COMMON SENSE AND THE CANNIBAL COP

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The Internet has created unprecedented opportunities for individuals to explore a wide range of unfamiliar and often-marginalized desires, and in doing so has also created unprecedented opportunities for the criminal justice system to monitor and punish these sexual desires. An important example of this dynamic is the recent trial of Gilberto Valle, New York City's so-called "Cannibal Cop." Valle, an NYPD officer, was convicted for conspiracy to kidnap several women based on a series of highly fictionalized conversations on a "dark fetish" fantasy website. Although these conversations revealed Valle's fantasies involving kidnapping, torturing, and cannibalizing women, he had made no effort to kidnap, kill, or eat anyone, and there was no evidence that his online discussions went beyond graphic exchanges and digital role-playing.

The "Cannibal Cop" case provides a useful template for examining the ethical boundaries of applying criminal laws to the precarious realm of Internet-mediated sexuality. This Essay highlights some of the important questions raised by the prosecution of the Cannibal Cop, and it emphasizes the need to carefully approach the important, yet inherently blurry line between "fantasy" and "reality." We caution against overreliance on "common sense" in cases like this, given the incomplete lay understandings of how people use the Internet to explore sexual desires and the risk that legal decisions will be driven by disapproval of these desires.

INTRODUCTION

The trial of New York City's so-called "Cannibal Cop" seemed ripped from an episode of *Law & Order: Special Victims Unit*. New York City Police Officer Gilberto Valle was caught chatting online with men from New Jersey to Pakistan about kidnapping, killing, and eating women he knew—including his wife, college friends, and a local teenager.[1] For almost a year, he took actions

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1. United States v. Valle, 301 F.R.D. 53, 59 (S.D.N.Y. 2014).

like exchanging photos with his cohorts, discussing various methods of torture, and googling the uses of chloroform.[2] He adopted the pseudonym "girlmeathunter."[3]

This all sounds heinous. However, by the time of his arrest in 2013, he had made no effort to kidnap, kill, or eat anyone, and there was no evidence that his online discussions went beyond graphic exchanges of dark sexual fantasies. Indeed, in these discussions, Valle repeatedly gave false identifying information about the alleged victims,[4] concocted false stories about his own "kidnapper-for-hire" past,[5] lied about his location,[6] and omitted any mention of the various weapons he had access to as a police officer.[7] Nonetheless, Valle was charged with and tried for conspiracy to kidnap and conducting an unauthorized computer search of a federal database.[8] At trial, the government repeatedly pressed the jury to use its "common sense" and find that it was not "okay" for an NYPD officer to have these types of conversations.[9] On March 12, 2013, the jury convicted Valle on both counts.[10] But on June 30, 2014, Judge Gardephe issued a 118-page opinion vacating the decision of the jury as to the conspiracy to kidnap charge and overturned Valle's conviction on that count.[11]

Although it provoked outrage in some circles,[12] Judge Gardephe's decision is a useful starting point for thinking about the knotty ethical boundaries of applying criminal laws to the precarious realm of Internet-mediated sexuality.[13] We argue here that prosecutors cannot rely on their own gut reactions, calls for common sense, or the intuitions of law enforcement in determining when

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2. *Id*. at 59, 75-76.

3. *Id*. at 64.

4. *Id*. at 98.

5. Defendant Gilberto Valle's Memorandum of Law in Support of His Motion for a Judgment of Acquittal on Count One at 27, *Valle*, 301 F.R.D. 53 (No. 1:12-cr-847), 2013 WL 8366191 [hereinafter Motion for a Judgment of Acquittal].

6. *Valle*, 301 F.R.D. at 94.

7. While Valle's status as police officer was a centerpiece of the prosecutor's case at trial, *id*. at 107-08, there is no evidence that Valle ever actually mentioned to his cohorts online that he was a police officer.

8. Indictment at 1-2, *Valle*, 301 F.R.D. 53 (No. 1:12-cr-847), 2012 WL 5835831; *see also* 18 U.S.C. § 1201(c) (2013); 18 U.S.C. § 1030(a)(2)(B) (2013).

9. *See infra* notes 46-53 and accompanying text.

10. *Valle*, 301 F.R.D. at 59.

11. *Id*. at 115.

12. *See, e.g*., Hillary Crosley Coker, *Cannibal Cop, Convicted of Plotting to Eat Women, May Be Home Soon*, JEZEBEL (July 1, 2014, 10:20 AM), http://jezebel.com/cannibal-cop-convicted-of-plotting-to-eat-woman-may-b-1598474328 ("Dude, if someone is plotting to kidnap, cook and eat me, please put them under the jail America.").

13. We use the term "Internet-mediated sexuality" to refer to cybersex or the use of the Internet to make sexual contacts. *See, e.g*., Michael W. Ross, *Typing, Doing, and Being: Sexuality and the Internet*, 42 J. SEX RES. 342, 342 (2005).

fantasy becomes "real."

The prosecutor in the "Cannibal Cop" case called on jurors to rely on their "common sense" about Valle's fantasy life. It is unlikely, however, that the jury had much or any "common sense" about the issues that arose in the "Cannibal Cop" case. And missing from the trial was any expert testimony to educate jurors about the paraphilia,[14] fantasy, and role-play at the center of the case. Moreover, there is no evidence that the FBI or the U.S. Attorney's Office made any effort to better understand the context or meaning of the conversations they sought to criminalize. A key takeaway from the "Cannibal Cop" case is the urgent need to better educate law enforcement, prosecutors, judges, and defense attorneys about the many, diverse ways people use the Internet to pursue their sexual desires.

While the "Cannibal Cop" case may seem like an outlier, the punch line to a joke even,[15] it sheds light on a troubling dynamic within the contemporary criminal justice system. How does the system handle the reality of the Internet's endless ability to give people an easy outlet for sexual desires that may make others deeply uncomfortable? How do we decide what is "fantasy" and what is "reality?" And who should be making those decisions? In order to begin to tackle these difficult questions, all actors within the criminal justice system—law enforcement, prosecutors, judges, and juries—need a better understanding about the contexts in which individuals explore their desires online. The prosecution, conviction, and ultimate acquittal of Gilberto Valle demonstrate the need for education, expertise, and social science data both in and outside the courtroom.

I. THE CASE

Gilberto Valle was a twenty-five-year-old beat cop in Harlem when he met his wife, Kathleen Mangan, on OkCupid.[16] They courted, got pregnant, and decided to marry.[17] As Mangan explained: "The wedding was nice. The

14. Paraphilic Disorders require that the person with the paraphilic interests (1) "feel personal distress about their interest, not merely distress resulting from society's disapproval" or (2) "have a sexual desire or behavior that involves another person's psychological distress, injury, or death, or a desire for sexual behaviors involving unwilling persons or persons unable to give legal consent." AM. PSYCHIATRIC ASS'N, PARAPHILIC DISORDERS FACT SHEET (2013), *available at* http://www.dsm5.org/Documents/Paraphilic%20Disorders%20Fact%20Sheet.pdf.

15. *See, e.g.*, N.Y. POST, Mar. 13, 2013 (featuring cover showing a photoshopped image of Valle lifting a ladle out of a steaming caldron of soup with the headline *Chopped Liver! Cannibal Cop Guilty*); N.Y. DAILY NEWS, Feb. 26, 2013 (using headline *Meat the Wife* in reference to Valle's case on the cover).

16. Robert Kolker, *A Dangerous Mind*, N.Y. MAG. (Jan. 12, 2014), http://nymag.com/news/features/cannibal-cop-2014-1.

17. *Id.*

marriage was not."[18]

Shortly after their marriage and the birth of their son, Valle became distant and uninterested in intimacy with his wife. When Mangan found some websites on their shared computer that disturbed her, she installed spyware to track her husband's online behavior.[19] She discovered that her husband had been visiting extreme fetish websites, such as DarkFetishNet, where people discuss a wide range of BDSM fantasies, including scenarios involving kidnapping, torture, and cannibalism.[20] Mangan saw in her husband's chats the names of women she recognized, including her own.[21] She also saw disturbing pictures, including images of what appeared to be dead women[22] and "feet that were not attached to bodies."[23] That day she grabbed her child and left the home.[24] After she left, she called the FBI.[25]

The primary basis of the FBI investigation (and later the prosecution against Valle) was thousands of online chats that Valle had exchanged with twenty-one other individuals about a variety of graphic kidnapping or cannibalism scenarios.[26] The FBI assigned a rookie agent, Corey Walsh, to pore through these conversations.[27] In these conversations, Valle claimed to have a cabin in the woods of Pennsylvania, where he had a soundproof basement and a human-sized oven for cooking the women.[28] The chats went into detail about how different women would be kidnapped, tortured, and eventually killed. There was, however, no house in the woods and no human-sized oven.[29] Moreover, Valle provided a wide range of false details about his own life—in certain conversations, Valle was an experienced kidnapper soliciting new clients; in others he was a neophyte looking for guidance from more seasoned experts.[30] At no point did he reveal that he was a police officer with access to a

18. *Id*.

19. United States v. Valle, 301 F.R.D. 53, 63-64 (S.D.N.Y. 2014).

20. *Id*. ("The website [DarkFetishNet] is designed to facilitate communication among those interested in a variety of sexual fetishes and deviant practices, including erotic asphyxiation, cannibalism, rape, necrophilia, and 'peril' scenarios (*i.e*., fantasies that involve 'a victim in a dangerous situation')." (discussing the deposition of Sergey Merenkov, one of the founders of DarkFetishNet)).

21. *Id*. at 64.

22. *Id*. at 63.

23. *Id*. at 64 (citation and internal quotation marks omitted).

24. *Id*.

25. *Id*.

26. *Id*. at 61.

27. *Id*. Walsh had only been with the FBI for "seven or eight months when he was assigned to the Valle investigation." *Id*. at 65. He had a college degree in sociology, and although he had served several years in the army, he had no prior law enforcement experience. *Id*.

28. *Id*. at 61.

29. *Id*.

30. *Compare* Motion for a Judgment of Acquittal, *supra* note 5, at 8 (describing conversations in which Valle pretended to be "a professional kidnapper"), *with Valle*, 301

firearm and handcuffs. Importantly, he never used the alleged victims' last names and repeatedly obfuscated or lied regarding other identifying details about them.[31] Finally, Valle's profile on DarkFetishNet contained an express disclaimer that everything he said on his profile was fantasy.[32]

Agent Walsh nonetheless purported to identify forty "real" chats, which he classified as real-world preparation for kidnapping, rather than fantasy play. In Walsh's assessment,

> In the ones that I believe[d] were fantasy, the individuals said they were fantasy. In the ones that I thought were real, people were sharing, the two people were sharing real details of women, names, what appeared to be photographs of the women, details of past crimes and they also said they were for real. . . .[33]

Walsh also explained:

> [In the "real" chats, the participants] described dates, names and activities that you would use to conduct a real crime. . . .
> [The "fantasy" chats were those] that didn't seem realistic. . . . They were clearly role-play.[34]

The problem, as Judge Gardephe would later note, was that Walsh had no real training in identifying what made a chat "real" and what made it "fantasy."[35] In fact, Walsh admitted that he had never read chats between actual kidnappers before.[36] Nor did he make any effort to understand the nature of the sexual fetishes he was investigating or the context in which these graphic conversations took place.[37] The only indications that Walsh seemed to offer for the authenticity of Valle's threats in these forty or so chats were that they involved real dates and real people, and that they were not explicitly labeled by the participants as a fantasy (Valle's disclaimer notwithstanding).[38]

The conspiracy to kidnap charge was born of Walsh's identification of these forty "real" chats.[39] In the chats, the government identified three main "co-conspirators" out of the twenty-one men Valle had communicated with

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F.R.D. at 69-70 (transcribing Internet chat in which Valle sought help but stated "i am just afraid of getting caugh t [sic]").

31. *Valle*, 301 F.R.D. at 61.

32. *Id*. at 59 ("Valle's DFN profile page stated: 'I like to press the envelope but no matter what I say, it is all fantasy.'").

33. *Id*. at 65 (alterations in original).

34. *Id*. (alterations in original).

35. *Id*.

36. *Id*.

37. In his opinion, Judge Gardephe explores Walsh's background in relation to his qualification for his role in Valle's case. Nowhere in that discussion does he mention that Walsh had any particular training in role-play, fantasy, or the fetish community. In fact, he noted Walsh's lack of training in distinguishing "real" chats from "role-play." *See id*.

38. *See id*. at 64-67.

39. *See id*. at 65-66.

online.[40] There is no evidence that Valle had ever met any of these men in person or communicated with them through any means other than the chats. They included Michael Van Hise from New Jersey[41] and two additional users who went by the usernames "Aly Khan"[42] and "Moody Blues."[43] "Aly Khan" was never identified, but was logging on from somewhere Pakistan.[44] "Moody Blues" was eventually identified as Dale Bolinger of England.[45]

Although the prosecution's case at trial would seem to hinge upon the line between "reality" and "fantasy," the trial soon became focused on whether Valle's fantasies were "'okay' or 'not okay'—normal or abnormal."[46] It is worth noting in some detail, as Judge Gardephe did, the exact language used by the prosecutor in explaining Valle's fantasies to the jury. Among the statements highlighted by the court were the following:

> • "There is a reason why the word 'fantasy' gets sprinkled over and over again through every cross-examination. . . . It is because [when] we think of fantasies, we normally have a positive idea. You think of Mariah Carey, or maybe you think about the stories you told to your children—fairies, pixie dust, unicorns. That is not what we are talking about here. Gil Valle's fantasy is about seeing women executed. The fantasies he is engaging in are about seeing women sexually assaulted, executed and left for dead. *That's not a fantasy that is OK*."[47]
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> • "He is Googling, ['Sound you make with a knife before carving.'] Let's just step back and think about that for a second. *That is not normal*."[48]
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> • "Defense counsel stated that the file folders reflect the women that Gil was attracted to and that is it. Well, that doesn't explain why he is Googling death fetish. *That is not sex. The man likes seeing people dead*."[49]
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> • "If your por[n] is seeing actual dead women's mutilated bodie[s], that is incredibly telling about what your state of mind is. *That is not normal*."[50]

The prosecutor also asked the jury on many occasions to use their common sense in determining Valle's guilt.

> • "[S]ince the beginning of this case . . . defense counsel has been trying to sell you on two broad concepts that are in *total conflict with your common sense*. The first one is the idea that it is OK, a police officer, walking around New York City with a loaded weapon who on a daily basis is engaging in

40. *Id*. at 59.

41. *Id*. at 66-69 (discussing the chats between Valle and Michael Van Hise).

42. *Id*. at 69-73 (discussing the chats between Valle and "Aly Khan").

43. *Id*. at 73-77 (discussing the chats between Valle and "Moody Blues").

44. *Id*. at 69 n.22 ("While Aly Khan tells Valle that he lives in India, the Government 'trac[ed] [his] Internet Protocol IP address' and learned that he resides in Pakistan." (alterations in original)).

45. *Id*. at 62 n.3.

46. *Id*. at 107.

47. *Id*. (alterations in original) (emphasis added) (citation omitted).

48. *Id*. at 108 (alterations in original) (emphasis added) (citation omitted).

49. *Id*. (emphasis added) (citation omitted).

50. *Id*. (alterations in original) (emphasis added) (citation omitted).

> making detailed plans about the execution of actual women. *That is one of the underlying themes of what we just heard, that that is just something that is OK*."[51]
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> • "There is nothing about Mr. Valle that is special. At bottom he is a dirty cop. *It is something we've seen a million times*."[52]
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> • "This is a New York [C]ity police officer. *That is what we were talking about when we talked about common sense in the beginning*. . . . There is something incredibly wrong just on that fact with a New York City police officer talking about killing a high school student and then Googling to try to get information about her address."[53]

In response to these arguments, the defense continued to focus on the lack of evidence, shunning arguments about Valle's predilections or his potential dangerousness.[54] In fact, although before trial the prosecution had unsuccessfully challenged two proposed experts on sexuality and fantasy,[55] at trial the defense chose not to call either expert. While we will discuss the experts in more detail below, it is worth noting that the defense team ultimately decided not to call the experts because of the dearth of evidence as to the conspiracy.[56] They wanted to focus on the lack of evidence, rather than

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51. *Id*. (alterations in original) (emphasis added) (citation omitted). Although we will not cover it here, we think it relevant to note the real risk of improper argument in controversial cases involving sexuality and fantasy. Judge Gardephe did not decide on the issue, but he did make clear in his ruling that certain arguments by the prosecutor may have veered towards the improper. It is a rule of closing arguments, in both criminal and civil trials, that neither side may inflame the emotion of the jury during closing arguments. *See* Alvarado-Santos v. Dep't of Health, 619 F.3d 126, 136 (1st Cir. 2010) (finding that lawyer may not make arguments that inflame the jury); *see also* Brooks v. State, 762 So. 2d 879, 900, 905 (Fla. 2000) (reversing death sentence where the prosecutor "inflamed the passions and prejudices of the jury with elements of emotion and fear"). The rule makes sense. The jury's decision should be based only on what is before them and not their feelings about the defendant, his counsel, or other matters that are outside of the facts. *See, e.g*., Viereck v. United States, 318 U.S. 236, 247 (1943) (finding it improper for the prosecutor to attempt to "arouse [the] passion and prejudice" of the jury); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-5.8(c) (3d ed. 1993), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html ("The prosecutor should not make arguments calculated to appeal to the prejudices of the jury."). Neither may attorneys make personal attacks on opposing counsel or the defendant. *See* United States v. Diaz-Carreon, 915 F.2d 951, 958 (5th Cir. 1990) (finding a prosecutor's closing arguments "disgraceful" where he argued that the defense attorney was a "zealot" and that the jury should "[t]hank God he's a defense attorney and not part of the Government"); *see also Alvarado-Santos*, 619 F.3d at 136 (finding that plaintiff counsel's arguments about the defendants' national origin had "no place in a court of law").

52. *Valle*, 301 F.R.D. at 108 (emphasis added) (citation omitted).

53. *Id*. (alterations in original) (emphasis added).

54. *See* Kaitlin Ek, Note, *Conspiracy and the Fantasy Defense: The Strange Case of the Cannibal Cop*, 64 DUKE L.J. 901, 905-09 (2015) (walking through the main evidence that the prosecution presented against Valle and defense counsel's response to this evidence).

55. Order Denying Prosecution's Motion to Exclude Defendant's Proposed Expert Testimony at *10, *Valle*, 301 F.R.D. 53 (No. 1:12-cr-847), 2013 WL 440687 [hereinafter Order Denying Prosecution's Motion].

56. *See* Kolker, *supra* note 16.

engaging more deeply in a discussion of Valle's fantasy life.[57]

On March 12, 2013, the jury convicted Valle on both counts: conspiracy to kidnap and conducting a computer search of a federal database that exceeded his authorized access.[58] At the time of his conviction, Valle's lawyers renewed a prior motion for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure.[59]

Over a year later, in June 2014, Judge Gardephe granted the motion as to the conspiracy to kidnap charge.[60] In his 118-page decision, Judge Gardephe went through in painstaking detail all of the alleged bases for a "real" conspiracy and found no evidence that Valle ever actually intended to kidnap anyone. As Judge Gardephe put it, Valle provided a "veritable avalanche of false, fictitious, and fantastical information" to those he met online.[61] He consistently lied about his own background, including his job, his marital status, and other details of his life.[62] Of the personal information he looked up on the police database, he did not share that information with *anyone*. As Judge Gardephe noted, "[d]espite repeated requests, Valle never provided his alleged co-conspirators with the last names and addresses that would have permitted them to locate and identify these women."[63] As to the kidnapping, Judge Gardephe found that "the nearly year-long kidnapping conspiracy alleged by the Government is one in which no one was ever kidnapped, no attempted kidnapping ever took place, and no real-world, non-Internet-based steps were ever taken to kidnap anyone."[64] The "agreed-upon date for kidnapping a woman came and went," and nothing happened.[65]

Valle was released and sentenced to the equivalent of time served on the unauthorized database access charge.[66] He had spent almost two years in jail.[67]

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57. *See id*.

58. *Valle*, 301 F.R.D. at 59.

59. *Id*. at 78. Under Rule 29, a defendant may move within fourteen days of a jury conviction to ask the court to find the evidence insufficient to sustain a conviction. FED. R. CRIM. P. 29(c)(1).

60. *Valle*, 301 F.R.D. at 115.

61. *Id*. at 61.

62. *See supra* notes 4-7, 29-32 and accompanying text.

63. *Valle*, 301 F.R.D. at 61.

64. *Id*. at 60.

65. *Id*.

66. Tom Hays, *Ex-NYPD "Cannibal Cop" Sentenced to Time Served for Illegally Accessing Law Enforcement Database*, NBC N.Y. (Nov. 12. 2014, 12:42 PM), http://www.nbcnewyork.com/news/local/EX-NYPD-Cannibal-Cop-Time-Served-Federal-Database-Conviction-282426501.html.

67. Rich Calder et al., *'Cannibal Cop' Walks Free*, N.Y. POST (July 1, 2014, 12:00 PM), http://nypost.com/2014/07/01/cannibal-cop-freed-on-100k-bond-after-judge-vacates-conviction.

II. THE NEED FOR EXPERTISE, DATA, AND BALANCED NARRATIVES

The intersection of sexuality and the Internet is regularly associated with a range of highly publicized social evils: online predators,[68] child pornography,[69] sex trafficking,[70] sexting,[71] revenge porn,[72] cyberbullying,[73] and harassment.[74] Numerous television shows, trumpeted attorney general campaigns, and endless sensationalist news reports have created a one-sided narrative that, in the realm of sex, the Internet is solely a source of trauma, harassment, and sickening criminal behavior.[75]

But this is only one side of the coin. The Internet has provided unprecedented opportunities to explore one's own sexual identity and desires, form communities around such desires, and figure out how best to harmonize those desires with one's "real world" circumstances.[76] Research has demonstrated that such explorations are ubiquitous,[77] even if stigmatized. Internet-mediated sexuality may be palatable when connected to mainstream services like OkCupid or Match.com, but it can be particularly valuable for those on the sexual margins.[78] Moreover, the social science data on the dangers

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68. *See, e.g.*, Amy Adler, *To Catch a Predator*, 21 COLUM. J. GENDER & L. 130, 143 (2012).

69. *See, e.g.*, Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 227, 234, 252 (2001).

70. *See, e.g.*, *Online and Anonymous: New Challenges To Prosecuting Sex Trafficking*, NPR (Aug. 3, 2013, 6:28 PM), http://www.npr.org/2013/08/03/208664066/online-the-web-of-sex-trafficking-can-be-even-more-obscure.

71. *See, e.g.*, Nina Burleigh, *Sexting, Shame, and Suicide*, ROLLING STONE (Sept. 17, 2013), http://www.rollingstone.com/culture/news/sexting-shame-and-suicide-20130917; Hanna Rosin, *Why Kids Sext*, ATLANTIC (Nov. 2014), http://www.theatlantic.com/magazine/archive/2014/11/why-kids-sext/380798.

72. *See, e.g.*, Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 347-54 (2014).

73. *See, e.g.*, Andrew Gilden, *Cyberbullying and the Innocence Narrative*, 48 HARV. C.R.-C.L. L. REV. 357, 358 (2013).

74. *See, e.g.*, DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014).

75. *See, e.g.*, Gilden, *supra* note 73, at 377-78, 389-93; Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529, 546 (2002); Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1568-73 (2014).

76. *See, e.g.*, Ross, *supra* note 13; *see also* Kristian Daneback & Michael W. Ross, *The Complexity of Internet Sexuality*, *in* SEXUAL DYSFUNCTION: BEYOND THE BRAIN-BODY CONNECTION 121 (R. Balon ed., 2011), *available at* http://www.karger.com/Article/Pdf/328920.

77. *See, e.g.*, OGI OGAS & SAI GADDAM, A BILLION WICKED THOUGHTS: WHAT THE WORLD'S LARGEST EXPERIMENT REVEALS ABOUT HUMAN DESIRE, at xiv-xv (2011).

78. *See generally* MARY L. GRAY, OUT IN THE COUNTRY: YOUTH, MEDIA, AND QUEER VISIBILITY IN RURAL AMERICA (2009); Gilden, *supra* note 73, at 377-80 (and sources cited therein); Gary W. Harper et al., *The Role of the Internet in the Sexual Identity Development of Gay and Bisexual Male Adolescents*, *in* THE STORY OF SEXUAL IDENTITY: NARRATIVE PERSPECTIVES ON THE GAY AND LESBIAN LIFE COURSE 302 (Phillip L. Hammack & Bertram

of the Internet is far more nuanced than the *To Catch a Predator* moral panics and their equivalents have conveyed.[79] These nuances and complexities rarely make it into the public eye, and, accordingly, prospective jurors are unlikely to be familiar with the conventions, practices, and broader social significance of the online sexual interactions they are being asked to pass judgment on.

Jurors are often told to rely on their "common sense"[80]—jurors are, after all, the system's "renewable source of ordinary common sense in the law."[81] However, there can be serious risks to calls for jurors to use common sense, particularly where "common sense" is in tension with expertise, data, or science on a particular issue. Criminal law, has never been very quick to catch up with science,[82] and juries are susceptible to the pitfalls of calls for common

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J. Cohler eds., 2009); Darryl B. Hill, *Coming to Terms: Using Technology to Know Identity*, SEXUALITY & CULTURE, Summer 2005, at 24; Emily S. Pingel et al., *"A Safe Way to Explore": Reframing Risk on the Internet Amidst Young Gay Men's Search for Identity*, 28 J. ADOLESCENT RES. 453 (2012).

79. *See* DANAH BOYD, IT'S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS 111 (2014) ("Internet-initiated sexual assaults are rare. The overall number of sex crimes against minors has been steadily declining since 1992, which also suggests that the internet is not creating a new plague. At the same time, fear-based advertising campaigns continue to propagate the belief that the internet has introduced a new flood of predators into the living rooms of families across the United States." (footnote omitted)); *see also* KAVERI SUBRAHMANYAM & DAVID SMAHEL, DIGITAL YOUTH: THE ROLE OF MEDIA IN DEVELOPMENT 54 (2011) ("[T]he Internet is a tool that can help youth to overcome their shyness, to learn to talk about sex, find a romantic partner, or learn about sexuality and sexual health."); YOUTH & MEDIA POLICY WORKING GRP. INITIATIVE, BERKMAN CTR. FOR INTERNET & SOC'Y, SPECIAL REPORT: KIDS, DATA, AND INTERNET SAFETY 2-3 (2010), *available at* http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Kids_Data_Internet_Safety_BCIS_Youth_Policy_03-30-10.pdf.

80. *See, e.g.*, United States v. Durham, 211 F.3d 437, 441-42 (7th Cir. 2000) ("[I]t is well established that 'juries are allowed to draw upon their own experience in life as well as their common sense in reaching their verdict . . . .'" (quoting United States v. Magana, 118 F.3d 1173, 1201 (7th Cir. 1997))).

81. Neal Feigenson, *Law's Common Senses*, 30 QUINNIPIAC L. REV. 459, 460 (2012).

82. There is plentiful and mounting scientific evidence about the shakiness of even the most certain eyewitness identifications, JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 263 (2000) (showing that eyewitness misidentifications were the leading cause of miscarriages of justice in DNA exoneration cases), and about the surprising ease with which certain innocent people will confess to horrific crimes, *see generally* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004) (analyzing 125 cases where DNA led to the exoneration of those who falsely confessed and finding that false confessions are a wider problem in the criminal justice system than previously acknowledged, particularly because of the strong influence confessions have on the trier-of-fact). And yet, criminal law has been slow to acknowledge these realities. For instance, it was only in 2012 that New Jersey became the first state to adopt new jury instructions for eyewitness identifications that took into account decades of science on how memory works. Karen Newirth, *New Jersey Leads the Way on Eyewitness Identification Reform*, INNOCENCE PROJECT (July 23, 2012, 5:40 PM), http://www.innocenceproject.org/news-events-exonerations/new-jersey-leads-the-way-on-eyewitness-identification-reform; *see also* Benjamin Weiser, *New Jersey Court Issues Guidance for Juries About Reliability of Eyewitnesses*, N.Y. TIMES (July 19, 2012),

sense without context. As, in fact, are all actors in the system—including judges, prosecutors, and defense attorneys—who use their common sense in making determinations about what evidence is strong or weak, which cases to pursue, which cases to plead, and the level of culpability of the defendant.

The risks of common sense are particularly acute in the context of crimes involving sexual fantasies. At first (and most likely second) blush, the conversations in Valle's case seem without any positive social value. But, as Judge Gardephe appreciated, there is nothing to show that they posed any realistic harm to third parties, and our free speech traditions repeatedly shield thoughts and expressions that may seem vile to many other people.[83] The interactive environment, with graphic, easily decontextualized text certainly *feels* different from the more detached production and consumption of *Grand Theft Auto*, *Game of Thrones* or *Lolita*, but it is far from clear that seemingly vile online interactions should be treated fundamentally differently. Valle's conversations may understandably provoke disgust or condemnation from a large majority of outside observers, but disgust in the absence of harm is, and for many reasons should be, an impermissible basis for policing conversation, thoughts, and fantasies.[84]

We are accordingly highly skeptical that "common sense" provides useful guidance to law enforcement, prosecutors, judges, or juries in this context. In a case like the "Cannibal Cop," which raises sticky issues about the line between sexual fantasy and criminal behavior, there often is not a reliable well of everyday experience that actors in the criminal justice system are drawing on in making these decisions. Again, the invocation of sexuality, Internet, and fetish immediately brings to mind the "real" dangers of online predators featured on *To Catch a Predator*, *Law & Order: Special Victims Unit*, or *CSI: Crime Scene Investigation*—not the ubiquity, diversity, and complexity of the interactions that are decontextualized and transcribed for jurors.

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http://www.nytimes.com/2012/07/20/nyregion/judges-must-warn-new-jersey-jurors-about-eyewitnesses-reliability.html.

83. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011) (striking down ban on the sale of violent video games to minors); Ashcroft v. Free Speech Coal., 535 U.S. 234, 246, 258 (2002) (striking down ban on "virtual child pornography"); R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992) (overturning conviction for burning cross on the lawn of an African-American family despite acknowledging that the act was "reprehensible"); Erznoznik v. City of Jacksonville, 422 U.S. 205, 206, 217 (1975) (invalidating city ordinance banning films containing nudity at drive-in theaters); Cohen v. California, 403 U.S. 15, 26 (1971) (overturning conviction for wearing jacket displaying the phrase "Fuck the Draft"). *See generally* Eugene Volokh, *Gruesome Speech*, 100 CORNELL L. REV. (forthcoming 2015) (arguing that the First Amendment protects the right of abortion protestors to display gruesome images of aborted fetuses).

84. *Brown*, 131 S. Ct. at 2738 ("Justice Alito recounts all these disgusting video games in order to disgust us—but disgust is not a valid basis for restricting expression. . . . Justice Alito's argument highlights the precise danger posed by the California Act: that the *ideas* expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription.").

Moreover, it is easy to forget just how novel these forms of communication are. Chat rooms only grew into widespread use in the mid-1990s, and contemporary forms of social media didn't come into prominence until the early-to-mid-2000s. Many of the early sites were "identity-driven," like BlackPlanet or PlanetOut or MiGente, or "affiliation-focused," like MyChurch.[85] Jurors, who vary greatly in age and life experience, may have a very difficult time navigating the margins of the Internet due to the relative novelty and sheer diversity of these spaces. The use of social media to explore sexuality or fantasy is still taboo and tainted with implications of pedophilia and violence.

In the "Cannibal Cop" case, for instance, the key issue was whether Valle's chats had crossed the line from fantasy to reality. This inquiry should have involved a careful examination of not just Valle's online conversations but also the context of the world in which those conversations took place. And that inquiry—by the FBI and prosecutors, in particular—should have taken place well before the jury was seated. While most people, of course, have a sense of how the Internet works generally, and how individuals use social media more specifically, the subculture that Valle inhabited is different. This is not to say that fetish subcultures are insubstantial. In Valle's case, he was frequenting sites like DarkFetishNet, SexyAmazons, Darkfet, Motherless, and FetLife.[86] These are well-traveled sites[87] and can be entry points for thriving, safe, consensual BDSM communities.[88] Although these sites, like *any* social media platform, can be a launching pad for criminal activity, there is huge interest and potential upside to interacting and engaging with other people who share similar desires and perhaps also struggle with addressing those desires in their everyday lives.

Valle's defense team seemed to understand the need to convey all this to the jury, and early in the case, it made a motion to introduce two experts: James Herriot and Park Dietz.[89] Herriot's task was to educate the jury on "how people communicate and socialize on the internet via social media websites, like Facebook, [and] 'fetish' websites, like[]darkfetishnet.com."[90] The defense wanted him to explain the "distinct culture which exists on the internet in

85. *See* danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 218 (2008).

86. United States v. Valle, 301 F.R.D. 53, 64 (S.D.N.Y. 2014).

87. DarkFetishNet, for instance, has 38,000 registered members and 4500 active users. *Id*.

88. *See* Declaration of Park Dietz at 8-9, *Valle*, 301 F.R.D. 53 (No. 1:12-cr-847).

89. Order Denying Prosecution's Motion, *supra* note 55, at *1. Before trial, Valle's attorneys moved to introduce the two experts at trial to explain Valle's fantasies and give some context to his chats. The prosecutors in the case opposed this motion. Judge Gardephe, finding for the defense, found that both experts were qualified to testify in the area of sexual fantasy and fetish, particularly because the jury was likely not familiar with these areas. *Id*. at *1, *2-4, *8.

90. *Id*. at *2.

sexual 'fetish' and similar websites" and the ways in which people engaged in role-play online "weave a bit of truth about themselves into the communications with a great deal of imagination and exaggeration."[91] Park Dietz, a famed forensic psychologist,[92] interviewed Valle in preparation for testifying at trial. Although he did not end up testifying at the trial, he planned to explain that Valle "lack[ed] any of the risk factors for violence . . . with the exception of some bouts of intoxication . . . and various psychosocial stressors."[93]

Judge Gardephe recognized the value of such testimony. In his pretrial ruling allowing Herriot and Dietz's testimony, he noted that he had "no reason to believe that the 'average juror' will be familiar with the sexual fetish websites on which the Defendant encountered his alleged co-conspirators" and concluded that issues about role play on the Internet were "beyond the ken of the average juror."[94]

Ultimately, however, the defense decided not to put Herriot or Dietz on the stand.[95] Instead, their trial strategy was to hammer on the weaknesses in the prosecution's case.[96] And so, the prosecution presented forty chats, which rookie FBI Agent Walsh labeled as "real," and latched onto the jury's disgust and common sense. Ultimately they obtained a guilty verdict from the jury.

Dietz's post-trial letter to the court is particularly illustrative of the type of information missing from the Valle trial. According to Dietz:

> [A] number of assertions made by the government . . . are . . . incorrect and spurious inasmuch as they are not supported by, and often are contrary to, the body of psychiatric and scientific knowledge regarding the nature of sexual fantasy, the prevalence of males being aroused by sexually sadistic imagery, and the differences between the many men with such arousal patterns and the few who commit violent crimes to fulfill their fantasies.[97]

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91. *Id*.

92. According to Judge Gardephe's decision on the defense motion to include expert testimony, Dietz was an "expert in sexual fantasy, extreme or bizarre sexual role play, sexual sadism, sadomasochism and BDSM subculture, and the extent to which persons involved in such alternative sexual lifestyles carry out their fantasies or role playing" and had provided expert testimony or consultant services in the cases of "John W. Hinckley Jr., Jeffrey Dahmer, Susan Smith, Robert Chambers, Theodore Kaczynski, [and] the Washington, D.C. snipers." *Id*. at *3.

93. *Id* at *4 (second and third alterations in original) (internal quotation marks omitted).

94. *Id*. at *7-8.

95. Although it might have been a valid trial strategy, we would note that we disagree with the defense's decision because education on these issues is so critical to a jury's understanding of why Valle was using the Internet in this particular way.

96. Valle's attorneys gave an interview to *New York Magazine* after the trial. The article indicates that Valle's attorneys felt that more attention on Valle's fetishes would distract from the weaknesses in the prosecution's case and therefore decided not to call either the experts or Valle himself to the stand. Kolker, *supra* note 16.

97. Declaration of Park Dietz, *supra* note 88, at 1-2. In addition, on appeal to the

Dietz informed the court that "[r]esearch has demonstrated that many aspects of human sexual arousal, particularly among those aroused by unconventional stimuli, are, in fact, counterintuitive and contrary to common sense."[98] Disturbingly, yet contrary to the government's insistence that Valle was not "normal," "the prevalence of sexually arousing fantasies concerning binding, domination, torturing, and forcing sex on women is so high in every study that the inference that millions of American males experience sexual arousal from thoughts, images, and stories of violence against women is inescapable."[99] Nonetheless, the "overwhelming majority" of men with such recurring, sadistic thoughts never act on their fantasies—instead, they generally pursue a variety of nonviolent coping mechanisms, such as "sharing their thoughts with consenting partners," "visiting chat rooms," "researching the accoutrements of their fantasies," and writing stories.[100] "These behaviors can be powerful and persuasive evidence of what probably gives such a man an erection, but they are no evidence whatsoever of whether the man ever has or ever will commit a violent crime."[101] Dietz interviewed Valle for over eighteen hours and found "no evidence that the defendant has ever suffered from a psychotic or other mental illness, and that the defendant was free from psychopathy, antisocial personality, or any other personality disorder associated with violence."[102] In a separate interview, Dietz said of Valle: "He's the nicest guy you'd ever meet."[103]

As Dietz's testimony also would have highlighted, the introduction of real elements—names, places, or dates—in a fantasy-like environment is not an indication that a participant has exited the fantasy or had any desire to harm the people who spurred his graphic conversation.[104] Instead, online fantasies can help an Internet user negotiate his or her problems in ways that are otherwise unavailable in offline life.[105] At the same time, these extensions of the real

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Second Circuit, Drs. Frederick Berlin and Chris Kraft submitted an amicus brief similarly explaining that violent sexual fantasies are not "indicative of criminality" in the overwhelming majority of cases. Brief of *Amici Curiae* Frederick S. Berlin, M.D, [sic] Ph.D., and Chris Kraft, Ph.D., in Support of Affirmance at 4, United States v. Valle, No. 14-02710 (2d Cir. Mar. 20, 2014) [hereinafter Brief of Berlin & Kraft].

98. Declaration of Park Dietz, *supra* note 88, at 6.

99. *Id*.

100. *Id*. at 6-7.

101. *Id*. at 7.

102. *Id*. at 2.

103. Kolker, *supra* note 16.

104. Declaration of Park Dietz, *supra* note 88, at 12 ("[N]ormal men incorporate images of women they've noticed into their erotic fantasies . . . and they freely mix, match, and embellish . . . ."); *see also* Brief of Berlin & Kraft, *supra* note 97, at 10 ("Additionally, it is quite common to incorporate one's friends, acquaintances, lovers, and even strangers into one's sexual fantasies.").

105. *See* Ross, *supra* note 13, at 348 ("[F]or more stigmatized or uncommon sexual choices or for the large number of people who do not live in an urban area, the internet is a critical element and an additional stage (seeking out similar others, but from afar) in the

world often manifest themselves in an exaggerated, highly altered manner—they are related to the "real world" but are at the same time a distorted reflection of it.[106]

Valle's conversations may not have been as 100% fictional as a graphic moment from *Fifty Shades of Grey*,[107] and the interactive and textual nature of the medium make it particularly difficult to tease out fantasy from criminal intent. But in trying to navigate the difficult line between crime and fantasy, it is incredibly important that such navigation is pursued in a nuanced and cautious manner. A haphazard, purely intuitive approach to policing the sexual Internet causes harm to real people who have endangered no one and risks chilling interactions among other Internet users who might meaningfully benefit from them. Again, in the First Amendment context we would never allow violent, even relatively interactive, media to be punished without some real demonstration of harm to third parties,[108] yet the criminal justice system seems not to have taken this commitment to heart.

While there is some common sense that we can expect actors in the system and jurors in general to come to the table with, there is a lot of information outside the boundaries of common sense. And we see the risks of this reflected in the *Valle* case. Judge Gardephe's decision serves as an important backstop against the "common sense" conflation of sexually-charged, interactive role-play with a "real" criminal conspiracy. But at the same time, judicial scrutiny of the crime/fantasy boundary is insufficient.

Valle spent almost two years in jail awaiting trial and Judge Gardephe's decision, lost his job, cannot see his child, continues to be berated by the media,

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coming-out process."); *id*. at 349 ("[P]eople who are hindered from acting on important aspects of their sexuality in real life will turn to the internet as a means of exploration of these important self-aspects." (citing Katelyn Y.A. McKenna et al., *Demarginalizing the Sexual Self*, 38 J. SEX RES. 302 (2001))).

106. *See* Declaration of Park Dietz, *supra* note 88, at 14 ("The vast majority of people who frequent sex sites and participate in uncensored sex chats do so under fictitious names . . . ."); boyd & Ellison, *supra* note 85, at 220 ("[P]rofiles [can] never be 'real.' The extent to which portraits are authentic . . . varies across sites; both social and technological forces shape user practices."); *id*. ("'Friends' on SNSs are not the same as 'friends' in the everyday sense; instead, Friends provide context by offering users an imagined audience to guide behavioral norms.").

107. *See* E.L. JAMES, FIFTY SHADES OF GREY (2012). *Fifty Shades of Grey* explores a BDSM relationship between a young female college student and a powerful male CEO. The book has been incredibly successful and was the first to sell over one million copies on Amazon Kindle. The book was transformed into a popular movie. Kirsten Acuna, *By The Numbers: The 'Fifty Shades of Grey' Phenomenon*, BUS. INSIDER (Sept. 4, 2013, 11:59 PM), http://www.businessinsider.com/50-shades-of-grey-by-the-numbers-2013-9.

108. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2737 n.4 (2011) ("Reading Dante is unquestionably more cultured and intellectually edifying than playing Mortal Kombat. But these cultural and intellectual differences are not *constitutional* ones. Crudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than The Divine Comedy, and restrictions upon them must survive strict scrutiny . . . .").

and has had his reputation utterly destroyed.[109] Better, more balanced information about Internet-mediated sexuality accordingly needs to enter into the criminal justice system during much earlier stages than at or after trial. These include (1) the decision to investigate a particular person or forum; (2) law enforcement efforts to elicit graphic fantasies; (3) the decision to prosecute; and (4) the decision to go to trial. (Ideally, such information also would make its way into media coverage of criminal justice issues.) Navigating the realm of cybercrimes, particularly cyber-sex crimes, raises important ethical questions for prosecutors and law enforcement that appear largely to have been skirted in the *Valle* case. Even if the information provided by Valle's wife to the FBI gave cause to launch an investigation, the decision to move forward with the case stemmed from a lack of understanding of how sexual fantasies play out in online spaces.[110]

CONCLUSION

The "Cannibal Cop" case shows that we should be wary of common sense and that balanced expert advice and testimony in other, similarly controversial cases. Expertise needs to enter the process well before a case gets to trial, and we encourage law enforcement, prosecutors, judges, and defense attorneys to become better acquainted with evidence about the Internet and sexuality before uprooting the lives of people who have made no effort to harm others. For those cases that do go to trial, juries similarly must be better informed on the ways in which people use the Internet and social media to pursue their sexual desires.

We are, however, aware of the real dangers of both the Internet and expert advice and testimony. Social media certainly has been used to torment and harm real people, and the victims of such behavior are disproportionately women, people of color, LGBT people, and other marginalized groups.[111]

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109. *See, e.g.*, Shawn Cohen & Natasha Velez, *"Cannibal Cop" Cooks Up Online Dating Profile*, N.Y. POST (Jan. 21, 2015, 4:42 AM), http://nypost.com/2015/01/21/eat-your-heart-out-cannibal-cop-cooks-up-online-dating-profile; Mark Hughes, *New York "Cannibal Cop" Walks Free from Prison*, TELEGRAPH (Jul. 1, 2014, 10:34 PM), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/10939667/New-York-cannibal-cop-walks-free-from-prison.html; Caitlin Keating, *Starved for Love? "Cannibal Cop" Reportedly Joins Match.com*, PEOPLE (Jan. 21, 2015, 5:50 PM), http://www.people.com/article/cannibal-cop-joins-match.

110. It should be noted that this is hardly the only case grappling with the ethics of policing online sexual interactions. *See, e.g.*, United States v. Curtin, 489 F.3d 935, 960 (9th Cir. 2007) (en banc) (Kleinfeld, J., concurring) ("Curtin had a First Amendment right to possess and read the disgusting stories he downloaded from the internet and to fantasize about the criminal sexual conduct they describe."); United States v. Poehlman, 217 F.3d 692, 695 (9th Cir. 2000) ("Mark Poehlman, a cross-dresser and foot-fetishist, sought the company of like-minded adults on the Internet. What he found, instead, were federal agents looking to catch child molesters.").

111. *See* CITRON, *supra* note 74, at 11-14; THE OFFENSIVE INTERNET: PRIVACY, SPEECH,

Moreover, the criminal justice system has a long history of using experts and science in a way that is not reliable, fair, or credible. Think, for instance, of the junk science behind "crack babies"[112] that sent so many new mothers to prison or the "expert" on satanic ritual, who secured a wrongful conviction against the West Memphis Three.[113] Sex offenders in particular are singled out for a broad range of surveillance, monitoring, and civil commitment practices[114] that are based on faulty science on their rates of recidivism.[115] Experts and sex have not always mixed well in the criminal justice system, and the results have been harmful to the civil liberties of defendants who find themselves in the system.

We do not think of experts as a panacea for the problems that arise in controversial cases like Valle's, and we recognize the issues that can and do arise with reckless use of expert testimony. But this cannot be a reason to shy away from data. The careful and measured use of experts, social science, and expert testimony can be an important means of educating the actors in the criminal justice system about how people use the Internet for good, bad, and everything in between. The extant research on Internet-mediated sexuality should push law enforcement, prosecutors, judges, and juries to exercise caution before jumping to conclusions based on "common sense." Cavalier approaches to policing the Internet have wrought real havoc on people's lives based solely on the fantasies in their head and on the screen.

AND REPUTATION 31-33 (Saul Levmore & Martha C. Nussbaum eds., 2010).

112. *See* Michael Winerip, *Revisiting the 'Crack Babies' Epidemic that Was Not*, N.Y. TIMES (May 20, 2013), http://www.nytimes.com/2013/05/20/booming/revisiting-the-crack-babies-epidemic-that-was-not.html.

113. *See* Shaila Dewan, *Defense Offers New Evidence in a Murder Case that Shocked Arkansas*, N.Y. TIMES (Oct. 30, 2007), http://www.nytimes.com/2007/10/30/us/30satanic.html (noting that the prosecution's case hinged on the testimony of a satanic cult expert who received "a mail-order degree"); Campbell Robertson, *Deal Frees 'West Memphis Three' in Arkansas*, N.Y. TIMES (Aug. 19, 2011), http://www.nytimes.com/2011/08/20/us/20arkansas.html.

114. *See generally* McLeod, *supra* note 75; Peter C. Pfaffenroth, *The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of* Kansas v. Crane, 55 STAN. L. REV. 2229, 2233-40 (2003) (tracing the history of civil commitment for sexually criminal or deviant behavior); Rachel Aviv, *The Science of Sex Abuse*, NEW YORKER (Jan. 14, 2013), http://www.newyorker.com/magazine/2013/01/14/the-science-of-sex-abuse.

115. *See generally* Mary Helen McNeal & Patricia Warth, *Barred Forever: Seniors, Housing, and Sex Offense Registratio*n, 22 KAN. J.L. & PUB. POL'Y 317, 345 (2013) ("The Bureau of Justice Statistics reports that 'compared to non-sex offenders released from State prison, sex offenders had a lower overall rearrest rate.' Data on probationers in New York State indicates that for those on probation, 'sex offenders are arrested and/or convicted of committing a new sex crime at a *lower* rate than other offenders who commit other new non-sexual crimes.'" (footnotes omitted) (quoting PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 2 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf; N.Y. STATE DIV. OF PROB. & CORR. ALTS., RESEARCH BULLETIN: SEX OFFENDER POPULATIONS, RECIDIVISM AND ACTUARIAL ASSESSMENT 4 (2007), *available at* http://www.criminaljustice.ny.gov/opca/pdfs/somgmtbulletinmay2007.pdf)).

Social media does have its dangers, but it also provides a forum for people to explore sexuality in a safe and open way, which may not be available to them in the "real" world.[116] This use of the Internet has gotten far too little attention compared to the risks that the Internet poses. We call for some counter-balance to "stranger-danger," online predator, and moral panic narratives—an acknowledgment that the Internet can be a safe space to explore sexual fantasy, even if its manifestations might alienate the outside observer.

116. *See, e.g.*, Gilden, *supra* note 73.