CHAPTER 6
THE CHANGING STATUS OF THE CHILD

Barbara Bennett Woodhouse*

“A prime part of the history of our Constitution,” as Supreme Court Justice Ruth Bader Ginsburg observed, “is the story of the extension of constitutional rights and protections to people once ignored and excluded.”1 Children are the newest beneficiaries of this principle. Although the Declaration of Independence proclaims that “All men are created equal,” the United States originally granted the rights of full citizenship only to white, adult, property-owning males. As our society evolved, different groups gradually have won rights and recognition as full citizens. We have seen the status of children change due to new laws or new approaches to child welfare and protection, child custody, and evolving principles of equality and fundamental fairness. The movement for children’s rights in the United States, however, presents some special issues that were not present in other rights movements and perhaps less salient in other legal systems.

In the United States, we tend to equate rights with personal autonomy. We assume that the bearer of rights is an autonomous individual capable of making choices and asserting his rights. The issue of children’s rights is complicated by the fact that children do not possess the same cognitive abilities as adults. Children are not “created equal,” but instead are born almost entirely helpless. Young children and even adolescents are unable to exercise the informed and independent choices associated with being full citizens. Restricting the autonomy rights afforded to children is justified by the real differences between children and adults. The fact that most Americans do not believe that young children are capable of being equal citizens prevents the type of consensus for the “children’s rights” movement that formed around rights movements for other groups.

To further complicate the issue of children’s autonomy rights, the abilities and capacities of children are constantly evolving. Children move gradually from the helpless state of infancy to the maturity of late adolescence

* This chapter benefited from the work of two Children’s Fellows of the Center on Children and Families, Dr. Bob Jacobs ’03 and Jenna Partin ’06.

and young adulthood. In most states in the United States, the “age of majority” where children are considered adults has shifted from 21 to 18. The 26th Amendment, inspired by the sacrifices of young citizens during the Vietnam War and effective in 1971, gives citizens the right to vote when they turn 18. Yet few would argue that there is anything magical about the actual moment when the 18th birthday occurs. Just as we also allow individuals under the age of 18 to voluntarily join the military, to marry, and to obtain drivers’ licenses, surely there are underage Americans who are capable of responsibly using the rights they will have on their 18th birthday. In some states, persons under 21 are not permitted to purchase alcohol. The issue of identifying what autonomy rights are appropriate at any particular moment is complex. Sometimes laws adopt a bright line such as age 16, 18, or 21, and in other situations, the law examines the issue on a case-by-case basis, looking at factors particular to the individual child’s circumstances.

It does seem clear that not all children can be treated equally to adults, so the movement for children’s rights in the United States has focused on children being treated “fairly” by the law, even when they are being treated differently. It has also focused on children’s vulnerability and their special needs for protection, which are both reflections of their difference from adults.

It is important to understand children’s status at the end of the 19th century in order to understand the legal status of American children today. A century ago, children had few legal rights. Children were subject to virtually unlimited parental authority, vested in the father as head of the household. The age of majority was 21 for boys, and many girls never achieved independence, passing upon marriage from the control of a father to the control of a husband. Children’s status was dictated by the marital status of their mother. The law protected the child born to a married mother, by presuming that the child was the offspring of her husband and thus “legitimate.” The father was the legal owner of the labor of his children until they turned 21, most children worked, and children’s pay packets generally were turned over directly to their parent. In return for this “ownership” of the child, the father, and in some cases both parents, were required to perform certain duties for their children, including providing them with shelter, clothing, nurture, education, and discipline. Children’s legal rights were simply the mirror image of parental obligations. A child had a right to support that matched the father’s duty of support. Children were seldom viewed as individuals with a direct relationship with the state; when a child was harmed, the parent had a right to compensation.

---