

FIGHTING FOR CHILDREN’S RIGHTS: LESSONS FROM THE
CIVIL RIGHTS MOVEMENT*

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I. INTRODUCTION

Despite the ruling in *Brown v. Board Education*,¹ poor children and children of color are disproportionately denied access to basic education and justice. In fact, vast numbers of all children attending public schools are denied the opportunity for a sound basic education. Worse yet, vast numbers of our nation's children are denied health care, safe permanent homes, and dumped into the juvenile delinquency system. For years the research, reports and studies have told us about these problems, yet we as a nation have failed to respond meaningfully.

This Article aims to bring about action to address the unmet legal and developmental needs of children. By such action we, the people, will be addressing the critical needs of our country, including a renewed sense of self-governance, individual civic responsibility, and a deep realization that democracy is not a spectator sport. We first must accept both Frederick Douglass' claim, "power concedes nothing without a demand"² and that each of us individually has a moral responsibility to create the demand.

The immediate social change required here is for children to be recognized as "persons" under the U.S. Constitution with the right to vigorous legal representation when they have significant interests at stake. Simply put, when children are being abused, neglected, or abandoned, or when their safety, liberty, education, or health-care rights are denied, children have a right to be heard through a qualified attorney. The larger social change implicated in this Article is the continued struggle for real democracy in the form of a truly representative government where "one person-one vote" is a reality, not just an appeasing slogan. If we courageously fight for the right of children to have their voices heard and their needs met, we have the best chance of having our own adult voices heard as we demand public policy that serves the common good and not just the wealthy. That is democracy.

1. 347 U.S. 483 (1954).

2. Frederick Douglass, *The Significance of Emancipation in the West Indies* (Aug. 3, 1857), in 3 *THE FREDERICK DOUGLASS PAPERS SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS, 1855-63*, at 204 (John W. Blassingame ed., 1985).

II. THE TREATMENT OF OUR CHILDREN: "INSTITUTIONAL IMMORALITY"

The 1990 Report of the U.S. Advisory Board on Child Abuse and Neglect concluded the issue amounted to a "national emergency." The report states:

The Board bases this conclusion on three findings: 1) each year hundreds of thousands of children are being starved and abandoned, burned and severely beaten, raped and sodomized, berated and belittled; 2) the system the nation has devised to respond to child abuse and neglect is failing; and 3) the United States spend billions of dollars on programs that deal with the results of the nation's failure to treat child abuse and neglect . . . All Americans should be outraged by child maltreatment.³

Further, the 1991 Final Report from the National Commission on Children, chaired by Senator Jay Rockefeller, stated:

As a commission on children, we could not avoid questioning the moral character of a nation that allows so many children to grow up poor, to live in unsafe dwellings and violent neighborhoods, to lack access to basic health care and a decent education. In our visits to communities across the country, we saw the consistent presence of institutional immorality — often unintended, but present nonetheless. We were shocked by the callous treatment of children in the child welfare system and the public health system.⁴

Nearly a decade has passed since these reports were issued, and "institutional immorality" remains a huge sinful gap between our rhetoric proclaiming children as a national treasure and the reality of how we prioritize resources and attend to their actual needs.⁵ One need only go to the Children's Defense Fund Web Site to see the revolting data concerning how we treat our children. For example, the United States is first among industrialized nations in military technology, exports, millionaires and

3. U.S. ADVISORY BD. ON CHILD ABUSE AND NEGLECT, *CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NAT'L EMERGENCY* (1990). (available from the U.S. Government Printing Office, Washington D.C. as stock n. 017-092-00104-5) (emphasis added).

4. NAT'L COMM'N ON CHILDREN, *FINAL REPORT, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES* 344 (1991) (emphasis added).

5. Children's Defense Fund Web Site, at <http://www.childrensdefense.org> (last visited May 10, 2005).

billionaires, and defense expenditures. But, the country ranks 13th in the gap between rich and poor, 14th in effort to lift children out of poverty, 18th in percent of children in poverty, 23rd in infant mortality, and last in protecting children from gun violence.⁶ Thousands of children in juvenile detention centers await mental-health testing. During a six-month period nearly 15,000 incarcerated youths waited for community mental-health services.⁷

III. PROMISES MADE, PROMISES BROKEN

The problem is not that child development specialists, educators, physicians, psychiatrists, and psychologists have failed to tell us what children need. Their research is voluminous and clear. In fact, we promised, on paper, years ago through state constitutional provisions and federal and state statutes to provide most of the essential educational and developmental services and treatments to eligible children. The word “eligible” is telling. Only very poor children are promised Medicaid services and other supports while the working poor usually get nothing. Today there are 8.4 million children without health insurance.⁸ Under current law, we promise our children many worthwhile programs: First, the Medicaid Act promises early and periodic screening, diagnosis and treatment for children’s medical and mental-health needs.⁹ Second, the Individuals with Disabilities Education Act (IDEA) promises a free, appropriate, public education to children with disabilities, including emotional/behavioral disabilities which are often present in children involved in the foster-care system.¹⁰ Finally, the Adoption and Safe Families Act (ASFA) promises the speedy and permanent placement of children who become involved in the foster-care system.¹¹ These promises of essential services are important for all children, but for children

6. *Id.*

7. Press Release, Bazelon Center for Mental Health Law, Thousands of Children with Mental Illness Warehoused in Juvenile Detention Centers Awaiting Mental Health Services (July 7, 2004), *available at* <http://www.bazelon.org/newsroom/7-7-04jjhearing.htm> (last visited Jan. 14, 2005).

8. Press Release, House Democrats.gov, 45 Million Americans Without Health Insurance (Sept. 2, 2004), *available at* http://www.housedemocrats.gov/news/librarydetail.cfm?library_content_id=262 (last visited Jan. 14, 2005).

9. *See* 42 U.S.C. § 1396d (2004).

10. *See* 20 U.S.C. § 1412 (2004).

11. *See generally* Adoption and Safe Families Act of 1997, Pub. L. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

involved in delinquency and foster care courts, they are essential needs. However, all three are expensive to fully implement and are pitifully and disgustingly underfunded.

The sad truth is that state and local officials, most of whom are good-hearted people, do not have the moral courage to speak out about the disasters happening in the programs they run. If they speak out they will be fired or demoted by their political superiors, who are caught in the trap of going along with years of extreme budget cuts without tax increases. However, our own tolerance or "understanding" of silence is complicity in the institutional immorality. All too often, the chilling effect of being part of the system causes us to round off the sharp edges of reality. Left unchecked, the competitive, economic, ladder-climbing nature of society, and the very normal human desire to fit in, has profound effect on our ability to truly recognize the plight of a child. Meanwhile, business as usual allows children to suffer while fiscal and emotional societal costs soar.

There is no federal constitutional right to education.¹² However, most states promise public education in their constitutions.¹³ Yet at least twenty-three states are now in school finance litigation or under court orders to fairly and adequately fund their school systems.¹⁴ North Carolina is one of those states. The North Carolina Supreme Court issued decisions in 1997 and 2004 explicating the state constitutional "fundamental" right to the "opportunity for a sound basic education" and the associated requirements.¹⁵ As in many states, the Attorney General fought the case for ten years prompting the Court to write:

The time and financial resources devoted to litigating these issues over the past ten years undoubtably [sic] have cost the taxpayers of this state an incalculable sum of money. While obtaining judicial interpretation of our Constitution in this matter and applying it to the context of the facts in this case is a critical process, one can only wonder how many additional teachers, books, classrooms, and programs could have been provided by that money in furtherance

12. *E.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

13. N.C. CONST. art. I, § 15; art. IX, § 2(1).

14. *See, e.g.*, Dennis Farney, *Insufficient Funds*, GOVERNING MAG., Dec. 2004, available at <http://www.governing.com/archive2004/dec/schools.txt> (last visited Jan. 14, 2005).

15. *See Hoke County Bd. of Educ. v. North Carolina*, 599 S.E.2d 365 (N.C. 2004); *Leandro v. State*, 488 S.E.2d 249, 346 N.C. 336 (1997).

of the requirement to provide the school children of North Carolina with the opportunity for a sound basic education.¹⁶

The decision to fight against these children at such a cost and for so long speaks volumes about the priorities of our public officials.

The practice of not funding services for children has become so common and tolerated we have long made jokes about politicians kissing babies during the campaign and ignoring them thereafter. But it is not a joking matter. Children suffer real pain as a result. When doctors and dentists are not reimbursed fairly, they choose not to participate in Medicaid, leaving a grossly inadequate number of medical and mental-health professionals who will. When parents do not receive early intervention with adequate services, or an opportunity to earn a living wage, there is little hope they will be able to become successful parents. When children do not receive special education services tailored to their actual needs, or appropriate transition services, or fair hearings before suspensions/expulsions, they do not have the chance to explore their potential to become successfully independent adults. When foster parents are not given adequate rates and support services, it is unlikely they will be able to meet a child's many needs.

When child protection social workers are overburdened and underpaid, they cannot even identify all of the children who are entitled to help. In 2002, newspapers exposed how Florida had "lost" some foster children¹⁷ Florida has, like every state, a system so underfunded and in crisis it cannot even be sure the children taken from their parents can be located, much less be sure the child has the care and services needed. In addition, children need adoption placement services. Children need fully funded Head Start Programs. They need adequately funded public schools and teachers with reasonable class sizes; they need mentors, but most of all, they need love.

When these things are not provided, children are at an even higher risk of delinquent behavior.¹⁸ They need a delinquency court system able to

16. *Hoke County*, 599 S.E.2d at 373.

17. See, e.g., *Find the Lost Children and Tighten Up Procedures*, TAMPA TRIB., June 12, 2002, at 12.

18. "Mental illness and substance abuse, which often co-occur among juvenile offenders, can contribute substantially to delinquent behavior . . . Lack of appropriate treatment in adolescence may lead to further delinquency, adult criminality, and adult mental illness. Fran Lexcen & Richard E. Redding, *Mental Health Needs of Juvenile Offenders*, Juvenile Justice Forensic Evaluation Resource Center, at 1, available at http://www.ilppp.virginia.edu/Publications_and_Reports/MHNeedsJuvOff.html (last visited July 7, 2005). "Poor education performance among children in the delinquency system is, in significant part, a function of the high percentage of children in that

recognize these undiagnosed or untreated disabilities. They need a court system seeking to rehabilitate that has appropriate rehabilitation services available. They need a court system with adequate court personnel and facilities, and trained judges with the time and temperament to really pursue the child's best interest.

IV. A CHILD'S PLIGHT — A COMPOSITE

Jane represents a composite child in the state system. She is allowed to be physically or sexually abused repeatedly at home because Child Protective Services (CPS) is looking for reasons to unsubstantiate the reports of abuse to save resources. Finally Jane is brought into foster care but is not provided with the mental-health treatment she needs as a result of being abused. She has no attorney to appeal her care. As one of approximately 500,000 foster children, Jane is Medicaid eligible. Therefore, under federal law she is entitled to whatever services are deemed "medically necessary" by her provider.¹⁹ But her Guardian Ad Litem (GAL), even if an attorney, does not get paid to handle those appeals. Such appeals require filings before a different judge than the foster care judge. The appeals are fundamental and well-established due process hearing rights.²⁰ But those rights mean nothing without a lawyer to pursue them. The denial of necessary services goes unchallenged and Jane suffers. Meanwhile, in court, the next case is called. The files are shuffled and the judge, lawyers and social workers mumble about the best interest of the child.

At school, Jane is not identified as being in need of special education services despite all the signs and requests from her foster parent. Jane has no lawyer to appeal this denial of federally promised services. Jane gets into trouble in school due to her emotional and behavioral disability but gets no manifestation determination review (MDR).²¹ MDRs are afforded all children who have disabilities and are given Individual Education Plans

system who have education-related disabilities and who, more particularly, have not received the benefit of appropriate and effective special education services." Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 4 (2003).

19. See 42 U.S.C. § 1396(r)(5); 42 U.S.C. § 1396(a)(13).

20. U.S. CONST. amend. XIV, § 1; 42 U.S.C. § 1396(a)(3); 42 C.F.R. § 431.200, 431.206(c); 42 C.F.R. §§ 431.200-431.250; *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970).

21. 20 U.S.C. § 1414 (k)(4).

(IEPs).²² When handled correctly, the IEP team meets to determine if the behavior at issue was a manifestation of the disability. If so, federal law forbids suspension except under the most dangerous situations, such as those involving guns or drugs.²³ The override of a suspension is called a stay put provision. The school cannot kick out a child who misbehaves because of her disability.²⁴ Since Jane is not even in the special education system, she is therefore denied an IEP and the MDR. So, Jane is “long term suspended,” which can last the rest of the school year. Again, she has no lawyer to appeal.

While suspended or expelled from school, Jane gets arrested for possessing drugs. Jane has a lawyer to defend the charge but not to sort out and appeal the above broken federal laws guaranteeing necessary mental and health services.

If Jane is lucky, her foster parent will complain to the state or local CPS agency about the denial of mental-health and special education services. However, CPS will likely label the foster parent a troublemaker. The foster parent, if tough enough to stand up to CPS, finds an attorney to represent Jane for free. The CPS attorney objects to this representation, claiming the foster parent has breached confidentiality by talking to the pro bono attorney. The CPS attorney threatens to remove Jane to another foster home in her best interest.

Rather than allow the pro bono lawyer to embarrass the state or county agency by appealing the multiple denials of services, the CPS attorney says he is looking out for Jane’s best interest by keeping these matters confidential. The CPS attorney therefore denies Jane’s attorney access to Jane or her records. A court, assuming CPS and the GAL are ensuring the best interest of the child, will reject intrusions or interference by another lawyer.²⁵

The U.S. Supreme Court has said “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone”²⁶ and that “[u]nder our constitution, the condition of being a boy [or girl] does not justify a kangaroo court.”²⁷ While the Court did not define “kangaroo court,” it is obvious and occurs in courts every day for children. They are treated as objects of the proceedings rather than participants with the right to be

22. *Id.*

23. *Id.* § 1414(k)(1).

24. *Id.* § 1414(k).

25. For legal briefs detailing the law and facts involving children experiencing deprivations of services and denial of representation by free, available counsel, contact the author.

26. *In re Gault*, 387 U.S. 1, 13 (1967).

27. *Id.* at 28.

heard through counsel. The U.S. Supreme Court has said “[t]he right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.”²⁸ Yet children are routinely denied this right. Worse, there is no organized, systemic campaign being waged in or out of court to expose and correct this gross injustice.

V. REASONABLE RIGHTS, NOT UNBOUNDED RIGHTS, FOR CHILDREN

The call for rights for children conjures up many fears and misconceptions. Anyone parenting a teenager is going to have initial doubts about what appears to be open-ended calls for children’s rights. There is general reluctance to take a stand for affirmative rights for children and even dialogue about the issue. The fears not only remain inadequately addressed, but also often propagate the misconceptions. Many scholarly writings about children’s rights fail to distinguish between children’s basic rights to access courts and be heard when fundamental interests are at stake.

Rights of religion, thought, conscience, and freedom of expression also generate fear. These areas must include deference to parental direction and appropriate guidance for a child’s evolving capacities.²⁹ Sorting out enforceable rights of children from areas appropriate for parental discretion is essential to build the support needed to achieve legal personhood status for children.

There is a huge difference between the right of a child to be heard in court and any claimed right of a child to associate with substance-abusing friends or to decline to attend the parents’ church, synagogue, or temple. As for the latter rights to association, reasonable minds differ over the degrees and the appropriate age at which such rights should exist. However, the vast majority of reasonable minds are likely to understand and be supportive of the right to be heard when significant interests are at stake. A small number of child advocates have sorted out these undeniable, inalienable rights to be heard and to court access. These advocates have been struggling for public and judicial recognition of these rights. However, the discussion must include the public and increased citizen involvement to establish these elementary due process rights.

28. *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

29. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); see also Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

University of Florida Law Professor Barbara Bennett Woodhouse has written:

The current discourse, in which children's mere "interests" are easily overwhelmed by parents' powerful "rights," entails . . . problematic choices about allocating power over children and about when action or inaction constitutes state "intervention" or "oppression." Perhaps children, as the least powerful members of both the family and the political community, are also the least dangerous of rights-bearers and the most in need of an affirmative rights rhetoric in order to be heard. By defining children's rights as flowing from their needs, we can affirm rather than undermine an ethic of care for others. By listening to children's voices and experiences as evidence of their needs, and by trying to come to terms with the children's reality, we can confront our own adult ambivalence and conflicts of interest regarding children's rights.³⁰

Woodhouse has captured the core ingredients of the first stage of rights for children. Children are entitled to due process and protective rights because of their human dignity and our ethic of care. The debate and progress should continue with deliberate speed concerning at what age, if any, a minor is entitled to choose clothes, bedtime, television, friends, curfew, or religious preference. But basic legal rights such as the right of access to court and to be heard through competent counsel should not be delayed one more second. The corollary to the U.S. Supreme Court's statement that the right of access to court is the right conservative of all other rights is that without the right of access to court, one effectively has no other rights.³¹ These simple first stage rights to due process and protective rights implicate issues of standing, capacity, weakened parental rights to custody and child-rearing techniques, expressed interest representation as opposed to best interest representation and the fears and misconceptions associated with these issues.

30. Barbara Bennett Woodhouse, "Out of Children's Needs, Children's Rights:" *The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 327 (1994).

31. *Chambers*, 207 U.S. at 148.

VI. FEARS AND MISCONCEPTIONS ABOUT CHILDREN'S RIGHTS

A. *Confusing the Right to be Heard with the Right of the Child to Decide the Issue*

The first stage of rights for children is premised on the ethic of care for the child and asserts the right of the child to have her or his basic interests and needs presented to a court and recognized as relevant. This seems too fundamental to be in question, but in the nationally profiled cases of Baby Jessica and Baby Richard, their best interests were deemed not relevant by three state Supreme Courts.³² Expert testimony explaining the irreparable harm likely to occur from forced removal of the child from foster care was deemed inadmissible.³³

The child should have the right of access to court since he or she is the real party in interest. In other words, the child is the person who gains or loses the most. Yet children are constantly ruled not to have standing to seek court protection from abuse or removal from foster care for a permanent, loving home. For example, Gregory K, a ten-year-old with a lawyer seeking to have parental rights terminated so he could be adopted, was told by the Florida Court of Appeals that he had no standing to seek court protection even though all his allegations were found to be true.³⁴ A child should be able to knock at the courthouse door seeking protection and have that knock answered.

This argument for first stage protective rights does not contend that the child has the right to decide the issues. The judge consistent with the rules of procedure and evidence, makes all decisions after hearing from all the parties. Yet the refrain that is advocated, the child's right to divorce her or his parents, implies the child simply needs to check the divorce box on some legal form and leave home as a matter of right. Frequently lawyers and judges initially fail to make a distinction between the child's right to decide and right to be heard.

32. These cases involve allegedly defective adoption proceedings and the forced removal of the child after bonding with the adoptive parents. *See generally In re Kirchner*, 649 N.E.2d 324 (Ill. 1995); *In re Interest of B.G.C.*, 496 N.W. 2d 239 (Iowa 1992); *DeBoer v. Schmidt (In re Clausen)*, 502 N.W.2d 649 (Mich. 1993).

33. *See supra* text accompanying note 32.

34. *See Kingsley v. Kingsley*, 623 So. 2d 780, 783-85 (Fla. Dist. Ct. App. 1993), *rev. denied*, 634 So. 2d 625 (Fla. 1994); *see generally* George H. Russ, *Through the Eyes of a Child*, "Gregory K": *A Child's Right to Be Heard*, 27 FAM. L.Q. 365 (1993) (stating that Mr. Russ and his wife adopted Gregory).

B. Confusing the Narrowly Defined Children's Rights of Access to Court, Status as a Party, and Right to Representation

Children's rights are not unbounded. In matters of abuse, neglect, abandonment, and custody children should have the opportunity to be heard through counsel regarding their specific interests, needs, and preferences. This has been the position of the American Bar Association since 1979.³⁵ Thus, the first stage of rights is not breaking new ground, rather it is trying to implement the theory of children's rights into practice.

The rights listed above are narrowly tailored to give the child protection. These are protective rights. They do not in any way encroach upon parental rights to decide bedtime, chores, punishment, religion, whether to purchase the latest computer game or the latest \$170 pair of Nike sneakers. Even if a child initiates an action, as Gregory K did, it is only to allege a denial of basic needs, such as a timely, safe, loving, and permanent home.

In the unlikely circumstance that a lawyer filed a suit over the failure to provide Nike shoes or the existence of an unfair bedtime, the judge would have the power to immediately dismiss. The judge could even sanction the lawyer for bringing a frivolous suit.³⁶ Giving children the right to be heard regarding protective rights and basic needs is not going to open a flood gate of lawsuits challenging the basic rights of parents to raise their children as they choose.

C. Confusing the Common Law Concept that Children are Incompetent and Lack Capacity with Their Right to Due Process

The ancient legal concept of minors as infants and incompetents, even at 15, 16, or 17 years old, is intended to protect children from their immaturity and vulnerability.³⁷ Under that doctrine, children may be able to unilaterally enter into a contract with a door-to-door salesman for \$2000 worth of encyclopedias. But that contract would be deemed void by a court because a child does not have the capacity to enter into such a contract.

This doctrine is sound as long as it is being used to protect children. However, it is illogical to allow the doctrine to become a sword against the child. Yet that is exactly what happened when the Florida court of appeals told Gregory K that it could not answer his pleading knock at its courthouse door because he was only a child and lacked capacity to knock.

35. See generally American Bar Association Web Site, at <http://www.abanet.org> (last visited May 10, 2005).

36. See FRCP11, NRCPP11, or analogous state rule of civil procedure.

37. E.g., *Goodsell v. Myers*, 3 Wend. 479, 481 (N.Y. Sup. Ct. 1830).

States have modified this old legal concept, when appropriate, to protect children.³⁸ For example, every state recognizes that a minor has the capacity to be named as a respondent in a petition alleging delinquency, to have legal counsel in such a proceeding and to waive basic rights such as the Fifth Amendment right to remain silent and the right to trial.³⁹ Most states recognize a child's capacity to contract for the necessities of life, such as food, clothing, and shelter.⁴⁰ Other states recognize a child's right to contract for an education.⁴¹ This means the child is held to the terms of a contract and must pay a bill on a contract just as an adult would.⁴² Given these existing adjustments of the common-law notion of capacity, it is reasonable to modify the old concept and recognize the child as having the capacity to be a party in court and have an attorney for the four narrowly tailored protective rights and basic needs. Children should be entitled to this due process protection to ensure that judicial findings of fact and law are fair and just. The person most affected by a court decision, the child, is being protected by a concept that holds that she or he cannot be present nor heard in a court proceeding.

The point is not to abolish the existing concepts or principles of law that shield and protect children, but those concepts should not be allowed to hurt children more than the concepts help children. Telling children that they are incompetent and must find an adult to knock on the courthouse door for them is simply putting another obstacle in the way of justice. Even when the adult goes to court on their behalf, the adult is frequently told she or he has no standing to bring the matter to court for the child.⁴³ Often grandparents or adult friends of the child are turned away by the court with this legal ploy.⁴⁴

Most states have a rule of professional conduct that addresses and approves representation of a minor despite the capacity issue.⁴⁵ The rules expressly recognize attorney representation of minors, even if the child lacks the ability to make adequately considered decisions. For example, in

38. *In re Gault*, 387 U.S. 1, 13 (1967).

39. *E.g.*, *Bradley v. Pratt*, 23 Vt. 378, 384-85 (1851).

40. 42 AM. JR. 2D *Infants* § 45 (2004); *see also* *Nationwide Mutual Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977); *Fisher v. Taylor Motor Co.*, 249 N.C. 617, 107 S.E.2d 94 (1958).

41. N.C. GEN. STAT. 116-1741 (year) (authorizing 17-year-old to contract for loans for higher education).

42. *See supra* text accompanying note 40.

43. In North Carolina only the director of the department of social services may file a petition alleging abuse, neglect, or dependency. *See* N.C. GEN. STAT. § 7B-403 (year).

44. *Id.*

45. N.C. RULES OF PROF'L CONDUCT R. 1.14 (2004) and analogous rule in other states.

North Carolina, for example, Rule 1.14 is titled “Client with Diminished Capacity.” It reads:

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, *whether because of minority*, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.⁴⁶

The comment section to this Rule recognizes intermediate degrees of competence: “For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”⁴⁷

Children are persons and not property, and thereby, entitled to the human dignity of due process of law. “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’ . . . [Due process] ‘calls for such procedural protections as the particular situation demands.’”⁴⁸

VII. DEMOCRACY AS SOMETHING YOU DO, NOT SOMETHING YOU HAVE

A. Law as a Tool for Social Change

While the law and lawyers are seen most often in popular culture as instruments for individuals and corporations to resolve disputes among themselves, both can and should be used to expose and redress systemic wrongs and injustices. Over thirty years ago the U.S. Supreme Court in *NAACP v. Button* stated:

46. *Id.*

47. *Id.* R. 1.14, cmt. 1.

48. *Mathews v. Eldridge*, 424 U.S. 319, 333-34 (1976).

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. . . . And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.⁴⁹

The notion that litigation for a cause, such as equality, liberty, economic justice, education, healthcare, is itself a “form of political expression,” and thus protected First Amendment activity, has largely gone unnoticed. At least in theory, our nation holds First Amendment rights to assemble, petition, organize, dissent and leaflet to be essential to preserving self government.⁵⁰ Lawyers engaging in such work are toiling at the epicenter of our constitutional democracy and should never feel or be perceived as working of the Bar or society. Moreover, they are adhering to the core value of the Rules of Professional Responsibility. Those Rules insist: that we are public citizens with a “special responsibility for the quality of justice;” that we “should seek improvement of the law . . . [and] the administration of justice;” that we employ our knowledge “in reform of the law;” and that “[l]awyers play a vital role in the preservation of society.”⁵¹

In striking down as unconstitutional the Virginia Bar’s Rules forbidding lawyers from making a range of comments during the investigation or litigation of a case, the U.S. Court of Appeals for the Fourth Circuit said:

The lawyers involved in such cases can often enlighten public debate. It is no answer to say that the comments can be made after the case is concluded, for it is well established that the first amendment protects not only the content of speech but also its timeliness.⁵²

Further, two former Supreme Court justices have embraced the concept of law as an important tool for social change in our constitutional

49. NAACP v. Button, 371 U.S. 415, 429-30 (1963).

50. U.S. CONST. amend. I; United States v. Grace, 461 U.S. 171, 179-80 (1983).

51. N.C. RULES OF PROF'L CONDUCT R. 0.1 pmb1.

52. Hirschkop v. Snead, 594 F.2d 356, 373 (4th Cir. 1979).

democracy. Justice William Brennan gave a commencement address in 1987 to the graduating law school class at University of California-Davis:

For [the Equality Principle] is the rock upon which our Constitution rests. Any defense of a constitutional democracy must begin with the equality principle, for the equality principle of our Constitution facilitates important social and economic change; it acts as the springboard for the realignment of unequal political forces toward economic and social equality. It nurtures social mobilization; it can activate a quiescent citizenry and it can recognize new and different forms of social organization. . . . [The] *judicial pursuit of equality is, in my view, properly regarded to be the noblest mission of judges.*⁵³

Justice Thurgood Marshall wrote two years earlier:

Courts, however, do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a “natural” and “self-evident” ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom. . . . Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause.⁵⁴

Therefore, litigating for children to be acknowledged as “persons” under the U.S. Constitution with full due process rights should be every bit as protected and important as doing so for highway safety and eminent domain. Lawyers have a moral and professional duty to speak out and participate in public policy debates about the needs of children.

53. William J. Brennan, Jr., *The Equality Principle: A Foundation of American Law*, 20 U.C. DAVIS L. REV. 673-74 (1987) (emphasis added).

54. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 466 (1985) (concurring in part and dissenting in part).

B. *Lessons from the Civil Rights Movement*

A direct connection can be drawn between the inhumane way our system treats children and our historical treatment of African-Americans and women. The parallel is unmistakable when considered in a legal context: Each group has the grim distinction of being seen as less than fully human and thus not as rights-bearing persons in the eyes of the law. While African-Americans and women enjoy equal protection today, at least in theory, it was a long and hard-won battle. Children are on the doorstep of such a struggle today and we must adopt a civil rights strategy for this fight. We must draw upon the rich history of creative lawyering, in tandem with superstructure and grassroots mass action. It is of crucial importance to link such litigation simultaneously with public education, organizing, media work, marches and other protected First Amendment activity. Most importantly, the civil rights movement approach allows and encourages society to fight to end the mistreatment and abuse of our children with the moral outrage and indignation it deserves.

To effectively address the denial of basic rights to children, society will have to deal with complex and controversial issues like economics, taxes, budget cuts, and campaign finance reform. Resistance will likely occur, just as Dr. Martin Luther King, Jr. Met resistance when he introduced a critique of capitalism and militarism into the struggle against segregation.

On April 4, 1967, King spoke to a large gathering of clergy and laity concerned about Vietnam at Riverside Church in New York City.⁵⁵ His powerful words provide both substantive direction and inspiration to take action.

Even when pressed by the demands of inner truth, men do not easily assume the task of opposing their government's policy, especially in time of war. Nor does the human spirit move without great difficulty against all the apathy of conformist thought within one's own bosom and in the surrounding world. . . . [W]e are always on the verge of being mesmerized by uncertainty. . . .

. . . [W]e must speak with all the humility that is appropriate to our limited vision, but we must speak. . . .

. . . [W]e as a nation must undergo a radical revolution of values. We must rapidly begin [] the shift from a thing-oriented society to a person-oriented society. When machines and computers, profit

55. Martin Luther King, Jr., *Beyond Vietnam*, Address Delivered to the Clergy and Laymen Concerned About Vietnam, at the Riverside Church (Apr. 4, 1967), *available at* http://www.stanford.edu/group/King/publications/speeches/Beyond_Vietnam.pdf (last visited Jan. 14, 2005).

motives and property rights, are considered more important than people, the giant triplets of racism, extreme materialism, and militarism are incapable of being conquered. . . .

. . . True compassion is more than flinging a coin to a beggar. It comes to see that an edifice which produces beggars needs restructuring. . . .

. . . A nation that continues year after year to spend more money on military defense than on programs of social uplift is approaching spiritual death. . . . We are now faced with the fact, my friends, that tomorrow is today. We are confronted with the fierce urgency of now. . . .

. . . We must move past indecision to action.⁵⁶

We must confront our silence regarding the plight of the children. Doing so points us directly into the pathway of King's triplets of evil: racism, extreme materialism and militarism. What actions should be taken are for each individual and community to determine. Each of us will act according to our commitment and circumstance, which are not fixed but can change. King urged nonviolent, direct action, which included marches, rallies, sit-ins, demonstrations and civil disobedience. He also wrote letters and books, gave lectures, worked with lawyers on litigation tactics, and worked with the media. There are a myriad of options for individuals and groups. The obstacle is being motivated and hopeful enough to do something.

C. Democracy is not a Spectator Sport

Citizens taking action to solve problems is the heart and soul of democracy. Citizens fed up with King George III began the American revolution by organizing through the basics of talk, leaflets, direct action, debating, and becoming indignant. While the Founding Fathers were white, wealthy, landowning men, the war was won by the spirit and action of regular people.⁵⁷ The Elite and the Masses combined around their common interests, defeated the King, and began the long journey to establish democracy and self-government.⁵⁸

56. *Id.*

57. Howard Zinn, *A People's History of the United States, 1492-Present*, in PERENNIAL CLASSICS (2003).

58. *Id.*

The right to revolt against repressive government was written directly into the Declaration of Independence.⁵⁹ It codified the principle that citizens have the right and duty to overthrow government when it oppresses and fails to serve the people.⁶⁰ The signers of the Declaration of Independence expressly pledged their good names, their fortunes, and their lives to the struggle. They were not afraid or ashamed to believe in principles for which they would sacrifice their life. Caring for children and ensuring their healthy, full development are principles individuals and nations must uphold at any cost. Otherwise, society not only condones suffering, but also cripples the future potential of the human race and thereby the world it inhabits.

As the revolutionary fervor diminished, the U.S. Constitution was written and debated.⁶¹ The express language of the Declaration of Independence was tamed considerably by the landed gentry and emerging merchant class who wanted the stability of a strong federal government.⁶² Instead of the right to revolt, society adopted a First Amendment that promised rights to free speech, assemble, petition the government with our grievances, organize, and protest. In a word, it preserved the right to dissent and fuss. Nevertheless, state constitutions made it perfectly clear that all power resides in the people. For example, the North Carolina Constitution states in its Declaration of Rights: "All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."⁶³ This sentence makes a clear statement that government policies and priorities regarding children, and all other issues, are to be consistent with the will and good of the whole population.

The Preamble to the U.S. Constitution reads:

59. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

60. *Id.*

61. Zinn, *supra* note 57.

62. *Id.*

63. N.C. CONST. art. I, § 2. Article I, section 3 states:

Internal government of the State. The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States.

Id. § 3.

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.⁶⁴

Surely the words “justice,” “domestic tranquility,” “general welfare,” and “our posterity” must be about our children and their needs. These words convey the very reasons we ordained and established our nation and the U.S. Constitution. In light of the “national emergency” and “institutional immorality,” why is this hypocrisy not burning in our guts and fueling our conversations and actions?

The meaning of the U.S. Constitution is often left to the courts. Society has lost the ability to even envision the very self-government and sovereign power of the people enshrined in our written constitutions. It is easy to understand the tendency to see “government” as “them” and not “us.” Our system of campaign finance laws allows a tiny minority of the population to contribute the vast majority of the money to candidates.⁶⁵ The public policy our society gets serves those who pay. We have winner-take-all elections and no form of proportional representation at the national level. We have districts drawn to ensure incumbents and the predominant party wins. We have laws and procedures rigged to maintain a two-party system, both of which are dependent on corporations and the wealthy. We do not even have a trustworthy system for counting the votes.⁶⁶ However, this is not an excuse for nonaction, apathy, or pessimism. This is fuel to compel our society to straighten our civic backbones, fight for our children, and to reclaim democracy. King warned us: “Pessimism is a chronic disease. It destroys the red corpuscles of hope and slows down the heartbeat of positive action.”⁶⁷

We must know in our hearts that the majority of people do not want the United States to be the only government in the world that has not ratified the U.N. Convention of the Rights of the Child.⁶⁸ Once the Athenian

64. U.S. CONST. pmbl.

65. Just .22% of the U.S. voting age population gave 76% of all individual candidate contributions in the 2002 congressional elections. Adam Lioz, *The Role of Money in the 2002 Congressional Elections*, U.S. PIRE Report, July 2003.

66. See National Voting Rights Institute (regarding vote counting and the “wealth primary”), at <http://www.nvri.org> (last visited Jan. 14, 2005).

67. From King’s notes at the King Museum in Atlanta, Georgia. 2 QUINNIPIAC HEALTH L.J. 97 (1998).

68. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989 1577 U.N.T.S. 3 (*entered into force* Sept. 2, 1990; signed by the United States Feb. 16, 1995, but not yet

philosopher Thucydides was asked when justice would come to Athens. He answered: "Justice will not come until those who are not injured are as indignant as those who are injured."⁶⁹

Unfortunately, our collective consciousness, manifested through our government, our culture, our institutions, and our individual selves, is not sufficiently indignant or morally outraged over the maltreatment of children. Society pretends that the business as usual approach is achieving incremental improvement sufficient to be adequate. How many of the groups and activities for children that are reflected in the conferences, brochures, academic gatherings, and newsletters really tackle the systemic causes of the institutional immorality?

Society is not outraged enough to be that political about advocating for children. We dare not raise hell about the rich getting richer at the expense of the majority, nor about the need for tax transfer policies that force corporations and those made wealthy by them to pay a fair share towards basic needs for our children. Meanwhile the misery index piles up.

Opposition from the powerful to the needs of the people and their meaningful role in the democratic process has been a cancer in the body politic since our nation's inception.⁷⁰ Alexander Hamilton put the matter starkly for the elites, who feared the leveling spirit of the people:

All communities divide themselves into the few and the many. The first are the rich and well born, the other the mass of the people. . . . The people are turbulent and changing; they seldom judge or determine right. Give therefore to the first class a distinct, permanent share in the government. They will check the unsteadiness of the second and as they cannot receive any advantage by a change, they therefore will ever maintain good government.⁷¹

John Jay put it more concisely: "The people who own the country ought to govern it."⁷²

Because we the people have slumbered on our right and duty to defend the actual values of constitutional democracy, the current day Hamilton's

ratified). For a list of participants and their dates of signature and ratification, see the United Nations Web Site, at <http://untreaty.un.org> (last visited May 10, 2005).

69. Thucydides, *This History of the Peloponnesian War*, 431-413 B.C., available at <http://www.zaadz.com/quotes/authors/thucydides/> (last visited July 7, 2005).

70. Zinn, *supra* note 59.

71. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 299 (Max Farrand ed., 1966).

72. MICHAEL PARENTI, *DEMOCRACY FOR THE FEW* 4 (7th ed. 2002).

and Jay's have power. Today their definition of "good government" is a strong military, subsidies and tax breaks for corporations and the wealthy, a starvation diet for all human services, and the social safety net and privatization of as many of the remaining services as possible.

Educating and exposing citizens to the prioritization of the wealthy over the needs of children can open their eyes to the chasm between our felt values and government policies. The instinct to fight for and defend children simultaneously awakens our historic, revolutionary aspirations for government of the people, by the people, and for the people. Present democratic actions determine and brighten our future democratic potential in that neglected, ill-developed youth cannot become the necessary critical thinking voters of tomorrow.

D. Corporate Power and Wealth is Antithetical to Democracy and the Needs of Children

It is a huge mistake to think that only a handful of Ralph Nader fans perceive growing corporate power as antithetical to democracy. The Rehnquist Court in 1990 upheld Michigan's criminal law banning the expenditure of corporate general funds in state elections. The Court said the law was necessary to respond to a "different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."⁷³

It is empowering to find and read many other examples of towering figures from the establishment speaking out boldly about corporate power undermining democracy. Abraham Lincoln said:

As a result of the [civil] war, corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands, and the Republic is destroyed. I feel at this moment more anxiety for the safety of my country than ever before, even in the midst of war.⁷⁴

73. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

74. Letter from Abraham Lincoln to William F. Elkins (Nov. 21, 1864), *in* THE LINCOLN ENCYCLOPEDIA 40 (Archer H. Shaw ed., 1950).

Justice Louis Brandeis captured today's situation almost perfectly: "Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business have become an institution — an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state."⁷⁵ Today the state is a willing partner putting up little or no resistance.⁷⁶

As these quotes show, the servant has become the master. The sovereign power of the people has been usurped by state created corporations. We must creatively use this understanding to craft legal arguments and claim our right to self-government, and thereby governmental policies that serve the interest of the whole including children. We must give these legal claims the power to succeed by linking them to grassroots social movements. There is no better way to awaken people to the corrosive and distorting effects of runaway corporate power and wealth than to juxtapose the impact of government taxing and spending on kids and corporations. Advocating successfully for full funding for existing promises of services for children will require the people to believe in and exercise their inalienable right of authority over both government and corporations. Our children and our democracy depend on it.

VIII. CONCLUSION

Once people cease pursuing their aspirations for themselves and their children, the Hamilton and Jay ideologies regarding rule by the rich become reality. Likewise, there is no endpoint of self-government. If we stop, democracy stops, while wealth and corporate power fill the void. Sadly, this is our reality today. It is not the village that is raising our children; it is the corporate market and culture. We fill our time with all the day to day tasks and entertainment. We either do not notice that government is cutting budgets of programs for the needy and children or we prefer denial and rationalization. Possibly Susan B. Anthony sums us up: "Cautious, careful people always casting about to preserve their reputation and social standing, can never bring about reform."⁷⁷ Perhaps

75. *Louis K. Liggett, Co. v. Lee*, 288 U.S. 517, 565 (1933) (Brandeis, J., dissenting in part).

76. For a very insightful look at the issues of corporations, law and democracy, see *DEFYING CORPORATIONS, DEFINING DEMOCRACY: A BOOK OF HISTORY AND STRATEGIES* (Dean Ritz ed., 2001); see also Program on Corporations, Law and Democracy, at www.poclad.org.

77. *POLITICAL QUOTATIONS: A COLLECTION OF NOTABLE SAYINGS ON POLITICS FROM ANTIQUITY THROUGH 1989*, at 187 (Daniel B. Baker ed., 1990).

our stake in the corporate culture blinds us and change will not occur until more hungry bellies demand revolution. Such a notion may not be that far-fetched.⁷⁸

The histories of African-Americans, women, labor, and many others show us the strivings of hope and faith can and do succeed. Small groups make big differences. Margaret Mead's statement is true: "Never doubt that small groups of thoughtful committed citizens can change the world. Indeed, it is the only thing that ever has."⁷⁹ Justice Brandeis once commented that "the most important political office is that of private citizen."⁸⁰

There are so many ways that each of us can act to expose and redress institutional immorality. There are many ways, small and large, to help children gain due process rights and personhood status. If we all do something and link those actions together so they are public and visible, democracy and children benefit. But leave it to King to hammer directly into our individual and collective consciences: "The ultimate tragedy is not the brutality of the bad people but the silence of the good people."⁸¹

78. Note that the U.S. Department of Agriculture "reported that about 35 million Americans in 2002 were food insecure, including more than 13 million children." Press Release, Children's Defense Fund (Oct. 29, 2004).

79. Wilton S. Dillon, *Margaret Mead*, 31 PROSPECTS: THE Q. REV. OF COMP. EDUC. 447, 447 n.3 (2001).

80. THE MACMILLAN DICTIONARY OF POLITICAL QUOTATIONS 65 (Lewis D. Eigen & Jonathon P. Siegel eds., 1993).

81. Martin Luther King, Jr., ch.18, at 2, THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. (Clayborne Carson ed., 2001).

