

INTRODUCTION

AIN'T I A PERSON?

Ain't I a person? Ain't I got rights?

—Questions posed by a thirteen-year-old foster child

The great strength of history in a free society is its capacity for self-correction. This is the endless excitement of historical writing—the search to reconstruct what went before, a quest illuminated by those ever changing prisms that continually place old questions in a new light.

—Historian Arthur M. Schlesinger Jr.¹

The boy I shall call Tony was not very tall or strong for his age, but he was intense, intelligent, and articulate. Tony had been removed from his mentally ill mother's care at age four because of medical neglect. He and his younger half sister had spent the previous nine years in various foster homes. He saw his mother often but she remained unable to care for him. When Tony was thirteen, the attorney for the state had decided to file a motion, known as a TPR, to terminate the parental rights of Tony's mother. A TPR is the ultimate sanction—the “death penalty” of family law. The judge had asked an interdisciplinary team, composed of a lawyer, a psychiatrist, and a social worker, to evaluate mother and children. I was not Tony's lawyer. My job was to advise the child psychiatrist and the social worker on the relevant law. But

Tony knew I was a lawyer, and he had a lot of questions about his rights.

Everywhere but the United States, the answers would have been readily available in “child friendly” language, in booklets describing the United Nations Convention on the Rights of the Child, popularly known as the Children’s Rights Convention or CRC. The United States is alone in refusing to ratify the CRC, the most rapidly and universally accepted of all human rights charters.² Although the CRC was widely supported by mainstream organizations from the American Bar Association to the PTA, ratification in the United States had been blocked by opposition from the religious right because of concerns about undermining the traditional family and because of a pervasive American distrust of international law. Many Americans assumed our laws already gave children all the rights they could need or handle. Others feared that giving rights to children would threaten the autonomy of American families and open the privacy of the home to state intervention.

Meanwhile, Tony and hundreds of thousands of other American children were growing up in the custody of the state—essentially being raised by the government—with few rights and precious little family. For Tony, state intervention in his home life was a given. He lived each day with the state looking over his shoulder, deciding where he would live and what he would be allowed to do. In the words of another foster child, Malcolm X, he was stigmatized before his peers as a “state child” with no real home of his own.³ Whatever family ties Tony had were at the mercy of the state. A child in state custody, as Tony’s story graphically illustrates, even more than an adult in custody, needs legal assistance to navigate the system and correct its mistakes and failures. The U.S. Constitution requires that the states provide lawyers to adults when they are placed in state custody—in prisons or psychiatric institutions, for example. However, abused and neglected children in the United States have no constitutional right to a lawyer and are lucky in some states to have a civilian representative to speak for them. Tony happened to live in a forward-looking

state that had passed laws providing lawyers to children in foster care. But with a caseload of several hundred child clients, Tony's lawyer was not returning his phone calls. Tony had been saving up some tough questions and now here was a lawyer—myself—to answer them. I was stuck with the job of explaining to him that, under the law of his state, he did not have “standing”—the right to file papers on his own behalf—to oppose the TPR that would forever sever any legal relationship with his mother and remaining family members.

His disbelief and outrage were palpable. “She’s my mother, ain’t she? Ain’t I got rights?” he demanded. “Look here,” he said, pointing to the text of a pocket size U.S. Constitution I had given him. “It says here ‘all persons born in the United States are citizens.’ And it says ‘nor shall any State deprive any person of life, liberty or property.’ Ain’t I a person? Ain’t this my life? Ain’t I got rights?” Tony had never read the 1851 speech delivered by the African American abolitionist Sojourner Truth marked with the refrain, “Ain’t I a Woman?”⁴ His cry, like hers, arose from the heart of his own experience of frustration and injustice in a system that treated him not as a person who could feel pain and loss and desperation, but as an object.

The TPR that brought our team into this case seemed to have had a vicious domino effect on Tony's life. The TPR was a knee-jerk reaction to a new law, the Adoption and Safe Families Act, but it bore no rational relation to Tony's developmental needs. Tony was an articulate thirteen year old, and he made a persuasive case that a TPR at this late date simply made no sense. He said, “I don’t need an adoptive mother. I got a mother—the one sitting right here,” and he pointed to his mother sitting next to him. He admitted his mother was not capable of caring for him and his sister, but he had a plan and it made sense to him. “In four more years,” he told us, “I’ll be going to college. I’ll get me an apartment and my Mom and my little sister can come live with me.” Perhaps his plan was unrealistic, but he had given it a lot of thought. He didn’t want to be adopted by some stranger. He wanted to get an education and a job and make a home where they could be together as a family.

Tony's longtime foster mother understood and had supported Tony in his efforts to resist the TPR. A few weeks after our meeting, the state agency suddenly decided that her home was "out of compliance" with its regulations. Tony's social worker called him one morning and instructed him to put his and his sister's belongings in a bag and bring them to school. She explained that he was being moved to a "respite shelter" and she wanted to avoid a scene with his foster mother. Tony refused. He knew enough about bureaucratic double talk to suspect that respite was a synonym for limbo and that the caseworker was up to no good. Like any sane person would, he demanded to know where he was being sent, and why. He demanded a chance to state his objections to the move and told the caseworker that, if she wanted him, she would have to come and get him.

Tony was courting disaster. Technically, by refusing to follow orders, he could be designated as "ungovernable," and subject to detention in a locked facility. If he resisted physically he could be charged with assault of a government official—a felony. For a child in state custody, being sent from the "dependency" system into the "delinquency" system signals the end of childhood. While adults cannot be evicted for failure to pay rent without being given a court hearing, in many states a child can be sent away from a foster home without a hearing, for any reason or no reason at all.

Tony's complaints about the foster care system had begun long before the state's filing of the TPR. Why, he asked me, had the state not made any attempt to locate his father during the nine long years that he had been in foster care? A few years before we spoke, on his own initiative, Tony had found out who his father was and where he was living. He had telephoned him in another state, and they had talked. Before they could meet, however, his father passed away. Tony had another question. As his father's sole survivor, he was entitled to Social Security survivors' benefits. He wanted to save for college, he told me, but the checks were being taken by the state. How could the state just take his money, he asked? And how come the state said he could not visit his paternal grandfather who had invited him to spend some time down south with his cousins?

His grandfather had sent him a ticket. Shouldn't Tony have a right to visit his own grandfather?

Dr. Annie, the child psychiatrist leading our team, asked him gently, "Why is it so important to you to know your grandfather, or your father, for that matter? Why does it matter so much to you?" He looked at her as if she had lost her mind. But he tried to answer her strange question.

"You know, a person wants to know where he comes from. He wants to know his roots. Sometimes, when I was a young 'un, I used to cry and say, 'Where's my Daddy? Where's my Daddy?' It tore me up inside. I want to see my Granddaddy so he can tell me about him—what my Daddy was like as a boy; how it was when he was coming up." He paused and looked down at his hands. "Sometimes, I just feel . . . kinda' . . . mad . . ."

Tony's face crumpled and he broke down in bitter tears as he tried to explain how much this lost relationship meant to him. Of course he was angry. Anyone would be angry after what had happened to him. Nine years when maybe he could have lived with his own father, instead of in foster care, were gone forever. He was being kept from knowing his only living male relative and now he was about to lose his mother. No wonder he asked, "Ain't I a person? Ain't I got rights?"

There are too many Tonys. At any given time, there are over half a million children in foster care in the United States and half of these are twelve or older. Most Americans are vaguely aware of the existence of this system. They read about it in the newspaper or see stories on TV of kids killed, lost, starved, or abused, and they are shocked. They imagine that shows like *Judging Amy*, where foster children are listened to and treated with respect, reflect real life.⁵ Most would be astonished to learn that abused and neglected children in state custody have fewer rights than accused criminals. While a long line of Supreme Court cases has addressed the rights of adults to counsel when taken into state custody, to protection of their property from unjust takings, and to protection of their familial ties, the Supreme Court has never held that a foster child has a right to legal representation, a right to speak in his own court

case, a right not to be deprived of property without due process, or a right to contact with his family. The situation of children in foster care is but one example of our failure to recognize and protect the human rights of American children. One questioner at a recent lecture responded to Tony's story by saying, "This is a horrible, tragic story. But isn't the answer to fire all the people who messed up and hire people who will do a good job?" This answer is too simple—it has been tried, over and over, and has failed. Despite the systemic flaws in the child welfare system that are so evident in Tony's story, I believe the system is filled with hard-working and dedicated people. They carry heavy caseloads, lack adequate funding, and get little pay and no respect for doing one of the most difficult jobs ever invented. How can we expect them to succeed at protecting our children when we, as a people, devalue children and deny recognition of their basic rights?

We like to think of ourselves as a young and forward-looking nation. As Americans, we are proud of our nation's role in extending rights beyond the narrow circle of landed gentry to working people, people of color, women, and ethnic and religious minorities. American children and youth have played an important role in the struggle for a more perfect union, from revolutionary and civil wars, to the antislavery and women's suffrage movements to the civil rights, disability rights, and labor movements. Yet they are still waiting for rights of their own. Formalization of children's rights in the United States has been stalled for decades in superficial debates that pit conservatives against liberals and parent advocates against advocates for children. The purpose of this book is to spark public debate about the meaning of rights for children and to force a closer examination of our national resistance to children's rights. I use dramatic narratives about children, drawn from both historical and contemporary sources, to give meaning to the abstraction of rights for children and show how American children have earned their claim to rights.

The story of children's rights has been "hidden in plain sight." History has been purged of stories about children's agency and voice that make adults uncomfortable. Adults do not like to adver-

tise the pivotal role played in American history and culture by acts of youthful defiance. We are more comfortable with George Washington's confession ("I did it with my little hatchet") than with Ben Franklin's precocious political activism. At sixteen Ben was publishing satires that infuriated the Boston censors and at seventeen he was a fugitive from justice, breaking the terms of his apprenticeship and lying his way into a job in Philadelphia.

History has also been purged of stories about children's suffering and exploitation that adults find too disturbing. Like stories about slavery, stories about children's real lives are prettified to make them more palatable. But the fact remains that this nation was built with the sweat of children, many of them enslaved or serving long terms of indenture. Children fought in our wars, toiled in our factories, marched on picket lines, and went to jail for civil rights.

Some of the child protagonists profiled in this book grew up to become famous men and women. Others lived and died in anonymity. By weaving together in each chapter the stories of famous and unknown children, the book presents children, both as individuals and as a group, as leaders in the American struggle for justice. These stories lay the foundation for a new conversation about the meaning and purpose of children's rights. A deeper understanding of children's rights can open a deeper discussion in America about human rights, by expanding the notion of rights to encompass dependency and difference as well as liberty and equality.

It is an American tragedy that Ben Franklin's homeland is now the only civilized nation where a twelve-year-old like Lionel Tate could be sentenced to life in prison without parole. While children's rights have gained universal acceptance around the world, the American debate about rights for children is polarized and mired in simplistic imagery. One reason is simply a failure of imagination. Rather than envisioning children marching against racial discrimination or unsafe working conditions, the typical American tends to think of children's rights in very personal terms, as involving children seeking liberation from parental authority. Adults laugh uneasily and joke about children refusing to take out the garbage or even hiring lawyers to "divorce" their parents. Concerns about the

balance of legal rights within the family, and in contexts such as divorce or custody where family members ask courts to resolve their disputes, while difficult and important, are the topic for a different book.

Children's rights, and this book, are about something far more serious than children hiring lawyers to sue their parents or refusing their parents' reasonable commands. This book is about children's human rights in relation to the power of the state. While the children in this book may sometimes be at odds with their parents, the primary focus of these stories is the systematic denial of children's basic human rights. The children profiled in this book have been indentured and sold into slavery, denied equal education, persecuted for religious and gender differences, physically and sexually abused, exploited by employers, excluded from court proceedings, and separated from their homes and families without due process of law. These children, side by side with their elders, have been leaders in the struggle against oppression and injustice, playing important roles in American movements for fair labor practices, women's equality, and civil rights.

Many contemporary Americans seem to see children's rights as a threat to family integrity and parental authority. This concern about children's rights as a wedge to open the doors to state intervention in the family cuts across categories of liberal and conservative, uniting critics from both ends of the spectrum.⁶ On the left, critics voice concern that child rights will be misused as a weapon against the poorest and most vulnerable families to justify intrusive state intervention. On the right, critics fear that emphasizing children's rights will imperil adult authority within the traditional family. I will argue that a fuller and more nuanced description of children's rights, encompassing not only rights of protection but also of family privacy, and acknowledging needs-based as well as capacity-based rights, will address the fears voiced by critics on each end of the political spectrum.

Americans' cautiousness in embracing rights for children also reflects a fear we have seen before that new rights (such as those of women and people of color) would result in erosion of established

rights. But human rights need not be a zero sum game, especially when it comes to children and families. Adults' rights and children's rights can be complementary as opposed to mutually exclusive. Recognizing that children have rights need not subtract from the rights of parents. Instead, recognizing rights for the child adds to the armory of the parent who is defending a child from harm or seeking assistance in meeting the child's needs.

Defining children's rights as complementary to parents' rights and as a part of the universal quest for human rights may calm the concerns of some Americans, but it stirs up a different set of concerns in others. A widespread disaffection with international rights agencies makes many Americans wary of international authority. A look at Web sites discussing children's rights illustrates the radical disconnect between those who see the international movement for children's rights as a beacon to follow and those who reject it as an invasion of American parental autonomy and national sovereignty. The specter of blue-helmeted United Nations storm troops invading the American home and internationalizing American family values is clearly alarmist, but the desire to protect American political, cultural, and religious autonomy strikes a chord with large numbers of citizens. In addition, many conservatives reject the very notion of expanding recognition of rights beyond those specifically enumerated in the U.S. Constitution, believing it should be up to the democratic majority to distinguish between just and unjust laws. Yet the concept of rights more fundamental than either the will of the majority or the fiat of the king is deeply embedded in American constitutional democracy. The Declaration of Independence begins with the proposition that certain truths are "self-evident" and certain rights "unalienable."

Even Americans who generally favor the extension of human rights at home and around the world may hesitate at the idea of rights for children. What good are rights to persons who lack the maturity to understand them or the autonomy to assert them in a court of law? Who speaks for children too young to express their views—and how authentic can any adult be in claiming to speak for children? By claiming autonomy rights for children, do we sacrifice

their needs for special protection? At what point do children's rights to protection from harm give way to rights to self-determination? And how shall we define children and childhood? Childhood means different things in different times and places. Given the chasms that divide children not only by age and cognitive ability but also by race, class, gender, ethnicity, and historical moment, how can we draw upon any shared concept of "childhood" to construct a coherent theory of children's rights?

To complicate matters further, the United States is not only a highly religious but also a religiously and culturally diverse society. Americans harbor conflicting images of children's proper place. Should children honor and obey, should they be seen and not heard? Or is their place on the front lines of the revolution, whether it is a political revolution, or a revolution in technology, popular culture, or human sexuality? Do we need to protect children from themselves or worry more about protecting ourselves from them? As the narratives in this volume suggest, children's proper place defies easy definition. Obedience and defiance, courage and recklessness, the need to make choices and the need for protection from bad choices, are all essential elements of children's developmental journey to adulthood.

Despite conceptual challenges and political, religious, and cultural tensions, it is time for Americans to grapple seriously with children's rights. Our ambivalence toward rights for children has isolated the United States from the world community. Isolationism has its defenders, but the reasons behind our hostility toward children's rights deserve more systematic analysis. Outside the United States, the CRC is universally recognized as the framework for analyzing laws that affect children. It provides the basic metric for measuring a nation's progress in meeting its obligations to respect and protect its children. Inside the United States, the CRC is virtually unknown. When the CRC was cited by the U.S. Supreme Court, in a recent decision striking down the death penalty for juveniles as unconstitutional, the Court's reference to the CRC was attacked as pandering to international opinion and ignoring American democratic values.

The CRC, however, has provided citizens around the world with

a comprehensive language for talking about rights for children that is sorely needed in America. The basic human rights principles of the CRC are already deeply embedded in American history and tradition. By fully exploring the concept of rights from a child-centered perspective, I will show that rights for children are the natural outgrowth of American constitutional, democratic, and moral values.

But why, one might ask, build a book around stories about children if the purpose is to explore the theoretical and legal issues discussed above? Why not simply describe the CRC and our current constitutional laws and the theoretical issues they pose? Narrative enables the reader to revisit familiar territory with a fresh perspective. It brings the marginalized voice into the center of the conversation. Feminists used oppositional narrative to expose the ways in which women's stories and concerns had been made invisible by their lack of power within a patriarchal society. Telling the story of rights from the children's perspective fosters a critical analysis of unexamined truths. Of course, no adult, including the author of this book, can craft a story of children or childhood that is fully authentic, since we must either imagine or remember what it means to be a child and since childhood itself is a contested idea, defined as much by culture as by nature. Such obstacles should inform but not deter children's advocates from helping children, past and present, to begin to tell their own stories. A core principle of children's rights is the obligation of government to foster the direct participation of children in civil life, but Americans must first accept that children have something important to say.

Narrative allows for complexity and ambiguity. Stories about children's lives offer a more contextually rich terrain for exploration of children's rights than philosophical reasoning or legal doctrine standing alone. Children's situation, like that of adults, is rarely unambiguous. Elements of dependence and independence, victimization and heroism, authenticity and group identity coexist and can never be fully resolved. In the context of narratives, children's rights may be more clearly seen as involving negotiation and compromise between competing values and interests rather than as absolute demands.

Narrative humanizes. It challenges at a very personal level the stereotypes we use to make those whom we marginalize seem less than fully human. The stories in this volume invoke the respect and admiration Americans share for people who see and challenge injustice, who refuse to become jaded or accept defeat, who pull themselves up by their bootstraps. By using quintessentially American stories, I expose the fundamental connections between children's rights and American values.

Readers who have walked with children like Sheyann Webb in the civil rights movement or stood beside children like Lionel Tate in a criminal court will better understand the importance to children of equal protection and due process of law. Readers who have heard Helen Keller speak and visited with severely and profoundly retarded children like Mara in their schools will better understand why children like Helen and Mara need the right to an education. Readers who have walked with children of color in the civil rights movement and stood beside them in the modern juvenile courts will better understand the importance to children of equal protection and due process of law. This book aims to *show* rather than merely tell why rights matter to children and should matter to adult citizens.

I use historical materials in this book but I also use stories drawn from today's headlines and from my own work with children. Before I became an academic I was a lawyer, and before that a preschool teacher and a biological, adoptive, and kinship foster mother. Children in each of these settings have taught me much of what I know. In narratives involving children with whom I have worked or talked, I will sometimes use pseudonyms and change dates and personal details, to protect the children's privacy, or combine several cases into one to enhance anonymity and efficiency. Some of my quotations are verbatim where I was able to draw upon a written or recorded transcript, but others are paraphrases of remembered conversations. However, all the children in this book are real children, and I try to reflect each child's unique voice and to be faithful to each child's story.

But before turning to the stories of individual children, in chapters 1 and 2 I will lay out a framework for thinking about rights

for children. The framework for thinking about children's rights that I have developed and will apply throughout this book is not meant to compete with or displace the CRC. Rather, it is intended to clarify and explain to Americans what an American scheme of rights for children might look like. I start by visualizing rights as generated by certain universal human rights values and then apply the lens of developmental theory to understand what these values mean in relation to children. Far from calling for a simplified or dumbed-down version of rights for adults, the project of defining rights for children poses especially complex and difficult challenges. It challenges us to rethink the very meaning of human rights through a less individualistic and more ecologically and developmentally sensitive lens. Many would agree with me that having and raising children is what turns adults into grown-ups. Thinking seriously about justice for children can have the same maturing effect on our capacity to understand the fundamental meaning of human rights.

You may be wondering what happened to Tony. I introduced him to you, but left you in suspense after he defied the state and refused to pack his things and move to "respite care." He could have run away, as many children do, from foster care. He could have been sent to a secure institution for refusing to cooperate with adult authority. He could have been browbeaten into accepting a TPR that made no sense to him. The experience was a watershed for Tony, but not in the ways one might have feared. Instead of cowing him, it convinced him that he would rather be adopted than remain in foster care, always at the mercy of the arbitrary decisions of the system. But he insisted he would not be adopted by strangers. He made a list of adults he would like to adopt him. One of these adults, a woman I will call Ms. Barnette, had befriended Tony at the church he attended with his foster family. She was active in her community, lived in a tidy two bedroom apartment, had a good job "with benefits," and her children were all grown. She enjoyed Tony's lively company and would invite him for milk and cookies after church. One time, she gave him a paper with her phone number and said, "If you ever need

me, you just call me.” So he did. He asked her if she would adopt him and his little sister. Ms. Barnette agreed on the spot. Amazingly, the plan encountered resistance from the agency—perhaps the workers resented how Tony had taken charge of his own case, or perhaps they were just too surprised to respond flexibly. Instead of telling her she might be eligible for adoption subsidies and for Medicaid for the children, they tried to discourage her by warning her that Tony’s and his sister’s medical care could be a big burden, and they cited rules such as the one that boys and girls cannot share a room. Ms. Barnette was not deterred. Her insurance would cover the children once they were adopted. As for the requirement that Tony and his sister each have a separate room, that was easy. Tony could have the spare room, his sister could have Ms. Barnette’s room, and Ms. Barnette would sleep on the Barcalounger in the living room. So the children made their transition to their preadoptive home and were settling in nicely the next time we saw Tony.

Ms. Barnette came to the session with Tony and his little sister, since our role had now shifted to evaluating the adoptive placement. She was a large woman with a big bosom and motherly body language, and you could see both kids sinking comfortably into her embrace. Ms. Barnette understood how they felt about losing their mother and, like many African Americans, she saw no sense in an adoption cutting off a child’s family ties. “She will always be your mother,” she assured them. “She will always be welcome in our home.” She would also be sure that the children had plenty of chances to visit with extended family and that Tony could visit his paternal grandfather on summer vacations. And once Tony was adopted, he would get his Social Security survivors’ benefits and together they would save for his future education. So Tony’s story had a happy ending, and it was an ending that he wrote himself. In common with many children you will meet in these pages, Tony exemplifies not only children’s needs for stability, protection, and nurture, but also children’s voice and agency—their understanding of their own needs and their capacity to mold and shape their own lives.