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## PREFACE

*Robert G. Schwartz\**

The decades after 1975, when Juvenile Law Center opened for business, have been something of an inverse parabola when it comes to the legal status and public attitudes about children and the law. In the mid-1970's, just at the time we thought we would ride a wave of expanding constitutional rights for children, the Supreme Court and state courts and legislatures began a two-decade retrenchment that reached its nadir in the mid-1990s. We have spent the last twenty years trying to reclaim ground. The evidence from this Symposium is that we have not only done so, but pulled ahead, although not necessarily in ways that we foresaw forty years ago.

In our first days, Juvenile Law Center had to confront the “empowerment vs. protection” challenge that is at this Symposium’s core. We encountered a recently built edifice of constitutional holdings that enhanced youth participation in proceedings that affected them. We thus adopted a rights-based approach that built upon Supreme Court cases like *In re Gault*,<sup>1</sup> which gave delinquent youth more adultlike procedural rights at trial, and *Tinker v. Des Moines Independent School District*,<sup>2</sup> which affirmed students’ First Amendment rights.

Across from those constitutional pillars were the newly built foundations of child protection. Congress in 1974 enacted the Child Abuse Prevention and Treatment Act.<sup>3</sup> In November 1975—shortly *after* Juvenile Law Center opened for business—Pennsylvania passed the Child Protective Services Law.<sup>4</sup>

Our first core fundraising proposal was the blueprint we used to declare (1) who we were as lawyers, and (2) the rights we sought to advance. Juvenile Law Center’s founders<sup>5</sup> agreed on a common document that would establish a mission and goals for what would become the first nonprofit, multi-issue public interest law firm for children in the United States. Our first grant application noted the large numbers of children and youth who came into contact with the legal system. We discussed children who were accused of delinquency, as well as those involved with the child welfare system. Our generic proposal asserted that we would represent children who were in institutions and foster care, or who were eligible for adoption. And we included in Juvenile Law Center’s mission children involved in custody and child support hearings.

Our basic grant application also included several client categories that were

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1. 367 U.S. 1 (1967).

2. 393 U.S. 503 (1969).

3. Pub. L. No. 93-247, 88 Stat. 4.

4. 1975 Pa. Laws 438.

5. Judith Chomsky, Marsha Levick, Philip Margolis, and Robert Schwartz.

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congenial to our self-image. Even though we recognized the complexities of cases involving children who were arrested or involved with the child welfare system—areas that would become, by 2015, the heart of our work—in 1975, we believed that an even bigger part of our advocacy would be tied to a *general expansion of children's rights*. This idea had gained recent currency. In 1973, Marian Wright Edelman had founded the Children's Defense Fund, arguing that children should have the same kind of lawyering that had served blacks during the prior thirty years. In 1974, the *Harvard Education Review* had devoted a celebrated issue to "The Rights of Children." The Review included a seminal piece by Hillary Rodham—who reviewed substantive and procedural rights that were accruing to children—as well as other articles by leading children's rights exponents of the day.<sup>6</sup>

Juvenile Law Center's generic application in 1975 thus spoke of "eliminating arbitrary age barriers which restrict the freedom of minors to engage in certain activities, or undertake certain responsibilities, with or without parental consent." We had the certainty of recent law school graduates, arguing that "those restrictions completely lacking in any rational justification should be eliminated." We were particularly interested in empowering youth to overcome barriers to obtaining medical and psychiatric treatment.

Our early documents thus reveal the "empowerment vs. protection" tension in representing children that infuses our field today. Some of the rights we asserted were based on a notion of human dignity and autonomy; as youth matured, we believed, they should be able to participate in—and in many cases control—the important decisions affecting their lives. We also asserted a complementary notion of rights, one emerging from children's needs. For example, drawing on Goldstein, Solnit, and Freud,<sup>7</sup> we argued for stability in the lives of young children as a way to meet their needs *and* advance their rights.

Also influential in 1975 were the burgeoning mental health and special education movements. Juvenile Law Center's founders had studied the literature on mental patients' right to treatment—mental health advocates argued that mental patients could not be deprived of their liberty in order to treat them, and then go untreated. We understood the corollary to the right to treatment: patients had a right to be treated in the least restrictive setting necessary to accomplish the treatment goals. This result was dictated by the Fourteenth Amendment's Due Process Clause. The synergistic notions of "right to treatment" and "least restrictive alternative" had led to the deinstitutionalization of mental patients that swept the country in the early 1970s. A similar philosophy prompted new special education laws, as students with disabilities were increasingly "mainstreamed." The language of Pennsylvania's Juvenile Act, passed in 1972, was consistent with the treatment language of mental health statutes, and we felt that we could transplant mental health case law into the garden of children's rights.

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6. Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487 (1974).

7. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SONIT, *BEYOND THE BEST INTEREST OF THE CHILD* (1973).

In 1975 we were optimistic young lawyers—fashioning a nice mix of individual case work, policy reform, public education, and litigation. Unfortunately, the lethal combination of crack cocaine and guns in the late 1980s and early 1990s created a seism that shook our landscape. The Supreme Court had already begun its unhappy constitutional descent in cases like *Schall v. Martin*<sup>8</sup> and *DeShaney v. Winnebago County*,<sup>9</sup> but it was crack, abetted by guns, that changed our world.

More and more children came into foster care, and those changes would lead to national discontent with the slow pace of adoptions. Congress would try to address this problem in 1997.<sup>10</sup>

By 1995, too, states had changed their laws to crack down on youth crime. It would become easier in almost every state to try youth as adults. Similarly, in amending the Elementary and Secondary Education Act in 1994,<sup>11</sup> Congress would require states to expel students who brought weapons to school, launching what would become a wave of vague “zero-tolerance” policies that would morph into the school-to-prison pipeline.<sup>12</sup>

The world of lawyering for children had changed, and not for the better. It’s not possible to mark historic inflection points with precision, but it is fair to say that the bottom of the parabola came around 1995, when Juvenile Law Center and Temple Law School held a symposium celebrating Juvenile Law Center’s twentieth anniversary and the law school’s one hundredth. The symposium issue twenty years ago was titled, “Looking Back, Looking Ahead: The Evolution of Children’s Rights.”<sup>13</sup> Trying to come to grips with harsh recent years, the symposium was less “looking forward” and more “looking back.”

It is exciting today to “look back” and realize that in 1995 good news was just around the corner. Coming around the bend was the “developmental” framework that would represent a paradigmatic shift in juvenile justice. It would change our world.

Indeed, several things were happening—

The John D. and Catherine T. MacArthur Foundation in 1996 created a Research Network on Adolescent Development and Adolescent Development (the Network). MacArthur’s Laurie Garduque conceived of the Network, which was created in part to respond to the wave of legislation that required thousands of teens to be tried as adults. Led by Symposium contributor Laurence Steinberg,<sup>14</sup> the Network included some of the nation’s leading psychologists,

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8. 467 U.S. 253 (1984).

9. 489 U.S. 189 (1989).

10. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

11. See Improving America’s Schools Act of 1994, Pub. L. 103-382, 108 Stat. 3518 (amending the Elementary and Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 27).

12. Gun Free Schools Act of 1994, Pub. L. 103-382, § 14601, 108 Stat. 3518 (codified as amended at 20 U.S.C. § 8921 (2012)).

13. Symposium, *Looking Back, Looking Ahead: The Evolution of Children’s Rights*, 68 TEMP. L. REV. 1557 (1995).

14. Distinguished University Professor and Laura H. Carnell Professor of Psychology, Temple University.

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criminologists, and academics, including Symposium contributor Elizabeth Scott.<sup>15</sup> The Network also included practitioners, of whom I was one.

Over a ten-year period, the Network conducted research on teens' competence to stand trial, on culpability (blameworthiness), and on the reasons that most youth cease offending. While all of the research has had an impact on the field, the research on competence and culpability was immediately potent. Many other researchers, including neuroscientists, built upon the Network's research. Collectively, the new knowledge led to legislative reform, and to case law—beginning with *Roper v. Simmons*<sup>16</sup>—that has reshaped juvenile justice in America. It is fair to say that by the time of the 2015 Symposium, social science, behavioral science, and neuroscience required that youth in the justice system be treated by the law differently than adults.

Principles of adolescent development transformed child welfare, too. The Chafee Foster Care Independence Act of 1999<sup>17</sup> created opportunities for older foster youth. Congress went further in 2008, when it passed the Fostering Connections to Success and Increasing Adoptions Act of 2008.<sup>18</sup>

In addition to advancing permanence through promoting subsidized guardianships and adoptions, Fostering Connections used Title IV-E<sup>19</sup> incentives to encourage states to allow youth to stay in care or return to care past age eighteen. If states adjusted their laws, youth would be IV-E eligible if they were completing secondary education or a program leading to an equivalent credential; enrolled in an institution which provided postsecondary or vocational education; participating in a program or activity designed to promote, or remove barriers to, employment; employed for at least eighty hours per month; or incapable of doing any of those activities due to a medical condition.

Fostering Connections was designed to reduce homelessness and bolster the developmental trajectory of foster youth. It recognized that too many youth were being dumped by the system that raised them. It thus gave youth opportunities while providing them with additional protection from the system itself.

Juvenile Law Center was a part of these changes. By the late 1990s, we had come to realize that we could no longer have a practice that addressed the needs of children from birth to twenty-one. The implications of adolescent development were vastly different from those of early childhood development. Legal rights, policies, and programs for adolescents were different, too. Over the course of triennial strategic planning processes, Juvenile Law Center changed its mission.

By the time of our 2005 thirtieth anniversary symposium with the *Temple Law Review*, Juvenile Law Center was playing a leadership role nationally. Our mission had become shaping and using the law on behalf of children in the child

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15. Harold R. Medina Professor of Law, Columbia University.

16. 543 U.S. 551 (2005).

17. Pub. L. 106-169, 113 Stat. 1822.

18. Pub. L. 110-351, 122 Stat. 3949.

19. 42 U.S.C. §§ 670-679c (2012).

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welfare and justice systems to promote fairness, prevent harm, secure access to appropriate services, and ensure a smooth transition from adolescence to adulthood. Most of the youth on whose behalf we were working were now between ages ten and twenty-one. They were among society's most vulnerable and disconnected youth—most likely to be mislabeled, ignored, harmed, or scarred for life by systems that were supposed to help them.

Thus, our thirtieth anniversary symposium issue in this Law Review, published in 2006, was called “Law and Adolescence: The Legal Status, Rights, and Responsibilities of Adolescents in the Child Welfare, Juvenile, and Criminal Justice Systems.”<sup>20</sup> At that time, Juvenile Law Center, scholars, and the field were focusing on disconnected youth,<sup>21</sup> youth aging out of foster care, and the barrier-shattering *Roper* decision (building on the work of the MacArthur Network).

Our 2015 “empowerment vs. protection” Symposium reflects changes that research and experience have wrought in the last decade. Developmental principles underpin almost every aspect of the child welfare system—as it affects teens and young adults—and the justice system. There is a neat, emerging clarity about the balance between empowerment and protection. The principles that have sprouted from a developmental framework have supported increased youth participation and new ways of thinking about harm. The role of lawyers has increased in importance: while youth have the capacity to exercise many rights, they need the “guiding hand”<sup>22</sup> of counsel to do so. Their developmental status affects when, where, and how those rights get exercised.

This Symposium is also a gratifying testament to the connections that Juvenile Law Center has nurtured with colleagues across the United States and elsewhere in the world. Indeed, my colleague and cofounder, Marsha Levick, and I are proud that colleagues from South Africa, Ireland, and the Netherlands have joined an extraordinary set of American authors to validate the work we have done these past forty years, and to lay the foundation for the work to come.

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20. Symposium, *Law and Adolescence: The Legal Status, Rights, and Responsibilities of Adolescents in the Child Welfare, Juvenile, and Criminal Justice Systems*, 79 TEMP. L. REV. 317 (2006).

21. Michael Wald & Tia Martinez, Connected by 25: Improving the Life Chances of the Country's Most Vulnerable 14-24 Year Olds (Nov. 2003) (unpublished working paper), <http://www.hewlett.org/uploads/files/ConnectedBy25.pdf>.

22. *In re Gault*, 367 U.S. 1 (1967).