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Infancy Doctrine Inquiries

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INTRODUCTION

The infancy doctrine,[1] the concept that minors' contracts are generally voidable, has been traced to the fifteenth century.[2] In the United States, the doctrine evolved to

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1. The infancy doctrine is also known as the infancy defense.

2. RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 9:2 (4th ed. 2010) [hereinafter WILLISTON]. For a discussion of the early developments of the infancy doctrine, see Melvin John Dugas, Comment, *The Contractual Capacity of Minors: A Survey of the Prior Law and the New Articles*, 62 TUL. L. REV. 745 (1988) (examining developments in early French and Roman law).

include a fairly complex set of interpretive nuances and exceptions. As a matter of doctrine, these nuances and exceptions are fairly susceptible to neat packaging; and in some states, most elements are clearly laid out by statute. Perhaps because the doctrine is sufficiently clear to permit most cases to be resolved on summary judgment, not many recent reported cases exist. Of the cases that are reported, many judges are evidencing some confusion about the doctrine. Without purporting to reverse or change the doctrine, some judicial opinions apply it but reach inconsistent or irrational results. Similar confusion is prevalent among current literature. Although rare, some commentators have from time to time considered various aspects of the infancy doctrine and its underlying rationales,[3] but few have done a comprehensive review of existing doctrine or a thoughtful assessment of whether changes are needed.

In this developing information age, contract law is changing rapidly. The increasing quantity of digital interactions has led to a vast increase in the number of contracts entered as well significant changes in the process of contracting, such as clickwrap and browsewrap agreements. These contracts are even more rarely read than traditional contracts and the terms more difficult to find. Alongside

3. *See, e.g.*, Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 291–94 (2006); Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope*, 43 GONZ. L. REV. 239 (2007); Larry A. DiMatteo, *A Theory of Interpretation in the Realm of Idealism*, 5 DEPAUL BUS. & COM. L.J. 17, 57–58 (2006) [hereinafter *Theory*]; Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481 (1994) [hereinafter *Deconstructing*]; Robert G. Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205 (1967); Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1302–05 (2000); Irving M. Mehler, *Infant Contractual Responsibility: A Time for Reappraisal and Realistic Adjustment?*, 11 U. KAN. L. REV. 361 (1963); Clark Miller, *Fraudulent Misrepresentations of Age as Affecting the Infant's Contract—A Comparative Study*, 15 U. PITT. L. REV. 73 (1953); Walter D. Navin, Jr., *The Contracts of Minors Viewed from the Perspective of Fair Exchange*, 50 N.C. L. REV. 517 (1972); Julie Cromer Young, *From the Mouths of Babes: Protecting Child Authors From Themselves*, 112 W. VA. L. REV. 431, 443 (2010); Dugas, *supra* note 2; James L. Sivils, Jr., Comment, *Contracts—Capacity of the Older Minor*, 30 U. KAN. CITY L. REV. 230 (1962); Victoria Slade, Note, *The Infancy Defense in the Modern Contract Age: A Useful Vestige*, 34 SEATTLE U. L. REV. 613 (2011).

these developments, the courts have been willing to lower the legal standards for recognizing assent to contractual terms and have become increasingly tolerant of oppressive terms.[4] At the same time, minors have increasing access to money and are now a significant market segment. These recent trends in markets as well as in contract practice and law leave minors more exposed to potentially harmful or unfair terms. The infancy doctrine is their only viable protection.

Thus, this is a particularly appropriate time to shine a light on the infancy doctrine—to determine what it includes and whether it needs adjustments. Although the infancy doctrine is well-established in American jurisprudence, even well-established legal doctrines should be periodically reexamined to determine if they still serve their intended purpose or have become a barrier to justice and efficiency. This Article will briefly identify the elements of and exceptions to the infancy doctrine and explore various critiques of and justifications for the infancy doctrine; ultimately suggesting that the infancy doctrine is necessary in some configuration to protect minors. Minors deserve the benefit of a safety net when navigating significant financial and legal commitments. The appropriate parameters of that net, however, need further tailoring.

Part I examines the elements, rationales, and policies behind the infancy doctrine, including the established exceptions and defenses. The discussion of various accurate and inaccurate applications and critiques of the infancy doctrine explored in Part I form the foundation for a reassessment of the doctrine's role in a digital world. Part II explains the paucity of recent cases addressing the infancy doctrine, and then suggests what to expect of this doctrine in the future as the market activity of teens continues to expand. Finally, this Article concludes with how the infancy doctrine can be promoted and refined to continue to serve its still-legitimate purposes.

4. Historical and current trends in contract law are more fully discussed in Cheryl B. Preston & Eli McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browsewraps,* BYU J. PUB. L. (forthcoming 2012).

I. ELEMENTS AND RATIONALES OF THE INFANCY DOCTRINE

A. *The Rule*

The infancy doctrine[5] protects persons under the legally designated age of adulthood from both "crafty adults" and their own bad judgment.[6] The doctrine is based on the presumption that minors are generally easily exploitable and less capable of understanding the nature of legal obligations that come with a contract.[7] For ease of administration and clarity in application, the rule was settled with a categorical age cutoff line without regard to whether any particular individual is mature or infantile.[8]

The doctrine, although subject to many exceptions, allows minors to disaffirm or "void" a contract that they entered as a minor.[9] The right to avoid the contract lasts until a reasonable time after reaching adulthood as long as the minor has not ratified the contract as an adult.[10] All jurisdictions allow the minor to disaffirm the contract and not perform further. Disaffirmance generally requires only that the minor return any tangible benefit received as consideration still in the minor's possession.[11] A few jurisdictions go further;

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5. In some states the doctrine is statutory. *See, e.g.*, CAL. CIV. CODE § 1556 (West 1982); UTAH CODE ANN. § 15-2-2 (West 2004).

6. 43 C.J.S. *Infants* § 210 (2011).

7. *See* City of New York v. Stringfellow's of N.Y., Ltd., 684 N.Y.S.2d 544, 550–51 (App. Div. 1999) ("Infancy . . . is a legal disability and an infant . . . is universally considered to be lacking in judgment, since his or her normal condition is that of incompetency. In addition, an infant is deemed to lack the adult's knowledge of the probable consequences of his or her acts or omissions and the capacity to make effective use of such knowledge as he or she has. It is the policy of the law to look after the interests of infants, who are considered incapable of looking after their own affairs, to protect them from their own folly and improvidence, and to prevent adults from taking advantage of them."); *see also* Loveless v. State, 896 N.E.2d 918, 920–21 (Ind. Ct. App. 2008) ("The rule that minors may avoid contracts they enter into with adults is based on the presumption that unequal bargaining power always exists between the two, with the power, and therefore, the potential for overreaching, inuring to the adult.").

8. BRIAN A. BLUM & AMY C. BUSHAW, CONTRACTS CASES, DISCUSSION, AND PROBLEMS 504 (2d ed. 2008). Under the common law, this line was set as the day before the minor's twenty-first birthday. RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. a (1981). Currently, the line is more often set as the minor's eighteenth birthday rather than the preceding day.

9. RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. a (1981).

10. BLUM & BUSHAW, *supra* note 8, at 504; WILLISTON, *supra* note 2, § 9:18.

11. *See* RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. c (1981); *see also*

allowing the minor to keep the benefit derived, and even recoup any consideration already transferred to the adult.[12] These general infancy principles have been partially cabined by a number of enumerated exceptions.

B. The Exceptions and Defenses

The law has responded to concerns about the infancy doctrine's potential unfairness in a variety of ways. The harshness of the result of the infancy doctrine, the lack of sympathy engendered by some minors who assert the infancy doctrine, and the doctrine's obviously arbitrary age cutoff that may be unjust in particular cases have led courts to limit the infancy doctrine with some express exceptions.[13] In addition, a few other courts and commentators have claimed exceptions that are not supported by any reliable source or rationale. We discuss both types in this Section.

1. Completed Transactions

Allan Farnsworth suggests one possible broad limitation to the infancy doctrine as part of the definition of a contract. He interpreted the Restatement's definition of a contract as "a promise or a set of promises"[14] to suggest that contracts can only exist where exchanges "relate to the future," what is termed an "executory contract," and would not cover a performed contract such as an immediate sale of apples for cash.[15] Taken to its logical conclusion, this suggests that a minor would not be able to disaffirm any completed exchange because there would be no contract to disaffirm. However,

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Cunningham, *supra* note 3, at 288–89 (stating that the minor generally is not required to make restitution even for damaged goods); Cheryl B. Preston, *CyberInfants*, 39 PEPP. L. REV. (forthcoming 2012).

12. Daniel, *supra* note 3, at 256 (citing Halbman v. Lemke, 298 N.W.2d 562, 567 (Wis. 1980); Weisbook v. Clyde C. Netzley, Inc., 374 N.E.2d 1102, 1107 (Ill. App. Ct. 1978).

13. This Article seeks to address the major and generally applicable exceptions. Other very limited exceptions in some states include, for example, holding minors to a waiver of liability for participation in recreational sports staffed by volunteers. *See, e.g.*, Zivich v. Mentor Soccer Club, Inc., 696 N.E.2d 201, 205 (Ohio 1998). Another possible emerging exception is holding minors to an arbitration provision in a contract for necessary medical care, but this has not been fleshed out. *See, e.g.*, Doyle v. Giuliucci, 401 P.2d 1, 3 (Cal. 1965); Leong by Leong v. Kaiser Found. Hosps., 788 P.2d 164, 169 (Haw. 1990).

14. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

15. E. ALLAN FARNSWORTH, CONTRACTS § 1.1 (4th ed. 2004).

courts and commentators have not accepted this definition of a contract, and even Farnsworth recognizes that a "minor may avoid the contract even if it has been fully performed on both sides, as where the minor has received and paid for goods."[16]

2. Necessaries

A minor is liable on a contract for necessaries.[17] Society wants to allow minors to obtain items necessary for their survival where the minor has no other means to do so. We therefore encourage adults to enter such contracts by assuring merchants that minors' contracts for necessities will be binding.[18] Applicability of this exception is based on the need of the infant at the time of contracting, rather than on the nature of the item contracted for.[19] This approach limits the exception dramatically, and puts the burden on merchants to make a judgment whether an item is a necessity for a particular minor. Although society requires such an exception, the law limits its scope. Thus, if a minor contracts for what would generally be a necessity, but that minor has already been provided for by his parents or his parents are willing to provide for him, the contract is not binding and the minor is permitted to disaffirm it.[20] Further, even when validly contracting for necessities, the minor is never held liable for more than the actual value of the necessities.[21] And finally, a minor is not bound to an executory contract to pay

16. *Id.* § 4.4.

17. WILLISTON, *supra* note 2, § 9:6.

18. Daniel, *supra* note 3, at 246 (citing FARNSWORTH, *supra* note 15 § 4.5). The contract itself is not necessarily binding, but the minor is held liable in quasi-contract for the reasonable value of the goods provided. JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 27.8 (Mathew Bender & Co. rev. ed. 2010). This distinction can be important where the contract for necessaries carries additional terms beyond a simple purchase contract.

19. WILLISTON, *supra* note 2, § 9:21; *see also id.* § 9:18 ("An infant may make himself liable for goods that are necessary, *considering his position and station in life*." (emphasis added)).

20. *Id.* § 9:21; *see also* Young v. Weaver, 883 So. 2d 234 (Ala. Civ. App. 2003) (holding that the minor could disaffirm contract for an apartment because parents "were willing and able to provide lodging"); Bowling v. Sperry, 184 N.E.2d 901, 904 (Ind. App. 1962) (quoting 27 AM. JUR. *Infants* § 17 (1940)) ("[T]he infant must not have at the time of delivery an adequate supply from other sources. To be liable for articles as necessaries, an infant must be in actual need of them, and obliged to procure them for himself.").

21. WILLISTON, *supra* note 2, § 9:18.

for necessities—only for the portion that has been received.[22]

Deciding what a necessity is has been characterized by at least one court as a two step inquiry. First, the court must determine, as a matter of law, "whether the subject of the contract is generally considered a necessity."[23] This is still a nebulous inquiry beyond the obvious categories such as food and clothing that are easily within this definition. Whether other areas, such as transportation and communication devices, can be considered one of these categories is a more difficult inquiry. Second, if the subject of the contract can be a necessity, the fact-finder must determine whether it actually was a necessity to that specific minor.[24]

Determining what is a necessity for a minor is a fact-intensive inquiry,[25] although also a matter of law,[26] and it is useful to look at what has been upheld and rejected as a necessity in the past. Food, clothing, shelter, and medical expenses are in the traditional category of necessities.[27] Education also generally falls in this list.[28] Interestingly enough, "retaining counsel in criminal proceedings" has also been upheld as a necessity[29] and "under extraordinary circumstances," counsel in a civil suit can be as well.[30]

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22. *Young*, 883 So. 2d at 237 n.4 (citing *Ex parte* McFerren, 63 So. 159, 159 (Ala. 1913); 43 C.J.S. *Infants* § 180 (1978)).

23. *Young*, 883 So. 2d at 238.

24. *Id.*

25. Webster St. P'ship v. Sheridan, 368 N.W.2d 439, 442 (Neb. 1985) ("Just what are necessaries . . . has no exact definition. The term is flexible and varies according to the facts of each individual case."); *see also* Ragan v. Williams, 127 So. 190, 191 (Ala. 1930) ("[E]very case stands upon its peculiar facts and reasonable necessities, according to the circumstances of each case; and there is no positive or iron-bound rule by means of which it may be determined what are or what are not necessaries.").

26. Bowling v. Sperry, 184 N.E.2d 901, 904 (Ind. App. 1962).

27. *See* State *ex rel.* Packard v. Perry, 655 S.E.2d 548, 557 n.12 (W. Va. 2007); 42 AM. JUR. 2D *Infants* § 66 (2011).

28. PERILLO, *supra* note 18. ("Education is necessary, but the kind of education that is necessary depends upon the circumstances of the infant."); *see also Bowling*, 184 N.E.2d at 903 (quoting Price v. Sanders, 60 Ind. 310, 314 (Ind. 1878)) (categorizing a "common school education" as a personal comfort that rises to the level of a necessary).

29. *In re* H.V., 252 S.W.3d 319 (Tex. 2008).

30. Munson v. Washband, 31 Conn. 303, 308 (Conn. 1863) ("We think there may be cases, and the jury have found this to be one of them, where a civil suit may, under extraordinary circumstances, be the only means by which an infant can procure the absolute necessaries which he requires, and where such is the case, it would be a reproach to the law to deny him the power of making the necessary contracts for its commencement and prosecution."). The suit

The question of transportation is an interesting inquiry. Can transportation ever constitute a necessity for an unemancipated minor? In *Bowling v. Sperry*, the court seemed to answer that question in the affirmative.[31] Although the court claimed that the car purchased by a teenager in that case was not a necessity, the court commented that "every high school boy today wants a car of his own, and many of them own automobiles *which under given circumstances may be considered necessaries.*"[32] However, according to *Bowling*, a car must be "vital to [the minor's] existence" to rise to such a level.[33] *Star Chevrolet Co. v. Green*, a more recent case, held that a car was not a necessity for the minor.[34] While that court seemed wary of ever allowing a car to be a necessity, the fact that the minor had a car pool available for transportation also factored prominently in the court's analysis.[35] Of course, a second car would not qualify as a necessity.[36]

Overall, the necessities exception to the infancy doctrine provides a consistent and useful check on the infancy doctrine. It is unlikely to bind minors to very many contracts, but serves as a way for minors to obtain essential goods and

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referenced in *Munson* was to enforce a promise of support from the plaintiff's potential husband. *Id.* at 305; *see also* Statler v. Dodson, 466 S.E.2d 497, 502 (W. Va. 1995) ("Legal services rendered for prosecution of an infant's claim based on personal injuries, or protection of an infant's liberty, security or reputation, have generally been considered necessaries rendering the infant liable for such service.").

31. *Bowling*, 184 N.E.2d at 903.

32. *Id.* at 904 (emphasis added).

33. *Id.* One court has hinted that whether the minor is a worker can be a significant factor in this analysis. *See* Ehrsam v. Borgan, 347 P.2d 260, 264 (Kan. 1959) ("We are, therefore, of the opinion that private transportation for the worker is now a necessity and an agreement made by a minor for such transportation is binding and not subject to disaffirmance for the reason of minority alone."). *But see* Russell v. Buck, 68 A.2d 691, 694 (Vt. 1949) (finding that trucks were not necessaries although used in the course of employment because "the owning or leasing and the operation of a truck or trucks was [not] the only means of livelihood open to [the minor]."). In a similar vein to *Russell*, one court held that a truck used for business purposes was not a necessary and that the term necessaries is limited "to articles of personal use necessary for the support of the body and improvement of the mind of the infant, and is not extended to articles purchased for business purposes, even though the minor earns his living by the use of them, and has no other means of support." Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 725–26 (Me. 1924).

34. Star Chevrolet Co. v. Green, 473 So. 2d 157, 161 (Miss. 1985).

35. *Id.*

36. *See* Harris v. Raughton, 73 So. 2d 921 (Ala. Ct. App. 1954).

services without requiring adults to take extra risks in providing them.

3. Emancipation

Another common exception to the infancy doctrine is based on the emancipation of some youth. The doctrine is largely statutory, and varies from state to state. The general principle, however, is that when minors are emancipated, they are generally treated as adults for contracting purposes.[37] The primary ways that minors are emancipated are through permanent abandonment of the parents' homes, military service, and marriage.[38]

States differ as to whether such circumstances provide automatic emancipation for the minor or provide merely a factor to consider for judicial emancipation. For example, twenty states statutorily provide for automatic emancipation upon marriage,[39] six states provide for automatic

37. Daniel, *supra* note 3, at 246. *But see* Mitchell v. Mitchell, 963 S.W.2d 222, 223 (Ky. Ct. App. 1998) (quoting Bensinger's Coex'rs v. West, 255 S.W.2d 27, 29 (Ky. 1953)) ("Although parental emancipation may free the infant from parental control, it does not remove all of the disabilities of infancy. It does not, for example, enlarge or affect the minor's capacity or incapacity to contract."); Webster St. P'ship v. Sheridan, 368 N.W.2d 439, 443 (Neb. 1985) ("The effect of emancipation is only relevant with regard to necessaries."); *In re* Montgomery, No. 87-09-123, 1988 WL 82405, at *3 (Ohio Ct. App. Aug. 8, 1988) ("[A] minor child, although married, is nevertheless still a minor and under the legal disability of age and may void her contracts if she so elects."); Kiefer v. Fred Howe Motors, Inc., 158 N.W.2d 288, 290 (Wis. 1968) ("The general rule [of infancy] is not affected by the minor's status as emancipated or unemancipated.").

38. WILLISTON, *supra* note 2, § 9:4.

39. ARIZ. REV. STAT. ANN. § 44–131(B) (2011) (by marriage to an adult); CAL. FAM. CODE § 7002(a) (West 2011); FLA. STAT. ANN. § 743.01 (West 2011); HAW. REV. STAT. § 577–25 (West 2011); IDAHO CODE ANN. § 32–101(3) (2011); IOWA CODE § 599.1 (West 2011); KAN. STAT. ANN. § 38–101 (West 2011); LA. CIV. CODE ANN. art. 367 (2011); MICH. COMP. LAWS ANN. § 722.4(2)(a) (West 2011); MONT. CODE ANN. § 40–6–234(2) (2011); NEB. REV. STAT. § 43–2101 (2011); N.M. STAT. ANN. § 32A–21–3(A) (West 2011); N.C. GEN. STAT. ANN. § 7B–3509 (West 2011); N.D. CENT. CODE § 14–09–20(2) (2011); OR. REV. STAT. ANN. § 109.520 (West 2011); S.D. CODIFIED LAWS § 25–5–24(1) (2011); UTAH CODE ANN. § 15–2–1 (West 2011); W. VA. CODE ANN. § 49–7–27 (West 2011); WIS. STAT. ANN. § 54.46(6) (West 2011); WYO. STAT. ANN. § 14–1–201(a)(1)(A) (2011). Williston includes Connecticut, Illinois, Kentucky, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Tennessee, Texas, Vermont, and Washington as states that have accepted emancipation by marriage under state common law. WILLISTON, *supra* note 2, § 9:4. Including these states brings the total number of states recognizing emancipation by marriage to thirty-five.

emancipation by military service,[40] and twenty-five states maintain a form of court-ordered emancipation.[41] Of those states that statutorily provide for the emancipation exception, many provide a minimum age for emancipation, the most common being age sixteen.[42] Further, even where states do

40. ARIZ. REV. STAT. ANN. § 44–131(A) (2011); CAL. FAM. CODE § 7002(b) (West 2011); MICH. COMP. LAWS ANN. § 722.4(2)(c) (West 2011); N.M. STAT. ANN. § 32A–21–3(B) (West 2011); S.D. CODIFIED LAWS § 25–5–24(2) (2011); WYO. STAT. ANN. § 14–1–201(a)(1)(B) (2011).

41. ALA. CODE § 26–13–1 (2011); ALASKA STAT. § 09.55.590 (2011); ARK. CODE ANN. § 9–26–104 (2011); CAL. FAM. CODE § 7002 (West 2011); CONN. GEN. STAT. ANN. § 46b–150 (West 2011); FLA. STAT. ANN. § 743.015 (West 2011); 750 ILL. COMP. STAT. ANN. 30 / 9 (West 2011) (where no parental objection; can also have partial emancipation); KAN. STAT. ANN. § 38–109 (West 2011) (can be limited or full emancipation); LA. CIV. CODE ANN. art. 366 (2011) (limited or full emancipation); ME. REV. STAT. tit. 15, § 3506–A (2011); MICH. COMP. LAWS ANN. § 722.4 (West 2011); MISS. CODE ANN. § 93–19–3 (2011); MONT. CODE ANN. § 41–1–501 (2011) (limited emancipation); NEV. REV. STAT. ANN. § 129.080 (West 2011); N.M. STAT. ANN. § 32A–21–3 (West 2011); N.C. GEN. STAT. ANN. § 7B–3500 (West 2011); OKLA. STAT. tit. 10, § 91 (2011); OR. REV. STAT. ANN. § 419B.552 (West 2011); S.D. CODIFIED LAWS § 25–5–24 (2011); TENN. CODE ANN. § 29–31–101 (2011); TEX. FAM. CODE ANN. § 31.001 (West 2011) (limited or general emancipation); VA. CODE ANN. § 16.1–331 (2011); WASH. REV. CODE ANN. § 13.64.010 (West 2011); W. VA. CODE ANN. § 49–7–27 (West 2011); WYO. STAT. ANN. § 14–1–201 (2011).

42. ALA. CODE § 26–13–1 (2011) (age eighteen) (Alabama's general age of majority, however, is nineteen); ALASKA STAT. § 09.55.590 (2011) (age sixteen); ARIZ. REV. STAT. ANN. § 44–131 (2011) (no minimum age); ARK. CODE ANN. § 9–26–104 (2011) (age sixteen); CAL. FAM. CODE § 7120 (West 2011) (age fourteen for judicial emancipation); CONN. GEN. STAT. ANN. § 46b–150 (West 2011) (age sixteen); FLA. STAT. ANN. § 743.015 (West 2011) (age sixteen for judicial emancipation); HAW. REV. STAT. § 572–1(2) (West 2011) (age fifteen for marriage with court approval); IDAHO CODE ANN. § 32–101 (2011) (no minimum age); 750 ILL. COMP. STAT. ANN. 30 / 3–1 (West 2011) (age sixteen); IOWA CODE ANN. § 599.1 (West 2011) (no minimum age); KAN. STAT. ANN. § 38–101, 38–109 (West 2011) (age sixteen for marriage; no minimum for judicial emancipation); LA. CIV. CODE ANN. art. 366 (2011) (age sixteen for judicial emancipation); ME. REV. STAT. tit. 15, § 3506–A (2011) (age sixteen); MICH. COMP. LAWS ANN. § 722.4c (West 2011) (age sixteen for judicial emancipation); MISS. CODE ANN. § 93–19–3 (2011) (no minimum age); MONT. CODE ANN. § 41–1–501 (2011) (age sixteen for judicial emancipation); NEB. REV. STAT. § 43–2101 (2011) (no minimum age); NEV. REV. STAT. ANN. § 129.080 (West 2011) (age sixteen); N.M. STAT. ANN. § 32A–21–3 (West 2011) (age sixteen); N.C. GEN. STAT. ANN. § 7B–3500 (West 2011) (age sixteen for judicial emancipation); N.D. CENT. CODE § 14–09–20 (2011) (no minimum age); OKLA. STAT. tit. 10, § 91 (2011) (no minimum age); OR. REV. STAT. ANN. § 419B.558 (West 2011) (age sixteen for judicial emancipation); S.D. CODIFIED LAWS § 25–5–26 (2011) (age sixteen for judicial emancipation); TENN. CODE ANN. § 29–31–101 (2011) (no minimum age); TEX. FAM. CODE ANN. § 31.001 (West 2011) (age sixteen); UTAH CODE ANN. § 15–2–1 (West 2011) (no minimum age); VA. CODE ANN. § 16.1–331 (2011) (age sixteen); WASH. REV. CODE ANN. § 13.64.010 (West 2011) (age sixteen); W. VA. CODE ANN. § 49–7–27 (West 2011) (age sixteen); WIS. STAT. ANN. § 54.46 (West

not statutorily provide for complete contractual capacity through emancipation, they frequently have limited emancipation statutes that generally provide more lenient conditions for minors to validly contract for medical services.[43]

Of the states that accept the common law version of emancipation, the effect may simply be that the definition of "necessities" is expanded for that minor. As one court said:

> [I]f we have a combination of emancipation with necessity there is often an enlarged and more extended necessity. If the minor is emancipated and does not have the parental roof for shelter, and if he is married (or marrying), with a wife for whom he is obligated to furnish shelter and lodging, the purchase or lease of a home can, depending upon the individual circumstances, become a *necessity*.[44]

The reasoning for the emancipation exception is similar to that of the necessities exception: society wants to allow minors to make contracts in situations where the minor is without parental support and has taken on responsibilities of adulthood.[45] With the majority of states providing this exception by statute, its nuances are well-defined and the status of emancipation is ascertainable by those who contract with such minors. This exception is available to relatively few minors, but it does provide necessary contractual capacity for those minors who are without parental support and protection for adults who provide assistance to them.

2011) (no minimum age); WYO. STAT. ANN. § 14–1–203 (2011) (age seventeen for judicial emancipation). For states that allow emancipation by marriage, the minimum age for marriage (generally age sixteen) acts as an additional minimum age for emancipation. *See* NATIONAL SURVEY OF STATE LAWS 463–68 (Richard A. Leiter ed., 6th ed. 2008).

43. *See, e.g.*, COLO. REV. STAT. §13–22–103 (2011); IND. CODE ANN. § 16–36–1–3 (West 2011); VT. STAT. ANN. tit. 18, § 4226 (2011). The capacity of minors to consent for health care is more fully discussed in Cheryl B. Preston & Brandon T. Crowther, *Minor Restrictions: How Adolescence in Treated Across Legal Disciplines* (Aug. 18, 2011) (unpublished manuscript) (on file with authors).

44. Merrick v. Stephens, 337 S.W.2d 713, 720 (Mo. Ct. App. 1960); *see also* PERILLO, *supra* note 18 ("It would seem clear that the range of what is necessary is considerably larger if the infant is emancipated, and larger yet if the infant is married.").

45. *See* Daniel, *supra* note 3, at 246.

4. Employment

Some state statutes permit minors, generally from age fourteen, to obtain paid employment, although this permission is heavily regulated.[46] Sometimes employers require these teenagers to sign an employment contract. Where the right to teen employment is provided by statute, these contracts can be enforceable against them.[47] For example, the Supreme Court of Hawaii held such an employment contract to be binding on a minor as to issues that arose in the courseof his employment.[48] The court based its decision on statutory language that "relax[ed] the requirements for sixteen- and seventeen-year-olds to obtain employment."[49] Although adolescents in Hawaii under age sixteen were permitted to work, they had to obtain a certificate of employment, which required parental consent.[50] Parents would presumably scrutinize any requirement of their child to sign a contract.[51] These same restrictions, however, did not apply to sixteen- and seventeen-year-olds.[52] The court argued that the legislature essentially emancipated older minors for the narrow purpose of employment, and so contracts entered in the course of such employment should be enforceable.[53]

A few other courts in much older cases have declared employment contracts enforceable against minors, although they did so in very different contexts than the Hawaii court. In *Robinson v. Van Vleet*[54] and *Spicer v. Earl*,[55] the minor plaintiffs were seeking to void their employment contracts so that they could recover a greater value in *quantum meruit* for the services they rendered.[56] In both cases, the courts held the minors to their employment contracts because the

46. *See* Seymour Moskowitz, *Save the Children: The Legal Abandonment of American Youth in the Workplace*, 43 AKRON L. REV. 107, 108, 135 (2010) (discussing the Fair Labor Standards Act in relation to youth).

47. WILLISTON, *supra* note 2, § 9:8; 42 AM. JUR. 2D *Infants* § 54 (2011).

48. Douglass v. Pflueger Hawaii, Inc., 135 P.3d 129, 138–39 (Haw. 2006).

49. *Id.* at 138.

50. *Id.*

51. *See id.*

52. *Id.*

53. *See id.*

54. 121 S.W. 288 (Ark. 1909).

55. 1 N.W. 923 (Mich. 1879).

56. *Id.* at 923; *Robinson*, 121 S.W. at 289.

contracts were reasonable and, if minors' employment contracts were voidable, few would take the risk to employ them.[57]

Other courts have taken steps towards partially upholding minors' employment agreements without upholding them in their entirety. Some have done so by enforcing minors' covenants not to compete, "notwithstanding the voidability of the employment contracts containing the negative covenant."[58] This position relies on a policy decision that a minor should not use the training he receives from an employer to that employer's injury.[59] Other courts have upheld minors' agreements in employment contracts to arbitrate disputes.[60]

In cases where courts departed from the general rule of incapacity, there is evidence that they did so to avoid wrongdoing by the teen to the detriment of her employer. There is little evidence that this employment exception will extend beyond the prevention of wrongdoing by the minor. Further, besides the few states that provide an employment exception, "the general rule is that a contract of an infant for his or her performance of labor or personal services is voidable at his or her election."[61]

5. Misrepresentation of Age

In some jurisdictions, the law provides that the minor's fraudulent misrepresentation of her age is a defense to an action to avoid a contract,[62] but the general principle requires

57. *Spicer*, 1 N.W. at 925; *Robinson*, 121 S.W. at 289.

58. R. F. Chase, Annotation, *Enforceability of Covenant Not to Compete in Infant's Employment Contract*, 17 A.L.R.3D 863, 864 (2008). The Pennsylvania Court declined to carve out an exception for employment contracts, but effectively enforced the non-competition clause of the contract by not allowing the minor "to utilize any benefits, training or knowledge derived from such contract to the damage and detriment of his former employer." Pankas v. Bell, 198 A.2d 312, 315 (Pa. 1964).

59. Chase, *supra* note 58; Mut. Milk & Cream Co. v. Prigge, 98 N.Y.S. 458 (N.Y. App. Div. 1906).

60. *E.g.*, Sheller v. Frank's Nursery & Crafts, Inc., 957 F. Supp. 150, 153 (N.D. Ill. 1997); *see also Douglass*, 135 P.3d at 129; ANDREW J. RUZICHO & LOUIS A. JACOBS, EMPLOYMENT PRACTICES MANUAL: A GUIDE TO MINIMIZING CONSTITUTIONAL, STATUTORY AND COMMON LAW LIABILITIES § 7:13 (2011) ("In jurisdictions where minors may enter into employment contracts, their tender years do not preclude agreeing to arbitrate.").

61. 42 AM. JUR. 2D *Infants* § 54 (2011).

62. *See* WILLISTON, *supra* note 2, § 9:22 (stating that this rule is statutory in

more than a mere statement of inaccurate age.[63] The adult has a duty to reasonably investigate age, notwithstanding the representation. The reliance must be "justified" and in "good faith."[64] In a case where a minor affirmatively presented a false identification, the court said that the false identification was a mere attempt to defraud, and insufficient under a three-part test: (1) the minor misrepresented her age, (2) the minor intended for the other party to rely on the misrepresentation, and (3) the party was injured as a result of its actual and justifiable reliance.[65] However, not all courts follow Texas's approach.

In Michigan, the misrepresentation of age defense is statutory and nearly absolute.[66] The minor is liable if he willfully misrepresents his age and the seller has "no actual knowledge of the actual age of such minor."[67] North Carolina

some jurisdictions); *see also* Merrick v. Stephens, 337 S.W.2d 713, 717 (Mo. Ct. App. 1960) ("If the minor has reached 'the age of discretion' and has misrepresented his age and in so doing has misled the person with whom he dealt, the equity courts will not permit him to take advantage of his own fraud in order to mulct the opposite party."); Feinsilver v. Schifter Motors, 23 A.2d 283, 284 (N.J. Sup. Ct. 1942) ("[A]n infant who represents himself to be, and appears to be, an adult, is estopped from setting up infancy only if he has received a benefit under the contract he fraudulently induced and retains it."); Harwell Motor Co. v. Cunningham, 337 S.W.2d 765, 769 (Tenn. Ct. App. 1959) ("If an infant procures an agreement to be made through false and fraudulent representations that he is of age, a court of equity will enforce his liability as though he were an adult, and may cancel a conveyance or executed contract obtained by fraud.").

63. *See, e.g.*, Gillis v. Whitley's Discount Auto Sales, Inc., 319 S.E.2d 661, 666 (N.C. Ct. App. 1984) (holding that minor's misrepresenting his age does not bar him from disaffirming a contract).

64. A. D. Kaufman, Annotation, *Infant's Misrepresentation as to His Age as Estopping Him from Disaffirming His Voidable Transaction*, 29 A.L.R.3D 1270 (1970); *see also* DiMatteo, *Deconstructing*, *supra* note 3, at 497 (stating that the requirement is "reasonable reliance").

65. Topheavy Studios, Inc. v. Doe, No. 03–05–00022–CV, 2005 WL 1940159, at *4 (Tex. App. Aug. 11, 2005) (citing and mirroring the elements of fraud discussed in Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co., 51 S.W.3d 573, 577 (Tex. 2001)). Generally, the elements of estoppel must be met for an infant to be estopped from disaffirming a contract. Kaufman, *supra* note 64 (stating the elements as "justified and good faith reliance" on the infant's representation of age; the infant received and retained benefits under the contract or caused substantial detriment to the other party; and "[t]he infant must be capable of and shown to have acted with conscious fraudulent intent").

66. MICH. COMP. LAWS ANN. § 600.1403 (West 2011).

67. *Id.* at § 600.1403(1). For less absolute statutory positions, *see* IOWA CODE ANN. § 599.3 (West 2011) (stating that in addition to the misrepresentations, the other party must have "good reason to believe the minor capable of contracting"); KAN. STAT. ANN. § 38–103 (West 2011) (same);

appears to take the exact opposite position. In *Gillis v. Whitley's Discount Auto Sales*, the court entirely rejected a fraudulent misrepresentation of age defense to voiding the contract.[68] Justifying why a fraudulent misrepresentation of age would not raise an issue of material fact, the court stated, in absolute terms, "[a] minor's representation of his age does not bar him from disaffirming his contract."[69] Between these two approaches are a myriad of options.

The majority position appears to be that minors can disaffirm their contracts notwithstanding misrepresenting their ages.[70] But at least one commentator has been quick to suggest that "modern courts are more receptive to . . . disallowing the power of avoidance where the elements of conscious misrepresentation by the infant and reasonable and good faith reliance causing substantial detriment to the other party are present."[71] If this trend proves true, it would lend significant power to the misrepresentation of age defense and would serve to protect those adults who innocently deal with minors who act in bad faith.

The expansion of this exception does not threaten the underlying policies of the infancy doctrine as it only removes the protections of the infancy doctrine for those minors who have the capacity to deceive and consciously do so.[72] Most minors remain protected from their improvidence and crafty adults.

A seeming conflict in the law exists in some states where a minor can disaffirm a contract although he misrepresented his age and yet be potentially liable for the tort of fraudulent

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UTAH CODE ANN. § 15–2–3 (West 2011) (same); WASH. REV. CODE ANN. § 26.28.040 (West 2011) (same).

68. 319 S.E.2d at 666.

69. *Id.*

70. *See, e.g.*, PERILLO, *supra* note 18, § 27.7 ("Under the majority view, infants who willfully misrepresent their ages may nevertheless exercise their powers of avoidance."); WILLISTON, *supra* note 2, § 9:22 ("The view generally accepted is that aside from a statute, the minor is not thereby precluded [by misrepresenting his age] in an action at law from asserting his privilege as an infant.").

71. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 25 (4th ed. 2001).

72. However, there could be problems if misrepresentation of age were expanded to include boilerplate terms in online terms of service ("TOS") agreements where minors may agree to being over the age of majority without knowing that they are doing so. This issue is briefly addressed in Preston, *supra* note 11.

misrepresentation.[73] However, the purpose of this is to hold minors accountable for their actions, but only for the actual damages caused rather than for the whole bargain.[74] Thus, a minor who disaffirmed a promissory note would not be liable for "the full amount of the note plus interest and a reasonable attorney's fee," but rather for only "the amount of money the plaintiff parted with."[75] In many cases, being liable for the tort of fraudulent misrepresentation will have the same effect as being estopped from disaffirming the contract, but there are cases where being only tortuously liable will be a lighter punishment.

Interestingly, misrepresentation of age seems to be the only type of misrepresentation that a minor can make that might estop him from disaffirming a contract.[76] For example, in a very recent case, a minor who misrepresented that he obtained parental consent to an online employment application by digitally signing his mother's name, was still allowed to disaffirm that contract.[77] Even without a separate exception for general misrepresentations, the misrepresentation of age defense is some protection for innocent adults who may be deceived into believing they are contracting with an adult.

6. Retained Benefit

An exception to the infancy doctrine currently garnering a great deal of attention, as a way to eviscerate the infancy doctrine, is that of retained benefits. Williston states the rule: "If an infant enters into any contract subject to conditions or stipulations, the minor cannot take the benefit of the contract without the burden of the conditions or stipulations."[78] A recent case, *A.V. v. iParadigms*,[79] has been

73. WILLISTON, *supra* note 2, § 9:22. A number of states take this approach. *See, e.g.*, Kiefer v. Fred Howe Motors, 158 N.W.2d 288, 292 (Wis. 1968).

74. *See Kiefer*, 158 N.W.2d at 292.

75. *Id.* (quoting Wis. Loan & Fin. Corp. v. Goodnough, 228 N.W. 484, 486 (Wis. 1930)).

76. However, it may still be possible to hold the minor liable in tort. *See* WILLISTON, *supra* note 2, § 9:23.

77. Foss v. Circuit City Stores, Inc., 477 F. Supp. 2d 230, 235–37 (D. Me. 2007).

78. WILLISTON, *supra* note 2, § 9:14.

79. 544 F. Supp. 2d 473 (E.D. Va. 2008).

cited as eroding the infancy doctrine,[80] although mistakenly.[81] In that case, the district court prevented four high school students from disaffirming their contract with iParadigms because they had "retained" the "benefits" of the contract while seeking to avoid the conditions.[82] However, on appeal, the Fourth Circuit affirmed on copyright grounds and subtly clarified the district court's reference to the infancy doctrine, which only requires the infant to forfeit *returnable* consideration upon disaffirmance.[83]

The *retains benefit* exception to the infancy doctrine is a step towards mediating the potential for harm when minors actually disaffirm contracts. However, in many ways, the result is still that the adult bears the risk of loss from the imprudent actions of the minor. A common example is that a minor purchases a car, damages the car in an accident, and then seeks to disaffirm the contract for the purchase of the car.[84] The retains benefit exception allows the minor to disaffirm the contract as long as the remains of the damaged or destroyed car (or its equivalent value) are returned to the seller.[85] While this rule still leaves the risk with the contracting adult, it is a balance given the underlying purposes of the infancy doctrine and the other exceptions previously mentioned. The infancy doctrine is meant to discourage contracting with minors and this rule does not fully alleviate that risk, particularly when contracts of substantial value are involved. If the minor truly needs the item (such as a car), the adult can be sheltered under the necessities exception or the emancipation exception, or the adult can simply assume the risk. Nonetheless, a handful of states have recognized the potential inequities in the retains benefit scenario and have held that the adult has the right to offset the depreciation of the item from the consideration to be returned to the minor.[86]

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80. Cromer Young, *supra* note 3, at 453.

81. For a detailed discussion of the *iParadigms* case, see Preston, *supra* note 11.

82. *iParadigms*, 544 F. Supp. 2d at 481.

83. A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630, 636 n.5 (4th Cir. 2009) (quoting WILLISTON, *supra* note 2, § 9:14).

84. *See, e.g.*, Star Chevrolet Co. v. Green, 473 So. 2d 157, 161 (Miss. 1985).

85. *See* WILLISTON, *supra* note 2, § 9:14.

86. *Id.* § 9.16 ("Although the weight of authority still permits an infant buyer to recover the price paid merely upon offering to return the property, if

C. *The Scholarly Criticism and Responses*

To the extent the infancy doctrine has been evaluated in scholarly literature and published student work,[87] the major themes are that the doctrine is anachronistic,[88] unsupported by current data,[89] and dangerous[90]—especially in the online context.[91] One commentator declares that the infancy

any, remaining in her hands, without accounting to the seller for its depreciation or its use, there is an increasing number of jurisdictions that allow the seller to deduct for such depreciation and use."); *see also id.* § 9.16 n.13 (listing twelve states that allow depreciation deductions). The confusion related to the depreciation doctrine is addressed more fully in Preston, *supra* note 11; Dodson *ex. rel.* Dodson v. Shrader, 824 S.W.2d 545, 547–58 (Tenn. 1992); Rice v. Butler, 55 N.E. 275 (N.Y. 1899).

87. Overall, there are relatively few sources that directly address the infancy doctrine. *See* Preston, *supra* note 11.

88. CHILDREN'S COMPETENCE TO CONSENT 57 (Gary B. Melton, Gerald P. Koocher & Michael J. Saks eds. 1983) ("[T]he rules regarding majority today are a mélange of legal anachronism and contemporary expediency which reflect only minimally our current understanding about the intellectual and emotional capacities and interests of young persons."); Cunningham, *supra* note 3, at 292 (condemning lack of reassessment of "the infancy doctrine despite criticism from academics and even courts, despite the advances in child development research that suggests that children, particularly older adolescents, are not the naïve infants that the common law decisions suggest."); DiMatteo, *Theory*, *supra* note 3, at 58 ("The ancient lineage of this paternalistic doctrine has lost touch with the socioeconomic condition of minors in the modern world. The law's response has produced a patchwork of sub-doctrines that continue to pay homage to the pristine version. The attempt to bridge the gap between the social reality of minority and legal doctrine through the use of exceptions has produced a chaotic jurisprudence."); DiMatteo, *Deconstructing*, *supra* note 3, at 515 ("[T]he infancy doctrine has not gone through a constructive evolutionary process, but has suffered an implosion or deconstruction. Unfortunately, the shell of the doctrine is still masqueraded as the law of the land."); *see also* Miller, *supra* note 3, at 91 ("Here then is a field in which the law needs modernization."); Kiefer v. Fred Howe Motors, 158 N.W.2d 288, 290 (Wis. 1968) ("[I]n today's modern and sophisticated society the 'infancy doctrine' seems to lose some of its gloss.").

89. DiMatteo, *Deconstructing*, *supra* note 3, at 525 ("The time has long been ripe for the elimination of the law of infant incapacity. The sophistication of today's youth and the increase of their buying power has made the hindrance caused by the 'protection' of the infancy law doctrine even more severe."); *Id.* at 504–05 ("Given the advanced maturity of many minors and their tremendous purchasing power, the right of disaffirmance as a means of protecting them seems somewhat draconian." (internal citations omitted)); *see also* Sivils, *supra* note 3 (arguing that the infancy defense should not be available to "older minors" because they have mental capacity).

90. Hartman, *supra* note 3, at 1361 ("[I]njustice has been adduced by adherence to presumptive incapacity, resulting in injustice not only for adolescents but also for adults interacting with them."); Navin, *supra* note 3 (discussing potential injustices caused by the infancy doctrine).

91. Daniel, *supra* note 3, at 268–69 ("If electronic commerce is worth

doctrine is already dead.[92] Different normative sentiments on the policies that support the doctrine are expected, such as how vulnerable youth are and how much protection they deserve. If based on these different views, criticisms of the doctrine generally raise legitimate issues.

However, the supporting research in such literature is sparse and some declarations are simply wrong. For example, one commonly cited source concluded without footnotes:

> [I]n reality [the infancy doctrine] has been dismantled piece by piece by its twin adversaries. These two adversaries can be found in the courthouse and in the statehouse. The result has been the emasculation of an ironclad rule of disaffirmance that provided the certainty that the law cherishes at the expense of injustice in a given case. This rule of certainty has been transplanted by a regime characterized by a multiplicity of rules bolstered by an equally chaotic jurisprudence.[93]

The paragraph that appears just ahead of these conclusions, where these arguments were initiated, cites only a 1794 case[94] and a 1921 law review article.[95]

Another source regularly cited in these critiques declares how "[t]he technologically oriented and knowledgeably mature youth of our hectic age is not at all comparable to the minor of even five or six decades ago who needed the solicitous attention and protection the law so thoroughly afforded him."[96] This statement was written in 1963, and may have contributed to the legislative movement in the early seventies to drop the age of adulthood to eighteen from twenty-one so draftees could at least vote.[97] The minors of "five or six" decades ago against whom this author makes the

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advancing, contract law can certainly clear this outdated hurdle and allow society in general to reap the full benefit of this emerging technology.").

92. DiMatteo, *Deconstructing, supra* note 3, at 485.

93. *Id.*

94. Zouch v. Parsons, (1765) 3 Burr. 1794 (K.B.).

95. Comment, *Liability of an Infant for Fraudulent Misrepresentation*, 31 YALE L.J. 201 (1921).

96. Michael G. Bennett, *The Edge of Ethics in iParadigms*, 2009 B.C. INTELL. PROP & TECH. F. 100601, 15 n.110 (2009) (quoting Mehler, *supra* note 3, at 373); *see also* Daniel, *supra* note 3, at 254 (same quote); DiMatteo, *Deconstructing*, *supra* note 3, at 482 n.5 (same quote).

97. The reasons for lowering the age of majority are discussed in Preston & Crowther, *supra* note 43.

comparison were teens in the mid-1900s. Perhaps this same could be said about today's youth, but an article from almost fifty years ago is not good authority to support such an assertion. Reasoned commentary on dropping the infancy age again or limiting the doctrine any further should be based on current studies and authorities.

While the infancy doctrine has the potential to protect minors from the designs of crafty adults, it also opens the door for minors to take advantage of unsuspecting adults.[98] However, it is difficult to have much pity for adults who, in most instances, are able to investigate age and choose to avoid entering into an unenforceable contract in the first place.[99] This is analogous to a hunter who illegally hunts bald eagles and is then injured by his prey. The hunter would still be punished for his bad actions despite being the victim of the suffered injury. Similarly, an adult who chooses to deal with a minor and seeks to impose heavy legal obligations should not be surprised when the law allows disaffirmation.

Nevertheless, with modern contracting methods on the Internet, it is becoming more difficult to accurately discern the age of customers without imposing heavy commercial burdens on adult users. In these situations, the infancy doctrine has greater potential to be used in ways that unfairly disadvantage unsuspecting adults. Proposals to mitigate this risk are addressed below.[100]

II. DUSTING OFF THE INFANCY DOCTRINE

The infancy doctrine was once more prevalent in legal discussion, commentary, and litigation than it has been

98. *See* Natalie Loder Clark, Parens Patriae *and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381, 382–83 n.6 (2000) ("[T]his doctrine also allows the minor to take advantage of an adult, in that such a contract is void or voidable at the option of the minor."); Daniel, *supra* note 3, at 241 ("[I]n many cases it may be the minor who is preying on unsuspecting, less-technologically savvy persons.").

99. *See* Webster St. P'ship v. Sheridian, 368 N.W.2d 439, 442 (Neb. 1985) (quoting Ross P. Curtice Co. v. Kent, 131 N.W. 944, 945 (Neb. 1911)) ("The result seems hardly just to the [adult], but persons dealing with infants do so at their peril. The law is plain as to their disability to contract, and safety lies in refusing to transact business with them."). *But see* Doe v. Sexsearch.com, 551 F.3d 412, 416–17 (6th Cir. 2008) (addressing the difficulty an adult may encounter in determining if a contracting party is a minor).

100. *See infra* Part II.A–B.

recently.[101] Some of the more famous cases feature minors disaffirming contracts for bicycles,[102] motorcycles,[103] and even a deed of trust.[104] Modern uses of the infancy doctrine involve disaffirming a release of liability for use of a motocross park,[105] disaffirming an endorsement agreement for a professional child athlete,[106] seeking to void a guilty plea as part of a plea agreement,[107] and disaffirming an online terms of service agreement (TOS) for using plagiarism detection software.[108] The changed legal landscape has drastically affected the way the infancy doctrine operates and its potential for use in the future.

This section will address possible reasons for the small number of published opinions on the infancy doctrine as well as reasons to expect litigation on the doctrine will become much more prevalent. Next, it will discuss the recent judicial trend that undermines traditional contractual protections and how that relates to the infancy doctrine. This section concludes with insights into the future of the infancy doctrine and the potential for refining the infancy doctrine without losing its fundamental character and policy purposes.

A. Increasing Infancy Lawsuits

The infancy doctrine itself has only been addressed in reported cases 128 times in the past ten years.[109] As of the date of this Article, *iParadigms* appears to be the only case to

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101. Like most well-defined doctrines, the infancy doctrine was most frequently litigated and discussed while its parameters were being developed. With the recently changed legal landscape, the doctrine needs to be reapplied rather than redefined. However, as the roots of the doctrine have been lost over time, courts have been prone to misapply elements of such a well-defined doctrine to new situations. *See, e.g.*, A.V. v. iParadigms, 544 F. Supp. 2d 473 (E.D. Va. 2008).

102. Rice v. Butler, 55 N.E. 275 (N.Y. 1899).

103. Pettit v. Liston, 191 P. 660 (Or. 1920).

104. MacGreal v. Taylor, 167 U.S. 688 (1897).

105. J.T. *ex rel.* Thode v. Monster Mountain, No. 2:09 cv 643–WHA–TFM, 2010 WL 4986100 (M.D. Ala. Dec. 9, 2010).

106. Baker v. Adidas Am., Inc., 335 F. App'x 356 (4th Cir. 2009).

107. Boykins v. State, 680 S.E.2d 665 (Ga. Ct. App. 2009).

108. A.V. *ex rel.* Vanderhye v. iParadigms, 562 F.3d 630 (4th Cir. 2009).

109. Data was gathered using Westlaw to search for "(infan! minor) /s voidable & da(last 10 years)" across all state and federal cases (last visited Jun. 22, 2011). It should also be noted that among these are dozens of cases where the court only referenced the infancy doctrine in passing and did not need to reach the issue at all.

discuss the infancy doctrine in the context of an online TOS. One may wonder why the doctrine deserves any attention. This section explains why the doctrine appears so rarely in reported cases and why its use is on the rise.

As context, it is useful to mention what may be overlooked in proceeding through this section. Virtually every law and doctrine exists for two purposes. First, laws, even if rarely used, can be very important in resolving disputes at the margin, which can control the recalcitrant abuser among other things.[110] Second, everyday commercial and personal conduct is shaped by the awareness that certain laws exist and that the consequences of contravening them would be negative.[111]

For example, the fact that few lawyers are ever sued for malpractice attests to the general care and attention they give their cases, in part due to awareness of the causes of action for malpractice and sanctions imposed by the bar association and the resulting consequences.[112] The same

110. Brendan S. Maher, *The Civil Judicial Subsidy*, 85 IND. L.J. 1527, 1537 n.38 (2010) ("[T]he deterrent effect on behavior is not entirely caused by fear of explicit sanction; public expression of the law can have positive consequential effects through the influence such expression has on the changing or strengthening of norms."); Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1113–14 ("If it is sufficiently publicized, legal expression can by itself clarify conventions--removing the fuzziness and incompleteness of contracts and custom. Sanctions and legitimacy may increase the salience of legal expression, and enhance its clarifying function, but they are not essential to it.").

111. Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976) (noting existence of legal sanctions tends to deter behavior); Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law,* 149 U. PA. L. REV. 1735, 1736 (2001) ("[T]he experimental evidence on trust sheds light on how corporate law works, by suggesting that judicial opinions in corporate cases influence corporate officers' and directors' behavior not only by altering their external incentives but also by changing their internalized preferences."); John Leubsdorf, *Evidence Law as a System of Incentives*, 95 IOWA L. REV. 1621, 1625 (2010) (briefly describing how the existence of evidence rules "encourage" some behaviors before litigation commences and "deter" others); *see also* Bryan T. Camp, *The Play's the Thing: A Theory of Taxing Virtual Worlds*, 59 HASTINGS L.J. 1, 22 (2007); Christopher A. Cotropia, *Modernizing Patent Law's Inequitable Conduct Doctrine*, 24 BERKELEY TECH. L.J. 723, 767 (2009); Bernhard Grossfeld & Edward J. Eberle, *Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers*, 38 TEX. INT'L L.J. 291, 295 (2003).

112. *See, e.g.*, Jesse A. Goldner, *An Overview of Legal Controls on Human Experimentation and the Regulatory Implication of Taking Professor Katz Seriously*, 38 ST. LOUIS U. L.J. 63, 117 n.344 (1993).

principle holds true for littering laws. Notwithstanding the fact that a tiny percentage of perpetrators are ever punished for littering, the practice significantly waned after littering laws were enacted.[113]

Similar to the previous examples, the infancy doctrine serves the purpose of shaping societal behavior and legal expectations. When asserted in a court case, the issue generally should not survive summary judgment. This is because the doctrine, even if not statutory in that jurisdiction, is susceptible to few legitimate interpretative issues.[114] The doctrine is devoid of balancing tests and complex elements, and rarely relies on fact specific inquiries. The current confusion about the doctrine traces to lack of widespread awareness of the contours of the doctrine, not gaps in the doctrine, and occasionally to veiled challenges to its merits[115]—as courts thus far are unwilling to overrule it.

When disputes arise with online services, the ability to cancel a minor's account and prevent future dealings may eliminate many issues relating to the risk of dealing with a minor. In addition, a minor savvy enough to know that the infancy doctrine exists is likely to know that asserting it to prevent application of the TOS will result in losing privileges for future access to the service. Where a plethora of basically equivalent services are available, the minor may just move to another service. However, with something the minor may consider irreplaceable, such as Facebook, the risk of being cut off may loom larger than submitting to the TOS.

Because the minor can be barred from ongoing use of the service, application of the TOS is relevant only to disputes involving events that occurred prior to the disaffirmation, and in many cases the dispute between the parties can be worked out amicably. Perhaps businesses have so far responded to

113. *See, e.g.*, Cass R. Sunstein, *Social Norms and Big Government*, 15 QUINNIPIAC L. REV. 147, 157 (1995); *see also* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 402–03, 402 n.213 (1997) (suggesting that any publicity to societal consensus increases compliance with that view and that "legislation is a signal of consensus").

114. Summary judgment is granted where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Provided that the facts are not in material dispute, the law relating to the infancy doctrine can be easily applied to resolve most cases.

115. This confusion is also attributable to courts which ignore the principles of the infancy doctrine because they believe the minor is lying, is undeserving, or that adolescents in general do not deserve legal protection.

the infancy doctrine by incorporating the risk into their cost/benefit analysis and determining that the increased business with minors is worth the cost of an occasional voided TOS. Such risk taking is a common practice as businesses continue to operate despite shoplifting, returns of goods, and debtors who occasionally default. In each situation, just as with the risk associated with the infancy doctrine, businesses have the capacity to adjust prices and practices to account for potential losses. Businesses who continue to deal with minors do so because they find it is worth the risk.

In addition, the present risk from the infancy doctrine is generally low because most minors, parents, and even attorneys are not well informed about the availability of the infancy doctrine in the first place. Moreover, when it is raised, online businesses may be very effective in making minors believe they have no realistic remedy; vulnerability to that kind of persuasion is an example of what the infancy doctrine intends to address. For instance, in some cases, online service providers may be quick to argue that, because of the statement in the TOS that the user is age eighteen or a similar provision, the minor has waived the protection of the infancy doctrine. Moreover, the provider may claim that the TOS cannot be voided without judicial action undertaken in a remote and unfamiliar venue, according to the choice of venue provision in the TOS.

In a few cases, such efforts to use the TOS itself to convince a minor to give up will likely fail. In those cases, smart attorneys for major online service providers should advise their clients to privately settle rather than pursue a lawsuit (or publicity) that may draw attention to the existence of the infancy doctrine and set further adverse precedent. Thus, the infancy doctrine remains underused. Public policy may actually support a program to educate minors about the doctrine and encourage its use, and to educate adults on the doctrine and the policies it represents.

Finally, one of the reasons that there are not as many infancy cases as there could be is because some business have adapted to the doctrine by adopting alternative measures, or obtaining other avenues of recourse, that are not against the minor.[116] However, even with these adaptations, there are

116. For example, a parent might be liable for charges that a child makes

still ample opportunities for minors to contract in situations where they can disaffirm, particularly outside of the traditional purchase contract.

B. Decreasing Contractual Protections

Few people dispute that protecting minors from more-experienced adults is a worthy goal. In fact, contract law has developed doctrines such as duress and unconscionability to avoid overreaching contracts altogether.[117] Professor Daniel has suggested that these general contract avoidance doctrines act as sufficient protection for minors who might enter imprudent contracts.[118] However, recent judicial trends show that these doctrines do not afford the necessary degree of protection to minors that the infancy law provides.

1. Weakening Requirement of Assent

While contract law is based on assent by both parties, the judicial interpretation of what is required to establish assent has changed as practical market needs put pressure on traditional doctrines.[119] The scope of what is acceptable evidence of assent has expanded even more rapidly as technological advancements have changed the form and frequency of contractual interaction.[120]

Initially, assent was the term given to represent the parties' "meeting of the minds."[121] A finding of assent essentially assumed two things: first, the ability of both parties to understand the nature of the transaction, and

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with the parent's credit card. *See* Preston, *supra* note 11.

117. Daniel, *supra* note 3, at 258.

118. *Id.* at 258–61.

119. An insightful discussion of these market needs may be found in ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996). *See also*, Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 802 (2007) (explaining that many online contracts are being enforced despite not representing any true assent by parties with no negotiation power); Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 477 (2006) (discussing some of the effects the Internet has had in contract law, primarily regarding the expansion of the assent doctrine: enforcing contracts based on a reasonable expectation that the assenting party is on notice that terms exist).

120. For a detailed discussion of this topic, see Preston & McCann, *supra* note 4.

121. *See* Katz v. Abrams, 549 F. Supp. 668, 672–73 (E.D. Pa. 1982) (explaining that a "meeting of the minds" is the goal in contract formation and courts should only give credence to objective actions insomuch as they could reasonably suggest subjective intent to be bound to terms).

second, intentional consent to be bound to specific legal obligations.[122] While the goal of the assent doctrine was to bind only parties who truly wished to be bound, finding subjective intent proved to be all but impossible, and courts shifted to requiring only objective observable manifestations of understanding and commitment.[123]

Further complicating matters, contract documentation shifted from individually directed scribes to machine printing. Along the way, an ingenious printer figured out that each contract did not have to be reset from scratch but could be produced with large portions of preset type.[124]

The urge to avoid additional work in documenting each transaction, especially when lawyers had to be involved, eventually led to convenient and cheap nonnegotiable standard form contracts.[125] The new norm of nonnegotiable contracts threatened the policy considerations of the assent doctrine; with some commentators arguing that there could be no real consent without the ability to negotiate any changes, especially when one party was in a position of significantly less power.[126] As a result, other defenses to formation—most notably unconscionability, which incorporated concepts of good faith, adhesion, overreaching, and public policy—replaced some of the functions previously served by the assent doctrine.[127] Courts, however, are reluctant to rely on such defenses, although their existence

122. *See id.*; *see also* Kim, *supra* note 11919.

123. *Katz*, 549 F. Supp. at 672–73; *ProCD*, 86 F.3d at 1452 (explaining that not returning a product associated with a shrinkwrap license is an objective manifestation to be bound to the terms); Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 29 (2d Cir. 2002) (looking for an objective manifestation of assent to terms if the party went forward with the transaction with notice that there were terms and conditions).

124. *See* Preston & McCann, *supra* note 4.

125. *See* Donald M. Zupanec, Annotation, *Doctrine of Unconscionability as Applied to Insurance Contracts*, 86 A.L.R.3D 862 § 2(a) (1978).

126. *See* Kim, *supra* note 11919, at 802–03 (discussing whether a party can give genuine consent to nonnegotiable contracts online).

127. Preston & McCann, *supra* note 4 (discussing this in great detail, especially with respect to electronic contracts); *see also* Kim, *supra* note 11919, at 802; Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (discussing the purpose of substantive and procedural unconscionability); Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 73 (2006) (discussing the purpose of unconscionability doctrine as "provid[ing] a flexible safety net for catching contractual unfairness that slips by formulaic contract defenses").

may act as a deterrent to some overreaching and as a negotiating tool in settlement.[128]

The last few decades saw a vastly expanded scope of contractual transactions involving human interaction at every level of society. In addition, the ballooning trade in intellectual property, rather than simple tangible goods, requires sophisticated licensing conditions to preserve the value of the property for other sales.[129] The many online transactions where lengthy collections of terms will likely not be seen, lifted, handled, or otherwise made apparent, have created a climate where nearly everyone frequently enters contractual relationships with complex legal terms without even realizing they are doing so.[130] Online contracts are even less subject to negotiation, as finding anyone with whom to conduct a dialogue about contract terms is nearly impossible. In some cases, browsewrap agreements purport to bind consumers who merely visit websites.[131]

To encourage the expansion of digital markets, some judges and approving scholars stress the market benefits of binding participants to arrangements that may not have withstood scrutiny in the past. Most notably is a trend tied to Judge Easterbrook in the 1996 case, *ProCD v. Zeidenberg*.[132] He argued for a result that conformed to the realities of current market needs, even if at the expense of traditional contract formation requirements.[133] Judge Easterbrook

128. Kim, *supra* note 11919, at 827 (arguing that the trend is for courts to be very reluctant to throw out a contract on unconscionability grounds); Schmitz, *supra* note 1277, at 91 (arguing that the "courts' current constraint of the doctrine threatens its ability to serve its safety net function" and calling the process used to determine whether unconscionability exists "increasingly rigid"); Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067 (2006) (showing through a study that few are winning cases on unconscionability grounds).

129. Preston & McCann, *supra* note 4.

130. *Id.* (discussing effects of virtually hidden terms).

131. For cases discussing the enforcement of browsewrap agreements (agreements assented to online when a consumer merely uses services), see Register.com, Inc. v. Verio, Inc., 356 F.3d 393 (2d Cir. 2004); Specht v. Netscape Communications Corp., 306 F.3d 17, 30–31 (2d Cir. 2002); Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362 (E.D.N.Y. 2009); Sw. Airlines Co. v. BoardFirst, LLC, No. 3:06-CV-0891-B, 2007 WL 4823761 (N.D. Tex. Sept. 12, 2007); Motise v. Am. Online, Inc., 346 F. Supp. 2d 563 (S.D.N.Y. 2004).

132. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1448 (7th Cir. 1996).

133. *Id.* at 1452–53.

explained that contract law must adjust to the practical circumstances of a fast-paced, high-volume transaction market; circumstances that make traditional requirements of term transparency unreasonable.[134] Courts have used these market arguments, as well as other practical justifications, to continually expand the assent doctrine and enforce contracts that would fail under a traditional assent analysis.

Overall, these weakened tests do not provide the degree of protection that the traditional assent doctrine once had. Without these alternative protections, the infancy doctrine becomes more important in counterbalancing, providing the necessary protection for minors who enter unfavorable contracts.

2. Broadening Tolerance of Oppressive Terms

Courts are becoming more tolerant of, and more willing to enforce, clauses that were once thought draconian, or at least suspect. A major example of this trend is courts' increasing tolerance of arbitration clauses. Throughout the nineteenth century and into the first part of the twentieth century, courts were extremely reluctant to enforce by contract what amounts to an agreement to give up the constitutional right to access the judicial system, particularly trial by jury.[135] This reluctance was driven primarily by the concern that arbitration clauses were merely a way for repeat players to unfairly strip underdog consumers of judicial rights.[136] Critics of arbitration clauses claim that there is often unfairness in the contracting process, especially where the arbitration clause is found in a nonnegotiable standard

134. *Id.*

135. *See* Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME. L. REV. 263, 266–67 (1988) (citing Tobey v. Country of Bristo, 23 F. Cas. 1313 (C.C.D. Mass. 1845), as a classic example of this inhospitable view).

136. *See* Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 115 (2010) (discussing some of the criticisms of arbitration clauses). For more discussion on criticisms of arbitration, see Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 334–54 (1990) (discussing some of the policy grounds driving the arbitration debate); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001) (attacking the judicial acceptance of arbitration clauses).

form contract or is hidden inside a long, dense agreement.[137] The early hostility in some cases went so far as to cause courts to invalidate arbitration clauses unless an award was already rendered by an arbitrator, assuming in those situations that the party's failure to challenge the clause in the first place was evidence of consent to be bound by the arbitrator's decision.[138]

Proponents of arbitration clauses have argued that the clauses promote efficiency and keep costs down for consumers by allowing repeat players in the market to avoid the high costs of regular litigation.[139] However, courts historically were hesitant to respond to these efficiency arguments without some sort of legislative enactment in support of arbitration.[140] The push for arbitration from the market eventually gave birth to the Federal Arbitration Act of 1925 (FAA).[141] The FAA marked the beginning of a strong trend in favor of enforcing arbitration agreements.[142]

Debate about the scope of the FAA outside of federal courts persisted through the early 1990s, as states with legislation or judiciaries hostile to arbitration refused to recognize the FAA's applicability. In reviewing one such case from California, the Supreme Court held that the parties' agreement to be bound to state arbitration laws rather than the FAA would be upheld because the purpose of the FAA was to make sure legal agreements were enforced.[143] A few years later, the Montana Supreme Court held that "it was never Congress's intent when it enacted the FAA to preempt the entire field of arbitration," and, "the FAA does not require

137. *See* Schmitz, *supra* note 1366, at 115.

138. *Id.*

139. *Id.*

140. *See* U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum, 222 F. 1006 (S.D.N.Y. 1915) (explaining the hesitancy to uphold arbitration agreements without statutory compulsion).

141. Federal Arbitration Act, 9 U.S.C. §§ 1–15, 43 Stat. 883–886 (1925) (current version at 9 U.S.C. §§ 1–16 (2006)).

142. *See* Preston v. Ferrer, 552 U.S. 346, 353 (2008) (explaining the strong national push favoring arbitration agreements); Green Tree Fin. Corp.—Ala. v. Randolph, 531 U.S. 79, 91 (2000) (noting the "liberal federal policy of favoring arbitration agreements"); Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (explaining that the FAA's applicability to states keeps state legislatures from "undercut[ting] the enforceability of arbitration agreements").

143. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478–79 (1989).

parties to arbitrate when they have not agreed to do so."[144] The Supreme Court granted certiorari and reversed, holding that the FAA preempted all state arbitration laws.[145] This preemption interpretation was a significant victory for supporters of arbitration.

Even in the aftermath of the FAA and its application to the states, some courts were reluctant to enforce arbitration clauses, avoiding them by claiming the clauses were poorly worded or intended to be interpreted narrowly.[146] Arbitration clauses came under condemnation when seen as part of a larger pattern of overreaching.[147]

Recently, the United States Supreme Court took its tolerance for arbitration agreements a step further in *Rent-A-Center, West, Inc. v. Jackson*.[148] In *Rent-A-Center*, the Court reviewed an employment agreement in which a clause both compelled arbitration and granted the arbitrator authority to determine the enforceability of the arbitration agreement.[149] The dispute was over whether this latter grant of authority was enforceable.[150] The Court recognized the general enforceability of arbitration agreements as granted by the FAA and concluded that, when questions of enforceability of an arbitration agreement are brought on appeal, all other provisions are presumed valid.[151] Thus, unless the complaining party challenges the term that grants authority to the arbitrator to resolve this specific dispute, the arbitrator is the one to decide the validity of the clause against claims of defects in assent such as unconscionability.[152]

144. Casarotto v. Lombardi, 886 P.2d 931, 938–39 (Mont. 1994).

145. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688 (1996).

146. *See* Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1534 (Cal. App. 1997) (arbitration term was complicated and nonnegotiable); Sosa v. Paulos, 924 P.2d 357, 362 (Utah 1996) (arguing among other things that the arbitration clause was difficult to understand and its placement helped constitute procedural unconscionability).

147. *See, e.g.*, John Deere Leasing Co. v. Blubaugh, 636 F. Supp. 1569, 1572–73 (D. Kan. 1986) (calling the arbitration term one that was not only very strong but also buried in the contract); Keblish v. Thomas Equip., Ltd., 628 A.2d 840, 846 (Pa. Super. Ct. 1993) (finding that the arbitration language was not conspicuous, buried in the contract, and printed in the same font as the rest of the contractual language).

148. 130 S. Ct. 2772 (2010).

149. *Id.* at 2777.

150. *Id.*

151. *Id.* at 2778.

152. *Id.*

Venue restrictions are another example of terms for which courts have increasingly shown tolerance. In 1991, the Supreme Court case *Carnival Cruise Lines, Inc. v. Shute* acknowledged that while forum-selection clauses are not "historically . . . favored," they are "prima facie valid."[153] To support the assertion that the clauses have not been favored historically, *Carnival Cruise* cited another Supreme Court case that noted that courts had "declined to enforce [forum-selection] clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court."[154] Yet even in 1972 when the Supreme Court issued this opinion, it recognized that "courts are tending to adopt a more hospitable attitude toward forum-selection clauses."[155]

This judicial tolerance towards potentially oppressive terms coupled with the relaxation of traditional assent requirements led to fewer protections for all contracting parties and diluted the chance that vulnerable minors could find relief outside of the infancy doctrine.

C. Infancy Restored and Reformed

The erosion of traditional contract protections coupled with the movement to include complex contract terms with every online transaction creates fertile ground for the infancy doctrine to return to mainstream use, especially if awareness of the doctrine becomes more widespread. If society continues to support the values behind the doctrine—a safety net for the vulnerable—then its availability for this purpose should be broadcast to the point it becomes an effective deterrent to adults marketing to minors. Of course, awareness of the infancy doctrine must be accompanied with protections against abuse. This subsection discusses strategies for spreading knowledge about the protections of the doctrine and establishing mechanisms to avoid abuse of the doctrine.

One way to spread knowledge about the infancy doctrine's safety net is for states to fund youth consumer advocacy organizations to help minors who get in financial or contract law trouble. These advocacy groups could educate

153. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 589 (1991) (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9–10 (1972)).

154. *Bremen*, 407 U.S. at 9.

155. *Id.*

youth about their rights and help them assert those rights in appropriate circumstances. Law and business students could assist these nonprofit groups, which would also expose these students increased awareness of the policies protecting minors and responsible ways to deal with minors.

Another approach to informing adolescents about the infancy doctrine would be to incorporate the doctrine into junior and high school curricula. As many states are beginning to require financial literacy classes for high school students,[156] a brief lesson on the infancy doctrine could easily be inserted in conjunction with messages about self-discipline, honesty, and proper planning. Programs could be implemented to offer similar education to younger children. Minors do not need to understand the detailed contours of the doctrine, but simply that the doctrine exists and is available in appropriate circumstances.

Unfortunately, educating minors about the infancy doctrine opens the door for abuse. If abuse became a common practice, the marketplace might naturally adapt with increased precautions. Perhaps adults would once again become wary of contracting with minors and would avoid doing so. Admittedly this would fulfill one of the purposes of the infancy doctrine—to discourage adults from contracting with minors.

On the other hand, because the infancy doctrine serves to protect minors rather than cut them off from the marketplace entirely, legal reform might be able to counteract the negative effects that adults might suffer from contracting with devious teens. One simple proposal is to create a defense when the adult can show that the minor has asserted the infancy doctrine in a prior transaction. Such a bright-line rule would keep the clarity of the doctrine intact, but would minimize the impact of those youth who might otherwise play the system. On the other hand, such a strict rule has the potential to leave some deserving, but foolish minors unprotected—particularly if the minor entered a series of bad contracts that needed to be disaffirmed in separate proceedings. It could also be difficult to determine if a minor had previously

156. Jeffrey T. Dinwoodie, *Ignorance is Not Bliss: Financial Illiteracy, the Mortgage Market Collapse, and the Global Economic Crisis*, 18 U. MIAMI BUS. L. REV. 181, 209 (2010).

asserted the infancy doctrine if the business involved in the transaction privately settled the matter without any court proceedings and the minor is willing to lie about his history.

An alternate proposal for reform is to allow the assertion of incapacity to be rebutted by proof of previous involvement in sophisticated contractual arrangements. This would essentially act as evidence that the minor had reason to know what the terms of the contract meant. Such proof would need to be limited to the child's actual experience, judged by previous contractual involvement, rather than extensive and illusive factors such as IQ, parent's education level, or child's disposable income, and other inquiries that could significantly complicate litigation, thus further disadvantaging a child ill suited to pay for expansive fact inquiries. The scope of the defense would necessarily need to be limited to prevent expensive litigation that could be used as a bargaining tool to force kids to settle.

This proposal would limit the potential for abuse by eliminating the doctrine from the repertoire of those minors who engage in substantial, sophisticated business, as well as accounting for repeated bad faith use of the doctrine. To keep the rule simple and to work within existing doctrines, the rule would center on the maxim that the infancy doctrine should not be used as a pre-mediated sword.[157] However, instead of carrying a nebulous meaning, the maxim could have concrete content. Under this limitation, a minor could not assert the infancy doctrine where he had knowledge of the doctrine upon entering the contract and planned to use the doctrine from the outset.

Each of these proposed solutions highlights some ways that the infancy doctrine can be restored and refined to balance the protection of minors in a consumer marketplace that has lost many traditional contract protections. Going forward, legislatures, courts, and youth advocates can affect gradual change that will ultimately be in the best interests of our children.

157. *See* Preston, *supra* note 11 (discussing frequent misunderstandings of this maxim).

CONCLUSION

The infancy doctrine remains a well-established doctrine in the United States despite the infrequent, but vehement opposition to it. It exists today as a firm protection for minors in the economic marketplace, although with largely misunderstood contours. The law has struggled to adapt to a changing social landscape and the result has been a number of enumerated exceptions to the doctrine that balance the protection of minors.

Although few courts have addressed the infancy doctrine in recent years, the growth of online contracting and the weakening of traditional contractual protections, namely the decreased requirements for assent and the broadening acceptance of oppressive terms, have left minors with little protection beyond the infancy doctrine against overreaching by adults.

Youth advocates, legislatures, and courts have the capacity to restore the infancy doctrine in the legal system and encourage its appropriate use. By educating minors and reforming the doctrine to reduce its potential for misuse, the doctrine can once again fully serve its intended purposes.