

# CHAPTER ONE — CHILD, PARENT AND STATE

## Children's Rights: A Framework for Analysis\*

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*The Article identifies four different types of claims being made under the rubric of "children's rights" and explores the questions that need to be answered in deciding whether to expand the "rights" of children in each area. Some of the claims involve providing children with more protection, others involve giving them more autonomy. These claims may be inconsistent or conflicting. The author argues that a separate framework is needed in analyzing each category of rights.*

The question of what rights should be given children is now being debated in courts, legislatures and scholarly and popular journals.<sup>1</sup> Increased societal concern over individual rights, the

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<sup>1</sup> Among the most important court cases are *In re Gault*, 387 U.S. 1 (1967) (juvenile court procedures); *Ginsberg v. New York*, 390 U.S. 629 (1968) (first amendment); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (first amendment); *Goss v. Lopez*, 419 U.S. 565 (1975) (school expulsion); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (first amendment); *Bellotti v. Baird*, 428 U.S. 152 (1976) (abortion); *Carey v. Population Services, Int'l*, 428 U.S. 132 (1976) (access to contraceptives); *Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment); *In Re Roger S.*, 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977) (civil commitment). The literature is becoming quite extensive. Among the most influential works are R. FARSON, *BIRTHRIGHTS* (1974); H. FOSTER, *A BILL OF RIGHTS FOR CHILDREN* (1974); J. HOLT, *ESCAPE FROM CHILDHOOD* (1974); IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, *STANDARDS RELATING TO RIGHTS OF MINORS* (Tent. Draft 1977); Geiser, *The Rights of Children*, 28 HAST. L. J. 1027 (1977); Goldstein, *Medical Care for the Child at Risk: On State Supervision of Parental Autonomy*, 86 YALE L. J. 645 (1977); Hafen, *Children's*

recognition of child abuse as a major problem, the loss of faith by many in juvenile courts, schools and other institutions dealing with children, and the changing structure and role of families have all played a part in the emergence of a movement to give children more "rights."<sup>2</sup>

The idea of children having rights is, in many ways, a revolutionary one. Historically, children have been under the control of their parents, and to a lesser degree, the state.<sup>3</sup> Presumed by law to lack the capacity of adults, children are denied full participation in the political, legal and social processes.<sup>4</sup> In lieu of most rights, the state affords children special protection.<sup>5</sup>

Today, however, many people consider this control, and the special protection that accompanies it, to be harmful, even op-

*Liberation and The New Equalitarianism: Some Reservations About Abandoning Youth to Their Rights*, 1976 B.Y.U.L. REV. 605; *The Rights of Children*, Special Issue (p 131-2), 43 HARV. EDUC. REV. 481, 44 HARV. EDUC. REV. 1 (1973-74).

The issue has received a good deal of press as well. See, e.g., *Children's Rights: The Latest Crusade*, TIME, Dec. 25, 1972, at 41; *Drive For Rights of Children*, U.S. News & World Rep., Aug. 5, 1974, at 42.

<sup>2</sup> See Margolin, *Salvation v. Liberation: The Movement For Children's Rights In A Historical Contest*, 25 SOC. PROB. 441 (1978), for a discussion of the forces leading to the "children's rights movement." See also Geiser, *supra* note 1.

<sup>3</sup> The discussion in this article focuses on the status of children in the United States. The degree of autonomy given to children and the relative role of state and parent varies from society to society. Unfortunately, the anthropological and historical literature provide relatively little information about children's rights in different cultures or times.

<sup>4</sup> Jeremy Bentham stated the traditional view of the law over 100 years ago:

The feebleness of infancy demands a continual protection. Everything must be done for an imperfect being, which as yet does nothing for itself. The complete development of its physical power takes many years; that of its intellectual faculties is still slower. At a certain age, it has already strength and passions, without experience enough to regulate them. Too sensitive to present impulses, too negligent of the future, such a being must be kept under an authority more immediate than that of the laws . . . . .

1 J. BENTHAM, THEORY OF LEGISLATION 248 (Boston 1840).

<sup>5</sup> It is questionable whether children actually get special protection. Adult treatment of children has always been a mixed bag. While children are thought of as special, deserving of extra help and care, they have also been viewed and treated as chattels. Infanticide, severe misuse of children in factories, selling of children into marriage are just some examples of the ways children have been treated like property. Institutions, like juvenile courts, designed to protect children have often harmed them instead. See E. RYERSON, THE BEST LAID PLANS (1978).

pressive,<sup>6</sup> to children. At the extreme, some children's rights advocates call for a total change in policy. For example, teacher and author John Holt advocates that children of any age be given the right to vote, to work for money, to choose what type of education they want, and to be free from corporal punishment.<sup>7</sup> Psychologist Richard Farson goes even further. He argues that the issue of self-determination is at the heart of "children's liberation."<sup>8</sup> To Farson, children's rights can only be realized when all children have total freedom to decide for themselves what is best for them, including the right to sexual freedom, financial independence, and the right to choose where they shall live. Therefore, he argues for the elimination of both state and parental control of children.<sup>9</sup>

While most advocates do not go this far, respected experts from many disciplines argue that we need to adopt a "Bill of Rights" for children to assure their well-being. The type of rights suggested range from broad claims such as the right to grow up free from poverty and discrimination, to be born a wanted child, and to grow up nurtured by affectionate parents, to more specific rights, such as the right of children to choose their custodians upon divorce, to decide whether or not to have an abortion, to get medical care without parental consent or knowledge and to live on their own if they can support themselves.<sup>10</sup> Some advocates

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<sup>6</sup> Even the media uses the term oppression. See Finebrock, *Our Last Oppressed Minority—Children*, San Francisco Examiner, Nov. 30, 1978, at 1.

<sup>7</sup> Holt, *supra* note 1, at 18 *passim*.

<sup>8</sup> Farson, *supra* note 1, at 27.

<sup>9</sup> *Id. passim*.

<sup>10</sup> One of the first Children's Bill of Rights is found in the United Nations Declaration of the Rights of the Child reprinted in B. GROSS & R. GROSS, *THE CHILDREN'S RIGHTS MOVEMENT* 333 (1977). See also H. Foster, *supra* note 1. A constitutional amendment to assure children's rights has been proposed by S. SOMAN, *LET'S STOP DESTROYING OUR CHILDREN* (1975). The amendment would include the right to

- Physical safety and health care before and after birth;
- The basics of life itself, including love;
- Learn and be educated;
- Enjoyment, play, laughter;
- The same constitutional protections as anyone else;
- Understanding, tolerance, acceptance on the part of all adults;
- Adult models demonstrating consideration, integrity, ethics and, most especially, compassion;
- A peaceful, nonracist world where violence, massacres and wars are considered obsolete;
- His or her own identity;

Even the children have joined in. A recent conference of educators, held at Columbia Teachers College, invited a group of 9 to 16-year-olds to address them

make distinctions by age; many do not.<sup>11</sup> Most advocates also assert that children must have access to counsel to effectuate their rights. A number of legal organizations funded to provide free legal services to children are already raising issues of children's rights.<sup>12</sup>

Not everyone shares the views of children's rights advocates, however. Among the most prominent proponent of limited rights and expanded parental control is Yale Law Professor Joseph Goldstein. He argues that:

To be a *child* is to be at risk, dependent, and without capacity to decide what is "best" for oneself.

To be an adult is to be a risktaker, independent, and with capacity and authority to decide and to do what is "best" for oneself.

To be an *adult who is a parent* is to be presumed in law to have the capacity, authority, and responsibility to determine and to do what is good for one's children.<sup>13</sup>

Others, who fear that expansion of the notion of children's rights will undermine the family structure to the detriment of children and society as a whole, have expressed similar views.<sup>14</sup>

To date, neither legislatures nor courts have developed a coherent philosophy or approach when addressing questions relating to children's rights.<sup>15</sup> Different courts and legislatures have been willing to give some new rights to children, while denying them others, without explaining the difference in outcome.<sup>16</sup>

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on the issue of children's rights. The children made more limited claims than their elder advocates. They asked for freedom from corporal punishment, the end of placement of children in large penal or mental institutions, and the end of child pornography. Their position was summarized by 9-year-old Cristy, who said, "Children should have civil rights, just like women and other people get, because, you know, civil rights isn't only for grownups, it is for children, too." *Last Oppressed Minority Speaks Up*, N.Y. Times, June 17, 1977, A at 24.

<sup>11</sup> Cf. FARSON *supra* note 1 and IJA-ABA STANDARDS, *supra* note 1.

<sup>12</sup> Among the organizations suing on behalf of children are the National Youth Law Center, the ACLU Juvenile Rights Project, and the Children's Defense Fund. See Campbell, *Children's Rights Drive Is Centered In Courtroom*, N.Y. Times, Oct. 31, 1976, at 26.

<sup>13</sup> Goldstein, *supra* note 1, at 645.

<sup>14</sup> See, e.g., Hafen *supra* note 1.

<sup>15</sup> For example, many states allow minors the right to abortion without parental permission or guidance, while others demand such permission. For a summary of various state laws relating to children's rights, see A. SUSSMAN, *THE RIGHTS OF YOUNG PEOPLE* (1977).

<sup>16</sup> See SUSSMAN, *supra* note 15, for a comparison of which rights each state gives to, and denies, to children. Compare *Bellotti v. Baird*, 428 U.S. 152 (1976) with *Ingraham v. Wright*, 430 U.S. 651 (1977).

The absence of a coherent theory is not surprising. The status of children in society raises extremely perplexing issues. The demand for children's rights calls into question basic beliefs of our society. Implementation of many of the rights being claimed for children could involve substantially altering the role of the state towards parents and children and the role of parents towards children. Most legal and social policy is based on the beliefs that children lack the capacity to make decisions on their own and that parental control of children is needed to support a stable family system, which is crucial to the well-being of society.<sup>17</sup> These views are widely held and, at least for young children, seem intuitively correct.<sup>18</sup> On the other hand, our society is unwilling to treat children merely as the property of adults. Given our commitment to individual liberty, there needs to be substantial reason for treating any class of individuals in a special way. Therefore, it is necessary to examine closely the claims of children's rights advocates in order to see whether the existing legal structure should be altered.

This article does not attempt to delineate what specific rights, if any, children should be given. Instead, it tries to provide a framework for analyzing the concept of "children's rights" and to isolate some of the issues that must be resolved in order to make sound policy decisions.<sup>19</sup> In order to assess the need for further extension of children's rights, it is first necessary to separate the various type of claims beings made on behalf of children. By lumping a wide range of claims under the heading "children's rights," proponents of expanded rights broaden their appeal while masking significant differences in the desirability or undesirability of granting specific rights to children.<sup>20</sup> In addition, assuming that children should have some additional rights, the means of achieving and enforcing various rights depends on the type of "right" being advocated.<sup>21</sup>

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<sup>17</sup> Statements about the importance of family are commonplace in judicial opinions regarding family or children's rights. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 816, 844 (1977). However, the reasons why our family structure is critical to the well-being of the state are rarely articulated.

<sup>18</sup> These intuitive views are supported by child development research. See notes 71-76 *infra*.

<sup>19</sup> The article addresses policy decisions at both the legislative and judicial level. Although much of the activity concerning children's rights has focused on the courts, it may well be that legislative, rather than judicial, resolution is more appropriate for many issues.

<sup>20</sup> Many advocates do lump the classes together, without distinction. See SOMAN, *supra* note 10.

<sup>21</sup> Means of enforcement are of particular concern to lawyers, who think in

## I. CATEGORIES OF RIGHTS

There are four different types of claims under the general rubric of children's rights. While there is some overlap among the categories, each has special characteristics relevant to analyzing whether children should be given such rights. The categories are: (A) generalized claims against the world, e.g., the right of freedom from discrimination and poverty; (B) the right to greater protection from abuse, neglect or exploitation by adults; (C) the right to be treated in the same manner as an adult, with the same constitutional protections, in relationship to state actions; (D) the right to act independently of parental control and/or guidance.

### A. Rights Against the World

The first category, claims for rights such as the right to freedom from poverty, to adequate health care, to adequate housing and to a safe community are frequently found in proposed "Children's Bills of Rights."<sup>22</sup> In many respects, these type of claims are the most important "rights" that could be given to children. They lie at the heart of a child's well-being. It is now well-established that factors such as nutrition and medical care can greatly affect a child's physical and mental development from the time of conception onward.<sup>23</sup> In addition, poverty, neighborhood conditions and discrimination seem to contribute to delinquency, school and mental health problems.<sup>24</sup> To the extent that children are denied equal access to adequate nutrition, housing, medical care and schooling they may be effectively denied equal opportunity in our

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terms of legal remedies. Many non-lawyer proponents of children's rights have not given much thought to implementation. See, e.g., S. SOMAN, *supra* note 10. The failure to think about implementation is not limited to non-lawyers, however. See FOSTER, *supra* note 1.

<sup>22</sup> This type of protections can be thought of as "welfare" or "positive" rights. See Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 966, 997 (1973).

<sup>23</sup> See generally K. KENISTON, ALL OUR CHILDREN (1977); U.S. DEPT. OF HEW, 200 YEARS OF CHILDREN, chs. 2 & 3 (E. Grotberg ed. 1977). This does not mean that nutrition or medical care are dispositive, just that they can have a big influence. Children are quite resilient and often can overcome deficits. See WERNER, BIERMAN, & FRENCH, KAUAI'S CHILDREN COME OF AGE (1977).

<sup>24</sup> We do not know the "causes" of these problems, but there is a high correlation between the factors enumerated and these problems. Other factors are certainly important as well. See Pierce, *Poverty and Racism as They Affect Children* and Berlin, *It Can be Done: Aspects of Delinquency Treatment and Prevention* in ADVOCACY FOR CHILD MENTAL HEALTH (I. Berlin ed. 1975).

society. In a society committed to both equal opportunity and individualism, the moral force of such claims is very great.

On the other hand, these claims are not of great significance in terms of reordering the legal and social status of children. First, the rights in this category are not meant to benefit only children; they are not claims for legal rights now given adults but denied children. These are rights that would and should benefit all people if they were available to children.<sup>25</sup>

Moreover, making the world a better place for children will not alter the status of children in the manner Holt, Farson or the numerous lawsuits attempting to establish legal rights for children seek. Providing children with adequate income or health care does not entail giving them more autonomy or self-determination. Quite the opposite. Demands for such rights recognize that children cannot provide for themselves and need the care and guidance of adults. Thus, these claims might be better thought of as protections due, rather than rights of, children.<sup>26</sup>

In fact, these claims generally are not for things traditionally thought of as legal "rights," i.e., entitlements enforceable by court order. Courts cannot order that the world be free of poverty or that all children have adequate health care.<sup>27</sup> Only the legislative process can provide all children with these goods and it cannot guarantee a "right" to them.

Properly classifying these "rights" as protections tells us where to focus claims and how to defend them. Because the claims are basically moral and social goals, they should be addressed to legislatures, not courts. The debate should center in defining the obligations society has towards both adults and children, not on questions of the status of children and parents or on the capacity of children for independent decision-making.

### B. *Protection from Inadequate Care*

The second category of rights encompasses claims that the

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<sup>25</sup> Some of these "rights" could be given solely to children, through special medical programs, school breakfast and lunches, etc. It may be that children should have a special claim to such goods since they are more dependent than adults, and perhaps more likely to be affected by deprivations. They are also a more politically appealing group for redistribution purposes. However, by not giving adults such goods as well, we impair their ability to care for their children.

<sup>26</sup> See Geiser, *supra* note 1, at 1039-1044.

<sup>27</sup> Courts can give children some such rights, especially if there is any legislative basis. See Michelman, *supra* note 22, at 991-997, 1003-1015.

state should more actively protect children from harm by adults, especially their parents. Over the past fifteen years, concern over child abuse, plus increased evidence that early child rearing can affect a child's school readiness and performance, has led many commentators to advocate, in the name of children's rights, increased state monitoring of the adequacy of the parental care.<sup>28</sup> In general, these commentators have argued for broadening the definition of child neglect, in order to insure that parents rear their children properly. The most expansive definition would include "any act of commission or omission by individuals, institutions, or society as a whole . . . which deprive children of equal rights and liberties, and/or interfere with their optimal development."<sup>29</sup>

In many respects, this category of "rights" is closely analogous to the category of general rights just discussed.<sup>30</sup> The need for more "rights" is based on the premise that children lack the capacity to care for themselves and therefore need adult protection, care and guidance. Our society, as most societies, has given the power and duty to rear children primarily to their parents.<sup>31</sup> The power is great, although it has never been without limits. Because society assumes that children cannot raise themselves, that the type of rearing they receive will affect their life chances, and that children, as individual human beings, are not merely chattels subject to total parental control, all states have established some minimal standards for parental conduct<sup>32</sup> and have assumed some child rearing activities, most notably schooling.<sup>33</sup>

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<sup>28</sup> These trends and the issues they raise are discussed in Wald, *State Intervention on Behalf of "Neglected" Children: A Search For Realistic Standards*, 27 STAN. L. REV. 985 (1975).

<sup>29</sup> D. GIL, *VIOLENCE AGAINST CHILDREN* 202 (3d ed. 1973). Insofar as definitions like Gil's apply to "society as a whole" they are addressing category one as well as category two "rights."

<sup>30</sup> The rights in both groups are designed to insure that children receive adequate care from adults until such time as they can care for themselves. The distinction lies in the fact that the first category requires the state to directly provide goods to the child to insure the child a given quality of life, while the second category only requires the state to monitor whether adults, especially parents, are actually harming children.

<sup>31</sup> A few countries or cultures have adopted more communal child-rearing methods, such as the kibbutz in Israel. While the relative role of state and parent must be addressed in deciding how to cope with child abuse, it is unlikely that the U.S. will move in any significant way towards communal child-rearing, although some subgroups in society may do so.

<sup>32</sup> See Wald, *supra* note 28.

<sup>33</sup> Given our society's commitment to parental freedom, the state has not



Those advocating more rights for children would require a higher level of minimum parental care than current standards require,<sup>34</sup> just as they would require the state to provide a higher level of state services to children and help to parents through expansion of the rights included in category one.

Again, however, claims in this area are of a very different nature than the assertion that children should have more autonomy or independence. They do not change the status of children. The intervention advocated entails substituting one adult decision-maker for another, rather than giving children the choice of deciding whether they like the conditions in which they find themselves. Generally, it is adults, not children, who invoke the protection process.<sup>35</sup>

In fact, children's views often are disregarded when giving them more protection.<sup>36</sup> Thus, if parents allowed their children to appear in pornographic movies, few children's rights advocates, let alone legislators or the general public, would allow the situation to continue, even if the child said, "I'm enjoying myself and making good money. Leave me alone." They would "protect" children in spite of their "rights" or "autonomy." Neither do we ask physically abused children whether they want to remain with their parents if we cannot protect them from further physical harm. We assume that children in these situations are not capable of protecting their own long-range interests.

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assumed total control of schooling. Although all parents must insure that their children receive a certain amount and type of education, they can do so in schools of the parents' choice, if they are able to pay for them. Some parents may even be able to limit the amount, as well as influence, of education. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish parents can end their children's formal schooling at eighth grade).

<sup>34</sup> One group of children's rights cases has focused on the adequacy of care given to children under state care. See, e.g., *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973). Conceptually these are not a separate class of rights; instead they can be seen as an extension of abuse and neglect laws to the state, when it assumes guardianship of a child. The key issue is the level of such care. The greater resources available to the state make it appropriate to demand a higher level of care than we demand of parents.

<sup>35</sup> Older children do sometimes initiate abuse proceedings.

<sup>36</sup> Courts often solicit older children's views in abuse or neglect proceedings. Young children usually are not consulted. Even when children have lawyers to represent them, the lawyers frequently see their role as deciding what is best for the child, not advocating the child's position. See *Areen & Mlyniec Representing Juveniles In Neglect, PINS, and Delinquency Cases in DISTRICT OF COLUMBIA* (DC Bar Assoc. 1975).

In addition to protection from parental abuse or inadequate care, a number of other claims for increased protection of children come within this category of "rights." For example, those adults who advocate, in the name of children's rights, putting controls on television violence or on the quality of children's food are not asking whether children like violent programs or enjoy eating Captain Crunch Chocolate Flakes; they are asserting that such fare is not in a child's interest, regardless of the child's views.<sup>37</sup> At least in my family, my children would consider this a significant interference with their rights. Implementation of such controls would actually reduce, rather than increase, the rights of choice many children now have.

Thus, these claims, like those in category one, are appropriately viewed as protections, not rights. Because the protections in this category are more specific and generally focus on whether parents are harming a child, the claims are more easily subject to judicial, as well as legislative, resolution.<sup>38</sup> The critical questions for debate should center on the appropriate role of parents and the state in child rearing.<sup>39</sup> It is necessary to decide what level of adult care is essential for children and how this can be best provided. This is an issue that divides "children's rights" advocates, since some people who work with children believe that less, rather than more, state interference is the way to best protect children.<sup>40</sup> It must also be decided what role the child should have in defining an acceptable environment.<sup>41</sup>

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<sup>37</sup> Opponents of regulation of commercials or cereal makers usually are defending parents' rights, not children's. They argue that control of television watching and food buying should be in the hands of parents, not government.

<sup>38</sup> Social work agencies and courts are responsible for protecting children from inadequate parental care. They are expected to apply specific standards in evaluating the adequacy of parental care. Through the use of services to the parents or foster care, these agencies are supposed to insure that children receive adequate care.

<sup>39</sup> See Wald, *supra* note 28, for a discussion of the various issues that must be considered in this debate.

<sup>40</sup> Cf. e.g., Bourne & Newberger, *Family Autonomy or Coercive Intervention? Ambiguity and Conflict in the Proposed Standards For Child Abuse and Neglect*, 57 BOSTON U. L. REV. 670 (1977); Wald, *supra* note 28.

<sup>41</sup> The question of the role of the child in defining abuse or neglect is a very troublesome one. The problem can arise even in cases where society in general believes the parent to be abusive, such as in cases of incest. The child may not view the relationship as harmful. How much weight should be given the child's views? Protectionists would protect; it is not clear what liberators would say.

Even more difficult are instances where older children want to leave their home because of parent-child conflict or because they find the home a difficult

While there has been some increase, in the past few years, in the "rights" afforded children with regard to state services and parental care—or more accurately put, there has been some effort to better protect children's interests—implementation of these rights has not affected the status of children in society. If these claims were the full extent of the children's rights movement, the debate over children's rights would be relatively limited. Since 1967, however, the children's rights movement has focused on two other categories of rights. These categories—the right of children of certain ages to be treated similarly to adults with regard to constitutional claims and the right to act independently of parents—do raise fundamental issues regarding the role assigned to children in our society.

### *C. Adult Legal Status*

The third category of rights, i.e. the right of children to fuller adult legal status in terms of state policies, has been the focus of the greatest amount of legislative and judicial activity. Historically, age alone has been accepted as a sufficient basis for withholding certain privileges from children.<sup>42</sup> Among the adult rights they lack are the right to vote, marry, drive, drink alcoholic beverages, work, express themselves and read what they please. Children are subject to compulsory education, a form of coercion that would be unconstitutional if attempted with adults. In addition, children have been denied due process protections in proceedings

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place to live. Home environments can be bad for children without falling into the abuse or neglect range. If the child is able to earn a living and is willing to be independent, emancipation is possible. However, emancipation is unrealistic for most people under 18, since they are unemployable. It must then be asked whether the state would provide them with state supported alternative living arrangements.

When the home situation does not amount to abuse or neglect but the child finds the situation intolerable, the policy questions involve category four disputes, i.e. parent-child conflicts.

It may be difficult to draw the line between neglect and family conflict in many instances. Thus, the two categories overlap.

<sup>42</sup> Throughout this article I use the term children rather than minors. The term obviously lumps a disparate group. While it may be reasonable to lump all persons falling below the age of majority for purposes of providing children protection, issues of autonomy generally involve older children, primarily adolescents. In fact, the term "minors" is often used in discussing the type of issues raised in categories three and four. The semantic difference may reflect real differences in how we perceive young people depending on the issue under consideration.

where adults would be entitled to such protections.<sup>43</sup> The special treatment of children has been justified on the basis of the minor's incapacity or lack of maturity or because of special protections children purportedly receive.<sup>44</sup>

Beginning with the U.S. Supreme Court decision in *In Re Gault*,<sup>45</sup> which provided due process procedural protections to minors charged with crimes in a juvenile court, the right of minors to adult legal status or protections has gradually increased. For example, the U.S. Supreme Court has ruled that children have a right to some due process protections before being expelled from school<sup>46</sup> and that school children are entitled to some first amendment freedoms, such as the right to wear armbands or distribute literature.<sup>47</sup> Among the legislature reforms are new juvenile court codes which give children rights similar to adults in delinquency and school expulsion proceedings.

In granting children these rights, the courts and legislatures have not arrived at any consistent theory of why they should grant children some rights and not others. In many instances the courts also have stopped short of placing the minor on equal footing with an adult in the same situation. For example, children still do not have full adult rights in delinquency proceedings and may be subjected to corporal punishment at school.<sup>48</sup>

It is in this area that children's rights advocates make their strongest claim. The special treatment of children rests on assumptions about their incapacity to act in an "adult" manner or on the necessity to protect them from factors that might impair their growing into autonomous, productive citizens. To the extent that the assumptions of incapacity are invalid or that changes in our social structure and in the rate of development of adolescents call into question constraints placed on children, these constraints should be eliminated.<sup>49</sup>

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<sup>43</sup> For example, children do not enjoy full adult rights in proceedings which deprive them of liberty, such as juvenile delinquency or civil commitment proceedings.

<sup>44</sup> See RYERSON, *supra* note 5.

<sup>45</sup> 387 U.S. 1 (1967).

<sup>46</sup> *Goss v. Lopez*, 419 U.S. 565 (1975).

<sup>47</sup> *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969).

<sup>48</sup> *Ingraham v. Wright* 430 U.S. 651 (1977).

<sup>49</sup> Children now reach puberty earlier than in the past. See Tanner, *Physical Growth* in *MANUAL OF CHILD PSYCHOLOGY*, vol. 1 at 146-47 (P. Mussen ed. 1970). Children are exposed to television which may provide them with more information (and misinformation) than they have had in past times. On the other hand, people started full time work much earlier in the past, which may have prepared

Such an action has already taken place, on an immense scale, by the lowering of the age majority from 21 to 18 in most states. In so doing, the legislatures determined that people at 18 have the capacity to exercise all rights of citizenship and/or do not need the special protections given younger people.<sup>50</sup> Eighteen, however, should not be a magic age. Various states already use widely disparate standards in granting rights to children at different ages. For example, the minimum age for marriage ranges from 14 to 21; for driving the age range varies from 13 to 17.<sup>51</sup> Similar disparities exist in other areas—such as contract law, work laws and compulsory schooling ages.<sup>52</sup> Different conditions among the states may, in some instances, justify disparities. For example, it may be that younger people can drive more safely in primarily rural states. In many instances, however, states have adopted age constraints arbitrarily, without any basis in developmental or sociological differences.

The question of age discrimination should be examined from both a constitutional and a legislative perspective. At the constitutional level, the basic question is whether a given discrimination based on age is rationally related to differences in the capacities of people under a certain age or to the special needs of children.<sup>53</sup> In deciding this question the courts must also determine whether age is a "suspect classification," which would require states to meet a high burden of proof in order to justify differential treatment of children.<sup>54</sup>

In determining the rationality of a given restriction, it must be recognized that any given age will be arbitrary to some degree.

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(entitled?) them for adult roles earlier. There is virtually no literature describing the capacities of children at different times in history. *But see* P. ARIES, *CENTURIES OF CHILDHOOD* (1962).

The rationale for given restrictions can also change. *See, e.g.*, the discussion of child labor laws in R. MNOOKIN, *CHILD, FAMILY, STATE* 646-667 (1978).

<sup>50</sup> Not all legislatures have lowered the age of majority and some "rights," such as the right to drink alcoholic beverages, still may be withheld even after a person reaches the age of majority. *See* SUSSMAN *supra* note 15, at 220-223.

<sup>51</sup> *See* SUSSMAN, *supra* note 15, at 229-230.

<sup>52</sup> *Id.* at 245-46.

<sup>53</sup> *Id.* at 220-246.

<sup>54</sup> Advocates of total liberation argue that no age-related disabilities are rational. *See* FARSON, *supra* note 1; HOLT, *supra* note 1. However, the evidence from developmental psychology belies their assertions. *See* note 59 and accompanying text *infra*. While it is therefore tempting to dismiss their claims outright, this should not be done. Instead their claims should be treated as a challenge to prove the basis for existing restrictions and to abandon those that do not withstand scrutiny.

People mature at different times so that not all 13 year olds are the same. The difficulty of making decisions on a case-by-case basis may justify selection of some age as a cut-off point for granting specific rights.<sup>55</sup> However, the courts should determine both whether any age restriction is necessary in order to achieve a legitimate state interest and whether the specific classification chosen is reasonable in light of existing data of the capacities of children at different ages.<sup>56</sup> Since most restrictions were enacted years ago, the courts should determine whether their rationales remain valid.<sup>57</sup>

Depending on the standard of review employed by courts, a number of present restrictions may be unconstitutional. Courts have already invalidated many restrictions. For example, courts have struck down school regulations limiting speech by students, as well as school hair and dress codes. Other decisions provide children with the right to counsel and other constitutional protections when the state is seeking to deprive them of liberty, and the right of access to contraceptive devices and to abortions.<sup>58</sup> The rationality of the present age limits on the exercise of other rights, such as the right to contract, marry, or vote also may not withstand judicial scrutiny.

Legislative reevaluation of existing restrictions is needed also. Such review should extend into areas that may be outside the realm of judicial review. Given society's commitment to equality under law, legislatures should examine closely the accuracy of prevailing assumptions about the capacities of children and should analyze the skills needed for specific rights, e.g. voting, marrying, or reading "obscene" literature. It should be determined whether existing age lines continue to make sense (if they ever did) in light of changes in children's development and our social structure. Only through such an analysis can the claim of Holt, Farson and other children's liberators be confidently rejected or accepted.

Such review is not likely to totally eliminate the incapacities

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<sup>55</sup> A specific cut-off age, even if somewhat arbitrary, may be preferable to a system which requires case-by-case determination of "maturity" or "capacity." Case-by-case determination is only viable if there are objective ways to measure capacity. Otherwise there is too great a possibility of discrimination. Case-by-case determination can also be very costly.

<sup>56</sup> For a discussion of some of the constitutional law considerations see, Garvey, *Child, Parent, State, and the Due Process Clause: An Essay On The Supreme Court's Recent Work*, 51 SO. CAL. L. REV. 769 (1978).

<sup>57</sup> See note 49 *supra*.

<sup>58</sup> See cases cited in note 1 *supra*.

of childhood. Many restrictions are undoubtedly sound. Children are not adults in their mental abilities, judgment, or work capacity.<sup>59</sup> Adequate preparation for participation in society may require a period of forced learning. This does not mean, however, that existing age lines are sensible. While the reasons for disenfranchising a one year old are clear, the justification is less obvious with regard to sixteen year olds.<sup>60</sup> Upon analysis, a legislature may conclude that a different age line is appropriate in some areas and that age restrictions should be abandoned and new criteria adopted in other areas.<sup>61</sup>

For some rights it may be sensible to give control to parents, rather than the state. Many states already make some rights contingent upon parental approval, for example the right of children to marry. Requiring parental guidance or approval can alleviate concerns about a child's capacity to make wise decisions.<sup>62</sup>

In deciding whether to give children more rights, it also must be recognized that the notions of rights and responsibilities are closely related. There is currently a growing movement to hold children more responsible for their criminal actions.<sup>63</sup> If children

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<sup>59</sup> Most researchers interested in child development have not examined the capacities of children to make decisions with regard to such activities as voting, marrying, driving or reading "obscene" material. A thorough review of the literature on adolescent decision-making is found in C. Lewis, *Three Studies of Adolescent Decision-Making* (unpublished Ph.D. dissertation, Stanford Univ. 1979).

Of course, criteria for "good" decision-making in these areas must be established before we can examine whether children of various ages are capable of making "good" decisions.

<sup>60</sup> See Schrag, *The Child's Status In The Democratic State*, 3 POLITICAL THEORY 441 (1975) for an analysis of the capacities required for voting.

<sup>61</sup> This analysis should be on a "right" by "right" basis.

<sup>62</sup> The fact of parent-child unity in asserting a claim for rights is significant since in such situations family privacy and autonomy is being preserved. Deference to parents is especially justified in cases where the "right" is denied on the theory that it is good for the child (e.g. limits on access to contraceptives), as opposed to cases where the right is denied for the good of society (driving? voting?). The Supreme Court seems to have indicated that in some areas state limitations are unreasonable but parental control may be acceptable. See *Carey v. Population Services, Int'l*, 431 U.S. 678 (1977).

Legislatures have made the same decision with regard to some rights, e.g., marriage. Children under a certain age are allowed to exercise these rights only with parental permission.

However, some rights might be the minors' regardless of parental views, e.g., the right to counsel in delinquency proceedings.

<sup>63</sup> See IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, *STANDARDS RELATING TO DISPOSITIONAL PROCEDURES* (Tent. Draft 1977).

are to be held responsible for their acts, perhaps they should be given rights commensurate with their responsibilities. On the other hand, those arguing for additional rights must decide whether they are willing to accept the imposition of responsibility on children as well.

#### *D. Rights Versus Parents*

Perhaps the most controversial and the most complex questions make up the fourth category of claimed rights, i.e. the right of children to act independently of their parents prior to emancipation.<sup>64</sup> It is one thing to argue, for example, that a school, without compelling reasons, should not be able to dictate to children and their parents the length of children's hair. It is quite another to argue that children who want long hair should have a right, enforceable by court order, not to cut their hair if their parents want it cut.<sup>65</sup>

In order to develop a framework for analyzing claims in this category, it is useful to examine the types of claims currently being asserted. Again, the extreme view asserts that all children, of any age, should be free to make their own decisions, ranging from what to eat and when to go to bed to whether to have an operation. Fortunately, most court cases have involved issues of greater magnitude than bedtime. The major questions center on whether a parent should be able to control the medical care a child receives, including whether a child should have an abortion, whether the parent should be able to determine what school the child attends, the material the child reads or views, and the place where a child shall live.

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<sup>64</sup> The issue of emancipation involves both category three and four rights. By selecting an age of majority each legislature determines the general age of emancipation. However, it may be that certain children are ready for emancipation, i.e. freedom from parental control, prior to the general age of majority. Such freedom, however, may not be accompanied by full adult status, e.g. emancipation does not entitle the minor to vote. Emancipation may even be partial, i.e. for specific rights, such as access to medical care.

In deciding whether to allow case-by-case emancipation the legislature must formulate standards for determining that a minor is ready to be emancipated and decide what institution should make the determination. It must also decide whether emancipation only involves freedom from parental control or should entail complete adult status.

<sup>65</sup> The question of rights versus parents has been an especially troublesome and divisive issue among people concerned with children's rights. See Uviller, *Children Versus Parents: Perplexing Policy Questions for the ACLU* in *HAVING CHILDREN* 214 (O. O'Neill and W. Ruddick eds. 1979).



Historically, all such decisions were within the parents' domain, unless a given decision endangered the child in a manner covered by abuse and neglect laws. Recently, however, courts and legislatures have altered the extent of parental control. For example, a number of legislatures have granted children the right to get medical care, especially care related to pregnancy or contraception, without parental permission or knowledge.<sup>66</sup>

The expansion of rights can take several different forms. The right to act independently can be given solely to the child or the child may be required to seek approval for his or her action, or to challenge the parental decision, in a court or other agency. For example, some states have given a child the right to have an abortion whenever the child wants, without parental consent or even knowledge. Other states do not leave the final decision to the child. Instead, the child may petition a court to order the abortion in cases of parent-child dispute. In other instances, children must inform their parents of given actions, even if the children have the ultimate decision.

Thus, if decision-making authority is removed from the realm of parental discretion, it must be decided who will be given the authority—the child or an adult other than the parents. In determining whether to remove the decision-making authority from the parents, five factors must be considered: (a) whether the child can make such decisions adequately; (b) if not, whether other decision-makers, or decision-making processes, are likely to arrive at better decisions than the parents; (c) whether the state can really remove the decision-making power from the parents; (d) the costs of removing the decision from the parents in terms of family autonomy and family privacy (both valued goals in our society); and (e) the costs of *not* giving the decision to the child. For some specific issues, it also must be considered whether there are parental interests, such as in being able to visit a child not in one's custody, which may equal or exceed the child's interest in autonomy. In addition, if the decision is given solely to the child, it must be decided whether the parents should be informed of the child's actions.

Analyzing claims from this perspective, it is apparent that it is unrealistic to treat certain claimed rights, designed to give children autonomy, as legally enforceable rights. Children, as members of family units, cannot enjoy total autonomy over their lives, even if they are capable of making all decisions. While a

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<sup>66</sup> See SUSSMAN, *supra* note 15, at 24-38.

legislature could declare that children, while living with their parents, have the right to decide when to go to bed, when to bathe and what to eat, it would not be realistic to expect such a declaration to have operative consequences. Allowing courts to enforce such rights would be enormously costly, and not very effective. It would be a waste of resources for courts to hear such disputes. Moreover, it would be very difficult to enforce such orders. For example, if a parent orders a child to bed and the child refuses, can a court order the parent to let the child stay up? If the parents do not follow the court order, will they be sent to jail? Will the parents be forbidden from enforcing their request by cutting off allowance, setting a curfew, not buying Christmas presents, or giving the child a spanking? With regard to these decisions, Farson's concept of total independence is just unrealistic unless we are prepared to place an outside monitor in every home to eliminate the authority parents have stemming from their greater strength and economic power.<sup>67</sup>

Of course, analysis need not stop at this level. One could ask whether children are capable of making such decisions without harming themselves. Clearly infants cannot. We know little about how older children would make such decisions. As a practical matter most older children probably enjoy substantial autonomy in many such areas, anyway. The impact of total autonomy on parental willingness to provide and sacrifice for children might also be explored. But such analysis seems unnecessary in light of the practical reasons militating against giving children total autonomy in these areas. Debate over such issues can be left in the philosophical or rhetorical arenas.

Most children's rights advocates do not go as far as Farson or Holt, of course. Instead of focusing on minor decisions like bed time or clothing, they argue that some types of decisions, such as

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<sup>67</sup> Giving children such rights might have substantial symbolic value. Husbands and wives each can act independently in such matters but they could not enforce these "rights" in a court. Adults either use power or negotiation to do what they want or get a divorce. While some people advocate allowing children to divorce their parents, see *Expert Proposes Child "Divorce" of Parents*, Los Angeles Times, Nov. 17, 1978 Pt. 1-B at 7, this is unrealistic unless the child can be independent. It is not very likely that a large number of children can do so.

The symbolic value may be important if we want to alter family power relationships. Of course, many children are able to obtain such rights from their parents without legal backing. Parents may go along willing or grudgingly. It is probably best to leave the internal workings of families to "power politics" and to reserve state action for only very serious situations.

whether to have an abortion, to receive drug, alcohol or medical care, to go to a certain school or participate in religious exercises, to use contraceptives, or to enter a mental hospital, either should be entirely in the hands of the child or, at least, be subject to the ultimate control of a court, rather than the parents.<sup>68</sup>

There are a number of good reasons for giving children additional rights in these areas. First, such rights are most likely to be exercised by older children, who have the greatest claim to individual autonomy. Moreover, failure to give children certain rights might be harmful to them. For example, parents may place a child in a mental hospital because they do not like his or her behavior or may refuse to allow a daughter to receive an abortion although she may be psychologically damaged by bearing the child. Similarly, requiring parental involvement in some of these decisions may lead some children to forego actions that would benefit them. For example, teenagers with a drug or alcohol problem or who are sexually active may refuse to seek out counseling or contraceptive information if their parents must learn of their actions.<sup>69</sup>

Giving children the right to make such decisions does not entail the same problems as giving them the right to decide on bedtime or bathing. It would not involve courts in the minutia of day-to-day living decisions. Some rights, for example the right to receive certain medical care, if given exclusively to the child, could be exercised without parental knowledge. Monitoring of a limited class of conflicts, e.g. conflicts over civil commitment, would not place undue burdens on the courts or other agencies and generally would not require on-going involvement with the family.<sup>70</sup>

However, there are many countervailing considerations. Before giving children a specific right it is necessary to determine whether children are likely to have the capacity to make the decision for themselves. For example, do we believe that a child of a given age (or maturity level if we can develop a means of

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<sup>68</sup> The ability to exercise category three's "rights," e.g., voting, driving, counsel, also fall in this more significant area of rights.

<sup>69</sup> It is unclear whether teenagers are, in fact, discouraged by parental consent requirements. See Torres, *Does Your Mother Know. . . .?*, 10 FAMILY PLANNING PERSPECTIVES 280 (1978).

<sup>70</sup> Spelling out children's rights in the medical or contract area may be extremely important in terms of giving guidance to third parties, such as doctors or merchants, who deal with children. Their actions often are constrained due to the uncertain legal status of children. See IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO RIGHTS OF MINORS 1-6, 50-85, 104-119 (Tent Draft 1977).

determining maturity levels) is capable of deciding whether to have an operation (including abortions?), to go to one school rather than another, or to use contraceptives? To analyze this question we must determine what types of skills a person needs to make a given decision and to what degree children of any given age possess the requisite abilities.

The exploration of these questions should begin with the research regarding the intellectual, social and moral development of children.<sup>71</sup> This research documents, contrary to the assertions of total liberators, that younger children, generally those under 10-12 years old, do lack the cognitive abilities and judgmental skills necessary to make decisions about major events which could severely affect their lives.<sup>72</sup> These limitations are developmental, not just a result of more limited experience or social expertise. Younger children are not able to think abstractly, have a limited future time sense, and are limited in their ability to generalize and predict from experience.

The research regarding older children is more limited and therefore offers less guidance for legislation. In both moral and cognitive development, many people seem to reach adult levels between 12 and 14.<sup>73</sup> However, there is little evidence regarding adolescents' decision-making capacity with regard to issues such as abortion, use of medical care, or choice of education.<sup>74</sup> It does appear that the ability to reason improves throughout adolescence. This may reflect greater social experience, but there may be biological reasons as well.<sup>75</sup>

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<sup>71</sup> This research is summarized in Lewis, *supra* note 50. Among the major works are W. DAMON, *THE SOCIAL WORLD OF THE CHILD* (1977); CONTEMPORARY ISSUES IN ADOLESCENT DEVELOPMENT (J. Conger ed. 1975); J. CONGER, *ADOLESCENCE AND YOUTH: PSYCHOLOGICAL DEVELOPMENT IN A CHANGING WORLD* (1973); E. DOUVAN & J. ADELSON, *THE ADOLESCENT EXPERIENCE* (1966); E. ERIKSON, *CHILDHOOD AND SOCIETY* (1963); J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (1932); MORALIZATION, *THE COGNITIVE DEVELOPMENT APPROACH* (L. Kohlberg & E. Turiel eds. 1973).

<sup>72</sup> See, e.g., DAMON, *supra* note 71.

<sup>73</sup> See PIAGET, *supra* note 71; KOHLBERG & TURIEL, *supra* note 57. With regard to some types of moral development the age may be much earlier. See Darley, Klosson & Zanna, *Intentions and Their Contexts in the Moral Judgments of Children and Adults*, 49 *CHILD DEV.* 66 (1978).

<sup>74</sup> Lewis, *supra* note 59, in her dissertation, interviewed pregnant girls ages 13 to 18 who were faced with the decision whether to have the child. She found that older girls did tend to consider a larger number of factors and consult more people but no clearcut decision-making differences emerged along age lines.

<sup>75</sup> It may well be that children's problem solving capacities reflect the limited role they are given in society and that if they were given more responsibility they

Some researchers and clinicians assert that the decision-making capabilities of adolescents are limited in other ways. It is argued that adolescents must struggle with both dependence and independence needs, which may cause an adolescent to act in a way which meets some immediate psychological needs, but which may be adverse to long-term interests, as the child would define those interests.<sup>76</sup> For example, a 12-year-old may wish to keep a baby in order to feel more "grown-up" or to compensate for rejection by parents or peers, without any realistic assessment of her capabilities at childrearing or the impact that having a child would have on her development. Similarly, teenagers may resist necessary psychiatric treatment because they feel it is an imposition of adult values.

Clinicians also claim that adolescents benefit from having parental restraints available. Such restraints allow adolescents to challenge authority and to explore new areas with the realization that "wise" parents will stop them if they act in harmful ways.<sup>77</sup> While parents often do not act wisely, removing the authority structure may be more detrimental than unwise parental actions.

This brief summary is not meant to be exhaustive. Moreover, it is unlikely that developmental psychology can provide any firm conclusions about adolescent decision-making at this time. However, in deciding whether to give adolescents more autonomy, it is necessary to utilize the best existing data and to assess the likely costs of giving adolescents greater autonomy.

Even if adolescents could make some (or all) decisions without harming themselves significantly, we still might not give autonomy to children because of its disruption of the family system.<sup>78</sup>

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would have the ability to make sound decisions. See Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, L. & CONTEMP. PROB., Summer 1975, at 66.

<sup>76</sup> See D. ELKIND, CHILDREN AND ADOLESCENTS: INTERPRETIVE ESSAYS ON JEAN PIAGET 101 (1970).

<sup>77</sup> These views have been expressed to me in conversations with a number of mental health professionals.

Even when autonomy is presumably given directly to the child, the effect may be to turn the decision over to an adult, such as a lawyer, doctor or counselor. Young children, and even adolescents, often have great difficulty acting independently. In many cases where I have represented children, my clients wanted me to make the decisions for them. Unlike adult clients, children rarely tell you what they want. Instead, they ask "What should I do?" In fact, decision-making authority may be extremely traumatic for children.

<sup>78</sup> Home and family disruption are not the only concerns. Children are unable to utilize some rights because they lack money. For example, the right to medi-

The loss of family harmony and the potential destruction of family autonomy are major concerns of those opposed to more children's rights in the family context.

These concerns need careful scrutiny, however. Opponents of children's rights fail to explain how giving children some autonomy to make major decisions threatens our family system.<sup>79</sup> As discussed below, the family system may be threatened if courts are given authority to intervene in cases of family disputes.<sup>80</sup> However, if the ultimate authority to decide on an abortion, on other medical care, on schooling<sup>81</sup> or religion resides in the child, no outside intervention is necessary. Family privacy remains.

What is the threat to the family then? Giving children decision-making power could generate family conflict, thereby worsening the situation for all family members. Since "divorce" by either side often is impossible or undesirable,<sup>82</sup> such conflict can con-

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cal care is only valuable if it is provided free or for the limited number of children with income.

<sup>79</sup> The impact of the law on changing social attitudes and customs is highly debatable. The law generally follows changes in values rather than generates them. All discussions about the impact on our family system is highly speculative and no data are presented documenting changes caused by the recent grants of autonomy to children.

<sup>80</sup> See notes 100-101 and accompanying text *infra*.

<sup>81</sup> Choice of school could become a major issue if proposals to use school vouchers in lieu of compulsory attendance at a given school are adopted. School vouchers could be used to buy a variety of kinds of education. It would then have to be decided who has the right to use the voucher—parent or child. See J. COONS & S. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR PARENTAL CONTROL* (1978).

<sup>82</sup> Divorce, by emancipation, is impossible because most children do not have the resources, and ability, to live independently. This would still be true even if we eliminated child labor laws, since most children do not have marketable skills.

"Divorce" would only be feasible if the state were willing to assume care of children or the state compelled parents to pay for their children to live elsewhere. Historically laws dealing with "status" offenders, i.e., children beyond control of their parents, did allow parents to divorce their children by turning them over to the state. This approach is now being widely rejected. See IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, *STANDARDS RELATING TO NONCRIMINAL BEHAVIOR* (Tent. Draft 1977).

Whether the state should provide alternative living situations for children who cannot get along with their parents is an extremely troubling one. There is no problem if both the parent and child agree to an alternative living situation and are willing to pay for it.

Even if children were allowed to divorce their parents prior to emancipation, they would still have to remain under adult supervision, until they were capable of living on their own and supporting themselves.

tinue for long periods or may lead to the child's running away. On the other hand, children resentful of parental decision-making may also generate family conflict.

Parental retaliation is also possible. We cannot prevent parents from cutting allowances, setting curfews, etc., as a means of enforcing their authority even if the child has the legal right to autonomy. This may be a cost children are willing to pay for exercising autonomy, especially since parents already exercise such powers, and children have no legal redress.

Perhaps the most legitimate concern is that if parents lose ultimate authority they will be less willing to assume responsibility for the child. Among the major reasons for supporting family-based child rearing is the substantial evidence that children thrive best in an environment where a small number of adults strongly committed to their well-being nurture and guide them.<sup>83</sup> Among the commitments of parenthood is the willingness to put the child's well-being ahead of the parents'. There is evidence that an increasing number of parents feel unwilling or unable to make this commitment.<sup>84</sup> For example, in a recent survey of American families a large number of parents expressed the belief that parents should not sacrifice in order to give their children the "best."<sup>85</sup> Many of these parents expressed doubts about their capability of controlling or guiding their children.<sup>86</sup> If such commitment is deemed important, it must be determined whether giving children more autonomy will affect adults' willingness to assume parent functions.<sup>87</sup> It must be recognized, however, that the legal system and the granting or withholding of legal rights may have little to do with how parents view their role. Other forces in society are likely to be far more important.<sup>88</sup>

Finally, it must be decided whether in some situations the costs of not giving the child autonomy exceed any costs in terms of weakening families. For example, forcing a girl to have (or not

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<sup>83</sup> See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 9-52 (1973) [hereinafter cited as GOLDSTEIN, FREUD & SOLNIT].

<sup>84</sup> *Raising Children in a Changing Society* in GENERAL MILLS AMERICAN FAMILY REPORT 1976-77 (1977).

<sup>85</sup> *Id.* at 10.

<sup>86</sup> *Id.* at 16.

<sup>87</sup> Traditionally families have played a central role as a stabilizing and socializing force in our society. This role is said to be critical to the development of the child. While the "decline of the family" has been blamed for many of society's ills, there is little research supporting such assertions. Assertions of autonomy by children need not necessarily result in less parental commitment.

<sup>88</sup> See note 79 *supra*.

have) an abortion or discouraging children from getting drug counseling or birth control information by requiring parental permission before the child can obtain such services may be very harmful to some children. It has been argued that if children faced with such problems are unwilling to talk with their parents, there is not much of a family relationship to preserve anyway.<sup>89</sup>

These concerns may be decisive, especially for specific issues, such as abortion. An analysis much more thorough than the courts or legislatures have made so far is necessary, however, before we can conclude that children should have greater autonomy.

The preceding analysis focuses on claims that autonomy ought to be given to the child. This is not the only option, however. It may be that in cases of parent-child conflict a court or other agency should have to resolve the dispute. The Supreme Court seems to have supported this approach with regard to teenagers' abortions.<sup>90</sup> Other courts have become involved in disputes ranging from whether a parent can place a child in a psychiatric hospital<sup>91</sup> to whether a teenager should have to accompany her parents on a round-the-world trip.<sup>92</sup>

The option of referring such disputes to courts or to "child development experts"<sup>93</sup> is attractive to many legislators. "Experts" frequently are involved in deciding whether a child is abused or neglected, who should have custody of a child and what to do with delinquents. In all these instances they have to decide what is in a child's best interest; so why not let them decide cases of parent-child conflict?

There are many reasons not to allow court intervention in such cases, however. In fact, many commentators question whether courts should continue to have authority even in areas such as custody disputes.<sup>94</sup> First, disputes between parents and children

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<sup>89</sup> See, e.g., P. Wald, *Making Sense Out of the Rights of Youth*, 55 *CHILD WELFARE* 379, 383-84 (1976).

<sup>90</sup> See *Bellotti v. Baird*, 428 U.S. 132, 147 (1976).

<sup>91</sup> See *In Re Roger S.*, 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977).

<sup>92</sup> The Hennepin County, Minn. Juvenile Court was willing to intervene in this dispute and arrange to have the girl stay with an aunt. *In re Lee Anne G.*, (Hennepin County Dist. Ct.—Juv. Div. Aug. 11, 1972).

<sup>93</sup> The legal system relies heavily on professionals from other disciplines, especially psychiatry, psychology and social work—in making decisions about children. While these professionals have expertise in treating children with problems, it is questionable whether they are expert in determining what is best for a child. See Wald, *supra* note 28, at 992.

<sup>94</sup> See GOLDSTEIN, FREUD & SOLNIT, *supra* note 83, at 63 n.12; Mnookin, *Child-*



cannot be settled by reference to any existing statutes or principles of law. Instead, they involve making value judgments about appropriate family relationships. Inevitably, such decisions will be based on the personal values and biases of the decision-maker, not on legal grounds. In other areas where judges have such discretion, they often make decisions based on their own moral or social values or life style preferences.<sup>95</sup> Personal predilections, which vary from judge to judge, would undoubtedly become decisive in a court's views regarding whether to grant an abortion, to allow a child to use contraceptives, or to attend a particular school. Moreover, since judges are not trained in child development, are not chosen from a wide cross section of racial, ethnic or cultural backgrounds,<sup>96</sup> and frequently are not subject to public control, it must be questioned why they should be allowed to make decisions about a child's best interest or about how a family should function.<sup>97</sup>

Similar concerns may dictate against giving these decisions to other professionals. Except in extreme situations, there is no scientific method for determining a child's best interest. We get no consistent answers from Drs. Spock, Ginott, Salk or Brothers. Most experts have not even faced questions of the sort raised by children's rights issues. We could expect value judgments to play just as large a role as in the decisions of judges, regardless of the profession involved.

Moreover, courts, doctors, lawyers and other professionals frequently just drop in and then drop out of the child's life. Yet the child's problems may be ongoing. For example, a girl who gets an abortion may need counseling after the abortion, either with regard to the psychological impact of the abortion or to future sexual behavior. No professional can insure that the child will continue to consult them.<sup>98</sup> So long as the child continues to function

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*Custody Adjudication: Judicial Functions In the Face of Indeterminacy*, 39 L & CP 226 (1975).

<sup>95</sup> See Mnookin, *supra* note 79, at 260-61. One widely known example is the Iowa Supreme Court decision in *Painter v. Bannister*, 258 Iowa 1390, N.W.2d 152, 154, 156 (1966) where the court opted for grandparents who provided "a stable, dependable, conventional middle-class midwestern background," rather than the father, whose home would be "unstable, unconventional, arty, Bohemian and probably intellectually stimulating."

<sup>96</sup> Females are not well represented either.

<sup>97</sup> It is questionable whether any type of training exists which would enable judges to make such decisions, in any case.

<sup>98</sup> Some proposals would have the professional decide whether the child is a "mature minor" capable of giving "informal consent." See Amer. Academy of

as part of the family, it will still be the parents who bear primary responsibility for providing help, guidance and support for the child. Parents may not be able to perform these roles adequately if they do not know about critical events in the child's life—such as abortions or psychiatric counseling.<sup>99</sup> Even a helpful professional who is willing to make the kind of commitment to a child that most parents are willing to make cannot be certain that the child will remain available, since either the parents or the “helper” may leave the area.

Finally, we must again consider the broader implications for the family system if courts or experts become the ultimate decision-makers. As discussed previously, this might deter parents from assuming important parental roles. While many factors influence the role a parent assumes, one of these factors might well be society's view of the role of parents. At least one commentator has argued recently that turning over major decision-making to professionals is extremely detrimental to society.<sup>100</sup> He claims that parents will not be able to act autonomously, and children will be harmed as a result, if parents are made to believe that only professionals know what is best for children. If we want to bolster the family, parents have to want to perform traditional functions, and they must be able to feel confident that they can perform these functions. While no data are provided to support such claims, we might want to search for evidence and analyze the logic of the claims before abandoning traditional structures.

One other cost of court intervention is also relevant. Just the fact of turning over such disputes to courts or agencies outside the family may, in and of itself, have negative implications. Our society is already very litigious. We have, in recent years, placed a great deal of emphasis on protecting individual rights. One benefit of staying out of such disputes may be in the message that family problems should be worked out within the family.

Of course, all these supposed advantages of family decision-making assume that parents will be willing to make such deci-

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Pediatrics, *A Model Act Providing for Consent of Minors For Health Services*, 51 PEDIATRICS 293 (1973). Obviously, this isn't giving autonomy to children; it's being given to the professional. Can professionals make better judgments than parents?

<sup>99</sup> Difficulties like unwanted pregnancies are frequently recurring problems for the child. Yet, doctors who perform an abortion may do little to prepare the girl for avoiding future unwanted pregnancies.

<sup>100</sup> See, e.g., C. LASCH, *HAVENS IN A 'HEARTLESS' WORLD* (1978). See also Goldstein, *supra* note 1 for a strong condemnation of court involvement.

sions.<sup>101</sup> Perhaps we have passed the point where this can be assumed to be true of most parents. If large numbers of parents are disinterested in their children, that circumstance may justify giving more autonomy to children, or even to other institutions. Recent changes in family structure, which result in parents being less available to their children, may also affect the ability of parents to perform these roles.<sup>102</sup>

In addition, some decisions by parents may have such potentially negative consequences for almost all children that we should subject such decisions to review. The decision to place a child in a mental hospital may be one such decision.<sup>103</sup> Requiring such review would alter the roles of the state and parents in control of child rearing. Requiring review is analogous to expanding the definition of abuse and neglect, and proposals to require review should be analyzed in the manner recommended for category two cases.<sup>104</sup> Instead of viewing state review of commitment decisions as protecting a child's right to liberty, it is more appropriate to see the state acting in its protective functions, ensuring that parents are providing adequate care.<sup>105</sup>

### Conclusion

The foregoing analysis raises, rather than resolves, questions.<sup>106</sup>

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<sup>101</sup> A policy protecting family (parental) autonomy does not mean children should be totally excluded from decision-making. Parents should be encouraged to include their children in the decision-making process. The findings from researchers like psychologist Diana Baumrind indicate that including children in family decisions contributes to their positive growth in areas such as the development of autonomy, flexibility and self-esteem. See Baumrind, *Some Thoughts on Children* in CHILD DEVELOPMENT CONTEMPORARY PERSPECTIVES (S. Cohen & T. Comiskey eds. 1977).

<sup>102</sup> See NATIONAL ACADEMY OF SCIENCES, TOWARD A NATIONAL POLICY FOR CHILDREN AND FAMILIES Ch. 2 (1976).

<sup>103</sup> This is the argument being made in cases of civil commitment. See *Bartley v. Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975) *rev'd on other grounds*, 431 U.S. 119 (1977). Similar decisions might be the decision to sterilize a child or to force an abortion.

<sup>104</sup> It is also possible to leave the decision to the child, of course.

<sup>105</sup> Questions of appropriate medical care, including hospitalization in a psychiatric facility, are among the most difficult for courts to handle. See Wald, *supra* note 28, at 1028-33; Goldstein, *supra* note 1.

<sup>106</sup> Moreover, not every type of children's right claim falls within one of the four categories. The most significant exception involves the role of children in the custody process. Among the issues are: should children have a right to choose their custodian upon divorce? Does it have to be one of the parents? Should this differ depending on whether the parents are in agreement or disa-

The questions are difficult ones; their resolution requires data about child development which are not available currently. Far more articulation of the assumptions underlying the positions of both opponents and advocates of children's rights also is necessary before we can begin to intelligently define the appropriate scope of both the rights and protections to which children should be entitled. The need for an interdisciplinary approach is critical. At present persons from different disciplines often talk past one another. Common framing of questions and attempts at data gathering should help significantly in clarifying and resolving issues.

Finally, it must be recognized that the proposed analysis, especially the analysis of parent-child conflicts, could be rejected entirely. The analysis assumes that the capacity of children for decision-making and the impact of autonomy on family structures are relevant to deciding whether children should have more rights. These assumptions need not be accepted. Other commentators have approached the subject as a moral issue. They believe children should have autonomy because they are independent individuals. Giving parents control of children can be viewed as treating children as property. As one commentator concluded "in the final analysis the . . . justification . . . for . . . honoring children's rights is that it is right and fair."<sup>107</sup> One must wonder, however, whether such an approach is, in effect, a case of abandoning children to their rights.<sup>108</sup>

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agreement about custody? Should children have to visit a non-custodial parent?

At least in cases of parental disagreement these issues do not fit any category. [Where the parents agree it then becomes a parent-child dispute.] The key questions turn on the child's capacity to make such decisions and, in the case of visitation, the balancing of the adult's needs with the child's. In these latter cases it should be recognized that we do not require adults to visit their children. Why should it be different for children, (perhaps because the adult is paying support?).

<sup>107</sup> See P. Wald, *supra* note 89, at 392.

<sup>108</sup> This term is borrowed from Hafen, *supra* note 1.