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A HUMAN RIGHTS PERSPECTIVE ON U.S. EDUCATION: ONLY SOME CHILDREN MATTER

Professor James A. Gross⁺

I. INTRODUCTION

The quality and the availability of public education have continuously been debated in this country. The most recent debate is rooted in the report of the National Commission on Excellence in Education of 1983 which found education in the United States inadequate and in need of fundamental reform.¹ Since then, problems in the educational system have been the subject of numerous publicly funded reports and programs, federal legislation, judicial review and executive action through the creation of the Department of Education. Despite the blizzard of studies, papers, programs, and statistics about the overall problem, a major difference in the quality of education provided to the “advantaged and disadvantaged” remains.² The school-age children most affected by these educational “inadequacies” continue to be those most vulnerable to discrimination and the consequences of poverty.

How a problem is framed can seriously affect how it is addressed, and the dialogue on education has generally been framed in terms of a loss of national resources and loss of productivity. Those individuals who assess the problems of education in this country appear unable to understand or unwilling to acknowledge that fundamental issues of human rights, moral choice, and value judgments are at the core of any educational policy formulation. In short, the concept of human rights is widely ignored in the United States education policy. Policy-makers fail to recognize that when issues of rights and justice are ignored, educational policy decisions become a choice among alternatives representing only conflicting

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1. National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform* (1983).

2. William J. Bennet et al., *A Nation Still At Risk*, 90 POL'Y REV., 23, 25 (1998).

interests and varying degrees of power among interest groups who would gain or lose as a consequence of policy changes.

Policy-makers do not speak about children as children.³ They do not deplore that “beautiful lives are [being] wasted,”⁴ nor affirm that “[e]very child among us has a precious life and holds a precious dream.”⁵ They do not proclaim the most deadly sin to be the “mutilation of a child’s spirit.”⁶ Policy-makers ignore that poor, minority children in this country are still denied their human right to education as well as their right to realize their full humanity.

This essay explains why education, particularly elementary and secondary education, is a human right. It explores how the United States historically ignored children’s right to education. This essay identifies and discusses largely ignored moral choices and value judgments and conceptions of rights and justice underlying the distribution of educational benefits and burdens in this country. The essay also demonstrates how the application of human rights standards would require a fundamental redefinition of the issues of U.S. educational policy as well as a fundamental change in our understanding of the purpose of education.

Internationally, particularly beginning with the Universal Declaration of Human Rights,⁷ education is already considered a human right. Education commissions in this country prefer to focus on inefficiencies rather than injustices. However, the existence of failing education for many children and excellent education for other children is the consequence of human decisions. These benefits for some and burdens for others are not the result of accidental or impersonal forces beyond our control. Consequently, the values and conceptions of rights and justice underlying those decisions must be identified and assessed.

The educational injustices of today are not new. In 1953, a research project entitled *The Uneducated*⁸ expressed the same concerns about the lack of quality education in the United States. The authors of *The Uneducated*, in carefully chosen words, found that although this country’s

3. JONATHAN KOZOL, ORDINARY RESURRECTIONS: CHILDREN IN THE YEARS OF HOPE 117 (2000).

4. HERBERT KOHL, 36 CHILDREN x (1998).

5. JONATHAN KOZOL, AMAZING GRACE: THE LIVES OF CHILDREN AND THE CONSCIENCE OF A NATION 88 (1995).

6. JONATHAN KOZOL, DEATH AT AN EARLY AGE vii (1967).

7. *Universal Declaration of Human Rights*, in UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, VOL. I (FIRST PART), 1-7 (1994).

8. ELI GINZBERG & DOUGLAS W. BRAY, THE UNEDUCATED (1953).

efforts to provide “an ever-higher level of education for the mass of the population” are “unique and largely successful,” certain parts of the country and particularly “certain groups” did not share in those educational efforts.⁹

The authors of *The Uneducated* cited the “wastage of manpower” during World War II as irrefutable evidence that inadequate education in certain areas had serious consequences and that the country as a whole no longer could disregard these regional deficiencies as only local community or state responsibilities.¹⁰ The report identified the southern states and specifically the Southeast as the most educationally deficient areas.¹¹ In an alarmingly frank statement, the authors attributed the “general disinterest” in the “educational problem” of the Southeast to “the fact that in that area so many of those affected by poor educational facilities were Negroes.”¹²

Although today’s jargon is different, the themes of *The Uneducated* have remained unchanged over the years. The inadequately educated are “handicapped persons” who cannot function effectively as citizens, workers or soldiers. The solution requires improving the quality of education, and the federal government plays a major role in that improvement.¹³

The heralded study, *A Nation At Risk* maintains that national goals are needed to provide common direction for educational improvement in all states.¹⁴ The key goal, however, remains pragmatic and job market directed. In the words of the National Educational Goals Panel,¹⁵ the setting of national goals “focused debate on what we needed to do in order to ensure that our students and our future workforce would be prepared to meet the technological, scientific, and economic challenges of the 21st century.”¹⁶ An internationally competitive workforce is necessary to keep United States businesses competitive in an increasingly global marketplace. The poorly educated place business at a “terrible competitive disadvantage” and jeopardize the national defense by requiring the armed forces to “spend millions of dollars on remedial

9. *Id.* at 12.

10. *Id.* at 3, 12, 227.

11. *Id.* at 233.

12. *Id.* at 227.

13. *Id.* at 235.

14. *A Nation at Risk*, *supra* note 1, at 7.

15. National Education Goals Panel, *The National Education Goals Report: Building a Nation of Learners*, (1999), available at <http://www.negp.gov/reports/99rpt.pdf>.

16. *Id.* at 2.

education in basic skills such as reading, writing, spelling, and computation."¹⁷

Thirty years after *The Uneducated*, the National Commission on Excellence in Education stated that, among other things, twenty-three million adults, thirteen percent of all seventeen-year-olds and up to forty percent of all minority youth were "functionally illiterate."¹⁸ The suggested solution to this problem was to raise academic standards in the pursuit of educational excellence.¹⁹

Since the publication of *The Uneducated*, the main difference is that persons in major cities and some poor rural areas, in addition to a significant part of the population, have been deprived of an education. Those "Negroes" that comprised the "certain groups" category in *The Uneducated* changed in name only. They are now labeled even less personally as "disadvantaged," "urban poor," and "urban underclass" in poor "inner-city" schools.

II. THE COURTS: A BASIC EDUCATION IS ENOUGH

In the 1973 landmark decision of *San Antonio Independent School District v. Rodriguez*, the Supreme Court held that education was not a constitutional right.²⁰ The Court acknowledged the "undisputed importance of education" but refused to place education among those rights that were explicitly or implicitly protected by the Federal Constitution.²¹ In the United States, education is not a right granted to individuals by the Constitution or a right recognized in individuals because they are human. In fact, as Justice Marshall noted in his dissenting opinion to *Rodriguez*, the Supreme Court "has never deemed the provision of free public education to be required by the Constitution."²²

Rodriguez concerned a constitutional challenge to the Texas system of financing public education.²³ The state of Texas provided all school districts with state education funds but permitted local school districts to supplement those state funds with revenues obtained through *ad valorem*

17. Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 558-59 (1992) (citation omitted).

18. A Nation at Risk, *supra* note 1, at 8.

19. Bitensky, *supra* note 17, at 555-58.

20. 411 U.S. 1, 35 (1973).

21. *Id.*

22. *Id.* at 111 (Marshall, J., dissenting).

23. *Id.* at 4-5.

taxes on property within each district.²⁴ Some districts were property-rich and some were property-poor, resulting in significant disparities in available “enhancement” revenues and significant differences among districts in expenditures for each child’s education.²⁵

Those who sought to have this financing system declared unconstitutional relied on the necessity of education for the intelligent exercise of the explicit constitutional right of free speech and the implicit constitutional right to vote.²⁶ The Court did not dispute the existence or essential nature of that connection but asserted that “we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice.”²⁷

The Court emphasized, moreover, that there was no claim that the state’s system of financing education resulted in an “absolute deprivation” of public education to any of its children in property-poor districts.²⁸ Rather, the plaintiffs merely charged “that they are receiving a poorer quality education than that available to children in districts having more assessable wealth.”²⁹ The majority was persuaded that the state’s system provided each child with an opportunity to acquire the “basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.”³⁰ The majority further stated that the state’s system assured a “basic education” for all children in the state.³¹

The state argued that its financing plan provided an adequate education for all children in the state.³² The majority agreed that there is no basis for a finding of interference with any fundamental right “where only relative differences in spending levels are involved. . . .”³³ As Justice

24. *Id.* at 6-7.

25. *See id.* at 7-9 (describing how the school funding system created disparities in available funds in the 1940s). Even after the legislature tried to remedy this situation, the disparities remained. *See id.* at 15-16.

26. *Id.* at 35 n.78 (“Since the right to vote, *per se*, is not a constitutionally protected right, we assume that appellees’ references to that right are simply shorthand references to the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State’s population.”).

27. *Id.* at 36.

28. *See id.* at 23.

29. *Id.*

30. *Id.* at 37.

31. *Id.* at 49.

32. *See id.* at 16-17.

33. *Id.* at 37.

Marshall noted, the majority ruling made it constitutional for a state to vary the quality of education it offered its children according to the wealth of the school.³⁴ Marshall criticized the majority for its “unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens.”³⁵ He questioned “the opportunities lost and the talents wasted for want of a broader, more enriched education [when children were] forced to attend an underfunded school with poorer physical facilities, less experienced teachers, larger classes, and a narrower range of courses than a school with substantially more funds – and thus with greater choice in educational planning.”³⁶ Marshall also raised the question of “how much education is ‘enough’ to excuse constitutional discrimination,”³⁷ given the majority’s reference to “a basic education for every child”³⁸ – or what Marshall called “some unspecified amount of education which evidently is ‘enough.’”³⁹ *Rodriguez* raised the issue of the varying quality of education that the state made available to its children. In Marshall’s words, it is “of little benefit to an individual from a property-poor district to have ‘enough’ education if those around him have more than ‘enough.’”⁴⁰

After *Rodriguez*, many litigants looked to the language of their state constitutions when challenging inequities in public school education.⁴¹ In what commentators refer to as the first wave of that litigation, plaintiffs argued that variations in school funding violated the Equal Protection Clause of the Federal Constitution – an argument denied by the Supreme Court’s decision in *Rodriguez*.⁴² The second wave of litigation centered on the equal protection and education clauses of state constitutions.⁴³ The majority of those cases, like *Rodriguez*, held that the unequal funding of school districts did not violate state equal protection clauses.⁴⁴

When the equal protection argument failed, the plaintiffs in a third wave of cases asked the courts to interpret and apply the usually vaguely

34. *See id.* at 70 (Marshall, J., dissenting).

35. *Id.* at 71 (Marshall, J., dissenting).

36. *Id.* at 84 (Marshall, J., dissenting).

37. *Id.* at 89 (Marshall, J., dissenting).

38. *Id.* at 49.

39. *Id.* at 88 (Marshall, J., dissenting).

40. *Id.* at 114 n.72 (Marshall, J., dissenting).

41. *See* Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”*: *From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152 (1995).

42. *See id.* at 1153-57.

43. *Id.* at 1157.

44. *Id.* at 1159-62.

worded education clauses of state constitutions in a different way. These cases focus on the *adequacy*, not the *equality*, of education.⁴⁵ Rather than seeking a reduction of the disparities in spending among districts like the first two waves had done, third wave plaintiffs concentrate on the sufficiency of school funding and contend that there is a “constitutional floor” of “minimally adequate education” to which all public school students are entitled.⁴⁶

More specifically, these new plaintiffs seek a definition of what constitutes sufficient education. The Education Article of the New York State Constitution, for example, states only that “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”⁴⁷ In 1982, the New York State Court of Appeals read this language to require the State to provide a “sound basic education” to students in the State’s public schools.⁴⁸ Thirteen years later, the court of appeals, instead of specifying what the constitutional mandate of a sound basic education required, provided the State Supreme Court with a “template” to be used in determining if the constitutional obligation was met: “whether the children in the plaintiffs’ districts are in fact being provided the opportunity to acquire the basic literacy, calculating and verbal skills necessary to enable them to function as civic participants capable of voting and serving as jurors.”⁴⁹

The court of appeals did conclude that children are entitled to “minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn,” “to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks,” and “to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies” conducted by “personnel adequately trained to teach those subject areas.”⁵⁰ Given the court’s repeated use of the terms “adequate,” “basic,” and “minimally adequate” to describe the education to which the state’s public school students were entitled, the New York Supreme Court agreed that the

45. *Id.* at 1162.

46. *Campaign For Fiscal Equity v. New York*, 719 N.Y.2d. 475, 483 (N.Y. Sup. Ct. 2001).

47. *Id.* at 482 (citing N.Y. CONST. art. XI, § 1).

48. *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 48 (N.Y. 1982).

49. *Campaign For Fiscal Equity*, 86 N.Y.2d at 317-18.

50. *Id.* at 317.

Education Article did not require a “state of the art” education or incorporate “the highest aspirations of educators.”⁵¹

However, the New York Supreme Court rejected the contention that a “sound basic education” means only “an education sufficient to allow high school graduates simply to serve as jurors and voters.”⁵² The court instead held that the “sound basic education” mandated by the Education Article “consists of the foundational skills that students need to become productive citizens capable of civic engagement and sustaining competitive employment.”⁵³

The “template” provided by the New York State Court of Appeals is consistent with the decisions of the U.S. Supreme Court and other state courts holding that federal and state constitutions entitle children in public schools to an opportunity for an education that is “basic” or “minimally adequate.”⁵⁴ Even the most ambitious state court definition of what constitutes an adequate education uses the adjective “sufficient” to limit the quantity and quality of the education that must be provided.⁵⁵

51. *Campaign For Fiscal Equity*, 719 N.Y.2d. at 483.

52. *Id.* at 484.

53. *Id.* at 487. The New York Supreme Court observed: “[m]ost state courts that have examined the substantive right to education under the education clauses of their constitutions have recognized both civic participation and participation for employment as the basic purposes of public education.” *Id.* at 486.

54. See Timothy D. Lynch, Note, *Education as a Fundamental Right: Challenging the Supreme Court’s Jurisprudence*, 26 HOFSTRA L. REV. 953, 973 (1998)(stating that “[e]ven where courts have found that their states have created unequal educational opportunities that work to the express disadvantage of many poor children, there has not been a substantial change for the better for the poor children the courts intended to benefit”).

Another study of state litigation concluded “that without the guidance of the United States Supreme Court, there has been no consensus among the state courts as to what constitutes an acceptable non-discriminatory system of public school finance. In addition, the courts have also demonstrated difficulty in determining what constitutes an ‘adequate education.’” Frank J. Macchiarola & Joseph G. Diaz, *Disorder in the Courts: The Aftermath of San Antonio Independent School District v. Rodriguez in the State Courts*, 30 VAL. U. L. REV. 551, 570 (1996).

55. See *Rose v. Council For Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989). The Supreme Court of Kentucky held that:

A child’s right to an adequate education is a fundamental one under our Constitution. The General Assembly must protect and advance that right. We concur with the trial court that an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to

Minimum or basic education, however, is not enough to live a fully human life.

Twenty years before *Rodriguez*, the authors of *The Uneducated* understood that it was not the lack of opportunity for *any* schooling that was the cause of illiteracy but rather the *quality* of the schooling children received.⁵⁶ The *Rodriguez* majority did not explain what it meant by the “basic minimal skill” level of education sufficient to reject the constitutional challenge in that case.

The U.S. Army first used the term “functional literacy” in World War II to indicate the basic capability to understand military instructions.⁵⁷ The Army defined the functionally literate as those who were able “to comprehend bulletins, written orders and directives”; possessed sufficient language skills “to use and understand the everyday oral and written language necessary for getting along with officers and men”; were able to understand their pay accounts, laundry bills and “conduct their business in the PX [post exchange]”; and were able to adjust to military training and army life.⁵⁸

This basic level of education is sufficient for *survival* because it enables a person to perform vocationally and provides the elementary social skills necessary to function in society.⁵⁹ Education by rote, repetition, and literal comprehension does not develop the capacity to draw inferences, to generalize, to criticize, to reflect on one’s place in the world, to transfer and apply what was learned to other situations, to see things from new perspectives, or to distinguish the desirable from the undesirable.⁶⁰

appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Id. at 212.

56. See GINZBERG & BRAY, *supra* note 8, at 232-33.

57. See Suzanne de Castell & Allan Luke, *Models of Literacy in North American Schools: Social and Historical Conditions and Consequences*, in LITERACY, SOCIETY, AND SCHOOLING 87, 100-01 (Suzanne de Castell et al. eds., 1986).

58. GINZBERG & BRAY, *supra* note 8, at 69-70.

59. Suzanne de Castell et al., *On Defining Literacy*, in LITERACY, SOCIETY AND SCHOOLING 3, 7 (Suzanne de Castell et al. eds., 1986).

60. See Daniel Resnick, *Spreading the Word: An Introduction*, in LITERACY IN HISTORICAL PERSPECTIVE 1, 3 (Daniel P. Resnick, ed., 1983); Rose-Marie Weber, *Adult Literacy in the United States*, in TOWARD A LITERATE SOCIETY: THE REPORT OF THE COMMITTEE ON READING OF THE NATIONAL ACADEMY OF EDUCATION 147, 151-52 (John B. Carroll & Jeanne S. Chall eds., 1975).

Effective participation in a democratic society requires more than a basic level of education and literacy. In a democracy, a person needs more than “enough” education to participate effectively in social and economic systems.⁶¹ The level of literacy, which defines education as basic occupational, voter, and consumer skills, promotes passivity and acquiescence. It is not enough to comprehend and follow rules. Democracy works only when a person is able to make what one expert calls “second order” informed, reasoned judgments about the desirability of those rules.⁶² Such judgments require “competency above and beyond the ability to carry out limited interpersonal and specific occupational responsibilities.”⁶³

Ten years after the Supreme Court’s decision in *Rodriguez*, the National Commission on Excellence in Education blamed low standards and the adherence to minimum requirements for much of the country’s poor educational performance. The Commission found that “[I]n some metropolitan areas ‘basic literacy’ has become the goal rather than the starting point” of education.⁶⁴ The report criticized public school systems for setting academic standards too low and for expressing “our educational standards and expectations largely in terms of ‘minimum requirements’” rather than pursuing excellence in education.⁶⁵ The Commission set a goal of “develop[ing] the talents of *all* to their *fullest*.”⁶⁶

In 1989, the fifty state governors met in an education summit and proclaimed a goal of excellence that would enable “all children [to] reach their highest educational potential.”⁶⁷ Ten years later, the National Education Goals Panel also rejected standards that call for “minimal competency.”⁶⁸ In 1998, a group of influential educators, business leaders and policy-makers issued *A Nation Still At Risk*, an educational reform “manifesto” that called for the “true equality of opportunity that results from providing every child with a first-rate primary and secondary education.”⁶⁹

The entitlement was not only to an equal opportunity for education

61. DE CASTELL, *supra* note 59, at 11.

62. *See id.*

63. *Id.* at 11-12.

64. *A Nation at Risk*, *supra* note 1, at 14.

65. *Id.*

66. *Id.* at 13 (emphasis added).

67. Bitensky, *supra* note 17, at 557 (citation omitted).

68. National Education Goals Panel, *supra* note 15, at 4.

69. *A Nation Still at Risk*, *supra* note 2, at 25.

but also to an education of excellent quality – not an equal opportunity for some “basic” amount of education or an equal opportunity for only some children to an excellent education. *A Nation Still At Risk* joined many others in deploring the “huge” gaps in education “between advantaged and disadvantaged students” that “handicap[] poor children in their pursuit of higher education, good jobs, and a better life.”⁷⁰ In sum, these manifesto writers maintain “that education has become a civil rights issue.”⁷¹

But this perspective is too limiting. Education is more than a civil right. It is a human right.

III. INTERNATIONAL DECLARATIONS: EDUCATION IS A HUMAN RIGHT

Human rights are a species of moral rights which all persons possess simply because they are human,⁷² and not because these rights were earned or acquired by special enactments or contractual agreements. Michael Perry maintains that the concept of human rights consists of two parts. According to the first part, “every human being is sacred” and, according to the second part, because every human being is sacred, “certain things ought not to be done to any human being and certain other things ought to be done for every human being.”⁷³ Without entering the relative versus universal debate, Perry further asserts that human beings are all alike at least in some essential respects.⁷⁴ Furthermore, there is a need to “ensur[e] greater openness and sensitivity to different cultural contexts in the implementation of human rights standards.”⁷⁵

Human beings are sacred: they are inviolable, they have intrinsic dignity and worth, and they are ends to themselves, not to be used for the fulfillment of others’ purposes. For many, the belief that human beings are sacred is an inescapably religious conviction. Some believe that human beings were created in the image of God. Some further believe, as the Declaration of Independence states, that “all Men are created equal” and “are endowed by their Creator with certain unalienable Rights.”⁷⁶

70. *Id.*

71. *Id.* at 26.

72. MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 4-5 (1998).

73. *Id.*

74. *Id.* at 65.

75. *Id.* at 83 (citation omitted).

76. David T. Ozar, *Rights: What They Are and Where They Come From*, in *PHILOSOPHICAL ISSUES IN HUMAN RIGHTS: THEORIES AND APPLICATIONS* 9-10

Whether religion-based or not, many find the sacredness of human beings one of the unique features making them special among all other beings. A human being is more than a parcel of matter or an element in nature.⁷⁷ Human beings make their own decisions and have their own purposes.⁷⁸ They are not merely sensors of the world responding to stimuli.⁷⁹ Humans' ability to reason makes them knowers, judges, creators, and communicators who can "put information together to form generalized truths about the world [and] [t]hey use these truths to understand each new situation that arises."⁸⁰ They "are also able to reshape the world and to share their experiences of the world with one another in language, symbol, and culture."⁸¹ Humans should therefore be treated as originators, shapers, and builders of human communities.⁸²

At the foundation of human rights is the idea that every human being is sacred, and has certain responsibilities to all other humans.⁸³ Such responsibility is necessary because "the good of every human being is an end worth pursuing in its own right *because every human being is sacred.*"⁸⁴ Although the dignity of the human person arises from their sacredness, it means little unless they possess rights, including the basic right to be respected.⁸⁵

In general, rights are claims on others (individuals and governments) that oblige them to refrain from doing anything that interferes with the exercise of those rights or to take action to promote, implement, and enforce those rights. The rights people need to live a human life include those that a government must not invade (negative rights) and those that a government must provide or promote (positive rights).⁸⁶ Consequently, human rights are drawn in part from the "classical 'civil

(Patricia H. Werhane et al. eds., 1986). See generally JACQUES MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* (1943). Maritain maintains, for example, that "the human person is the image of God" and that "[a] person possesses absolute dignity because he is in direct relationship with the absolute, in which alone he can find his complete fulfillment." *Id.* at 4.

77. See MARITAIN, *supra* note 76, at 2.

78. See Ozar, *supra* note 76, at 10.

79. See *id.*

80. *Id.*

81. *Id.* at 11.

82. *Id.*; MARITAIN, *supra* note 76, at 4-7.

83. Perry, *supra* note 72, at 51.

84. *Id.* at 60.

85. See MARITAIN, *supra* note 72, at 65.

86. See James A. Gross, *A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association*, 3 *EMPLOYEE RTS. & EMP. POL'Y J.* 65, 69 (1999).

and political' rights of non-intervention [by the state] in the lives of private citizens" – for example, the right to liberty, speech, assembly, association, religion and equality before the law.⁸⁷ Human rights also include economic, social, and cultural rights, which oblige states to intervene and ensure subsistence, physical security, safety and health, housing, education and other positive rights.⁸⁸

A modern revolution in the international law of human rights began after World War II. Condemnation of the atrocities that shocked the conscience of most of the world led to an international consensus that one of the principle purposes of the United Nations was to advocate and protect human rights.⁸⁹ International human rights law formally established education as a human right, beginning with the issuance of the United Nations Charter in 1945.⁹⁰

The Universal Declaration of Human Rights (UDHR) adopted by the UN in 1948, is still the central document in the international law of human rights. The UDHR sets forth the human rights that people need to be fully human, that is, "not only to live but to live with dignity"⁹¹ Eleanor Roosevelt, who played an integral role in drafting the document, warned that human rights would have little meaning unless they were enforced in the places people lived, worked and went to school.⁹² Article

87. Paul Sieghart, *International Human Rights Law: Some Current Problems*, in HUMAN RIGHTS FOR THE 1990S: LEGAL, POLITICAL AND ETHICAL ISSUES 25, 26 (Robert Blackburn & John Taylor, eds., 1991).

88. *See id.*

89. *See* Ann I. Park, Comment, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1216-17 (1987).

90. *See generally* *Charter of the United Nations*, in HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 1365-75 (2d ed. 2000).

91. *See* Ziyauddin S. Saiyed, A PAPER-COMPILATION, at <http://litserver.literacy.upenn.edu/products/ili/webdocs/saiyed.html> (last visited Apr. 2, 2001).

92. *See The Universal Declaration of Human Rights: A Magna Carta for All Humanity* (1997) at <http://www.unhchr.ch/udhr/miscinfo/carta.htm>. The document quotes Eleanor Roosevelt as stating:

Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.

22 of the UDHR provides that everyone has a right to the “economic, social and cultural rights indispensable for his dignity and the free development of his personality.”⁹³ Article 26 affirms not only that “[e]veryone has the right to education” but also that “[e]ducation shall be directed to the full development of the human personality.”⁹⁴

To clarify the rights proclaimed in the UDHR and to provide for their implementation, the United Nations subsequently drafted two covenants, one on economic, political and cultural rights,⁹⁵ and the other on civil and political rights.⁹⁶ Those two covenants, completed in 1966, together with the UDHR and the optional protocol, constitute the International Bill of Human Rights.⁹⁷ Article 13 of the International Covenant on Economic, Social and Cultural Rights reaffirms the right to education that has as its objective “the full development of the human personality.”⁹⁸

In 1988, a United Nations Working Group drafted the Convention on the Rights of the Child, which became effective in 1990.⁹⁹ The convention explicitly treats a child “as an active subject of rights and not only as the object of special protection and assistance.”¹⁰⁰ The Convention specifically established a child’s right to an education that focuses on “[t]he development of the child’s personality, talents and mental and physical abilities to their fullest potential.”¹⁰¹

The UDHR, the International Covenant on Economic and Cultural Rights, the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights and other human rights treaties and declarations all guarantee every person the right to be free from

Id.

93. *Universal Declaration of Human Rights*, *supra* note 7, at 5.

94. *Id.* at 6.

95. *International Covenant on Economic, Social and Cultural Rights*, in UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, VOL. I (FIRST PART), 8-19 (1994).

96. *International Covenant on Civil and Political Rights*, in UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, VOL. I (FIRST PART), at 20-40 (1994).

97. UNITED NATIONS, UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS 43 (1994).

98. *International Covenant on Economic, Social and Cultural Rights*, *supra* note 95, at 13.

99. *See* ACTION IN THE FIELD OF HUMAN RIGHTS, *supra* note 97, at 54-55; *see also* *Convention on the Rights of the Child*, in UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, VOL. I (FIRST PART), at 174-95 (1994).

100. ACTION IN THE FIELD OF HUMAN RIGHTS, *supra* note 97, at 55.

101. *Convention on the Rights of the Child*, *supra* note 99, at 185.

discrimination. The Convention Against the Discrimination in Education,¹⁰² adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1960 is relevant. The Convention Against Discrimination in Education considers discrimination in education to be a violation of the rights set forth in the UDHR.¹⁰³ The Convention refers to all types and levels of education, the standard and quality of education, and the conditions under which it is provided.¹⁰⁴ The Convention asserts that discrimination in education includes lower standards for any group or person as well as poor learning conditions for any group or person.¹⁰⁵ The Convention also compels states that adopt its provisions to undertake all necessary measures to ensure that “[e]ducation shall be directed to the full development of the human personality. . . .”¹⁰⁶ Such states are also committed to ensuring that all public education institutions have equal standards and learning conditions.¹⁰⁷

IV. WHY EDUCATION IS A HUMAN RIGHT

Although the United Nations is long on lists of human rights, it is often short about the foundations of human rights in moral and political thought. For example, education is repeatedly asserted as a human right, but without careful explanation of why it is a human right. It is necessary to justify and substantiate education as a human right, particularly in a society such as ours where education is seen mainly in utilitarian and instrumental terms as a skill needed for both economic and social success.

The author of *A History of the Freedmen’s Bureau*¹⁰⁸ found a religious motivation behind the freed slaves’ desire for the learning so long forbidden: “In learning to read he . . . was entering a Mystery which seemed almost holy.”¹⁰⁹ As one ex-slave exclaimed: “[y]ou can read. JOHN GREEN, YOU ARE A MAN!”¹¹⁰ John Green understood that a

102. *Convention Against Discrimination in Education*, in UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, VOL. I (FIRST PART), at 101-07 (1994).

103. *Id.* at 101.

104. *Id.* at 102.

105. *Id.*

106. *Id.* at 104.

107. *Id.* at 103.

108. GEORGE R. BENTLEY, *A HISTORY OF THE FREEDMEN’S BUREAU* (1955).

109. *Id.* at 170.

110. *Id.* (citation omitted).

lack of education represented a denial of part of his own humanity. The ability to read helped make John Green aware of his full humanity. Literacy was the beginning of self-awareness. It was the beginning of education for becoming more fully human, "for the affirmation of men [and women] as persons," and for understanding that they are not things to be possessed or used by another.¹¹¹

Only human beings are introspective: they are able to examine, contemplate, and reflect on their own minds, perspectives, emotions, and actions. Human beings require the basic rights of subsistence and physical security to enjoy other rights. Humans also need education to develop their capacity to understand and reflect more completely on what and who they are and what they are doing. Education is a basic right necessary to realize and exercise other rights.¹¹² Paulo Freire explained that, men and women are unfinished, incomplete beings, who are aware of their own incompleteness and are always in the process of becoming.¹¹³ Their education must be ongoing.¹¹⁴

Education is a uniquely human experience that enables men and women to understand themselves, to discover their potential, to understand one another better, and to move toward a fuller human life.¹¹⁵ In Freire's words, people have a vocation to be more fully human which "is not the privilege of some few men, but the right of every man."¹¹⁶ Education that provides a negligible amount of knowledge and skill, enough only to make a person employable, leaves individuals not "all that much above the animal level."¹¹⁷ The victims of such education generally become "unreflecting, unrecording, time-bound, humans" who cannot, or are conditioned not to, separate themselves from what they do and merely adapt to the demands of the world in which they exist.¹¹⁸ These individuals live far less than a fully human life.

Ex-slave John Green needed more than legal emancipation to live a fully human life. His self-determination could not begin without self-

111. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 28, 32-33, 158 (Myra Bergman Ramos trans., 1999).

112. Douglas Ray & Norma Bernstein Tarrow, *Human Rights and Education: An Overview*, in *HUMAN RIGHTS AND EDUCATION* 3 (Norma Bernstein Tarrow ed., 1987).

113. FREIRE, *supra* note 111, at 72.

114. *Id.*

115. DENNY TAYLOR & CATHERINE DORSEY-GAINES, *GROWING UP LITERATE: LEARNING FROM INNER-CITY FAMILIES 200-01* (1988).

116. FREIRE, *supra* note 111, at 76.

117. John Wilson, *The Properties, Purposes, and Promotion of Literacy*, in *LITERACY, SOCIETY, AND SCHOOLING* 27, 31 (Suzanne de Castell et al. eds., 1986).

118. *Id.*

knowledge and could not grow without the flowering of his rational and intellectual life and the development of the life of the spirit within him. The humanizing education to which all human beings are entitled satisfies a fundamental aspiration for self-development and autonomy.¹¹⁹ Autonomy is essential to a fully human life and depends in great part on a strong education that affirms men and women as decision-makers and inspires and promotes their creative presence in the world.¹²⁰

Although humans are “autobiographical,” the pursuit of full humanity cannot be carried out in complete isolation, that is, in what would be an individualism of “tragic isolation of each one in his own selfishness or helplessness.”¹²¹ A fully human life is realized only in community and in communion with other persons in the world. The good of the community, however, is the common good of human persons. Human life is neither entirely personal nor exclusively communal.¹²²

Education that enables people to become more fully human also enables men and women to critique their existence. Education enables people to participate with others “in a way of being in the world,” conscious not only of what and who they are but also of their human heritage and history.¹²³ That does not mean, however, that they would accommodate themselves to an unjust world. The education that people need enables them to be subjects who know and act rather than objects that are acted upon. Their future is not something to be received passively or submissively but should be created by them.¹²⁴ Those individuals who are more conscious of their humanity and the humanity of others, more aware of their rights and the rights of others to be respected as human persons, and more aware of their right to fulfill their own destinies are much more likely to cooperate to make a good society and to “struggle against the obstacles to their humanization.”¹²⁵ When a person is “[p]rovided with the proper tools for such an encounter,” he discovers himself, realizes his potential, and “wins back his right to *say his own word, to name the world.*”¹²⁶

119. See MARITAIN, *supra* note 76, at 44.

120. See FREIRE, *supra* note 111, at 141.

121. See JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 82-83 (1947); FREIRE, *supra* note 111, at 66.

122. MARITAIN, *supra* note 121, at 55.

123. Robert C. Solomon, *Literacy and the Education of the Emotions*, in *LITERACY, SOCIETY, AND SCHOOLING* 37, 44-45 (Suzanne de Castell et al. eds., 1986); FREIRE, *supra* note 111, at 64-65, 79.

124. FREIRE, *supra* note 111, at 20-21.

125. *Id.* at 100; MARITAIN, *supra* note 76, at 65.

126. FREIRE, *supra* note 111, at 13 (emphasis in original).

The importance of human rights “in international relations and international moral discourse means that almost every [nation] now finds it necessary to claim to be upholding human rights whether they are or not.”¹²⁷ It is hypocrisy at least to engage in human rights talk without action which often takes the form of “self-righteous posturing” and selective condemnation of human rights violations.¹²⁸ As Freire writes: “[t]o glorify democracy and to silence the people is a farce; to discourse on humanism and to negate man is a lie.”¹²⁹

The history of mankind is proof enough that human life is cheap. Human lives have been and continue to be abused and wasted. Many children in our country are treated not only as if their lives are cheap and do not matter but also as if they are not members of the human race. Among these children are the minority students who exist at the margin of the educational system. They are the “educationally ‘handicapped’”; the “disadvantaged” who are lazy and not “motivated” to learn or, more bluntly, they are “savages” or “animals” who are uncontrollable and unteachable.¹³⁰ However, these children, particularly black children, are labeled and believed to be “inherently inferior.”¹³¹ These beliefs are not of recent origin. As Thomas Sowell states:

Virtually every black child who has grown up in this country over the past 300 years has been told, by word or deed, that he is inferior intellectually, that the expectations of those around him are geared to his lack of capacity, that when he shows progress it is something of a fluke, and that when he persists in showing progress he is something of a freak.¹³²

This racial inferiority doctrine was used to justify some of our greatest moral wrongs, including the violation of these children’s human rights. The doctrine is invoked in one form or another primarily because it blames the victims for their plight; these children are at fault, not the educational system. The twisted conclusion is that these children are the

127. Gross, *supra* note 86, at 103 (internal quotations and footnote omitted).

128. *Id.*

129. FREIRE, *supra* note 111, at 80.

130. See John U. Ogbu, *Literacy and Schooling in Subordinate Cultures: The Case of Black Americans*, in LITERACY IN HISTORICAL PERSPECTIVE, 129, 142 (Daniel P. Resnick ed., 1983); Lauren B. Resnick & Betty H. Robinson, *Motivational Aspects of the Literacy Problem*, in TOWARD A LITERATE SOCIETY 257 (John B. Carrol & Jeanne S. Chall eds., 1975); THOMAS SOWELL, BLACK EDUCATION: MYTHS AND TRAGEDIES 222-23 (1972); KOZOL, *supra* note 5, at 128; KOHL, *supra* note 4, at vii.

131. SOWELL, *supra* note 130, at 223.

132. *Id.* at 270.

pathology of an otherwise healthy and just society.¹³³ This violation is complete when the children become convinced of their unfitness and their life is suppressed.

V. THE GAP BETWEEN IDEALS AND PRACTICE

Based on his experiences teaching in an elementary school in Harlem, Herbert Kohl concluded that “[c]hildren who fail, whose lives are miserable, are made that way in and out of school because of some form of injustice.”¹³⁴ Kohl maintained that all teachers are required “to hone [their] skills and refuse to believe there is one child destined for failure.”¹³⁵ Kohl also believed that each teacher had a responsibility “to act politically in the name of his or her students for the creation of a just world where children can do rewarding work and live happy lives.”¹³⁶

Everyone is responsible for respecting and promoting the human right of all children to education. There is, however, a great gap between rhetoric and reality, between ideals and practice. Many children are concentrated in the most poverty-stricken school districts in the country. These children still receive an education that is separate and unequal almost fifty years after the Supreme Court, in *Brown v. Board of Education*,¹³⁷ held that even when physical facilities and other “tangible” factors were equal, state-mandated school segregation based on race itself “generates a feeling of inferiority” in children “that may affect their hearts and minds in a way unlikely ever to be undone.”¹³⁸ The Court found separate educational facilities to be inherently unequal, but did not assert any right of children to equality of educational resources. The Court found publicly funded schools unequal, yet it did not address the associated disparities in the quality of education available to white and black children. The schools that minority children attend are still segregated racially and are still unequal in quality and resources in part because school funding across the nation is dependent predominately on local property taxes.¹³⁹

The *Rodriguez* Court upheld these systems for funding education based on property taxes.¹⁴⁰ One year after *Rodriguez*, the Court in

133. FREIRE, *supra* note 111, at 55.

134. KOHL, *supra* note 4, at x.

135. *Id.*

136. *Id.*

137. 347 U.S. 483 (1954).

138. *Id.* at 494.

139. Lynch, *supra* note 54, at 966-67.

140. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6 (1973).

*Milliken v. Bradley*¹⁴¹ sharply limited the power of federal courts to achieve racial balance in schools by ruling that the courts could not remedy *de facto* segregation not caused by an explicit government policy.¹⁴² As Justice Douglas stated in his dissent to *Milliken*, “[t]oday’s decision, given *Rodriguez*, means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the black schools are not only ‘separate’ but ‘inferior.’”¹⁴³

The inferiority of most “separate” schools is well documented. Slavery ended over 130 years ago, yet black children remain subject to inferior education in both segregated and integrated schools.¹⁴⁴ Freed slaves and their children had a desire for education so strong that it has been described as “unabated,” and “amounting almost to a passion.”¹⁴⁵ Another commentator described the freedmen’s “regard for schooling” as having “almost a religious nature.”¹⁴⁶ Congress created the Bureau of Refugees, Freedmen and Abandoned Lands in part to help ex-slaves attain the schooling they desired:

In the first fever of freedom, colored men, women, and children thronged around the teachers who had come to give them the magic of reading and writing. Their classes convened indoors and outdoors, under live oaks and magnolias, in barracks and church basements and army hospital buildings. [In one school] the colored children prepare for their writing lesson by kneeling on the floor and putting their copybooks on the benches they had deserted. Having to improvise desks, they [looked as if] “they were all saying their prayers.”¹⁴⁷

It was a hopeful and exciting time and the “toll of school bells across a land that had never heard such sounds was in itself revolutionary.”¹⁴⁸ The period of hope did not last for many reasons. These reasons are as real today as they were then. The Freedmen’s Bureau had insufficient financial resources,¹⁴⁹ and the Bureau and its allies were unable to attract

141. 418 U.S. 717 (1974).

142. *Id.* at 744-45.

143. *Id.* at 761 (Douglas, J., dissenting).

144. Ogbu, *supra* note 130, at 144.

145. RANDY FINLEY, FROM SLAVERY TO UNCERTAIN FREEDOM: THE FREEDMEN’S BUREAU IN ARKANSAS, 1865-1869, 122-23 (1996).

146. BENTLEY, *supra* note 108, at 170.

147. *Id.* (citation omitted).

148. FINLEY, *supra* note 145, at 139.

149. PAUL A. CIMBALA, UNDER THE GUARDIANSHIP OF THE NATION: THE FREEDMAN’S BUREAU AND THE RECONSTRUCTION OF GEORGIA, 1865-1870, 105-06, 114 (1997).

and retain enough competent teachers. Many of the teachers “shared the standard racial assumptions of the day.”¹⁵⁰ School buildings were dilapidated.¹⁵¹ Often, there were few useful books and other materials for the children.¹⁵² Finally, there was an overwhelming pupil to teacher ratio.¹⁵³

It was widely accepted that education, although separate, was equal for black and white children.¹⁵⁴ This myth ignored the reality of unheated cabins and tar paper shacks passing as school buildings for black children; out-dated, previously used, hand-me-down text books from white schools; substantially lower pay for teachers and administrators who taught black students; black children subjected to over-crowded classes, poor curricula, and poorly prepared teachers.¹⁵⁵ States, particularly southern states, spent “very much more for white pupils than for Negro pupils, and they [spent] the smallest amount for Negro pupils living in [rural areas].”¹⁵⁶

For certain underprivileged children, education was the one great hope of escaping dehumanization.¹⁵⁷ One hundred and thirty years later, education for children of color remained largely unchanged. Jonathan Kozol wrote about the “tenacity and courage”¹⁵⁸ of Black children who went to school with some “trust that they are going to be treated fairly” only to have their wills broken and their trust betrayed.¹⁵⁹ What else could be expected with so little change in the available education? Black children still use old and biased textbooks.¹⁶⁰ Often black children have only basic items such as crayons and paper, because churches or benefactors pay for them out of their own financial resources.¹⁶¹ In addition, there are few books in Black children’s school libraries.¹⁶²

150. Paul A. Cibala, *Making Good Yankees: The Freedmen’s Bureau and Education in Reconstruction Georgia, 1865-1870*, in *AFRICAN AMERICAN LIFE IN THE POST-EMANCIPATION SOUTH, 1861-1900*, VOL. 2: THE FREEDMEN’S BUREAU AND BLACK FREEDOM 57 (Donald G. Nieman ed., 1994).

151. FINLEY, *supra* note 145, at 131-32.

152. *Id.* at 138-39.

153. *Id.* at 139-40.

154. Pamela J. Smith, *Our Children’s Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 *How. L.J.* 133, 169-70 (1999).

155. *Id.* at 171-74; GINZBERG & BRAY, *supra* note 8, at 132.

156. GINZBERG & BRAY, *supra* note 8, at 234.

157. SOWELL, *supra* note 130, at 229.

158. KOZOL, *supra* note 3, at 5-6.

159. *Id.* at 218.

160. Smith, *supra* note 154, at 172.

161. KOZOL, *supra* note 3, at 214.

162. SOWELL *supra* note 130, at 230 (citation omitted).

Furthermore, black children have less access to physics, chemistry and language labs, which are inadequate when available.¹⁶³ “Enrichment” opportunities for Black children are rare.¹⁶⁴ Black children received their education from the largest number of uncertified and inexperienced teachers,¹⁶⁵ and learning is difficult for these students due to overcrowded classrooms.¹⁶⁶ Black children have classes in unsafe and deteriorating buildings,¹⁶⁷ and have limited pre-school opportunities.¹⁶⁸ “Apartheid education,” as Kozol calls it, with schools separated racially and economically, “are fearful mechanisms for apportionment of destinies.”¹⁶⁹ Many people would consider the apartheid system in South Africa as a massive and systematic violation of the most basic human rights. Inferior education for non-whites was integral to that system. What made the education inferior in apartheid South Africa was exactly what has made education in the United States inferior: treatment of children from certain groups as inferior; overcrowded classrooms; dilapidated school buildings; no textbooks or books that are out-of-date or need to be replaced; overburdened teachers; unqualified teachers; and teachers and administrators who are disinterested or even hostile.¹⁷⁰ Inferior education was readily acknowledged as a violation of human rights in apartheid South Africa. In the United States, however, it is characterized, at most, as a misfortune and inefficiency.

A. Injustice Not Misfortune

The *Rodriguez* Court asserted that it was “inevitable that some localities are going to be blessed with more taxable assets than others.”¹⁷¹ This assertion suggests that benefits and burdens in a society are distributed, not by some group’s or government’s deliberate allocation of

163. *Id.* (citation omitted).

164. Erwin Chemerinsky, *Lost Opportunity: The Burger Court and the Failure to Achieve Equal Educational Opportunity*, 45 MERCER L. REV. 999, 1002 (1994).

165. KOZOL, *supra* note 3, at 201.

166. Amy J. Schmitz, Note, *Providing an Escape for Inner-City Children: Creating a Federal Remedy for Educational Ills of Poor Urban Schools*, 78 MINN. L. REV. 1639, 1642-43 (1994); KOZOL *supra* note 3, at 215.

167. Schmitz, *supra* note 166, at 1643.

168. SOWELL, *supra* note 130, at 231; Chemerinsky, *supra* note 164, at 1006; Schmitz, *supra* note 166, at 1643-44; KOZOL, *supra* note 3, at 214.

169. KOZOL, *supra* note 3, at 292.

170. Jonathan Jansen, *Knowledge and Power in the Classroom: Rethinking Educational Research and Practice*, in KNOWLEDGE AND POWER IN SOUTH AFRICA: CRITICAL PERSPECTIVES ACROSS THE DISCIPLINES 189-91 (Jonathan D. Jansen ed., 1991).

171. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 16, 54 (1973).

income and wealth to particular people, but rather by the interaction of a multitude of impersonal forces and circumstances over which people have no control – possibly, even by chance or luck.

The consequences for people in such a system are neither intended nor foreseen. It is futile to demand justice of such a process when there is no answer to the question of who has been unjust. A victim of the system would not be able to identify an individual or group to assert a just complaint.¹⁷² In fact, justice is not only allegedly irrelevant, but in the words of a distinguished economist, “‘social justice’ is simply a quasi-religious superstition.”¹⁷³ This is a value system that disassociates misfortune and fault. The world is “full of uncaused events, littered with things that are just one of those things.”¹⁷⁴ In the scramble to disown responsibility for the suffering of others, evil is found only in the “blamable other.”¹⁷⁵

The denial of education, which children need to live full human lives, however, is not a misfortune, it is an injustice. This denial is a violation of their rights as human beings. This violation is not caused by uncontrollable forces or bad luck. Rather, it is caused by the deliberate moral choices, and the political and economic choices, made by certain communities pursuing their own self-interest and the self-interest of their children. Those individuals in wealthy school districts, for example “have a major stake in preserving the lifetime advantages that their privileged, though tax-supported, schools offer their children.”¹⁷⁶

There is no accident or error here.¹⁷⁷ There is something brutal and selfish in this nation that permits human rights violations to be

172. KOZOL, *supra* note 3, at 247. In commenting on a neighborhood minister’s reaction to this theory, Jonathan Kozol writes:

The idea of unauthored evil, of inert and agentless injustice where advantages and disadvantages are doled out more or less by chance (clean air and charming neighborhoods with nice boutiques and outdoor restaurants on one side of the city, children wheezing from their asthma, waking up each day to odors of incinerators and of burning trash and plastics on the other side), may be appealing, and is certainly exonerating, to the powerful.

Id.

173. James A. Gross, *The Broken Promises of the National Labor Relations Act and the Occupational Safety and Health Act: Conflicting Values and Conceptions of Rights and Justice*, 73 CHI.-KENT L. REV. 351, 373 (1998) (quoting FRIEDRICH A. HAYEK, *THE MIRAGE OF SOCIAL JUSTICE* 66 (1976) (vol. 2 of *LAW, LEGISLATION AND LIBERTY*)).

174. ANDREW DELBANCO, *THE DEATH OF SATAN: HOW AMERICANS HAVE LOST THE SENSE OF EVIL* 216 (1995).

175. *Id.* at 234.

176. JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS* 200 (1991).

177. JONATHAN KOZOL, *ILLITERATE AMERICA* 89 (1985).

committed against children of certain groups.¹⁷⁸ Some identify it as “greed, racism, political cowardice and public apathy.”¹⁷⁹ Others view it as an attempt to defend and retain the economic, political and social advantages and privileges that whiteness has embodied in this country.¹⁸⁰ The lack of concern for the plight of non-white children may be explained by the same reasons that led to the end of the benevolence given the Freedmen’s Bureau’s educational efforts: “the negro suffers from the magnitude of the undertaking, from his remoteness from view, and the general disposition among mankind to let everybody hoe their own weeds so long as they don’t shade one’s own garden.”¹⁸¹

Some reasonably wealthy individuals forget their own vulnerabilities. They become passive beholders of the humiliation of others, even children. They are complacent about injustice when it is not inflicted on them. If we can prevent or oppose wrongs, but are simply indifferent and do nothing to prevent them, we contribute to injustice. This passive injustice goes beyond the usual legalistic or adjudicatory model which defines injustice as the violation of established rules by actively unjust people. It recognizes that inactive or passive individuals contribute to injustice by turning away from actual or potential victims.¹⁸²

The lack of concern for the education of certain children manifests itself in different ways, each with its own rationalization. Some people avoid the public system completely. They enroll their children in private schools, wanting only the best for their children regardless of the expense. Others close their eyes to what they choose not to see, and wish to avoid contact with it in their private lives.¹⁸³ Still others point to the “little miracles,” those heroes who succeed despite their disadvantages, as evidence that anyone can do it if they are willing to work hard.¹⁸⁴

178. *Id.*

179. KOZOL, *supra* note 176, at 72.

180. Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1713, 1745, 1759-60 (1993).

181. BENTLEY, *supra* note 108, at 171 (citation omitted).

182. See generally JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* (1990) (containing an excellent discussion of “passive injustice”).

183. See KOHL, *supra* note 4, at 101-02.

184. KOZOL, *supra* note 5, at 160. Kozol adds:

The trouble with miracles, however, is that they don’t happen for most children; and a good society cannot be built on miracles or on the likelihood that they will keep occurring. There is also a degree of danger that, in emphasizing these unusual relationships and holding up for praise the very special children who can take advantage of them, without making clear how rare these situations are, we may seem to be condemning those who don’t have opportunities like these or, if they do, cannot respond to them.

These individuals do not ask why low income black children and others like them should have to be heroic to achieve what other children have the opportunity to achieve without heroic efforts.¹⁸⁵ In short, the fault lies with the children and not with the advantaged.

Finally, there is the “throwing money at it does not solve the problem” justification for opposing any increase in taxes on those who reside in wealthier school districts. These objections are often raised if a tax increase would be used to pay for improvements in poor school districts. After describing the woeful facilities at Camden High School in New Jersey, Jonathan Kozol told an audience in Princeton that, if they did not believe money made a difference, they should let their children go to school in Camden beginning in the first or second grade. Kozol observed, “[w]hen I say this, people will not meet my eyes. They stare down at the floor”¹⁸⁶

Analysis of the reasons and the motivation for committing or tolerating the violation of a child’s right to education reveals no “public conviction that the most deadly of all possible sins is the mutilation of a child’s spirit.”¹⁸⁷ Instead of outrage at the devaluation of the lives of others’ children, there is rejection by the “more fortunate” of any attempt to extend more justly to others the income security and opportunities they enjoy.

Id. at 160.

185. Richard Wasserstrom, *Rights, Human Rights, and Racial Discrimination*, 61 J. PHIL. 628, 639 n.12 (1964)(stating that “[t]his is to say nothing, of course, of the speciousness of any principle of differentiation that builds upon inequalities that are themselves produced by the unequal and unjust distribution of *opportunities*”).

186. KOZOL, *supra* note 176, at 145. Cheryl Harris writes:

In part, these funding inequities are the result of property tax-based funding schemes for public schools that operate to the disadvantage of all poor students. But because of the convergence of housing and employment discrimination, and the lack of political power of poor school districts, Blacks disproportionately experience “the racist impact of less than equal funding to poor school districts.”

Harris, *supra* note 180, at 1753, n.203.

187. KOZOL, *supra* note 6, at vii (quoting Erik Erickson). Karl Polyani wrote of the comfortable classes: “[i]nitially, there may have to be a reduction in their own leisure and security, and, consequently, their freedom so that the level of freedom throughout the land shall be raised.” KARL POLANYI, *THE GREAT TRANSFORMATION* 254 (1944). In Freire’s words:

Formerly they could eat, dress, wear shoes, be educated, travel, and hear Beethoven; while millions did not eat, had no clothes or shoes, neither studied nor traveled, much less listened to Beethoven. Any restriction on this way of life, in the name of the rights of the community, appears to the former oppressors as a profound violation of their individual rights – although they had no respect for the millions who suffered and died of hunger, pain, sorrow, and despair.

FREIRE, *supra* note 111, at 39.

There is an understanding that actively preventing children from pursuing their full humanity (or passively permitting that to happen) is an act of violence.¹⁸⁸ This action reads these children out of the human race by conceiving of them as impersonal abstractions and treating them as disposable rather than as human persons with human rights and human dignity. That "is surely among the greatest of all moral wrongs."¹⁸⁹

B. Education Only for Jobs

The intense debate about whether values should be taught in public schools reveals little sense of history or understanding of education. Values were always and continue to be an essential and unavoidable part of education.¹⁹⁰ All systems of education want to produce a certain kind of human being.¹⁹¹ Therefore, they must embody social philosophies or values that underlie their purposes. Public education in the United States historically supported and promoted the objectives and values of the dominant economic, political, and religious groups.

Public schools in this country never took the lead in advocating fundamental change in the existing social or economic order. On the contrary, there is a utilitarian theme to U.S. public education, always emphasizing job-oriented training (and the associated values of respect for authority, efficiency, success and competitive individualism) that business and industry need to compete at home and in global markets. Public education in this country is a good investment for employers.¹⁹²

This close relationship between education and U.S. business became even closer during the Cold War when education became the "indispensable means by which the United States could regain and keep supremacy over the Russians in science and technology."¹⁹³ Now that the Cold War is over, education is the indispensable means for preparing our future workforce "to meet the technological, scientific, and economic challenges of the 21st century" so the nation can remain internationally competitive.¹⁹⁴

Although humanization involves much more, it must include the ability

188. FREIRE, *supra* note 111, at 66.

189. Wasserstrom, *supra* note 185, at 641.

190. See generally MERLE CURTI, *THE SOCIAL IDEAS OF AMERICAN EDUCATORS* (1978).

191. ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 26 (1987).

192. Curti, *supra* note 190, at 228.

193. *Id.* at xxxv.

194. National Education Goals Panel, *supra* note 15, at 1-2.

to make a living, to obtain food, clothing and shelter. A person prepared to meet these basic needs, will enjoy greater employment opportunities, economic rewards and likelihood of success or getting ahead. Education is an important and legitimate instrument for obtaining subsistence and physical security as part of living a more complete life.

When education for children is designed primarily as a means to get jobs, it becomes merely an instrument for *adapting* children to fill various roles in the economy. Education becomes narrow and utilitarian. Children are taught reading, writing and computation as practical skills essential for subsistence in the economy. They are prepared for the more specialized job training they will receive upon entering the labor force. They are socialized to develop habits and attitudes required for participation at workplaces. Completion of this education gets them the credentials they need to become employable.¹⁹⁵

This technocratic approach to education results in a preoccupation with receiving “value for the education dollar” and with bottom line concerns that are “cost-effective” and “outcome oriented.” Education as an investment is considered successful only if the economic pay back is some multiple of the dollars put into it. It is investment not in children as children but “in a later incarnation of the child as a ‘product’ or ‘producer.’”¹⁹⁶ Children are valued “only as a ‘necessary prologue’ to utilitarian adulthood.”¹⁹⁷

If economic return on investment is the purpose for educating children then we need to ask “[w]hat if a future generation of geneticists, economists, or both, should come to the conclusion that [certain] children . . . don’t offer a sufficient payoff to a corporation’s bottom line to warrant serious investment?”¹⁹⁸ The answer seems obvious because when applied to education, the economic jargon “return on investment” is a utilitarian standard for determining the “relative value” of children. The concept in its essence is contrary to children’s human rights and to their education as a human right. As Kozol writes about the humanity of the children he came to know in a South Bronx, New York school:

Pineapple and Elio are not “preparatory people.” They are complete and good in what they are already; and their small but mystical and interesting beings ought to count for something in our estimation without any calculation as to how they someday may, or may not, serve the economic interests of somebody else

195. Ogbu, *supra* note 130, at 139-40.

196. KOZOL, *supra* note 3, at 139.

197. DE CASTELL, *supra* note 59, at 6; KOZOL, *supra* note 3, at 139.

198. KOZOL, *supra* note 3, at 137-38.

or something else when they are 25 or 30. Mariposa is not simply 37 pounds of raw material that wants a certain “processing” and “finishing” before she can be shipped to market and considered to have value. She is of value now, and if she dies of a disease or accident when she is twelve years old, the sixth year of her life will not as a result be robbed of meaning. But *we* can rob it of its meaning now if we deny her the essential dignity of being seen and celebrated for the person that she is.¹⁹⁹

The common pattern of education for poor black children has been to prepare them for inferior positions in the economy.²⁰⁰ Someone must perform bottom-level jobs, and as the authors of *The Uneducated* found fifty years ago: “a man’s willingness to serve in the infantry is inversely correlated with his education.”²⁰¹ At an early age many children are locked “into the slots that are regarded as appropriate to their societal position.”²⁰²

Many parents of “disadvantaged” children are aware of the differences between the nature of the education their children receive and that available to other children:

They know that “business math” is not the same as calculus and that “job-readiness instruction” is not European history or English literature. They know that children of rich people do not often spend semesters of their teenage years in classes where they learn to type an application for an entry-level clerical position; they know these wealthy children are too busy learning composition skills and polishing their French pronunciation and receiving preparation for the SATs. They come to understand the process by which a texture of entitlement is stitched together for some children while it is denied to others. They also understand that, as the years go by, some of these children will appear to have deserved one kind of role in life, and some another.²⁰³

This is the education of a minimal existence. It is justified as “realistic” given the circumstances in which these children and their parents exist. Yet how different is this “realistic” education for limited career

199. *Id.* at 139-40.

200. Ogbu, *supra* note 130, at 141.

201. GINZBERG & BRAY, *supra* note 8, at 218.

202. KOZOL, *supra* note 176, at 76. Kozol comments: “No corporate CEO is likely to confess a secret wish to see his children trained as cosmetologists or clerical assistants. So the prerogatives of class and caste are clear.” *Id.*

203. KOZOL, *supra* note 3, at 100-01.

objectives from the education made available 140 years ago to newly freed slaves intended to prepare them for the kinds of lives they would lead in the post-Reconstruction South? The nature and purpose of that education were also based on the “realistic” conclusion that “black equality simply would not be possible in the foreseeable future”²⁰⁴ Such education prepared blacks to be servants, farm laborers, and industrial workers.²⁰⁵ Even for the sake of argument and accepting the technocratic approach as a legitimate primary purpose of education, at no point in our history has the United States “seriously intended blacks to achieve social and occupational equality with whites through education.”²⁰⁶

C. The Value Choices of the Supreme Court

In the *Rodriguez* decision, the majority of the Supreme Court protested that it was “not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.”²⁰⁷ In support of this assertion, the majority cited Justice Harlan’s admonition in an earlier case that when a statute affects matters not mentioned in the Constitution, the Court would become a “super-legislature”²⁰⁸ if the justices on the basis of their own views of the importance of the specific issues involved felt entitled “to pick out particular human activities, characterize them as ‘fundamental,’ and give them added protection under an unusually stringent equal protection test.”²⁰⁹

The influence of the values of decision-makers, including judges, is a vastly neglected subject. As Justice Benjamin Cardozo observed over eighty years ago, “[t]here has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations.”²¹⁰

204. ROBERT F. ENGS, *EDUCATING THE DISFRANCHISED AND DISINHERITED: SAMUEL CHAPMAN ARMSTRONG AND HAMPTON INSTITUTE, 1839-1893*, 71 (1999).

205. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 897 (1944). Myrdal adds: “By and large, *in spite of all the talk about it, no effective industrial training was ever given the Negroes in the Southern public schools, except training in cooking and menial service.*” *Id.* at 899 (emphasis in original).

206. *See* Ogbu, *supra* note 130, at 142.

207. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

208. *Id.* at 31 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 655, 661 (1969) (Harlan, J., dissenting)).

209. *Shapiro*, 394 U.S. at 662 (Harlan, J., dissenting).

210. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167-68

The orthodox doctrine was (and apparently still is in some quarters) that judges did not create law but merely discovered preexisting legal rules and principles and applied them to new situations.²¹¹ Cardozo asserted, however, that he and his colleagues “do not pick our rules of law full-blossomed from the trees.”²¹² He maintained that there is judicial choice, not submission to some allegedly apolitical and inevitable fate.²¹³ Cardozo argued, that “jurisprudence is more plastic, more malleable, the moulds less definitely cast, the bounds of right and wrong less preordained and constant, than most of us . . . have been accustomed to believe.”²¹⁴

Judges’ choices between the logic of one principle over the logic of another is not impossibly objective but is influenced by “inherited instincts, traditional beliefs, acquired convictions” that result in an outlook on life²¹⁵ as well as “the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.”²¹⁶ Cardozo believed that “[w]e [as judges] may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.”²¹⁷ Consequently, “[t]he decisions of the courts on economic and social questions depend upon their economic and social philosophy.”²¹⁸ This was true, Cardozo maintained, whether the judge was considering “a village ordinance or a nation’s charter.”²¹⁹ Even when interpreting the Constitution, within the confines of precedent and what Cardozo called the “open spaces” in the law, judges’ choices move with a creative freedom.²²⁰ In sum, “[t]he law which is the resulting product is not found, but made.”²²¹

As the majority in *Rodriguez* noted, the right to education is not among the rights explicitly mentioned in the Constitution.²²² The majority said that the question was whether a right to education was

(1921).

211. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 17, 19 (1973).

212. CARDOZO, *supra* note 210, at 103.

213. *Id.* at 11.

214. *Id.* at 161.

215. *Id.* at 12.

216. *Id.* at 167.

217. *Id.* at 13.

218. *Id.* at 171.

219. *Id.* at 13.

220. *Id.* at 115.

221. *Id.*

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

implicitly guaranteed by the Constitution.²²³ That required the judges to fill in that interstice in the Constitution – in other words, to create law by deciding if education was or was not a fundamental right. It is in such gap-filling situations that judges have the most freedom to exercise personal discretion to choose among available alternative values and outcomes.²²⁴

Over the years the Supreme Court selectively incorporated into these open-ended provisions of the Constitution a large number of diverse implied, or non-textual rights by deeming there to be a nexus between them and the Constitution.²²⁵ Non-textual rights include: the right to interstate travel;²²⁶ the right to procreate;²²⁷ the right to vote in state elections;²²⁸ the right to appeal from a criminal conviction,²²⁹ the freedom of association,²³⁰ the right of privacy,²³¹ the right of choice in marital

223. See *id.* at 33. As Marshall put it, “[t]he task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental . . .” *Id.* at 102-03 (Marshall, J., dissenting). In Brennan’s words, “‘fundamentality’ is, in large measure, a function of the right’s importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed.” *Id.* at 62 (Brennan, J., dissenting).

224. See, e.g., James A. Gross, *Value Judgments in Arbitration: Their Impact on the Parties’ Arguments and on the Arbitrators’ Decisions - I. The Influence of Values in the Arbitral Decisionmaking Process*, in *ARBITRATION 1997: THE NEXT FIFTY YEARS* (PROCEEDINGS OF THE FIFTIETH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS) 218 (Joyce M. Najita ed., 1998).

225. See, e.g., John Adams Rizzo, Note, *Beyond Youngberg: Protecting the Fundamental Rights of the Mentally Retarded*, 51 *FORDHAM L. REV.* 1064, 1072-73 (1983) (noting that the Court has used strict constitutional scrutiny to strike down acts infringing on those fundamental rights implicit in the constitution); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 *U. CIN. L. REV.* 3, 4-5 (1983).

226. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (finding the right to interstate travel fundamental to the “nature of our Federal Union and our constitutional concepts of personal liberty”); see also Bitensky, *supra* note 17, at 615 n.378 (analyzing the reasoning of *Shapiro*).

227. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (explaining that strict scrutiny of sterilization laws “is essential” because “[m]arriage and procreation are fundamental to the very existence and survival of the race”).

228. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (asserting that “[u]ndoubtedly, the right of suffrage is a fundamental matter” particularly because this right is “preservative of other basic civil and political rights”).

229. See, e.g., *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (holding that a state must provide “adequate and effective appellate review to indigent defendants”).

230. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (holding that the freedom of association is “an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment”).

relations;²³² the right to choose to have an abortion;²³³ the right of free access to the courts;²³⁴ the right to an open criminal trial;²³⁵ and the right of married couples to use contraceptives.²³⁶ The contents of these rights are “scarcely at all specified” in the Constitution as written but have been defined by judges’ conscious value preferences, including their conceptions of justice, reasonableness, custom, fair procedure, and equality before the law.²³⁷ A “myth of objective principles often masks subjective judicial preferences.”²³⁸

Justice Marshall challenged the Court to be open about the bases of its choices in cases involving implicit constitutional rights.²³⁹ In his dissent in *Rodriguez*, for example, Marshall said that the Court would give the appearance of being a “super-legislature” as long as “it continues on its present course of effectively selecting in private which cases will be afforded special consideration without acknowledging the true basis of its action.”²⁴⁰

In *Rodriguez*, the majority *chose* not to deem education a fundamental right.²⁴¹ The majority also *chose* to pull back from previous decisions

231. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (finding that the guarantees in the Bill of Rights “create zones of privacy”).

232. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971) (holding that a state may not pre-empt a couple’s right to divorce unless it affords all citizens access to the process).

233. See, e.g., *Roe v. Wade*, 410 U.S. 113, 162-64 (1973) (holding that a statute restricting legal abortions swept too broadly).

234. See, e.g., *Douglas v. California*, 372 U.S. 353, 357-58 (1963). In *Douglas*, the Court required the state to provide counsel to indigent criminals as a matter of right. See *id.*; see also *Griffin*, 351 U.S. at 19. In *Griffin*, the court required the state to provide an indigent criminal appellant with either a free trial transcript or “other means of affording adequate and effective appellate review.” See *id.* at 19-20.

235. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980) (finding “the right to attend criminal trials is implicit in the guarantees of the First Amendment”) (footnote omitted).

236. See, e.g., *Griswold*, 381 U.S. at 485-86 (holding that a law which forbid the use, rather than the manufacture or sale, of contraceptives was invalid because it “invade[d] the area of protected freedoms”).

237. Thomas C. Grey, *Do we Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 707-08 (1975).

238. Christenson, *supra* note 225, at 8, n.22; see also ARTHUR SELWYN MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT 19-21 (1982).

239. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 110 (1973) (Marshall, J., dissenting).

240. *Id.* at 109-10. Marshall observed that “Such obfuscated action may be appropriate to a political body such as a legislature, but it is not appropriate to this Court.” *Id.* at 110.

241. See *id.* at 35.

indicating that poverty alone could constitute a “suspect classification” requiring strict judicial scrutiny of legislation affecting the rights of people living in poverty.²⁴²

VI. CONCLUDING OBSERVATIONS

To understand that education is a human right is to understand that the problems of education in this country and the proposed solutions are inextricably interconnected with issues of morality, justice and values. Fundamental issues of human rights, justice and morality must be addressed and resolved before any reconstruction of the educational system is attempted. What is excused as misfortune must be recognized as injustice and what has been dismissed as the status quo must be traced to the action or inaction of the unjust.

A just society, particularly one with the economic resources of the United States, would not choose to reject any of its children. A just society would treat *each* of its children as an “unprecedented wonder”²⁴³ and would be committed to enabling them to realize their potential for living a full human life.²⁴⁴ Each child would be recognized for the person he is; his presence on this earth would be treated as an “uncondition[al] blessing.”²⁴⁵

This recognition and celebration of life is the core principle of human rights. It was recognized by a Freedmen’s Bureau commissioner who urged that the freed people in the Bureau’s schools be “treated as men with immortal souls rather than as beasts of burden or machines for pulling cotton.”²⁴⁶ More than 100 years later, Thomas Sowell similarly noted that the “only common denominator among the successful schools [in the black community/ghetto] was that the students were treated like human beings and everything was geared to the expectation that they would succeed.”²⁴⁷ The children understood that they were important in and of themselves.²⁴⁸

242. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 257-58 (Kermit L. Hall et al. eds., 1992).

243. Joseph Campbell, *Mythological Themes in Creative Literature and Art*, in MYTHS, DREAMS, AND RELIGION 146 (Joseph Campbell ed., 1970).

244. MARITAIN, *supra* note 76, at 47.

245. KOZOL, *supra* note 3, at 142.

246. Paul A. Cimbala, *Reconstruction’s Allies: The Relationship of the Freedmen’s Bureau and the Georgia Freedmen*, in THE FREEDMEN’S BUREAU AND RECONSTRUCTION 318 (Paul A. Cimbala & Randall M. Miller eds., 1999).

247. SOWELL, *supra* note 130, at 224.

248. *Id.* at 224, 230.

Conscious choices violate the human rights of certain children. Yet human rights constitute the most essential moral claims that all human beings can assert.²⁴⁹ They confirm the sacredness of human beings and their intrinsic dignity. Human rights are entitlements. The great disparity in the amount of money spent for some compared to that spent on the education of other people's children is a measure of how little certain children are valued as human beings. As a result, a message is sent that those children "deserve to be neglected [and] to be surrounded by a blatant lack of respect."²⁵⁰

A solution to this problem will require the problem solvers to know what it is like for children to grow up rejected and shunned by the dominant society, what it means and does to them, and whether they think they deserve to be treated that way. As Kozol asks, "[w]hat is it that enables some of them to pray? When they pray, what do they say to God?"²⁵¹ Other previously ignored questions must also be answered:

how certain people hold up under terrible ordeal, how many more do not, how human beings devalue other people's lives, how numbness and destructiveness are universalized, how human pity is at length extinguished and the shunning of the vulnerable can come in time to be perceived as natural behavior How does a nation deal with those whom it has cursed?²⁵²

Others wonder about the impact of long-standing devaluation on both the children devalued and on those responsible for that devaluation: "[a]fter all that has happened, in history and in our own time, can black people still be seen with empathy and without sentimentality as human beings with aspirations and potential that deserve fulfillment?"²⁵³ Andrew Hacker maintains that persuading Americans to care about children other than their own is imperative because indigent children are looked upon as a burden.²⁵⁴

Where is the public indignation at the abuse of innocent children who have done nothing wrong? Despite a "reverence for fair play" and a "genuine distaste for loaded dice" in the United States, Kozol maintains

249. Wasserstrom, *supra* note 185, at 633.

250. THEODORE R. SIZER & NANCY FAUST SIZER, *THE STUDENTS ARE WATCHING: SCHOOLS AND THE MORAL CONTRACT* xi, 87 (1999).

251. KOZOL, *supra* note 5, at 5.

252. *Id.* at 186.

253. SOWELL, *supra* note 130, at 315-16.

254. Andrew Hacker, *Why the Rich Get Smarter*, *THE NEW YORK TIMES BOOK REVIEW*, Oct. 6, 1991, at 7.

that in the realms of education, health care and inheritance of wealth, fairness is not evident.²⁵⁵ In those areas, Kozol says, “we want the game to be unfair and we have made it so; and it will likely so remain.”²⁵⁶ If our motives can be judged most accurately by our actions or inaction, Hacker and Kozol’s perceptions are on the mark. Many in our country, including children, are isolated in helplessness while others choose to isolate themselves by their own selfishness. It is a selfishness that consists not only of an unwillingness to redistribute resources to others in need, but also of a deliberate perpetuation of an unfair distribution of the benefits of the educational system which secures advantages in society.

Americans pride themselves on their morality. The “American Creed” is the ideological foundation of the nation, encompassing the ideals of the inherent dignity of the individual human being, and of the fundamental equality of all, as well as “inalienable” rights to freedom, justice and fair opportunity. All of these ideals are reconciled within the framework of the common good. These are the elements of a democratic creed that, although pre-dating the United States, represents the “national conscience.”²⁵⁷ The creed is the basis for the realization of the “American Dream,” which in addition to being a dream of wealth has also “been a dream of being able to grow to fullest development as a man and woman” to benefit “the simple human being of any and every class.”²⁵⁸

In 1944, Swedish economist Gunnar Myrdal characterized U.S. race relations as an “American Dilemma”: the moral dilemma of the disparity between ideals and actual behavior.²⁵⁹ It is tragic that any such gap remains after all of these years. Yet, it is not unrealistic to believe in and work for change unless those with economic and political influence are completely hypocritical. The civil rights and women’s rights movements in this country are among the precedents that justify some optimism and hope.

No matter how discouraging the prospects for fundamental change in the educational system, it would be even more irresponsible to fail to act.²⁶⁰ If human rights violations are to end, then the moral choices that

255. KOZOL, *supra* note 5, at 223.

256. *Id.*

257. MYRDAL, *supra* note 205, at 23.

258. *Id.* at 5-6.

259. *Id.* at xlvii.

260. Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1108 (1981).

underlie those violations and the values that influence those moral choices must be changed.²⁶¹ Without that change, we will continue merely to remodel on a faulty foundation. Despite commentaries about the futility of trying to reverse these choices, fundamental change is possible and one of the many reasons for that change is the ability of challengers to redefine a policy issue.

Acceptance of education as a human right changes our understanding of the essential purpose of education and requires a fundamental and thorough redefinition of education policy. The primary objective of education policy would become compliance with the rights of *all* children to the type and quality of education needed to live full human lives rather than, as now, conceiving of education as merely a utilitarian instrument for maximizing payoff for those who invest in it – or for those who can afford the type of education most likely to provide the greatest return on investment. It puts into sharp historical and cultural perspective the fact that since the Universal Declaration of Human Rights in 1945, nations from all over the world have recognized education as a human right while our own Supreme Court does not consider education to be even a constitutional right.

It may be that domestic human rights issues go unacknowledged by the public because of the myth that the United States is a paragon of human rights observance. As human rights become more important in international relations, this country is vulnerable to charges of hypocrisy for attempting to maintain a “facade of championing human rights when it does not protect the rights of its own citizens.”²⁶² Despite the rhetoric about the sanctity of human rights, hypocritical or not, it is likely that most people in this country comprehend human rights only in the context of such egregious human evils as genocide or systematic torture. Beyond that there is little understanding of the meaning, significance and implications of human rights.

All education systems want to produce a certain kind of human being, and values have always been an essential and unavoidable part of education. Ironically, therefore, the redefinition of education policy

261. MYRDAL, *supra* note 205, at xlvi. Myrdal quotes John Dewey as saying: Anything that obscures the fundamentally moral nature of the social problem is harmful, no matter whether it proceeds from the side of physical or of psychological theory. Any doctrine that eliminates or even obscures the function of choice of values and enlistment of desires and emotions in behalf of those chosen weakens personal responsibility for judgment and for action.

262. Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?* 11 HARV. BLACKLETTER L.J. 37, 60 (1994).

issue requires education. From the time they start school, children need to learn about human rights and to respect the human rights and dignity of all people regardless of race, color, language, gender, or faith. Human rights education needs to occur at all levels from elementary school through college or university.

Promotion of internationally recognized human rights principles emerging in international law, moreover, would educate our judiciary as well as the public. These international human rights principles pose a growing challenge to what some experts consider the isolation and provincialism of U.S. courts.²⁶³ Given the influence of values on judicial decision-making, these human rights principles provide an important source of law for U.S. courts to use in the interpretation of the Constitution, including filling in the gaps in constitutional protections. To ignore those principles is to express indifference to them and expresses a willingness to put the United States in direct conflict with international law.²⁶⁴

No attempt is made here to spell out the details of a curriculum or the content of specific course subjects needed to enable people to live full human lives. However, a quality education is about reading, writing, computing, communicating, imagining, thinking, reasoning, creating, participating, questioning, analyzing, challenging, judging, and changing. It is about the unprecedented wonder of each and every human being, the rights and duties of each other. It is about history and heritage as well as partaking in cultural stories and heritage. It is about sharing all the intellectual adventures at the heart of civilization. It is about morals and ethics and the content of character. It is also about participating in decisions that affect one's life.

A quality education must not be indoctrination in an "Aren't-We-Americans-Just-Dandy curriculum" as Theodore and Nancy Sizer called it.²⁶⁵ Education needs to have a global perspective with an understanding of all peoples, their cultural heritage, values, problems and ways of life. Education needs to be about human solidarity, respect for human dignity, the equal rights of all human beings, and justice and equality for all people.

There is no reason that can justify the perpetuation of human rights violations to education: not transparent appeals to the democratic principle of local control of education (it would be a perverted

263. Christenson, *supra* note 225, at 13, 25, 35-36; Park, *supra* note 89, at 1233.

264. Christenson, *supra* note 225, at 10, 33.

265. SIZER & SIZER, *supra* note 250, at 1.

democracy that commits or tolerates violations of the human rights of children); not a state's use of local control as an excuse rather than as a justification for interdistrict inequality;²⁶⁶ and not the federal government's evasion of the duty by hiding behind the myth that education is exclusively a state and local matter in this country.²⁶⁷

A just society would not tolerate anything less than the end of these violations of our children's human right to education. Of course, our willingness to end these violations depends on the type of a society we desire and what kind of people we want to be.

266. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 97 (1973) (Marshall, J., dissenting).

267. KOZOL, *supra* note 177, at 76. Kozol maintains, "[i]t is one consistent and unbroken schooling system. National goals define it. National inequality degrades it." *Id.*