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## Just Pictures: Recent Trends in Research and Sentencing in Child Pornography Cases

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# INTRODUCTION: JUST PICTURES? RECENT TRENDS IN RESEARCH AND SENTENCING IN CHILD PORNOGRAPHY CASES

*Hon. Michael J. Newman\**

On March 19 & 20, 2015, legal and scientific experts from the United States, Canada and the United Kingdom, along with federal and state practitioners from throughout the United States, met at the University of Dayton School of Law (“UDSL”) in Dayton, Ohio to discuss and review the complex legal and scientific issues facing prosecutors, defense counsel, and judges, who handle child pornography prosecutions and sentencings.

In the United States, federal court prosecutions for child pornography offenses—such as possession, receipt, distribution and trafficking—have been significantly on the rise for many years.<sup>1</sup> In the Southern District of Ohio, where I sit, this issue is of particular significance since prosecutions and convictions for these crimes occur more frequently than the national average.<sup>2</sup> Sentencing in these cases has become a prominent issue, with judges having to reconcile mandatory minimum sentences and advisory Sentencing Guidelines with their own views on what constitutes a just sentence.<sup>3</sup>

Given this background, United States District Judge Walter H. Rice approached both UDSL and the Dayton chapter of the Federal Bar Association (“FBA”) to propose a joint effort whereby the two organizations would work together to host an education symposium of practical import: to

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\* United States Magistrate Judge Michael Newman is the national president of the Federal Bar Association and an adjunct professor at the University of Dayton School of Law.

<sup>1</sup> U.S. SENTENCING COMM’N, REPORT TO CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES, at ii n.5 (2012), [http://www.usc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Executive\\_Summary.pdf](http://www.usc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Executive_Summary.pdf) (last visited Sept. 1, 2016).

<sup>2</sup> U.S. SENTENCING COMM’N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2012 SOUTHERN DISTRICT OF OHIO 1 fig. A (2013), <http://www.usc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2012/ohs12.pdf> (last visited Oct. 9, 2016) (showing that while nationally child pornography cases account for 2.4% of federal criminal cases, in the Southern District of Ohio, such cases account for 9.7% of the criminal docket); *see also* U.S. SENTENCING COMM’N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2015 SOUTHERN DISTRICT OF OHIO 1 fig. A (2015), <http://www.usc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2015/ohs15.pdf> (last visited Sept. 1, 2016) (showing that while nationally child pornography cases account for 2.7% of federal criminal cases, in the Southern District of Ohio, such cases account for 6.6% of the criminal docket).

<sup>3</sup> *See* John T. Hughes, Note, *Reacting to the Judicial Revolt: Applying Innovations in Narcotics Sentencing to Federal Non-Production Child Pornography Cases*, 47 COLUM. J.L. & SOC. PROBS. 31, 33 (2013) (pointing out a “growing discontent” among judges in non-production child pornography cases, highlighted by “the imposition of sentences that fall short of the recommended Guidelines range”).

educate lawyers and judges on who these defendants are; whether or not their crimes reflect a common personality or other characteristic; how most appropriately to punish, and also attempt to rehabilitate, these defendants; and how victims can be identified and protected, among many other issues and important concerns. Both UDSL and the Dayton FBA chapter graciously agreed to work together on this effort, and representatives from both organizations spent more than one year thereafter in the planning stages.

Early on, UDSL and the FBA decided that this effort should be larger in scope than that contemplated by a typical continuing legal education seminar. It was agreed, therefore, that a legal symposium would be held instead of a CLE, and that the event would occur under the umbrella of the *Gilvary Symposium*.

The *Gilvary Symposium on Law, Religion and Social Justice*—held biennially at UDSL, and named in honor of the late and well-respected Montgomery County, Ohio Common Pleas Judge James J. Gilvary—tackles issues of significant societal import. Prior symposia have focused on issues including capital punishment, child custody, and immigration. The *2015 Gilvary Symposium* was entitled *Just Pictures? Recent Trends in Research & Sentencing in Child Pornography Cases*.

As my career law clerk, Michael Rhinehart, summarized in the FBA Dayton chapter newsletter following the *2015 Gilvary Symposium*:

The Symposium began with a cocktail reception and dinner on Thursday, March 19, to meet and greet the featured international speakers and Symposium attendees. The dinner featured remarks from Dayton chapter president Jeff Cox, UDSL Professor James Durham, and the Honorable Walter H. Rice, whose idea inspired the discourse of this year's Symposium. The opening evening ended with an impassioned speech by Christy Muncy, as Assistant United States Attorney for the Southern District of Ohio, who set the tone for the extensive dialogue to follow throughout the Symposium.

On Friday morning, the Symposium began with opening remarks from Paul E. McGreal, UDSL Dean. Steven Grocki, Esq., who serves as Deputy Counsel for the United States Department of Justice's Child Exploitation and Obscenity Section ("CEOS") in Washington, D.C., followed the opening remarks with the first substantive presentation of the morning, titled *Issues Related to Prosecution and Sentencing for Child Pornography Offenses*, which included a discussion of rapidly advancing technology used by offenders to avoid law enforcement detection and

prosecution.

Next, Ethel Quayle, Ph.D., a senior lecturer in clinical psychology at the University of Edinburgh in Scotland, presented on the topic of *Child Pornography Offenders: Making Sense of Psychological Research*. Dr. Quayle's dialogue not only educated attendees about her research, but also included a discussion about differences in sentencing methodology and severity between courts in the United States and the United Kingdom.

Fred S. Berlin, M.D., Ph.D., founder of The Johns Hopkins Sexual Disorder Clinic and Director of the Sexual Behaviors Consultation Unit -- who has testified as an expert in well-known cases, including the trial of serial killer Jeffrey Dahmer -- ended the morning session with a presentation titled *The Paraphilias; With an Emphasis on Pedophilia and Viewers of Child Pornography*. Among other issues, Dr. Berlin spoke concerning his opinion about the need for flexibility in child pornography sentencing to account for those offenders who only look at images and present no history or risk of child contact offenses.

Following a lunch break -- which featured a discussion of the United States Sentencing Guidelines by Raquel Wilson, Esq., Acting Director for [the] Office of Education and Sentencing Practices at the United States Sentencing Commission -- Angela Eke, Ph.D., Coordinator of the Research Unit within the Behavioral Sciences and Analysis Services ("BSAS") at the Ontario Provincial Police in Canada, presented the topic concerning *The Relationship Between Child Pornography Offending and Contact Sex Offending Against Children*.

Following a question and answer session with Drs. Quayle, Berlin, and Eke, attendees were treated to the final presentation by Carissa Hessick, Esq., Professor at the University of Utah S.J. Quinney College of Law, who spoke on the topic of *Exercising Discretion in Child Pornography Cases*. Dr. Hessick spoke concerning federal appellate review of child pornography sentencing, as well as factors judges could consider in exercising sentencing discretion in such cases.

Following the Symposium's closing remarks, UDSL held a reception for attendees to speak with and bid farewell to the featured speakers. Thereafter, UDSL hosted a goodbye dinner at the Dayton Racquet Club, attended by many of the

Symposium's featured speakers and members of the Dayton Chapter Executive Committee and Board. Attendees were introduced to incoming UDSL Dean Andrew Strauss and the Honorable Thomas M. Rose presented final remarks by thanking the speakers for their contributions in making the 2015 Gilvary Symposium a world class event.<sup>4</sup>

I attended both days of the *2015 Gilvary Symposium*, and was quite impressed by the quality of the speakers and the depth of the materials presented.

Significant credit is due and owing to UDSL Professors James Durham and Susan Elliot, along with FBA Dayton chapter board member J. Steven Justice, all of whom worked together to organize the *2015 Gilvary Symposium* and bring to UDSL legal, psychological and medical scholars of international renown. Professor Carissa Hessick also deserves our thanks for permitting her remarks to be reprinted in this edition of the LAW REVIEW.

The *2015 Gilvary Symposium* is considered, by all who attended, a significant success, which shall be remembered for many years to come. In this most challenging area of criminal law, prosecutors, defense attorneys, and federal judges all greatly benefitted from the scholarly work presented.

I hope you find the article that follows in these pages likewise instructive.

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<sup>4</sup> Michael N. Rhinehart, *Gilvary Symposium*, ON THE MERITS (Fed. Bar Assoc. – Dayton, Ohio Chapter), Summer 2015, at 5, 7.