

# Journal of Civil Rights and Economic Development

---

Volume 14  
Issue 3 *Volume 14, Summer 2000, Issue 3*

Article 1

---

June 2000

## Keynote Address

Barbara Bennett Woodhouse

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

---

### Recommended Citation

Woodhouse, Barbara Bennett (2000) "Keynote Address," *Journal of Civil Rights and Economic Development*: Vol. 14 : Iss. 3 , Article 1.

Available at: <https://scholarship.law.stjohns.edu/jcred/vol14/iss3/1>

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# KEYNOTE ADDRESS

BARBARA BENNETT WOODHOUSE\*

Let me thank you all for your very warm welcome. I think all of us who have come to St. John's today are as proud to be here as you are to have us here. I hope that my remarks will help get

\*Barbara Bennett Woodhouse graduated from Columbia Law School in 1983, where she served on the board of the Columbia Law Review and in the Child Advocacy Clinic. After graduation, she clerked for Judge Abraham D. Sofaer in the Southern District of New York and for Associate Justice Sandra Day O'Connor at the Supreme Court of the United States in Washington, D.C.

Professor Woodhouse has been a member of the faculty of the University of Pennsylvania Law School since 1988 and a full Professor since 1994. Her courses include Constitutional Law, Family Law, Child Abuse and Neglect, Children's Rights, and The Supreme Court and the Family. A past President of the Family and Juvenile Law Section of the Association of American Law Schools, Professor Woodhouse is an active member of the International Society of Family Law, an editor of the *Journal of Psychology, Public Policy and Law*, and a member of the Advisory Committee of the National Center on Fathers and Families.

Professor Woodhouse has written numerous articles and book chapters and has spoken extensively on families, children and the law, both in the United States and abroad. Her scholarship has focused on articulating a theory of children's rights to care and nurture, and the reciprocal responsibilities of parents and society for children's well being. She has authored and co-authored several briefs to the United States Supreme Court and other courts, arguing that children in long term foster-care or adoptive placements have constitutionally protected rights not to be removed from their homes without consideration of the harm they may suffer from the rupturing of intimate family bonds.

Professor Woodhouse is currently serving on the Commonwealth of Pennsylvania's Joint Task Force on Adoption, Special Needs Subcommittee; the Philadelphia Bar Association Gender Fairness Task Force, Family Court Subcommittee; and is a founding member of the University of Pennsylvania's interdisciplinary Children's Group.

this symposium off to a right start by focusing on the children behind the stories of children's rights.

Many Americans dismiss the notion of rights for children as if it were a standup comic's joke. "Have you heard about the kid who sued his dad? He claimed that taking out the garbage was involuntary servitude. And he won. And he even got attorney's fees!" A recent New Yorker cartoon shows a five-year-old at the dinner table. His mother is holding a gun to his head and saying, "eat your vegetables or else." Another shows a husband, wife, and their two children sitting on the family room couch. Over the parents' heads is a thought bubble saying, "When do we break the news that we're getting a divorce?" An identical caption floats over the heads of the children.

We laugh at these jokes because they express our deeply rooted ambivalence about children. We see children as our most precious commodity and at the same time, a threat to the social fabric. They command our loyalty and they challenge our authority. They love us and they leave us. We are divided from our children not only by psychological ambivalence but also by race and class.

Americans tend to sort children into two categories. There are "our own children" and "other people's children." Our children are coddled and spoiled by adoring parents. They certainly do not need rights. They already know how to wrap us around their little fingers. Other people's children, especially if they are inner city children of color, are predatory monsters and are totally out of control. While our children are spoiled by too many luxuries and not enough work, other people's children work at jobs just to meet their basic needs for clothing, food, and shelter. While our children shuttle between two parents battling for custody, other people's children become state-created orphans when their parents' rights are terminated without any prospective adopter in sight.

This divide between our children and other people's children is an illusion. It ignores a fundamental tenet of human rights: All people are my brothers and sisters, parents and children. Human rights violations know no territorial, tribal, or family boundaries. As the three panels you will hear at today's conference demonstrate, there is nothing funny or trivial about trying children in adult criminal courts and executing them for

crimes committed as juveniles. There is nothing amusing about children torn from or forced out of their families by family breakdown, poverty and domestic violence, or about children who labor in sweatshops instead of hanging out in malls. These rights violations cry out for legal reform.

How can we transmute children's suffering and exploitation into legal rights for children? To borrow NYU Professor Peggy Cooper Davis' terms, we must look for and invoke in our legislatures, in our advocacy and in our research, the motivating stories of children's rights. Legal scholars too often neglect the human stories. These human stories, like the stories of slavery described by Professor Davis which motivated the 14th Amendment, give life and meaning to the abstract concept of rights.<sup>1</sup> Also critical in this effort is the construction of a written document; a basic text for describing rights. While Americans have resisted the notion of children's human rights, the rest of the world has been hard at work creating such a text and using it as a template for these new rights.

The United Nations Convention on the Rights of the Child<sup>2</sup> is only ten years old. Introduced in 1989, it is the most rapidly and universally accepted of all human rights charters. The Convention is a charter not only of negative liberties but also includes positive rights. Not only does the Convention commit its signatories to advancing due process, fundamental rights for children, the protection of children from exploitation and abuse, but also to sustenance of children's basic physical, educational, and medical needs. It recognizes rights as belonging to the child, even though he or she lacks capacity, and casts parents, families, and the community in the role of trustees of children's birthrights.

Peoples around the world now look to the U.N. Convention as a blueprint for constitutional and legislative reform. Presently

<sup>1</sup> See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 236-237 (1997) (demonstrating how disempowerment of parents during slavery destroyed children's sense of security and inflicted painful conflicts of loyalty and trust).

<sup>2</sup> U.N. G.A., 44th Sess., 25th Mtg., U.N. Doc. A/RES/44/25 (1989) (reprinted in 28 I.L.M. 1448) [hereinafter Convention]; see also Francesco Paolo Fulci, *Massacre of the Innocents*, 35 U.N. CHRONICLE 2627 (Jan. 1, 1998). The Convention on the Rights of the Child was signed by 191 States: six more than total United Nations membership. *Id.* No other Convention or treaty has ever received such universal endorsement: an unparalleled testimony to impact of children and their problems on international conscience. *Id.*

only two countries, Somalia and the United States, have failed to adopt it. Somalia lacks a functioning government and the United States lacks a governing body that truly believes in children's rights or in the obligation to meet the needs of children. Why has the United States remained the lone holdout in embracing this convention?

There are many reasons. First, as I have suggested, is the trivialization and invisibility of children's rights violations in our own culture. Perhaps we do not take children's rights seriously because children's stories of persecution and of heroism and survival remain hidden beneath the surface of historical accounts written by adults for adults and aimed at adult audiences. We have not identified children as a discrete class of persons targeted for focused persecution. We have tended to view harms to children as simply collateral damage in the endless wars between adults.

Additionally, we have not adequately recognized children as actors in the larger drama of human rights and as individuals of courage who fought and prevailed against their own destruction and refused to accept assaults on their human dignity. We have tended to see them, instead, as passive victims, not as role models and freedom fighters. We must learn to see the children hidden between the lines of the human rights story. To borrow a phrase from Linda Gordon, we must celebrate them not as victims, but as "heroes of their own lives."<sup>3</sup>

When the St. John's Journal of Legal Commentary asked me to deliver the keynote address last fall, I planned to invoke the spirits of Jesus and Moses, of Frederick Douglass and Anne Frank, and of the teenagers in Little Rock and the freedom fighters in South Africa, who paid such a high price to challenge apartheid and Jim Crow? Little did I imagine that the morning news, as I speak, would be dominated by a new wave of children drafted into a human rights battle not of their own choosing. The children of Kosovo are highly visible to Americans at this moment.<sup>4</sup> We respond with shock to their separation from their families, their exposure to horrific violence, their material

<sup>3</sup> See generally LINDA GORDON, *HEROES OF THEIR OWN LIVES* (1988).

<sup>4</sup> See generally Tom Gjelten, *Tribunal Justice: The Challenges, The Record, and The Prospects*, 13 AM. U. INT'L L. REV. 1541, 1562 (1998) (noting that children are being used as shields in Kosovo war).

deprivation, and their dislocation. If we watch carefully, we can also bear witness to their role in current events not only as victims, but also as gutsy survivors.

On the news last night, I saw Kosovar refugee children crying helplessly, but I also saw them inventing a pickup soccer game with an empty plastic water bottle. Just as current as the story of Kosovo's children, but far less visible on our TV screens, is the story of almost 50,000 children in New York City, a half-million nationwide, who are growing up in foster care.<sup>5</sup> In a very real sense, these children are also refugees, some from abuse at the hands of their own caregivers, but the vast majority because of neglect. Many were driven from their homes not by physical brutality, but by economic and social factors their parents were unable to overcome; including homelessness, unsafe living conditions, inadequate food, and unemployment. These children are evidence of the collateral damage caused by economic and trade policies that are leaving the children of the poorest behind as the richest children get even richer.

Most of America's foster children are adequately housed and fed, but they too have suffered dislocation trauma and discrimination. They bear the brunt of 300 years of ethnic and racial divisions that remain unhealed. One statistic offered by Marty Guggenheim speaks volumes. Out of roughly 50,000 kids in the New York City foster care population, 97.1 percent are children of color.<sup>6</sup>

Throughout history, all children, and especially the children of poor and minority communities, have suffered disproportionately from famine, war, plague, religious persecution, racism, genocide,

<sup>5</sup> See Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 *FORDHAM L. REV.* 2285, 2231 & n.51 (1998) (quoting Senator DeWine in 142 *CONG. REC.* S5710 (daily ed. June 4, 1996)) ("Tonight . . . almost 421,000 children will sleep in foster homes. Over a year's time, 659,000 will be in a foster home for at least part of the year."); Mark Hardin, *Symposium on Unified Family Courts: Child Protection Cases in a Unified Family Court*, 32 *FAM. L. Q.* 147, 199 n.48 (1998) ("Of the approximately 73 million children in the United States, approximately 500,000 are in child welfare agency supervised foster care."); Megan M. O'Laughlin, *Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Terminations vs. Reunification*, 51 *VAND. L. REV.* 1427, 1432-34 (1998) (noting that number of kids in foster care has doubled in last decade).

<sup>6</sup> See Dorothy E. Roberts, *Access to Justice: Poverty, Race, and New Directions in Child Welfare Policy*, 1 *WASH. U.J. URB. & CONTEMP. L.* 63, 71 (1999) (quoting remark by Martin Guggenheim that of forty-two thousand foster care children in New York City only seven hundred and fifty are white).

social dislocation, and economic exploitation. As I stated earlier, these harms did not seem like targeted assaults on children. They appeared to adult observers as tragic, but somehow collateral effects.

I marvel now that I failed to see the story of children's human rights violations hidden in so many familiar narratives. I certainly knew and was grimly fascinated as a child by the biblical stories of Moses and Jesus, each of whom narrowly escaped death in a mass murder of innocent children. The infant Moses was hidden in the bulrushes, where he was discovered by Pharaoh's daughter and raised in luxury as her foster child. He went on to reclaim his identity and to lead his people out of slavery.<sup>7</sup> An angel instructed Jesus' foster father Joseph to take his wife and son to safety in Egypt. Jesus escaped Herod's command to slaughter the children of Bethlehem, and he too became the leader of a new faith and as a child amazed and frightened the sages in the Temple with his visionary wisdom.<sup>8</sup>

I learned these stories at my grandmother's knee, but never saw them as stories about violations of children's human rights, much less as stories about children's capacity for heroism. The importance of recognizing children's systematic persecution, as well as their spiritual victories, was first made real to me in a visit several years ago to Anne Frank's house in Amsterdam. As I toured the cramped and darkened attic rooms where Anne wrote her famous diary,<sup>9</sup> it struck me that children were not merely swept up in the Holocaust, they were singled out as children for destruction. When the Frank's hiding place was betrayed and she and her family were shipped to the concentration camps, Anne narrowly escaped immediate extermination. On arrival children under fifteen were automatically separated from their parents and sent to their deaths. Anne, however, had celebrated her fifteenth birthday on June 12, 1944, a few months earlier. She was no longer classified as a child, completely dispensable and useless to the Nazi

<sup>7</sup> See *Exodus* 3:1-4, 17, 6:2-7, 13 (discussing transformation of Jewish people from slavery in Egypt to free nationhood in Israel by divine legislation disseminated through leadership of Moses).

<sup>8</sup> See *Luke* 2:27, 41, 48 (discussing escape); *Matthew* 2 (discussing escape and aftermath).

<sup>9</sup> See ANNE FRANK, *THE DIARY OF A YOUNG GIRL* 24 (B.M. Mooyart - Doubleday trans., The Modern Library 1994).

machine and her life was spared, if only for a few months.

Separated from both her parents, weakened by typhus, starvation, and grief, Anne died in March 1945. A school friend who was the last to see her in the camps reported, "It was so terrible. She immediately began to cry and she told me, 'I don't have parents anymore.' I always think if Anne had known that her father was still alive, she might have had more strength to survive."<sup>10</sup>

For Anne Frank, unlawful imprisonment, harsh labor, untreated illness, and starvation were the final chapters of a long story. Three years earlier, Anne's world began to crumble when she was banned from the school she had always attended and segregated from her classmates. Soon Jewish children could not ride a bicycle or a tram, although Anne wrote in her diary that she learned to make due cheerfully with "shank's mare."

As the persecution deepened, like all Jewish children in Holland six and over, Anne was forced to wear a yellow star, could not shop in stores, associate with non-Jews or go freely in public streets. One diary entry concerns her father's terror and anger when Anne came home at ten minutes past 8:00, violating the Nazi curfew laws. For three years Anne and her sister were terrorized relentlessly, deprived of freedoms of education, association and speech, and subjected to religious and ethnic persecution. The event that sent the family into hiding occurred in July 1942. Sixteen-year-old Margo was ordered to report for transportation to a labor camp in Germany. Finally, in September of 1944 Anne suffered her greatest loss. When she was forcibly separated from the person whom she most loved, Otto Frank, her father, and soon thereafter from her mother.

Anne Frank is only the most famous of the children of the Holocaust. Jane Marks has recently authored a book about other hidden children in Holland, France, Germany, and Poland.<sup>11</sup> The tales in her book are told in the words of adults, who as children, survived by hiding in sewers, attics, hay stacks, and in Catholic and Protestant homes. In a remarkable passage, one child recalled taking refuge during an air attack in a trench with her

<sup>10</sup> RUUD VAN DER ROL & RIAN VERHOEVEN, ANNE FRANK: BEYOND THE DIARY, A PHOTOGRAPHIC REMEMBRANCE 100 (1995).

<sup>11</sup> See JANE MARKS, THE HIDDEN CHILDREN: THE SECRET SURVIVORS OF THE HOLOCAUST X (1993).



parents shielding her with their bodies. She described feeling warm and safe because her parents were there and she knew they would protect her.

Another child, who spent many months hiding in a sewer without being able to speak aloud for fear of detection, invokes the treasured memory of his father teaching him the alphabet by marking the letters in the dark on his hand. These children survived incredible deprivation intact, apparently because they remained with their families. Perhaps most traumatized were the children whose parents tried to save them by hiding them in plain sight. They were forced to assume false identities, which required them to memorize lies, deny their heritage, and even forget their own parents. Many were twice victimized, first by separation from their biological families and then from what these children called their hiding families, the foster and adoptive mothers and fathers they had come to love.

All these children showed amazing courage and resilience in the face of trauma and death. Fifty years later, they are still struggling. Some struggle to reconstruct lost identities and to forgive themselves for being unable to save their parents and siblings despite heroic efforts. Others struggle to insure that new holocausts do not occur. Like Anne Frank, these children confronted the reality of unspeakable evil, but they survived. Their voices provide a child's perspective on man's inhumanity to man. Their stories and those of the children who did not survive provided the motivating stories that led to the postwar United Nations Universal Declaration of Human Rights for Children.<sup>12</sup>

These narratives remind us of the importance to children of the abstract rights that the 1989 U.N. Convention recognizes and protects. Persecution and separation of communities and families violate the human rights of adults, but even more acutely they violate the rights of children. Far more than adults, children are damaged by an environment that stunts their physical and mental growth, compromising their sense of self and their prospects for the future. Their growth to autonomy depends on the care and guidance provided by bonded caregivers in the intimacy of the family, and children rely on these

<sup>12</sup> U.N. G.A. Res. 217 (III), U.N. GAOR, 3rd Sess., Supp. No. 13 at 71, U.N. Doc. A/810 (1948).

supportive relationships for their very survival.

Other charters of human rights recognize the importance of basic liberties to adults. These liberties include protection of intimate family relationships. However, as the stories of these children demonstrate, while food, shelter, medical care, religious and ethnic tolerance, and particularly the right to nurturing family relationships may be important to grown-ups, they are a matter of life and death to children.

We recognize Anne Frank's autobiography as a child's story because Anne's life was taken before she reached adulthood. Often the stories of children as heroes are hidden in the autobiographies of famous adults. How many of you recognize the name Fred Bailey? Do you recognize the name Frederick Douglass?

The great abolitionist writer and orator was born Fred Bailey in Eastern Shore, Maryland, in 1818. Although Fred Bailey knew nothing of such laws, the laws of slavery controlled his destiny from birth. Separated from his mother so she could work in the field, he was raised by his grandmother, and grieved as an adult that he could capture no memory of his mother's face.

His childhood ended abruptly at age six when Fred's grandmother was forced to turn him over to his owners in the big house. He felt terrified and abandoned. At eight he was uprooted again to be a house servant in the bustling port city of Baltimore. Here, a new world opened to this bright and curious child, who made friends of all colors among the working children of the Fells Point shipyards. Challenged by his master's chance comment that learning to read would "forever unfit him to be a slave," Fred defied the laws, which prohibited slave children from learning to read. Hiding this newfound weapon against oppression, he studied anti-slavery tracts in secret and surreptitiously read discarded newspapers for news of the abolitionist movement. By the time he turned fifteen, Fred Bailey was no longer a precocious little boy, but a young man who had learned a trade and was flexing his physical, economic, and mental powers. He openly began to question the injustice of racial slavery and the laws that forced him to labor to enrich his master.

To punish Fred for challenging authority, his master sent him back to the plantation, where he was bound out to a wheat

farmer with a reputation as a slave breaker. Worked to exhaustion, yearning for freedom, in his bleakest moments he consoled himself with this thought: "I am but a boy, and all boys are bound to someone."<sup>13</sup> Like other boys of his times, Fred was resigned to the inevitability of children's bondage, but he was determined not to be, in his own words, "a slave for life." Fred Bailey ultimately escaped to freedom, took the name of Frederick Douglass, and wrote the powerful narrative of a life in slavery that galvanized abolitionist resistance.<sup>14</sup> Few readers paused to realize that the entire story of this man's bondage and escape to freedom take place while Frederick Douglass was still legally a child.

Fred Bailey's story reminds us of the continuing influence of a long and discredited tradition, the tradition of treating children as property. The tenacious power of this property theory is not surprising. The concept of human property, which slavery was the most notorious vestige, had ancient roots. The notion of children as their father's property flowed naturally from the story of procreation as told by a patrilineal society.

According to the ancients, it was the father's seed, which once planted in the mother's womb, grew into his likeness within the woman's body. Flesh of their father's flesh, children rightly belonged to the patriarch, to be worked, traded, and given in marriage in exchange for money. Had you tried to engage Aristotle in debate over the question of parental powers versus justice for children, the debate might have ended almost before it began. He would have contended, as he did in the *Nichomachean Ethics*, "There cannot be injustice towards that which is one's own. And a chattel or a child, until it is at a certain age and has attained independence, is, as it were, a part of one's self. And nobody chooses to injure himself. Hence there can be no injustice towards oneself. And so neither can there be any conduct towards them that is politically just or unjust."<sup>15</sup>

Subsequent Western European political theorists, such as

<sup>13</sup> F. DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE, WRITTEN BY HIMSELF* 107 (Penguin Classic ed. 1986) (1845)

<sup>14</sup> See, e.g., F. DOUGLASS, *LIFE AND TIMES OF FREDERICK DOUGLASS* (1881, revised ed. 1892); F. DOUGLASS, *MY BONDAGE AND MY FREEDOM* (W. Andrews ed. 1987); F. DOUGLASS, *supra* note 13.

<sup>15</sup> ARISTOTLE, *NICHOMACHEAN ETHICS* 188 (J.A.K. Thomson trans., 1986).

Thomas Hobbes and John Locke, attempted to map out other arguments justifying adult power over children. Hobbes argued that parental power was based on an implicit contract. The infant agrees to obey the parent in exchange for the parent's forbearance from allowing the helpless infant to perish. Locke contended that God was the true owner of children. God created children and gave them into their parents' care. Parental powers were a form of trusteeship of the Creator's property.

This conception of parental right as a reflection of parental responsibilities appeared in the writings of American scholars like Blackstone. However, lawyers and philosophers seldom questioned the self-evident scope of adults' powers over children. Under Roman law, fathers possessed the power of life or death over their children. Even in American colonies, laws in many places provided capital punishment for a child who cursed his parent, although no record exists of such sentences being carried out.

As late as 1920, a parent who killed a child in the course of punishment could claim a legal excuse for homicide in no fewer than nine states.<sup>16</sup> Well into the nineteenth century, a father could enroll his male child in the army and collect the enrollment bounty, betroth his minor female children to persons of his choice, put his children to work as day laborers on farms or factories, and collect their wage packets. A father had the power to decide where and with whom his child would reside, to transfer his children in his will by testamentary disposition, often to someone other than the mother.

The lines between freedom and bondage, between persons and property were patrolled and reinforced by age as well as by race. It was simply a fact of economic and social life that all children were bound to somebody. In combination, race, poverty, and minority status were used to deprive children of many valuable rights, including their rights to be raised by their parents.

Involuntary indenture of children whose families were destitute was viewed as the appropriate response to child poverty and family dislocation. The United States was settled in large

<sup>16</sup> See Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 *GEO. J. FIGHTING POVERTY* 313, 314 (1998) (discussing historical rights parents had over children).

part by working indentured children, many of whom were bound out for long terms of service and separated by an ocean from their parents. Historian Mary Ann Mason notes that over half the people who settled the colonies south of New England came to America under contracts of indenture, binding them in many cases past the age of majority.<sup>17</sup> Many were poor children taken from the streets of English cities, often without their consent. The average age of an indentured servant was fourteen to sixteen, and the youngest was six. Even the Constitution, supposedly a charter of liberties, protected vested rights to the involuntary servitude of children and youths and of adults who had been bound out or had bound themselves out as youths. Article 4, Section 3, Clause 3, which formed the basis for the Fugitive Slave Act, covered "all persons held in Service or Labour," and obligated neighboring states to return them if they escaped across state lines.

Fred Bailey's story not only speaks of the evils of child labor, but also reminds us of the critical importance of children's inclusion in the intellectual community of rights bearers. Virtually every one of the human rights of children articulated in the U.N. Convention was violated on a daily basis under the legally sanctioned regime of racial slavery. What saved Fred from internalizing the message of his own powerlessness and inferiority was the conviction, born in his own spirit and nurtured by access to the written word, that his oppression was neither natural nor deserved. He confronted and rejected racism as fundamentally unjust. Frederick Douglass the man owed his life to Fred Bailey the child, who refused to be enslaved.

In much the same way, all of us owe a debt as Americans to the teenagers of Little Rock and the young plaintiffs in *Brown v. Board of Education*.<sup>18</sup> We must never underestimate children's rights to freedom of thought, education, association, and especially to personhood and ownership of their own lives. Fred Bailey, Anne Frank, and the children who challenged Jim Crow were surely heroes of human rights, despite their young ages. They are fitting icons for those who seek to preserve the rights of

<sup>17</sup> *Id.* (discussing plight of indentured children in the colonies).

<sup>18</sup> 347 U.S. 483, 495 (1954) (holding that children may not be segregated in essentially equal schools solely on the basis of race).

children at risk of separation from their families, and of those who fight to end the economic exploitation of children. However, what about the bad children, the predatory children, the ones who join gangs, run wild in the streets, murder each other, catching innocent bystanders in the crossfire? "If they want rights," say American legislators, "we'll give them rights," the same rights we gave Miranda<sup>19</sup> and Gideon.<sup>20</sup> "We'll try them as adults and they'll get adult time for adult crime." Surely these predators have no claim to special treatment. To the contrary, these children are the ones most in need of our unflinching commitment to children's human rights. A core principle of children's rights is the notion that children have not only the rights preserved to all persons, but may also claim special rights because of their youth. The notion is that they are young risk-takers, impulsive, feel no fear, and because they are young, they have not yet learned about the connection between acts and consequences.

Adolescents are learning to operate a dangerous vehicle; their own untested personal autonomy. We must give them the benefit of a learner's permit in spite of the potential for disaster. Can we fairly hold them to the same standards of culpability or require them to pay for the damage they inflict as we would an adult offender who fully understood his crimes? I am not an apologist for juvenile violence. To temper our anger, however, let me invoke the story of a group of children who committed many lawless and violent acts and are yet recognized by their elders as victims and even heroes of the human rights struggle. I spoke not long ago with Yvonne Mokgoro, a justice of the South African Constitutional Court, a former student of mine and, I should also say, a teacher of mine. She had dedicated many years to fighting for children's rights before being named by President Nelson Mandela as the very first black woman judge in South African history. Justice Mokgoro spoke movingly of the huge debt owed by the new South African Republic to the youths that took the

<sup>19</sup> See *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966) (establishing specific procedural safeguards, commonly known as "Miranda warnings" to help guarantee Fifth Amendment protections).

<sup>20</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963) (holding that right to counsel guaranteed by Sixth Amendment is to be enforced against states under Fourteenth Amendment according to same standards that protect those personal rights against federal encroachment).

streets in protest in townships torn by rioting and strife.<sup>21</sup>

I will try to paraphrase her message, although I cannot match her eloquence. "So many of our nation's children," she told me earnestly, "lost their childhood in detention. Their schools were battlegrounds and their communities were destroyed. They grew up without parents because of the Group Areas Act,<sup>22</sup> which forced mothers and fathers to leave home to find work.<sup>23</sup> These children had to kill or be killed before they had ever been young. We must make reparation for their stolen childhood."

I believe these words could fairly describe the lives of many youths incarcerated in American juvenile prisons and institutions. Unlike Americans, however, South Africans responded to the crisis of this lost generation by enacting a constitution with a children's bill of rights that gives especially strong protections to juveniles in criminal or delinquency proceedings. For example, a right to counsel in all proceedings, including quasi-criminal and civil cases, and rights not to be detained with adults and to age-appropriate conditions of confinement and rehabilitation. This bill of rights is drawn in large part from the Convention on the Rights of the Child<sup>24</sup> as well as from the African Children's Charter,<sup>25</sup> and it explicitly recognizes that children have all the rights guaranteed to other persons, plus additional enumerated rights of their own.

Let me close by pointing out one final irony, a twist on the strange dichotomy between "our children" and "other people's children." When Americans see the suffering of children of faraway nations on the nightly news, often they respond with empathy and assistance. Think of the planeloads of hot meals and clothing being flown from Dover Air Force base and JFK to the refugee children of Kosovo. To give another example, international attention has been focused on Mozambique, in the

<sup>21</sup> See, e.g., Yvonne Mokgoro, *Traditional Authority and Democracy in The Interim South African Constitution*, 3 REV. CONST. STUD. 60 (1996) (discussing conflict between constitutional protections of traditional leadership and of gender and racial equality).

<sup>22</sup> Group Areas Act, No. 41 of 1950 (S. Afr.); Group Areas Act, No. 36 of 1966 (S. Afr.).

<sup>23</sup> See generally Timothy J. Treanor, *Relief for Mandela's Children: Street Children and the Law in the New South Africa*, 63 FORDHAM L. REV. 883, 892-95 (1994) (discussing Group Areas Act).

<sup>24</sup> Convention, *supra* note 2.

<sup>25</sup> African Charter on the Rights and Welfare of the Child, art. 32 (*reprinted in* 1 Afr. Y.B. Int'l L. 295 (1993)).

form of an economic development project to retrain and employ youths recruited from the ranks of demobilized-armed bands of militiamen. These young men were handed guns at age ten or twelve, were conscripted into tribal warfare and grew up knowing no other way. It seems clear that they need help not condemnation. Perhaps, if we make more real and vivid our own children's stories as displaced refugees, as children armed by adults, as children exploited in sweatshops, and treated like human property, we can generate sufficient political commitment to meet their needs through domestic humanitarian aid, income transfers, reunification and rehabilitation programs, and through law reform.

I hope I have persuaded you that the story of human rights violations and of human rights victories belongs to children, as well as to adults. Look for such stories, and I guarantee you will find them everywhere. In "The Autobiography of Malcolm X,"<sup>26</sup> who spoke searingly of the destruction of his family and of the pain of being raised as a "state child"? In the emerging feminism of Willa Cather, who wrote of the hard lives of Nebraska's immigrant daughters and sons?<sup>27</sup> In the caged bird song of Maya Angelou, who wrote about a child's brutal rape and her triumphant spirit?<sup>28</sup> And in the book, "Fist Stick Knife Gun,"<sup>29</sup> by Geoffrey Canada, who makes real to us the fear and courage of a little boy traversing the four blocks of enemy territory between his home and his school in New York City?

These are the motivating stories of today's symposium, of working children, of displaced refugees, of abused children, of children who grow up amid violence, learning to fight and kill or be killed. As lawyers and policy makers, we must look for the stories of children's heroism, suffering and survival, in our own clients and in our research. We must bring these children's stories out of hiding and into the courtrooms, legislatures, and newsrooms of America.

<sup>26</sup> MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* (1965).

<sup>27</sup> See WILLA CATHER, *ONE OF OURS* (1922).

<sup>28</sup> See MAYA ANGELOU, *I KNOW WHY THE CAGED BIRD SINGS* (1969).

<sup>29</sup> See GEOFFREY CANADA, *FIST, KNIFE, STICK, GUN: A PERSONAL HISTORY OF VIOLENCE IN AMERICA* (1995).



