

AUTONOMY, STANDING, AND CHILDREN'S RIGHTS

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I. INTRODUCTION.....	807
II. THE DEVELOPMENT OF CHILDREN'S RIGHTS.....	809
A. <i>Antiquity</i>	809
B. <i>Medieval and Pre-Reformation</i>	811
C. <i>Post-Reformation</i>	812
D. <i>Modern Approaches</i>	813
E. <i>International Context</i>	815
III. AUTONOMY AND THE CONCEPT OF CHILDREN'S RIGHTS	816
IV. AUTONOMY AND LEGAL STANDING.....	820
V. CONCLUSION	825

I. INTRODUCTION

Questions regarding rights permeate family law, just as they do other areas of the law. In teaching family law, one addresses parents' rights to custody and parenting time, grandparents' rights to visitation with their grandchildren, the rights of third-party custodians, and, of course, the very right of the state to interfere with family affairs in the first place. But a sub-text in all these discussions is the question of whose rights are being considered and to what extent, if at all, we can or should consider children¹ as having meaningful rights.² If we do agree that there is such a thing

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1. I will use the term "children" rather than "minors" in this article. For child-protection purposes, the two can mean the same thing. *See, e.g.*, MINN. STAT. § 260C.007, subdiv. 4 (2006) ("[c]hild" means an individual under 18 years of age); § 260C.007, subdiv. 23 ("[m]inor" means an individual under 18 years of age). But in paternity matters, for instance, a child is not necessarily a minor. § 257.60. And more importantly, the term "children's rights" is far more commonly used by commentators.

2. For the purposes of this article, I am assuming that for a right to be meaningful, it has to be either enforceable or, at least, capable of being enforced.

as children's rights, then to what extent does the concept have any content? This question arises particularly when we consider "hard" cases such as *DeShaney v. Winnebago County Department of Social Services*³ that involve children's rights or lack of them. Additionally, the matter is complicated because the very term "children's rights" is both broad and loose⁴ and because the notion of children's rights has been viewed as threatening to society.⁵ Some have also feared that focusing on children's rights may be harmful to the long-term interests of children themselves.⁶ Moreover, children's rights advocates have conceived of children's rights in different ways,⁷ but seemingly without devising a concept that has been either philosophically or politically persuasive.⁸ This may be because various rights principles have been created in the adult world⁹ and do not work well when applied to children. Nevertheless, if we conceive of children as having the capacity to develop into autonomous citizens, it should be possible for our legal system to foster that development in areas, such as family law, where children have important and fundamental interests.

Part II of this article considers the historical development of children's rights from antiquity through more recent international human rights instruments. Part III looks at several different approaches to the concept of children's rights and focuses on the presupposition that children can or should be able to act autonomously. Part IV considers the application of children's rights and autonomy in the specific context of legal standing.

3. 489 U.S. 189 (1989), discussed further *infra* Part III.

4. Annette Ruth Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L.J. 141, 152 (2004).

5. See Barbara Bennett Woodhouse, *Talking About Children's Rights in Judicial Custody and Visitation*, 36 FAM. L.Q. 105, 107 (2002).

6. Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* in CHILD LAW 113, 115 (Harry D. Krause ed., 1992).

7. See, e.g., Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMPLE L. REV. 1585 (1995) (criticizing concepts of children's rights grounded in will theory and interest theory and proposing an empowerment theory of children's rights). See also Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 260-81 (1979) (discussing different types of claims under the rubric of children's rights).

8. Martha Minow, *What Ever Happened to Children's Rights*, 80 MINN. L. REV. 267 (1995). For Minow, at least by the 1980s, "the movement for children's rights had failed to secure a coherent political or intellectual foundation, not to mention a viable constituency with political clout." *Id.* at 287. This does not seem to have changed in subsequent years.

9. See Woodhouse, *supra* note 5, at 114-15.

Finally, Part V concludes that grounding concepts of children's rights on the basis of autonomy alone is inadequate; considers that meaningful children's rights might best be understood in a much broader human rights context; and suggests that a form of graduated standing for children consistent with children's developing capacities for acting autonomously may be appropriate in certain family law cases, particularly in cases involving domestic violence where children's interests may be opposed to at least one of their parents.

II. THE DEVELOPMENT OF CHILDREN'S RIGHTS

A. *Antiquity*

At least according to early historians, children's rights and duties were unknown among uncivilized people.¹⁰ Far from being considered autonomous beings, children were originally regarded as a species of property. In classical Athens, the father of the family had the right to decide whether to keep a new-born baby or to expose it.¹¹ Although an Athenian father did not have the right to put his child to death, abandoning a child did not count as homicide.¹² Moreover, children could be sold into slavery¹³ and parents were under no legal obligation to raise children.¹⁴ Children born to an unmarried woman were not even considered to be citizens.¹⁵ As a general rule, children and women could not be expected to act autonomously and men were responsible for controlling and protecting them.¹⁶ Though not owed any particular rights, children were obliged to honor parents and, if necessary, to support them.¹⁷

10. See generally, SAMUEL M. DAVIS & MORTIMER J. SCHWARTZ, CHILDREN'S RIGHTS AND THE LAW 8 (1987).

11. A DICTIONARY OF ANCIENT GREEK CIVILIZATION 105 (Methuen 1970). By contrast, in Sparta it was essentially the state making the equivalent decision. *Id.*

12. DOUGLAS M. MACDOUGALL, THE LAW IN CLASSICAL ATHENS 91 (1978).

13. *Id.* at 80. For instance, daughters traditionally could be sold into slavery for engaging in premarital sex though, as MacDougall notes, it seems unlikely that Athenian fathers sold even their naughtiest daughters in the fourth and fifth centuries. *Id.*

14. *Id.* at 91.

15. Alberto Maffi, *Family and Property Law*, in THE CAMBRIDGE COMPANION TO ANCIENT GREEK LAW, 255 (Michael Gagarin & David Cohen eds., 2005).

16. MACDOUGALL, *supra* note 12, at 84.

17. Maffi, *supra* note 15, at 255. See also MACDOUGALL, *supra* note 12, at 91. Under a law attributed to Solon, a son was liable to prosecution for maltreating his parents if: he failed to provide food or housing to his parents or grandparents, he

Similar duties of respect and support appear to have existed in other ancient societies.¹⁸ Under Roman law, a father had absolute power, *patria potestas*,¹⁹ over his children.²⁰ The scope and extent of paternal power changed over the centuries, and under later law, a father's power could be taken away if he abandoned a child or prostituted a daughter.²¹ Nevertheless, the power of life and death was not formally abolished until Constantine, and it is unlikely that child abandonment was forbidden by law until 374.²² After Constantine, the law began to take greater notice of children,²³ though the notice that the law took was not always very protective.²⁴ But having said this, it is possible to make too much of what seems to modern eyes to be a cavalier disregard of children. There can be little doubt that parents loved their children in ancient times, and childhood, at least for males,²⁵ was a period during which future citizens were trained and educated. Indeed, from classical times through the time of Blackstone's commentaries, there has been at least a sense that fathers owed obligations to provide maintenance, protection, and education to their children.²⁶ But for the most part, these were moral obligations; there were no corresponding legal rights that children *qua* children could assert

used violence against them, or he failed to provide proper funeral rites when they died. *Id.* But the duty to support was excused if the father had failed to teach him a trade, had prostituted him, or he was illegitimate—under those circumstances, the theory was that the father was at fault. *Id.* at 92.

18. *See, e.g.*, RUSS VERSTEGG, *EARLY MESOPOTAMIAN LAW* 94 (2000); RUSS VERSTEGG, *LAW IN ANCIENT EGYPT* 135 (2002); DAVIS & SCHWARTZ, *supra* note 10, at 8–9.

19. *Patria potestas* included the power of life and death, the power of sale, the power to give children in marriage and divorce them at pleasure, and the right to give them in adoption and emancipate them at pleasure. R. W. LEE, *THE ELEMENTS OF ROMAN LAW* 60–61 (4th ed. 1956).

20. WILLIAM L. BURDICK, *THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW* 241 (W. M. Grant & Sons 1989). While the Romans believed they originated the doctrine of paternal power, it has been observed in a number of pre-Roman societies. *Id.* at 254.

21. *Id.* at 260.

22. LEE, *supra* note 19, at 61. Constantine also permitted sale of new-born children, though Justinian allowed it only in cases of extreme poverty. *Id.*

23. This was true at least in the case of natural children; illegitimate children were in quite a different position and generally were unable to inherit or even to have the opportunity to be legitimized. JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 103 (1987).

24. *Id.*

25. *But see* DAVIS & SCHWARTZ, *supra* note 10, at 10 (suggesting that in Roman times, elder daughters were entitled to an education as were their male counterparts).

26. *See generally id.* at 7–21.

against either their parents or the state.²⁷

B. Medieval and Pre-Reformation

The medieval view of children may have begun to diverge from that prevailing during the classical period, though little survives about adult attitudes toward children during the Anglo-Saxon period from 500 to 1066.²⁸ Evidence from burials does show that children were often buried with grave-goods, like adults, and that children with deformities were cared for and enabled to grow up.²⁹ But these may be exceptional cases, for “[o]f all the characteristics in which the medieval age differs from the modern, none is so striking as the comparative absence of interest in children.”³⁰ There are echoes of earlier ages in a tendency to leave babies and young children to survive or die without great concern in their first five or six years.³¹ Nonetheless, medieval parents appear to have been sufficiently concerned to preserve and nurture children into productive adulthood³² and it has been suggested that the eleventh and twelfth centuries evidenced a new preoccupation with the experiences of childhood.³³ But during what came to be known as the Middle Ages, there is little reason to believe that children were

27. *But see* BRUNDAGE, *supra* note 24, at 480. Brundage notes that evidence from court records suggests that support orders for minor children were small, but despite this, “judges had to intervene with both moral suasion and penal sanctions in order to secure payments as ordered.” *Id.* Over 700 years later, perhaps the only comment needed is *plus ça change, plus c’est la même chose*.

28. Nicholas Orme, *Childhood in Medieval England*, in REPRESENTING CHILDHOOD, http://www.pitt.edu/AFShome/d/c/dch29/public/html/gubar/medieval_child.htm.

29. *Id.* *But see* B. J. Peens & D. A. Louw, *Children’s Rights: A Review*, 19 MED. & L. 31, 32–33 (2000). Peens and Louw refer to a number of studies that highlight the worthlessness of children before the sixteenth century with children over the age of six being considered small adults who had to participate in adult work. *Id.* No doubt childhood was short and, no doubt, not as pleasant as it could be by modern standards, but it seems somewhat contradictory to argue that children were both property *and* essentially worthless.

30. BARBARA W. TUCHMAN, *A DISTANT MIRROR* 49 (1978). Tuchman notes that in literature, for example, “the chief role of children was to die, usually drowned, smothered, or abandoned in a forest on the orders of some king fearing prophecy or mad husband testing a wife’s endurance.” *Id.*

31. *Id.* at 52.

32. BARBARA A. HANAWALT, *OF GOOD AND ILL REPUTE: GENDER AND SOCIAL CONTROL IN MEDIEVAL ENGLAND* 174 (1998). In particular, Hanawalt notes the importance of the whole community, rather than just individual families, in children’s lives. *Id.* at 158–75. *See also* TUCHMAN, *supra* note 30, at 52 (noting that children had toys and that “[l]ittle boys were like little boys of any time . . .”).

33. HANAWALT, *supra* note 32, at 194 n.1.

excluded from the feudal social structure in which relationships were ordered and based on a hierarchy of duty and obedience.³⁴ As one might expect, the thread of this relationship structure that posited children's duties (without any sense of corresponding rights) has been very persistent.³⁵

C. Post-Reformation

The importance of status and a hierarchy of authority based on duty and obedience perhaps explains what otherwise seems as an anomaly regarding children's rights. That is, in post-Reformation England, children often occupied positions of great power.³⁶ The explanation for this may be that prevailing notions regarding duty and obedience did not particularly distinguish between children and adults.³⁷ Rather than being about children, the point was to reinforce status relationships.³⁸ But the weight of political and social reform that began in England in the late sixteenth century was transported to the American colonies and shifted the justification of authority from status to consent. Because of the widespread belief that children were immature and incapable of looking after themselves physically, mentally, and emotionally, children were viewed as being unable to consent.³⁹ Thus, childhood became a distinct legal status because children were perceived as lacking the ability to form their own judgments.⁴⁰

34. HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* 103 (2005). But Brewer also notes that feudal rules, such as primogeniture, gave great power to the very young. *Id.*

35. *See, e.g.,* *Miller v. Monson*, 228 Minn. 400, 401–02, 37 N.W.2d 543, 544–45 (1949) (stating that child has a duty to render obedience and services to the parent).

36. BREWER, *supra* note 34, at 26–29.

37. *Id.* at 29.

38. *Id.*

39. The influence of thinkers such as Locke and Mill is frequently noted in this respect. For Locke, parents had a duty to take care of their offspring “during the imperfect state of childhood . . . [and to] govern the actions of their yet ignorant nonage, till reason shall take its place and ease them of that trouble” JOHN LOCKE, *An Essay Concerning the True Original, Extent and End of Civil Government*, in *MAN AND THE STATE: THE POLITICAL PHILOSOPHERS* 89 (Saxe Commins & Robert N. Linscott, eds., 1947). Similarly, Mill excluded children from his principle of liberty because they were not “in the maturity of their faculties . . . [and] must be protected against their own actions as well as against external injury.” JOHN STUART MILL, *On Liberty*, in *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 73 (Everyman's Library ed., J. M. Dent & Sons, Ltd. 1940) (1859).

40. BREWER, *supra* note 34, at 7.

D. Modern Approaches

Towards the end of the nineteenth century, a nascent children's rights movement opposed the view that children were primarily quasi-property and economic assets. Indeed, as economic assets, children were probably little better off than animals and it was not until scandals such as the "Mary Ellen Affair" that organizations devoted to child protection began to emerge.⁴¹ That organized child protection should arise so late is not so surprising when one considers that nineteenth-century courts were generally loath to interfere in matters of family government.⁴² Courts were guided by a tradition of individual autonomy that kept the government out of purely family affairs, thereby limiting the government's role in protecting children.⁴³ By contrast, the Progressive movement, which continued into the early part of the twentieth century, focused on broad child welfare reforms as being integral to development of a more humane society.⁴⁴ For the reformers, children's rights grew out of their dependency and capacity for growth.⁴⁵ Therefore, for Progressives, it was essential for society to protect children from abuse, even where the abusers were their parents,⁴⁶ and to pass laws regulating child labor and

41. In 1874, a New York court ordered that ten-year-old Mary Ellen Wilson be removed from the abusive home of her putative biological father's widow. Mary Ellen's plight came to light largely through the efforts of Henry Bergh, then president of the American Society for the Prevention of Cruelty to Animals. Subsequent publicity directly led to the American Society for the Prevention of Cruelty to Children being established. See American Humane: Who We Are: Mary Ellen Wilson, http://www.americanhumane.org/site/PageServer?pagename=wh_mission_maryellen (last visited March 24, 2007). Interestingly, despite its original intention to prevent child abuse, the Society initially dealt primarily with poverty, not abuse. Andrea Charlow, *Race, Poverty, and Neglect*, 28 WM. MITCHELL L. REV. 763, 764 (2001). But see Appell, *supra* note 4, at 158 (noting that protecting children did not include protecting enslaved or newly freed children).

42. See, e.g., *State v. Rhodes*, 61 N.C. (Phil.) 453 (1868).

43. Elizabeth Bartholet, *The Challenge of Children's Rights Advocacy: Problems and Progress in the Area of Child Abuse and Neglect*, 3 WHITTIER J. OF CHILD & FAM. ADVOC. 215, 217 (2004).

44. MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 1 (2005).

45. Barbara Bennett Woodhouse & Sarah Rebecca Katz, *Martyrs, the Media and the Web: Examining Grassroots Children's Rights Movement Through the Lens of Social Movement Theory*, 5 WHITTIER J. OF CHILD & FAM. ADVOC. 121, 125 (2005).

46. GUGGENHEIM, *supra* note 44, at 2. As Guggenheim also points out, these advances were strongly resisted. As late as 1924, the President of Columbia University condemned proposed child labor laws because "they would empower Congress to invade the rights of parents and to shape family life to its liking." *Id.* at 3.

providing for compulsory education.⁴⁷ Despite setbacks,⁴⁸ the Progressive movement was ultimately successful in raising awareness of children's issues and, significantly, in the establishment of the juvenile court system.⁴⁹

The most recent burst of enthusiasm for children's rights arose in the 1960s and 1970s and was strongly influenced by commentators who viewed children as victims of discrimination⁵⁰ or as an oppressed group in need of liberation.⁵¹ As such, children were seen to be in essentially the same position as racial minorities or women.⁵² This conception of children's rights identified state interference as preventing children from being autonomous beings.⁵³ Ironically, according to this view, the advances gained by the Progressive movement worked against children who were now enmeshed in a system that denied them autonomy and personal freedom.⁵⁴ For children's rights advocates, this problem may arise because the focus is on children's interests and in protecting them from themselves and others.⁵⁵ Thus, grounding children's rights in dependency on others merely reaffirms children's vulnerability and helplessness.⁵⁶

By contrast, advocates may focus on liberty rights as a basis for children's rights⁵⁷ and advance rights claims based on a child's individual personhood.⁵⁸ Of course, this approach comes closer than the dependency view to holding a child to be an autonomous

47. *Id.* at 2.

48. *E.g.*, *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (declaring federal laws regulating child labor to be unconstitutional).

49. GUGGENHEIM, *supra* note 44, at 4.

50. RICHARD FARSON, *BIRTHRIGHTS 1* (1974).

51. *See* JOHN HOLT, *ESCAPE FROM CHILDHOOD* 26–29 (1974).

52. Appell, *supra* note 4, at 153.

53. *Id.*

54. GUGGENHEIM, *supra* note 44, at 6.

55. *See, e.g.*, Federle, *supra* note 7, at 1590. Federle argues that by linking “rights-generating interests to children’s incapacities, interest theorists suggest that children are incapable of caring for themselves.” *Id.* *See also*, Appell, *supra* note 4, at 166–71. Appell criticizes dependency rights as being “no more than a question of competing adult values, in which dominant values—those appreciated by the state—are likely to prevail.” *Id.* at 171.

56. Appell, *supra* note 4, at 171.

57. *See, e.g., id.* at 154–55 for an outline of what Appell calls “quasi-civil rights.” *See also* Woodhouse, *supra* note 5, at 114 n.33 (noting that the U.S. Supreme Court has recognized children's rights in many different settings, from education to juvenile justice).

58. *See* GUGGENHEIM, *supra* note 44, at 13. For Guggenheim, this is a fatally flawed premise because it runs the risk of “isolating children from the larger fabric of society into which they have been born and are being raised.” *Id.*

individual with his or her own personal rights, rather than being the property of either the parents or the state.⁵⁹ Recognizing that children have individual personhood entails recognizing that children are not merely extensions of their parents with the capacity to develop into autonomous actors, if not necessarily having the present capacity to act autonomously.

E. International Context

The growth of children's rights in international and transnational law has been identified as a striking change in the post-war legal landscape.⁶⁰ The principles enumerated by the 1959 United Nations' Declaration of the Rights of the Child (UNDRC) included children's rights in the rubric of fundamental human rights and focused on children's rights as arising from their dependency needs, rather than as being autonomous, individual rights.⁶¹ For instance, Principle 6 of the UNDRC provided for the full and harmonious development of children's personalities through love and understanding, through growing up in the care and under the responsibility of parents, and "in any case, in an atmosphere of affection and of moral and material security."⁶² Moreover, the UNDRC identified the best interests of the child as the paramount consideration for States in enacting laws to promote child development.⁶³

Subsequently, the United Nations' Convention on the Rights of the Child (CRC)⁶⁴ set forth a broad range of dependency, autonomy, and equality rights.⁶⁵ Some of the rights in the CRC remain merely aspirational, but a more significant problem may be that there is an internal conflict between individual autonomy enjoyed by the child and the role of the family, in particular the authority enjoyed by parents, in relation to children.⁶⁶ It has now

59. See Jamie D. Manasco, *Parent-Child Relationships: The Impetus Behind the Gregory K. Decision*, 17 LAW & PSYCHOL. REV. 243, 258 (1993).

60. Woodhouse, *supra* note 5, at 108.

61. Declaration on the Rights of the Child, G.A. Res. 1386 (XIV), at pmb. 14 U.N. GAOR, Supp. No. 16 at 19, U.N. Doc. A/4354 (Nov. 20, 1959).

62. *Id.* at princ. 6.

63. *Id.* at princ. 2. Notwithstanding the inclusion of the best interests standard, the UNDRC also endorsed the tender years doctrine. See *id.* at princ. 6.

64. See Convention on the Rights of the Child, G.A. Res. 44/25, ¶ 44 U.N. GAOR, Supp. No. 49, U.N. Doc. A/Res/44/736 (Nov. 28, 1989).

65. See Woodhouse, *supra* note 5, at 109.

66. See, e.g., G.A. Res. 44/25, *supra* note 64, art. 14. Paragraph 1 of Article 14 provides that "States Parties shall respect the right of the child to freedom of

become something of a truism that the United States remains the only nation not to have ratified the CRC. While this may not have anything to do with children's rights,⁶⁷ it is, nevertheless, a conspicuous absence.

III. AUTONOMY AND THE CONCEPT OF CHILDREN'S RIGHTS

On one level, it makes little sense to think of children's rights as arising from their status as autonomous individuals. To suggest that a child is autonomous is to suggest that he or she is either self-governing or capable of existing or functioning independently.⁶⁸ This is not always self-evidently true to the extent that children exhibit defects of practical rationality.⁶⁹ That is to say, young children in particular cannot tailor their current actions to take account of later desires, such as conserving water now for later thirst.⁷⁰ Of course, this is not to say that children do not make, and act on, independent decisions.⁷¹ Much depends on the child's age, since even the most ardent children's rights advocate would not suggest that a child under five, for example, is capable of acting autonomously in the sense that the child, in making a choice, is assuming responsibility for all foreseeable consequences.⁷² Indeed,

thought, conscience and religion," whereas paragraph 2 provides that "States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child." *Id.*, art. 14, ¶¶ 1, 2. This conflict has been noted by an Irish examination of children's rights law. See LAW REFORM COMMITTEE OF THE LAW SOCIETY OF IRELAND, RIGHTS-BASED CHILD LAW: THE CASE FOR REFORM 57-58 (2006), <http://www.lawsociety.ie/documents/committees/lawreform/childreport06.pdf>. The report also notes that enforcement of the Convention is compromised by the vagueness of its language—which makes incorporation into national law difficult—and, perhaps more importantly, that there is no enforcement mechanism. *Id.* But see Woodhouse, *supra* note 5, at 109 ("The CRC's most important role is not in articulating claims to be asserted by children in court . . . but is in proposing norms of justice to guide those engaged in developing laws and social policies.").

67. See GUGGENHEIM, *supra* note 44, at 15. Guggenheim suggests that the United States' failure to ratify the CRC does not amount to a repudiation of children's rights. I think this view underestimates the importance of perception in international law.

68. See RANDOM HOUSE WEBSTER'S DICTIONARY 47 (4th ed. 2001).

69. See David A. J. Richards, *Rights and Autonomy*, in THE INNER CITADEL 203, 206 (John Christman, ed., 1989).

70. *Id.*

71. On a trivial level, even very young children can choose whether to have cereal or toast, or both, for breakfast. But this does not necessarily indicate autonomy, as children may not have any say whatsoever in the range of choices.

72. Joel Feinberg, *Autonomy*, in THE INNER CITADEL, *supra* note 69, at 27, 42.

recent research into brain changes in adolescence suggests that the frontal areas of the brain responsible for high-level reasoning and decision making do not fully mature until adulthood or their early twenties.⁷³ Consequently, minor children typically are not considered to be fully rational, autonomous individuals.⁷⁴ Scholars have defined autonomy, in this sense, as “the capacities, developed or undeveloped, of persons, which enable them to develop, want to act on, and act on higher-order plans of action. . . .”⁷⁵ Additionally, at least in the Western tradition of rights, autonomy is part and parcel of our bundle of negative rights: the right to pursue our own individual ideas of good, to be left alone, and to be free from unwarranted state intervention in our lives.⁷⁶

On this basis, then, it is somewhat natural to be skeptical of negative, autonomy-based rights insofar as such rights are attributed to all children *qua* children. This is particularly so when viewed against the background of the United States Supreme Court’s jurisprudence regarding negative children’s rights, as manifested in *DeShaney*.⁷⁷

In *DeShaney*, a four-year-old boy, Joshua, was beaten repeatedly by his father and suffered serious and permanent brain damage despite the fact that the Wisconsin child protection services had known of the abuse and had repeatedly failed to take action to remove Joshua from harm.⁷⁸ The case is clearly a “hard” one because it involved senseless assaults by a parent on a defenseless child. But just as importantly, however, it highlights the very narrow protections offered children by the negative rights granted under the Due Process Clause as interpreted by *DeShaney*.⁷⁹ It has

73. Robert S. Boyd, *Teenage Trouble? Blame It on Their Brains*, STAR TRIB. (Minneapolis), Dec. 19, 2006, at A1. See generally DAVID WALSH, *WHY DO THEY ACT THAT WAY* 37 (2004). While beyond the scope of this article, the impact of such recent research involving childhood cognitive and emotional development on areas of family law and juvenile justice would be a fruitful area for study.

74. See Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 1–2 (2004).

75. Richards, *supra* note 69, at 205.

76. See Ezer, *supra* note 74, at 4.

77. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

78. *Id.* at 192–93. Joshua’s abuse was well-documented, as was his case-worker’s chilling remark when told of Joshua’s last beating that “I just knew the phone would ring some day and Joshua would be dead.” *Id.* at 209 (Brennan, J., dissenting).

79. *Id.* at 195 (majority opinion). The Court drew a sharp distinction between public and private action, concluding that there was no constitutional right to protection against private violence. See also *Town of Castle Rock v.*

been noted that the Court could not sustain this purely negative constitutional view,⁸⁰ leaving open the possibility of the State having affirmative duties to care for and protect certain individuals,⁸¹ and that the State may not deny protective services to disfavored minorities.⁸² Nonetheless, the Court refused to accept the notion that the government has a duty to protect children even where the government is responsible for the child remaining in known danger,⁸³ thus supporting the proposition that an autonomy model predicated on a right to be free from interference is inadequate for children.⁸⁴

Despite the differences between children and adults, some commentators have categorized children's rights that presuppose children's autonomy.⁸⁵ For example, the empowerment perspective attributes competencies to children that enable them to act autonomously in legal proceedings affecting them.⁸⁶ This view is critical both of interest-based rights and of feminist theories of rights that emphasize relationships between individuals and reject traditional approaches to rights in which autonomy is central.⁸⁷ But autonomy seems to be necessary to the empowerment perspective because it requires that children act

Gonzales, 545 U.S. 748 (2005). In *Town of Castle Rock*, three children were murdered by their father after law enforcement failed to enforce a domestic abuse order. *Id.* at 754. The Court held that the benefit to a third party in having someone arrested for a crime generally does not trigger Due Process Clause protections. *Id.* at 768.

80. Ezer, *supra* note 74, at 21.

81. *DeShaney*, 489 U.S. at 198.

82. *Id.* at 197 n.3.

83. *See id.* at 202.

84. *See Ezer, supra* note 74, at 38. Ezer argues that a better approach would be to ground children's rights in "positive" freedom based on human dignity and children's development and potential. This approach emphasizes that "[s]tanding alone, neither emphasis on autonomy, dependence, nor development provides a complete picture of children's rights." *Id.* at 41.

85. *See, e.g., Wald, supra* note 7, at 260 (stating four different types of claims under children's rights, vis-à-vis, generalized claims against the world, protection from abuse or neglect, the right to be treated equally with adults by the state, and the right to act independently of parental control); Woodhouse, *supra* note 5, at 114–22 (describing five principles governing rights schemes: equality, individual dignity, privacy, protection, and empowerment).

86. *See Federle, supra* note 7, at 1601 (suggesting that adherence to the empowerment perspective provides children a crucial voice and bargaining power in legal proceedings); *see also infra* Part IV.

87. Federle, *supra* note 7, at 1591–92. For Federle, however, tying rights to relationships is just another way of saying that children have interests that have to be protected because they are incompetent. *Id.*

independently to vindicate their own rights, albeit with competent representation to advocate the children's *interests and wishes*.⁸⁸ It may well be true that the empowerment perspective separates rights from interests, and therefore avoids reaffirming children's vulnerability and helplessness;⁸⁹ but if these rights are not relationship rights,⁹⁰ then it is unclear where they are grounded unless we attribute to children the same negative rights that we attribute to adults, thus implying that children are equally capable of autonomous, free choices. But we treat children differently precisely because we make assumptions about their incapacity to act in an adult manner and thereby try to foster their growth toward autonomous citizens.⁹¹

That we do not attribute to children the capacity to make autonomous, free choices is perhaps not least because of the difficulty of delineating a theory of rights that is appropriate for all children at all stages of development.⁹² Therefore, it may be more productive to view autonomy as latent in the sense that it is present in all persons, including children, but that the capacity to exercise it may be restricted.⁹³ At the same time, the capacity to exercise it might also be encouraged.⁹⁴ The question then becomes how we might best do that; it is perhaps in this area that the empowerment perspective is of some value. It may ensure that at least some children have a voice in matters that directly affect them and tangibly recognize their capacity for autonomy.⁹⁵ Standing in judicial proceedings may be a place to start. One way to do this

88. *Id.* at 1600. Advocating for children's *interests* and children's *wishes* need not be the same thing, of course. A guardian ad litem normally advises the court on a child's interests. An attorney normally must represent her client's wishes.

89. *Id.* at 1591.

90. Children's rights may not necessarily be relational rights. *See, e.g.,* Ezer, *supra* note 74, at 1 (noting that the term "child" does not stand alone but necessarily implies a relationship).

91. Wald, *supra* note 7, at 266.

92. *See, e.g.,* Theresa Glennon & Robert G. Schwartz, *Foreword: Looking Back, Looking Ahead: The Evolution of Children's Rights*, 68 TEMP. L. REV. 1557, 1561 (1995) (pointing out that children's developmental years are continuously changing and that one set of rights may not be appropriate for all levels of children).

93. Alexander McCall Smith, *Is Anything Left of Parental Rights?*, in FAMILY RIGHTS, 5–6 (Elaine Sutherland & Alexander McCall Smith eds., 1990).

94. Woodhouse, *supra* note 5, at 118–20.

95. Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 324–25 (1999). *See also* Woodhouse, *supra* note 5, at 118 (stating that empowerment respects children's individuality while within the context of their eventual capacity for autonomy).

may be to expand the statutory schemes, which permit children to have standing and representation in termination of parental rights and neglect proceedings, to include proceedings such as those involving domestic abuse where children's interests may be adverse to parents and where they do not benefit from statutory rights to representation.⁹⁶ A move in this direction may reflect "graduated standing" that takes into account children's development and their capacity to act autonomously.

IV. AUTONOMY AND LEGAL STANDING

An autonomy-based approach to children's rights suggests that it is appropriate to grant standing to children in family law cases that can profoundly affect their interests and their lives. Indeed, not only would it be appropriate—it would be necessary to vindicate children's rights that might be opposed to those of their parents or others. For example, children's interests will be adverse to at least one of their parents in family violence cases.⁹⁷

Though there may be statutory bases for the permissive joinder of children⁹⁸ and of third parties in custody proceedings,⁹⁹ standing is the right to take the initial steps in framing legal issues ultimately to be decided by a court or jury.¹⁰⁰ One must have, in an individual or representative capacity, a real interest in the cause of action.¹⁰¹ Thus, standing requires that a party has a sufficient stake in a justiciable controversy to seek relief from a court.¹⁰² Such a stake has been defined as having a substantial, direct, and immediate interest in the subject-matter litigation.¹⁰³

Read in this way, it makes perfect sense that the child of a marriage should be a party as a matter of course to the dissolution of that marriage.¹⁰⁴ Additionally, from the point of view of

96. Goodmark, *supra* note 95, at 319.

97. *Id.*

98. *See, e.g.*, MINN. STAT. § 257.60 (2006) (providing for permissive joinder in paternity actions).

99. *E.g.*, *Murray v. Antell*, 361 N.W.2d 466, 468–69 (Minn. Ct. App. 1985) (permitting joinder of stepfather in former husband's motion to modify custody).

100. BLACK'S LAW DICTIONARY 1442 (8th ed. 2004).

101. *E.g.*, *Presidential Capital Corp. v. Reale*, 652 A.2d 489, 504 (Conn. 1994).

102. *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 913 (Minn. Ct. App. 2003) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731–32 (1972)).

103. *Frank v. Frank*, 833 A.2d 194, 196 (Pa. Super. Ct. 2003).

104. Indeed, some proponents of children's rights take such a position. *See, e.g.*, Federle, *supra* note 7, at 1600–01. Federle describes the hypothetical cases of

children's autonomy, it would seem to follow that children should have standing and be parties as of right to family law proceedings that affect their interests.¹⁰⁵ It is difficult to argue that children do not have a sufficient stake in the outcome of a marriage dissolution case that may well determine where the child lives and with whom.¹⁰⁶ But children are generally not considered to be parties to marriage dissolution proceedings.¹⁰⁷ This is so even though the dissolution binds children to the parts of the dissolution judgment that resolve the child-related aspects of the dissolution.¹⁰⁸ Children are also denied standing in their parents' custody and visitation cases, largely on the theory that at least one of the parents will adequately represent the child's interests.¹⁰⁹ As a result, courts place children in the same place as adult would-be interveners whose personal or family interests do not constitute an "interest" sufficient to support intervention as of right.¹¹⁰ Instead of children

"Ashley," who would have the right to participate as a party, which would mean more than simply participating in the process. *Id.* "Ashley" would necessarily have standing as a party in all divorce proceedings affecting her family. *Id.*

105. *But see* Woodhouse, *supra* note 5, at 119 (noting that state laws and judges routinely deny children standing in family law cases).

106. Of course, children might be excluded in the sense that they are typically not parties to the original marriage contract. *See, e.g., In re Estate of Crockett*, 728 N.E.2d 765, 767 (Ill. App. Ct. 2000) (stating the widely held position that marriage is a civil contract with three interested parties: the husband, the wife, and the State). But children might be considered to be third-party beneficiaries with interests and/or rights that should be protected. *See, e.g., Morelli v. Morelli*, 720 P.2d 704, 706 (Nev. 1986) (holding that a child was a third-party beneficiary of her parents' separation agreement providing for payment of the adult child's college expenses); *Drake v. Drake*, 455 N.Y.S.2d 420, 424 (N.Y. App. Div. 1982) (holding that children may enforce specific provisions of their parents' separation agreement that are made exclusively for the benefit of the child, such as to provide for the child's educational expenses). *See also* *Armstrong v. Armstrong*, 544 P.2d 941, 951 (Cal. 1976) (concluding that children were bound by judgment in divorce action to which their mother was a party, but conceiving situations where parent's and child's interests may be opposed).

107. *See* *Kielley v. Kielley*, 674 N.W.2d 770, 776 n.1 (Minn. Ct. App. 2004). *See also* MINN. GEN. R. PRAC. 302.04(a) (providing for party designations in various family law proceedings and permitting subsequent references to "husband" and "wife").

108. *Kielley*, 674 N.W.2d at 776 n.1.

109. *E.g., In re Marriage of Thompson*, 651 N.E.2d 222 (Ill. App. Ct. 1995).

110. *Van Meveren v. Van Meveren*, 603 N.W.2d 671, 673 (Minn. Ct. App. 1999). The Minnesota Rules of Civil Procedure permit intervention as of right where (1) the motion to intervene was timely; (2) there is an interest relating to the property or transaction that is the subject of the action; (3) as a practical matter, disposition of the action may impair or impede the party's ability to protect that interest; and (4) the party is not adequately represented by the existing parties. MINN. R. CIV. P. 24.01. But Rule 24.01 has been interpreted to

having standing, a court may, or in some cases must, appoint a guardian ad litem to represent children's interests.¹¹¹ In addition, a child over the age of 14 may apply for the appointment of a guardian ad litem.¹¹²

Two well-known Florida cases illustrate divergent approaches to autonomy and children's rights to standing in legal proceedings. *Kingsley* adhered to the general rule that children are not entitled to bring legal proceedings in their own names.¹¹³ In *Kingsley*, an eleven-year-old boy sought to terminate his mother's parental rights by suing in his own name. Concluding that the district court had erred in allowing him to do so, the Florida District Court of Appeal held that non-age was a disability that prevented a child from initiating such an action.¹¹⁴ Rather, while the child is the real party in interest, courts require that an adult of reasonable judgment and integrity act for the child as his or her "next friend."¹¹⁵ Thus, as a procedural disability, non-age could be cured by appointment of guardian ad litem.¹¹⁶ By contrast, a Florida circuit court concluded that Kimberley Mays had standing to sue in her own name to sever all ties, including visitation rights, with her biological parents.¹¹⁷ Kimberley had been "swapped" at birth with a child, Arlena Twigg, who later died. Blood tests revealed Kimberley's true identity and her biological parents sought to establish visitation with her. After some efforts to do so, the relationship broke down and Kimberley sued to sever ties with her

preclude intervention as of right in family law situations. *Valentine v. Lutz*, 512 N.W.2d 868, 870 (Minn. 1994). Moreover, a child who wishes to intervene would also have to persuade a court that his or her interests are not protected by the existing parties, i.e., the parents.

111. MINN. STAT. § 518.165, subdvs. 1 and 2 (2006) (providing for permissive appointment or, in cases where the court has reason to believe a child is a victim of domestic child abuse or neglect, mandatory appointment). But in both situations, appointment of a guardian applies only "where custody or parenting time with a minor child is in issue . . ." *Id.* Therefore, there is no provision for appointing a guardian to advise the court on effects of a property settlement, for example, on a child's interests.

112. *See, e.g.*, MINN. R. CIV. P. 17.02.

113. *Kingsley v. Kingsley*, 623 So. 2d 780, 784 (Fla. Dist. Ct. App. 1993) (citing *Bellotti v. Baird*, 443 U.S. 622, 650 (1979)).

114. *Id.* at 783.

115. *Id.* at 784.

116. *Id.* *See also In re* Petition of Frazer, 721 A.2d. 920, 921 (Del. 1998) (holding the issue of non-age curable by appointing a guardian ad litem).

117. *Twigg v. Mays*, No. 88-4489-CA-01, 1993 WL 330624, at *3 (Fla. Cir. Ct. Aug. 18, 1993).

biological parents.¹¹⁸ The *Twigg* court concluded that Kimberley had standing based on its reading of two separate provisions of the Florida Constitution.¹¹⁹ The first provided that children are “natural persons” and that minors as well as adults possess constitutional rights.¹²⁰ The second, that “[t]he courts shall be open to every person for redress of any injury.”¹²¹ Having concluded that Kimberley had standing, the court held that it would be detrimental to Kimberley to declare her to be the Twigg’s biological child.¹²²

Both the *Kingsley* and the *Twigg* cases involved the right of children to maintain termination of parental rights actions in their own names.¹²³ Although the courts reached different conclusions on the standing issue, for the children, the results were the same: each achieved termination of their biological parents’ parental rights.¹²⁴ As a result, the question remained as to whether a child had status to sue on his or her own behalf to sever parental rights.¹²⁵ The cases could indicate an inclination to address each case on its merits, and, though not swinging the courthouse doors wide open for children to sue on their own behalf, at least leaving them unlocked.¹²⁶ Perhaps this is so, but since *Kingsley* and *Twigg*, there has been no great clamoring to open the courthouse doors. This may be because courts remain wary of intruding into areas traditionally reserved for parental authority even where, for standing purposes, a child is within the zone of interests that a statute or constitutional guarantee protects.¹²⁷

Subsequently, in an unreported decision in *Ramos v. Cox*, a Connecticut court considered a child’s right to challenge a paternity judgment in her own name.¹²⁸ In *Ramos*, the parents acknowledged Cox as Brianna’s father pursuant to Connecticut

118. *Id.* at *2.

119. *Id.* at *3.

120. *Id.* (citing FLA. CONST. art. I, § 23).

121. *Id.* (citing FLA. CONST. art. I, § 21).

122. *Id.* at *6.

123. See *Kingsley*, 623 So. 2d 780; *Twiggs*, No. 88-4489-CA-01, 1993 WL 330624.

124. Scott A. Cannon, *Finding Their Own “Place to Be”: What Gregory Kingsley’s and Kimberley Mays’ “Divorces” From Their Parents Have Done for Children’s Rights*, 39 LOY. L. REV. 837, 853 (1994).

125. *Id.*

126. *Id.* at 855.

127. Frank v. Frank, 833 A.2d 194, 197 (Pa. Super. Ct. 2003).

128. *Ramos v. Cox*, No. FA000630917, 2002 WL 31894798, at *1 (Conn. Super. Ct. Dec. 3, 2002).

law.¹²⁹ The parents then resided together and became the parents of twin girls.¹³⁰ Later, Brianna sued to vacate the paternity judgment on a number of grounds, including fraud.¹³¹ The court noted that it would be “peculiar to recognize the interest of the child to the determination of parentage and then deny her standing in legal proceedings based on or involving that determination.”¹³² Therefore, it concluded that Brianna had standing, *through her guardian ad litem*, to pursue the motion to vacate and to be heard on pending motions.¹³³

By contrast, in *Frank v. Frank*, three teenage children sought to modify a custody order of joint physical custody to sole physical custody in their mother, a Christian, following their conversion from Judaism. The father was Jewish.¹³⁴ Noting that the custody issues had already been fully litigated, the court held that the mother was seeking to relitigate the trial court’s denial of her petition for reconsideration raising the same claims.¹³⁵ The court may well have been correct in this assessment. But even if the case had been an original custody determination rather than a modification proceeding, the court would still have held that the children lacked standing.¹³⁶ Pennsylvania law does provide that children may express a preference in custody matters,¹³⁷ as does that of most other jurisdictions.¹³⁸ The child’s preference may be expressed through a guardian ad litem or, more commonly, through interviews with a court-appointed evaluator.¹³⁹ But in either case, it is the guardian or evaluator who ultimately makes recommendations to the court based on her assessment of what is

129. *Id.*

130. *Id.*

131. *Id.* at *3.

132. *Id.* But this notion has not necessarily troubled many courts. *See supra* note 84 and accompanying text.

133. *Ramos*, 2002 WL 31894798, at *3. This still leaves open the question of whether Brianna could pursue the case in her own name and be represented by an attorney as opposed to a guardian. In any event, Brianna was ultimately unable to produce sufficient evidence of fraud and her motion was unsuccessful. *Id.* at *6.

134. *Frank*, 833 A.2d at 195.

135. *Id.* at 197.

136. *Id.*

137. *Id.* at 198.

138. *E.g.*, MINN. STAT. § 518.17 (2006) (providing that the court must evaluate the reasonable preference of a child if the court deems the child to be of sufficient age to express a preference).

139. A judge, of course, may interview children directly to ascertain their preferences and, as such, they can speak directly. But for unrepresented children, even a relatively informal interview could be intimidating.

in the child's best interests. The risk here is that children's voice will be muted, disregarded, or, perhaps, not even their own. On the other hand, allowing children to have standing in proceedings affecting their fundamental interests would serve two purposes: it would grant a direct voice to developmentally capable children,¹⁴⁰ and it would advance an important societal interest in encouraging and enhancing children's capacity for developing into autonomous citizens.¹⁴¹

V. CONCLUSION

A purely autonomy-based theory of children's rights seems inadequate in light of the way notions of children's rights have developed historically and in the way the law has considered issues of standing in family law matters. The traditional view of autonomy emphasizes negative freedoms, which seem inappropriate for children.

How children's rights should properly be conceived remains a work in progress. It may be more productive to conceive of children's rights as being inherent in children as persons and to ground children's rights in dignity and protection rather than purely on the position that children are autonomous legal actors. At the same time, providing a system of graduated standing for children in certain family law cases may provide an opportunity to foster children's development into autonomous citizens by allowing them a clearer and more direct voice in proceedings that directly affect their fundamental interests.

140. See Woodhouse, *supra* note 5, at 119.

141. See *id.* at 118. See also discussion *supra* Part III.