
SELLING KIDS SHORT: HOW “RIGHTS FOR KIDS” TURNED INTO “KIDS FOR CASH”

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INTRODUCTION

The opportunity to celebrate the fortieth anniversary of the founding of Juvenile Law Center (JLC)—and the remarkable career of its cofounder, Bob Schwartz, who is stepping down as its Executive Director after forty years of service—is a dream for law professors like us, who specialize in juvenile justice. It provides us with a natural context for reflecting on the peaks and valleys of juvenile justice during the forty-year period in which JLC has worked prodigiously and tirelessly to protect individual children and to establish broad-based protections for youth.¹

In this Article, we will use one of JLC’s many victories, the case of the so-called “kids for cash” scandal of Luzerne County, Pennsylvania in 2008–2009, to look at the current state of juvenile justice and to look back at how we got here. This was a case so bizarre and shocking that it is still difficult to believe it could have happened, let alone that it could have taken place in the modern era. Over the course of roughly a decade, two judges in the western part of Pennsylvania made millions of dollars by wrongfully imprisoning more than 1,800 children in a private juvenile prison that kicked money back to the judges.²

Section I of this Article recounts the story. It is a tale with a hero (JLC, which came to the rescue of the kids, as it has in so many other cases), a couple of villains (the judges, of course), and a large backup cast of prosecutors, defenders, probation officers, and others who apparently turned a blind eye to flagrant abuses that occurred regularly over the span of many years. Section II of this Article tackles the big, broad questions that inevitably leap to mind: How could something like this have happened? Why didn’t any of the many lawyers or caseworkers involved in the Luzerne County juvenile justice system step in to stop the abuses and protect the children? In a system that is governed by a rule of law, what happened to all of the procedural safeguards that should have

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1. We are particularly pleased to have an opportunity to express our gratitude to and admiration for our longtime friend, Bob Schwartz, who, in the course of a brilliant career, has contributed more to the cause of children’s rights than anyone in this country.

2. See generally WILLIAM ECENBARGER, KIDS FOR CASH: TWO JUDGES, THOUSANDS OF CHILDREN, AND A \$2.6 MILLION KICKBACK SCHEME (2012). For more details about the “kids for cash” case, see *infra* Section I.

prevented an abuse of this type and magnitude? In the course of addressing these questions, we look back at the caselaw and developments in the juvenile justice field to try to identify factors that may have played a role.

I. THE “KIDS FOR CASH” SCANDAL

The “kids for cash” scheme was simple in design. First, the administrative judge for Luzerne County, Michael Conahan, closed the county-run juvenile detention facility, requiring that it be replaced by a private, for-profit detention facility. The owners of the for-profit facility would kick back some of the money they were to receive from the county to Conahan and to Judge Mark Ciavarella, Jr., the juvenile court judge who would order the children detained in the private facility. The judges then became extremely rich by placing more children in the juvenile correctional facility than any other county in the state. The facility owners became rich because they were guaranteed full occupancy of all of the beds in the facility.³

Between the end of the 1990s and 2008, Judges Ciavarella and Conahan denied thousands of juveniles their constitutional rights to counsel and to fair court proceedings.⁴ In Luzerne County Juvenile Court, where Judge Ciavarella presided, approximately fifty percent of juveniles appeared without counsel, and almost all of those unrepresented children were adjudicated delinquent.⁵ In the year before the scandal was uncovered, “one of every four juveniles ruled delinquent in Luzerne County—25.8 percent—were being sent to out-of-home placements.”⁶ Almost every other young person who appeared in Judge Ciavarella’s court was without counsel, and nearly sixty percent of delinquency dispositions for unrepresented youth resulted in out-of-home placements.⁷

As is surely self-evident, there was no epidemic of juvenile criminality in the county, even a misperceived one. Rather, the high percentage of imprisonments was attained by locking kids up for the most minor and trivial of offenses. These included, for example, throwing a piece of steak at a family member,⁸ possessing a motor bike purchased by the child’s parents which neither they nor the child knew to be stolen,⁹ failing to testify against another student who allegedly had a

3. See generally ECENBARGER, *supra* note 2; Wendy N. Davis, *Town Without Pity*, 95 A.B.A. J. 50, 50–55 (2009).

4. *United States v. Ciavarella*, 716 F.3d 705, 713 (3d Cir. 2013); see also Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit*, N.Y. TIMES, Feb. 13, 2009, at A22.

5. JUVENILE LAW CTR., LESSONS FROM LUZERNE COUNTY: PROMOTING FAIRNESS, TRANSPARENCY AND ACCOUNTABILITY i (2010), http://www.jlc.org/sites/default/files/publication_pdfs/Lessons%20From%20Luzerne%20County%20Report.pdf.

6. INTERBRANCH COMM’N ON JUVENILE JUSTICE, REPORT TO THE GENERAL ASSEMBLY, GOVERNOR EDWARD G. RENDELL AND THE SUPREME COURT OF PENNSYLVANIA 24 (2010), <http://www.pacourts.us/assets/files/setting-2032/file-730.pdf?cb=4beb87>.

7. JUVENILE LAW CTR., *supra* note 5, at i.

8. See *Youth Stories: Matt*, JUV. L. CTR., <http://jlc.org/about-us/what-we-do/stories/matt> (last visited June 1, 2016).

9. Bill Hewitt, *Young Lives Ruined*, PEOPLE, Apr. 13, 2009, at 60, 61.

knife,¹⁰ giving a middle-finger gesture to a cop,¹¹ making fun of an assistant principal on a fake Myspace account,¹² and stealing a jar of nutmeg.¹³ One young person committed suicide after suffering a sentence of imprisonment that never would have been imposed in any other court.¹⁴ There are too many similar stories to recount.¹⁵ Judge Ciavarella filled the first facility with so many “offenders” that the county eventually needed two facilities.¹⁶ The juvenile placement facility contracts ended up being worth approximately \$58 million.¹⁷

JLC entered the story in 1999 when it successfully appealed the adjudication of a thirteen-year-old in Ciavarella’s court after the judge failed to inform the juvenile of his right to a lawyer.¹⁸ Somewhat oddly, given his record in the ensuing nine years, Judge Ciavarella reacted to the reversal by publicly announcing that “he would never again allow juveniles to appear before him without attorneys.”¹⁹ If he kept to that promise, which seems at odds with the evidence, it was readily apparent that the presence of counsel was no impediment to the steady stream of juvenile prison sentences that emanated from his courtroom. In 2004, a local newspaper reported on the unusually high number of children whom Ciavarella was sending to juvenile correctional facilities.²⁰

In 2008, after being contacted by a parent of one of the children grossly mistreated by Judge Ciavarella and realizing that the judge had routinely and cavalierly processed cases without allowing defense lawyers to appear, JLC filed a King’s Bench petition in the Pennsylvania Supreme Court for extraordinary relief.²¹ JLC identified that “a matter of urgent importance was at hand in Luzerne County in the violation of constitutional rights of youths who appeared

10. *Id.*

11. Michael Rubinkam, *Former Pa. Judge to Go on Trial in Kickbacks Case*, NBCNEWS.COM (Feb. 6, 2011, 2:40 PM), http://www.nbcnews.com/id/41448385/ns/us_news-crime_and_courts/t/former-pa-judge-go-trial-kickbacks-case/#.

12. Joel Rose, *After Scandal, New Rules for Juveniles in Pa. Courts*, NPR (Mar. 3, 2012, 4:25 PM), <http://www.npr.org/2012/03/03/147876810/after-scandal-new-rules-for-juveniles-in-pa-courts>.

13. Jon Hurdle & Sabrina Tavernise, *Former Judge Is on Trial in ‘Cash for Kids’ Scheme*, N.Y. TIMES, Feb. 9, 2011, at A20.

14. *See Mom Blames Son’s Suicide on Luzerne County Judge in ‘Kids for Cash’ Case*, PENNLIVE (Feb. 22, 2011, 6:18 PM), http://www.pennlive.com/midstate/index.ssf/2011/02/mom_blames_luzerne_county_judg.html; *see also* Michael Rubinkam, *Pa. Judge Guilty of Racketeering in Kickback Case*, DEL. CTY. DAILY TIMES (Feb. 18, 2011, 12:01 AM), <http://www.delcotimes.com/general-news/20110218/pa-judge-guilty-of-racketeering-in-kickback-case>.

15. JLC has detailed many of these stories on its website where it offers a number of “Lessons from Cash for Kids.” *See, e.g., Lessons from “Kids for Cash,” Part 1: Illegal Kickbacks Were Just the Tip of the Iceberg*, JUV. L. CTR.: PURSUING JUST. (Feb. 12, 2014), <http://jlc.org/blog/lessons-kids-for-cash-part-1-illegal-kickbacks-were-just-tip-iceberg>.

16. *Clark v. Conahan*, 737 F. Supp. 2d 239, 249 (M.D. Pa. 2010).

17. *Id.* at 250.

18. Davis, *supra* note 3, at 54.

19. *Id.*

20. *Id.* at 53.

21. *Id.* at 55.

on delinquency matters before Judge Mark A. Ciavarella, Jr.”²² In its petition, JLC asked the court to “exercise either its King’s Bench Power or extraordinary jurisdiction to end the practice in Luzerne County of conducting delinquency hearings without counsel for children—or without lawful waivers of counsel.”²³

At first, the Pennsylvania Supreme Court was unmoved. The court denied the petition in its entirety in January 2009, and JLC responded by asking the court to reconsider.²⁴ But, in the background, events were unfolding that would alter the state high court’s view of the case and its disposition of it. After JLC filed its petition in the Pennsylvania Supreme Court, the FBI contacted Marsha Levick, JLC’s Deputy Director and Chief Counsel, to find out what facts JLC had uncovered that might be of use to the Department of Justice (DOJ) in a criminal investigation of the matter that DOJ had launched. Soon after the Pennsylvania Supreme Court denied JLC’s petition, the U.S. Attorney unsealed an indictment of the judges in federal court on a variety of felonies. After the indictments were announced and the attendant publicity, the Pennsylvania Supreme Court had a change of heart. The second time around, it appointed a special master to review all juvenile court dispositions in which the judge placed juveniles in a private detention facility.²⁵ After it became clear that the proceedings in Judge Ciavarella’s court were thoroughly corrupt, the state high court vacated the adjudications of all cases ruled upon by Judge Ciavarella between 2003 and 2008.²⁶

II. HOW COULD THIS HAVE HAPPENED?

A. *Taking Stock at the Local Level*

If Judge Ciavarella had engaged in his shameful behavior only occasionally and in secret, it would have been no less reprehensible, but at least one could understand how he got away with it for so long. But the obviously excessive sentences and the denials of counsel were flagrant, readily visible, and constant. Judge Ciavarella even boasted about his “zero tolerance” practices for more

22. INTERBRANCH COMM’N ON JUVENILE JUSTICE, *supra* note 6, at 8.

23. Application of Jessica Van Reeth, H.T. & Similarly Situated Youth for Exercise of King’s Bench Power or Extraordinary Jurisdiction at 1, *In re* J.V.R., No. 81, M.M. 2008 (Pa. 2009), http://www.jlc.org/sites/default/files/case_files/Application%20for%20Extraordinary%20Jurisdiction.pdf.

24. See Motion of J.V.R., H.T. et al. for Reconsideration of Denial of Application for the Exercise of King’s Bench Power or Extraordinary Jurisdiction and to Amend Application at 1, *In re* J.V.R., No. 81 M.M. 2008 (Pa. 2009), http://www.jlc.org/sites/default/files/case_files/Motion%20for%20Reconsideration%20of%20Denial%20of%20Application%20for%20Extraordinary%20Jurisdiction.pdf.

25. Order, No. 81 M.M. 2008 (Pa. 2009), http://www.jlc.org/sites/default/files/case_files/Order%20Granting%20Motion%20for%20Leave%20to%20File%20Motion%20for%20Reconsideration%20of%20Denial.pdf.

26. See Order, *In re*: Expungement of Juvenile Records and Vacatur of Luzerne County Juvenile Court Consent Decrees or Adjudications from 2003–2008, No. 81 M.M. 2008 (Pa. 2009), http://www.jlc.org/sites/default/files/case_files/Court%20Order%20Adopting%20and%20Approving%20Special%20Master%27s%20Third%20Interim%20Report%20and%20Recommendations.pdf.

than a decade, and his bragging made him a local hero. He was a regular guest at the local schools, where he warned students they would be sent to prison for minor school infractions.²⁷ Even if students weren't fond of him, many adults were. One local school board member proclaimed him a "savior."²⁸ The community understood who he was: "Mr. Zero Tolerance."²⁹ According to the chief public defender of Luzerne County, the community knew about Judge Ciavarella's sentencing philosophy and "[e]verybody loved it."³⁰

JLC realized that it was not enough to erase the improper adjudications. It was essential that state officials take a close look at the root causes of the scandal and the reasons it was able to go on for so long. To that end, JLC supported the creation of what became known as the Pennsylvania Interbranch Commission on Juvenile Justice, which was charged "to determine how the Luzerne County juvenile justice system failed, to restore public confidence in the administration of justice and to prevent similar events from occurring in Luzerne County or elsewhere in the Commonwealth."³¹

The Commission took testimony from many of the key players in the Luzerne County juvenile justice system, including the district attorney and chief public defender.³² After a thorough review, it called for many changes in the juvenile court system including new training for probation officers,³³ expedited appeals when juveniles are placed in a facility,³⁴ and new ethical obligations imposed on prosecutors in juvenile court.³⁵

The Commission recognized that what went wrong in Luzerne County went beyond the wrongdoings of the men who went to federal prison for their crimes. In the Commission's words, "the failures of the juvenile justice system" were the result of

a far more complex and nuanced picture in which many individuals may be seen to have shared the responsibility. Silence, inaction, inexperience, ignorance, fear of retaliation. Greed, ambition, carelessness. All these factors played a part in the failure of the system. Prosecutors, defenders and probation officials witnessed and participated in proceedings. . . .³⁶

As Bart Lubow of the Annie E. Casey Foundation characterized it, a "culture of complicity surrounded [the] system" in Luzerne County, "a culture where virtually every stakeholder, by not vigorously and consistently fighting for the

27. Davis, *supra* note 3, at 51.

28. *Id.*

29. Ian Urbina, *Despite Red Flags About Judges, a Kickback Scheme Flourished*, N.Y. TIMES, Mar. 28, 2009, at A1.

30. INTERBRANCH COMM'N ON JUVENILE JUSTICE, *supra* note 6, at 35.

31. *Id.* at 5.

32. *Id.* at 31–35. For further discussion of the testimony of the prosecutors and defenders, see *infra* notes 133–39 and accompanying text.

33. See INTERBRANCH COMM'N ON JUVENILE JUSTICE, *supra* note 6, at 51–52.

34. *Id.* at 55–56.

35. *Id.* at 47–48.

36. *Id.* at 6.

rights and interests of all kids, allowed the grossest of abuses to happen.”³⁷

Among the Commission’s most important findings is that the local zero-tolerance school policy played a significant role in fueling the wrongful placement of the children who appeared in Judge Ciavarella’s courtroom. The Commission found that “school referrals made under zero-tolerance policies were integral to the overall scheme as they provided an easy removal of children from their homes and schools and a constant stream of children to be placed into detention.”³⁸ The Commission concluded “that zero-tolerance and allowing schools to use the justice system as its school disciplinarian has no place in the educational process or in the juvenile court system.”³⁹

B. *The Big(ger) Picture: What Happened to Gault and the “Due Process Revolution”?*

1. *Gault* and Subsequent Developments in the Supreme Court

The cascade of absurdly excessive sentences handed down by Judge Ciavarella and the procedural void in his courtroom are startlingly reminiscent of a much earlier era in juvenile justice and a case that seemed to spell the end of that era: *In re Gault*.⁴⁰ In 1964, a fifteen-year-old youth named Gerald Gault was convicted of juvenile delinquency by an Arizona juvenile judge and sentenced to serve an indeterminate period of incarceration until age twenty-one for making a lewd phone call.⁴¹ Like so many of the youth who appeared before Judge Ciavarella, Gerald Gault had no defense counsel.⁴² The case went to the U.S. Supreme Court during the period when the Warren Court was instituting a “due process revolution” in numerous areas of the law, and the decision handed down by the Court in 1967 established a panoply of due process protections in juvenile court proceedings, including the right to counsel.⁴³

In the years immediately following *Gault*, the Court established a number of other protections for children in both the courthouse and the schoolhouse. In *Tinker v. Des Moines Independent Community School District*⁴⁴ in 1969, the Court held that public school students may not be punished for expressing their personal views on school premises—whether “in the cafeteria, or on the playing field, or on the campus during the authorized hours,”⁴⁵—unless school authorities have reason to believe that such expression will “substantially

37. Bart Lubow, *Prepared Keynote Address: Minimizing Youth Incarceration: A Civilizing Aspiration?*, 6 NW J.L. & SOC. POL’Y 285, 289 (2011) (referencing comments by Bob Schwartz and his colleagues at Juvenile Law Center).

38. INTERBRANCH COMM’N ON JUVENILE JUSTICE, *supra* note 6, at 59.

39. *Id.*

40. 387 U.S. 1 (1967).

41. *See Gault*, 387 U.S. at 4–9.

42. *See id.* at 34–42.

43. *See id.* at 41. *See generally* DAVID S. TANENHAUS, *THE CONSTITUTIONAL RIGHTS OF CHILDREN: IN RE GAULT AND JUVENILE JUSTICE* (2011).

44. 393 U.S. 503 (1969).

45. *Tinker*, 393 U.S. at 512–13.

interfere with the work of the school or impinge upon the rights of other students.”⁴⁶ In 1970, the Court ruled in *In re Winship*⁴⁷ that juveniles are constitutionally entitled to a right that is not expressly mentioned in the Constitution and which it was not even clear at the time that adults possessed: the right to proof beyond a reasonable doubt before they can be adjudicated delinquent. In *Breed v. Jones*⁴⁸ in 1975, the Court held that juveniles are protected by the double jeopardy clause when initially prosecuted as a juvenile delinquent. That same year, the Court also ruled in *Goss v. Lopez*⁴⁹ that when students are suspended from public schools, they are protected by the Fourteenth Amendment’s Due Process Clause. In 1976, children’s rights advocates scored a major victory in *Planned Parenthood of Central Missouri v. Danforth*,⁵⁰ when the Court extended children’s rights to the area of privacy by upholding a challenge by pregnant minors to a Missouri law that required that a pregnant minor secure written parental consent before terminating her pregnancy.⁵¹ And one year later, the Court came within one vote of holding that minors have a privacy right protected by the Fourteenth Amendment which would allow them to engage in consensual sex.⁵² Except for a loss in 1971 in *McKeiver v. Pennsylvania*,⁵³ holding that accused delinquents do not have a right to a trial by jury, children’s rights advocates racked up a string of victories in the decade from 1967 to 1977.

Why were the protections of *Gault* and some of these other cases of no avail in the day-to-day proceedings in Judge Ciavarella’s courtroom? The answer requires that we look at how *Gault* was actually implemented at the local level in the decades following its issuance. But before we do that, it is useful to flesh out the picture at the level of Supreme Court jurisprudence by considering what happened to the burgeoning field of children’s rights after 1977.

In 1977, the losses in children’s rights cases in the Supreme Court began to outpace and overwhelm the victories. In that year, in *Ingraham v. Wright*,⁵⁴ the Court held that the Constitution is not offended when school officials corporally punish public school students by “paddling the recalcitrant student on the buttocks with a flat wooden paddle measuring less than two feet long, three to four inches wide, and about one-half inch thick,” commonly “limited to one to

46. *Id.* at 509.

47. 397 U.S. 358 (1970).

48. 421 U.S. 519 (1975).

49. 419 U.S. 565 (1975).

50. 428 U.S. 52 (1976).

51. *Danforth*, 428 U.S. at 72.

52. In *Carey v. Population Services International*, Justice Brennan, writing for himself and three other Justices, said that “the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults.” 431 U.S. 678, 693 (1977) (plurality opinion). Justice Stevens expressly disagreed with the plurality, explaining that he “would describe as ‘frivolous’ appellees’ argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State.” *Id.* at 713.

53. 403 U.S. 528 (1971).

54. 430 U.S. 651 (1977).

five 'licks' or blows with the paddle."⁵⁵ In 1979, in *Parham v. J.R.*,⁵⁶ the Court held that minors, including adolescents, may be placed in a state-run mental health institution with considerably fewer substantive and procedural protections than would be permissible for adults.⁵⁷ That same year also saw a loss in the juvenile justice context in *Fare v. Michael C.*,⁵⁸ when the Court held that a juvenile suspect's request to see a probation officer (rather than a lawyer) was insufficient to trigger constitutional protections against self-incrimination.

A much bigger blow to children's rights in the juvenile justice context came in 1984. In that year, the Burger Court made clear in *Schall v. Martin*⁵⁹ that whatever momentum *Gault* had created would hereafter be constrained by a new principle: that juveniles have a lesser liberty interest than adults because they "are always in some form of custody."⁶⁰ Repudiating *Gault's* insistence that juvenile justice be "candidly appraised,"⁶¹ the *Schall* Court equated the sending of a juvenile to a detention facility (with locked doors and in which inmates wore prison-like clothes) to children living with their parents or living in a foster home. In both instances, the Court proclaimed, children are in someone's "custody."⁶² Juveniles, the Court explained, thus have reduced liberty rights, and their "liberty interest" is "subordinated to the State's '*parens patriae*' interest in preserving and promoting the welfare of the child."⁶³

Between 1977 and 2005, there was practically nothing in Supreme Court jurisprudence for children's rights advocates to celebrate. Except for a 1988 decision in *Thompson v. Oklahoma*,⁶⁴ holding that the Eighth Amendment prohibits the death penalty for offenders who were below the age of sixteen years at the time of the crime, juveniles lost every case that was decided by the Court in the area of juvenile justice. The victory in *Thompson* was particularly bittersweet because the very next term, the Court ruled that the Constitution does not forbid executing persons for criminal behavior so long as they have reached their sixteenth birthday when they committed the crime.⁶⁵ All that *Thompson* accomplished was to mitigate ever so slightly the barbaric practice of executing juveniles.

The losses involving children's rights in this period were not limited to the field of juvenile justice. Despite the promising holding in *Tinker* in 1969, no

55. *Ingraham*, 430 U.S. at 656, 670-71.

56. 442 U.S. 584 (1979).

57. *Parham*, 442 U.S. at 612-13.

58. 442 U.S. 707 (1979).

59. 467 U.S. 253 (1984).

60. *Schall*, 467 U.S. at 265.

61. *In re Gault*, 387 U.S. 1, 21 (1967).

62. *Schall*, 467 U.S. at 265.

63. *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

64. 487 U.S. 815 (1988).

65. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989). A decade and a half later, the Court reversed this decision and held that the Eighth Amendment prohibits a death sentence for any offender who was below the age of eighteen at the time of the crime. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

Supreme Court decision since has ever held unconstitutional school officials' suppression or punishment of students for student speech in school.⁶⁶

2. The Vast Disconnect Between *Gault's* Ruling and its Implementation at the Local Level

If things went badly for juvenile rights in the Supreme Court after *Gault* and its immediate successors, that doesn't begin to reflect just how bad things actually got for children during this period. This is so because the main story of the multiple travesties in juvenile justice in the latter part of the twentieth century in the United States is not a story about the Supreme Court.⁶⁷ The real actors who influenced juvenile justice were state juvenile court judges and administrators whose hostility to the principles of *Gault* led many of them to ignore the decision.

From the very beginning, many trial-level juvenile courts simply ignored *Gault's* thrust when it came to the actual provision of counsel to juveniles.⁶⁸ According to Professor Wally Mlyniec, "[S]tudies in the 1970s and 1980s found that few children were represented by counsel."⁶⁹ The predominant reason is

66. In *Board of Education v. Pico*, the Court recognized the authority of school officials not to exclude from their libraries material that is vulgar but not obscene. 457 U.S. 853, 872 (1982). In *Bethel School District No. 403 v. Fraser*, school officials successfully defended their authority to restrict the speech of school children and punish students for speech that would be protected if uttered by adults. 478 U.S. 675, 685 (1986). In *Hazelwood v. Kuhlmeier*, school officials won the right to censor student speech under conditions that would be impermissible if adults had written the articles or if the audience had been adults. 484 U.S. 260, 276 (1988). In *Morse v. Frederick*, the Court allowed a high school principal to punish a student for refusing to take down a sign that the principal reasonably interpreted to have advocated drug use. 551 U.S. 393, 397 (2007).

Nor have public school students fared much better with respect to protections of privacy in the schoolhouse. In *New Jersey v. T.L.O.*, the Court upheld the power of school officials to search students under circumstances that would otherwise violate the Fourth Amendment. 469 U.S. 325, 345 (1985). In *Vernonia School District 47J v. Acton*, the Court granted school officials the power to randomly test student athletes for drug use as a condition to allowing students to participate in sports. 515 U.S. 646, 664–65 (1995). In *Board of Education of Independent School District No. 92 v. Earls*, the Court upheld a school requirement that all children who participate in any extracurricular activity make themselves available for random drug testing, despite the absence of drug problems in the school. 536 U.S. 822, 837–38 (2002). After the end of the period of retrenchment of children's rights, the Court applied *T.L.O.* in a 2009 case to hold that a search of a student violated privacy rights. See *Safford Unified School District No. 1 v. Redding*, 557 U.S. 364, 376–77 (2009).

67. Professor Franklin Zimring has made the important point that students of juvenile justice in the United States in the last three decades of the twentieth century are looking in the wrong place if they study what the Supreme Court has done. See Franklin E. Zimring, *Levels of Government, Branches of Government, and the Reform of Juvenile Justice*, 46 TEX. TECH L. REV. 1, 2 (2013) ("[S]tate and local government has always been, and will always remain, the main arena of juvenile justice policy in the United States.").

68. See PATRICIA PURITZ ET AL., AM. BAR ASS'N JUVENILE JUSTICE CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 6–7 (1995) (documenting deficient representation in juvenile courts around the country).

69. Wallace J. Mlyniec, In re *Gault at 40: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 CRIM. L. BULL. 371, 376 (2008) (citing BARRY C. FELD, JUSTICE FOR CHILDREN: THE

that these juveniles “waived” their right to counsel, often without being properly informed of the right.⁷⁰ State courts also employed insidious methods to ensure that juveniles from poor families who were supposed to benefit from the constitutional right to free, court-assigned counsel never were assigned a lawyer. In Florida, for example, “indigency rules . . . were so strict that having \$5 in the bank made a family ineligible for appointment [of] counsel.”⁷¹ Moreover, as Professor Mlyniec has explained, “Florida parents had to pay a \$40 fee just to apply for an indigency determination.”⁷²

A comprehensive and important study of juvenile court counsel in the mid-1990s, overseen by JLC and the American Bar Association’s National Juvenile Justice Center, found that many children charged with crimes were “literally left defenseless.”⁷³ In many of the jurisdictions surveyed, “an extremely high percentage of youth routinely waived their right to counsel.”⁷⁴ As the study reports:

In Maryland 40% to 58% of children charged with crimes waived their right to a lawyer, and 90% to 95% did so in Louisiana. Depending on the county, 50% to 75% waived the right in Florida. Interviews and observations in Georgia, Ohio, and Kentucky all revealed that more than 50% of the children charged in juvenile court waived their right to an attorney. In Washington, up to 30% waived their right.⁷⁵

3. A Vast, Interconnected Array of Punitive Measures in the 1990s and Early 2000s

a. Shifting Juveniles to Adult Court and Adult Sentences

Until 2010, there was no viable claim to be made that juveniles have any kind of legally enforceable right to be treated as a juvenile or, more particularly, to be sentenced as a juvenile, rather than indistinguishably from an adult who was convicted of the same crime.⁷⁶ So, until recently, it was the general understanding, on the part of judges and legislators, that juvenile court is a legislative grace given to juveniles and thus one that can be taken away.⁷⁷ This

RIGHT TO COUNSEL AND THE JUVENILE COURTS 27–29 (Northeastern Univ. Press 1993)).

70. *Id.*

71. *Id.* at 383 (citing NAT’L JUVENILE DEF. CTR. ET AL., FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 33 (2006)).

72. *Id.*

73. *Id.* at 379–80 (citing PURITZ ET AL., *supra* note 68, at 6–7).

74. *Id.* at 380.

75. *Id.* at 384–85; see AM. BAR ASS’N JUVENILE JUSTICE CTR. ET AL., WASHINGTON: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE OFFENDER MATTERS 27 (Elizabeth M. Calvin ed., 2003).

76. See Martin Guggenheim, *Graham v. Florida and a Juvenile’s Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 487 (2012) (noting that until 2010, “[f]ew took seriously that children have any kind of ‘right’ to be treated as children when the state is prosecuting them for crimes; in its place was the view that the great juvenile justice experiment was a legislative gift that could be taken away at will”).

77. *Id.* (describing how legislatures were “free to embrace or reject at will” the concept that

meant that legislatures were free, with no meaningful oversight by the courts, to decide when and under what conditions children would be prosecuted as children and under what conditions they would be prosecuted as adults. It also meant that legislatures were free to set the penalty for a crime committed by a young person as low or high as the legislature wished.⁷⁸

The most profound change in juvenile justice in the post-*Gault* era was the widespread rewriting of the rules by which juveniles were eligible for juvenile court jurisdiction. New York State, already one of the harshest states in the country in categorically excluding all sixteen- and seventeen-year-olds from juvenile court, was one of the first to begin the process of legislative reconsideration of the wisdom of juvenile justice laws.⁷⁹ New York amended its laws in 1978 to make it possible to prosecute juveniles as young as thirteen in adult criminal court.⁸⁰

Over the next two decades, every state followed New York's lead, either by making it easier to transfer juveniles from juvenile to adult criminal court or by initiating prosecutions in criminal court directly, thereby bypassing juvenile court entirely.⁸¹ Public fear over juvenile arrests for violent juvenile crimes in the 1980s and 1990s led legislatures in nearly every state to expand juvenile transfer to adult court by lowering age or offense thresholds, shifting from individual to categorical handling, and/or shifting authority from judges to prosecutors.⁸² The political realities regarding voting on crime-related matters in the United States meant that politicians were unwilling to appear "soft on crime."⁸³

juveniles ought to be punished less severely than adults).

78. The only restriction during these years was *Thompson v. Oklahoma's* qualification that no one could be sentenced to death for a crime committed before his or her sixteenth birthday. *Id.* at 467 n.72.

79. New York's first juvenile court—the New York State Children's Court—was established in 1922. See Merrill Sobie, *Pity the Child: The Age of Delinquency in New York*, 30 PACE L. REV. 1061, 1069 (2010).

80. Act of July 28, 1978, ch. 481, 1978 N.Y. Laws 1.

81. See Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 84 (2000) ("Between 1992 and 1997, legislatures in forty-four states and the District of Columbia enacted provisions to facilitate the [transfer] of young offenders to criminal court."); Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 LAW & POL'Y 77, 79 (1996); Franklin E. Zimring & Stephen Rushin, *Did Changes in Juvenile Sanctions Reduce Juvenile Crime Rates? A Natural Experiment*, 11 OHIO ST. J. CRIM. L. 57, 60 (2013) ("[F]orty-seven states across the country passed various legislative measures in the 1990s designed to deter youth violence by enhancing criminal penalties on juvenile offenders. These new laws took three primary forms: (1) forty-five states expanded juvenile eligibility for adult criminal court proceedings, (2) thirty states expanded sentencing authority in juvenile cases, and (3) forty-seven states removed traditional confidentiality provisions by making previously sealed juvenile records more open to public scrutiny."). See generally THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

82. NAT'L CTR. FOR JUVENILE JUSTICE, DIFFERENT FROM ADULTS: AN UPDATED ANALYSIS OF JUVENILE TRANSFER AND BLENDED SENTENCING LAWS, WITH RECOMMENDATIONS FOR REFORM 1 (Patrick Griffin ed., 2008).

83. See Ronald J. Tabak, Commentary, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 280, 295–96 (1994)

By 1999, juveniles could be tried as adults in criminal court in every state.⁸⁴ In twenty-nine states, juveniles are automatically transferred by statute to criminal court for certain crimes; in fifteen, prosecutors are given discretion to file petitions directly in criminal court; in forty-five, juvenile court judges may decide to transfer juvenile cases to criminal court; and a few states have simply lowered the age of criminal responsibility below the age of eighteen.⁸⁵ As a result, an ever-growing number of persons under eighteen are prosecuted as adults.⁸⁶

b. Zero Tolerance and the School-to-Prison Pipeline

Even more important to most children's lives than the criminal justice or juvenile justice systems is the public school, a place that the vast majority of children in the United States are required to attend. The ever-increasing punitiveness of the juvenile and criminal justice systems in the 1990s and early 2000s was paralleled, and perhaps even exceeded, by what transpired in the public school system. This was the period in which the United States built a "school-to-prison pipeline." It has gotten so bad that it is sometimes better known as a "cradle-to-prison pipeline."⁸⁷

Prior to this period, students charged with school infractions were suspended less than ten percent of the time.⁸⁸ Altogether, about 1.5 million middle and high school students were suspended in the 1970s.⁸⁹ By 2000, there were over 3 million school suspensions and over 97,000 school expulsions.⁹⁰

(explaining how, in the context of the death penalty, the fear of being labeled "soft on crime" has caused politicians to shy away from any attempts to reform the criminal justice system).

84. See OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, *JUVENILE JUSTICE: A CENTURY OF CHANGE* 13 (1999) (showing how "[a]ll States allow juveniles to be tried as adults in criminal court under certain circumstances").

85. NAT'L CTR. FOR JUVENILE JUSTICE, *supra* note 82, at 2. Twenty-five states have "reverse waiver" statutes, which allow juveniles subject to prosecution in criminal court to petition to have their cases transferred to juvenile court. *Id.* The states in which juveniles may be granted reverse waiver to juvenile court include Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Iowa, Kentucky, Maryland, Mississippi, Montana, Nebraska, Nevada, New York, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming. *Id.*

86. See Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 108 (2010) (finding that "an estimated 200,000 youth are prosecuted, sentenced, or incarcerated as adults across the United States" (footnote omitted)).

87. See *Cradle to Prison Pipeline Campaign*, CHILD'S DEF. FUND, <http://www.childrensdefense.org/campaigns/cradle-to-prison-pipeline/> (last visited June 1, 2016).

88. Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 832 (2015) (citing DANIEL J. LOSEN & TIA ELENA MARTINEZ, THE CIVIL RIGHTS PROJECT, *OUT OF SCHOOL AND OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS* 8 (2013)).

89. *Id.* (citing Miriam Rokeach & John Denvir, *Front-Loading Due Process: A Dignity-Based Approach to School Discipline*, 67 OHIO ST. L.J. 277, 282 (2006)).

90. Gregory Volz et al., *Youth Courts: Lawyers Helping Students Make Better Decisions*, 15 U. PA. J.L. & SOC. CHANGE 199, 203 (2012) ("In 2000, over three million students in the United States were suspended, and over 97,000 students were expelled." (citing NAACP LEGAL DEF. & EDUC.

Today, suspensions and even expulsions in elementary schools are “routine,” something that “almost never occurred” in the 1970s.⁹¹

And even these numbers do not tell the whole picture. In the early 2000s, as the number of police officers present in public schools increased dramatically, so too did the rates of suspensions, expulsions, and arrests for offenses on school grounds.⁹² In the 2009–2010 academic year, “over five hundred schools in the country suspended more than half of their students.”⁹³

According to Professor Ellen Marrus, “The number of suspensions for students in kindergarten through twelfth grade doubled from the early 1970s to 2006.”⁹⁴ By 2006, nearly fifteen percent of black male middle school students were suspended.⁹⁵ In Indiana, ninety-five percent of all suspensions in the 2002–2003 school year were for behavior unrelated to drugs or weapons.⁹⁶

We have transformed our schools into sites patrolled by police, and we have grown accustomed to students being led out of schools in handcuffs, brought to juvenile or criminal court, and sent to jail.

c. *Mass Incarceration and its Effects on Children*

The “get tough on crime” philosophy that fueled the shifting of juveniles to adult court in the 1990s and early 2000s also produced numerous new, draconian “innovations” in adult sentencing. This was the period that saw the rise of mandatory minimum sentence schemes, dramatically longer prison sentences, and three-strike laws.

The combination of the changes in sentences led to an astonishing expansion of the United States’ prison population in the last decades of the twentieth century, reaching unprecedented levels. Prior to this period, America’s prison population was about 300,000.⁹⁷ By the early 2000s, it grew to be greater than 1.4 million inmates.⁹⁸ The incarceration rate went from 100 per 100,000 people in the mid-1970s to over 500 per 100,000 people in the early 2010s.⁹⁹

FUND, DISMANTLING THE SCHOOL-TO-PRISON-PIPELINE 2 (2005), <http://naacpldf.org/publication/dismantling-school-prison-pipeline>)).

91. Black, *supra* note 88, at 832 (citing JUDITH A. BROWNE, ADVANCEMENT PROJECT, *DERAILED: THE SCHOOLHOUSE TO JAILHOUSE TRACK 11* (2003)).

92. See Jay D. Blitzman, *Are We Criminalizing Adolescence?*, 30 CRIM. JUST. 22, 24 (2015); Aaron J. Curtis, Note, *Tracing the School-to-Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions*, 102 GEO. L.J. 1251, 1258–60 (2014).

93. Black, *supra* note 88, at 832–33 (citing LOSEN & MARTINEZ, *supra* note 88, at 3).

94. Ellen Marrus, *Education in Black America: Is It the New Jim Crow?*, 68 ARK. L. REV. 27, 35 (2015) (citing DANIEL J. LOSEN & RUSSELL SKIBA, *SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 2–3* (2010)).

95. *Id.* (citing LOSEN & SKIBA, *supra* note 94, at 3).

96. *Id.* at 36.

97. John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173, 173 (2015).

98. E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP’T OF JUSTICE, *PRISONERS IN 2011*, at 6 (2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf>.

99. Pfaff, *supra* note 97, at 173.

Today, the United States incarcerates almost twenty-five percent of the world's offenders, despite comprising only 5% of the global population.¹⁰⁰ Three-quarters of children locked up in juvenile or adult facilities were arrested for nonviolent offenses.¹⁰¹

Because of the dramatic changes in juvenile justice through the end of the 1990s, children under the age of eighteen became ever more eligible for prosecution as adults and for adultlike punishments. As Professor Perry Moriearty has explained, new laws that expanded criminal court jurisdiction over young people and eliminated the need for any kind of hearing to determine when juveniles should be prosecuted as adults, combined with a preference for fixed sentences, mandatory minimum sentences, and ever-longer sentences, resulted in a dramatic growth of children behind bars.¹⁰² As of 2010, “[a]n estimated 250,000 youth are tried, sentenced, or incarcerated as adults every year across the United States, most of whom are charged with non-violent offenses.”¹⁰³

In 2009, more than 85,000 youth were detained in correctional facilities or detention centers in the United States, making this country the most punitive in the world. This actually is an improvement from the peak period of incarceration, the very late 1990s. According to a Justice Department report, in 1997 there were 107,000 youth incarcerated on any given day in the United States.¹⁰⁴ As the Annie E. Casey Foundation has observed, “America’s heavy reliance on juvenile incarceration is unique among the world’s developed nations.”¹⁰⁵ We imprison juveniles at nearly five times the rate of the next highest nation (which is South Africa).¹⁰⁶ Between 1983 and 1998, there was an

100. See ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 2, 14 tbl.7 (11th ed. 2015), http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition.pdf.

101. Blitzman, *supra* note 92, at 25 (citing Henrick Karoliszyn, *Juvenile Justice 40 Years On: Unfinished Business*, CRIME REP. (Sept. 17, 2014, 6:58 AM), <http://www.thecrimereport.org/news/inside-criminal-justice/2014-09-juvenile-justice-40-years-on-unfinished-business>).

102. Perry L. Moriearty, *Miller v. Alabama and the Retroactivity of Proportionality Rules*, 17 U. PA. J. CONST. L. 929, 941–42 (2015).

103. Esther Pak, Note, *The Impact of State In re V.A. on the Road Back to Juvenile Rehabilitation and the Need for Further Legislative Changes in New Jersey’s Waiver Law*, 66 RUTGERS L. REV. 531, 532 (2014) (alterations in original) (quoting GERSTEIN BOCIAN AGNE STRATEGIES, CAMPAIGN FOR YOUTH JUSTICE: YOUTH JUSTICE SYSTEM SURVEY 1 (2011), http://www.campaignforyouthjustice.org/documents/FR_GBA_Poll_1011.pdf).

104. JAMES AUSTIN ET AL., BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 4 tbl.1 (2000), <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf>.

105. RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 2 (2011), <http://www.juvenile-in-justice.com/wp-content/uploads/2011/10/NoPlace>

ForKids.pdf (citing NEAL HAZEL, CROSS NATIONAL COMPARISON OF YOUTH JUSTICE, YOUTH JUSTICE BD. (2008), http://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf).

106. On any given day, ten thousand youths are detained or incarcerated in adult jails and prisons. *Keep Youth Out of Adult Courts, Jails, and Prisons*, NAT’L JUV. JUST. NETWORK, <http://www.njjn.org/about-us/keep-youth-out-of-adult-prisons> (last visited June 1, 2016).

increase of 366% in the number of juveniles held in adult jails.¹⁰⁷

d. Privatizing the Prison Industry

As we went from a country that imprisoned people at a rate comparable to other nations to the outlier that the United States has become in the world community, we unintentionally created a new industry: the private prison industry. The biggest single change in prison construction and maintenance in the United States over the past thirty years has been the extraordinary growth of the private prison industry. It is astonishingly profitable and dominant.¹⁰⁸ As one commentator recently explained, “In 2010 alone, the two [largest private prison] corporations generated nearly \$3 billion in revenue.”¹⁰⁹

This modern industry is the handmaiden to the host of policy changes that contributed to a burgeoning prison population, including the war on drugs, three-strikes laws, zero-tolerance school policies, and ever-harsher prison terms.¹¹⁰ The industry’s growth is astonishing. In 1990, for example, the number of Americans detained in private facilities was about 7,000.¹¹¹ By 2010, it had reached “126,000 prisoners, or 9 percent of the nation’s total state and federal prison population.”¹¹²

C. The Ultimate Result: An Ideal Climate for Lawless Incarceration of Youth for Personal Profit

Many have placed the blame for the “kids for cash” scandal on the avarice of the judges.¹¹³ This is indisputably correct, at least in the most literal sense. Self-evidently, the scandal would never have occurred if not for the criminal proclivities of the judges. But the complicity goes far beyond the principals.

As the Pennsylvania Interbranch Commission on Juvenile Justice observed in its analysis of the scandal, the local zero-tolerance school policy played a significant role in a school-to-prison pipeline that Judge Ciavarella turned to his own profit.¹¹⁴ The Commission drew a very practical connection between the schools and Judge Ciavarella: school referrals of children to court provided the

107. AUSTINET AL., *supra* note 104, at 5 tbl.2.

108. Tracie R. Porter, *The School-to-Prison Pipeline: The Business Side of Incarcerating, Not Educating, Students in Public Schools*, 68 ARK. L. REV. 55, 59 (2015).

109. *Id.* at 59–60 (citing DAVID SHAPIRO, AM. CIVIL LIBERTIES UNION, *BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION* 13 (2011), https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf); *see also* Michael Brickner & Shakyra Diaz, *Prisons for Profit: Incarceration for Sale*, 38 HUM. RTS. 13, 13 (2011) (“As the number of private prisons has grown, it has also led to banner profits for the companies. The largest private prison company, Corrections Corporation of America (CCA), reported revenues of \$1.675 billion in 2010 alone.”).

110. Brickner & Diaz, *supra* note 109, at 13.

111. *Id.*

112. *Id.*; *see also* Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC, Dec. 1998, at 51.

113. *See* Urbina & Hamill, *supra* note 4, at A22. For a scholarly discussion of the judges’ (lack of) ethics, *see* Lawrence Lessig, *What Everyone Knows and What Too Few Accept*, 123 HARV. L. REV. 104 (2009).

114. *See supra* notes 28–39 and accompanying text.

fodder for Judge Chiavrella's money-making apparatus. But it is useful to recognize the deeper, cognitive processes that were at play here and are typical of the school-to-prison pipeline. In cases of minor misconduct at school—which, a generation earlier, might have resulted in a telephone call to a child's parents—the zero-tolerance policy causes the school to view the child as a lawbreaker. So now the call is made instead to the police (or, as in the many urban schools in which the police are already on the premises as school safety officers, a call to the SSO down the hall). The child thereafter is categorized by both its former schoolhouse caretaker and its new courthouse custodian as a “criminal.” Whatever happens to the child in court is deemed appropriate since this individual is a potential danger to the “good” school children and the rest of the community.

Judge Ciavarella didn't have to change anyone's mind about how to run his courtroom. For the most part, all he did was personify the times. His heavy-handed, no-nonsense persona made him a local hero. His publicly stated views were well within the mainstream. Although the community didn't know that he was lining his pockets by locking up children, the community applauded his actions in locking up juvenile lawbreakers.

If the public had known more of the specifics about how minor the offenses were for which children were being incarcerated, one would hope that there would have been some outcry. But there have been so many instances, throughout the country, in which the community has remained mute as zero-tolerance policies in schools have produced absurd results. These include, for example, a sixteen-year-old girl suspended because she had been “in the presence of” alcohol when she picked up an intoxicated friend;¹¹⁵ a young middle school male student suspended for the remainder of the school year for coming to the immediate aid of a friend by removing a knife from his suicidal friend's bookbinder;¹¹⁶ a sixth grader suspended for unknowingly bringing his miniature Swiss army knife to school in his backpack;¹¹⁷ and a six-year-old boy suspended for kissing a five-year-old girl on the hand.¹¹⁸ As newspapers, public commentators, and politicians increasingly classified teenagers as dangerous criminals and violent predators, the rest of society bought into this philosophy as well.

Why didn't the vaunted protections of *Gault* make a difference? Although *Gault* certainly jumpstarted a juvenile rights revolution, it was a revolution founded on soft turf. As we have seen, *Gault*'s promise of creating a fair justice system for juveniles was never realized in many parts of the United States. State or local government did not believe in the need for or wisdom of providing lawyers for juveniles and thus failed to provide sufficient funds to ensure these

115. Black, *supra* note 88, at 824.

116. *Id.*

117. *Id.*

118. Marine Cole, *11 Ridiculous Reasons Children Got Suspended from School*, FISCAL TIMES (Aug. 14, 2014), <http://www.thefiscaltimes.com/Media/Slideshow/2014/08/14/11-Ridiculous-Reasons-Children-Got-Suspended-School?page=2>.

lawyers would be able to do a competent job. Juvenile court judges did not believe in the importance of lawyers for juveniles appearing before them and thus created a system in which juveniles routinely waived their right to counsel. Defense lawyers didn't embrace the adult court model of a lawyer who zealously seeks the objectives defined by their client, and instead substituted the lawyer's own judgment about what was "best" for the client. In all of these ways, *Gault* was being reversed every day in a large part of the country by being ignored or undermined.

But *Gault* had still other limitations that turned out very badly for young people. *Gault* addressed only procedural protections and even then with regard only to trials. The Court expressly stated in *Gault* that it was not addressing "the post-adjudicative or dispositional process."¹¹⁹ Thus, *Gault* left untouched the then-existing juvenile court dispositional process, largely still followed today, that empowers judges to impose lengthy, indeterminate sentences based on a wide variety of factors including not just the crime but all circumstances of the child's life.¹²⁰ Although premised on a laudable notion that a juvenile court sentence should serve the ends of rehabilitation and thus should reflect the child's life circumstances and not just the crime,¹²¹ the resulting system confers such wide discretion upon the judge that there is an ever-present risk of misjudgments¹²²—or, in very rare cases like the "kids for cash" scandal—gross abuses.

Yet another aspect of the juvenile court process untouched by *Gault*, and one that may help to explain how the Luzerne County scandal could have gone on for so long without detection, is that juvenile courts in many jurisdictions are not open to the public and press.¹²³ This is another of the features of the juvenile court that rests on noble intentions but can have unintended, dire consequences. As Justice Rehnquist observed in a concurring opinion in *Smith v. Daily Mail Publishing Co.*¹²⁴ in 1979, "It is a hallmark of our juvenile justice system in the United States that virtually from its inception at the end of the last century its

119. *In re Gault*, 387 U.S. 1, 13 (1967).

120. See RANDY HERTZ, MARTIN GUGGENHEIM & ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE DELINQUENCY CASES 812–16 (2014).

121. *Id.* at 6.

122. Appellate review is rarely an adequate safeguard in these cases because appellate courts in most jurisdictions tend to defer completely to the juvenile court judge when it comes to the determination of what sentence best fits the juvenile's needs. In those few jurisdictions in which appellate courts actually engage in meaningful scrutiny of juvenile court sentences, there are often reversals based on the excessive harshness of the sentence selected by the family court judge. See, e.g., *In re Jacob A.T.*, 6 N.Y.S.3d 855 (N.Y. App. Div. 2015) (reversing a family court judge's sentence of placement in a juvenile correctional facility because a less restrictive sentence would have been more appropriate); *In re Clarissa V.*, 986 N.Y.S.2d 59 (N.Y. App. Div. 2014) (reversing a family court judge's sentence of probation because a lesser disposition of diversion was more appropriate); *In re Genny J.*, 912 N.Y.S.2d 273 (N.Y. App. Div. 2010) (reversing a sentence of placement in a juvenile correctional facility and ordering a sentence of probation—which was what the probation department and even the prosecutor had recommended).

123. See HERTZ, GUGGENHEIM & AMSTERDAM, *supra* note 120, at 658–62.

124. 443 U.S. 97 (1979).

proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity."¹²⁵ But as Justice Brennan prophetically warned in an opinion partially concurring and partially dissenting in *McKeiver v. Pennsylvania*¹²⁶ in 1971, the closure of juvenile courtrooms to the general public and press can result in shielding "improper judicial behavior" from "public view," and thereby deny the juvenile victims of that judicial misconduct the opportunity for "executive redress through the medium of public indignation."¹²⁷

III. A MORAL OF THE STORY: THE NEED FOR INDEPENDENT ADVOCATES LIKE JLC

Even if the hypotheses presented in the preceding Section are correct and adequately explain how a scandal of this breadth and depth could have gone on for so long, there is still a part of this puzzle that demands further examination. Even if the public and the press were largely in the dark about what was actually happening in Judge Ciavarella's courtroom, and even if the public was lulled and gulled by his public statements about his "zero-tolerance" practices, the prosecutors and defenders who appeared in his courtroom had reason to know what was going on and presumably had the professional judgment to recognize that the system had gone off the rails. Even if they couldn't have suspected that Judge Ciavarella was lining his pockets, they could see that large numbers of youth were taking guilty pleas without representation by counsel and without waiving their right to counsel. The prosecutors, no less than the defenders, had an ethical obligation to intervene to correct injustices of this sort.¹²⁸

The testimony that prosecutors and defenders gave in the hearings of the Interbranch Commission on Juvenile Justice are very revealing, both with regard to what happened here and more broadly about how situations of this sort can occur. Many of the lawyers blithely assumed, despite all indications to the contrary, that the system was functioning normally and that the judge must be acting properly. The district attorney at the time and his first assistant testified that they never received reports of problems from the assistant district attorneys

125. *Smith*, 443 U.S. at 107 (Rehnquist, J., concurring).

126. 403 U.S. 528 (1971).

127. *McKeiver*, 403 U.S. at 555 (Brennan, J., concurring in the judgment and dissenting in part); *see also id.* ("Juveniles able to bring the community's attention to bear upon their trials may therefore draw upon a reservoir of public concern unavailable to the adult criminal defendant.").

128. As the Interbranch Commission stated in its report, the Pennsylvania Code of Professional Responsibility imposed upon prosecutors "the responsibility of a minister of justice and not simply that of an advocate." INTERBRANCH COMM'N ON JUVENILE JUSTICE, *supra* note 6, at 31; *see also* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (AM. BAR ASS'N 2002); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13, DR 7-103 (AM. BAR ASS'N 1983). For a powerful analysis by Judge Alex Kozinski of the disturbingly high number of cases in which prosecutors and "sometimes entire prosecutorial offices . . . engage in misconduct that seriously undermines the fairness of criminal trials," *see* Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxii-xxxiii (2015).

assigned to juvenile court.¹²⁹ When one of the two line prosecutors was asked “if he was troubled by the fact that Ciavarella did not conduct guilty plea colloquies with youth defendants as is done in adult court,” the prosecutor replied:

I observed my colleagues handle that environment in the same way as I came to handle it. And, again, it was an established practice by the court. And the trust factor was there that if the court is satisfied in proceeding in that manner that was the manner it proceeded.¹³⁰

The other prosecutor said that “he discussed Ciavarella’s zero-tolerance policy with other prosecutors, but found it to be generally accepted among them.”¹³¹ The chief public defender of Luzerne County tried to excuse his inaction by saying that the office was too overloaded with cases to follow up on “complaint[s] about Ciavarella’s courtroom practices, involving possible procedural rights violations of juvenile defendants.”¹³² But it is also apparent from his testimony that he, like the prosecutors, was blinded by what amounted to a conclusive presumption of overall propriety. The chief public defender stated:

We have to assume there’s a proper waiver going on. We have to assume the judge has a waiver. We have to assume the District Attorney knows the rules and the waiver and the juvenile probation office is doing the waiver. And we don’t have the time or the manpower to intervene. And we didn’t, and we don’t.¹³³

The only lawyer who acknowledged any awareness of the improprieties in Judge Ciavarella’s courtroom practices was an assistant public defender who said that he “complained to [the chief public defender] about improper procedures involving the waiver of counsel in Ciavarella’s court,” but that the chief defender said that “the defender’s office could not take on more clients.”¹³⁴ As a result, the assistant defender reported, he reached out to “the Juvenile Law Center of Philadelphia which was gathering evidence to challenge suspected illegal practices in Luzerne County’s juvenile court.”¹³⁵

The prosecutors’ and chief defender’s assumptions of propriety are not

129. David W. Lupas, the District Attorney of Luzerne County during the relevant period and a judge of the Court of Common Pleas at the time of the Interbranch Commission hearings, testified that “[he] didn’t get any feedback that there were concerns or problems, just everything was going well,” and that “[h]is assistants did not bring it to his attention.” INTERBRANCH COMM’N ON JUVENILE JUSTICE, *supra* note 6, at 31–32. He went on to testify that “[i]f he had received complaints from his assistants that constitutional rights were being violated . . . he would have taken action—but no one complained.” *Id.* at 32. Jacqueline Musto Carroll, the first assistant in the Luzerne County District Attorney’s Office during the relevant period and the head of the Luzerne County District Attorney’s Office at the time of the Interbranch Commission hearings, testified that “no such information [about various improprieties] was reported to her,” “[n]or did assistant district attorneys assigned to juvenile court raise other concerns.” *Id.* at 33.

130. *Id.* at 32 (testimony of Thomas J. Killino).

131. *Id.* at 33 (testimony of Samuel M. Sanguedolce).

132. *Id.* at 34 (testimony of Basil G. Russin).

133. *Id.*

134. *Id.* at 35 (testimony of Jonathan Ursiak).

135. *Id.*

surprising when one considers the nature of institutional practice. When lawyers interact on a regular basis with a judge, they customarily develop a reasonably good relationship with the judge. To a certain extent, this is expedient since a cordial relationship may improve the lawyer's chances of favorable rulings or at least the benefit of the doubt when that's needed. But it is also an invariable, and probably inevitable, product of working together in the same workspace, particularly one as complex, challenging, and stressful as the juvenile court.¹³⁶ When one comes to know and respect (and possibly also like) a work partner, there is a natural tendency to assume that he or she is behaving appropriately and to come up with explanations for any oddities or apparent missteps.

One of the many advantages of an outside, independent organization like JLC is that it is free of such psychological blinders. It is not beholden in any way to any of the institutional players, and so it is both capable of recognizing problems and unafraid to make waves when necessary. When the assistant public defender discovered that his boss was unwilling to take any action, the assistant defender made a smart, savvy judgment that it was time to turn to an independent outsider.

The courage, creativity, and persistence that JLC exhibited in its handling of the "kids for cash" case are emblematic of the organization. This point is probably made best and most fully by considering the wide variety of ways in which JLC has acted to protect children and their rights over the course of four decades. And such a review seems fitting for a symposium issue commemorating JLC's fortieth anniversary.

JLC is the oldest nonprofit, public interest law firm for children in the United States. It was founded in 1975 in Philadelphia by four Temple University Beasley School of Law graduates.¹³⁷ It began as a walk-in legal clinic for Philadelphia youth with legal problems, and then grew into a statewide organization and eventually a national public interest law firm. In its advocacy, JLC uses an array of approaches, including litigation, submission of amicus curiae briefs in key cases, policy reform, and public education. It has filed influential amicus briefs in the most important Supreme Court cases affecting children's rights.

The year of JLC's founding was a heady time for children's rights: as we discussed earlier, the Supreme Court was still handing down decisions expanding children's rights, a pattern that had begun eight years earlier with *Gault*.¹³⁸ But, within two years of JLC's launching, the party was over. As was explained earlier, that was the start of a long period of retrenchment in children's rights.¹³⁹

136. For further discussion of the complex psychological aspects of institutional practice in criminal and juvenile courts, see Martin Guggenheim, *Divided Loyalties: Musings on Some Ethical Dilemmas for the Institutional Criminal Defense Attorney*, 14 N.Y.U. REV. L. & SOC. CHANGE 13 (1986).

137. Judith Chomsky, Marsha Levick, Philip Margolis, and Robert Schwartz started the organization.

138. See *supra* Part II.B.1.

139. See *supra* Part II.B.

During that fallow period, JLC did all that could be done to stem the tide. It fought against transferring juveniles to criminal court; it pressed for full implementation of *Gault* by insisting that all juveniles receive the benefit of counsel when appearing in juvenile court; it condemned zero-tolerance policies.¹⁴⁰ JLC also played a crucial role by planting the seeds for future reforms. As we saw earlier,¹⁴¹ JLC initiated a study to document the inadequacies in the national network of court-appointed counsel for indigent youths. JLC founder Bob Schwartz helped to lead an effort by the MacArthur Foundation's Research Network on Adolescent Development and Juvenile Justice to develop social scientific data on what has now become known as "adolescent brain science" and to explain the many profound implications of such data for the legal system.¹⁴² The Network's studies laid the groundwork for the big Supreme Court victories on children's rights in the past decade: *Roper v. Simmons*¹⁴³ in 2005, barring imposition of the death penalty on anyone who was below the age of eighteen at the time of the crime; *Graham v. Florida*¹⁴⁴ in 2010, barring a mandatory sentence of life imprisonment without parole in nonhomicide cases for offenders who were below eighteen at the time of the crime; *J.D.B. v. North Carolina*¹⁴⁵ in 2011, requiring that the assessment of "custody" for purposes of the *Miranda* rule in juvenile cases must take into account the suspect's age; and *Miller v. Alabama*¹⁴⁶ in 2012, holding that it is unconstitutional to impose a mandatory life sentence on a juvenile, even when the juvenile was convicted of a homicide.

In all these ways, JLC has played an essential role in protecting children and furthering the cause of children's rights. Along the way, it has won numerous awards, including—and particularly fittingly—an award from the MacArthur Foundation in 2008 for being a "Creative and Effective Institution." And, in 2009, JLC won awards for its work on the "kids for cash" case from the *Harrisburg Patriot-News* ("Best of 2009" award) and the *Philadelphia Inquirer* ("Citizen of the Year" award).

CONCLUSION

It is a well-worn truism that "it takes a village to raise a child."¹⁴⁷ But in Luzerne County in the 2000s, the village was asleep to the abuses that were being

140. See, e.g., Marsha L. Levick & Robert G. Schwartz, *Changing the Narrative: Convincing Courts to Distinguish Between Misbehavior and Criminal Conduct in School Referral Cases*, 9 UDC/DCSL L. REV. 53 (2007).

141. See *supra* notes 73–75 and accompanying text.

142. See Robert G. Schwartz, *Age-Appropriate Charging and Sentencing*, 27 CRIM. JUST. 49 (2012); see also YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (Thomas Grisso & Robert G. Schwartz eds., 2000).

143. 543 U.S. 551 (2005).

144. 560 U.S. 48 (2010).

145. 564 U.S. 261 (2011).

146. 132 S. Ct. 2455 (2012).

147. See HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US* (1996).

inflicted on its children. In this case, what it took was a corps of dedicated, talented, and determined advocates at Juvenile Law Center.