POSSESSION OF CHILD PORNOGRAPHY: LEGAL OR ILLEGAL ACTIVITY (EXPERIENCE OF COMMON LAW COUNTRIES)

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Straipsnyje analizuojama, ar vaiko pornografijos laikymas (turėjimas) turėtų būti uždraustas baudžiamuoju įstatymu ar, atvirkščiai, traktuojamas kaip įstatymui neprieštaraujanti veika. Pateikiami argumentai „už" – palaikantys vaiko pornografijos laikymo (turėjimo) nebaudžiamumo idėją, taip pat apžvelgiami argumentai „prieš" – teigiantys, kad vaiko pornografijos laikymas (turėjimas) yra nusikalstama veika. Turint omenyje, kad vaiko pornografijos tema iki šiol dažniausiai buvo nagrinėta bendrosios teisės (common law) *valstybėse, straipsnyje daugiausia dėmesio skiriama Jungtinėse Amerikos Valstijose ir Didžiojoje Britanijoje atliktų tyrimų ir teismų praktikos analizei.*

In this article the question whether the possession of child pornography should be prohibited by criminal law or, on the contrary, should it be treated as legal activity, is analysed. Arguments declaring the legality of possession of child pornography and arguments characterising possession of child pornography as illegal activity are provided in this article. Keeping in mind, that in the US and the UK the topic of child pornography is analysed in the broadest extent, this article basically relies on the data of the countries mentioned.

Introduction

Public discourse on child pornography is afflicted by extreme definitional ambiguity [11, p. 172]. The legal definition of this phenomenon varies from country to country and depends on different legislative framework, diverse understanding, moral, religious beliefs, cultural basis and codes. To say precisely what child pornography is, and which cases are not involved in this definition, might be difficult because of the following parameters: what type of behaviour is being depicted in the photograph, who is a child, do the depictions record actual, or imaginary behaviour and what is the intended effect of the material on its consumer(s) [11, p. 173]. However, at the very centre of many debates there are two essential definitional components: "child"[1] and "porno-

[1] The age of the person that is represented in the pornographic material is the key condition in considering that a certain form of expression is legal, or not. The way that the age limit is determined is one of the most controversial issues. Most of the European countries agreed that any representation of a minor under the age of 18 involved in a sexually explicit conduct should be banned as child pornography. On the other hand, according to the laws of Canada and the United States a

graphy"[2], because each jurisdiction has its own discussions towards the most suitable way in defining these two issues.

While individual and community understandings of child pornography may vary within and between societies, the Convention on the Rights of the Child (CRC), Article 34, commits signatories to act to prevent "the exploitative use of children in pornographic performances and materials". The Convention's Optional Protocol on the sale of children, child prostitution and child pornography expands on this to offer a good general description of child pornography[3]. But a more comprehensive definition that more adequately addresses very computer-generated images is incorporated into the Council of Europe's Convention on Cybercrime[4] (although the scope for its application remains limited geographically) [25, p. 26]. Child pornography was also defined by World Congress against Commercial Sexual Exploitation of Children (1996) as "any visual or audio material which uses children in a sexual context"[5]. This definition is of significant importance because this Congress for the first time focused world attention on child pornography among other forms of child sexual abuse [28].

The purpose of this article is to analyse not the definition of child pornography, but only one part of this phenomenon – possession of child pornography. Between other activities, e.g. production, distribution, showing, selling etc. of child pornographic images, possession of child pornography seems to be the most discussable and the most problematic issue. In practice, most children pornographers are involved in taking of photographs rather than in possession per se. Sometimes judges fail to recognize the dangerousness of those defendant convicted of possession [12, p. 1]. Should such kind of activity be legal or illegal is the focal question of this article. This article analyses arguments supporting and denying criminalization of being in a mere possession of child pornography with a particular focus upon the court practice, opinion of different theoreticians and public discourse.

person becomes a "major" at the age of 21. Norway considered the age limit in a different manner paying attention to the sexual maturity of a child. Whether a child has reached or not the level of sexual maturity, it is a matter for the Court to establish, considering the data provided in each case [6].

However, the Convention on the Rights of the Child (CRC) has traditionally been used by the international child rights community to help define the period known as childhood. Under article 1 of the Convention, a child is defined as: every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier [25, p. 61].

[2] It has never been easy to define pornography. In 1964, Justice Potter, a Supreme Court Justice of the United States of America, in the course of a trial regarding censorship of a movie disinclined to define pornography and said, "I never would succeed in intelligibly doing so, but I know it when I see it" [9, p. 167]. Stoller states that pornography is that product manufactured with the intent to produce erotic excitement. Pornography is pornographic when it does excite. Not all pornography, then, is pornographic at all [20, p. 307].

[3] Child pornography means any representation, by whatever means, of a child engaged in real or simulated sexual activities or any representation of the sexual parts of a child for primarily sexual purposes [3].

[4] Child pornography shall include pornographic material that visually depicts: a minor engaged in sexually explicit conduct, a person appearing to be a minor engaged in sexually explicit conduct, realistic images representing a minor engaged in sexually explicit conduct (article 9, paragraph 2). There is possibility for the countries not to apply two latter aspects [1].

[5] It consists of the visual depictions of a child engaged in explicit sexual conduct, real or simulated, or the lewd exhibition of the genitals intended for the sexual gratification of the user, and involves the production, or distribution, and/or use ("use" in its broad meaning should include viewing, possession and other alternative activities) of such material [28].

It is difficult to find enough information in Lithuania concerning child pornography and especially about possession of child pornography as well. In spite the fact that almost every day we find some news in the media about child pornography, we do not have any huge research on this problem. Usually, researches about sexual exploitation of children are done just in general, without any detailed aspect to the specific branch of it – child exploitation for pornography[6]. This situation comes from the soviet times, when the problem of sexual exploitation of children was a taboo, such cases were kept in silence or even emphatically denied. However, after proclaiming the independence everything started to change, at least the very approach, while it remains one of the most clandestine crime. Nevertheless, if the topic of children's pornography is not well researched in Lithuania, it does not mean it does not exist. For this reason more studies should be done in this field in order to tackle the problem effectively.

Possession of Child Pornography

What does it mean to be in possession of child pornography? Does viewing child pornographic material on your computer screen already means that you are in possession of it?[7] Should you have a special intention for further sexual actions towards the child in order for the possession to be upheld as criminal activity? Or is it enough to be in a mere possession of child pornography which would mean that the crime is already committed? The answers to these questions will be provided through different perspectives evaluating the main advantages and disadvantages of criminalizing the possession of child pornography.

A person has possession of something if he knows of its presence and has physical control of it, or has the power and intention to control it [17]. The U.S. Supreme Court has said that "there is no word more ambiguous in its meaning than possession" [36]. As far as child pornography is concerned, the question of possession is especially complicated in the virtual world. It is a question of different approaches and opinions when we are talking whether an individual possesses an image that is viewed on line[8].

Only recently possession of child pornography has been recognized as one of the crimes against children. In 1988 the United Kingdom legislation criminalized the mere possession of child pornography[9].

[6] In Lithuania, for example, in 2006 there were only 2 cases in the Supreme Court dealing with child pornography. However, they have nothing to do with the possession of child pornographic images.

[7] For example, in Great Britain, all child pornography is illegal, even pseudo-images. It is illegal to possess, make or deal in any other way with these images (this means even possess or just view) [33, p. 417].

[8] A U.S. court has ruled that viewing child pornography on a website without deliberately saving it to a computer is not a crime. State law says that a person must have "knowing possession" of child pornography in order for it to be a crime. In the UK, the Protection of Children Act can be used to convict someone for viewing child porn on the internet, regardless of whether or not they understood a computer's cache function. "In the UK simply viewing images classes as a download because your computer makes images of them on your screen," said Tony Fagelman from the Internet Watch Foundation, a body which works to minimise the availability of images of child abuse [23]. Nevertheless, under traditional legal definition of possession, mere viewing is not sufficient to demonstrate possession [43].

[9] It is an offence for a person to have any indecent photograph of a child in his possession and this mere possession offence has been extended by the Criminal Justice & Public Order Act to cover pseudo – photographs [22, p. 441]. The latest criminal statistics from

In the United States the federal statutes and most state laws do not prohibit individuals from possessing, producing or distributing pseudo images. Only 19 states have found it necessary to proscribe the possession and viewing of child pornography[10].

This article relies mainly on the data of the common law countries (in particular, the United States and the United Kingdom)[11]. It is quite difficult to find enough cases on child pornography in the continental countries (in many countries these kind of crimes are very latent and often the court practice is inaccessible, besides only recently, majority of European countries enacted laws prohibiting the possession of child pornographic images). Moreover, most of the researches on the issue of child pornography (possession of it as well) were done exactly in the US and the UK. Besides, the invention and development of the internet was very much an American affair, which nowadays is the main measure for spreading child pornography. In 1997, 43 per cent of all child pornographic images being reported in the UK originated in the US[12]. The overall effect of all this is that the US remains the world's no. 1 exporter of child abuse images. For these reasons this article is supported by the information from these two countries mentioned.

Arguments Considering the Possession of Child Pornography as Legal Activity

Right to Private Life, Freedom of Expression

To view and to read whatever one wishes in private life is guaranteed under the article 8 of the European Convention on Human Rights (ECHR). For this reason criminalizing possession of child pornographic material interferes with this right to a private life. In the case of R v. Bowden [39], this rule of the ECHR was arguably wrongly interpreted. The case concerned downloading indecent images of children from the internet. The Court of Appeal, without giving reasons, considered that the laws were compatible with article 8 of the ECHR because it was necessary to protect public morals and/or for the protection of the rights and freedoms of others. They assumed that, because many found such images and the desire to view them abhorrent, mere possession necessarily should be illegal. In R v. Smethurst[13], Lord Chief Justice Woolf, again without real explanation, stated that the laws can be justified as being "for the protection of morals". The debate surrounding necessity has been equally poor in the Council of Europe itself, which had no problem with criminalising the possession of all child pornography –

the Home Office show that in 2001 some 51 defendants were convicted of "possession of an indecent photograph or pseudo-photograph of a child" and 289 for "taking or making indecent photographs, or pseudo-photograph of a children" (Home Office, 2003) [7, p. 2]. For example in Finland, in 2001 there were in all 13 reports of possession of child pornography to the police. However, there were only 3 convictions during the year 2001 on possession of child pornography [30, p. 116].

[10] In the case Osburne v. Ohio it was decided that Ohio may constitutionally proscribe the possession and viewing of child pornography [38].

[11] Between 1998–2001 there has been a 1,500 per cent increase in the offence of making and taking or possessing child pornography in England and Wales, up from 35 in 1988 to 549 in 2001. By comparison, in the US the number of indictments and information laid by the FBI increased by 629 per cent from 99 to 722 [4, p. 12].

[12] This was at a time when over 75 per cent of all the world's internet users lived in the US [4, p. 18].

[13] [2002] 1 Cr. App. R. 6: 58.

including pseudo – pornography [32, p. 253–255]. According to these topicalities it seems that legislature has enacted laws just as the consequence of moral panic[14] in the society. Such a prohibition serves to reassure the society and this is a bit far away from protecting innocent children or a right to privacy of a certain individual.

Every human being has a right to express his ideas, feelings and thoughts. Especially this is the case concerning pornographic pseudo images of children created by the computer graphics. A person can even paint or put the view of the created child on the paper in any other way. This can be treated as only one possibility of expression, prohibition of which would be really illogical[15]. This would be inconsistent with the article 8 of ECHR declaring everybody's right to private life and freedom of expression. Mere possession of self created pictures of children could serve even as an advantage if a person is controlling himself in such a way and that helps him not to overstep the borderline of crime. D. Finkelhor discussed about positive aspects of viewing or possessing child pornography. He states that such an activity even can be upheld as a preventive measure, e.g. a person is not going into further action towards sexual exploitation of children, because for him it is enough to view child pornographic images which he possesses, and he does not have any intention to commit sexual crimes. Justification to protect children from paedophiles is not enough, because it is difficult to limit many of the things which paedophiles have in their fantasy. Paedophiles use also non-pornographic things and nobody could enumerate all the stuff that helps the paedophile to feel the sexual gratification. It is possible to say that simple picture of child with clothes can sexually arouse any paedophile, but this does not mean that to be in possession of such kind of images should be prohibited. Otherwise, it would seem logical that stories, cartoons, sketches, paintings, or other indecent representations of child sexual activities should also be tested as they may have similar effects and therefore need controlling. However, these items are only controlled if they are deemed obscene, a more stringent test, and only then if they are traded in some way: mere possession is legal [32, p. 252].

On the other hand it is really difficult to find out what child pornography viewers have in their imagination. However, every person has a right to support and understanding from society, especially when this is the case of privacy and freedom of expression. We should not be so suspicious every time we find any picture in anybody's possession. The only one fact of having the image should not be sufficient factor for

[14] The original concept of "moral panic" was developed by Jock Young and Stan Cohen, who argued that the combined effect of the media's coverage of the phenomenon, public opinion, and the reaction of the authorities can have the spiral-like effect of creating a moral panic about the phenomenon in question [33, p. 443].

[15] In Sweden the prohibition against depiction and possession does not apply to a person who draws, paints or in some other similar hand-crafted fashion produces a picture of the kind described in the paragraph as long as it is not intended for dissemination, transfer, granted use, exhibition or in any other way be available to others. Before 1999 only 30 cases concerning child pornography were tried before the Swedish courts. After that the possession of child pornography was criminalised a dramatic increase of reported cases has been seen in Sweden. During 2000 – 2002 approximately 1000 suspected crimes of child pornography has been reported to the police. Of the offenders that were found guilty 60% was found guilty only of the possession [38, p. 361].

criminalizing such a possession of child pornographic material. More research is needed into this area and a risk assessment needs to be carried out to determine whether child pornographers have been involved in abusing children in the past or do they represent an on-going threat to children in the future.

Prohibition of being in possession of child pornography touches upon those persons who do not have any malicious intentions towards children, so it is a threat to sentence innocent people

A law against possession of certain images makes it ridiculously easy to get convictions on the basis of planted evidence. Let the police "find" the wrong sort of image on one's hard disc or among the books, and there is no need to prove how it got there [14, p. 4] The typical case of "legitimate possession" is provided when family members have naked photographs of their children in the possession [12, p. 1]. Criminalizing the mere possession of child pornography means that every time any image of a naked child (e.g. in a family album) would require proof that it is not pornographic, indecent etc., otherwise prosecution should be commenced.

In Arizona v. Berger [34], the defendant, a 52 year old high school teacher with no criminal records was found to be in a possession of 20 pictures of child pornography which he had downloaded for free from various websites. The trial court imposed 20 ten – year sentences, to be served consecutively, without the possibility of pardon or early release. "It is morally and legally wrong to condemn a non – violent first – time offender to death in prison, solely for the possession (not the purchase, not the commission) of certain images". Free societies should not grant their governments the power to destroy someone's life just for looking at pictures – no matter what those pictures show[16].

The most important aspect in this issue is "knowing" about child pornographic images. Without this it is impossible to declare that somebody is in a possession of depictions mentioned. The Court practice says that "a person is not guilty of an offence of "making" or "being in possession" of an indecent pseudo-photograph contained in an email attachment if, before he opens the attachment, he is unaware that it contains or is likely to contain an indecent images[17].

There is no victim in creating pseudo-photographs of children

To be in a possession of pseudo-photographs of children is one of the most discussable topics concerning child pornography. The victim in these photos is real, that is why must be protected. Possessors could not possess or look at the images, if someone else did not do the abusing acts. On the other hand, nowadays pictures where no real child (pseudo-photographs) is depicted are increasing. There are no real children in

[16] The decision in Berger cannot be rationalized with arguments from traditional consequentialist or retributive theories of punishment, as it violates every requirement of proportionality [19]. Sentences must not only reflect the seriousness of the offence and deter the defendant and others from committing future crimes, they should also promote respect for law.

[17] CA, [2002] EWCA Crim. 683, (No. 2001/00251/Y1), 7 March 2002.

them – so who are we protecting then? What this chapter very definitely does seek to do, however, is give shape to some of the larger emerging issues and key aspects of being in possession of pseudo-photographs of children, because the virtual world concerning child pornography, in some ways, seems to be creating a snowball effect.

Does criminalizing the possession of pseudo-photographs really reduce the harm posed to children? This question was addressed in the recent American case of Ashcroft v. Free Speech Coalition [35]. The Supreme Court held that computer generated pseudo-photographs posed no threat to children because such images are not intrinsically related to child sexual abuse involving real children[18]. The Court rejected the government's argument that "virtual child"[19] pornography encourages paedophiles to abuse children[20]. The American Civil Liberties Union has argued that people's thoughts are their private thoughts, and that prohibition of pseudo-child pornography is a violation of free speech rights. The Ashcroft v. Free Speech Coalition judgement seems for the moment to support this view [26, p. 38]. There is a lack of arguments in proscribing a mere possession of pseudo-photographs when no real child (created with the computer graphics) is depicted. The making and possession of pseudo-photographs is seen as less serious than the activity with photographs of real children: they are assumed to be less harmful [32, p. 248]. Clearly, where real children are used there is a strong and legitimate aim to protect the child. However, it is more difficult to justify the criminalisation of mere possession on this basis and would be impossible to justify the criminalising of pseudo – images (where no child is used) on this ground without proof of a causal relationship between child pornography and the sexual assault or abuse of children [32, p. 257]. However, most problems exactly arise because of virtual child pornography (e.g. the possession of virtual child pornographic images) [13, p. 234].

According to the fact that in pseudo-photographs no child has been exploited or harmed, the only claims along child protection lines appear to be the following: that the images may be used in grooming[21], that the child pornography can encourage child abuse, or where the faces of real children are used, that it might undermine their dignity.

Kutchinskey's work suggests that pornography (adult or pseudo photographs)

[18] The Supreme Court affirmed the previous Court of Appeals decision that the statutory provision which prohibited the creation and advertising of pseudo-photographs depicting children in sexual acts were unconstitutionally vague and overbroad, violating the right to freedom of speech under the First Amendment.

[19] Virtual photograph does not have any basis of a real picture, it is created just with the help of computer graphics technique [5].

[20] This argument is the intellectual equivalent of a claim that Romeo and Juliet encourages teenagers to kill themselves and should be banned from high school reading lists [14, p. 1].

[21] The grooming process is the strategy used by sexual abusers to manipulate the child, and potentially protective adults, so the abuse can take place in a situation where the abuser has total control over the victim. It is a process where the abuser gradually overcomes the child's resistance through a sequence of psychological manipulative acts. It is also used to silence the child after the abuse has taken place [24, p. 7]. The UK has recently introduced legislation to outlaw grooming and this example needs to be followed by other national governments in order to give a clear signal that to groom minors in order to abuse them sexually is illegal, on-line as well as in any other public area [24, p. 10].

might actually protect children. The crucial point remains, that there may be no necessary link between child pornography and further abuse of children and certainly no causative link[22]. Even where such a link to be discovered, a question still remains: is it acceptable to criminalise one activity, the mere possession of child pornography (especially pseudo – pornography), in case those images cause other harm which, if it occurs, would anyway be a criminal offence?[23] It is possible to take the standard libertarian position that an act should be criminal only so far as it can be shown to have caused an identifiable individual harm that would be recognised as such by a reasonable person [12, p. 3].

The Free Speech Coalition court believes that the alternative of legal virtual child pornography would reduce the production of actual child pornography because people could not be punished for the creation or possession of this substitute [35]. In addition, stiffer penalties for actual child pornographers and sexual abusers would prevent more abuse than prohibiting virtual child pornography as an alternative to abuse [12, p. 6]. If virtual child pornography were allowed, the perpetrators of actual child pornography might think twice about exploiting real children since there would be a legal and victimless alternative.

Arguments Considering the Possession of Child Pornography as Illegal Activity

It is dangerous not only for children, but for the whole society as well

It is obvious that child pornography poses a clear danger to children who are involved in the production of child pornography, whose physical and sexual abuse is the most relevant issue concerning the material created. In recent years, a near consensus has emerged that being in possession of child pornography places not only the children at a great risk, but also it is harmful to society because it has a corrupting effect upon the general morality[24] [33, p. 437].

The legislature now appears to have adopted the stance that even the mere possession of child pornography poses a threat to society. The question which arises, then, is why the law considers society to be at threat from the possession of child pornography? [33, p. 442] Criminalising possession has widespread public support. A recent survey found that about 70% of adults were in favour of banning a mere possession of child porno-

[22] Taylor and Quayle (2003) found that child pornography on the internet was extensively used as a means of achieving sexual arousal and as an aid to masturbation: it was there actively used in the paedophile's fulfilment of their sexual attraction to children and in their sexual fantasies. This use as a masturbatory aid is not in itself illegal nor is it of itself dangerous to children, though it may be abhorrent. If this were enough to feed and satisfy their sexual desire, then pseudo-images might be seen as having social utility even if most of us would be wholly disgusted by their existence and the use made of them by paedophiles [26, p. 253].

[23] The desire to prevent people obtaining sexual gratification, even if it does not interfere with the rights of children, merely because most people consider that viewing such images is abhorrent [26, p. 254].

[24] There is a high level of concern in society about the behaviour of those who possess child pornography. The recent increase of the maximum sentence that can be imposed upon conviction for the possession of such material and other judicial comment in child pornography cases reveals the fact that the threat posed to children (to society as well) by the possession of child pornography continues to be considered strong enough to warrant the legal prohibition upon the mere possession of such material [33, p. 451].

graphy[25]. Possibility to disseminate possessed children pornographic pictures or use them in the grooming process can be also qualified as one of the way how child pornographic images raise a threat to society.

The police distinguished other dangers posed by the possession of child pornography: that it led to the sexual arousal and gratification of paedophiles (fantasising) which, they suggested, is a prelude to actual sexual activity with children, that it would lower the inhibitions of children – convincing them that sexual abuse is acceptable (grooming), that it can involve the use of blackmail – to ensure that the child does not tell anyone and pressurise them into continuing the relationship, that it leads to the exchange of photographs between collectors, that profit may be made from the images, in which these claims are not proven and the evidence. It might also have been claimed that: images which appear to show children "enjoying" or not pained by sexual encounters depicted may lead to a belief that sexual activity with a child is acceptable ("normal"), the existence of such pornographic material is a proof of children humiliation, degrade etc. Furthermore, depictions of children in sexual encounters attack the dignity of all children, by showing them as sex objects [32, p. 251].

Such an anxiety to possession of child pornography can be noticed in case law as well. The courts in Wolk[26], Kimler[27] and Deaton[28] all stand for the principle that a defendant may be convicted of possession (or distribution) of child pornography without producing the child depicted in the image [13, p. 238]. In the case of R v. Fellows and Arnold, Evens LJ referred to the "perverted tastes" of collecting and viewing indecent photographs of children, and noted the "public revulsion against paedophilia in all its forms" [40].

It could be argued that criminalizing the possession of such material reinforces the legal and societal stance that child sexual abuse will not be tolerated. Criminalizing the possession of child pornography not only provides additional protection against child exploitation – exploitation associated with the production of child pornography for the market generated by possession and the availability of material for arousal, attitudinal change and grooming – but also reinforces the laws criminalizing the production and distribution of child pornography[29]. While the effectiveness of such laws is always discussable, at least society is appeased, and moral panic is controlled.

If consumption of child pornography is reduced – production and the abuse of children will also be reduced

Whilst the offence of possessing child pornography may not in itself cause direct

[25] Data took from guardian.uk.co (Monday, March 10, 2008). Japan is to bow to international pressure and ban the possession of child pornography. Currently Japan and Russia are the only G8 countries in which it is still legal to own pornographic images of children provided they do not intend to sell them or post them on the internet. Japan is one of the world's biggest suppliers of child pornography and the second biggest consumer after the US, despite a 1999 law that banned the production, sale and distribution of images of children under 18.

[26] Wolk had graphic photos of children engaging in sex, incest and bondage. He was indicted and convicted of transporting and possessing child pornography [44].

[27] He was convicted of a number of counts of receiving, distributing, and possessing child pornography [42].

[28] Deaton appealed his conviction of possessing child pornography arguing that it is necessary to proof that the images depicted real child [41].

[29] Opinion of McLachlin CJ in the case R v. Sharpe [2001] 1 S.C.R. 45, 2001 SCC 2.

harm to children, it may do so indirectly by encouraging the occurrence of child sexual abuse which forms the content of child pornography. Such an argument does seem to lend legitimation to the law which criminalizes the possession of child pornography[30].

Discouragement to those who produce child pornography and sexually abuse children in the process by limiting the market for their material is one of the motives why the mere possession of child pornography should be criminalized. Furthermore, it may serve to deter the propagation of representation of children[31].

A. Higonnet states that criminalizing the possession of child pornography as a way of reducing actual child abuse could perhaps be challenged by the statement that there is no evidence of a large, commercially profitable market for child pornography. Thus, criminalizing the possession of such material is unlikely to have any real impact as child pornography is a "marginal finger phenomenon", most often "home-made and clandestinely circulated among a small group of people" [16, p. 452]. However, it is possible to respond to this contention by considering whether those who produce child pornography are primarily motivated by the desire to gain financially, or rather, are motivated by the knowledge that offers want and are able to view the material they produce. If it is the latter as opposed to the former, then the "market reduction" argument still holds true [16, p. 452–453].

The belief that prohibition of possession of child pornography reduces the production of child pornographic images is clearly seen in the court practice. The court distinguishes between trafficking obscene material and possessing it in the privacy of one's own home in Stanley v. Georgia (1969)[32]. In Stanley, the United States Supreme Court struck down a Georgia law that prohibited mere possession of obscene material. Whether government could regulate the possession of child pornography was not settled until 1990, when the Court decided Osborne v. Ohio [38]. In Osborne the court upheld an Ohio law that prohibited possession of child pornography. Citing the holding in Ferber [37], the Court found that the state's interest in protecting children and in destroying the market for materials that exploit children to be compelling. Congress acted quickly to codify the holding in Osborne. In 1990, Congress outlawed possessing more than three publications containing child pornography [13, p. 234].

On the other hand it is difficult to talk about the market if people use pornography

[30] In R v. Sharpe, McLachlin CJ commented: the possession of child pornography contributes to the market of child pornography, a market which in turn drives production involving the exploitation of children... production of child pornography is fuelled by the market for it, and the market in turn is fuelled by those who seek to possess it. Criminalizing possession may reduce the market for child pornography and the abuse of children it often involves [16, p. 452].

[31] "When the demand will be lower, maybe there will also be less abuse" – such was an argumentation in Czech Republic which just recently criminalized the possession of child pornography. Paedophiles are not responsible for their sexual orientation, for the disturbance, but they are fully completely responsible for their behaviour [40]. In a press briefing, John Patten, then Home Office Minister of the State, declared that possession needed to be criminalised due to the indirect harm being done to children. If we are to stop the exploitation of children for this filthy trade we must act against those whom it would not exist – the people who actually buy child pornography (The Guardian, 1st March 1988) [32, p. 251].

[32] 394 U.S. 557 (1969).

for their own demand. It is impossible to know how big the market of whose using child pornography inside their minds is. You can reduce the market that is really obvious, but other things that are not prohibited can also form a part of such a market, so it becomes clandestine phenomenon. The question then arises – is it possible to reduce such kind of market at all?

To be in possession with child pornographic material encourages a further actions towards direct sexual contact with children

Although it is often assumed that possession of abuse images is related to commission of contact offences against children, the evidence supporting this link is unclear. Some people who possess abuse images are either involved in contact offences, or may become involved as a result of access to abuse images. But there seems to be an unknown, but probably large, group of people who limit their expression of sexual interest in children to possession of images, and furthermore, for some this may be part of a broader array of activities on the margins of internet life that has little if anything directly to do with sexual interest in children, and may perhaps relate more to other broader sexual interests [27, p. 21–22].

There is some evidence that people found in the possession of indecent photographs/pseudo-photographs of children are likely to be involved directly in child abuse. Thus, when somebody is discovered to have placed or accessed such material, the police should normally consider the likelihood that the individual is involved in active abuse of children [15]. Despite the fact there may not be any overwhelming proof that those who possess child pornography are actual abusers, the societal desire to protect children from harm may still justify the law which prohibits the possession of child pornography[33].

Certainly, it is possible that individuals use child pornography for sexual stimulation, yet have no inclination to actually go out and commit child abuse. A comparison can be drawn here with the use of adult pornography and the occurrence of sexual offences against women, in that partaking in this activity does not automatically incite an individual to go out and commit rape. I agree with the observation of Anthony D'Amato that if possession of child pornography is to be banned because it might provoke attacks on children, possession of all pornography ought to be banned for the protection of everyone else [8].

Supporters of the idea that mere possession of child pornography should be prohibited say that pseudo-child images could have the tendency to persuade the audience to commit crimes. Nevertheless, the court in Ashcroft case declared that argument stating the prospect of the crime, however, by itself

[33] For example, the findings from Marshall's research study involving fifty – one child sex abusers revealed that 67 per cent of the participants made use of "hard core stimuli" [16, p. 449]. Elliot, Brown and Kilcoyne in their research studies have aimed to establish that beyond a correlative link between the possession of child pornography and the occurrence of child sexual abuse, there also exists a causal link. In their study they indicated that 21 per cent of child sex abusers interviewed used pornography as a disinhibition method prior to committing child abuse. It could be argued, therefore, that whilst the existence of a causal relationship between the possession of child pornography and the occurrence of child abuse is frequently espoused in academic discourses, the existence of such a relationship is far from certain [16, p. 450].

does not justify laws suppressing protected speeches. Even if virtual pornography encourages unlawful acts, it is not a sufficient reason for banning it[34] [26, p. 38].

In spite the discrepancies of the aspect analyzed, discouraging those who commit sexual abuse against children is one of the arguments – criminalizing the possession of child pornography in order to discourage those who commit sexual abuse against children[35].

Conclusions

Traditionally the criminal law has sought to combat those who trade in pornography and left possession outside the scope of the law. Recently, such an approach has started to change. Nowadays, criminalization of being in possession of child pornographic materials is not justified on the grounds of not interfering more than necessary with individual freedom, because democratic values which are essential in our community, children rights, promotion of respect for their dignity are being held as a priority issues. Nevertheless, everybody's right to privacy and freedom of expression should be valued also as an important issue. An open question still remains the problem of children's pseudo-photographs. Although some would argue that being in a possession of virtual child pornography should be banned as it is related to child sexual abuse involving real children, the argument seems weak when one considers the fact that there is no victim in pseudo-photographs or that sexual child abuse existed long before the advent of the internet, printing press and photography.

Mere possession of child pornographic material is completely different crime compared to the same possession of child pornographic material when there is an intention for further actions to commit crimes against children. The use of pornography during sexual crimes against children should be studied more intensively, because the evidence supporting the link that possessing child pornographic material encourages direct sexual contacts with children is unclear. Besides, some could argue that possession of child pornography stimulates demand for such material. However, this argument requires further studies in order to find the link between the possession (consumption) and production of child pornography.

To my mind, mere possession of child pornography should not be criminalized or at least criminalized involving some exceptions. Following conduct should be excluded and treated not as being a criminal one: possession of child pornographic images when children have reached the age of sexual consent and such pictures are possessed with their consent and solely for the private use. This could be justified by the fact, that if a person can autonomously consent to have sexual relations with the other person, why could not he consent to pose for some pornographic pictures? The only one question then is to establish the same age of consent for both sexual relations and pornographic photo sessions. Also if child pornography consists even of realistic images but of non existing child (pseudo-photographs) which means

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[34] In Ashcroft's case the question of indirect harm to actual children that virtual child pornography can cause also was raised. However, the court stated that virtual child pornography is not intrinsically related to the sexual abuse of children [35].

[35] Nevertheless, the results of the study made by R. Langevin and S. Curnoe, supported the findings of the literature that pornography plays only a minor role in sexual offenses, in terms of the number of offenders using it immediately prior to, or during, the offence at least [18, p. 583].

that individual concerned is causing no harm to any child. Moreover, getting or having any child pornographic image without knowing the fact of being it pornographic also should be treated as not criminal activity, because this shows that a person is in possession of child pornographic material without his own will. It is necessary to find the balance between appropriate protection of children but at the same time not to be too much moralistic and influenced by moral panic in the society.

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VAIKO PORNOGRAFIJOS TURĖJIMAS (LAIKYMAS): TEISĖTA AR NETEISĖTA VEIKA (BENDROSIOS TEISĖS (*COMMON LAW*) VALSTYBIŲ PATIRTIS)

Tautvydas Žėkas

S a n t r a u k a

Diskusijos dėl vaiko pornografijos turėjimo (laikymo) įgauna vis didesnį pagreitį. Analizuojami argumentai „už“ ir „prieš“ siekiant atsakyti į klausimą dėl vaiko pornografijos turėjimo (laikymo) teisėtumo / neteisėtumo. Paminėtini šie argumentai, kad vaiko pornografijos turėjimas (laikymas) turėtų būti laikomas teisėta veika. Pirma, tai kiekvieno asmens teisė į privatų gyvenimą ir saviraiškos laisvę. Šios teisės yra numatytos Europos žmogaus teisių konvencijos 8 straipsnyje. Antra, draudimas turėti (laikyti) vaiko pornografijos atvaizdus gali paliesti tuos, kurie neturi jokių blogų ketinimų vaikų atžvilgiu, todėl kyla grėsmė nuteisti nekaltus asmenis. Trečia, kalbant apie virtualią vaiko pornografiją, nėra konkrečios aukos, t. y. pseudofotografijose vaizduojami vaikai, sukurti kompiuterine technika.

Kita vertus, yra keletas argumentų, kad vaiko pornografijos turėjimas (laikymas) turėtų būti laikomas neteisėta veika. Pirma, tai kelia pavojų ne tik vaikams, bet ir visai visuomenei. Antra, vaiko pornografijos vartojimo sumažinimas turėtų įtakos sumažinti vaiko išnaudojimo ir vaiko pornografijos gaminimą. Trečia, vaiko pornografijos turėjimas (laikymas) skatina tolesnius neteisėtus veiksmus siekiant išnaudoti vaiką.

Apibendrinant galima teigti, kad vaiko pornografijos turėjimo (laikymo) kriminalizavimo turėtų būti tam tikrų išimčių. Pavyzdžiui, turėjimas (laikymas) nuotraukų tokio vaiko, kuris jau gali duoti sutikimą lytiškai bendrauti, kai tokios nuotraukos yra turimos (laikomos) pačiam vaikui sutinkant ir tik asmeniniam naudojimui, taip pat turėjimas (laikymas) nuotraukų, kuriose vaizduojamas neegzistuojantis vaikas, neturėtų būti laikoma nusikalstama veika.

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