234. Martin II, 426 F.3d 83, 89 (2d Cir. 2005).
235. Id. at 89 (Pooler, J., dissenting).
236. Id. at 90 (emphasis omitted).
237. Id. at 89.
238. Id. at 89.
240. Martin II, 426 F.3d at 89 (Pooler, J., dissenting).
241. Id. at 90; see supra note 141 and accompanying text.
242. See Hamblett, supra note 226, at 1, 5.
243. Martin II, 426 F.3d at 89-90 (Pooler, J., dissenting) (citing Coreas I, 419 F.3d 151, 158 (2d Cir. 2005)).
Judge Pooler was particularly concerned with the fact that "the affidavit supporting the warrant application contain[ed] no allegation that Martin actually downloaded, or even viewed, any illegal visual depictions." The welcome message of girls12-16 included the ability to "share experiences with others, share your views and opinions quite freely without censorship, ‘connect with others . . . and get together sociall [sic].’" She concluded the majority was incorrect to create probable cause and make up for a "lack of evidence" by relying on "membership in an E-group whose ‘primary purpose’ is allegedly illegal." She argued that the First Amendment protection against guilt by association will be diluted, and the Fourth Amendment’s protection will be diminished by relying on the majority’s precedent, which "cites no case supporting the alarming proposition that probable cause may be based solely on group membership whenever the group’s ‘primary purpose’ is illegal, rather than on, as has been required in the past, particularized information about the person or place to be searched."

Finally, Judge Pooler noted that Martin’s case could not be distinguished from Willie Coreas’s because the internal structures of both Web sites were the same, both sites invited members to post pictures and videos in addition to engage in free speech, and there was no evidence in either case that the defendant actually viewed or collected any child pornography. The fact that members of girls12-16 could post messages, share views, and chat with others shows that the site was not for purely illegal purposes. Although pictures and videos could be posted, child pornography was present in less than eight percent of the e-mails, and almost eighty-five percent of the postings e-mailed to Agent Binney were child erotica, which unlike child pornography, is not illegal. Since less than eight percent of the e-mails sent to the members of girls12-16 contained child pornography, argued Judge Pooler, “exchanging child pornography can hardly be considered the primary purpose of the group.”

In her dissent from the denial for rehearing en banc, Judge Pooler stated, “I would not dissent after being on the losing side of an [e]n banc poll if I did not believe that the decision in Martin sets a perilous and plainly wrong

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244. Martin II, 426 F.3d at 90 (Pooler, J., dissenting).
245. Id. at 89 (citing United States v. Martin, 418 F.3d 148, 160 (2d Cir. 2005)).
246. Id. at 90 (quoting the girls12-16 e-group).
247. Id. at 89.
248. Id.
249. Id. at 91. The Coreas I court believed that the evidence should have been suppressed but felt compelled to follow precedent set by Martin I. Judge Pooler and the Coreas I and Coreas II panels effectively had the same reasoning for why probable cause did not exist in each case. See infra Part II.B.3-4 for a discussion of the Coreas holdings.
250. Martin II, 426 F.3d at 90 (Pooler, J., dissenting).
251. Id. at 91.
252. Id. at 90.
253. Id. at 91.
THE CANDYMAN CASES

precedent.” Judge Pooler wrote that she, as well as other colleagues, believed that both Martin and Coreas had been wrongly decided. She cautioned residents of the states within the Second Circuit to be wary of which links they choose to click on the Internet and then urged defense counsel to petition for certiorari.

3. Coreas I

In Coreas I, defendant Coreas’s home was searched on the basis of the same affidavit that was used to search Martin’s home and that was found to be knowingly or recklessly false in a number of material ways. About one hundred computerized images with child pornography were found on Coreas’s home computer and he was indicted on ten counts of possession of child pornography under 18 U.S.C. § 2252(a)(5)(B). When Coreas was indicted on March 13, 2002, serious doubts had already been raised about Agent Binney’s representations. Specifically, the Government had obtained information from Yahoo! that of the Candyman e-group members, more than eighty-five percent had elected to receive no automatic e-mails whatsoever. In light of the decision in United States v. Perez, Coreas petitioned for reconsideration of Judge Wexler’s denial of the suppression motion which had led to Coreas’s conviction for possession of child pornography. The district court denied this motion on the ground that

254. Martin III, 430 F.3d 73, 77 (2d Cir. 2005) (Pooler, J., dissenting); see also Hamblett, supra note 226, at 5 (noting that it is rare that judges write opinions for denials of rehearing en banc).
255. See Martin III, 430 F.3d at 76 n.3 (Pooler, J., dissenting).
256. Id. at 77. Herald Fahringer of Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, who assisted in representing Mr. Coreas, stated, “I don’t think I have ever seen a case where a member of the circuit said we should seek certiorari,” and also claimed to be “stunned” that the circuit elected not to rehear the two cases. See Hamblett, supra note 226, at 5. Fahringer asserted that “[t]he First Amendment implications . . . taken together with the unique Fourth and First Amendment challenges posed by Internet technology and the fact that judges . . . have been sharply divided over whether the faulty affidavit should have been grounds for dismissal . . . make the cases ideal for review by the U.S. Supreme Court.” Id.
258. Coreas I, 419 F.3d at 154.
259. Id. at 154.
260. Id. “Therefore, not only had Binney been wrong to aver that every member automatically received each e-mail (with pornographic attachments in many cases), but in fact any given member was unlikely to have received any automatic e-mails from the group.” Id. The Government disclosed the inaccuracy to Coreas’s counsel in July of 2002, and Coreas’s counsel moved to suppress the warrant. Id. In response to the motion, the Government submitted to the court false statements from Binney “reiterating his representation that he had joined Candyman via e-mail and had been given no e-mail delivery options.” Id. A number of courts considering the Candyman suppression motions denied suppression, holding that there was no evidence of the misstatements being knowingly or recklessly false. See supra note 151 and accompanying text.
261. Coreas II, 426 F.3d at 615.
the Berglas affidavit was sufficient to support the warrant even with the false information excised. Judge Jed Rakoff delivered the opinion, opening with "[c]hild pornography is so repulsive a crime that those entrusted to root it out may, in their zeal, be tempted to bend or even break the rules. If they do so, however, they endanger the freedom of all of us."  

In Coreas I, however, the judges begrudgingly ruled that they were bound by the precedent set by Martin I. Judge Rakoff, noting the "knowingly or recklessly false" allegations in the affidavit, stated that the panel would have found the remaining truthful allegations in the affidavit were insufficient to support probable cause, but that the panel was bound by the recent Martin I decision. Judge Rakoff also argued that "[t]he Government's papers submitted in support of the warrant nowhere argued that the 'collector' allegations could support an inference that any individual member of Candyman had downloaded child pornography." The panel noted that even if the purpose of the Candyman e-group had been to distribute pornography, probable cause still would have to be backed by individualized suspicion as to the target of the search. The Coreas I

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262. Id. at 155; see United States v. Coreas, 259 F. Supp. 2d 218 (E.D.N.Y. 2003).  
263. Coreas I, 419 F.3d at 151.  
264. Id. at 159 (“[S]ince the Martin case was heard first, we are compelled, under established rules of this circuit, to affirm Coreas’ conviction.”).  
265. Id. at 153, 158-59 ("[T]he Government] could have obtained each member’s e-mail preferences and then targeted its warrant applications to those members actually receiving the e-mails in question. There clearly was no exigency preventing the Government from taking such steps, given that the warrant application was not made until seven months after Candyman was shut down. Far from hindering the Government’s ability to prevent the distribution of child pornography over the Internet, requiring particularized information to be gathered before the warrant application is made will simply focus law enforcement efforts on those who can reasonably be suspected of receiving child pornography. For these reasons, as well as for the many other reasons so well articulated by Judge Pooler in her dissent in Martin, we believe Martin itself was wrongly decided.”). The Coreas I panel ruled that although Martin I may be distinguished on the ground that Coreas joined a different e-group, the Martin I majority noted that “the affidavit alleged that the way the [two] websites operated was not materially different.” Id. at 157 (internal quotations omitted). “While no comparable figures for [e-mail options] are given in . . . Martin . . . , the point is that people who joined both websites were invited to do so even if their only purpose was to chat about a taboo subject . . . [and] were provided with the tools to so limit their exchanges.” Id.  
266. Coreas I, 419 F.3d at 154; see id. at 156 (“The alleged ‘proclivities’ of collectors of child pornography, on which the district court relied, are only relevant if there is probable cause to believe that Coreas is such a collector. But the only evidence of such in the excised affidavit is his mere act of responding affirmatively to the invitation to join Candyman.”). The Coreas I panel noted that “Martin faults the defendant . . . for failing to submit evidence that either site was used for legal purposes[,] but it is the Government’s burden to provide probable cause.” Id. at 157-58 (citation omitted).  
267. Id. at 158 (“But the Martin majority opinion might be read to suggest that if you simply web-join an e-group whose ‘primary’ purpose is the unlawful distribution of pornography, that is enough to warrant the search of your home—even if there is no evidence that you knew this was the group’s ‘primary’ purpose or that you actually intended to use the group for such a purpose rather than for the other, lawful purposes that it also provided.”).
court faulted the Government for not having obtained each member's e-mail preferences before making the warrant applications.268

4. Coreas II

Like Martin, Coreas also petitioned for rehearing subsequent to his conviction being affirmed.269 A panel comprised of Second Circuit Judges Dennis Jacobs and Guido Calabresi and District Judge Rakoff presided.270 In the original opinion, the Coreas I panel held that Martin I's precedent required the court to affirm Coreas's conviction.271 In his petition for rehearing, Coreas argued that his case was sufficiently distinct from Martin's, thereby permitting the panel to rule in any way it chose.272 Subsequent to Coreas's petition for rehearing, but before his actual rehearing date, the Martin II panel denied rehearing.273 The Coreas II panel, after considering Coreas's arguments and the arguments set forth in Martin II, ruled that the court was bound by the Martin holdings to uphold Coreas's conviction.274

In Coreas II, the panel discussed the suggestion that the difference between the "girls 12-16" group that Martin joined and the "Candyman" group that Coreas joined was that the invitation to join the "girls 12-16" group was more explicit and detailed than the Candyman invitation.275 The Coreas II panel held, however, that both sites offered the opportunity to post pictures and videos and engage in conversation.276 Neither site made it clear that downloading or exchanging child pornography was the group's "primary purpose," and there was no evidence in either the Martin or Coreas cases that either defendant had actually downloaded any child pornography.277 The panel ruled that it still believed that Martin I was erroneously decided, but that the panel was bound by that decision to affirm Coreas's conviction.278 The Supreme Court denied Coreas's petition for certiorari, thereby allowing his conviction to stand.279

268. Id.
269. See Coreas II, 426 F.3d 615 (2d Cir. 2005).
270. See id. at 616.
271. See supra text accompanying note 264.
272. Specifically, Coreas argued that the Candyman e-group he subscribed to was unlike the girls12-16 group that Martin joined since the girls12-16 group made it clear that its purpose was to trade child pornography while the Candyman group did not have a clear purpose. Coreas II, 426 F.3d at 616.
273. 426 F.3d 83 (2d Cir. 2005).
274. Coreas II, 426 F.3d at 616.
275. Id.
276. Id.; see also Martin II, 426 F.3d at 91 (Pooler, J., dissenting).
277. Coreas II, 426 F.3d at 616.
278. Id. at 617.
III. THE MARTIN HOLDINGS VIOLATE THE FIRST AND FOURTH AMENDMENTS WITH THEIR FAULTY REASONING

This Note proposes that in the Candyman cases, the evidence should be suppressed where a defendant was a member of the Candyman site and/or another Web site containing child pornography, and the warrant to arrest him was based solely on the erroneous affidavit. Each case must be examined in light of its own circumstances, for evidence to be allowed into a trial, it must have been obtained in a constitutional manner. Probable cause must be present for each defendant in the form of individualized suspicion.

Creation or possession of child pornography is a hideous offense. It is easy to allow our disgust with the Candyman defendants to cloud our judgment and allow the evidence to be used against them regardless of the constitutional ramifications. It is true that some unconstitutionally derived evidence may protect children from some perpetrators, but constitutional rights cannot be ignored. Law enforcement officials must take care to prepare affidavits properly and be sure that the information included is not recklessly or knowingly false. It is in the initial preparation of the affidavit that the Candyman cases went wrong. For, it is not enough to look back in hindsight after finding child pornography and rationalize that the ends make the warrants constitutional. The judicial system cannot take on the added responsibility of remedying mistakes made in the initial process of apprehending a suspect, and the foundation of the judicial system should not be compromised in order to put criminals behind bars. Allowing illegally obtained evidence in the Candyman cases would effectively allow juries to hear any evidence obtained in an illegal manner based solely on the justification that the defendant did something blameworthy. This would severely undermine the judicial system, where a postulated reprehensible act is the first step in all criminal trials.

A. The Majority in the Martin Cases Made Erroneous Factual Conclusions

The majority in both Martin I and Martin II made a number of flawed analogies and comparisons.

First, the comparison of the e-groups in question to a marijuana collective is a weak analogy. The hypothetical collective cited by the Martin II panel ignores the inherent differences between face-to-face communications and the Internet. Joining the collective organization would take more work and investigation than clicking a simple “submit” button. Furthermore, there are many illegal activities that can be associated with producing and trading marijuana, such as growing the plants, drawing up smuggling plans, and creating a spray to divert the attention of drug-

280. See supra Part I.D.
281. See id.
282. See supra text accompanying notes 193-94.
sniffing dogs. Yet with the e-groups, there were two possibilities: (1) the members were simply discussing child pornography or (2) the members were actually viewing and sharing it.\footnote{283}

The Martin majority also discussed perceived differences between the two e-groups.\footnote{284} Even assuming, arguendo, that the girls12-16 e-group was more explicit in its welcome message than the Candyman e-group,\footnote{285} the problem remains that there should be an individualized probable cause requirement.\footnote{286} A hypothetical subscriber might have hit "subscribe" to find out more about the group. For instance, there were a number of typographical errors and a good deal of imprecise language in the girls12-16 welcome message.\footnote{287} In order to find out more about the group, a person would have to subscribe. Assume a hypothetical subscriber does hit subscribe and realizes that he or she is not interested in the group's messages or content and simply leaves the site without going through the unsubscribe process. Suppose further that this person deletes any and all correspondence from the group without reading it. By the Martin court's line of reasoning, the hypothetical subscriber would be likely to possess child pornography and would be subject to a search and seizure. Should the lesson be that the average Internet user must be savvy and intelligent enough to anticipate this and make sure to retrace all of his or her steps to eradicate any and all evidence of having even looked at questionable Web sites?\footnote{288}

The Martin II majority held that most textual messages sent to members of the e-group informed members of new files posted and their locations and called this "powerful evidence of criminal activity."\footnote{289} This reasoning would follow if the FBI agents had actually looked into individual members' activity and found that Martin actually received the e-mails. For example, if user X did receive a text-based e-mail with the location of a new file and then retrieved that file, that activity could support a finding of probable cause.

Additionally, in Martin II, the majority had no trouble separating the case at issue from Ybarra v. Illinois,\footnote{290} because in Ybarra, police, acting on information that a bartender possessed heroin, entered a bar, and also frisked its patrons.\footnote{291} The Supreme Court held that the police lacked probable cause to search Ybarra, who was a patron in the bar and was found

\begin{footnotes}
283. \textit{See supra} Part II.B.2.
284. \textit{See supra} notes 182-86 and accompanying text.
285. \textit{See supra} notes 186-88 and accompanying text.
286. \textit{See supra} Part I.D.
287. \textit{See supra} note 158.
288. "Average user" in this context refers to a person who might look at and/or join a questionable group without having any knowledge that even joining for legal purposes such as exchanging text-based commentary could lead to a criminal prosecution.
289. \textit{See supra} text accompanying note 191.
291. \textit{See id.} at 88.
\end{footnotes}
to have heroin on his person. The *Martin II* majority held that the cases are "quite different" because the warrant was associated with Martin’s home and "anyone joining the girls12-16 site was on notice that the site was an active marketplace for the illicit trade of child pornography." In *Ybarra*, however, the Supreme Court held that "a person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." The Court made no mention of how it would have ruled if the bar searched was anything similar to an "active marketplace" for the illicit use of heroin.

The e-group itself can be analogized to the bar in *Ybarra*, with all members like the patrons. Then, under *Ybarra*, the court’s refusal to suppress the evidence obtained from the search of Martin’s home was in error.

It is fairly simple to join an e-group like those joined by the defendants in *Martin*, *Coreas*, and *Perez*. Take for example, a person looking to join a Yahoo! e-group. As of October 2005, if that person went to www.yahoo.com and clicked on "groups," then "romance & relationships," then "singles," and finally "bisexual," that person would find that there were over 800 groups. One of the first groups would be a group called "sohalst2002" with over 9000 members. The problem is that in the welcome message for that group, the blurb contains only characters and symbols. But this person sees the membership and decides to subscribe to learn more about the group. The person clicks one button at the top of the page, "Join This Group," fills out a simple form with his e-mail address and message delivery options, and then subsequently stumbles upon a new page with a welcome message that indicates the presence of child pornography. Appalled, he closes his web browser and shuts off his computer without even thinking about unsubscribing. According to the *Martin* rulings, this person’s simple online curiosity might subject him to a search of his home and seizure of his personal files.

Finally, the *Martin I* and *Martin II* majority also made a questionable jump in logic to improperly classify subscribers to the e-groups as people

\[292. \text{Id. at 89-90.} \]
\[293. \text{*Martin II*, 426 F.3d 83, 88 (2d Cir. 2005).} \]
\[294. \text{*Ybarra*, 444 U.S. at 91; see supra note 109 and accompanying text.} \]
\[295. \text{This was not the case with the Candyman Web sites. Each had welcome messages that were included in the affidavit. The Candyman messages as well as a message composed of random characters and symbols may be enough to put a would-be member on alert that something questionable might be found on the site, but neither type of message could be said to definitively give would-be members knowledge that the site is mainly used for illegal purposes.} \]
\[296. \text{Many e-groups require people to "Join This Group" before being able to learn any more about the postings and membership.} \]
\[297. \text{In *Martin II*, the majority relied both on the girls12-16 welcome message and the fact that Martin remained a member of the e-group until it was shut down. See supra notes 187-92 and accompanying text. The majority did not explain whether one factor was dispositive and did not address how the holding would affect cases like the hypothetical described here.} \]
who would be likely to own and/or trade child pornography. Based upon the corrected affidavit, these offenders exhibited only two of sixteen behaviors usually used to classify a preferential sex offender. The majority's argument that probable cause existed was based on the idea that the defendants subscribed to a Web site with child pornography, and such people are more likely than not to own child pornography. The courts did not cite any statistics as a basis for the reasoning. The problem with assuming that because a person exhibits behaviors characteristic of a sex offender (for example, by joining an e-group that involves the trade, exchange, and posting of images and videos of child pornography), he or she is more likely to own or trade pornographic images, is that the assumption requires too great of a leap. A person who joins a Web site geared toward exchanging pornographic images of children can be said to have a specific sexual interest in children. Joining the Web site can be considered a well-developed technique used to fulfill that interest. If that person has been on such a Web site for long periods of time or expends a good deal of time, energy, and money on the Web site, those efforts tend to demonstrate long-term and persistent patterns of illicit behavior. An investigator may then understandably assert that such a person exhibits characteristics of a preferential sex offender. But, in instances like the Candyman cases where the only information known about the offenders was that they subscribed to textually based Web sites containing child pornography (falling under both specific sexual interest and well-developed technique), it is improper to immediately classify them as preferential sex offenders who necessarily collect and/or trade child pornography. Simply subscribing to a Web site where people like to discuss child pornography, albeit disgusting, is not enough in and of itself to find probable cause to link members to illegal activity.

The Martin I majority was, in effect, straining to classify the defendants as preferential-type sex offenders or pedophiles in order to justify finding probable cause that they traded or owned child pornography. The defendants had no prior convictions. They were eventually found to own and/or trade child pornography (thus they were deemed pedophiles), but this information was obtained after an improper search and should not be used to support probable cause for the search warrant.

298. See supra Part I.B.2.
299. See supra note 57 and accompanying text.
300. See supra notes 56-57 and accompanying text.
301. Cf. United States v. Brown, 951 F.2d 999, 1002 (9th Cir. 1991) ("[M]ere membership . . . without a link to actual criminal activity, [is] insufficient to support a finding of probable cause."); United States v. Rubio, 727 F.2d 786, 794 (9th Cir. 1983) (holding that membership in Hell's Angels does not establish probable cause that defendant engaged in illegal activity); United States v. Acosta, 110 F. Supp. 2d 918, 931 (E.D. Wis. 2000) ("Information about a group's reputation is legally insufficient to support probable cause that a member of that group is involved in criminal activities. . . . Thus, a mere inference of gang membership, without more, provides no basis for concluding that a search would uncover evidence of wrongdoing.").
B. The Martin Holdings Violate the First Amendment

The Martin II panel held that “[t]ext-based e-mail that helps others ‘meet,’ ‘chat up,’ and sexually exploit children is not protected speech.”\(^{302}\) Again, this is dangerous precedent. There was no particularized information in the affidavit stating that the e-mails exchanged over girls 12-16 or the Candyman e-group facilitated “meeting” or “chatting up” or the sexual exploitation of children. Rather, this is an assumed link that the panel made, with good intention, to protect children from possible harm, albeit at the expense of the constitutional rights of many citizens. Even if the e-mails “alerted members to new child pornography available for download,”\(^{303}\) this does not mean that the members were accessing the new pornography. Those e-mails should not be rendered “powerful evidence of criminal activity” to amount to probable cause without a stronger showing that the defendants in question actually accessed or were particularly likely to have accessed the child pornography.

Finding probable cause in the Candyman cases violates First Amendment rights.\(^{304}\) There are people who subscribe to Internet groups simply to discuss topics—a right that is protected by the Constitution. Any of the Candyman defendants might have subscribed to and remained a member of the chat group in order to talk about child pornography. This activity, while not socially acceptable, is constitutionally protected. Similarly, someone who subscribes to High Times magazine\(^{305}\) is not necessarily a marijuana smoker. While it might be a fair assumption that a subscriber to such a magazine might be more likely to smoke marijuana than a non-subscriber, the government certainly cannot find every person who buys the magazine and then search those people’s homes without violating the Constitution.\(^{306}\)

Take, for example, the CPPA.\(^{307}\) The Supreme Court could have upheld the CPPA by saying that the safeguarding of children and the prevention of their exploitation took precedent over the First Amendment concerns raised. Instead, the Court struck the Act down as overbroad.\(^{308}\) Similarly, a Yahoo! group, or any other Internet group for that matter, may involve a person joining the e-group seeking to combat child pornography. Under the logic of the Martin holdings, a user who simply subscribes to a site with a welcome message like the “Candyman” welcome message to confront users of the group and who sends messages to them expressing disgust would be

\(^{302}\) See supra note 190 and accompanying text.
\(^{303}\) See supra text accompanying note 191.
\(^{304}\) See supra Part I.C.
\(^{305}\) High Times is a magazine and Web site that contains information and stories having to do with marijuana. High Times includes advertisements for “legal smoking buds” and stories about people who have been “busted” for growing or using marijuana. See High Times, http://www.hightimes.com (last visited Sept. 15, 2006).
\(^{306}\) See supra Part I.D.
\(^{307}\) See supra notes 59-73 and accompanying text.
\(^{308}\) “[T]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.” Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002); see supra notes 72-73 and accompanying text.
subject to having his or her home searched and computer files seized. While subscribing to a pornographic site might not be the best or most effective way to get involved in the war against child pornography, it is improper to subject these individuals to an invasive search and/or seizure. Without viewing or trading images of child pornography, such an individual has not engaged in activity that amounts to probable cause.309

C. The Martin Holdings Violate the Fourth Amendment

The main issue with the Candyman cases is that when the erroneous information in the affidavit is removed, little substance is left to support probable cause. In the Candyman cases, not only is the First Amendment implicated by the Martin rulings (and subsequently, the Coreas holdings), but the Fourth Amendment is implicated, as well.310 This makes the precedent set by the Second Circuit doubly dangerous.

The Fourth Amendment mandates that a warrant shall only be issued when there is probable cause that is supported by affirmation.311 In the Candyman cases, the affidavits were clearly erroneous.312 The Martin I Court held that probable cause existed based on the idea that “those who view are likely to download and store child pornography.”313 Although this idea was included in the holding as to why the evidence should be admitted, the court did not cite any statistics to support this statement.

Another issue with finding probable cause is that the welcome message said nothing explicit about child pornography.314 A user could not see the contents of the Web site until he or she had subscribed to the group. Agent Binney admitted that a person could feasibly subscribe to the Web site and never go back.315 Additionally, a person could subscribe and subsequently forget about the subscription if he or she had not elected to receive e-mails.316

At least one other court besides the Perez court has recognized that more than subscription is needed for probable cause. In State v. Staley, a Georgia state court held that the state lacked probable cause to search a convicted child molester’s apartment and computer where there was no link between the apartment and the computer files found and the alleged molestation of a woman the defendant met through a personal ad seeking “younger wom[e]n with children.”317 There was no evidence that the molestation took place at the apartment or that a child had been there, there was no evidence that the

309. See supra Part I.C-D.
310. See id.
311. See supra Part I.D.
312. See supra notes 133-39 and accompanying text.
313. See Martin I, 426 F.3d 68, 77 (2d Cir. 2005).
314. See Perez Transcript, supra note 43, at 76.
315. Id. at 78-79.
316. Id. at 79.
defendant showed sexually explicit material to children, and there was no
evidence that the defendant communicated with children via e-mail.318

The Martin court was satisfied with the statistics and profile of people
who frequent pornographic Web sites,319 but these are not convincing. To
satisfy the Fourth Amendment’s requirements, an affidavit must contain
enough specific information pertaining to the persons in question to warrant
a search of private property.320

As the majority of members of the Candyman group opted not to receive
any attachments, the Second Circuit effectively held that clicking a “join”
button to discuss child pornography establishes probable cause that a person
is in possession of child pornography or is a pedophile.321 Speech, whether
in person or in a computer-mediated setting, is protected by the First
Amendment, even when it is sometimes offensive to most of society.

Because probable cause requires that there be a fair probability that
contraband or evidence of a crime will be found in a particular place,322 it is
necessary to examine the link between the correct factual information in the
affidavit and a defendant’s individualized circumstances.323 The affidavit,
with the erroneous information removed, simply contains information about
the welcome page of the Candyman Web site and the tendencies of people
who join such Web sites. The question is whether it is proper to assume
that simply joining an Internet group where some members, but far from a
majority of them, are using the group for illegal purposes can lead to a fair
probability that every member has committed a crime.324 Answering this
question in the affirmative involves a large jump in logic. Had Agent
Binney’s initial affidavit contained proper information—that is, had it
actually been the case that in order to subscribe to the Candyman Web site,
would-be members were informed that they would be receiving all e-mails
with pictorial and video attachments—then this assumption could be said to
be fair.

In Martin II, the court cited United States v. Fama, which held that “[t]he
fact that an innocent explanation may be consistent with the facts alleged
... does not negate probable cause.”325 By this line of reasoning, individuals
can easily be found guilty by association. This completely undermines the probable cause requirement enshrined in the Fourth
Amendment.

318. Id. at 29.
319. See supra notes 165-67 and accompanying text.
320. See supra Part I.D.
321. See supra Part II.A.
and accompanying text.
323. See supra note 109 and accompanying text.
324. See supra text accompanying note 260.
325. 758 F.2d 834, 838 (2d Cir. 1985); see supra note 189 and accompanying text.
In the Government’s brief in opposition to the petition for certiorari in the case of Martin v. United States, the Government made mention of United States v. Arvizu. Arvizu asserted that “although each factor in a reasonable-suspicion analysis may have . . . an innocent explanation, taken together, they [can be] sufficient to establish reasonable suspicion.” The Government applied Arvizu improperly, however. The brief goes on to say that by

applying the commonsense approach that informs the probable cause determination . . . a reviewing court could reasonably conclude that an individual who ‘chats’ with like-minded people about sex with children, votes on what age groups they prefer, and visits other child pornography sites also downloads the readily accessible child pornography that is the e-group’s mainstay.

This reasoning is flawed for a number of reasons. First, Martin was in fact a member of the girls12-16 e-group, but there is no evidence that shows whether or how often he “chatted” on the site or whether he voted on which age group he preferred. Second, Arvizu specifically states that innocent factors, “taken together,” can establish reasonable suspicion. Here, there was only one definite factor—that Martin joined an e-group with a welcome message that alluded to illegal activity.

The Government’s brief also applied United States v. Gourde, but this application was improper. In Gourde, the court rejected the defendant’s argument that because an affidavit did not contain “concrete evidence” that he had downloaded child pornography, probable cause did not exist. Micah Gourde, unlike Martin and Coreas, paid about twenty dollars a month to join a Web site called lolitagurls.com, which contained graphic images on its homepage. Martin and Coreas, in contrast, joined a free Yahoo! chat group by clicking a “join” button after reading a textual welcome message. Because the violation of 18 U.S.C. § 2252 is a possessory offense, probable cause is not supported by a person exhibiting an interest in proscribed materials; there must be an individualized indication of ownership. Reliance on United States v. Froman is also not

328. See Martin Opposition Brief, supra note 199, at 12.
329. Id.
330. See supra text accompanying note 328.
331. See Martin Opposition Brief, supra note 199, at 14, 15.
332. 440 F.3d 1065 (9th Cir. 2006) (en banc).
333. See Gourde, 440 F.3d at 1072. In Gourde, the Ninth Circuit was divided in an en banc decision, with two judges dissenting. Id. at 1074-84.
334. See id. at 1070 ("To become a member requires what are at first glance little, easy steps. It was easy for Gourde to submit his home address, email address and credit card data, and he consented to have $19.95 deducted from his credit card every month. But these steps, however easy, only could have been intentional and were not insignificant. Gourde could not have become a member by accident or by a mere click of a button.").
335. See supra notes 135-38 and accompanying text.
336. 355 F.3d 882 (5th Cir. 2004).
on point for the Candyman defendants,\textsuperscript{337} as Martin did not have a screen name that alluded to any interest in child pornography.\textsuperscript{338} In short, although all of the cases discussed in this Note stem from either the Candyman e-group or a similar group, there is still the need for individualized review when evaluating whether probable cause exists.\textsuperscript{339}

It is certainly true that the Internet poses problems to the regulation of illegal activity. It is also true that sexual abuse of children is a major societal concern. But these two truths do not, and should not, add up to a third assumed truth that all people who decide to participate in a discussion about a criminal activity are legally deemed likely to be engaging in that activity. Perhaps many of these people are engaging in illegal activity, but without individualized evidence, the assumption damages the integrity of the First and Fourth Amendments of the Constitution.

The question remains, where should the line be drawn? If a person has subscribed to one Web site like the Candyman site, and that one subscription is not enough to find probable cause, then what number of subscriptions to such sites would be enough to amount to probable cause? Two? Ten? Fifty-seven? It seems reasonable to assume that a person who subscribes to fifty-seven sites is likely to possess child pornography. But where should the line be drawn? What if a person subscribed to Web sites to log on and tell everybody else on the Web sites that they are all disgusting and should be incarcerated? While such a course of action may not be wise, the government is perhaps placing too high of an expectation on average citizens to really inspect their private behaviors and choices for potential misunderstandings and repercussions before they act.

Some fairly simple initial steps can be taken to combat this problem. All affidavits should be required to be sufficiently individualized and detailed to show probable cause in each case. The biggest issue with the Martin and Coreas holdings is that the affidavits did not contain any particularized information about whether the defendants had received or transmitted any files. Had the defendants been found to have transmitted any video or picture files, then probable cause would clearly have existed. Furthermore,

\textsuperscript{337} See id. at 890-91 (stating that "it is common sense that a person who voluntarily joins a group such as Candyman, remains a member of the group for approximately a month without canceling his subscription, and uses screen names that reflect his interest in child pornography, would download such pornography from the website and have it in his possession").

\textsuperscript{338} Martin’s e-mail address was Joeym@optonline.net. See Martin III, 430 F.3d 73, 75 (2d Cir. 2005). Coreas’s e-mail address was rev_bd@yahoo.com. See Brief of Petitioner-Appellant at 8, Coreas v. United States, No. 05-1062 (2d Cir. Feb. 16, 2006).

\textsuperscript{339} See Gourde, 440 F.3d at 1084 (Kleinfield, J., dissenting) ("The majority concludes that the affidavit made out probable cause by assuming that anyone who subscribes to an Internet site with both legal and illegal material must collect illegal material from the site. This assumption stacks inference upon inference until the conclusion is too weak to support the invasion of privacy entailed by a search warrant. . . . [T]he overwhelming importance of the privacy of people’s computers makes it essential to assure that—even in this ugly corner of human perversion—probable cause seriously interpreted remain[s] a prerequisite for search warrants.").
Web sites such as Yahoo! Groups should be required to post warnings to all potential subscribers about the criminal repercussions of sharing and posting illegal images of child pornography. Finally, Internet service providers, like Yahoo!, should be required to have better moderator systems that more readily detect and shut down sites where users post illegal pictures and videos.340

The stark split within the Second Circuit remains since the Supreme Court has denied certiorari in the Martin and Coreas cases.341 The Coreas panels reluctantly affirmed Coreas’s conviction and reluctantly denied rehearing but felt compelled to do so only because of the Martin holdings.342 While the Coreas panel found the differences in the e-groups girls12-16 and Candyman to be immaterial, the Martin majority used the differences as an “integral component” of the finding that probable cause existed to search Martin’s home.343 Perhaps a circuit that has not yet dealt with a case like the Candyman cases will rule the way the Coreas court would have liked to and the issue will become ripe for Supreme Court review.

CONCLUSION

Protecting children from exploitation is of paramount importance, but it cannot take precedence over constitutional rights. It is a terrible reality that in the Candyman cases, each defendant did, in fact, own or trade child pornography. In retrospect, only after the defendants’ Fourth Amendment rights were violated, was this realized, however. Although the circuit courts are currently in agreement about the correct outcome for the Candyman cases, not all district courts agree. The Candyman cases are a clear example of how societal views can infiltrate the decision-making process and manipulate legal analysis. A person’s constitutional rights should not be thwarted because he or she does something that society views as repulsive. If the Candyman verdicts are allowed to stand, a number of innocent people’s rights could be jeopardized in the future.

340. See supra notes 82-88 and accompanying text for measures that have been taken to date.
342. See supra Part II.B.3-4.
343. See supra text accompanying notes 185-86.