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Keynote Address: Revisiting Luzerne County: Promoting Fairness, Transparency, and Accountability in Juvenile Court

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Schwartz has represented dependent and delinquent children in Pennsylvania's juvenile and appellate courts, brought class action litigation over institutional conditions and probation functions, testified in congress before House and Senate committees, and has spoken in over twenty-five states on matters relating to children and the law. Mr. Schwartz's career has not been limited to Pennsylvania but has included fighting nationally and internationally for juvenile rights. From 1992 to 1998 he was chair of the juvenile justice committee of the American Bar Association's criminal justice section.

ROBERT SCHWARTZ: Why don't you skip some of that.

AUSTIN KUPKE: All right. I'm going to skip to the end. He's very modest also. On behalf Tennessee Journal Law and Policy, we're honored to have him here today. Please join me in welcoming Mr. Schwartz and thanking him for being here.

KEYNOTE ADDRESS
REVISITING LUZERNE COUNTY: PROMOTING
FAIRNESS, TRANSPARENCY AND
ACCOUNTABILITY IN JUVENILE COURT

Robert Schwartz

ROBERT SCHWARTZ: Thank you, Austin. Can you hear me back there? Is this on enough? You're okay? Okay. Thank you. If you can't, let me know. Thanks again for sticking around. This is a terrific program. This lunch hour I thought you would be interested in hearing about the judicial corruption scandal that has had the greatest impact in the history of the country that came out of Pennsylvania and in which Juvenile Law Center has been intimately involved. It's certainly affected our lives and changed our perspective on the world in many ways and I think that

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there are aspects of it that have implications for every State system everywhere in the country as folks look to see the fallout of Luzerne County.

Let me just mention just for the students in the room that in 1975 when I helped set up Juvenile Law Center it was with three classmates from law school, we were just out of law school at the time, and had really no clue what we were doing. In talking with a gentleman in the back who mentioned Mark Twain earlier, he also I think said there's no amount you can't accomplish without the right combination of confidence and ignorance. We were both quite confident and quite ignorant when we opened up our practice. We wanted to be public interest lawyers, and one of the reasons was because the Supreme Court in 1967 had decided *In re Gault*,¹ which gave kids for the first time a constitutional status that enabled them to have a right to a lawyer under the Fourteenth Amendment in delinquency proceedings.

At the time there were new rights coming into play in many other areas, the Education For All Handicapped Children Act had just been passed in 1975,² the Juvenile Justice and Delinquency Prevention Act in 1974,³ the Child Abuse Prevention and Treatment Act in 1974,⁴ all of these things were just coming in and nobody had worked to implement those laws or to give them content. So we were very, very lucky that, as stupid as we were, we didn't know less than other people and that helped in our ability to set up our practice and become experts ahead of everybody else as this edifice of children's rights was being built over the next few decades.

¹ *In re Gault*, 387 U.S. 1 (1967).

² Education for all Handicapped Children Act of 1975, 20 U.S.C. § 1411 (1975).

³ Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5602 (1974).

⁴ Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. § 5101 (1974).

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Our first office actually was a doctor's office in Philadelphia, because we had no money, and a business plan that really wasn't all that effective: that we could change the world one case at a time without paying clients. This was something that we learned pretty quickly wasn't going to last in the long haul. But one of the women in our group was married to a cardiologist who only used his Center City Philadelphia office two mornings a week, so we had it the rest of the time and shared the office with his patients, shared the waiting room actually on Tuesday and Thursday mornings, and made do the rest of the time using the X-Ray machine as a desk and having the only law office in the city with our own EKG and blood pressure equipment. The EKG we could actually pretend with the clients was a lie detector, because when we pulled out the old strips, they really had no idea what we were doing, and neither did we.

But let's take that story over again. We were a retail shop. We represented any client who had any legal interest as long as they were under eighteen, so name changes, child custody. You heard about child custody earlier this morning; we did some of that work early on. I didn't like it very much and we eventually got out of it. Special Ed., school discipline, adoption, delinquency, kids transferred to the adult system in criminal court. There was all the child abuse-related work that was developing at the time. Mental health commitments of kids. It turned out to be too big a field for us, we thought it was going to be too small. And over time we shifted from a Philadelphia-based walk-in center to a national policy shop trying to change the world wholesale rather than retail, and depending primarily on national foundations for our support because we don't have a fee-paying base. We now work and have worked for probably the last decade on working for teenagers. Originally, we were zero to twenty-one. But, again, if you're doing that, early childhood education is a very different world than keeping kids in school at the age of

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fifteen; the legal issues and the rights are different, so we had to keep modifying and changing our identity, geographic focus, and work plan. We worked for teenagers in the justice system and the child welfare system, seeing that they get what they're entitled to in education, health care, mental health services, housing, employment, and education. We try to ensure that kids have opportunities to succeed when they're emerging from those systems, that they're treated fairly by those systems, and that they aren't hurt by those systems which are supposed to be helpful to them.

The Luzerne County story is sort of a trifecta in that regard because it was a story that involved depriving kids of opportunity, inflicting harm, and treating kids unfairly. And it began for us in a serious way four years ago. It was April of 2007, in which a woman named Lorene Transue called about her daughter Hillary who was fifteen years old and was incarcerated in Pennsylvania. Lorene and Hillary Transue lived in Wilkes-Barre, Pennsylvania, a county of about 300,000 – old coal country in Pennsylvania, a Democratic party machine that still was pretty much in power, lots of poverty, lots of loss of jobs when the coal mining industry went away. What we learned I guess was that the major economic driver seemed to be bribes, and that kept the community solvent. But we didn't know that at the time.

What we knew was that Hillary had some months earlier done a MySpace parody of her assistant principal and said at the bottom, "I hope the assistant principal has a sense of humor." I think one of the things Hillary learned is that people don't get to be assistant principals of schools, at least in my experience, because of their sense of humor. So the assistant principal complained, the police filed a petition charging Hillary with harassment based on the parody, and she was called to come to the Luzerne County Juvenile Court for the hearing. She came without a lawyer. And this is a complicated situation that happens often to

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kids: a) she thought it was too trivial to warrant a lawyer; b) that a lawyer might only make the judge mad, and why do you really want a lawyer in that situation; c) lawyers would be expensive to a middle class family. We'll just go down, she'll apologize, get it over with. She arrived at the courthouse building. Outside the courtroom was a probation officer who sat at one of those little desks with the artist pallet kind of desktop that we used to have in elementary school and asked whether she had a lawyer. She said, "No." The probation officer said, "Sign here." And they signed a piece of paper, she and her mother, that turned out to be her agreeing to waive her right to counsel.

She then came into the courthouse which was run by the juvenile court judge who was also the president judge in Luzerne County, a judge named Mark Ciavarella, and she came in front of him and this relates to some of the questions we heard earlier that Dean described – he asked her, "Did you do this?" Now, it was asking a kid to essentially say, "yes" or "no" to a question that encompassed a lot more than yes or no related to guilt or innocence. He didn't ask whether her conduct met the elements of the crime of harassment, it was did you do the MySpace parody. And she said, "Yes." "Do you remember," the judge said, "when I came to your school last year and spoke at an assembly and said that any kid who came in front of me I was going to send away?" And she said, "No." "Well, I didn't go to your school just to hear myself talk." "Shackle her and get her out of here." That was her hearing. It took about ninety seconds. The transcript, such as it is, with really large font is about two-and-a-half, three pages, and that was it.

Lorene, Hillary's mother, collapsed. She didn't get a chance to talk to her daughter, who was indeed shackled and dragged from the courtroom and ended up going to a detention center and then to a placement facility.

Lorene called around and finally reached us. Different people in the State referred her to our office and

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we were attentive for a variety of reasons. Because of the change of our business plan, as I mentioned, we don't take every case that comes our way. We can't do it that way. We generally work within our foundation-funded boundaries. But this case was important for a variety of reasons. One, we were just starting our fortieth anniversary celebration of *In re Gault*,⁵ it was 2007, and Gault's case and Hillary's case, for those of you who have read *In re Gault* were identical essentially except for the technology. Gault was a fifteen-year-old who used a land line to call his next-door neighbor to make what the Supreme Court called a joke or a statement of the lewd and irritatingly offensive adolescent variety.⁶ He had been sent away for up to six years to an Arizona training center without a lawyer, and had been given no notice of the charges against him, and didn't have a lawyer, and was also asked did you do it, implicating Fifth Amendment issues, under the Fourteenth Amendment at the time.⁷ The Supreme Court in '67 said kids are persons within the meaning of the Constitution, the Fourteenth Amendment of which says no person shall be deprived of life, liberty or property without due process of law.⁸ So this Court in *Gault* had established constitutional personhood and given procedural protections for what was essentially the same offense that Hillary was adjudicated delinquent on and incarcerated for except she used MySpace for her little and irritatingly stupid adolescent humor. You can see why the assistant principal would have been really irritated and ticked off.

We also were intrigued because we had had a run-in with this judge before. In 1999, we had received a similar call out of Luzerne County for a twelve-year-old boy who had been in and out of psychiatric hospitals most of his life.

⁵ *In re Gault*, 387 U.S. 1.

⁶ *Id.* at 4.

⁷ *Id.* at 5-7.

⁸ *See generally In re Gault*, 387 U.S. 1.

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His mother thought that he may have abused a sibling and she had gone to Child Protective Services just to see what should she do and they sprang into action and had him immediately arrested and brought to court the same day, where an adult came over and said, “This is what we're going to do: you'll plead guilty and the judge will get you help.” So it turned out that adult was the prosecutor and the judge found him, this boy, guilty, adjudged delinquent, sent him to the detention center for assessment where over a five-week period he was beaten up and stabbed by other kids, taken off his medications and where they didn't listen to his mother about the psychotropic medication that he should have been receiving. By the time he got to a placement facility, he was so badly bruised that the placement facility filed a child abuse report against the detention center. We did a number of things; one was to bring an appeal around the adjudication, and the other was a lawsuit of the sort that I was mentioning earlier around the failure of the detention center to protect a kid or to have staff trained in mental health issues in a way that made them sufficient and capable of protecting a kid with serious mental health problems. We succeeded in the litigation and we succeeded in the appeal.⁹

What's interesting is, in 2001, when Judge Ciavarella was reversed on appeal in a fairly obvious decision by the State Intermediate Appellate Court, he said, “I will never again try a kid without a lawyer.” That was something that we paid attention to, because that was reported in all of the press in Wilkes-Barre in Luzerne County. So, now, six years later, we have a judge who is a recidivist, and that caught our attention. We did some investigation – and I say we, I'm here speaking but it was largely others on the Juvenile Law Center staff; we have

⁹ See generally *J.M.K. v. Luzerne County Juvenile Det. Ctr.*, 372 F.3d 572 (3rd Cir. 2004).

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about ten attorneys who are really first-rate – and interviewed Hillary and brought a writ of habeas corpus, and Judge Ciavarella immediately granted it.

Now, this should have been a signal. You know, for those of you who remember the Sherlock Holmes story *Silver Blaze* about the dog that didn't bark in the nighttime, there are signals, and when a judge immediately reverses himself and grants a writ of habeas corpus for us, that should have been a sign that something was amiss. But Hillary said when we got her out, "I wasn't the only one with a similar situation, there were a lot of other kids like me." We said, "Have them call us and we'll investigate." So she did, and we did. There was the case of the boy who threw a steak at his mother's boyfriend during a domestic dispute and was incarcerated. Now, we thought it must have been like a javelin or something. But, actually, it was a piece of raw meat that he threw at the boyfriend, and in the heat of the domestic quarrel the police were called, and took him in, Ciavarella adjudicated him delinquent without a lawyer, and sent him away. There was the kid who was arrested for conspiracy to shoplift when he was outside a store that his girlfriend took a DVD from; he went away for three months.

These were all first offenders. These are all kids who had never been in trouble. While responses are appropriate if they were in fact delinquent or if they were accused of being delinquent, placement here was never justified and also was done, again, without any process at all, not unlike the truancy hearings that you described earlier today that your students so well described, Dean. We had a kid we call the scooter boy. He was told by a next-door neighbor's kid, "I had a scooter I'll sell to you for sixty bucks." He and his parents went over, saw it, it seemed worth it, and the parents paid the neighbor sixty dollars. It turned out the scooter was hot. Our client was arrested and sent away for what ended up being a couple of years because he didn't adjust well in placement, and his

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failure to adjust and his deterioration over time meant that the judge kept ordering him replaced.

We heard lots of stories like that. We asked our State Juvenile Court Judges' Commission to give us data, because we had aggregate statewide data on waiver of counsel, and we saw that about five percent of the cases in Pennsylvania involved waiver of counsel. In Luzerne County, the rate turned out to be closer to fifty-five percent,¹⁰ all going back several years. This was troubling particularly since starting in October of 2005 we had had a new rule of procedure¹¹ that not only said that the right to counsel was the kid's alone to waive, but set up an elaborate colloquy process that the court must follow before the kid gave up that right. None of that was followed in Luzerne and they had a waiver of counsel rate of ten times that of any other county in Pennsylvania.¹² We have sixty-seven counties in our state. It also had what turned out to be a placement rate of about two-and-a-half times that of any other county in the state of Pennsylvania.¹³

We sent a team – and I don't know, Austin, whether you'll get a chance to do anything like this – we had some summer law students stake out the courthouse there in Luzerne and we set them up in disguise like with Groucho masks outside the courthouse to interview people when coming out, and to count to see whether there were fewer coming out than went in, to get their stories. By the winter

¹⁰ Application of Jessica Van Reeth, H.T. & Similarly Situated Youth for Exercise of King's Bench Power or Extraordinary Jurisdiction, Supreme Court of the Commonwealth of Pennsylvania, Exhibit E Affidavit of Linda Bender, Director of Juvenile Justice Information and Technology, Division of the Center for Juvenile Justice Training and Research, Pennsylvania Juvenile Court Judges' Commission at 2, 2008, available at http://www.jlc.org/files/luzernecounty/JLC_Luzerne_Application_Part_2.pdf [hereinafter Exhibit E].

¹¹ 37 PA. CODE § 152 (2005).

¹² Exhibit E, *supra* note 10, at 2.

¹³ *Id.*

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of '07/'08 we had a pretty comprehensive idea of sort of the railroad that was happening in the Luzerne County Juvenile Court as kid after kid was being sent away for fairly trivial offenses, including some that weren't even crimes under our crimes code, like status offenses or things that just didn't rise to a criminal level at all. There was one eleven-year-old who was locked up; had been ordered to make restitution for riding a moped without a license, or to pay a fine, couldn't pay the fine, and ended up spending many months incarcerated. "I'm going to lock you up until you have the money to pay the fine," was what the judge ordered that eleven-year-old, and it was about a 400 dollar fine, which is a mandatory riding a moped without a license fine in Pennsylvania. We had a lot of stories and the trick was what to do about it. We had enough data going back several years, but the time for appeal had long lapsed. Unlike statutes for adults which provide for post-conviction relief along habeas corpus lines, we have nothing in Pennsylvania that provides the collateral relief for juveniles when the time of appeal has expired. So we ended up doing what we always do when we don't know what to do, which is make it up as we go along and used a relatively archaic petition to our State Supreme Court asking it to assert or assume its King's Bench jurisdiction.¹⁴ You can see that this goes back a ways. But it's a pretty powerful authority it has when it does assume King's Bench jurisdiction because it can do almost anything by way of equitable relief that's in the public interest. So we had asked for it to assume jurisdiction, figure out what to do, and provide relief for the hundreds of kids whose rights had been violated by being processed without lawyers in the Luzerne County Court.

We filed our King's Bench petition. We had a couple of really useful allies, because we also thought that

¹⁴ Juvenile Law Center Petitions PA Supreme Court for Extraordinary Relief for Hundreds of Youth Tried Without the Benefit of Lawyers, available at <http://www.jlc.org/news/luzernecounty/>.

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asking for relief of this sort was as much a political act as a legal act. “At least our Supreme Court,” as Mr. Dooley once said, “pays attention to the election returns.” That’s probably not true here in Tennessee, but we had a Republican Attorney General who is now our Governor as of January. I called and asked whether he would file an amicus on our behalf in the interest of justice, kids were being treated unfairly, and, to his credit, he stepped up and did, and he had a tough re-election campaign that year and he was able to frame it saying I’m not condoning what the kids did, but no kid should be treated unfairly in this way. The State Department of Public Welfare under Democrat Governor Ed Rendell at the time filed an amicus brief on our behalf, too saying that the placement rate was so out of line here; there’s something rotten in Denmark, effectively.

Our court didn’t act very quickly, but we did very, very quickly get a call from the FBI wanting to know what we knew. We said, “What do you know?,” and they said, “We’re the FBI, we don’t tell you what we know, we ask you what you know.” We blinked first and told them what we had discovered and where our investigations had taken us, and we also gave the FBI and the U.S. Attorney for the Middle District of Pennsylvania where Wilkes-Barre is located, near Scranton, a little primer on the juvenile justice system. That summer of 2008 they got a warrant and seized all the juvenile probation records in the juvenile court, so we knew something was up. The press was giving us a lot of very good coverage and we were hearing more and more stories. Our Supreme Court didn’t act at all during 2008.

December of that year we filed a supplemental proceeding¹⁵ because we had had many, many more juvenile cases of kids who had been locked up for trivial offenses, that once Hillary and a few others came forward, other parents felt comfortable stepping up. It was very odd

¹⁵ Post-Submission Communication, Dec. 2008, http://www.jlc.org/luzerne_state_supreme_court_litigation/.

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that the parents were ashamed and embarrassed; they had not protected their kids, but nobody had said anything. Now people were beginning to come out of the woodwork. We filed a supplemental proceeding saying even though Judge Ciavarella had stepped down from juvenile court voluntarily that May, which was right after we filed our pleadings, kids were still in placement and still had records, many going back years, and these records were affecting their ability to get into college, enter the military, get jobs; their lives were effectively destroyed in many cases. The Supreme Court in the second week of January of 2009 with a one sentence per curiam order denied our application for King's Bench jurisdiction. We didn't know why. We thought we had lined up things pretty powerfully, but we hadn't at least adequately made the case in their view.

Two weeks later the U.S. Attorney from the Middle District held a press conference and announced that two bills of information had been filed alleging that Judge Ciavarella and the former president judge, Judge Conahan, had received at that time 2.6 million dollars from the contractor, builder, and owner of the for-profit detention center to which many of these kids were being sent. Not only were these judges engaged in wire fraud and tax evasion, but they were part of a larger conspiracy to keep the beds filled in return for the payments, and that part of what was going on as the subtext for our work was a large corrupt bartering that had led to the way the judge behaved.

Now, of course, all hell broke loose in the state. We were aware that there was a new detention center. It turns out that Judges Conahan and Ciavarella used that as an opportunity to convince the County commissioners to enter into a twenty-year, fifty-eight million dollar lease with the for-profit entity that was building the new facility, after our earlier litigation over the abuses at the former detention center. What we also learned at the time, although it turned out that there was no connection, was one of the two primary owners of the for-profit facility was the son of a

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former Chief Justice on the Pennsylvania Supreme Court. So we thought that there were connections there, and it turned out that there's been no evidence to connect him at all with this enterprise.

But everything was still unfolding at the time in early 2009. The Supreme Court immediately reversed itself and granted our petition. They did it two steps. First, they granted our petition by press release, which was the quickest way to let the world know that it would eventually grant it officially through court order.¹⁶ By mid-February of 2009, it had assumed jurisdiction under its King's Bench authority and appointed a special master, a wonderful senior judge from Reading, Pennsylvania named Arthur Grim who is also head of our Juvenile Court Judges' Commission and was a very, very good jurist. What we really have here is a Kids-For-Cash Scandal with what I think of as four different story lines. One is what happened in State court related to the King's Bench jurisdiction and the Supreme Court's exercise of it. Two is the federal criminal indictments. Three is a federal civil litigation that's going on. And four are the legislative and rule-making regulatory responses in the wake of that. So I want to take each of those in sequence. First, as soon as the U.S. attorney acted, we filed yet another amended King's Bench application.¹⁷ We knew we had a receptive audience at this time. Even though it was untimely because we were now three days past the fourteen day time limit, we were well able to file a *nunc pro tunc* application asking for the Court to treat it as though it were timely filed. There was no way in the world they were going to dismiss this for being untimely at this point because they had gotten a lot of bad

¹⁶ PA Supreme Court Order: Feb. 11, 2009, *available at* http://www.jlc.org/luzerne_state_supreme_court_litigation/.

¹⁷ JLC Application for Reconsideration to the PA Supreme Court, Jan. 29, 2009, *available at* http://www.jlc.org/pages/luzerne_state_supreme_court_litigation/.

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press for not acting on the original petitions. We spent the next year litigating what was effectively 6,500 cases of 4,500 kids going back to 2000 when Judge Ciavarella became administrative judge. We argued that all of these kids had appeared before a biased tribunal, many of them without counsel, and that under Pennsylvania case law 100 percent of the cases were tainted. The district attorney fought to a degree. The original strategy of the defense – and this was what we think of as the obscenity of this whole situation – is that the DA's office opposed our original motions saying we only named a few named plaintiffs and that therefore we hadn't shown that this scandal was wide and deep; this was from an office that had a representative in the courtroom in every case for every kid because they were prosecuting it. They changed that actually after the indictments came down and there was sequences of cases that we had to deal with, the kids who were all sent to the for-profit facility without, in some cases, lawyers were one category, and then there were other more serious cases. But eventually, by January of last year, on the one-year anniversary of the King's Bench petition being accepted, the Court accepted all of the special master's recommendations and ordered that all the delinquency adjudications be vacated back to 2003 and all of the records be expunged for all those kids. We got that done without a single case being retried. That was a particularly important step as part of the healing in Luzerne.

Needless to say, there were also a lot of mental health interventions and support from the Mental Health Association in Pennsylvania. Frankly, there were also interventions needed for original victims, because out of those cases there were cases of kids who had hurt other people or stolen or done things that required intervention, and, in fact, the legislature last year created a fund for the original victims' original crime for restitution purposes. But the first thing was to get records expunged, and that's

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turned out to be a lot harder and slower than we thought because we wanted the records wherever they were to be erased, and it wasn't just finding the court records or the State police records; we also had to track kids to wherever they were. The collateral rippling effects of these orders are still having an effect because some kids who were subsequently arrested as adults who had their sentences enhanced by juvenile record scores had to have recalibration of their offenses.

There have been many other situations that have had to be resolved, and we were too late for some kids. One of the kids committed suicide last month in a horrible situation; some of you may have seen his mother on TV after the Ciavarella verdict on the criminal side. So this is still a case that is having its impact.

We also filed in February of '09 a federal civil rights damage action with pro bono counsel from a Philadelphia law firm Hangle, Aronchick, Segal & Pudlin. The Segal is a board member and brought the resources of his firm to bear. There were many other lawsuits coming out of Luzerne, some for private damage action on behalf of individuals and at least one other class action. We couldn't get a lot of help, actually, from people while we were investigating up there, but as soon as the scandal broke, there were bus ads for lawyers and TV ads breaking out. The case is going on. We filed damage actions against the judges' wives who were part of the money laundering scheme because they set up the accounts, and the judges got very rich, as did the owner, a former County solicitor, who was the primary briber. They had condos in Florida, bought a yacht called Reel Justice, R-E-E-L, I guess for their fishing, and they made out quite handsomely.

The judges' wives are out from motions to dismiss. The judges are in and out. As you know, judges have absolute immunity for conduct taken while on the bench. We thought we could pierce that immunity by arguing essentially that what they ran was a star chamber, it wasn't

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a bench, the kind that we would recognize, and that in fact corrupt conduct over a five-year period in 6,500 cases was not the kind of conduct that the judicial immunity doctrine was designed to protect. We had many former judges sign on as amici to us, but the District Court judge rejected that, absolute immunity is absolute immunity. The judges are still in for their conduct as administrators, including their work in getting the detention center built and getting the contract in place and some of their other administrative conduct. We can't appeal that until after the case ends. I'm not sure how much it's worth. The judges will not have money left by the time this case is over. While it turns out that they are representing themselves on the civil side – I guess once again demonstrating their appreciation for the value of lawyers and replicating something that happened in their court with kids – they are paying a lot of money to be represented on the criminal side. There are lots of fines against them as well. They're not going to have very much, so this is largely a theoretical issue about judicial immunity.

The County is the other defendant that was able to drop out. We tried to create a *Monell v. Department of Social Services of the City of New York*.¹⁸ I think it's a circumstance that the State and County policies around training affected the way that the County prosecutors behaved and that that failure was in part a cause of what happened in Luzerne, but the federal judge decided that the prosecutors were, for purposes of this litigation, State employees, not County employees, and that we couldn't bring the County in.

All the other defendants are in, all our causes of action are in, including civil RICO¹⁹ claims, as well as

¹⁸ *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658 (1978).

¹⁹ Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1964 (1995).

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claims against the defendants for depriving the kids of an impartial tribunal in a number of other ways.

All of this, by the way, all the pleadings and the stories behind this are on our Web site at jlc.org, and it does make, I think, for pretty interesting reading; terrifying reading at the same time.

The judges in their initial guilty pleas had agreed to accept eighty-seven months in federal prison. Then they started squirming. Judge Ciavarella basically was pronouncing his innocence constantly and couldn't stop talking to TV cameras. Judge Conahan was constantly evasive in his negotiations with the federal probation department. The result was that the federal judge rejected the guilty pleas and gave the defendant judges the usual options: "You could come before me on an open plea and I'll decide your sentence or you can withdraw the guilty pleas." The two judges at the time decided to withdraw the guilty pleas. Judge Conahan reconsidered and pleaded guilty last summer to one count of the many charges against him, one RICO claim or wire fraud claim, I forget which, that would expose him to up to twenty years in jail. And Judge Ciavarella insisted on going to trial, and his trial took place in February. It was a very interesting proceeding, partly because of the choices the U.S. attorneys made. I thought of this as something of an Al Capone-like trial in the sense that they really focused on tax fraud, wire fraud, and other kinds of fiscal evasions, and put on very little evidence around kids for cash.

Ciavarella, I think, had wanted exactly that kind of prosecution, because he had been saying all along that basically, "Yeah, I broke the law but I didn't lock any kid up for cash." I think he had convinced himself that he wasn't that bad of a person and went to trial in a "don't throw me in the briar patch" approach that the U.S. attorneys bought into. They tried the case that played to Ciavarella's interests in claiming as he did after he was convicted, on only twelve of the thirty-nine counts that

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were brought against him, that he was vindicated. He's facing about 150 years. He went before the cameras afterwards to claim that the jury verdict, which acquitted him of some of the extortion and bribery charges but not of the tax charges to which he so readily admitted while on the stand, was a vindication of him. That's what led the mother of the boy who committed suicide to explode on camera at the time that Ciavarella was holding his press briefing after his conviction, and I think may yet not serve him very well when it comes time for the federal court to sentence him sometime later in the year. Ironically, he has now replicated the exact conduct that led the federal judge to reject his first guilty plea. One wonders exactly what he and his lawyers' strategy is now for sentencing when he has been telling the judge that you were wrong the first time when you rejected my eighty-seven-month plea.

So, we have the King's Bench piece. We have the federal civil damage action. We have the federal criminal actions. And then we have a "what do you do to prevent something like this from ever happening again?" I actually am fairly proud of Pennsylvania's juvenile justice system as a whole. We've done a lot of very good things. All public systems are imperfect, some more or less so, as you know in the child welfare side from what you've heard earlier today, and the Pennsylvania system is generally judge-based – judges retain control of all cases in our system from beginning to end exactly like they do in child welfare cases. There's no state system or youth authority to which kids get placed. Kids have a right to counsel at every stage of the proceeding in dependency and delinquency proceedings. It's a very community-based system as a whole, a lot of private nonprofit resources rather than training schools. But Luzerne was a stain on the state in a way that had everybody do more than just lift eyebrows. In

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2009 the legislature created an Interbranch Commission²⁰ to investigate and to make recommendations. They did a tremendous job. It was an eleven-person commission that included some D.A.s, judges, defenders, and citizen advocates. They took testimony; some of it was chilling. The District Attorney said, “What is a person to do?,” and the head of the commission, a real gentleman, a senior judge named John Cleland just exploded and said, “You report what you see, that's what a person is to do. When you're a D.A. responsible for ensuring that justice is done in the courtroom!” The judges were silent in thousands of cases; defense attorneys were nowhere. The public defender in the county was perfectly willing, when his attorneys came to him and said, “You know we have some problems,” to say, “It's not our cases.” Seeing kids dragged off day after day. “Not our cases.” “We have a big enough case load.” Now, this is a public defender who resigned last year because it turned out that he too had billed the County for overtime and weekend work that as a manager he wasn't entitled to bill for. But he also never really paid much attention to juvenile court, neither did the D.A. for that matter; it was a court that was out of sight and out of mind as far as they were concerned, and Judge Ciavarella was known as a person who didn't brook lawyers very much or very well anyway. Private lawyers said nothing; they saw what was happening. Juvenile probation said nothing, even though they were asked to alter the court documents to show that they had ordered detention when in fact they had recommended community release. There was a whole community conspiracy of silence in that courtroom. I don't know if you remember “A Bad Day at Black Rock” with Spencer Tracy – it's probably before your time maybe – but

²⁰ The Unified Judicial System of Pennsylvania, The Interbranch Commission on Juvenile Justice, <http://www.courts.state.pa.us/Links/Public/InterbranchCommissionJuvenileJustice.htm>.

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you should watch it, it's a good movie, where Robert Ryan goes down at the end. Communities of silence do a lot of harm. And our legal community failed kids enormously by not standing up. That was one of the chief findings: that everybody failed. The judicial conduct board in our state had received reports and complaints that it didn't act on because it had heard that there was a criminal investigation going on; "We can't get involved in judicial misconduct, we'd rather let the judges stay on the bench than interfere with a potential criminal prosecution." Unheard of anywhere else in the world, but our guys let it happen. It's very hard to change given the way our Judicial Conduct Board is embedded in our State Constitution.²¹

There were many other problems that the Interbranch Commission found. We submitted a lengthy report that is also on our Web site²² – the title of my talk today is the title of our report, so it's easily found – in which we talk about the importance of counsel for kids and other things. At the end of the day the Interbranch Commission made numerous recommendations, about forty of them related to judicial training and training of lawyers. We think training is important but doesn't go nearly far enough. We asked for a number of things, for example a ban on shackling of kids in courtrooms unless there's necessity based on evidence related to risk of flight or injury to others. We have 300-pound murder defendants in adult court who aren't shackled when they're brought into court; you protect the courtroom in other ways. Yet the twelve-year-old mentally ill kid, eighty pounds of him, is under wraps and metal. There's no excuse for treating kids that way. The issue of a right to counsel is another example. We recommended, and have been arguing fairly

²¹ See generally Penn. Const. art. 5, § 18.

²² Lessons from Luzerne County: Promoting Fairness, Transparency and Accountability, http://www.jlc.org/files/Juvenile_Law_Center_Report.pdf.

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fiercely now, that not only do kids have a right to counsel but they ought not to have a right to waive counsel in juvenile court. It's the right from which all other rights flow or are exercised. Kids are not informed enough. There's a lot of pressure on them, including pressure from parents not to pay for counsel or not to risk offending a judge. You want lawyers who are at times offending judges, who are making the cases for kids, who are putting in evidence. That now is an issue of rule-making by our State Supreme Court.²³ We will get, I think, a presumption that every kid in court is indigent, so appointing a counsel will not depend on whether parents can pay.

We needed to set up an appellate system. We have no appeals. As we had talked about on the child welfare side, it's essentially a lawless system. But it's not only Pennsylvania. There are very few appeals in delinquency cases anywhere in the country. Issues like disposition, whether this was the right intervention given this kid at this time with these facts. We occasionally see appeals of the adjudication based on "well it really wasn't aggravated assault, it was simple assault." But you never see appeals for "this kid should not have been sent to the training school." Also, you need a quick appeal process. Even a ninety-day process would not have helped most of the kids that we represented in Luzerne. The beauty of Ciavarella's work is that he sentenced almost all these kids to ninety days at a time. They'd be out and their appeals would be moot for the most part by the time they acted.

We want easier ways to get records expunged in the State. We've made recommendations on that. We've talked about opening up juvenile court in appropriate

²³ In the summer of 2011, the Supreme Court of Pennsylvania adopted many of Juvenile Law Center's recommendations. *See generally* New PA Rules Require Juvenile Courts to Address Needs of Youth in Child Welfare, Juvenile Justice Systems, http://www.jlc.org/news/new_pa_rules_require_juvenile_courts_to_address_needs_of_youth/.

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circumstances. It is really a court that has no public presence. It's our fault as well. The press has had the right to go into juvenile courts in Pennsylvania in serious cases since 1996, but nobody shows up. It's a court that has really been overlooked and abandoned by too many people in too many places.

We have a series of recommendations. The legislature has been slow to act. This spring, finally, we have bills being introduced related to shackling, related to waiver of counsel, presumption of indigence, expungement, and we're beginning to make headway. We're working on all four fronts with Luzerne. The first one on records and expungement is almost done. The litigation may end in my lifetime, I'm not sure. We still have to get through the discovery and trial phases, as it looks like the civil case will not be settled. And the judges have yet to be sentenced, so await word on that this year. The legislative reforms are still coming, but many of them are reforms that everyone anywhere in the country should consider. Let me pause there and take questions on the things that I have omitted, left out, or maybe you think I exaggerated.

UNIDENTIFIED SPEAKER: I'm very glad that you came down today and discussed this with us, because when I heard you were from Pennsylvania, the first thing that entered my mind was how people in Pennsylvania felt about that. But I've noticed, being an attorney here in Tennessee, we're not without sin either, as I'm representing an adult in Tennessee, I can go over to the adult detention facility, I can basically walk through the place without being harassed, be treated very respectfully by everybody there. When I see my client, I can go into a room, have a private conversation with him, stay as long as I like, and, as I said, be treated respectfully the entire time. I took on a case of a juvenile that was an appeal and I went to Mountainview and I went to see my fourteen-year-old client over there. What impressed me was that the security

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was tighter there than it was at the adult prison where I was representing some hardened criminals. When I went to converse with my client, it was in a large room and, by the way, I was told that I could only come to see him on Saturdays between a certain time. I went to talk to him and asked to have some alone time with him, because there was a huge room where everybody, parents and everybody, was visiting. I had a chair that I had to sit in and he had to sit beside of me and we had to face forward and there were folks all around us that could hear every word we were saying. When I got up and sort of moved our chair over to the corner of the room –

ROBERT SCHWARTZ: That got their attention, didn't it?

UNIDENTIFIED SPEAKER: – I was threatened. I was threatened with arrest. There were about four guards that came over to me, they didn't touch me, they didn't grab me, but boy they sure as hell let me know that they were there and that I was to comply with their rules. And I got sort of into an argument with them over the fact that I was there on business, I wasn't visiting my kid. In representing that juvenile that turned out to be the most frustrating event of my life, because I've never seen a place where children, and attorneys for that matter, were treated with such disrespect. The way that they acted is “this kid is here, he's going to stay here.” When I finally got my appeal before the Circuit Court judge, it was a pretty brief appeal. The judge asked me how my client was doing being there in that detention facility. And I was proud to say, “Oh, he's doing great.” And he said, “Well good, let him stay there, case dismissed.” And when I stood there sort of stammering, again I was told, “Hey this case is over, get out of here.”

ROBERT SCHWARTZ: Yeah. I think what you're describing is the power relationship that exists in the juvenile court world. I've had similar experiences with my

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first visits to see kids in placement. And I didn't get a lot of help from judges. I remember once very smugly saying to the staff at the facility, "All right, you don't want me to see my client alone here? Let's just call the emergency judge." I was sure that any judge would order me to be able to see my kid immediately. This is like never asking a question you don't know the answer to on cross. The emergency judge said, "What's the problem? Can't you work it out? No, I'm not going to order them to do things." It took a lot of work for me to get a culture change where lawyers could go in places in Pennsylvania and see their clients and talk to them alone. Many of these places make up their rules as they go along, and that, again, contributes to the lawlessness of our world. There are a lot of great judges, there are a lot of great lawyers, there are a lot of decisions that are correct; that's true in every aspect of our law. There are also a lot of abuses of power and incorrect decisions. And people ask me, "Can Luzerne happen elsewhere or is it happening elsewhere in Pennsylvania?" It's not that the bribes are happening; it's that there are cases in which some judges act arbitrarily without anybody challenging them. There are places where kids are sent where lawyers like you can't speak to them. We have an obligation to step up, because we're the last line of defense and we're all the kids have quite often.

UNIDENTIFIED SPEAKER: I've got a question for you, please, about whether, due to the sheer number of cases involving trauma to kids that you guys heard, there was any secondary trauma that you observed in yourselves?

ROBERT SCHWARTZ: That's a good question. I don't think so. I mean, when you do this work, you see a lot, and I think we were constantly appalled. What we saw fueled our anger and passion and we don't like to lose, for one. And, two, we were determined not to let go. I was very proud of our staff. They were like little terriers on the heels

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of these judges and they wouldn't let go. We just got angrier and angrier and more focused. Once the FBI stuff broke, all of a sudden we had a lot of backing and I don't think we had any secondary trauma. I think we felt some kind of vindication. Whatever the opposite of trauma is then, that's what we had.

COLLEEN STEELE: Following up on that, what about marriage rate and divorce rate in that area? A very hard thing for a marriage to sustain is having a child who is incarcerated for a length of time. Marriages will fall apart as a result of that kind of stressor I would think.

ROBERT SCHWARTZ: That's a great question, and I don't know the answer. It's something we should probably look into. I think it's an important part of the story line. And, actually, there are people writing things about this that we could ask to look into it. A guy is writing a book. We should say do a chapter on that.

UNIDENTIFIED SPEAKER: Regarding expungements, are you referring here to expungements on individual delinquency matters or at the beginning of the eighteenth year of the child?

ROBERT SCHWARTZ: We were talking about in individual delinquency matters. Generally, the public has a view that is incorrect in almost every state, that when a kid turns eighteen, records disappear. In fact, as we know, records don't disappear unless somebody makes them disappear. In most cases, records are correctly kept. Serious offenses, you want know that this was a serious offender, and it's important to have a record. But for many minor offenses, including a lot of arrests that have never led to an adjudication, those end up really dogging kids for life. The American Bar Association has a collateral consequences

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project now²⁴ that is looking at a fifty state review of the way juvenile adjudications affect kids' lives from getting into college, to drivers' licenses, to employment practices, to almost everything, and expungement is one way to get relief, but lawyers are needed in most cases to do that because there's almost no automatic expungement for kids.

JESSICA VAN DYKE: Thank you so much. Please join me in thanking him. At this point we are going to take a break.

(A break was taken)

JESSICA VAN DYKE: Before we start panel three, I wanted to very briefly mention that we started planning this symposium last October/November, over Christmas vacation. There have been many people who have been incredibly helpful, including all the Journal members and Jeff, who does all of the technical stuff that I could never even begin to do. So, a lot of work has been done, and we're thankful for all of those people. Also, when you signed up for CLE credit, you signed up with Micki Fox. Micki makes the world go round here at the College of Law. We had over 100 attorneys that ended up signing up and showing up today, and that's a huge amount of work for one person. Her assistant, Kaitlyn, is also incredibly helpful, so we're just so thankful for her.

Corinna Brock is Professor White's assistant and works for the Center for Advocacy and Dispute Resolution. And finally, we have Professor White, who was actually named the Outstanding Professor of the Year this year by her students. She's a real role model for all of us and really strives to achieve justice and help out the College of Law.

²⁴ Think Before You Plea: Juvenile Collateral Consequences in the United States, <http://www.beforeyouplea.com/>.