THE INFANCY DOCTRINE
FOR OFF- AND ONLINE CONTRACTS

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INTRODUCTION

In May 2010, the Supreme Court ruled that minors under age eighteen "may not be sentenced to life without parole for a non-homicide crime,"[1] because, "[a]lthough adolescents can, and on occasion do, exhibit adult levels of judgment and control, their ability to do so is limited and unreliable compared to that of adults."[2] Although older research began to suggest that mature minors possessed "decision-making capacities comparable to adults,"[3] research in the last decade has revolutionized thinking about adolescents as researchers have been able to view and evaluate live brain activity.[4]

In this same time frame, adolescent life has been dramatically altered by the digital revolution.[5] Minors, including small children and very mature adolescents age seventeen and

[1] Graham v. Florida, 130 S.Ct. 2011, 2017–18 (2010).
[2] Brief for the American Medical Ass'n and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party, Graham v. Florida, 130 S.Ct. 2011 (2010) (No. 08-7412), 2009 WL 2247127, at 4.
[3] Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope*, 43 GONZ. L. REV. 239, 255 (2008) (citing Rhonda Gay Hartman, *Coming of Age: Devising Legislation for Adolescent Medical Decision-Making*, 28 AM. J.L. & MED. 409, 423 (2002)); *see also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1011 (2003) ("[T]eens' capacities for understanding and reasoning in making decisions roughly approximate those of adults.") (citing Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-making Perspective*, 12 DEVELOPMENTAL REV. 1 (1992)).
[4] *See* Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?*, 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1012, 1012 (2001) (discussing how advances in neuroimaging "have opened unprecedented access to the developing human brain," particularly in the study of children).
[5] JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 1–15 (2008); DAVID BUCKINGHAM & REBEKAH WILLETT, DIGITAL GENERATIONS: CHILDREN, YOUNG PEOPLE, AND NEW MEDIA 1–12 (2006).

younger,[6] are increasingly involved in online activities. According to recent studies, approximately 93 percent of teens, ages twelve to seventeen were online in 2008,[7] and nearly three quarters (73 percent) of those online teens use social network sites.[8] Additionally, according to a study released in 2004 by Teenage Research Unlimited, 49 percent of adolescent boys and 41 percent of adolescent girls had at some time purchased something online.[9] With this online access and increasing access to money,[10] minors comprise a significant segment of the market for online goods and services.

Meanwhile, the legal standards for demonstrating sufficient assent to be bound to contractual terms, which may be difficult to find and understand, are dropping. In fact, some judges are stressing the market benefits of binding participants to contracts that may not have withstood contract doctrine scrutiny in the past. Most notably is a trend begun by Judge Easterbrook in *ProCD v. Zeidenberg* in 1996. He argued for a result that conformed to the realities of current market needs, even if at the expense of traditional contract formation requirements.[11] Easterbrook explained that because practical circumstances of a fast-paced high-volume transaction market make traditional requirements of term transparency

[6] This term means anyone under 18 in most states. RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 9:2 (4th ed. 2010); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. a (1981) ("49 States have lowered the age of majority, either generally or for contract capacity, to less than twenty-one; usually, the age is eighteen.").

[7] SUSANNAH FOX & SYDNEY JONES, PEW INTERNET, GENERATIONS ONLINE IN 2009 6 (2009), http://www.floridatechnet.org/Generations_Online_in_2009.pdf.

[8] AMANDA LENHART ET AL., PEW INTERNET, SOCIAL MEDIA AND YOUNG ADULTS 2 (2010), http://www.pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx; *see also* DEBRA AHO WILLIAMSON, eMarketer, Social Network Demographics and Usage 2 (2010), http://www.emarketer.com/Reports/All/Emarketer_2000644.aspx (estimating 78.2% of online teens use social networking sites and projecting growth to 85.7% in 2014).

[9] Bob Tedeschi, *E-Commerce Report; Teenagers are among online retailers' most sought-after customers. They're also among the most difficult to reach.*, N.Y. TIMES, Feb. 28, 2005.

[10] In 2005, children ages three to eleven commanded $18.3 billion in spending power, which was projected to increase to $21.4 billion in 2010. DEBRA AHO WILLIAMSON, eMARKETER, TWEENS AND TEENS ONLINE: FROM MARIO TO MYSPACE 4 (2006), http://www.emarketer.com/Reports/All/Em_tweens_oct06.aspx.

[11] ProCd, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

unreasonable, contract law must adjust.[12] As courts have looked to *ProCD* in viewing Internet contracts, they have used these market justifications to continually expand the assent doctrine, finding both market and other practical justifications for enforcing contracts that would otherwise fail under a traditional assent analysis.[13] Moreover, judicial acceptance of terms once thought to be draconian, such as binding arbitration and choice of venue provisions, has broadened.

The confluence of these developments makes this an appropriate time to reassess the infancy doctrine. A reasonable argument can be made that, in addition to the traditional criticisms of the infancy doctrine,[14] the infancy doctrine is particularly inappropriate with respect to online contracts because adolescents possess a degree of technical savvy that in many cases exceeds that of adults and because the infancy doctrine threatens the flourishing of online businesses that depend on adolescents as a significant part of their customer base.[15] Other commentators continue to support the infancy doctrine and emphasize the exploitation of minors, particularly in specific kinds of online transactions.[16]

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[12] *Id.*

[13] *See* James v. McDonald's Corp. 417 F.3d 672 (7th Cir. 2005); also, I only touch briefly on this assent expansion in this article. For a more detailed discussion, see Cheryl B. Preston and Eli McCann, *Assent in Online Contracting* (forthcoming 2011).

[14] Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1302–05 (2000); 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, 293–94 (2006); Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481 (1994); Irving M. Mehler, *Infant Contractual Responsibility: A Time for Reappraisal and Realistic Adjustment?*, 11 KAN. L. REV. 361 (1963); Robert G. Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205 (1967).

[15] *See* Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope*, 43 GONZ. L. REV. 239, 255 (2008).

[16] *See* Julie Cromer Young, *From the Mouths of Babes: Protecting Child Authors From Themselves*, 112 W. VA. L. REV. 431, 443 (2010) (arguing that minors need protection for their user-generated content online posted to sites such as Facebook); *see also* Steven Hetcher, *User-Generated Content and the Future of Copyright: Part Two--Agreements Between Users and Mega-Sites*, 24 Santa Clara Computer & High Tech. L.J. 829, 858–59 (2008)

This article evaluates the infancy doctrine in light of the scientific evidence on the decision making capacities of adolescents and their technology savvy and purchasing power, in the context of dramatic erosion of the protections in traditional contract doctrine.

I. Contract Doctrine in the Twenty-first Century

A. 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 have put pressure on the traditional doctrines.[17] 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.[18]

Initially, assent was the term given to represent the parties' "meeting of the minds."[19] A finding of assent essentially assumed two things: first, the ability of both parties to understand the nature of the transaction, and second, intentional consent to be bound to specific legal obligations.[20] While the goal of the assent doctrine was to bind parties only when they truly

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(arguing that minors should not be able to dispose of their intellectual property rights to mega-sites that include clauses in their TOS claiming these rights).

[17] 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 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 who have 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).

[18] For a detailed discussion of this topic, see *Assent in Online Contracting . . .*

[19] *See* Katz v. Abrams, 549 F. Supp. 668, 672–73 (3d Cir. 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).

[20] *See id. See also* Nancy Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 802 (2007).

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.[21]

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 affixed to a big sheet of the metal plate used to make boilers.[22] 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.[23] With nonnegotiable contracts as the norm, the policy considerations of the assent doctrine were threatened, 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.[24] As a result, some of the functions previously served by the assent doctrine were replaced with other defenses to formation, most notably unconscionability, which incorporated concepts of good faith, adhesion, overreaching, and public policy.[25] Courts are, however, reluctant to rely

[21] *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 Communications Corp., 306 F.3d 17, 28 (2d 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).

[22] *See* Black's Law Dictionary, (8th ed. 2004), boilerplate.

[23] *See* 86 A.L.R.3d 862 § 2(a).

[24] *See* Nancy Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 802 (2007) (discussing whether a party can give genuine consent to nonnegotiable contracts online).

[25] *Assent in Online Contracting* . . . discusses this in great detail, especially with respect to electronic contracts. *See also* Nancy Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 802 (2007); 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").

on such defenses, although their existence surely assists as a deterrent to overreaching and as a negotiating tool in settlement.[26]

The last few decades have seen a vastly expanded scope of contractual transactions involving every 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. On top of that, all kinds of online transactions, where terms need not be seen, lifted, handled or otherwise made apparent, have created a climate where almost everyone is frequently entering contractual relationships with lengthy legal terms without even realizing they are doing so.[27] 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 visited websites.[28] To encourage the expansion of digital markets, courts have loosened the assent doctrine further, although they have tried to formulate a new test combining weak forms of substantive and procedural unconscionability. The first half of this test weighs the relative fairness of the terms; however, courts have simultaneously become far more accepting of terms once thought to be against public policy

[26] Nancy Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 827 (2007) (arguing that the trend is for courts to be very reluctant to throw out a contract on unconscionability grounds); Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 91 (2006) (arguing that "courts' current constraint of the doctrine threatens its ability to serve its safety net function" calling the process used to determine unconscionability exists "increasingly rigid") ; Larry A.DiMatteo, *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).

[27] *Assent in Online Contracting . . .* discusses thoroughly the effects of this.

[28] For cases discussing the enforcement of browsewrap agreements (agreements assented to online when a consumer merely uses services), see *Hines v. Overstock.com, Inc.*, 668 F.Supp.2d 362 (E.D.N.Y. 2009); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004); *Southwest Airlines Co. v. BoardFirst, L.L.C.*, 2007 WL 4823761 (N.D. Tex. 2007); *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002); *Motise v. American Online, Inc.*, 346 F.Supp.2d 563 (S.D.N.Y. 2004).

such as arbitration requirements, selection of venue, choice of law, and so forth. This consideration of the terms is then combined with the second half of the test that determines, not if the other party consciously understood the terms, or read them, or was given them to read, but merely if they might be deemed aware that terms existed somewhere when they proceeded to do whatever was designated as the manifestation of assent.[29]

This climate where so few other protections remain to shield consumers from elaborate and overreaching terms is not the place to expand the exposure of minors.

B. Broadening Tolerance of Oppressive Terms.

Courts are becoming more tolerant of, and willing to enforce, clauses that were once thought draconian, or at least suspect. One prime example 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, especially trial by jury.[30] This reluctance was primarily driven by the concern that arbitration clauses were merely a way for repeat players to unfairly strip underdog consumers of judicial rights.[31] Critics of

[29] *See*, e.g., *Hines v. Overstock.com, Inc.*, 668 F.Supp.2d 362 (E.D.N.Y. 2009); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004); *Southwest Airlines Co. v. BoardFirst, L.L.C.*, 2007 WL 4823761 (N.D. Tex. 2007); *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002); *Motise v. American Online, Inc.*, 346 F.Supp.2d 563 (S.D.N.Y. 2004).

[30] *See* Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 MAINE L. REV. 263, 266-67 (1988) (explaining that "[n]ineteenth century United States courts espoused an inhospitable view of arbitration, perceiving it as an unwarranted intrusion into the domain of judicial authority" and citing *Tobey v. Country of Bristo*, 23 F. Cas. 1313 (C.C.D Mass. 1845) as a classic example of this inhospitable view).

[31] *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 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); 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).

arbitration clauses claim that there is often unfairness in the contracting process, especially where the arbitration clause is found in a nonnegotiable standard form contract or is hidden inside a long, dense agreement.[32] The early hostility evidently 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.[33]

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.[34] However, up until the early part of the twentieth century, courts were hesitant to respond to these efficiency arguments without some sort of legislative enactment in support of arbitration.[35] This push for arbitration from the market eventually gave birth to the Federal Arbitration Act of 1925 (FAA).[36] The FAA was the beginning of a strong trend in favor of enforcing arbitration agreements.[37]

Debate about the scope of the FAA outside of federal courts persisted through the early 1990's, 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, because the purpose of the FAA was to make sure legal agreements were enforced, the parties'

[32] *See* Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 115 (2010).
[33] *Id.*
[34] *Id.*
[35] *See* U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum, 222 F. 1006 (1915) (explaining hesitancy to uphold arbitration agreements without statutory compulsion).
[36] Federal Arbitration Act, 9 USC §§1-15, 43 Stat. 883-886 (1925 (current version at 9 USC §§ 1-16 (2006)).
[37] *See* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 91 (2001) (noting the "liberal federal policy of favoring arbitration agreements); Preston v. Ferrer, 552 U.S. 346 (2008) (explaining that there is a strong national push for favoring arbitration agreements); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (explaining that the FAA's applicability to states keeps state legislatures from "undercut[ting] the enforceability of arbitration agreements).

agreement to be bound to state arbitration laws rather than the FAA would be upheld.[38] 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 parties to arbitrate when they have not agreed to do so."[39] The Supreme Court granted certiorari and reversed, holding that the FAA preempted all state arbitration laws.[40] This preemption interpretation was a significant victory for supporters of arbitration.

Even in the aftermath of the FAA and its expansion to the states, some courts continued to express reluctance to enforce arbitration clauses, looking for ways around the FAA to strike them down by claiming the clauses were poorly worded or intended to be interpreted narrowly.[41] Arbitration clauses had often come under condemnation when seen as part of a larger pattern of over-reaching.[42] Additionally, many courts continued to articulate a form of stricter scrutiny to use in interpreting arbitration agreements.

Recently, the United States Supreme Court went a step further in its tolerance for arbitration agreements in *Rent-A-Center, West, Inc. v. Jackson*.[43] In *Rent-A-Center*, the Court reviewed an employment agreement in which there was an arbitration clause which both compelled arbitration and granted the arbitrator authority to determine the enforceability of

[38] Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989).
[39] Casarotto v. Lombardi, 866 P.2d 931, 938-39 (1994).
[40] Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996).
[41] *See*, 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); Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1419, 1534 (Cal. App. 1997) (arbitration term was complicated and nonnegotiable)
[42] *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., 427 Pa. Super. 93 (1993) (language was not conspicuous, buried in the contract and printed in the same font as the rest of the contractual language).
[43] 2010 WL 2471058 (U.S.).

the arbitration agreement.[44] The dispute was over whether this latter grant of authority was enforceable.[45] 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.[46] Thus, unless the complaining party challenges the term that grants authority to the arbitrator to resolve this specific dispute, the Court will assume the clause is valid.[47]

Another example of terms for which courts have increasingly shown tolerance includes venue restrictions. The Supreme Court in *Carnival Cruise Lines, Inc. v. Shute* in 1991 acknowledged, as did the lower court, that while forum-selection clauses are not "historically . . . favored," they are "prima facie valid."[48] For its assertion that the clauses have not been favored historically, *Carnival Cruise* cited another Supreme Court case that noted that courts in the past 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."[49] 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."[50]

II. ELEMENTS AND RATIONALES OF THE INFANCY DOCTRINE

[44] *Id.*
[45] *Id.*
[46] *Id.* at 5.
[47] *Id.*
[48] Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 589 (1991) (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 (1972).
[49] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).
[50] *Id.*

The infancy doctrine[51] protects persons under the legally designated age of adulthood, from both "crafty adults" and their own bad judgment.[52] The basic rule that an infant's contracts are voidable has been well-settled since the Fifteenth century.[53] The continued application of the doctrine is based on the presumption that minors generally are easily exploitable and less capable of fully comprehending the nature of the kind of legal obligation associated with a contract.[54] For ease of administration and clarity in application, the rule was settled as a firm age line without regard to whether any individual is mature or infantile.[55] There are policy considerations, such as encouraging responsibility in minors,[56] that could move courts and legislatures away from the infancy doctrine. However, where minors' parents would likely suffer most of the ill-effects of minors' improvident contracts, these policies do not rise to any level that would justify overruling the protections currently in place.

The doctrine, although subject to many exceptions, allows minors to disaffirm or "void" a contract they entered as a minor within a reasonable time after reaching adulthood and prior

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[51] In some states the doctrine is statutory. *See, e.g.*, Cal. Civ. Code § 1556 (West 1982); Utah Code Ann. § 15-2-2 (West 2004).

[52] 43 C.J.S. *Infants* § 210 (2010).

[53] RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 9:2 (4th ed. 2010).

[54] *See* City of New York v. Stringfellow's of N.Y., Ltd., 684 N.Y.S.2d 544 (App. Div. 1999).

> Infancy, since common-law times and most likely long before, is a legal disability and an infant, in the absence of evidence to the contrary, 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.

Id. at 550–51. In this case, an adult establishment attempted to skirt the city's zoning ordinances by allowing children to enter if they signed a waiver releasing the establishment from any liability for any damage caused to them by viewing uncovered female breasts. *Id.* at 550.

[55] BRIAN A. BLUM & AMY C. BUSHAW, CONTRACTS CASES, DISCUSSION, AND PROBLEMS 422 (2003).

[56] DiMatteo, *supra* note 13, at 507.

to any ratification as an adult.[57] All jurisdictions allow the infancy doctrine to be used as a "shield," allowing the minor to disaffirm the contract and not perform further, and some jurisdictions also allow its use as a "sword" to affirmatively punish an adult for having tried to impose a contract on a minor. Although a prerequisite to avoidance is the return of any physical benefit taken by the minor as consideration in the contract and still in the minor's possession,[58] the doctrine used as a sword may allow the minor to keep the benefit derived and even recoup any consideration already transferred to the adult.[59]

A. Exceptions

The harshness of the result of the infancy doctrine, even used as a shield, the lack of sympathy engendered by some minors who assert the infancy doctrine, and the doctrine's obviously arbitrary age cutoff that may work an injustice in particular cases, has led courts to limit the infancy doctrine with some express exceptions.

Necessities

A minor is not permitted to disaffirm a contract for necessities.[60] Society wants to allow minors to obtain items necessary for their survival by assuring merchants that minors' contracts for necessities will be binding.[61] 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.[62] 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. This shows that although

[57] BLUM & BUSHAW, *supra* note 56, at 422; RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 9:18 (4th ed. 2010).
[58] *See* RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. c (1981).
[59] 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)).
[60] RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 9:6 (4th ed. 2010).
[61] Daniel, *supra* note 3, at 246 (citing E. ALLAN FARNSWORTH, CONTRACTS § 4.5 (4th ed. 2004)).
[62] RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 9:21 (4th ed. 2010).

society deems such an exception necessary, the law is still aimed at protecting minors. Thus, if a minor contracts for food, an item that could be a necessity, but that minor has already been provided for by his parents, his contract is not binding, and he is permitted to disaffirm the contract.[63]

Emancipation

Another common exception to the infancy doctrine is emancipation. When minors are emancipated, they are treated as adults for contracting purposes.[64] Minors can be emancipated in a number of ways, including a minor's removal from the parents' home with their consent, military service, and marriage.[65] The reasons for the emancipation exception are similar to those of the necessities exception: society wants to allow minors to make contracts in situations where the minor is deemed to be without parental support.[66]

Employment

State statutes permit minors, generally from age fourteen,[67] to obtain paid employment, although this ability is heavily regulated.[68] Sometimes employers require minors to sign an employment contract. The Supreme Court of Hawaii held such an employment contract to be binding on a minor as to issues that arose in the course of his employment.[69] The court based its decision on statutory language that "relax[ed] the requirements for sixteen-

[63] *Id.*
[64] Daniel, *supra* note 3, at 246.
[65] RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 9:4 (4th ed. 2010).
[66] *See* Daniel, *supra* note 3, at 246.
[67] *Id.*
[68] *See* Seymour Moskowitz, *Save the Children: The Legal Abandonment of American Youth in the Workplace*, 43 AKRON L. REV. 107, 135 (2010) (discussing the Fair Labor Standards Act in relation to youth).
[69] Douglass v. Pflueger Hawaii, Inc., 135 P.3d 129, 138 (Haw. 2006).

and seventeen-year-olds to obtain employment."[70] Although minors under sixteen were permitted to work, they had to obtain a certificate of employment which required parental consent.[71] The court argued that the legislature had essentially emancipated older minors for the narrow purpose of employment, and so contracts entered in the course of such employment should be enforceable.

Although no courts outside of Hawaii have departed from the general rule that minors' employment contracts are voidable, other courts could follow similar logic to that of Hawaii. The argument that a state legislature intends to empower minors to enter employment contracts by statutorily allowing them to obtain employment might be developed, especially in states that include a written parental consent to the work relation. This consent provides one layer of protection by assuring parents are aware of the employment and presumably could ask to review any contract.

Other courts have, however, taken a lesser step towards upholding employment agreements by enforcing minors' covenants not to compete, "notwithstanding the voidability of the employment contracts containing the negative covenant."[72] 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.[73] But there is no evidence that this logic will be extended to do more than prevent wrongdoing by the minor.

Misrepresentation of Age

[70] *Id.*
[71] *Id.*
[72] R. F. Chase, Annotation, *Enforceability of Covenant Not to Compete in Infant's Employment Contract*, 17 A.L.R.3D 863 (2008).
[73] *Id.*

The law does provide the minor's fraudulent misrepresentation of her age as a defense to an action to avoid a contract, but it requires more than a mere statement of inaccurate age.[74] The adult has a duty to reasonably investigate age, notwithstanding the representation. The reliance must be "justified" and in "good faith."[75] In a case where a minor affirmatively presented a fake identification, the court said that the fake ID 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.[76]

Retain Benefit

One exception to the infancy doctrine is currently garnering a great deal of attention as a way to eviscerate the infancy doctrine. 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."[77]

B. **TurnItIn**

Of course, the infancy doctrine and its exceptions apply fully to contracts entered online for goods and services. However, some are citing a recent case, *A.V. v. iParadigms*,[78] as having cast some doubts on the infancy doctrine at least with respect to contracts for online services. The district court language suggests that a minor who uses the benefit of the services prior to attempting to avoid, cannot then assert the infancy doctrine. The idea is even kids can't have

[74] *See, e.g.,* Gillis v. Whitley's Discount Auto Sales, Inc., 70 N.C. App. 270 (N.C. App. 1984 (holding that minor's misrepresenting his age does not bar him from disaffirming a contract).
[75] 29 A.L.R. 3d 1270.
[76] *Topheavy Studios, Inc. v. Doe*, 2005 WL 1940159, 4 (Tex. App. 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 (Tex. 2001)).
[77] RICHARD A. LORD, 5 Williston on Contracts § 9:14 (4th ed. 2007).
[78] 544 F. Supp. 2d 473 (E.D. Va. 2008).

their cake and eat it too. The Fourth Circuit evaded its responsibility to fully articulate the district court's misapplication of the exception for the receipt and failure to return benefits by finding that its holding made full analysis of that point unnecessary. However, the footnote that covers the lower court language makes clear that the cursory declaration of the lower court was not supported by the authority it cited.

In *iParadigm*, four high school students sued iParadigm for copyright infringement of their papers, turned in through iParadigm's anti-plagiarism software, Turnitin.[79] Each of the students belonged to schools that required students to submit their papers through Turnitin, which then produced plagiarism reports for the teachers.[80] In addition, the schools had authorized Turnitin to archive the student submissions to be part of an ever-growing database against which to check future papers for plagiarism.[81] Each of the students "read and clicked 'I agree' to the terms of the Clickwrap Agreement," but did so with a written disclaimer on the copy of their submitted works that indicated they did not consent to the archiving of their works by Turnitin.[82] Turnitin continued to archive the students' works and the students subsequently sued for copyright infringement,[83] after the students were disciplined by their schools for plagiarism offenses.

In addition to claiming that the disclaimer changed the terms of the clickwrap agreement, the students argued that they could void the terms of the agreement under the infancy doctrine.[84] The court rejected this argument, declaring that the law only intends the

[79] *Id.* at 477.
[80] *Id.* at 478.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.* at 480–81.

infancy doctrine to be used "as a shield to protect the infant from injustice and wrong," and not as "a sword to be used to the injury of others."[85] As such, the court would not allow the students to "take the benefit of the contract without the burden of the conditions."[86] The court held that the students could not void the contract and retain the "grade from their teachers" as well as "standing to bring the present suit."[87]

The infancy doctrine, in virtually every jurisdiction,[88] only requires the minor to return any "consideration which *he still possesses*."[89] Where these students had no returnable consideration, they should have been able to void the contract under the infancy defense.[90] This ruling seems especially problematic because the two benefits that the court enumerated were not benefits that were conferred by the defendant, iParadigms, on the students.[91] The students received the benefit of getting a grade from their *teachers*, not from Turnitin's Clickwrap Agreement,[92] and as such, it was not part of the consideration given in the transaction sought to be voided. The second benefit noted by the district court was standing to

[85] *Id.* at 481 (quoting MacGreal v. Taylor, 167 U.S. 688, 701 (1897)); *see also* Michael G. Bennett, *The Edge of Ethics in iParadigms*, 2009 B.C. INTELL. PROP & TECH. F. 100601, at 5 (explaining that the judge in this case relied on an exception to the infancy doctrine that bars a minor from taking "the contract's benefits while leaving behind its burdens").

[86] *iParadigms*, 544 F. Supp. 2d at 481. The district court quotes RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 9:14 (4th ed. 2007) for the proposition that "[i]f an infant enters into any contract subject to conditions or stipulations, he cannot take the benefit of the contract without the burden of the conditions or stipulations." Although this is a correct quote, the meaning may not be what the district court envisioned.

[87] *Id.*

[88] However, some jurisdictions have statutorily required that an infant is liable for the depreciation of the goods to be returned under a disaffirmed contract. 42 AM. JUR. 2D *Infants* § 102 (2010) (citing Sec. Bank v. McEntire, 300 S.W.2d 588 (Ark. 1957); Toon v. Mack Int'l Motor Truck Corp., 262 P. 51 (Cal. Ct. App. 1927); Barber v. Gross, 51 N.W.2d 696 (S.D. 1952)).

[89] RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 9:14 (4th ed. 2010) (emphasis added).

[90] Stephen Sharon, Comment, *Do Students Turn Over Their Rights When They Turn in Their Papers? A Case Study of Turnitin.com*, 26 Tuoro L. Rev. 207, 215–16 (2010).

[91] *See id*. (arguing that neither standing to sue nor the classroom grade were conferred by Turnitin); Julie Cromer Young, *From the Mouths of Babes: Protecting Child Authors From Themselves*, 112 W. VA. L. REV. 431, 455 (2010) (arguing that the benefit of receiving a grade from the school would not qualify).

[92] *Id.* at 457.

sue, which has never before been cited as consideration, or a benefit, of a contract.[93] Moreover, in this case, "if there was no user agreement, [the] students would still have standing to sue for copyright infringement."[94]

On appeal,[95] the court avoided hitting this issue directly: "In light of our "fair use" analysis, we decline to address the question of whether the terms of the Clickwrap Agreement created an enforceable contract between plaintiffs and iParadigms."[96] However, the 4th Circuit provided a sufficient reply in footnote 5: "[T]he district court refused to void the contract based on the doctrine of infancy, *see Zelnick v. Adams,* 263 Va. 601, 561 S.E.2d 711, 715 (2002) ('[A] contract with an infant is not void, only voidable by the infant upon attaining the age of majority.')"[97] The district court did cite *Zelnick* for the general proposition of the Infancy Doctrine without this parenthetical.[98] *Zelnick* did say the truism in this parenthetical, but the phrase has no particular reference to the facts of the case or the language of the district court. However, *Zelnick*'s holding is unequivocal on the blanket application of the Infancy Doctrine. It is not clear what, other than general backup is gained in support of the district court opinion from the cite to *Zelnick*.

The district court then concluded "that plaintiffs cannot use this doctrine as a "sword" to void a contract while retaining the benefits of the contract-high school credit and standing to bring this action,"[99] citing Williston and including this snippet of Williston's text: "[i]f an infant

[93] *Id.* at 456. Young further argues that "standing to sue" cannot be the consideration of a contract because it is "implicit in the formation of a contract."
[94] Sharon, *supra* note 13, at 215.
[95] A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009).
[96] *Id.* at 645 n.8.
[97] *Id.* at 636 n.5.
[98] A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473, 481 (E.D. Va. 2008).
[99] A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d at 636 n.5.

enters into any contract subject to conditions or stipulations, he cannot take the benefit of the contract without the burden of the conditions or stipulations."[100]

However, note that the Fourth Circuit uses a cf. signal before the reference to the Williston section that the district court cited for support of its "not as a sword" language,[101] and then the Fourth Circuit includes this fuller excerpt from Williston: "When the infant has received consideration which he still possesses, . . . he cannot, upon reaching majority, keep it and refuse to pay."[102] In fact, Williston states that, if there is no returnable consideration, there is no "taking the benefit" defense.[103] This Williston section also covers the cases where the minor attempts to avoid one provision or part of the contract and keep the benefit of the rest on an ongoing, future basis, which of course is not permitted.[104] According to Bluebook, a cf. signal means that the "[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support."[105] The Fourth Circuit's use of a *cf.* signal here may be interpreted as intending to indicate that the Williston source differs from the textual assertion in the district court opinion. It seems that the Fourth Circuit was trying to clarify the district court's use of "retaining the benefits" which should be "consideration which he still possesses." The two concepts are substantially similar; however, "retaining the benefits" was not precise enough to capture the essence of the law and lead the district court to the correct conclusion. There are two major differences between these phrases: 1) not all

[100] A.V. v. iParadigms, LLC, 544 F. Supp. 2d at 481 (quoting RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 9:14 (4th ed. 2007)).
[101] A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d at 636 n.5.
[102] *Id.* (quoting 5 WILLISTON ON CONTRACTS § 9:14).
[103] 5 WILLISTON ON CONTRACTS § 9:14.
[104] *Id.*
[105] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 47 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

benefits need to be returned, only those that can be; and 2) the benefits to be returned must actually be part of the consideration for the contract. For benefits to be consideration, they must not be third-party benefits or other benefits that incidentally arose from the contract. In this case, the "high school credit and standing to bring this action" were not the consideration for the contract with Turnitin.com, which is why the Fourth Circuit needed to clarify the law with the *cf.* cite to Williston.

There is no hint in this Williston section of an expanded meaning such as the "sword" language quoted from an 1897 case by the district court. In most TOS, the benefit – using the service to communicate – would no doubt be terminated with respect to future use if the minor disaffirmed the TOS, but at that point there seems to be nothing to "return." Some jurisdictions do allow the infancy doctrine to be used in certain situations as a sword, allowing the minor to disaffirm the contract without returning the consideration,[106] but that was not the situation in this case where there was no consideration to return.

In addition, the district court relies on the inherent ability of a school district to detect and respond to plagiarism, citing for the proposition that a school can restrict the First Amendment rights of a student in a way that would be unconstitutional with respect to an adult.[107] The district court states that "the rights of students in public school are not automatically coextensive with the rights of adults."[108] Morse is the "BONG HiTS 4 JESUS" case that various circuits have been reluctant to apply outside of its narrow facts.[109] Thus, the

[106] 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)).
[107] A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473, 481 (E.D. Va. 2008) (citing Morse v. Frederick, 551 U.S. 393 (2007)).
[108] *Id.* (citing *Morse*, 551 U.S. 393).
[109] *See, e.g.,* B.W.A. v. Farmington R-7 School Dist. 554 F.3d 734 (8th Cir. 2009).

district court does not seem particularly convinced that the holding defeating the infancy doctrine claim is essential to reaching its result.

A driving force behind the district court's analysis seems to be its lack of sympathy for plaintiffs who are trying to evade the consequences of plagiarism. Perhaps this is an alternative holding drawing on the school context and the ethics question to bolster the argument that the minors should be held to this contract, which factors would not generally be applicable to other online TOS situations.

Finally, the district court directs most of its efforts to another alternative theory for its holding – that the retention of the shadow file of the students' papers was fair use under the copyright laws.[110] This is also where the Fourth Circuit directs its attention, also at some length.[111] Instead of directly addressing whether the contract was voidable under the infancy doctrine, which if true, would have been a simple straight-forward way to resolve the case, the Fourth Circuit spent an enormous amount of effort to reach the alternate holding that Turnitin's archival of the student papers constituted "fair use."[112]

III. Science and Minors

Recent scientific research on brain development and juvenile psychology has been able to confirm and explain what most parents, courts, and legislatures have recognized for centuries about minors,[113] even, if not especially, with respect to the older teen of the twenty-

[110] A.V. v. iParadigms, LLC, 544 F. Supp. 2d at 484.
[111] A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630, 645 (4th Cir. 2009).
[112] *Id.*
[113] Brief for the American Medical Ass'n and the American Academy of Child and Adolescent Psychiatry, *supra* note 5, at 2.

first century. In addition, social science studies have documented that, culturally, the transition into adulthood for American youth has become more delayed.

A. Medical Research

Through the use of modern technology, scientists have found structural and functional immaturities in the adolescent brain.[114] These brain immaturities are linked with observed behavioral immaturities in adolescents, such as limitations of their risk/reward evaluations, impulse control, and emotional regulation.[115]

In 2005, the Supreme Court in *Roper v. Simmons* eliminated the death penalty for "offenders who were under the age of 18 when their crimes were committed."[116] In reaching its decision, the Court relied in part on an amicus curiae brief of the American Medical Association (AMA), American Psychiatric Association, and other health professionals that supported the position that juveniles as a class have diminished culpability for their actions based on immaturity, susceptibility to outside pressures, and transitory character.[117] Although the court did not delve deep into the science behind the brief's conclusions, the brief argued the then novel idea that "[a]dolescents' behavioral immaturity mirrors the anatomical immaturity of their brains."[118]

Five years later in *Graham v. Florida*, the AMA and other medical organizations filed an amicus curiae brief detailing the connection between brain development and adolescent

[114] *Id.* at 13, 24.
[115] *Id.* at 4; *see also* Steinberg & Scott, *supra* note 3, at 1013 (citing Linda Patia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVS. 417 (2000)).
[116] 543 U.S. 551, 578 (2005).
[117] *Id.* at 569–70.
[118] Brief of the American Medical Ass'n et al. as Amici Curiae in Support of Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1633549, at 10 (citing Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (2004)).

behavior.[119] This brief updated the research from the prior brief and discussed in depth the ways that adolescents' behavior differs from adults and the immaturities in the adolescent brain that account for these differences.[120] Based on their research, the medical organizations concluded that "the average adolescent cannot be expected to act with the same control or foresight as a mature adult."[121]

Opponents of the infancy doctrine and proponents of adolescent autonomy during the second half of the 20th century have often cited the work of Jean Piaget and his progeny to show that adolescents "possess cognitive abilities equal to those of adults."[122] This research focused on the "cognitive capability to reason, understand, appreciate, and articulate decisions."[123] These studies have not necessarily been proven wrong, but they fail to take account of the complete picture of adolescent abilities. The latest research has allowed us to understand that although an adolescent may be capable of understanding risks, rewards, and situations, he is not able to make decisions just as an adult would. More specifically, he is prone to over-value the rewards of an action despite comprehending the risks, and to not fully appreciate future consequences even if he might be able to verbally articulate what those are.

1. *Adolescent Brain Immaturity*

While developmental studies have existed for decades that confirm adolescents' behavioral immaturity, the latest scientific developments about the adolescent brain have only

[119] Brief for the American Medical Ass'n and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party, Graham v. Florida, 130 S.Ct. 2011 (2010) (No. 08-7412), 2009 WL 2247127.
[120] *Id.*
[121] *Id.* at 2.
[122] Hartman, *supra* note 8, at 1285; *see, e.g.,* Shawn L. Ward & Willis F. Overton, *Semantic Familiarity, Relevance, and the Development of Deductive Reasoning*, 26 DEVELOPMENTAL PSYCHOL. 488, 492 (1990); Cunningham, *supra* note 42, at 303; BARBEL INHELDER & JEAN PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE: AN ESSAY ON THE CONSTRUCTION OF FORMAL OPERATIONAL STRUCTURES 251–65 (1958).
[123] Hartman, *supra* note 8, at 1286.

been emerging since the late 90's with the use of MRI's.[124] These developments have revealed "that both the structure of the adolescent brain, and the way it functions, are immature compared to the adult brain."[125]

Scientists have observed that the prefrontal cortex, responsible for the brain's "executive functions" continues to mature "even through late adolescence"[126] and is "one of the last brain regions to mature."[127] The prefrontal cortex is associated with "voluntary behavior control and inhibition[128] such as risk assessment, [129] evaluation of reward and punishment,[130] and impulse control,"[131] corresponding with the same deficiencies that developmental psychologists have found in adolescents as detailed below. Furthermore, the prefrontal cortex is associated with decision-making[132] and the "ability to judge and evaluate

[124] Brief for the American Medical Ass'n and the American Academy of Child and Adolescent Psychiatry, *supra* note 5, at 18, at 13 (citing Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?*, 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1012, 1012 (2001); MICHAEL S. GAZZANIGA ET AL., THE BIOLOGY OF THE MIND 20–21, 138 (2d ed. 2002)).
[125] *Id.*
[126] *Id.* at 15–16 (citing B.J. Casey, *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 68; Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCI. 859, 860 (1999)); *see also* Steinberg & Scott, *supra* note 3, at 1013.
[127] Brief for the American Medical Ass'n and the American Academy of Child and Adolescent Psychiatry, *supra* note 5, at 18 (citing B.J. Casey, *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 243 (2000)).
[128] *Id.* at 16 (citing R. Dias et al., *Dissociable Forms of Inhibitory Control Within Pre-frontal Cortex With an Analog of the Wisconsin Card Sort Test: Restriction to Novel Situations and Independence From "On-Line" Processing*, 17 J. NEUROSCI. 9285 (1997)).
[129] *Id.* at 16–17 (citing Facundo Manes et al., *Decision-Making Processes Following Damage to the Prefrontal Cortex*, 125 BRAIN 624 (2002)).
[130] *Id.* at 17 (citing J. O'Doherty et al., *Abstract Reward and Punishment Representations in the Human Orbitofrontal Cortex*, 4 NATURE NEUROSCI. 95 (2001); Robert D. Rogers et al., *Choosing Between Small, Likely Rewards and Large, Unlikely Rewards Activates Inferior and Orbital Prefrontal Cortex*, 20 J. NEUROSCI. 9029 (1999)).
[131] *Id.* (citing Antoine Bechara et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189, 2198–99 (2000)).
[132] *Id.* (citing Samantha B Wright et al., *Neural Correlates of Fluid Reasoning in Children and Adults*, 1:8 FRONTIERS HUMAN NEUROSCI. 7 (2008)).

future consequences."[133] The structural immaturity of the prefrontal cortex is a result of incomplete pruning and continuing myelination.[134]

In addition to the structural immaturities of the adolescent brain, developmental neuroimaging studies show that "adolescents and adults exhibit different patterns of brain activity during decision-making tasks."[135] These functional differences lead adolescents to "experience increasing motivation for risky and reward-seeking behavior without a corresponding increase in the ability to self-regulate behavior."[136]

Both the functional and structural immaturities in the adolescent brain have been linked to observed behavioral limitations, lending a "hard science" edge to psychological findings that might otherwise be dismissed as "soft."[137]

2. Adolescent Behavioral Immaturities

Skewed risk/reward perceptions

Adolescents tend to engage in far more risky behavior than adults do,[138] and emerging research is beginning to explain in more detail why that is.[139] "[A]dolescents tend to experience heightened levels of sensitivity to rewards, especially to immediate rewards," which results in "lower risk ratios for adolescents, . . . and thus a higher likelihood of engaging in the

[133] *Id.* (citing Bechara, *supra* note 25).
[134] *See id.* at 20–22 for a more detailed discussion of the process and effects of pruning and myelination.
[135] *Id.* at 26 (citing Amy L. Krain et al., *An fMRI Examination of Developmental Differences in the Neural Correlates of Uncertainty and Decision Making*, 47:10 J. CHILD PSYCHOL. & PSYCHIATRY 1023 (2006)).
[136] *Id.*
[137] Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 109 (2009).
[138] *Id.* at 97.
[139] Brief for the American Medical Ass'n and the American Academy of Child and Adolescent Psychiatry, *supra* note 5, at 7–8.

risky behavior."[140] This new research overturns prior beliefs that adolescent risk-taking behavior stems from "youthful ignorance, irrationality, delusions of invulnerability, or misperceptions of risk,"[141] and instead comes from a psychological misperception of potential rewards of risky behavior.[142]

Without the protections of the infancy doctrine in place, these misperceptions could lead adolescents to enter imprudent and harmful contracts that present prospects of immediate rewards, but come with great risks as well. As a society, we don't want to hold minors to contracts that they only entered because of a psychological misperception of the actual risks and rewards of that contract. To uphold such agreements would be to punish minors for their youth.

Impulse control and emotional regulation

Adolescents are limited in their ability to control their impulses[143] and consequently are "less able than adults to consistently reflect before they act."[144] Development studies have shown that capacity for self-direction increases gradually throughout adolescence[145] while impulsivity tends to decline during that time.[146] The ability to control one's impulsive reactions "is necessary to achieve adult levels of problem solving ability, logical reasoning, and the

[140] *Id.* at 7 (citing Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 16:3 ANN. REV. CLINICAL PSYCHOL. 47, 57–58 (2009)).
[141] *Id.* at 7–8 (quoting Elizabeth Cauffman & Elizabeth Shulman, *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCHOL. 193 (2010)).
[142] *Id.* at 8 (citing Susan L. Andersen, *Trajectories of Brain Development: Point of Vulnerability or Window of Opportunity?*, 86 PHARMACOLOGY BIOCHEMISTRY AND BEHAV. 189 (2007)) ; *see also* Steinberg & Scott, *supra* note 3, at 1012.
[143] Steinberg & Scott, *supra* note 3, at 1013.
[144] Brief for the American Medical Ass'n and the American Academy of Child and Adolescent Psychiatry, *supra* note 5, at 9.
[145] *Id.* (citing B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 64 (2008); Lawrence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 28–29, 38–40 (2009)).
[146] *Id.* (citing Lawrence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence of a Dual Systems Model*, 44:6 DEVELOPMENTAL PSYCHOL. 1774, 1776 (2008)).

consistent exercise of good judgment."[147] Without these controls fully developed, adolescents are lacking a "cornerstone of cognitive development."[148] Even if adolescents had the cognitive skills to correctly assess the costs and benefits of their actions, their impulsivity could lead them to not make wise decisions.[149]

Along with not being able to fully control their impulses, adolescents have less ability than adults to "regulate their emotional responses to stimuli"[150] which can "result in actions taken without full consideration or appreciation of the consequences."[151] In addition, stress can affect adolescents' ability to "effectively regulate behavior as well as . . . to weigh costs and benefits and override impulses with rational thought."[152] This skewed cost-benefit analysis is further skewed by adolescents' increased susceptibility to stress from daily events.[153] Altogether, adolescents' inability to fully regulate their emotional responses leads them to

[147] *Id.* at 8–9 (citing BEATRICE LUNA, THE MATURATION OF COGNITIVE CONTROL AND THE ADOLESCENT BRAIN, IN *FROM ATTENTION TO GOAL-DIRECTED BEHAVIOR* 251 (Francisco Aboitiz and Diego Cosmelli eds., Springer Berlin Heidelberg 2009)).
[148] *Id.* at 8 (quoting Casey, *supra* note 20, at 64).
[149] 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, 283–84 (2006) (quoting Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 L. & HUM. BEHAV. 249, 251 (1996)).
[150] Brief for the American Medical Ass'n and the American Academy of Child and Adolescent Psychiatry, *supra* note 5, at 10 (citing Isabelle M. Rosso et al., *Cognitive and Emotional Components of Frontal Lobe Functioning in Childhood and Adolescence*, 1021 ANNALS N.Y. ACAD. SCI. 355, 360–61 (2004)).
[151] *Id.* at 10–11 (citing Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1538 (2007) (explaining how resistance to peer pressure increases linearly between ages 14 and 18)); *see also* Maroney, *supra* note 31, at 110 (citing ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 40 (2008)) (attributing minors' lack of ability to perceive long-term consequences to the structural maturity of the adolescent brain).
[152] Brief for the American Medical Ass'n and the American Academy of Child and Adolescent Psychiatry, *supra* note 5, at 11 (citing Linda Patia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVS. 417, 423 (2000); Lita Furby & Ruth Beyth-Maron, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 22 (1992))
[153] *Id.* at 11–12 (citing Spear, *supra* note 45, at 423; Furby, *supra* note 45, at 22).

"experience emotional states that are more extreme and more variable than those experienced by adults."[154]

The lack of impulse control and emotional regulation in adolescents means that as a class, they are more likely to act irrationally than adults. Without the ability to consistently exercise good judgment[155] and act with full appreciation of the consequences,[156] minors are more likely to enter into disadvantageous contracts and are more vulnerable to being manipulated by crafty adults. The infancy doctrine protects minors from both of these situations by guarding them against their own mistakes and discouraging adults from contracting with them.[157]

All of these behavioral immaturities that make minors unable to properly assess the risks, make sound judgments, and fully appreciate the consequences of contracts they enter are not simply a function of lack of experience as was once believed.[158] As discussed above, recent scientific studies have linked each of these behavioral immaturities to the structure and function of the adolescent brain.[159]

[154] *Id.* at 12 (citing Spear, *supra* note 45, at 429; Elizabeth Cauffman & Lawrence Steinberg, *(Im)Maturity of Judgment in Adolescences: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 743–45, 756–57, 59 (2000)).
[155] *Id.* at 8–9 (citing Luna, *supra* note 40, at 251).
[156] *Id.* at 10–11 (citing Steinberg, *supra* note 44, at 1538).
[157] 43 C.J.S. *Infants* § 210 (2010).
[158] *See* Brianne Ogilvie, Note, *Is Life Unfair? What's Next for Juveniles After* Roper v. Simmons, 60 BAYLOR L. REV. 293, 299 (quoting RESTATEMENT (SECOND) OF TORTS § 895I cmt. a (1979)) ("[F]or the protection of infants against their inexperience and the undue advantage that might otherwise be taken of them, the law gives them the power of disaffirming their contracts and conveyances.").
[159] Brief for the American Medical Ass'n and the American Academy of Child and Adolescent Psychiatry, *supra* note 5, at 4.

Some have criticized these recent scientific findings claiming that a causal link between brain immaturity and behavioral immaturity has not been proven.[160] While it is true that correlation does not infer causality, the research overwhelmingly supports the assertion that the brain immaturity does (at least in part) cause the behavioral immaturity of adolescents.[161] At the very least, all of the evidence suggests that the behavioral differences in adolescents "*likely* have a neurobiological basis."[162] Mere assertions to the contrary, absent any evidence, are not sufficient for any degree of reliance.

Overall, the scientific research tends to confirm the underlying motivation for the infancy doctrine - that children and adolescents as a class really *are* different than adults and need some special protections under the law to account for those differences. In addition to medical research, the research from the social sciences confirms that this would be an inappropriate time to newly assert that the infancy doctrine is no longer necessary.

B. Social Science on the Transition into Adulthood

At the present time the transition from adolescence into adulthood happens much later in life than in earlier models of development.[163] The effect of this cultural delay in taking adult responsibility and facing adult decisions suggests that, at age eighteen, today's youth are, if

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[160] *See* Reply Brief for Petitioner at 13, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633); Cunningham, *supra* note 42, at 281 (citing Dorothy Otnow Lewis, et al., *Ethics Questions Raised by the Neuropsychiatric, Neuropsychological, Educational, Developmental, and Family Characteristics of 18 Juveniles Awaiting Execution in Texas*, 32 J. AM. ACAD. PSYCH. & L. 408, 409 (2004)); *see also* Sara B. Johnson, Robert W. Blum, & Jay N. Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 218 (2009) ("In many respects, neuroimaging research is in its infancy; there is much to be learned about how changes in brain structure and function relate to adolescent behavior.").

[161] *See* Steinberg & Scott, *supra* note 3, at 1013. Even in the absence of a cause and effect relationship between adolescent brain and behavioral immaturities, the research on the behavioral immaturities is sufficient to establish that juveniles, as a class, function differently than adults. The link to brain immaturities, merely adds a measure of credibility and explanation.

[162] *Id.* (emphasis added).

[163] Jordan Stanger-Ross et al., *Falling Far From the Tree: Transitions to Adulthood and the Social History of Twentieth-Century America*, 34 SOC. SCI. HIST. 625, 627 (2010).

anything, further from real adulthood than they were when the legal age was dropped from twenty-one.[164] This would be an inappropriate time to newly assert that sixteen and seventeen olds are more able to exercise adult judgment than they were in the past and so the infancy doctrine is no longer necessary.

What makes a person an adult has "traditionally been understood as comprising five core transitions—leaving home, completing school, entering the workforce, getting married, and having children," although it is difficult to get a precise measure.[165] At this time, "more than 95 percent of Americans consider the most important markers of adulthood to be completing school, establishing an independent household, and being employed full-time—concrete steps associated with the ability to support a family."[166] Thus, many young people consider financial independence and career establishment to be a necessary component of adulthood, more important than "marriage, parenthood, and full-time employment" at a non-career job.[167]

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[164] Monica Hof Wallace, *A Federal Referendum: Extending Child Support for Higher Education,* 58 U. KAN. L. REV. 665, 669 (2010) (citing HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 8.1, at 309 (2d ed. 1988); Kathleen Conrey Horan, *Postminority Support for College Education—A Legally Enforceable Obligation in Divorce Proceedings*?, 20 FAM. L.Q. 589, 590 (1987); Nat'l Assoc. of Secondary School Principals, *The Changing Age of Majority,* A LEGAL MEMORANDUM, Jan. 1974, at 7, *available at* http://www.eric.ed.gov/ERICWebPortal/detail?accno=ED099996). Two states reduced the age of majority to nineteen in 1970 before the effective date of the Twenty-sixth Amendment lowering voting age. Nat'l Assoc., s*upra.* By the end of 1973 thirty nine states had followed suit lowering the age of majority to eighteen. *Id.* (Internal citations omitted). New York and Ohio followed in 1974. *See* New York N.Y. Dom. Rel. Law § 2 (1974); Ohio Rev. Code Ann. § 3109.01(1974). *See also* Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 562–64 (2000) (discussing the climate surrounding the passage of the Twenty-sixth Amendment).

[165] Richard A. Stettersten Jr. & Barbara Ray, *What's Going On with Young People Today?: The Long and Twisting Path to Adulthood,* 20 TRANSITION TO ADULTHOOD 19, 20 (2010).

[166] *Id.* at 22.

[167] Jeylan T. Mortimer et al., *Tracing the Timing of "Career" Acquisition in a Contemporary Youth Cohort,* 35 WORK & OCCUPATIONS 44, 48 (2008) (citing Jeffrey Jensen Arnett, *Young People's Conceptions of the Transition to Adulthood*, 29 YOUTH & SOC'Y, 1, 1-23 (1997); Jeffrey Jensen Arnett, *Conceptions of the Transition to Adulthood: Perspectives from Adolescence to Midlife*, 8 J. ADULT DEVEL. 133, 133–143 (2001); Jeffrey Jensen Arnett, *Conceptions of the Transition to Adulthood Among Emerging Adults in American Ethnic Groups*, 100 NEW DIRECTIONS FOR CHILD &

Laws shifted legal age from age twenty-one to eighteen during the late Vietnam era in response to the protest that young men could not vote, but could be drafted.[168] For a short time post World War II, in the 1950's, 1960's and early 1970's, youth transitioned into adulthood earlier probably because of the prosperous economy. The influx of often high paying industrial jobs available to those with high school degrees, as well as new jobs for those with college diplomas,[169] made it possible for younger people to marry and begin families.[170] During this time, most Americans viewed these family roles as synonymous with being an adult.[171] To leave home quickly in the 1950's was 'normal' because opportunities were plentiful and social expectations of the time reinforced the need to do so. At the turn of both the twentieth and twenty-first centuries, greater proportions of young people stayed at home longer than those who came of age at mid-century because they faced distinctive social and economic conditions of their own.[172]

Beginning in the mid-1970's, the transition into adulthood slowed down, and the economy may help explain why. "[B]y the end of the century, a more prolonged and sequential picture reemerged."[173] Relative to older workers, and in comparison with what they could expect to earn as they aged, young men living from the mid-1970's to 2000 were poorer than they had been for more than 60 years.[174] During the post-war period, it was not uncommon to

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ADOLESCENT DEVEL. 63, 63-75 (2003), Scott D. Scheer & Rob Palkovitz, *Adolescent-to-Adult Transitions: Social Status and Cognitive Factors.* 6 SOC. STUD. CHILD., 125, 125-140 (1994)).

[168] Wallace, *supra* note 2, at 669; Scott, .

[169] Stettersten & Ray, *supra* note 3, at 21: Scott, *supra* note , at 563.

[170] *Id.*

[171] *Id.*

[172] *Id.* at 24.

[173] Stanger-Ross et al., *supra* note 1, at 633 (noting that, although decision making experiences and time frames were similar to those of males, "young women eschewed any particular order in the transition to adulthood").

[174] *Id.* at 643 (citing RICHARD A. EASTERLIN, BIRTH AND FORTUNE: THE IMPACT OF NUMBERS ON PERSONAL WELFARE (1980)).

have picked a job and be employed right out of high school; now "it simply takes more time than it did even a half-century ago to gain a job that is secure enough to form and support a family."[175]

Today's youth resist adulthood because they have not built a financial foundation.[176] They are spending more time in school and waiting to seriously consider career options until their education is nearly complete.[177] They are relying on their parents for a longer time.[178] A recent study showed that the age at which children are leaving their parents' house has increased.[179] It has become common for children to leave home only to "return home for a time, or several times, while getting situated in the world."[180] Further, for those young adults who have grown up privileged, the transition time is often a time of exploration, a chance to try out different jobs and educational experiences, with many finding no real reason to commit to adulthood.[181]

Not only are today's youth progressing to adulthood later than youth in the 1960's and 1970's, they are progressing more slowly than was the norm in the eighteenth and nineteenth century when the infancy doctrine was fully articulated.[182] In addition to wanting more children

[175] Frank F. Furstenberg Jr., *On a New Schedule: Transitions to Adulthood and Family Change,* 20 TRANSITION TO ADULTHOOD 67, 69 (2010).
[176] *Id.* at 70.
[177] *Id.* at 77.
[178] *Id.* at 71.
[179] Stanger-Ross et al., *supra* note 1, at 627 (noting that this study parallels an earlier study covering three periods during the twentieth century, FRANCES K. GOLDSCHEIDER & CALVIN GOLDSCHEIDER, THE CHANGING TRANSITION TO ADULTHOOD: LEAVING AND RETURNING HOME (1999)).
[180] JANE GOODMAN ET AL., COUNSELING ADULTS IN TRANSITION: LINKING PRACTICE WITH THEORY 17 (3d ed. 2006) (citing N. R. HINER ET AL., THE ADULT YEARS: CONTINUITY AND CHANGE 47-53 (1985)).
[181] Mortimer et al., *supra* note 5, at 46.
[182] Robert E. Richardson, *Children and the Recorded-Message Industry: The Need for a New Doctrine,* 72 VA. L. REV. 1325, 1332 (1986) (citing Y.B. 20 & 21 Edw. I 318 (A. Horwood, trans. 1866) (tracing doctrine to 1292). The doctrine underwent little change after 1800. *Id.* (citing Note, *Infants' Contractual Disabilities: Do Modern Sociological and Economic Trends Demand a Change in the Law?,* 41 IND. L.J. 140, 140 (1965) ("characterizing law of infants'

to help with the family work, young people of that era recognized the risk that few or none of their children might survive to adulthood. With higher infant mortality rates, people began trying to have children earlier and more frequently.[183] Today women can wait until their thirties and still raise three children to adulthood.[184] Because infant mortality became less of a worry during the twenty-first century, "economic maturity for many young people is being delayed while a larger proportion of them attend college and go on to graduate or professional schools."[185]

C. Treatment of Minors in Other Areas of Law

One concern with the infancy doctrine is whether the treatment of minors across legal disciplines is consistent. In other words, do advancements about the way we treat minors in areas outside contract law demonstrate that contract law is particularly anachronistic as some commentators have suggested.[186] It is true that some areas of the law hold minors more responsible based on various rationales that promote the policy justifications that form the law in those areas. And it is crucial to identify, in each of these cases, which policy considerations support courts' decisions to hold minors more accountable in these instances.

A. Tort Law

contractual responsibility as 'virtually stagnant' since the fifteenth century") ; H. H. W., *The Status of Infancy as a Defense to Contracts,* 34 VA. L. REV. 829, 829 (1948) ("law settled since 1800")).

[183] GOODMAN ET AL., supra *note 19.*

[184] *Id.*

[185] *Id.*

[186] *See* Daniel, *supra* note 8, at 261; *see also* Hartman, *supra* note 8, at 1267 (detailing inconsistent treatment of adolescents under medical law).

Under tort law, minors are held liable for their intentional torts,[187] and most jurisdictions hold minors liable for mere negligence.[188] However, in the majority of jurisdictions, minors are either deemed incapable of negligence based on their limited capacities (where the child is under seven years old),[189] or the limited capacities are taken into account to decide how the "reasonable minor" with similar age and capabilities should act.[190]

It does not implicate the infancy doctrine to permit the punishment of minors for intentional torts, which, similar to crimes, are a knowing violation of *malum in se* social norms that the law has incorporated as intentional torts.[191] Even with respect to mere negligence, tort doctrine is clearly distinguishable from contract doctrine, both in practical application and in policy.

First, tort victims do not "choose" who commits a tort against them. They become victims of whatever tortfeasor comes along, notwithstanding their efforts to avoid dangerous situations and people. A person cannot avoid being the victim of a tort committed by a minor unless he never ventures out of an adult-only community. On the other hand, contracting parties always have the ability to choose with whom they contract, or to only contract after taking reasonable measures to assure that the other party is an adult with legal capacity to be bound. Thus, tort liability, even in negligence, for the conduct of minors against innocent tort

[187] VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ'S TORTS 17 (10th ed. 2000) (illustrating minors' ability to form the requisite intent for an intentional tort with Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955)).
[188] RESTATEMENT (SECOND) OF TORTS § 283A.
[189] *Id.* § 283A cmt. b (1979). For a list of jurisdictions that cut off liability for young minors, see the cases in the Reporter's Notes for this section.
[190] *Id.* § 283A.
[191] Dawson v. Contractors Transport Corp., 467 F.2d 727, 729 n.1 (D.C. Cir. 1972).

victims does not conflict with the infancy doctrine in contract, as the application of the consequences can be easily avoided by not contracting with minors.

Second, parents are ultimately liable for the consequences of a tort committed by a minor.[192] Tort law puts the onus on adults to teach their children so they adhere to basic social decencies or to exercise sufficient control over their children to stop them from harming others. This is especially true with intentional torts, which, similar to crimes, are a knowing violation of *malum in se* social norms that the law has incorporated as intentional torts.[193] Thus, the deterrence effect of tort law is to motivate parents to control or teach their children before unleashing them on society. Moreover, legal enforcement of a tort judgment is ultimately against the parent. The purposes of tort law – to deter wrongful conduct and compensate the injured party[194] -- are focused ultimately on adults.

Third, one of the express purposes of the infancy doctrine is to warn adults to stay away from minors.[195] The policy in contract law, as with all areas of law, is aimed at the behavior of adults. Contract law assumes exchanges of consideration that have an economic contour, even if not always set forth in terms of cash. The law wants adults to conduct such exchanges only with other adults because of the risk that greed would cause adults to lure children into improvident transactions. The adult can conduct the transaction with the parent. We squarely discourage adults from being physically near to or otherwise interacting with children without parents around to avoid exploitation of children in other areas, such as in online chat rooms,

[192] *See* Randall K. Hanson, *Parental Liability for Torts of Children: Balancing the Rights of Victims and Parents* ("All states have passed modern tort statutes imposing varying degrees of responsibility on parents for the wrongful actions of their children.")
[193] *Id.*
[194] RESTATEMENT (SECOND) OF TORTS § 901 (1979); Schickling v. Aspinall, 369 S.E.2d 172, 174 (Va. 1988); *see also* Borish v. Russell, 230 P.3d 646, 650 (Wash. App. Div. 2010).
[195] *See* 43 C.J.S. *Infants* § 210 (2010).

adult businesses, and restraints on the movement of sexual predators.[196] No one would argue that the purpose of tort law is to convince adults to stay away from any child acting without a parent.

What may seem harsh about contract doctrine is mitigated in several ways. First, an adult might not be capable of perfectly determining whether a contracting party consents to a transaction with another. One can avoid contracts with minors in all cases except ones where the minor affirmatively misrepresents his age and the adult, after reasonable inquiry and investigation has no reason to suspect the deception. Adults who deal with minors make a choice where the situation can be avoided altogether.

Additionally, the infancy doctrine is consistent with the purpose of contract law, which is "to enforce the reasonable expectations of parties induced by promises,"[197] because adults should expect any of their contracts with minors to be voidable by the minor.

B. Criminal Law

Similar policy reasons exists to explain supposed inconsistencies in criminal law.[198] The treatment of minors in criminal law is perhaps the most "consistent" with the policies and aims of contract law, namely to protect minors and take account of their cognitive limitations.

This protective nature can be seen in the juvenile justice system, which is focused on rehabilitation over other penological justifications.[199] This is in part because studies have shown that the anti-social, or criminal tendencies in most youth are fleeting and are usually

[196] For example, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (2010), requires sexually violent predators to register a current address for a designated time, possibly for life..
[197] 6 ARTHUR LINTON CORBIN ET AL., CORBIN ON CONTRACTS § 570 (Joseph M. Perillo ed. 2010).
[198] Daniel, *supra* note 8, at 263–67.
[199] Scott, *supra* note 128, at 578.

outgrown.[200] Beyond that, it would be too difficult to distinguish those whose criminal natures are "permanent" from those who will naturally reform once they mature. This rationale can be seen in both *Roper* and *Graham*, discussed above.[201] However, criminal law seems to blur the cutoff between minors and adults, allowing transfer of older adolescents to adult court.[202] This is especially prevalent where the minor committed a serious offense.[203] Treating minors as adults in this situation does not undermine the incapacity rationales of the infancy doctrine. In these instances, society's desire for crime control and effective law enforcement takes precedence over the arguments of immaturity (which still play a role in deciding whether transfer is appropriate).[204] Furthermore, it is plausible that "the decision to make a contract is more difficult and requires greater capacity than resisting a compulsion to kill someone."[205]

With respect to the more significant issues in criminal law, the trend has been to raise the applicable age to eighteen. With respect to capital punishment, in 2005 in *Roper v. Simmons*,[206] the Supreme Court detailed an evolution toward even stricter adherence to the notion that children under the age of eighteen be treated differently than adults. Sixteen years earlier in *Stanford v. Kentucky*,[207] the Court approved a state statute that allowed the execution of offenders over age fifteen but under age eighteen, thus recognizing something like a "mature" minors exception. However, the *Roper* Court overruled *Stanford*, finding a consistent

[200] *Id.* at 587 (citing REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, IN CONFRONTING YOUTH CRIME 7 (1978).
[201] Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 130 S.Ct. 2011 (2010).
[202] *See* Cunningham, supra note 42, at 345.
[203] *Id.* at 347.
[204] *Id.* at 344, 347–48.
[205] *Id.* at 350.
[206] 543 U.S. 551, 561-64 (2005).
[207] 492 U.S. 361 (1989).

trend toward abolishing the death penalty for juveniles between ages sixteen and eighteen.[208] "[T]he consistency in the trend toward abolition of the practice-provide[s] sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as 'categorically less culpable than the average criminal.'"[209] In addition, the Court "acknowledge[d] the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime."[210]

C. Consent to Treatment

Currently, "[m]ost medical treatment of minors requires the consent of their parents."[211] However, a few exceptions have developed: the "mature minor doctrine" and allowing adolescents to consent to treatment "for sexually transmitted diseases, substance abuse, mental health problems, and pregnancy."[212]

Courts have been willing with respect to consent for treatment to cut a finer slice and consider a category between children and adults, called the "mature minor." This doctrine allows minors to give consent to medical treatment without parental consent "for routine beneficial medical treatment or in an emergency situation,"[213] where the minor's consent is "informed, voluntary, and competent."[214]

[208] 543 U.S. at 566-67.
[209] 543 U.S. at 567 (citing Atkins v. Virginia, 536 U.S. 304, 316 (2002)).
[210] Id. at 578.
[211] Scott, *supra* note 128, at 566 (citing Susan D. Hawkins, Note, *Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes*, 64 FORDHAM L. REV. 2075, 2075 (1996); Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1589 (1982)).
[212] *Id.* at 567–68.
[213] *Id.* at 567.
[214] Daniel, *supra* note 8, at 266.

Because adolescence is a transition stage from childhood to adult,[215] it might seem appropriate to apply the "mature minors" doctrine to contract law.[216] However, the context and policies of medical consent are far different from those in contract law. There are three main differences between medical consent and contracts that justify the different treatment of minors.

First, going forward without a parent's consent is only necessary in real emergencies. Nearly every person who needs emergency medical care will give consent to treatment, especially all those under age eighty who do not have signed "do-not-resuscitate orders." Most medical care providers will not go forward without the consent of a person who will be liable for the cost unless the treatment is critically time sensitive. The "mature minors" doctrine "facilitates necessary treatment when parental consent may be hard to get, under circumstances in which it is assumed that parents would likely consent.[217] This exception is very similar in purpose to the necessities exception to the infancy doctrine, discussed above, which provides a way for minors to obtain necessities without parental involvement.

Second, older teens are often injured because they engage in unusually risky behaviors and participate regularly in a wide variety of sports. Their parents are not always with them, although a coach or friend's parent or other responsible caring adult may well be with them. The risk of getting consent from a minor and having that decision seriously challenged in such cases is low. This reasoning that fully supports exceptions for consenting to treatment has the opposite effect in contract law. The fact that teens participate in unusually risky behavior

[215] *See* Maroney, *supra* note 31, at 97; Norman A. Sprinthall & W. Andrew Collins, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice*, 53 KAN. L. REV. 659, 692 (2005).
[216] Daniel, *supra* note 8, at 266.
[217] Scott, *supra* note 94, at 567.

suggests that they are not mature enough to fully contemplate the consequences of entering binding contracts.

Third, society has a great interest in allowing teens to receive treatment in specific cases whereas similar justifications do not exist in the context of contracts. The reason that teens are allowed to consent "for sexually transmitted diseases, substance abuse, mental health problems, and pregnancy" is because society has an interest in reducing the incidences of these in the teen population.[218] Society's interest is so great that teens are allowed to receive treatment in these instances without parental consent, particularly where the parents might be critical of the teen's decisions.[219] Legislatures have determined that there would be harm if parental consent was required because teens might conceal their behavior out of fear for their parents' reactions rather than obtain needed treatment.[220] There is no parallel societal interest in contract law. Minors have no need to contract without parental involvement, indeed, society would encourage parents to be involved with any such contracts to protect their children.

The foregoing differences show how unique policy concerns have carved out exceptions allowing minors to consent to treatment. Additionally, it is interesting to note that even proponents of the "mature minor" doctrine recognize that the determination of whether or not minors are mature is based on their capacity for factual understanding rather than their reasoning capabilities.[221] Brain imaging technology may someday provide a way to adequately

[218] *Id.* at 567–68.
[219] *Id.* at 568.
[220] *Id.*
[221] Daniel, *supra* note 8, at 266; *see also* Scott, *supra* note 94, at 568 ("No one argues that minors should be deemed adults because they are particularly mature in making decisions in these treatment contexts.").

distinguish between mature and immature adolescents, but is currently unable.[222] Hence, the "mature minors" doctrine might work in health care where doctors inform a minor of options with the minor's health in mind, but could be detrimental in contract law where adults have greater opportunities to take advantage of minors who may understand the factual nature of the transaction, but not fully appreciate the consequences.

D. Other Age-based Legal Standards

Not all legal standards have been changed to recognize the general age of majority adopted by the legislature. The minimum drinking age is statutorily set at twenty-one in all states,[223] and some states even have a minimum age for using tobacco products that is greater than eighteen.[224]

In recognition of minors' reduced capacities, states have limited minors' privileges. "No state has lowered its voting age below 18."[225] Also, only four States permit minors under eighteen to marry without parental consent.[226] This list of limitations includes not being able to gamble,[227] purchase pornographic material,[228] and even drive without parental consent.[229]

Other legal standards recognize that minors are not fully capable and should be given more protection. For example, minors do not have the Second Amendment right to bear arms.[230]

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[222] *See* Johnson, *supra* note 53, at 218 ("The ability to designate an adolescent as 'mature' or 'immature' neurologically is complicated by the fact that neuroscientific data are continuous and highly variable from person to person; the bounds of 'normal' development have not been well delineated.").
[223] Moskowitz, *supra* note 45, at 145 (citing Ken Sternberg, *Alcohol Consumer Must Be 21 Years Old in All States; Concerns Remain About Drunk Driving*, 260 J. AM. MED. ASS'N 2479, 2479 (1988)).
[224] *Id.* (citing Centers for Disease Control, *State Laws on Tobacco Control-United States 1998*, 48 MORBIDITY & MORTALITY WEEKLY REP. 21, 26 (1999)). Alabama, Alaska, and Utah have set the minimum age at 19.
[225] Thompson v. Oklahoma, 487 U.S. 815, app. A (1988)
[226] Stanford v. Kentucky, 492 U.S. 361, 394 (1989).
[227] *Id.* at 394–95 ("Thirty-four States require parental consent before a person below 18 may drive a motor car.").
[228] *Id.* at 395 ("Legislation in 42 States prohibits those under 18 from purchasing pornographic materials.").
[229] *Id.* ("Where gambling is legal, adolescents under 18 are generally not permitted to participate in it.").
[230] Cheryl B. Preston, *Zoning the Internet: A New Approach to Protecting Children Online*, 2007 BYU L. REV. 1417 (2007).

Additionally, states prohibit selling liquor to minors,[231] employing minors during school hours,[232] and body piercing or tattooing minors.[233]

In the few cases where minors have been given greater decisional autonomy for medical decision-making such as consenting "to treatment for drug[s], alcohol, and sexually transmitted diseases,"[234] the underlying policy determinations of the legislature were the driving force rather than a consideration of the capacities of minors as discussed above.[235]

The motivations for the infancy doctrine are just as applicable to online contracts as for standard contracts and the doctrine's continued existence is necessary for protecting minors, what the Supreme Court has declared to be a compelling governmental interest.

D. Constitutional Principles, the Supreme Court, and Minors

A. Compelling Governmental Interest in Protecting Minors

Although even a statutory change in legal age for contract law purposes would not raise a constitutional challenge, a fruitful place to look for jurisprudential principles is Supreme Court opinions dealing with significant constitutional and social issues. [236] Even in cases where the

[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] Hartman, *supra* note 13, at 1309.
[235] *Id.* (attributing the exception as "[A] relic of the early 1960's when adolescents were found to be the primary culprit for the spread of STDs").
[236] *See* Ashcroft v. ACLU, 542 U.S. 656 (2004) (statute struck down because it was not narrowly tailored for the compelling governmental interest of protecting minors from pornography); *see also* Reno v. ACLU, 521 U.S. 844, 863 n.30 (1997) ("Appellees also do not dispute that the Government generally has a compelling interest in protecting minors from 'indecent' and 'patently offensive' speech.").

Supreme Court has applied strict scrutiny, the compelling governmental interest in protecting minors is honored and reiterated.[237]

> It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' . . . Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.[238]

Further, this governmental interest exists in addition to and notwithstanding the duties of parents as a matter of "society's transcendent interest in protecting the welfare of children."[239] In Reno v. ACLU, the Court again rejected the idea that the same constitutional rights inure to adults as to minors.[240] Minors, as defined to age eighteen, are distinguished from adults even with respect to constitutional rights.[241]

B. Compelling Governmental Interest in Parental Discretion

Another constitutionally recognized compelling governmental interest is supporting parents' authority to raise their children in the manner they see fit.[242] "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own

[237] *See, e.g.,* Ashcroft v. ACLU, 542 U.S. 656 (2004) (statute struck down because it was not narrowly tailored for the compelling governmental interest of protecting minors from pornography). For further discussion of this compelling interest in the Child Online Protection Act context, see Preston, *supra* note 232.

[238] *Reno I*, 521 U.S. 844, 869 (1997) (quoting Sable Commc'ns, Inc. v. FCC, 492 U.S. 115, 126 (1989)); *see also* New York v. Ferber, 458 U.S. 747, 756–57 (1982).

[239] People v. Kahan, 206 N.E.2d 333, 334 (N.Y. 1965) (Fuld, J., concurring).

[240] *Reno I*, 521 U.S. 844, 865 (1997) (quoting *Ginsberg*, 390 U.S. at 636).

[241] At one point the Supreme Court reached toward recognizing a free speech right in minors attending public schools, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969). Critics assert that r "Tinker's reasoning conflicted with the traditional understanding of the judiciary's role in relation to public schooling." Morse v. Frederick, 551 U.S. 393, 417 (2007) (Thomas, concurring). However, the Court has since consistently distanced itself from *Tinker* primarily through making wide exceptions. See, e.g., *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 677, 678 (1986); *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260 (1988); Morse, *supra*.

[242] *See Ginsberg*, 390 U.S. at 639; Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

household to direct the rearing of their children is basic in the structure of our society."[243] As I have discussed elsewhere,[244] "the state respects parents' decisions regarding placing their children in private sectarian schools rather than public schools,[245] placing them in schools that teach in languages other than English,[246] and, at times, taking them out of school altogether."[247]

If a parent elects to restrict his or her teen from entering contracts, the government honors that choice. Other adults should not override that choice by dealing independently with children without parental knowledge and involvement. Parents who believe that their child needs to assume the responsibility of a major purchase may co-sign a contract or create inter-family transactions with whatever consequences they select.

C. Justifications for Categorical Age Determinations

The Infancy Doctrine is predictable and easy to apply because it relies on a categorical, objectively measurable standard based on counting eighteen years from a date of birth in a country where everyone has a birth certificate. Birthdates are consistently included in drivers' licenses and other forms of identification. On the other hand, determining that, for legal purposes, all children become responsible as adults on the day before or day of their eighteenth birthday, rather than the year before or after, is perhaps arbitrary. Some argue that

[243] *Ginsberg*, 390 U.S. at 639.

[244] Preston, *supra* note 232, at 1441.

[245] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[246] *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

[247] *See* Sch. Dist. of City of Grand Rapids v. Ball, 473 U.S. 373 (1985); Wisconsin v. Yoder, 406 U.S. 205 (1972).

determinations of who may assert the infancy doctrine should be resolved with a case-by-case approach.[248]

As one commentator put it: "It is quizzical at best to grasp the concept that in the blink of an eye, a person sheds infancy and attains adulthood the moment the person's eighteenth birthday is realized."[249] Those who take this position, generally support a rebuttable presumption of capacity for adolescents that would be subject to a factual inquiry of incapacity at the minors' request.[250]

As a matter of constitutional law, categorical lines are perhaps not ideal nor necessary in a world of unlimited resources and access to ultimate truth. But, the Supreme Court is quite clear that the age of minority requires a fixed line and that the line is appropriate at age eighteen. This year the Supreme Court in *Graham* reaffirmed the constitutionality of statutory enactments relying on an arbitrary age. Quoting *Roper*, the *Graham* Court was satisfied with age eighteen because it "is the point where society draws the line for many purposes between childhood and adulthood."[251]

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn.[252]

The choice of age eighteen is mirrored in the international context.[253] The *Roper* Court noted that "Article 37 of the United Nations Convention on the Rights of the Child, which every

[248] *See* Brief for Petitioner at 33, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633).
[249] Daniel, *supra* note 3, at 242.
[250] *Id.* at 267.
[251] Graham v. Florida, 130 S.Ct. 2011, 2016 (2010) (quoting *Roper*, 543 U.S. at 574).
[252] *Roper*, 543 U.S. at 574.
[253] *Id.* at 576.

country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18.[254] No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. Parallel prohibitions are contained in other significant international covenants."[255]

A categorical rule is appropriate here, among other reasons, because the differences in adolescents are a result of brain immaturity that cannot adequately be judged by a judge or a jury.[256] In *Roper*, relying in part on evidence that psychiatrists are forbidden from diagnosing any patient under age eighteen as having certain disorders, the Court explained: "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[257] The Graham Court agreed with this limitation of the case-by-case approach.[258] Even if some minors do have sufficient maturity to be treated as adults, "it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few . . . from the many.[259]

[254] *Id.* (citing United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468-1470 (entered into force Sept. 2, 1990); Brief for Respondent 48; Brief for European Union et al. as *Amici Curiae* 12-13; Brief for President James Earl Carter, Jr., et al. as *Amici Curiae* 9; Brief for Former U.S. Diplomats Morton Abramowitz et al. as *Amici Curiae* 7; Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* 13-14).

[255] *Id.* (citing See ICCPR, Art. 6(5), 999 U.N.T.S., at 175 (prohibiting capital punishment for anyone under 18 at the time of offense) (signed and ratified by the United States subject to a reservation regarding Article 6(5), as noted, *supra,* at 1194); American Convention on Human Rights: Pact of San Jose, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U.N.T.S. 146 (entered into force July 19, 1978) (same); African Charter on the Rights and Welfare of the Child, Art. 5(3), OAU Doc. CAB/LEG/ 24.9/49 (1990) (entered into force Nov. 29, 1999) (same)).

[256] *See* Maroney, *supra* note 31, at 94 ("[B]ecause developmental neuroscience supports only probabilistic generalizations about youth as a class, it is unhelpful in making highly individualized determinations such as formation of intent.").

[257] *Roper*, 543 U.S. at 573 (citing Steinberg & Scott, *supra* note 3, at 1014-16.)

[258] Graham v. Florida, 130 S.Ct. 2011, 2031–32.

[259] *Id.* at 2032.

Even if courts could reasonably determine the maturity and capacity of judgment possessed by a minor at some prior time when she entered a contract, forcing minors into expensive litigation based on subjective, personal facts that must interpreted by expensive experts trained in soft sciences, such a system would not necessarily reach better results.[260] As one commentator noted:

> An individualized system is not necessarily more effective at reducing the number of false positives or negatives. Rather, such a system may lead to greater uncertainty because a minor's rights and responsibilities are subject to the whims and assumptions of the particular factfinder who is assigned the minor's case. . . . The resulting uncertainty means that minors or the adults that must interact with them are not put on notice as to the former's legal status.[261]

Moreover, the people who would benefit most from such an approach would be the repeat players, the vendors and service providers, who have thousands of contracts with minors and can afford protracted and expensive litigation to create a line of precedent of invalidating the infancy doctrine. The minor who only wishes to avoid a contract once in her life cannot afford to invest significant time, money, and effort in making precedent for future cases.

Although the gravity of failure to obtain effective legal representation is not as significant with respect to a lawsuit defending a challenge to applying the infancy doctrine to a particular youth, the reasoning on how minors may interact with lawyers and the legal system provides another reason for avoiding ad hoc maturity determinations. The *Graham* Court concerns apply, at least with some force, to the experience of a minor in the civil legal system.

> Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than

[260] *See* Cunningham, *supra* note 42, at 368–69.
[261] *Id.*

> adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. These factors are likely to impair the quality of a juvenile defendant's representation. [262]

D. Province of Legislature rather than Courts

Because society, through the representative process of legislatures, has, with very few deviations, consistently over generations declared that the age of legal responsibility is eighteen or older, any change should be made by the legislature and not the courts.[263]

The legislature has changed the age of majority in the past as discussed above, and any potential future changes should be done in the same way.[264] The Constitution created three branches of government, each with different responsibilities and skill sets to be able to effectively govern. Although the courts arguably do at times delve into the realm of policy decision-making, it is generally recognized that policy decisions should be left to the legislature.[265] Further, the Supreme Court has declared that "the basic line-drawing process . . . is 'properly within the province of legislatures, not courts.'"[266] Most state legislatures have drawn the line of majority at age eighteen, and the legislatures remain responsible for any changes to that line.

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[262] *Graham*, 130 S.Ct. at 2016 (citing Brief for NAACP Legal Defense & Education Fund et al. as *Amici Curiae* 7-12; Henning, Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases, 81 Notre Dame L. Rev. 245, 272-273 (2005)).

[263] *See* Cunningham, *supra* note 42, at 369 ("[L]egislative action is the best way to resolve the current conflicts in the law regarding children.").

[264] *See id*.

[265] *See, e.g.*, Haskin v. Northeast Airways, Inc., 123 N.W.2d 81, 86 (Minn. 1963); Skyline Village Park Ass'n v. Skyline Village L.P., 2010 WL 2813568, at 6 (Minn. App.); Pannozzo v. Anthem Blue Cross & Blue Shield, 787 N.E.2d 91, 99 (Ohio App. 2003); Casella v. SouthWest Dealer Services, Inc., 69 Cal. Rptr. 3d 445, 454 (Cal. Ct. App. 2007); Housing Authority of City of Macon v. Ellis, 655 S.E.2d 621, 623 (Ga. Ct. App. 2007).

[266] Hutto v. Davis, 454 U.S. 370, 374 (1982) (quoting Rummel v. Estelle, 445 U.S. 263, 275–76 (1980)).

Legislatures are democratically elected bodies which are accountable to the people for their actions. In this capacity, the legislature can shape policy according to the will of the people. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."[267] Legislatures are far better equipped than the judiciary to handle determinations about the capacities and protections of minors because they are not limited by a "case-or-controversy requirement" and "an adversary context,"[268] and instead can independently investigate claims and solutions. If society ever deems minors to not be worthy of protection, it is the legislatures that should take the baton of popular will and run with it. The court has no part in such a determination.

The infancy doctrine is well entrenched in the law and should not be overturned or otherwise unraveled by the courts. A legislature is not hesitant "to change or refine preexisting legal doctrine *when [it] deems such a change appropriate*,"[269] and the legislature has done so with the infancy doctrine in the past by lowering the age of majority. The legislature has implicitly accepted the infancy doctrine by not changing the doctrine further where the legislature has the capacity to do so.[270] As one court put it: "This conclusion provides an additional reason for [a] court to be very hesitant before dabbling in matters involving such fundamental policy questions."[271] Simply put, "the courts ought not change an established legal doctrine."[272]

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[267] Gregg v. Georgia, 428 U.S. 153, 175 (1976) (quoting Furman v. Georgia, 408 U.S. 238, 383 (1972)).
[268] GTE Sylvania, Inc. v. Consumers Union of U.S., 445 U.S. 375, 382 (1980) (citing Flast v. Cohen, 392 U.S. 83, 95 (1968)).
[269] Watson v. J.C. Penney Co., 605 N.E.2d 723, 725 (Ill. App. Ct. 1992) (referring to issues in tort law).
[270] *See id.* ("[W]e conclude that the legislature, by not amending the 60-year-old natural accumulation rule, has indicated its present satisfaction with that rule.").
[271] *Id.*
[272] James v. Hutton, 373 S.W.2d 167, 168 (Mo. Ct. App. 1963).

If legislatures were to reconsider the issue, trends of the past couple of decades make clear that, if the line were to be moved, the cutoff age would likely increase, not decrease. The age at which a person is legally able to marry has been rising and young adults are increasingly relying upon parental support beyond the age of eighteen. Additionally, rather than moving away from the concept of minority, state legislatures are increasingly enacting statutes aimed to protect minors from themselves and to acknowledge the role of parents, and these statutes are being upheld by the courts.[273] For instance, "regulation of abortion on the basis of age has increased. Insofar as the predicate of the diminishment of a juvenile's right to abortion is maturity, recent legislation in this area indicates an equivocation of adolescence and childhood.[274]

As one commentator put it: "why not [retain] the eighteenth birthday as a presumptive age of majority … unless there is a very good reason not to."[275] Based on all of the scientific evidence about the adolescent brain and behavioral immaturities, there is certainly no "good reason" to lower the line for contractual capacity.

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[273] *See, e.g.,* Planned Parenthood of Blue Ridge v. Camblos, 155 F.3d 352, 355 (4th Cir. 1998), cert. denied, 525 U.S. 1140 (1999) (emphasis in original):

> We hold today that the Commonwealth's parental notice statute, as legislation that respects the fundamental interests of responsible parents in the rearing and in the educational, moral, and religious development of their children, without unduly burdening the fundamental abortion right, is facially constitutional under the Fourteenth Amendment. A contrary holding-that the People of Virginia are *forbidden* by the Constitution of the United States from requiring that the responsible mother and father of a pregnant teenage daughter even be told of the life-defining decision their own daughter confronts-we are convinced, would be a holding not of law, but of will, and thus would betray the trust upon which our very legitimacy as an institution depends.

[274] Jon-Michael Foxworth, Note, *An Unjust Act: The Schizophrenic State of Maturity and Culpability in Juvenile Justice and Minor Abortion Rights Law; Recent Trends in Virginia and Nationally,* 9 Wm. & Mary J. Women & L. 495, 496 (2003) (internal citations omitted) (noting that state statutes requiring parental notice and involvement have increased from fourteen in 1991 to forty-two in 2003)..

[275] Hartman, *supra* note 8, at 1361 (quoting FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 111–12 (1982)).

E. Still Children Online

To date there has been no successful campaign to devise a new body of law out of whole cloth for cyberspace. Thus, the same principles, rules and concerns apply with respect to clickwrap and browsewrap contracts that apply elsewhere, although the context of the Internet and electronic goods and services do suggest some additional issues. In this Part, we will discuss some of the prominent intersections of the infancy doctrine and online commerce. First, we discuss the extent to which minors possess a technical savvy and experience greater in many instances than that of most adults.[276] Second, minors are such a significant market segment with respect to certain online businesses and services that the application of infancy doctrine may work to chill development in these areas and to deter vendors from making goods and services available to minors. Third, without face to face contact, discerning the age of potential contracting partner is in many instances more difficult. These are all legitimate concerns, but they are better understood and less important when evaluated more carefully in the light of the policies and practices of the infancy doctrine.

A. Online Contracts and Overreaching Terms

Recently we conducted a study to identify trends in contract formation online and the types of powerful terms found in the TOS agreements. Our study took us through the account creation process of ten common online service providers where we specifically noted any indication of TOS existence and acceptance. The ten service providers are the only examples we dissected and are not merely the most extreme or noteworthy examples we found. We chose the service providers listed here merely because they came to mind as key players in the industry.

[276] Daniel, *supra* note 8, at 241.

Out of the ten online services that require a personal profile to use the service, eight of them required the user signing up for the service to verify their age by entering their birth date. Most providers block sign-up attempts by anyone who has entered an age that would make them younger than thirteen years old. For example, on MySpace, and XYZ, any user who entered a birth date that would make them younger than age thirteen will be blocked from opening an account.[277] [278] Service providers are leery of pre-teens because The Children's Online Privacy Protection Act of 1998 (COPPA) requires certain protections in obtaining and using their personal information. Rather than risk liability for failure to comply with the statute, some sites are programmed to refuse access to a person who has self identified as under age thirteen.

Only one of the examined sites, eBay, had text apparent on the registration page stating that users must be 18 years or older.[279] Other sites that require age verification (MySpace, Facebook, Google, Blogger, YouTube, and Yahoo!) each have a clause in their terms of service ("TOS") agreement where the user recites age qualification.[280] The Twitter and Amazon agreements do not mention the age of the user.

The MySpace agreement includes a representation that the user is not under age thirteen *and* is over eighteen.[281] If the provider were serious about not dealing with anyone under age eighteen, it could have easily skipped the first half of the statement. It is difficult to take seriously the commitment of Online Service Providers to prohibit teenage customers when they permit users who have entered a birth date establishing they are teens to go forward, while taking the effort to block children under thirteen.

[277] http://www.myspace.com/ (click "Sign Up!")
[278] http://www.facebook.com/, http://www.google.com/(click "Sign in"; then "Create an account now"), http://www.aim.com/ (click "Launch AIM"; then "Get a user name"), http://www.youtube.com/ (click "Create Account"), http://www.skype.com/intl/en-us/home (click "Join"), http://www.yahoo.com/ (click "New Here? Sign Up").
[279] http://www.ebay.com/ (click "Register")
[280] Facebook.com, *supra* note 2, Google.com, *supra* note 2, Aim.com, *supra* note 2, Youtube.com, *supra* note 2, Skype.com, *supra* note 2.
[281] Myspace.com, Myspace.com Terms of Use and Agreement, ¶ 1 (June 25, 2009), http://www.myspace.com/Modules/Common/Pages/TermsConditions.aspx.

The provider obviously knows how to prevent registering an account to an underage user. But it still allows users under age eighteen.

Although some of the clauses typical in TOS are particularly pro-provider rather than user oriented, some common provisions included in the TOS are good public policy, even for minors. For instance, Facebook, MySpace, Twitter, AIM, and eBay all specifically prohibit cyber-bullying and harassment. The Internet and social media have the potential to be very powerful tools for networking and building friendships, but they can also occasionally be a very effective vehicle to tear down or destroy peers. In some highly publicized cases, cyber-bullying was definitely a factor in the suicide deaths of teens.[282]

There are other aspects of these TOS that are perhaps overreaching, and even scary, which we would be concerned to enforce against adults let alone vulnerable minors. In addition to the arbitration and choice of venue provisions discussed above, sites such as MySpace, Twitter, and Amazon all are given the power in the TOS to unilaterally modify the user agreement.[283] MySpace doesn't even agree to provide the user with notifications of any changes, instead explaining that it is the user's obligation to read the TOS regularly to make sure she still agrees to all the terms.[284] Other sites, such as Facebook and Club Penguin, a site created by Disney that is popular with pre-teens, claim in the TOS to have licenses to all material posted or submitted to their sites and claim the ability to copy, sublicense, and distribute that material.[285] It is indeed scary to think that sites potentially could exercise such clauses to a minor's detriment at any time.

Some of these sites do, however, include more favorable terms intended to protect minors. For example, Facebook, MySpace, Blogger, Twitter, Amazon, eBay, AIM, and Skype include provisions in

[282] Sarah Castle, *Cyberbullying on Trial: The Computer Fraud and Abuse Act and United States v. Drew*, 17 J.L. & POL'Y 579, 589 (2009).
[283] Assent in Online Contracting
[284] *Id.*
[285] Julie Cromer Young, *From the Mouths of Babes: Protecting Child Authors from Themselves*, 112 W. VA. L. REV. 431, 444–47.

their TOS stating that users "will not post,"[286] "may not include,"[287] or "should not submit"[288] pornographic or obscene content on their sites and on individual profiles.[289] These provisions and restrictions are beneficial to minors and keep the sites and profiles age-appropriate, in addition to protecting minors from sexual predators.

One must wonder how seriously to take these prohibitions and whether any enforcement mechanisms exist. The futility of such provisions might be illustrated by the attempt to compel compliance from a person who has at least some history of violating the law. Facebook's TOS includes a clause which states "You will not use Facebook if you are a convicted sex offender."[290] In addition, it seems unlikely that convicted sex offenders are any more likely to read the TOS than any of the rest of us. These prohibitions in TOS are, however, at least a positive statement of norms and disapproval of certain actions that child users would hopefully take seriously.

B. Technical Savvy Is Not Consequence Savvy

One of the common challenges to the application of the infancy doctrine in the online context is acknowledged superior expertise demonstrated by many minors. Some commentators note that minors tend to be more comfortable with the technology than many adults.[291] Some even fear that skilled minors could use the infancy doctrine to wreak havoc on innocent, unsuspecting adults.[292] At the very least, minors' technological savvy arguably challenges the presumption of unequal bargaining power, which is one of the underlying

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[286] Facebook.com, Statement of Rights and Responsibilities, ¶ 3.7 (April 22, 2010), http://www.facebook.com/terms.php.
[287] Myspace.com, *supra* note 5, at¶¶ 8.3, 8.4, 8.15, 8.17.
[288] Skype.com, Terms of service ¶15.1.5 (last visited June 30, 2010), http://www.skype.com/intl/en-us/legal/terms/voip/.
[289] http://www.facebook.com/terms.php, http://www.myspace.com/Modules/Common/Pages/TermsConditions.aspx, http://support.twitter.com/articles/18311-the-twitter-rules, http://aws.amazon.com/terms/, http://pages.ebay.com/help/policies/everyone-boards.html, http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html, http://www.aim.com/tos/tos.adp, http://www.skype.com/intl/en-us/legal/terms/voip/,
[290] Facebook.com, *supra* note 11, at ¶ 4.6.
[291] *Id.*; Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 45 (1995).
[292] *See* Daniel, *supra* note 8, at 241; DiMatteo, *supra* note 8, at 485.

assumptions of the infancy doctrine.[293] However, this argument is a red herring. It is the substantive decision to purchase a product or service and the legal implications of the often invisible and elaborate terms that give rise to the need for the infancy doctrine. The product or service may be located by browser, selected on the basis of a digital image, and captured through an electronic shopping card using a secure socket layer to transmit virtual cash. To the extent this matters, these factors may actually increase the need for the protections of the infancy doctrine. The infancy doctrine is designed to protect minors from "crafty adults" and "from their own want of sound judgment," not merely as a safeguard for minors incorrectly using the technology in the process of contracting.[294] The terms of contracts are no less dangerous when they are accepted with a click of a mouse rather than a signature on an article. Actually, many "click-wrap" contracts may be more overreaching than traditional contracts[295] because the courts have not yet fully defined the boundaries of online contracting and notice of the terms is sometimes deficient as discussed above.[296]

The scientific evidence, societal norms, legislative consensus, and judicial precedent all affirm the substantial risk that a person under age eighteen is less likely to understand and process the implications of entering a contract.[297] Minors as a result of their cognitive development, tend to overvalue potential rewards and are less able to control their impulses

[293] 43 C.J.S. *Infants* § 210 (2010); *see also* Algeria Ford, *School Liability: Holding Middle Schools Liable for Cyber-Bullying Despite their Implementation of Internet Usage Contracts*, 38 J.L. & EDUC. 535, 537 (2009) (citing Johns Hopkins Hosp. v. Pepper, 697 A.2d 1358, 1364 (1997)).
[294] 43 C.J.S. *Infants* § 210 (2010).
[295] *See* Young, *supra* note 10, at 444–47 (providing examples of some modern online sites and the overreaching agreements minors enter to use those sites).
[296] *See Assent in Online Contracting*.
[297] Brief for the American Medical Ass'n and the American Academy of Child and Adolescent Psychiatry, *supra* note 5.

and emotional regulation.[298] These qualities allow minors to be easily manipulated by crafty adults and justify the protections of the infancy doctrine. The impulsive nature of minors encourages the extension of the infancy doctrine into cyberspace where minors have even greater opportunities to enter contracts because they have access to services all day and night without leaving home. Minors' inability to fully appreciate the consequences of their actions could be felt even more so online where minors may feel empowered by their greater understanding of the tools they are using, combined with an ignorance that there are potential significant legal implications buried in a very long contract that they don't even see unless they follow a link.

While the infancy doctrine protects minors from the designs of crafty adults, it also opens the door for minors to take advantage of unsuspecting adults.[299] However, it is difficult to have pity on these adults who in most instances have the choice of whether or not to enter into contracts with minors.[300] This is analogous to a hunter who illegally hunts bald eagles and is then injured by his prey, which he knew to be dangerous when he decided to hunt them. The hunter would still be punished for his bad actions despite being the one to have suffered injury. Similarly, if an adult chooses to deal with a minor and seeks to impose legal obligations, he should not be surprised when the law allows disaffirmation of the contract by the minor. The contracting adult is in the best position to simply avoid contracting with minors altogether. The

[298] *Id.*
[299] *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 n.6 (2000); Daniel, *supra* note 8, at 241.
[300] *But see* Doe v. Sexsearch.com, 551 F.3d 412, 416–17 (6th Cir. 2008) (applying Ohio law) (addressing the very limited inquiries that some sites use to determine if a contracting party is a minor, such as merely having the user "check a box stating that he or she is at least eighteen").

concern that adults and businesses might not be able to determine who is a minor online is discussed below.

For the foregoing reasons, minors' understanding of technology does not undermine the justifications for the infancy doctrine.

C. Businesses Risks

It is beyond doubt that "children comprise a significant segment of online consumers, a segment that is rapidly enlarging."[301] One would think that merchants would be extremely reluctant to deal with minors for any transaction that is not food or clothing (and even then for most minors providing these for themselves is certainly not a "necessity" as discussed above).[302] The threat of the infancy doctrine that could render their contracts voidable could be devastating to their online businesses and fewer would choose to do business online.[303]

This is an understandable concern, however, the reality suggests that merchants are willing to take the risk in order to attract minors as customers.[304] One of the most telling weaknesses of this argument against the infancy doctrine is that online businesses are flourishing, not withering.[305] The effects of the infancy doctrine in the online realm, at least so far, are apparently minimal, and in any event, of little concern to the adults who put up websites without any attempt to determine the age of who they are dealing with. Businesses may have adapted to the legal doctrine of infancy by simply incorporating the risk into the cost

[301] Daniel, *supra* note 8, at 255 (citing RONALD J. MANN & JANE K. WINN, ELECTRONIC COMMERCE 202 (2d ed. 2005)); *see also* http://www.pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx (73% of online teens use social networking sites); Cunningham, *supra* note 42, at 293.
[302] *See* Young, *supra* note 11, at 457 ("Because most services do not meet the category of necessity or other unavoidable contract, courts have allowed minors to disaffirm their contracts for services.").
[303] *See* Daniel, *supra* note 8, at 255.
[304] *See* Ford, *supra* note 64, at 537–38.
[305] *See, supra,* text accompanying notes 7–10 for discussion of minors' prevalence in online activities.

analysis or by determining that the increased business with minors is worth the risk, especially when they hope to deter minors from asserting the doctrine by the language in their contracts and agents who promptly inform minors that, because of the statement in the online agreement that the user is age eighteen or some other provisions, the minor has waived the protection of the infancy doctrine. It is no surprise that the infancy doctrine might ultimately discourage online businesses from contracting with minors, as argued by Daniel. In fact, that is one of the stated purposes of the doctrine.[306] At a minimum, the infancy doctrine should have the effect of encouraging online businesses to treat minors fairly in order to minimize the risk of later disaffirmation of their contracts. Minors who enter fair transactions for products they want are unlikely to seek to avoid the contract. The infancy doctrine is rarely asserted when minors end up with a product or service that is satisfactory, or when the contractual terms imposed by the adult are minimal. The risk of it being used capriciously certainly exists, but there is little evidence that minors are taking advantage of this on any scale.[307] Perhaps, as discussed below, a consistent public policy urges a program to actually educate minors about the doctrine to encourage its use and send the message to adults.

D. Determining Age

The infancy doctrine, as mentioned above in Part II, provides an exception when an adult has undertaken reasonable investigation and is misled into thinking the other party is also an adult. With the anonymity that the internet provides, it can be difficult to determine whether

[306] 43 C.J.S. *Infants* § 210 (2010).

[307] The infancy doctrine itself has only been addressed in reported cases 124 times in the past ten years. Although it is impossible to determine whether the minors in each of these cases were using the doctrine capriciously, it is clear that the issue in general is not being litigated extensively nationwide. Data was gathered using Westlaw to search for "(infan! minor) /s voidable & da(last 10 years)" across all state and federal cases (last visited Aug. 5, 2010).

or not an individual is a minor. Many sites require additional registration steps if a child is under 13 to comply with COPPA.[308] However, if a child enters a birthday that indicates she is 13 to 17, there is no attempt to block registration to most sites as discussed above.[309] Websites that undertake no inquiry regarding age or allow adolescents to register freely cannot argue that the online format has hoodwinked them into dealing with a minor against their will.

Conclusion

Minors have long been held as needing protection from both adults and themselves when it comes to entering contracts. These same protections are needed for online contracts as adolescents take part in our increasingly virtual world. The typical stereotypes and observed behaviors of these adolescents that justified the infancy doctrine have been reinforced by recent neuroscience developments that suggest that the adolescent brain is not fully developed and does not function as an adult brain does.

Based on this scientific evidence, as the law relating to online contracts develops, the courts must continue to uphold the infancy doctrine to fully take account for the differences between minors and adults.

[308] 15 U.S.C.A § 6502(b)(1)(A)(ii) (West 2009). For example, Yahoo! requires an adult (determined with a valid credit card) to add the child to a family account.

[309] *See* Ryan Patrick Murray, Comment, *MySpace-ing is not a Crime: Why Breaching Terms of Service Agreements Should not Implicate the Computer Fraud and Abuse Act*, 29 LOY. L.A. ENT. L. REV. 475 (2009) (providing various examples of terms of service for websites)