

INTRODUCTION TO SYMPOSIUM

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“Circumstantial evidence is a very tricky thing,” answered Holmes thoughtfully. “It may seem to point very straight to one thing, but if you shift your own point of view a little, you may find it pointing in an equally uncompromising manner to something entirely different.”¹

Where philosophy ends, poetry must commence. There should not be a common point of view, a natural manner of thinking which stands in contrast to art and liberal education, or mere living; that is, one should not conceive of a realm of crudeness beyond the boundaries of education. Every conscious link of an organism should not perceive its limits with a feeling for its unity in relation to the whole. For example, philosophy should not only be contrasted to non-Philosophy, but also to poetry.²

I. STRUCTURE OF THE CONFERENCE

In October 2002, the University of Arizona James E. Rogers College of Law, in collaboration with the Rogers Program on Law, Philosophy, and Social Inquiry,³ hosted a conference entitled “Youth, Voice, and Power: Multi-

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1. SIR ARTHUR CONAN DOYLE, *The Boscombe Valley Mystery*, in THE ADVENTURES OF SHERLOCK HOLMES (1891).

2. FRIEDRICH VON SCHLEGEL, *Idea 48*, in DIALOGUE ON POETRY AND LITERARY APHORISMS (Ernst Behler & Roman Struc trans., 1968).

3. The Rogers Program is a joint effort by the College of Law and the Departments of Anthropology, Philosophy, Psychology, and Sociology at the University of Arizona. The program engages participants in an exchange of ideas and methodologies in an ongoing effort to integrate the various disciplines in a sustained examination of issues of public importance. In the year preceding the Symposium, the Rogers Program Steering Committee—made up of representatives from each participating discipline—presented a series of colloquia on various dimensions of the topic of childhood and youth. The culmination of the discussions was the October conference.

Disciplinary Perspectives.” The Conference gave participants an opportunity to consider topics of deep mutual interest through the lense of different disciplines. The topic—the voice and power of youth—is in many ways a riddle. Common aphorisms reveal the tension inherent in the construct of childhood. Consider, for example, “children should be seen and not heard,” or “truth comes from the mouths of fools and children.” The hope of the Conference organizers was that the different disciplines—Law, Philosophy, Sociology, Anthropology, and Psychology—would offer unique perspectives on the riddle of youth. Bringing representatives of these disciplines together was a great adventure.

The Conference organizers included representatives from each participating department in the Rogers Program: Barbara Atwood and Paul Bennett from the College of Law; Dr. Tom Christiano, Associate Professor of Philosophy; Dr. Linda Green, Assistant Professor of Anthropology; Dr. Judith Becker, Professor of Psychology and Psychiatry; Dr. Roger Levesque, Associate Professor of Psychology; and Dr. Louise Roth, Assistant Professor of Sociology. Each department invited several presenters, many of whom contributed to this Symposium Issue of the *Arizona Law Review*.⁴ Professionals who work “in the trenches” with children—in family dispute resolution, child welfare, and juvenile delinquency—also participated in the Conference. Our keynote speaker was a highly respected jurist, the Honorable Hector E. Campoy, Presiding Judge of the Pima County Juvenile Court. In addition, we were most fortunate to have as a presenter the Honorable Marcella King-Ben, an Associate Justice of the Navajo Nation Supreme Court, who spoke eloquently about Navajo childrearing practices.

The Conference included two remarkably poignant and expressive artistic displays from children themselves. The Pima County Families for Kids Program, sponsored by the W.K. Kellogg Foundation Pima County Project, graciously shared pictures from an exhibit created by children in foster care entitled “I Have a Voice.” The Pima County Library provided an exhibit of poetry written by youth in the Pima County Juvenile Detention Center, entitled “Caged Beauty: Views from Detention.” Karen Abman, Director of Families for Kids, and Sharon Gilbert, Director of the Youth Library at the Detention Center, spoke to us about the creation of these extraordinary works.

Break-out sessions at the conclusion of the Conference proceedings were led by a distinguished and diverse group of facilitators. A description of the small group sessions is provided at the end of this Introduction.

4. The following people offered thoughtful presentations at the Conference but did not have their remarks included in this Symposium Issue: Barbara Babb, Associate Professor of Law, and Director, Center for Families, Children and the Courts, University of Baltimore; Dr. Peg Bortner, Director, Center for Urban Inquiry, Arizona State University; Dr. Guadalupe Gutierrez, Director of Research and Development, Chicanos Por La Causa; Hon. Marcella King-Ben, Associate Justice of the Navajo Supreme Court; Dr. Alice E. Schlegel, Professor of Sociology, University of Arizona; Professor Elizabeth S. Scott, University Professor, Class of 1962 Professor and Harrison Foundation Research Professor, University of Virginia School of Law; and Dr. John Sutton, Professor of Sociology, University of California at Santa Barbara.

On the third day of the Conference, we offered the “Children of the Border” program. Participants took an excursion to Nogales, Mexico, under the guidance of Borderlinks, a non-profit group dedicated to educating people about legal, social, and political issues arising along the Mexican/United States border. Those in attendance met with youth workers, a former child of the tunnels,⁵ a group of teenagers living in a “colonia,”⁶ and a young couple who run a bicycle building program designed to inject capital back into the border population.

II. CONFERENCE PROCEEDINGS

Judge Campoy captured the aspiration of the Conference in his keynote speech, reprinted at the beginning of this Issue. In Judge Campoy’s view, society’s responsibility to protect the welfare of children requires that we “reduce the cacophony of our disciplines”⁷ and listen to one another. Through communication, understanding, and collaboration, he believes we can develop more enlightened policies and practices affecting youth. In the style of W.H. Auden, Judge Campoy tells us that “like love, we must maintain our passion for children.”⁸

Philosopher Tamar Schapiro opened the Conference proceedings with a fittingly fundamental question: what is childhood? Her answer to that inquiry explores the differences between children and adults as agents—as persons capable of making their own choices. Revisiting a philosophical dilemma that has perplexed many,⁹ Professor Schapiro’s paper seeks a justification for adult paternalism. Rather than relying on the traditional justification that children lack reason, she advances the theory that the “second class moral status” of children is justified on the ground that children have not yet fully constituted themselves as authors of what they do.¹⁰ She terms this the “lack of attributability.”¹¹ To Professor Schapiro, growth from childhood to adulthood is a fluid process of

5. The “tunnel children” were adolescents who lived in the large storm drains that run between Nogales, Arizona, and Nogales, Mexico. Two parallel tunnels—each fourteen feet wide and several miles long—drain the summer rains from Mexico to the United States. The tunnels were a dangerous passageway, populated by drug runners, thieves, and homeless children. For a gripping account of the plight of the tunnel children, see LAWRENCE TAYLOR & MAEVE HICKEY, *TUNNEL KIDS* (2001).

6. A “colonia” is the equivalent of a squatters community that exists outside the formal law. Informal communities in the colonia pattern, where the basic infrastructure of clean water, sanitation, and electricity is often missing, are pervasive along the Mexican/United States border. See LUIS ALBERTO URREA, *BY THE LAKE OF SLEEPING CHILDREN: THE SECRET LIFE OF THE MEXICAN BORDER* (1996); Jane E. Larson, *Informality, Illegality, and Inequality*, 20 *YALE L. & POL’Y REV.* 137 (2002).

7. See Hon. Hector E. Campoy, *Symposium Introductory Speech, Youth, Voice and Power: A Multi-Disciplinary Perspective*, 45 *ARIZ. L. REV.* 567, 567 (2003).

8. *Id.* at 573.

9. See generally *THE MORAL AND POLITICAL STATUS OF CHILDREN* (David Archard & Colin Macleod eds., 2002); *HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD* (Onora O’Neill & William Ruddick eds., 1979).

10. See Tamar Schapiro, *Childhood and Personhood*, 45 *ARIZ. L. REV.* 575, 578 (2003).

11. *Id.* at 577.

“emerging personhood” through which the child acquires a sense of self and overcomes the governance of instinct.¹² Adult paternalism is justified, and, indeed essential, to protect the child from his or her animal nature. To Professor Schapiro, adults must earn their right to govern children by using their power in ways that both protect children’s interests and promote children’s capacities to govern themselves.

The child’s emerging capacity to govern herself was a thread linking several presentations at the Conference. Professor Barbara Bennett Woodhouse, whose scholarship and professional work have explored children’s rights in a variety of contexts,¹³ extends the concept of children’s rights in her contribution to this Symposium. Professor Woodhouse argues that children have a right of participation, not only in judicial or administrative proceedings directly affecting their interest, but also at policy-making levels. In her view, integrating children’s voices into policy formation will produce many benefits, including the creation of laws that take into account the lived reality of children’s lives. To illustrate the potential of such participation, she describes the Children’s Forum at the United Nations in May of 2002,¹⁴ at which more than 360 children from around the globe presented their aspirations on children’s issues. A summary of the children’s message, entitled “A World Fit for Us,” is reprinted at the end of Professor Woodhouse’s paper and makes for compelling reading.¹⁵

The enigmatic legal status of youth was the focus of Professor Paul Bennett’s contribution to the Conference and to this Symposium. Professor Bennett explores the role of secrets in the life of a child. He notes that adults may keep secrets from children (such as the identity of a child’s biological father) on the assumption that knowledge of the truth may pose a greater risk of harm to the child than ignorance.¹⁶ At the same time, adults may prevent children from

12. *Id.* at 588.

13. Some of Professor Woodhouse’s more recent articles reveal the range of contexts in which issues of children’s rights emerge. *See, e.g., Speaking Truth to Power: Challenging “The Power of Parents to Control the Education of Their Own,”* 11 CORNELL J.L. & PUB. POL’Y 481 (2002) (arguing against absolute parental control over children’s education); *Talking About Children’s Rights in Judicial Custody and Visitation Decision-Making*, 36 FAM. L. Q. 105 (2002) (contending that children’s views should be incorporated in custody dispute resolution); *The Constitutionalization of Children’s Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1 (1999) (urging that international norms on children’s rights be incorporated into domestic constitutional law).

14. The United Nations General Assembly Special Session on Children was held from May 8 to May 10, 2002, at the United Nations Headquarters in New York City, New York.

15. *See* Barbara Bennett Woodhouse, *Enhancing Children’s Participation in Policy Formation*, 45 ARIZ. L. REV. 751, 761-63 (2003).

16. For example, in cases where the law identifies one man as the presumed father but a different man wishes to establish biological paternity, some courts have required a showing that an accurate determination of paternity would be in the best interests of the child *before* ordering genetic testing. *See, e.g., Ban v. Quigley*, 812 P.2d 1014 (Ariz. Ct. App. 1990).

keeping secrets of their own (for example, the child's revelations to a therapist), on the assumption that confidentiality may pose a greater risk of harm than disclosure—despite the latter's violation of the child's sense of privacy.¹⁷ Professor Bennett, drawing on his broad experience as a children's advocate, urges us to rethink the validity of these assumptions at every step of a child welfare proceeding.¹⁸

Some of the participants at the Conference questioned whether enhancement of children's rights is a legitimate philosophical goal and whether rights discourse inevitably improves children's lives. Approaching the question as a philosopher, Professor Harry Brighouse¹⁹ analyzes the role of the child's voice through a matrix designed to identify the various interests at play. Within that matrix, he distinguishes the child's agency and welfare interests and further draws a contrast between the child's immediate and prospective interests. By identifying potential conflicts and tensions among these interests, he points out that imbuing children with actual decision-making power may be wrong-headed. In Professor Brighouse's view, adults should consider children's voices but not defer unthinkingly to children's wishes. To the contrary, he contends that adults have a moral obligation to decide for the child what course of action will promote the child's interests.

Law professor Martin Guggenheim similarly questions the growing movement towards children's rights, but he approaches the issue as a legal scholar and children's lawyer.²⁰ Drawing on his rich experience as an advocate for children and families, Professor Guggenheim suggests that the increased emphasis on children's rights in the last several decades has actually contributed to a worse legal position for children in the United States today. In particular, he believes that the view of children as rights possessors has led to both heightened expectations for children, and the imposition of greater criminal responsibility for juvenile

17. In dependency or delinquency proceedings, for example, therapists routinely report on private communications from children as part of their assessments to the court.

18. Taking a different approach, Professor Barbara Babb, in her presentation, endorsed a unified family court and family-systems approach to child welfare and described the ongoing reform of the family court in Maryland. To her, the traditional bifurcation of criminal and civil jurisdiction in family matters results in fragmented decision-making, inattention to alternative dispute resolution methods, and inadequate use of mental health professionals. For an explanation of the unified family court model, see Barbara A. Babb, *Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998).

19. Professor Brighouse has examined the philosophical implications of childhood in other contexts, particularly *vis-a-vis* education and school choice. See, e.g., MICHAEL HARRY BRIGHOUSE, *SCHOOL CHOICE AND SOCIAL JUSTICE* (2002).

20. See, e.g., MARTIN GUGGENHEIM ET AL., *THE RIGHTS OF FAMILIES* (1996); Martin Guggenheim, *The Foster Care Dilemma and What to do About It: Is the Problem that Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141 (1999). Among Professor Guggenheim's cases are three that produced influential decisions from the United States Supreme Court: *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502 (1982); and *Schall v. Martin*, 467 U.S. 253 (1984).

offenders. Professor Guggenheim proposes that children's rights advocates refocus their attention and rhetoric on children's needs and interests.

In a contribution from the field of clinical psychology and divorce mediation,²¹ Professor Robert Emery likewise urges caution in extending decision-making power to children. Just as Professor Schapiro sees the child in a status of emerging personhood, Professor Emery is concerned that giving children the right to be heard in custody disputes may unreasonably burden children with the responsibility for making adult decisions. Using an actual case history that has the power of allegory, he illustrates the dangers of giving too much deference to children. He also suggests that a child's expressed preference in a custody dispute often will not reflect a choice that is in the child's best interests, and may not even be a reliable representation of the child's views. Rather than insisting that the child have a voice, Professor Emery would prefer a process that places responsibility for difficult choices on the shoulders of parents, not children.

Also focusing on the child's voice in custody dispute resolution, Professor Barbara Atwood reports on a survey of judicial practices and attitudes within the state of Arizona. Judges in Arizona have broad discretion about whether and how to ascertain children's wishes in custody litigation. As revealed by the survey, their practices are remarkably diverse. Professor Atwood found profound disagreement among judges about whether children should be interviewed *in camera* and, if such an interview is conducted, whether a record should be made. Noting the competing policies at stake, Professor Atwood recommends that the wishes of a child able and willing to express them should be taken into account by the decision-maker. Consistent with Professor Brighthouse, she endorses a child's right to be heard but not a right to decide. At the same time, Professor Atwood contends that the procedural due process rights of the parents require that a record be made of interviews with children.

Several presenters at the Symposium focused on juvenile justice and the policy dilemmas surrounding the renewed emphasis on punishment of juvenile offenders.²² Taking a global perspective on the role of youth in the incidence of crime, anthropologist Thomas Park compares socio-economic and crime statistics of almost two dozen nations, ranging from wealthy, highly industrialized states to underdeveloped, economically impoverished countries. Dr. Park's multi-faceted study suggests a number of intriguing hypotheses that should be of importance to lawmakers concerned with juvenile crime. Incorporating such variables as the rates of HIV infection and relative employment opportunities, his data suggest that, for

21. For a comprehensive treatment of the psychological impact of divorce on children, see ROBERT E. EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT (2d ed. 1999).

22. For example, Professor Elizabeth Scott in her presentation suggested that adolescents are in a unique, intermediate category between childhood and adulthood. In her view, policy makers should take into account insights from developmental psychology as they design juvenile justice structures to maximize positive outcomes. For an articulation of her ideas, see Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799 (2003).

example, other things being equal, poor countries have less crime per capita than rich ones and that youthful populations commit less crime per capita than older populations. Dr. Park hopes ultimately to refocus the attention of policy-makers on socioeconomic causes and away from ungrounded assumptions about young people's propensities for criminality.

Like Dr. Park, Dr. Nan Stein questions the increasingly punitive response to misconduct by youth, but her eyes are trained on the school yard. Dr. Stein, a researcher in education and women's studies,²³ documents the upsurge in anti-bullying regulations within American schools in the last decade. She also questions the efficacy of and justifications for the so-called "zero-tolerance" laws. In her view, the school systems' desire to avoid legal liability has driven the changes, and too little attention has been given to designing preventive measures aimed at reforming children's behavior. An expert on the role of gender in peer interactions within the school environment, Dr. Stein notes that gender-based harassment remains an ongoing problem within the schools, but has disappeared from the radar screen of administrators in this post-Columbine world.

In the final segment of the Conference, participants explored the themes of the Symposium in small groups organized around discrete topics, ranging from fiscal crises in public education to violence among youth to children's roles in family court. Dr. Mari Wilhelm, director of the Institute for Children, Youth and Families at the University of Arizona, led a discussion focusing on ways in which multi-disciplinary centers studying children and families are in a unique position to foster collaboration across disciplinary boundaries. Dr. Doriane L. Coleman, Senior Lecturer at the Duke University School of Law and author of *Fixing Columbine: The Challenge to American Liberalism*,²⁴ facilitated a group exploring causes and potential responses to the problem of violence perpetrated by adolescents. Louis A. Goodman, Director of the Legal Division of the Arizona Department of Juvenile Corrections, moderated a session debating rehabilitation, punishment and deterrence philosophies for managing youth in detention and correctional facilities. Dr. Fredric Mitchell, Director of the Conciliation Court in Pima County, Arizona, and Robert Barrasso, a prominent Arizona family law attorney, jointly conducted a group discussion of how children's voices, welfare, and privacy are protected in family court. Dr. Toni Griego Jones, Associate Professor of Teaching and Teaching Education at the University of Arizona, facilitated a dialogue focused on the impact of current public school budgetary crises on educating society's youth. Finally, the Honorable Terry Chandler, a Commissioner of the Pima County Juvenile Court, led a group in examining child protection policies in our courts.

23. See, e.g., Nan D. Stein et al., *Gender Safety: A New Concept for Safer and More Equitable Schools*, J. SCHOOL VIOLENCE, Vol. 1, No. 2, 2002, at 35; Nan D. Stein, *Sexual Harassment Meets Zero Tolerance: Life in K-12 Schools Since Davis*, 12 HAST. WOMEN'S L.J. 1 (2001).

24. DORIANE LAMBELET COLEMAN, *FIXING COLUMBINE: THE CHALLENGE TO AMERICAN LIBERALISM* (2002).

The organizers of the Conference hoped to stimulate conversations across disciplines, among people who share a common concern for the well-being of children. Our operating assumption was that exposure to other disciplines offers a fresh perspective on familiar problems and enables us to think outside the constraints of our own methodologies. As this Symposium Issue demonstrates, the Conference succeeded in bringing together scholars and practitioners with very diverse visions. The presentations traversed the meaning of childhood in philosophy and law and explored a range of policy questions of enormous practical significance for children. We are deeply grateful to all the Conference participants and to the contributors to this Symposium Issue for enriching the public discourse on these important themes. We hope the conversation will continue.