

YOUTH RIGHTS

INALIENABLE, WAIVABLE, and

UNDER CONSTRUCTION

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TOWARD GREATER RECOGNITION OF YOUTH RIGHTS!

In the 21st Century, youth are claiming and taking full participation in American society. Youth assume they are entitled to legal “rights” and boldly talk of social justice, civil rights, and reform initiatives to abolish ageist stereotypes and hierarchal constructs. This short paper is written to assist youth (and their adult advocates) in better understanding the American foundation to youth legal rights.

Volumes have been written about legal rights and the rule of law. This short paper is but a feeble attempt to simply highlight some of the basic premises involved in the current dialogue over youth rights. The paper covers five basic areas:

- (1) an outlines of the acceptable definitions and classification of legal rights under American law,
- (2) a cursory overview of the historical context that support youth rights,
- (3) a brief (although wholly inadequate) outline of basic youth rights,
- (4) a discussion on the limitations of youth rights, and
- (5) suggestions for resources of legal representation and reform efforts.

I. DEFINITIONS OF LEGAL “RIGHTS”

In order to have a review of “youth rights,” one should have an understanding of how our jurisprudential system defines “rights.” What are rights? Are there different types of legal rights? Rights are powers, privileges, or immunities guaranteed under a constitution, statute, code, or claimed as a result of long usage. According to Black’s Law Dictionary, “rights” are defined generally as “powers of free action” or a capacity residing in humans of controlling, with the permission and assistance of the state, the actions of other humans.

Therefore, ***rights were created to transfer power to the people.*** Rights exist to protect humans from chaotic, despotic, or overreaching power of individuals or groups in political or economic power over a community. Rights act as a shield to protect humans, or they can serve as a sword to force justice or fair disposition of matters.

Rights come in all shapes and sizes. Under American law, there is a hierarchy of rights. The following subcategories of rights should be reviewed before any in depth review of the legal rights of youth:

Rights in personam – early Roman law concept of a right held by a single person which imposed an obligation on a definite person. Person “X” had rights over person “Y” and could make person “Y” do something or stop “Y” from doing something.

Right in rem – early Roman law concept of a right held by a single person which imposes an obligation on all the world (or persons generally). Person “X” held rights to exclude all people from trespassing onto her real estate.

Primary Rights – those rights which can be created without reference to rights already existing (the core rights in a society).

Secondary Rights - those rights which can only arise for the purpose of protecting or enforcing primary rights. (Example: A person may have a secondary “right” to receive his or her old job back after being fired if the person was fired due to racial discrimination. The person has a primary right to be protected from being fired due to racial discrimination, and a secondary right to get their job back in a court finds they’ve been illegally discriminated against.)

Civil Rights – Rights which belong to every citizen of a country.

Natural Rights – Deriving from Roman Law, natural rights are rights given to all humans by “natural law” or from the creator of Nature. (Examples include the right to: life, liberty, privacy, and the pursuit of happiness.)

Political Rights – Include powers to participate in the establishment or administration of government.

Civil Liberties – Rights guaranteed and protected by a constitution.

Rights are powers given to the people to protect their well-being and access to the political process. Rights are necessary because we live in a hierarchy of power and in a society controlled by social norms and practices which limit individual conduct. (Example, the government has the power to tell you to do certain things like how to drive your car.) Rights were created to transfer power to the people and to establish a system of checks and balances against unbridled secular control of persons’ lives. In an anarchy there is no need for rights since you have the right to do whatever you want.

II. Historical Background to Youth Rights

It is difficult to talk about the history of “youth rights” without first discussing the beginning of a societal recognition of “rights” in general. It may be hard for American youth to realize, but the concept of “legal rights” (the carving out of power to the people from a hierarchical system) is a relatively new concept in human history. It’s

hard to imagine a government that did not protect human rights. However, before the advent of “written laws” there was not societal recognition of “legal rights.” Legal rights of all persons (adults and youth) necessarily originated in written laws.

“Lex talionis” (law of retaliation) was the law of many early civilizations. It was the system of retribution (an eye for an eye). Literally, a human was harmed in the same way he or she harmed another human being. This type of law was recognized in the book of Exodus in the Old Testament (recorded sometime near 2000-1800 B.C.).

The early Egyptian civilization seemed to have a rule of law that was oral and spoken as theocracy from the seat of Pharaoh. Pharaoh was presumed to speak for or as a god. His or her announcement became the “law” in Egypt and there appeared to be little in the way of a systemic process of interpreting rules issued from the Pharaoh’s seat of power.

Mesopotamia civilizations blossomed from cities that acted as “states” - protected by feudal land systems and fortified walls. In 1780 B.C. King Hammurabi dictated and established a code of laws. Established on previous judges’ rulings and kings’ codes, the Code of Hammurabi is the earliest outline of human laws known to exist in writing. It was created for the direct purpose of allowing the people in the city-state to understand the boundaries of the law. The Code recognized various statuses in society (free men versus slaves), upheld a feudal land system (and rights to property), established fair trade laws, upheld the notion of “contracts” between parties, regulated marriage, and established criminal penalties which varied according to the status of the victim (more punishment was given for harming or killing a noble free man than a slave).

The Code of Hammurabi did not mention “rights” of the people. However, its mere existence and its establishment of “boundaries” created rights to the people. For example, people now had written law protecting their right to enter into contracts and were able to enforce the provisions of that contract under state law. It was the foundation of written law that created “legal rights” to the people.

European Foundation of Legal Rights

Europe of the medieval and renaissance period was a society controlled by feudal landed nobles, a hierarchical church, and political and social upheavals. English law had the strongest statement or recognition of “rights” under any European society. In 1215 nobles forced King John to sign the Magna Carta. The Magna Carta was a treaty from the King which more or less established the right to due process (the right to a fair hearing) and the right to a hearing before a jury of one’s peers before property or life could be taken from a countryman. The document was the first written policy limiting the power of the state (in Western Europe).

Much later, the English furthered the rights established by Magna Carta by adopting the English Bill of Rights in 1689. The English Bill of Rights was also forced upon the King of England and created the following rights to the people:

- (a) The King or Crown could no longer arbitrarily suspend Parliament's power (Parliament was the body of elected officials chosen by male citizens of free elections);
- (b) Limited the right to raise money through taxation from the Crown and vested all taxation powers in Parliament;
- (c) Ended the concept that the King had "divine rights" (rights that trumped everyone or anything in the kingdom);
- (d) Placed controls on the Royal Family's power and made them subject to laws passed by Parliament; and
- (e) Affirmed "due process" of law as a right to all male citizens.

Colonial American Traditions Adopted from English Common Law

Colonial Americans accepted premises from their English traditions. Many colonists believed they were entitled to certain legal rights because they were entrusted to all people by Nature. Certain rights were "inalienable" to men. The Crown and government was prohibited from encroaching on basic rights. At the beginning of the American Revolution, Thomas Jefferson wrote the Declaration of Independence. The Declaration proudly declared in 1776,

"We hold these truths to be self evident, that all men are created equal and endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness."

The Declaration of Independence copied from English common law, the English Bill of Rights, and philosophical theory of the Enlightenment Period concerning the rights of man. The Framers often discussed rights in the context of "natural rights" which was a theory adopted from Roman Law and canon (church) law. "Natural Rights" are rights held by each human at birth, endowed by nature or (as later theorized by ecclesiastical bodies) by the Creator. Natural rights are inalienable and cannot be taken away except by unjust oppression. Some of the rights were already codified in the Magna Carta (1215) and the English Bill of Rights (1689).

The rights the framers of the Constitution wanted to protect from governmental intrusion were "inalienable rights." They were called "natural" rights or to James Madison (the father of the Constitution) were the "great rights of mankind." Colonists believed that certain rights (freedom of speech) were naturally endowed for all men.

The Constitution did not have a section on "rights" when it was ratified in 1789. So, one of the first acts of the United States Congress was to author a Bill of Rights as amendments to the Constitution in 1792. The first amendment to the Constitution was invented to protect individual rights against the power of the government. The Bill of Rights protected the following key areas:

Freedom of Religion – the right to exercise ones own faith, or not to engage in religious activity, free from any government intrusion or compulsion;

Freedom of Speech, Press, Petition, and Assembly – even unpopular expression is protected from government suppression or censorship;

Privacy – the right to be free from unwarranted or unwanted government intrusion into one’s personal or private papers, documents, living space, or possessions;

Due Process of Law – the right to be treated fairly by the government whenever the loss of property, life, or liberty is at stake (right to notice of claims, right to confront your accusers, right to speak on your own behalf, and to a fair hearing or trial);

Equality Before the Law – the right to be treated equally before the law, regardless of social status. (www.aclu.org/library/pbp9)

But once the natural or inalienable rights of man were placed on paper, someone had to interpret the words to fit particular circumstances. Thomas Jefferson thought it should be the federal judiciary, and James Madison agreed, calling the courts, “an impenetrable bulwark” for liberty. However, the debate was never completely settled. After some confusion, the United States Supreme Court ruled in 1803 (*Marbury v. Madison*) that it held the authority to strike down congressional action or legislation that were unconstitutional. However, the 19th century was noted for its lack of judicial exercise of power and constitutional rights were rarely discussed.

It should be noted that the Bill of Rights were not written to protect the rights of all people. Whole groups were left out. Women were second-class citizens and considered to be the property of their husbands. It wasn’t until 1920 that they even had the right to vote (and that took the 19th Amendment to the Constitution). Native Americans were not considered citizens but aliens in their own land. The Bill of Rights was around for 135 years before Native Americans were granted citizenship by an Act of Congress. The Constitution also legalized slavery and the subordination of groups based upon their race. “Slave codes” enacted in each state controlled the rights of slaves. Slaves had no access to law, could not sign contracts, could not own property, and could not go to court. After the Civil War, the 13th Amendment (abolished slavery), 14th Amendment (protection of due process and equal protection), and the 15th Amendment (right to vote) were enacted.

European Foundation of Laws Related to Children and Youth

In European society of the late middle ages, children were not legally protected from the ravages of poverty, want, abuse, or violence. In English Common Law, financially able parents had a duty to maintain both legitimate and illegitimate children only as a moral obligation and not as a legal obligation.¹ Children had a presumptive legal right to inherit wealth from the estates of their dead parents, but could be completely disinherited by will and had no right to manage their wealth or financial assets.² Fathers (and not mothers) acted as trustees or guardians over the estates of their minor children, and any benefit or wages from child labor was given to the Father.³

Early colonists to America brought European traditions and laws with them. The early New England colonist held strict views regarding the rearing of children (based upon religious mores) and enacted laws that minimized youth rights. The leading example is the Massachusetts' *Stubborn Child Law of 1646* which granted parents the right to seek a state reprimand if a child was "stubborn and rebellious" or "disobedient of their voice." The state could even kill children for such infractions under the law of 1646.⁴ Childhood was viewed as an inherently evil state requiring stern societal measures.⁵

Furthermore, at English Common law, it was the father's responsibility to provide for his child's maintenance, and therefore any rights which inhered in children were vested solely in the father as guardian.⁶ This policy was bolstered by the concept of unity of marriage which gave husbands all legal rights.⁷

Parens Patriae

In regards to the civil rights of youth or juvenile offenders, the guiding principle in American Law has been that of "parens patriae." The principle, established in medieval English law recognized the right of the state or Crown to intervene into family life to protect the well-being of the child.

The common law of England was not beneficial to youth. Youth were considered to be "chattel" owned by their parents. The common law did not protect children from abuse or harm from parents or family members. In the late-middle ages, "legislative and judicial organs of the state recognized that the state owed youth protection due to youth's inability to protect themselves." Under the doctrine of parens patriae, the state took it upon itself to enforce its supreme and sovereign power of guardianship over persons within its borders, including children, who needed the state's protection.

¹ 2 W. Blackstone, *Commentaries on the Laws of England*, 447, 457 (1859).

² 2 W. Blackstone, *Commentaries on the Laws of England*, 449, 447 (1859).

³ 2 W. Blackstone, *Commentaries on the Laws of England*, 452 (1859).

⁴ Shurtleff, *Records of the Governor and Company of the Massachusetts Bay in New England 1628-1686*, 101 (1854).

⁵ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 1.02, p. 10 (1994)

⁶ Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. Fam. L. 423, 426 (1977).

⁷ Note, *Family Law – Child Custody – Tender Years Presumption in Child Custody Case Held Unconstitutional Gender Based Discrimination*, 12 Cum.L.Rev. 513, 516 (1981/82).

This guardianship or protective power trumped all other relationships including the role of the parent.⁸ This was another concept borrowed from Roman Law.

By the 1800's every state in the United States had adopted this principle as part of its "common law." Interestingly, despite the development of the *parens patriae* doctrine, termination of parent rights was not recognized by common law. Although the state could gain protective custody of the child, the rights of the parents were not severed. Termination of parental rights is established only by state statute.⁹

Child Saving and Rehabilitation Vogues of the 19th Century

In the early 19th century (as industrialization and immigration to America dramatically rose), social reforms began to concentrate attention on children subjected to poverty, industrial harm, and the vices of urban society. Social reformers began to utilize rescue and rehabilitation over punishment to solve societal problems of truancy, delinquency, and abject want. House of refuges and reform schools popped up to help serve and rehabilitate youth during this period.¹⁰

Juvenile Court and the Benevolent Age of the early 20th Century

The first Juvenile Court was established in 1899 in Chicago with the help of social reformer Jane Addams. The first model assumed that advocates would provide guidance to juvenile offenders for their own protection. Protection and guidance were considered to be more important than due process considerations. (In this way a more "Patriarchal system" was initiated.) "Combined with America's new love of science and social welfare, the court promised to treat children by directing their care, custody, and control. The judge was envisioned as a compassionate parent figure who would assure this direction and help bring about the youth's rehabilitation."¹¹ However, under this "benevolent" system, the concept of youth holding independent rights was not readily recognized.

The Recognition of Youth Rights as a Separate, Distinct Legal Definition in the last half of the 20th Century.

The history of American law has recognized a special status for children and youth. Youth were never afforded the same rights as adults given their dependency on adults, their level of immaturity, and a societal perception of a lack of proper judgment. Youth were seen first as unruly and sinful creatures in colonial days, as wards and dependents in the early 19th century, as angelic and fragile creatures in Victorian society of the late 19th century, and delinquents in the 20th century.

It was not until the last half of the 20th century that youth were recognized and given rights generally protected only to adults under the United States Constitution. In 1967, the Supreme Court ruled that protections guaranteed in the Bill of Rights

⁸ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, p. 3-4. In Interest of J.R.H., 358 N.W.2d 311 (Iowa 1984).

⁹ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, p. 4.

¹⁰ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 1.02, p. 10 (1994).

¹¹ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 1.02, p.11 (1994).

applied to youth as well as adults. In the decision of *In Re Gault* (387 U.S. 1) the Supreme Court held that the following principles:

1. The Fourteenth Amendment and the Bill of Rights are not for adults alone.
2. Due process allows for the continued processing and treatment of juveniles separately from the adult criminal system.
3. The concept of the kindly juvenile judge need not be replaced by the opposite.
4. The condition of being a minor does not justify a “kangaroo court.”
5. A juvenile court hearing need not conform to all the requirements of an adult criminal trial, but it must measure up to the essentials of due process and fair treatment,
6. Notice of a juvenile court hearing must be given sufficiently in advance so as to allow for a reasonable opportunity to prepare a defense, and the notice must set out the charges with particularity.
7. Notice, sufficient to pass constitutional muster (as if it were being given in an adult civil or criminal proceedings), must be sent to the juvenile and his/her parents or guardian in writing.
8. The requirement of written notice cannot be waived, even if the minor and his/her parents or guardian are in fact aware of the charges;
9. If the minor’s freedom is curtailed, due process requires that the minor and his parents be told that he or she is entitled to be represented by legal counsel, and to have counsel appointed if they are unable to afford counsel
10. The privilege against self-incrimination applies to juvenile proceedings, despite the fact that it technically applies only to criminal proceedings. For purposes of the Fifth Amendment, juvenile adjudicatory proceedings must be regarded as criminal proceedings.
11. Any confession relied up cannot have been obtained through threats or coercion; and
12. Absent a valid confession, a determination of delinquency and an order of commitment cannot be sustained in the absence of sworn testimony and an opportunity to cross-examine witnesses.¹²

Incredibly, it took another two years for the Supreme Court to finally declare that youth were “persons” under the United States Constitution, and thus granted protections and rights.¹³

Entry Into the 21st Century

We have some problems. In 1992 it was reported:

1. 25% of all children in the United States under the age of six live in families with incomes below the poverty line;
2. 25% of our children live in one-parent families;
3. Every day in our nation, guns kill or injure 40 children;

¹² Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 1.04, p. 13-14 (1994).

¹³ *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (U.S. S.Ct. 1969).

4. Gunshot wounds are the leading cause of death for both black and white teenage boys in the United States;
5. Fewer than half of American children possess the academic skills needed to hold most entry-level jobs or to attend college;
6. 8,000,000 of our children lack any kind of health care insurance; and
7. America's divorce rate has tripled within the last 20 years.¹⁴

The best review of our current situation is provided in the Introduction to *America's Children at Risk: A National Agenda for Legal Action*; a report prepared by the American Bar Association's Presidential Working Group on the Unmet Legal Needs of Children and Their Families (July, 1993). The report concludes:

"Our society is failing to protect its children and fails them even more once they are in crisis . . . Americans of all political persuasions have recently agreed on one point: America's children are increasingly at risk. [However,] our society has failed to reach a consensus about when and how to protect those children."

III. RIGHTS OF YOUTH PROTECTED BY LAW

Rights Protected by the United States Constitution

First Amendment: Protects the freedom of speech, the freedom to assemble, the freedom to petition the government, and the prohibition of the government from establishing any religion or stopping the free exercise of one's faith;

Fourth Amendment: Protects against unreasonable searches and seizures by the government and mandates that a warrant for the search or seizure must be based on probable cause;

Fifth Amendment: No person must answer to charges of a serious crime unless indicted by a grand jury, be made to testify against himself or herself, or be deprived of life, liberty, or property without the due process of law;

Sixth Amendment: Guarantees the right to a speedy and public trial with an impartial jury where the defendant can confront witnesses brought against him or her, call witnesses in his or her favor, and have the assistance of counsel;

Seventh Amendment: Preserves the right to have a jury decide certain civil court matters (not just criminal matters);

Eighth Amendment: Prohibits excessive bail amounts or fines and stops the government from inflicting cruel and unusual punishment;

¹⁴ *America's Children at Risk: A National Agenda for Legal Action*, ABA Presidential Working Group on the Unmet Legal Needs of Children and Their Families, pp. v, vi, and ix (July 1993).

Fourteenth Amendment: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizenship of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” (Effectively limiting state sovereignty)

Rights Protected by Federal Statute

Civil Rights

Youth are protected against discrimination on the job, in housing, in business dealings, in stores, or in places of public accommodations if the discrimination is based upon a person’s

- race,
- color,
- creed,
- religious faith,
- national origin,
- sex (gender),
- familial status (status of being part of a family), or
- disability.

Right of Youth to Income or Public Assistance:

1. Youth with Disabilities who meet all eligibility criteria for Supplemental Security Income (SSI – through the Social Security Administration) will receive a monthly federal grant (approximately \$450.00/month).¹⁵ They youth may also receive a state supplement if allowed by state law.¹⁶
2. Temporary Assistance to Needy Families (TANF) is available to provide financial assistance to teen or young adult parents of low-income.
3. General Assistance – a state program providing income support of the “last resort.” (Approximately \$250 in Minnesota).
4. Youth have a right to receive adequate child support from their absent parents. The law recognizes that a parent’s duty to provide child support is owed to the child, but given the limited legal capacity of minors (youth), it is the custodial parent who usually collects and seeks to enforce support obligations.¹⁷

Rights of Youth to Receive Medical Treatment, Rehabilitation, and Insurance

Youth are entitled to receive necessary medical treatment from their parents or the state if necessary.

¹⁵ 42 U.S.C. Section 1382(c).

¹⁶ 42 U.S.C. Section 1382(e).

¹⁷ Legal Rights of Youth, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 4.11, p. 199 (1994).

When parents fail to provide medical treatment or cannot afford to provide medical care, Medicaid or Medical Assistance insurance is provided to youth. Medicaid (or Medical Assistance) is a federal program to pay for medical care for low-income persons, established by Title XIX of the Social Security Act,¹⁸ under which the United States provides funds to reimburse states in part for programs of public assistance to low-income persons to meet the costs of necessary medical services.

The Medicaid program has two goals: (a) to provide federal funds to states to give medical care to families, youth, and disabled adults whose incomes are insufficient to meet the costs of necessary medical services, and (b) to assist states in making rehabilitation and other services available to help such families and individuals to attain or retain a capability for independence or self-care.¹⁹

Under federal law the following youth are guaranteed eligibility to receive Medicaid:

- (1) youth in families receiving TANF or family welfare benefits;
- (2) youth who are blind;
- (3) youth who are permanently and totally disabled;
- (4) youth receiving Supplemental Security Income (SSI);
- (5) youth in foster care;
- (6) youth who are “qualified severely impaired individuals;”
- (7) certain qualified pregnant youth; and
- (8) youth who do not have adequate income (defined by each state).²⁰

Right to Food and a Nutritional Diet

Youth have the legal right to receive food and an adequate, nutritional diet from their parents, or the state. Youth are entitled to receive Food Stamps if they cannot afford food.

Congress enacted the Food Stamp Program in 1964 under its constitutional authority to promote the general welfare.²¹ The Food Stamp Program is the federal public assistance program that provides aid to low-income persons. The program is administered at the federal level by the Food and Nutrition Service of the Department of Agriculture and at the state level by the state’s welfare or social services departments.

Food stamps are available to youth whose income does not exceed the “poverty line” established in the Community Services Block Grant Act by the Office of Management and Budget and based on the Bureau of the Census data.²²

¹⁸ 42 U.S.C. Section 1396 et seq. (Medicaid is sometimes confused with “Medicare” which is another federal program. Medicare is a form of health insurance provided to senior citizens or persons with disabilities and is not dependent on the persons income.)

¹⁹ 42 U.S.C. Section 1396.

²⁰ 42 U.S.C. Section 1396d.

²¹ 7 U.S.C. Section 2011 et seq. (Pub. L. No. 88-525, 78 Stat. 703), August 31, 1964.

²² 42 U.S.C. Section 9902(2).

Rights in Foster Care

Youth who have been taken from their parents and placed in foster care are entitled to the following rights:

- Services necessary for the proper maintenance of the children's health and well-being and the fulfillment of their special needs while in care. (Including nutrition, education, medical and rehabilitative care, psychiatric and psychological care, vocational training, and specialized placements.);
- Services related to planning for the child's future;²³ and
- Youth eligible to receive federal foster care maintenance payments are also eligible for medical and social services available through Titles XIX and XX of the Social Security Act.²⁴

These rights are either based on specific state statutes (state law) or by court's interpreting the general statutory requirements to include such comprehensive services.²⁵

Rights of Native American Youth in Out-of-Home Placements

Native American youth hold special protection under the Indian Child Welfare Act of 1978 (ICWA). Based on the historical relationship between the U.S. government and sovereign indigenous people, ICWA was enacted to promote the stability and security of Native American tribes and families and establish minimum federal standards for the removal of Native American youth from their parents and families. ICWA applies to child custody, foster care, guardianship, and adoption proceedings.²⁶ For example, tribes have the right to intervene in foster care and adoption decisions affecting Native American youth, even when the parents of those children have surrendered custody to non-Native American families.²⁷ However, while the placement of status offenders is covered by ICWA, placements incidental to state juvenile delinquency protections proceedings are not.²⁸

Right to be Free from Sexual Harassment

Youth have the right, on the job, in school, or in their apartment building to be free from sexual harassment. Sexual harassment includes the following: unwelcome sexual advances, requests for sex, sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature when used to gain power creating an intimidating, hostile, distracting, or offensive environment.

²³ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, p. 73.

²⁴ 42 U.S.C. Sections 672(h) and 671(a)(4).

²⁵ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, p. 74.

²⁶ 25 U.S.C. Sections 1902, 1903.

²⁷ *In the Matter of Baby Girl Doe*, 865 P.2d 1090 (Mont. 1993).

²⁸ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, pp. 100-102, H.R. Rep. No. 575, 95th Cong., 1st Sess. 16 (1977), 25 U.S.C. Section 1903(1).

Youth Rights Under American Common Law

Right to Care and Custody

Youth have the right to be cared for by their parents or the state. Youth have the right to have custody placed with adults (whether their parents or other adults) which will be in the “best interest of the child.” The best interest of the child is considered to be *the* most important, overriding factor in courts’ decisions regarding custody.²⁹ It is now accepted that while the right of the custodial or biological parent to custody of the child is paramount, it is trumped by the showing that the best interest of the child is served by transferring custody. Parents’ right of legal and physical custody may be thwarted by a showing that they are unsuitable, abusive, or chronically neglectful of the child.³⁰ (Limitation: Custody rights are generally held by parents and are enforced by parents and not by youth in family court.)

Youth also have a right to be adopted by others. Adoption is the legal process by which the legal and physical custody of a child is permanently transferred to another adult. Adoption was not recognized in medieval English common law but had deep traditions in Greek and Roman culture leading back several millennia.³¹ The adoption process is governed by state statute (or code) in every state.³²

Right to Have Visitation with Parents

Youth have the right to receive visitation with their parents, if visitation is in the best interest of the child. Usually, courts insist on some visitation with noncustodial parents because the courts assume a child’s emotional and psychological well-being will be enhanced by keeping an association with both parents.³³

Right to Own Property But Not to Manage It

American common law recognizes the right of youth to purchase and acquire property. This right extends to both the purchase and ownership of personal property (computers, clothes, cars, etc...) and real property (land, homes, mineral rights, etc...)³⁴ The property is held and owned by the individual child and not their parent. However, the law also presumes that youth are incapable of managing their property, and courts will traditionally appoint a “guardian” to manage property for youth.³⁵ Increasingly, the management of property for youth is being conducted through the

²⁹ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, Section 2.04, p. 38 (1994).

³⁰ *Id.* at 39.

³¹ Legal Rights of Youth, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 6.01, p. 263 (1994).

³² Only a few federal laws trump state law in this area. The Adoption Assistance and Child Welfare Act of 1980 (42 U.S.C. Sec. 670 et seq.) and the Abandoned Infants Assistance Act of 1988 (Pub. L. No. 102-236, Sections 2-8, 105 Stat. 1812) deal with adoption of children from foster care. The Indian Child Welfare Act of 1978 (25 U.S.C. Sections 1901 – 1963) deal with the adoption of Native American youth.

³³ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 3.01, p. 111-112 (1994).

³⁴ *In re Scott K.*, 595 P.2d 105 (1979), *cert denied sub nom Fare v. Scott K.*, 444 U.S. 973, 100 S.Ct. 468 (U.S. S.Ct. 1979).

³⁵ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 8.01, p. 394-95 (1994).

creation of “trusts” (an investment or property is held by a trustee for the youth and professionally managed).

Other property right issues to remember....

1. Minors have the right to receive and keep gifts even if they are not old enough to provide formal acceptance of the gift.³⁶
2. Youth may sell land or personal property they own,³⁷ however, youth also have the right to nullify the sale (right of avoidance) at any time before the age of majority (18 years). (Under common law, contracts signed by minors could be nullified by the youth during their age of minority, unless the contract was for a basic necessity.)³⁸ Therefore, unless a guardian is appointed and a court specifically approves of the sale of property, a minor can nullify the agreement.³⁹ (That’s why adults are reluctant to sign a contract with youth, because they can get out of it easily.)
3. Unlike real property or personal property, youth are assumed to have the right to own and manage their money. Youth may place money in a bank and reclaim it at any time (without permission of their parents), and the person or institution disbursing the money does not assume any risk in releasing the funds.⁴⁰

Right to Contract

Youth have the right to enter into contracts (oral or written), but common law holds that all contracts are “voidable” with limited exceptions.⁴¹ Youth may disaffirm or get out of a contract during their minority or within a reasonable time after emancipation.⁴² A youth may not disaffirm, nullify, or get out of a contract for necessities or a contract made nonvoidable by statute.⁴³

³⁶ *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269 (U.S. S.Ct. 1948); *In re Golos’ Will*, 64 N.Y.S.2d (Surr.Ct. 1946).

³⁷ *Midkiff v. Midkiff*, 113 S.E.2d 875 (Va. 1960).

³⁸ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 8.02, p. 396 (1994).

³⁹ *Kenwood Savings & Loan Assoc. v. Williams*, 37 Ohio Ops 2d 24, 8 Ohio Misc 23, 220 N.E.2d 582 (Com Pl. 1966).

⁴⁰ *Phillips v. Savings Trust Co. of St. Louis*, 231 Mo.App. 1178, 85 S.W.2d 923 (1935); *Peterson v. Weimar*, 194 N.W. 346 (Wis. 1923).

⁴¹ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 10.01, p. 501 (1994).

⁴² Williston on *Contracts* Sec. 239 (3rd Ed., 1939).

⁴³ *Aetna Casualty and Surety Co. v. Duncan*, 972 F.2d 523 (3d.Cir. 1992); The concept of necessities dates back to the 1400’s in English common law and is said to depend on the facts of each case and the child’s position and station in life. The term “necessaries” is flexible but the youth must prove that it is something of an actual need and not more ornamentation or pleasure items. However, the term is not confined to things as are required for a bare subsistence, but are those things required to maintain the youth’s existence and depend on the youth’s social position and situation in life. *But see, Webster Street Partnership, Ltd, v. Sheridan*, 220 Neb. 9, 368 N.W.2d 439 (1985), holding that an apartment was not a necessary for two minors who were attempting to void a lease, where the testimony showed that neither minor was in need of shelter since both had voluntarily chosen to leave home and their parents had told them that they could return to their homes whenever they wished.

Right to Sue or Bring a Lawsuit

In general, youth may be a “party” to a lawsuit. However, most states require that youth must sue or be sued through adult parties who may represent their interests (parents or guardians).⁴⁴

Medical Rights of Youth

1. Right to receive competent medical services that does no harm to the patient. (General medical malpractice, tort theory)
2. Right to receive necessary medical care and treatment without parental consent or knowledge. (This is primarily a “state” right issue.) This right is limited by: (a) the age of the child (older adolescents are entitled to the right for medical and treatment without parental consent by most state statutes); (b) educational level of the youth, and (c) emancipation status.⁴⁵

Rights of Youth Facing Institutionalization

- (1) Youth have no right under federal law to a court hearing before being institutionalized. The Supreme Court ruled that the U.S. Constitution does not protect a youth from being placed in an institution by their parent or state guardian, so long as a “neutral fact finder,” after careful investigation, finds the commitment medically justified.⁴⁶ However, nothing stops states from enacting stricter due process hearings before sending youth to institutions. A state law could require a court hearing before parents have the right to institutionalize their children.⁴⁷
- (2) Once a child has been admitted, the *Parham* case requires that the child’s need for continuing commitment be periodically reviewed.⁴⁸

⁴⁴ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 11.01, p. 517 (1994).

⁴⁵ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, p. 115.

⁴⁶ *Parham v. J.R.*, 442 U.S. 584, 606-07; 99 S.Ct. 2493; 61 L.Ed.2d 101 (1979).

⁴⁷ See, Mich Comp. Laws Ann. Section 330.1505 (West 1992); Ohio Rev. Code Ann Section 5122.02(C) (Page 1993).

⁴⁸ *Parham v. J.R.*, 442 U.S. 584, 619-20 (U.S. Sup.Ct. 1979). (The Court noted that children who are wards of the state may be entitled to something “different” in review hearings on whether continued commitment is necessary. The Supreme Court said, “the absence of an adult who cares deeply for a child. . . may have some effect on how long a child will remain in the hospital.”)

- (3) Under most state statutes, whenever a child is confined, it should be for the purpose of care and treatment (regardless as to whether for mental health treatment, child welfare, or juvenile justice systems). Although public safety may be a reason to confine a youth in the juvenile justice system, this purpose should not override the need for treatment.⁴⁹
- (4) Right to be treated in the manner least restrictive to the child's liberty.⁵⁰ However, this does not require the state to try every less restrictive alternative before imposing a more restrictive alternative on the child.⁵¹
- (5) Youth confined in mental health facilities have a right to treatment, as a constitutional right under substantive⁵² and procedural due process.⁵³
- (6) Youth civilly committed to state institutions have rights to:
 1. reasonably safe living conditions;
 2. freedom from undue bodily restraints, and
 3. minimally adequate training related to enhancing their ability to protect themselves.⁵⁴

(Furthermore, state law may provide even greater safeguards.)
- (7) Youth in state hospitals, mental health treatment facilities, and juvenile justice facilities have the right to refuse treatment.⁵⁵ Courts have ruled that the forced drugging of youth who are confined delinquents may occur for youth experiencing extreme agitation or hallucinations (but it cannot be used merely as a control mechanism).⁵⁶
- (8) Incarcerated youth have rights of privacy regarding their mail (can be searched for contraband), access to attorneys, and access to the court.⁵⁷
- (9) Incarcerated youth may NOT have a right to be free from unreasonable searches of their persons and possessions.⁵⁸
- (10) Incarcerated or institutionalized youth, under national standards, have the right to refuse medication if it is prescribed for program management, control, experimentation or research. Medication may only be forced on a youth when the

⁴⁹ *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). Legal Rights of Children, Vol 3, 2nd Ed., Donald T. Kramer (Sec. 30.10), p. 127.

⁵⁰ *See, e.g.*, *Shelton V. Tucker*, 364 U.S. 479, 81 S.Ct. 247 (1960). For a detailed discussion of the history of the least restrictive principle, see Zlotnick, *First Do No Harm: Least Restrictive Alternative Analysis and the Right of Mental Health Patients to Refuse Treatment*, 83 W.Va.L.Rev. 375 (1981).

⁵¹ *Matter of Nathan S.*, 603 N.Y.S.2d 210 (App.Div. 1993).

⁵² *Wyatt v. Stickney*, 325 F.Supp 781 (M.D.Ala 1971), *aff'd sub nom Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Welsch v. Likins*, 373 F.Supp. 487 (D.Minn. 1974), *aff'd in part and vacated and remanded in part* 550 F.2d 1122 (8th Cir. 1977).

⁵³ *White v. Reid*, 125 F.supp. 647 (D.D.C. 1954); *Inmates of Boys' Training School v. Affleck*, 346 F.Supp. 1354 (D.R.I. 1972).

⁵⁴ *Youngberg v. Romeo*, 407 U.S. 307, 324; 102 S.Ct. 2452 (U.S. S.Ct. 1982).

⁵⁵ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 30.17, p. 137.

⁵⁶ *Nelson v. Heyne*, 355 F.Supp. 451, 457-58 (N.D. Ind. 1972), *aff'd* 491 F.2d 352 (7th Cir.), *cert. denied* 417 U.S. 976 (U.S. S.Ct. 1974); *Pena v. New York State Division of Youth*, 419 F.Supp 203, 207 (S.D. N.Y. 1976).

⁵⁷ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, Section 30.20, p. 139; *John L. v. Adams*, 969 F.2d 228 (6th Cir. 1992), *reh denied* (incarcerated juveniles have a constitutional right to access to the courts and attorneys which is not satisfied by having mere access to a law library).

⁵⁸ The Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, Section 30.21, p. 142.

youth is “so uncontrollable that no other means of restraint can prevent the juvenile from harming him/herself.”⁵⁹

- (11) Right to have extreme limits placed on the use of isolation and physical restraints for institutionalized and incarcerated youth. Any use of isolation must be made subject to the most stringent safe-guards and used only when the child is “physically violent and dangerous to himself or others” and only for the shortest possible period of time necessary to restrain and calm the child.⁶⁰ Further, courts have ruled that use of physical restraint may not be used for the convenience of staff or to compensate for inadequate program staffing.⁶¹
- (12) Right to receive adequate educational programs while incarcerated or institutionalized.⁶²
- (13) Right to Nutrition, Housing, and Sanitation.⁶³
- (14) The right of institutionalized youth to choose their religious faith or abstain from religious activity has not been addressed by the courts, but seems to be assumed by constitutional mandates.⁶⁴ Questions remain, however, about the parents’ role in these decisions. The Supreme Court has expressly recognized parents’ rights to control the religious affiliation and training of their children while in their care and custody.⁶⁵ It is not clear whether those rights remain once the child is institutionalized.
- (15) Right to receive recreational or physical exercise each day for confined youth.⁶⁶
- (16) Right to be free from corporal punishments (physical beatings). Courts have held that corporal punishment of youth in correctional or mental health institutions is a violation of due process.⁶⁷

⁵⁹ A.B.A./Institute of Judicial Administration, *Standards Relating to Corrections Administration*, Standard 4.10 (1980); *Standards for the Administration of Juvenile Justice*, Standard 4.62 (National Advisory committee for Juvenile Justice and Delinquency Prevention 1980). The ramification of the misuse of medication is staggering. Evidence before one court revealed that the administration of various tranquilizing drugs to youth can cause, “collapse of the cardiovascular system, the closing of the patient’s throat with consequent asphyxiation, a depressant effect on the production of bone marrow, jaundice from an affected liver, drowsiness, hematological disorders, sore throat and ocular changes.” *Nelson v. Heyne*, 355 F.Supp. 451, 457-58 (N.D. Ind. 1972), *aff’d* 491 F.2d 352 (7th Cir.), *cert. denied* 417 U.S. 976, 94 S.Ct. 3183 (U.S. S.Ct. 1974).

⁶⁰ *Legal Rights of Children*, Vol 3, 2nd Ed., Donald T. Kramer, Section 30.23, p. 144. *Milonas v. Williams*, No. 78-0352, slip op. at p. 59 (D.Utah August 27, 1980), *aff’d* 691 F.2d 931 (10th Cir. 1982), *cert. denied* 103 S.Ct. 1524 (1983).

⁶¹ *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452 (U.S. S.Ct. 1982).

⁶² *McRedmond v. Wilson*, 533 F.2d 757 (2nd Cir. 1976).

⁶³ *Masjid Muhammad – D.C.C. v. Keve*, 479 F.Supp. 1311 (D.Del. 1979); *Nelson v. Heyne*, 355 F.Supp. 451(N.D. Ind. 1972).

⁶⁴ *Legal Rights of Children*, Vol. 3, 2nd Ed., Donald T. Kramer, Section 30.29, p. 150-51.

⁶⁵ *Wisconsin v. Yoder*, 406 U.S. 205, 232-34, 92 S.Ct. 1526 (U.S. S.Ct. 1972).

⁶⁶ *Thomas v. Mears*, 474 F.Supp. 908 (E.D. Ark. 1979).

⁶⁷ *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968). Interestingly, the Supreme Court failed to rule in 1977 that corporal punishment should be banned in public schools. *Ingraham v. Wright*, 430 U.S. 651 (U.S. S.Ct. 1977).

Juvenile Rights in Correctional or Criminal Settings

In 1974, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDPA). The JJDPA provided:

Rights to juvenile status offenders and nonoffenders from being held in detention or correctional facilities. States cannot receive funds under the JJDPA unless they guarantee that youth who are status offenders and nonoffenders are not held in prisons, jails, or correctional facilities. Unlike juvenile offenders, status offenders and nonoffenders are youth who have not committed a crime.

Right to Seek the Help of a Guardian Ad Litem in Court

In most states, youth cannot initiate or defend against a lawsuit without adult assistance. Most state statutes provide that youth are entitled to the assistance of a Guardian Ad Litem (an adult who works for the best interest of the youth) in particular cases (child protection hearings, for example).⁶⁸

Right to Inherit from Parent's Estate

Youth have a right to inherit the money or belongings ("the estate") left by parents who died without a will. If a parent dies without a will, the parent's estate will be divided between the surviving spouse and children. If a parent leaves a valid will and does not give anything to the youth, the youth has no right to take a portion of the estate.⁶⁹

Rights of Emancipation

By consent of the court, youth may be emancipated by any action or inaction by the parent that indicates their willingness to give up care, custody, and control of the youth. As a legal doctrine, emancipation is more concerned with the termination or the extinguishment of parental rights and duties than with the removal of the restraints imposed on minors.⁷⁰

Rights Held by Others which Affect the Lives of Youth

Parents have a right not to have their custody rights to their children severed by the state without due process (a fair hearing). Further, there are generally three grounds for terminating parental right: (1) the parent has voluntarily surrendered custody of the child to the state agency, (2) the parent has abandoned the child, or (3) the parent is unfit to retain custody of the child.⁷¹

⁶⁸ Legal Rights of Youth, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 12.02, p. 532 (1994).

⁶⁹ Legal Rights of Youth, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 7.01, p. 332 (1994).

⁷⁰ Legal Rights of Youth, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 15.01, p. 665 (1994).

⁷¹ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, p. 10-11. *Matter of Baby M.*, 109 N.J. 396, 537 A.2d 1227 (1988), *on remand* 225 N.J. Super 267, 542 A.2d 52.

IV. LIMITATIONS ON THE RIGHTS OF YOUTH

Youth want autonomy and their basic needs met. They don't want to be treated like children, but don't want the full responsibility that comes with adulthood. The history of American law has treated childhood as a homogenous status continuing from the age of birth to 18 years of age. But child development, attachment, and maturity are a slow and gradual process (if the youth is healthy and supported).

The law has attempted to curb the autonomy of youth in certain situations. The United States Supreme Court has stated, "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."⁷² But the Court did not answer how advocates or youth were to determine which rights adhere to youth and at what stage rights begin to be held by older adolescents or adults.

The following is a list on limitations on the right of youth:

1. Parents have the right to control their youth through rights of physical custody.
2. In general, parents are entitled to the services and earnings of the child, and have the right to make all decisions regarding the child's care, control, education, health, residence, associates, and religion.
3. Parents are entitled to access to the child and their companionship.
4. Children must follow the direction of their parents.
5. Youth must receive parental permission to obtain a driver's license, marriage, and entry into the armed services.
6. For the stated public policy of protecting society from youthful immaturity, youth may not drink, drive, vote, hold office, serve on a jury, or serve as a fiduciary (trustee) for another persons financial assets.
7. Youth may not be able to work until a particular age and may be banned from certain areas of employment. (Child labor restrictions prohibiting oppressive child labor are found in 29 U.S.C. Sec. 212.)
8. Based on local ordinances or rules, youth may be subject to a curfew time which prohibits their presence in public spaces or on the streets.
9. Youth do not have a right to purchase or use tobacco, alcohol, or illicit drugs.
10. Youth do not have a right to purchase or own pornography.
11. Youth may be banned from certain amusement areas (pool halls, video arcades, dance halls, bowling alleys, and bars).
12. Youth may not have the right to engage in consensual sexual activity.
13. Youth may need to pay income tax if the amount of their taxable income is high enough (age is irrelevant).

⁷² *Planned Parenthood v. Danforth*, 428 U.S. 52, 74, 96 S.Ct. 2831 (1976).

14. Generally, minors must be in school under state truancy laws.

Even though youth have rights of privacy, the courts have determined that school lockers are the property of the schools and can be searched without notice, without permission, and without a search warrant. However, items in the locker (like a backpack) may not be searched without a “reasonable suspicion” by the school administrator that the student has broken or is breaking the law.⁷³

Random Court Decisions Affecting Youth Legal Rights

Youth may only be incarcerated if the evidence shows they committed a crime “beyond a reasonable doubt.” The same standard as applied to adults. *In re Winship* 397 U.S. 358 (U.S. Supreme Court, 1970);

Due process does not mandate trial by jury for all proceedings. Some cases may be decided by a judge or referee. *McKeiver v. Pennsylvania*, 403 U.S. 528 (United States Supreme Court 1971);

Due process protections provide safety from “double jeopardy” – being tried for the same crime twice. *Breed v. Jones*, 421 U.S. 519 (U.S. Supreme Court, 1975)

Youth are entitled to a fair trial and due process but may not be entitled to all the Constitutional protections of adult offenders. *In the Matter of Jennings*, 375 N.E.2d 258 (1978).

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⁷³ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 14, pp. 583-663 (1994).

AGENDA FOR REFORM

The American Bar Association Presidential Working Group on the Unmet Legal Needs of Children and their Families (*America's Children at Risk: A National Agenda for Legal Action*, July, 1993) suggests the following reform efforts:

Increase Incomes – We need to find a way to make work pay off for poor families. We need to increase tax fairness for low-income workers, we must increase benefits under public assistance programs to realistic livable levels.

Help Working Parents – We must help overworked parents by providing more high quality child care, more carefully regulate child care facilities and improve child care for school-aged children.

Housing – We must increase our affordable housing supply, improve housing quality for low-income families, eradicate housing discrimination, and prevent homelessness by defending against unlawful evictions and foreclosures.

Education – We must achieve equitable funding in the states and school districts, enforce existing federal legislation to promote equality of educational opportunities, improve educational enrichment programs (Head Start), provide more vocational training, improve educational opportunities for children with disabilities, afford more protection and care to homeless children, improve school safety, seek solutions to problems caused by unruly youth rather than expelling or suspending them from school, provide more and better education to pregnant woman and parenting students, and involve parents in the education process.

Health – We must provide universal health care, including prenatal care, immunizations for children, provide better health coverage for children, increase resources to “underserved” locations and neighborhoods, treat violence and substance abuse as public health epidemics, enforce laws regarding environmental hazards, and do a better job of enforcing child labor laws.

Child Welfare – We must focus on preventing child abuse and abandonment, provide families in crisis with comprehensive services, develop uniform standards to govern coercive family interventions, improve the foster care system, and promote the adoption of children.

Child Support- We should create a uniform body of law for enforcing child support obligations, improve procedures for establishing paternity, and establish uniform child support guidelines throughout the United States.⁷⁴

Pick one of these and work furiously!

⁷⁴ Legal Rights of Children, Vol. 3, 2nd Ed., Donald T. Kramer, Sec. 1.07, p. 20-22; *America's Children at Risk: A National Agenda for Legal Action*, ABA Presidential Working Group on the Unmet Legal Needs of Children and Their Families (June 1993)