Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope

Juanda Lowder Daniel*

TABLE OF CONTENTS

I. INTRODUCTION 240
II. CURRENT STATE OF THE LAW RE: INCAPACITY OF MINORS TO CONTRACT 244
A. *Common Law Minority Incapacity Doctrine* 244
B. *Exceptions* 245
1. Necessities 246
2. Emancipation 246
3. Ratification after Reaching Age of Majority 247
4. Engaging in Business as Adults 247
5. Misrepresentation of Age by a Minor 248
6. Miscellaneous Statutory Basis 248
C. *Policies Supporting the Incapacity Doctrine* 248
III. COGNITIVE DEVELOPMENT OF MINORS IN LEGAL UNDERSTANDINGS 249
A. *Cognitive Decision-Making* 250
B. *Cognitive Development in Adolescents* 251
IV. MINORS IN CYBERSPACE 254
V. PROBLEMS WITH CURRENT LAW IN A TECHNOLOGICALLY-SAVVY WORLD 256
VI. AVOIDANCE DOCTRINES AS SUFFICIENT PROTECTION 258
A. *Misrepresentation* 258
B. *Undue Influence* 259
C. *Duress* 260
D. *Unconscionability* 260
VII. TREATMENT OF MINORITY ISSUES IN OTHER AREAS OF THE LAW 261
A. *Torts* 262
B. *Crimes* 263
C. *Medical Treatment* 265
VIII. PROPOSAL FOR CHANGE IN MINORITY INCAPACITY DOCTRINE 267
IX. CONCLUSION 268

*. B.A., California State University, Dominguez Hills; J.D., Emory University; Associate Professor Law, University of La Verne College of Law, Ontario, California.

I. INTRODUCTION

[M]iserable must the condition of minors be; excluded from the society and commerce of the world.[1]

When penned well over two hundred years ago, this quote was thought to capture the sentiment that minors were blanketly regarded as incompetent to contract. However, minor's seem to have the last laugh in today's society of technologically driven commerce. In fact, minors are not excluded from the world's commerce at all; they are squarely in the middle of it. The reality is that adults have always contracted with minors in some form or fashion.[2] Major industries strategically target those under the age of eighteen, confirming that this segment of the population is viewed as an important part of the economy.[3] Other industries depend upon patronage by minors for their very existence,[4] particularly those industries that provide products and services associated with electronic commerce; and therein lies the problem.

Generally, everyone is presumed to have the capacity and power to bind himself contractually.[5] However, it is well-established that those under the age of majority are coated with a non-stick exterior in contract law, despite their objective manifestation of assent to contractual terms. The present state of the law regarding minors and contracts allows a minor to disaffirm a contract made while under the age of majority with some exceptions.[6] Moreover, the law allocates the risk of contracting with a minor to the other contracting party by establishing a bright line age rule under which the minor is conclusively presumed incompetent to contract, but only if the minor raises the issue.[7]

The long-accepted rationale for the minority incapacity doctrine has been that children lack the ability to understand and appreciate the consequences of their acts, and thus should not be inextricably bound by the consequences of their youthful follies.[8] This rationale also posits that because of their lack of capacity to understand

---

1. Zouch v. Parsons, (1765) 97 Eng. Rep. 1103, 1106-07 (K.B.).

2. *See* Jessica Krieg, Comment, *There's No Business Like Show Business: Child Entertainers and the Law*, 6 U. PA. J. LAB. & EMP. L. 429, 431 (2004).

3. *See* Bob Tedeschi, *Teenagers Are Among Online Retailers' Most Sought-After Customers. They're Also Among the Most Difficult to Reach.*, N.Y. TIMES, Feb. 28, 2005, at C3.

4. *See* E. ALLAN FARNSWORTH, CONTRACTS § 4.3 (4th ed. 2004); Robert G. Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205, 230-31 (1967).

5. *E.g.*, FARNSWORTH, *supra* note 4, § 4.2.

6. The common exceptions are discussed *infra* Section II.B.

7. *See* FARNSWORTH, *supra* note 4, §§ 4.3–4.4; *see also* Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1303 (2000).

8. *See* Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 553 (2000).

the nature of their acts, minors are vulnerable to overreaching by adults who would otherwise take advantage of their naïveté.[9]

The minority incapacity doctrine and its attending conclusive presumption have been criticized by jurists and scholars since their introduction to American jurisprudence.[10] Some scholars have questioned whether the doctrine has anything to do with the capacity of minors to form the necessary mental assent.[11] The veracity of such critiques becomes more apparent when viewed in light of the prevalence of electronic commerce in today's society.

Minors are well-versed in the use of computers and other electronic devices with Internet capacity, and navigating through cyberspace may be second nature to many minors. In fact, minors tend to be more comfortable and proficient with web-based devices than many adults.[12] In today's world of electronic contracting, minors appear to be every bit as sophisticated as merchants in maneuvering through the newfound playground of cyberspace. However, as minors engage in contracting with the use of such electronic devices, the traditional paternalistic views of minors and contracts seem to arm minors with a no-accountability shield, allowing them to wreak havoc on the electronic commerce system with little or no legal consequences.[13] Indeed, in many cases it may be the minor who is preying on unsuspecting, less-technologically savvy persons.[14] To effectively advance electronic commerce, the lack of minor accountability regarding contractual obligations must be reexamined.

Noticeably absent from the legal scheme governing rights and obligations of minors in the contracts arena is a recognition of the developmental transition between childhood and adulthood commonly referred to as adolescence.[15] Other areas of the law account for this transitional stage by allowing some degree of autonomy or liability on the part of the minor.[16] Even laws implemented for the protection of

---

9. *See* Edge, *supra* note 4, at 205, 222.

10. *E.g.*, Sternlieb v. Normandie Nat'l Sec. Corp., 188 N.E. 726, 728 (N.Y. 1934); Edge, *supra* note 4, at 213-15.

11. *E.g.*, Walter D. Navin, Jr., *The Contracts of Minors Viewed From the Perspective of Fair Exchange*, 50 N.C. L. REV. 517, 520 (1972).

12. *See* Michele N. Breen, Comment, *Personal Jurisdiction and the Internet: "Shoehorning" Cyberspace Into International Shoe*, 8 SETON HALL CONST. L.J. 763, 813 (1998).

13. *See* Edge, *supra* note 4, at 231 (discussing that the same problem occurred over forty years earlier wherein minors were allowed to launch "piratical attacks" on merchants by disaffirming contracts).

14. *See* Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 485 (1994); *see also* Los Angeles District Attorney, *Protecting Our Kids*, Case #3 and Case #4, http://da.co.la.ca.us/pok/realcases.htm (last visited Dec. 12, 2007) (detailing situations in which minors set up and used online scams offering nonexisting products and services to unsuspecting persons).

15. This stage generally refers to individuals fourteen to seventeen years of age. *See* Hartman, *supra* note 7, at 1266-67.

16. *See* Carol Sanger & Eleanor Willemsen, *Minor Changes: Emancipating Children in*

minors seeking abortion procedures require an exception to the required parental notification for "mature minors."[17] However, the law of contracts continues to adhere to the all or nothing bright line rule that age is the sole demarcation between childhood and adulthood. This is so despite the absence of empirical evidence supporting the view that those under the age of majority lack the capacity to appreciate the significance of their acts.[18]

Contract law defines an infant as a person under the age of eighteen.[19] Thus, all persons under the age of eighteen are labeled infants and deemed incapable of entering into a legally binding transaction.[20] 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.

Contract law is also inconsistent in its treatment of minors where tort issues overlap. Although a minor may be allowed to disaffirm a contract he knowingly and voluntarily entered into, he may still be liable for tortious interference with the same contract by his act of disaffirming.[21] Moreover, a minor who fraudulently represents to the other contracting party that he is of the age of majority is still allowed to disaffirm the contract in at least one jurisdiction.[22] In a number of jurisdictions, a minor who misrepresents his age when executing a contract may be held liable in tort for misrepresentation.[23]

Almost from the beginning, jurists and scholars alike have questioned the wisdom of the common law doctrine that allows a person to disaffirm a contract made while he was under the age of legal majority.[24] Nevertheless, the majority of jurisdictions in the United States still retain some form of law allowing a minor to do so.[25]

Since the introduction of the infancy doctrine to American jurisprudence, little empirical evidence has been found to support the assumption that minors lack the capacity to appreciate the legal significance of their acts or need blanket protection from their own acts, as well as the acts of others.[26] In fact, it appears that children

---

Modern Times, 25 U. MICH. J.L. REFORM 239, 243 (1992).

17. *See infra* Section VII.C for a discussion of the mature minors doctrine in the medical arena.

18. *See* Hartman, *supra* note 7, at 1267-68.

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

20. *See id.*

21. Hartman, *supra* note 7, at 1304.

22. *See* Doenges-Long Motors, Inc. v. Gillen, 328 P.2d 1077, 1082 (Colo. 1958).

23. *See id.*; *see also* Royal Finance Co. v. Shaefer, 330 S.W.2d 129, 130 (Mo. App. 1959).

24. *See, e.g.,* Sternlieb v. Normandie Nat'l Sec. Corp., 188 N.E. 726, 728 (N.Y. 1934); Edge, *supra* note 4, at 213-15.

25. *See* Edge, *supra* note 4, at 205, 208.

26. *See* Rhonda Gay Hartman, *Coming of Age: Devising Legislation for Adolescent Medical Decision-Making*, 28 AM. J.L. & MED. 409, 411 (2002); Hartman, *supra* note 7, at 1266-67.

possess more sophisticated thought processes and greater appreciation for their acts than the infancy doctrine gives them credit for.[27] This is even more evident in today's world of advanced technology, including electronic commerce, wherein children make up a significant and critical part of the consumer population.[28]

In light of the proliferation of electronic commerce and minors' use thereof, it is time to revisit the outdated notion that minors need to be protected from unscrupulous merchants seeking to take advantage of them. In the world of e-commerce, it seems impracticable to hold merchants to the strict liability standard when contracting with children. Merchants are presented with the difficulty of how to perform with due diligence in assuring that they are not dealing with a child on the other end of an electronic transaction.[29]

Instead of sweeping treatment for all minors regardless of maturity level, it is worthwhile to consider adopting laws that reflect the demonstrated legal capacities of adolescents. Minors attaining the status of adolescents should be encouraged to take responsibility for their acts, especially when they initiate the commercial transaction. Only by allowing adolescents autonomy in their contractual affairs can we achieve the worthwhile goal of encouraging acceptance of individual responsibility and accountability[30] while simultaneously nurturing the fairness in electronic commerce.

This article examines the incapacity doctrine in light of the sophisticated nature of commercial transactions in which minors are regularly engaged in today's society. Section I provides an overview of the current state of the minority incapacity doctrine in contracts and the underlying policies for the doctrine. Section II explores the cognitive development and legal socialization of minors. Section III looks at the proliferation of minors in cyberspace. Section IV highlights the problems with the current doctrine in a technologically-savvy world. Section V details the sufficient safeguards outside of the minority incapacity doctrine which address the concerns undergirding the minority incapacity doctrine. Section VI examines the treatment of minors in other areas of law. Section VII proposes a new approach to minors and contracts. Section VIII concludes with a few thoughts about the need to shed old habits.

---

27. *See infra* Part III for a discussion of the cognitive development of minors.

28. *See* Edge, *supra* note 4, at 230-31.

29. This dilemma has been recognized for ages. *See, e.g., Sternlieb*, 188 N.E. at 728 ("[H]ow are the persons dealing with them to be protected if the infant's word cannot be taken or recognized at law?").

30. *See* Hartman, *supra* note 7, at 1268.

II. CURRENT STATE OF THE LAW RE: INCAPACITY OF MINORS TO CONTRACT[31]

A. *Common Law Minority Incapacity Doctrine*

Currently, most if not all jurisdictions allow a minor to disaffirm a contract made while he was under the age of majority solely based on his status as a minor.[32] However, this is a one-way street, meaning the other party to the contract does not have the same power to disaffirm the contract.[33] Thus, the contract is said to be voidable at the option of the minor.[34] If the minor is perfectly content to go through with the contract, the other party has no cause for complaint based on incapacity.[35] It is also commonly acknowledged that such a contract may be disaffirmed by the minor either before or after reaching the age of majority[36] and may be done expressly by words or implicitly by conduct conveying an unwillingness to be bound by the contract.[37] However, in order for the disaffirmance to be effective, the minor must disaffirm the entire contract[38] within a reasonable time of reaching the age of majority.[39]

The arbitrary age of eighteen, the statutory age of majority in most jurisdictions, has nothing to do with whether a person is actually capable of giving consent to the transaction. This is illustrated by the lack of inquiry into whether the minor actually understood the nature and consequences of his actions. The incapacity doctrine is also arbitrary in that a person can be deemed incapable of giving consent one day, but instantly gain contractual capacity if his eighteenth birthday happens to be the next day.

At one point, the age of majority was set at twenty-one years of age.[40] However, it was reduced to eighteen in many jurisdictions to coincide with the lowering of the voting age.[41] This sweeping change in the age of majority with a simple stroke of a pen further demonstrates that arbitrary age limits are not an appropriate means of determining true contractual capacity. The fact that a twenty-year-old person could

---

31. For a discussion of the origin and development of the Minority Incapacity Doctrine, *see* DiMatteo, *supra* note 14, at 485–501.

32. *See* FARNSWORTH, *supra* note 4, § 4.3.

33. *See id.* § 4.4.

34. The minor's legal representatives or guardian may also exercise the option to disaffirm. *See id.*; *see also* Crockett Motor Co. v. Thompson, 6 S.W.2d 834, 835 (Ark. 1928) (allowing the guardian or guardian ad litem to disaffirm a contract on behalf of the minor).

35. FARNSWORTH, *supra* note 4, § 4.4.

36. *Id.*

37. *Id.*

38. *Id.*; *see also* Putman v. Deinhamer, 70 N.W.2d 652, 655-56 (Wis. 1955) (holding that the minor's attempt to disaffirm only disadvantaged portions of the contract improper and ineffective).

39. *See* FARNSWORTH, *supra* note 4, § 4.4.

40. *See id.* § 4.3.

41. *Id.*

be generally regarded as incapable of contracting on one day and legally capable of contracting the next day due to a legislative enactment highlights the lack of consideration given to a person's actual cognitive abilities under the current scheme.

Even though a minor has the ability to disaffirm a contract, most jurisdictions have laws that hold a minor accountable in some fashion for the benefits he received under the contract by way of restitution.[42] However, the extent of this accountability varies greatly from state to state. It is generally agreed that once the minor disaffirms a contract, the minor is required to return the goods or other benefits he received under the contract if he still has them in his possession.[43] Most states take the position that the minor only has to account for the benefits still in his possession.[44] Thus, if the goods received were used, damaged, lost, stolen or otherwise decreased in value, the minor is not accountable to the other party for the loss.[45] Such losses are said to be "the result of the very improvidence and indiscretion of infancy which the law has always in mind."[46] In contrast, a minority of states allow the other contracting party to recover the full value of the benefit received by the minor.[47]

Regardless of the extent of restitution allowed by a jurisdiction, the purpose of restitution is to prevent unjust enrichment.[48] Thus, any recovery against a minor based on restitution seems to imply that the minor has worked an injustice against the other party by obtaining benefits and services and not being contractually obligated to perform in return. This flies in the face of the policy undergirding the minority incapacity doctrine, which is to prevent the other party from working an injustice against an unsuspecting minor. Thus, the unraveling of the antiquated justification for the minority incapacity doctrine begins.

B. *Exceptions*

Despite the continued existence of the minority incapacity doctrine in American jurisprudence, jurists and scholars alike have recognized the need to temper the conclusive presumption of minors' incapacity to contract.[49] In light of the harshness of the rule allowing minors to disaffirm contracts at their option, most jurisdictions recognize exceptions based in part on equitable grounds.

---

42. *Id.* § 4.5.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* (quoting Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 726 (Me. 1924)).
47. *See id.*
48. *Id.* § 12.19.
49. *See* DiMatteo, *supra* note 14, at 485.

1. Necessities

The most common exception to the minority incapacity doctrine is that minors may not disaffirm contracts for necessities.[50] This exception exists in order to ensure that others are willing to contract with minors when the minors are in need of goods and services necessary to sustain life.[51] However, whether the subject matter of the contract constitutes a "necessity" is not so clear-cut. In most cases, this is a question of fact depending on the minor's station in life.[52] In some cases, contracts for shelter, food, and clothing may be found to be necessities.[53] However, if the minor is receiving such items from his parents, they will not be deemed necessities.[54] This determination is not made until the parties are embroiled in litigation, which is troublesome to the other contracting party taking the risk of having the minor being allowed to disaffirm at some later point in time should the factual determination conclude the contract was not for necessities.

Even where the contract is found to be for necessities, the minor's liability is generally not based on the express terms of the contract. Instead, liability is imposed on a quasi-contractual theory making the minor liable only for the reasonable value of the goods or services.[55]

2. Emancipation

Another common exception involves minors who have been emancipated and thus recognized as adults for contract purposes. Generally, this category of minors may not assert lack of capacity as a defense to enforcement of a contract made while still a minor.[56] Based on the same premise as the necessities exception, the rationale for the emancipation exception is that society should encourage merchants to contract with emancipated minors by assuring merchants that such contracts will not be subject to voidability by the minor based solely on his status as a minor.[57] Lest, emancipated minors would not be able to handle their general affairs.

---

50. *See* FARNSWORTH, *supra* note 4, § 4.5.

51. *Id.*

52. *See, e.g.*, Valencia v. White, 654 P.2d 287, 289 (Ariz. Ct. App. 1982) ("Whether contracts of a minor are for necessities is ultimately a question of fact.").

53. *See* FARNSWORTH, *supra* note 4, § 4.5.

54. *See id.*

55. 5 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 9.18 (Richard A. Lord ed., 4th ed. 1993).

56. *But see* Mitchell *ex rel.* Fee v. Mitchell, 963 S.W.2d 222, 223 (Ky. Ct. App. 1998).

57. *See* HOWARD O. HUNTER & KEITH A. ROWLEY, MODERN LAW OF CONTRACTS § 2:6 (Supp. 2007).

The determination of which minors fall under the emancipated exception varies from state to state. In some states, a married minor is considered emancipated.[58] However, other states refuse to equate a minor's decision to marry with maturity.[59] As one court noted,

> We cannot adopt a rule that marriage by the minor somehow classifies him as more mature and intelligent than his unmarried counterpart. We . . . find that logic and common sense would not encourage such a result since marriage by a minor too frequently may itself be indicative of a lack of wisdom and maturity.[60]

Thus, even where emancipation is recognized as an exception to the minority incapacity doctrine, it may not be indicative of whether the minor is mature enough to understand the significance of contractual undertakings.

3. Ratification after Reaching Age of Majority

Once a minor reaches the age of majority, any act construed as a ratification of the contract made while he was a minor cuts off the power to disaffirm.[61] Such acts may take the form of an expressed ratification, as in the case of a verbal or written intent to be bound, or an implicit ratification, where the benefits of the contract are accepted after reaching the age of majority.[62] Although it is often said that failure to disaffirm the contract within a reasonable time of reaching the age of majority constitutes an implied ratification, in reality, few courts have determined that a delay in seeking disaffirmance is unreasonable in the absence of actual reliance by the other party.[63]

4. Engaging in Business as Adults

A few states have exceptions for minors engaged in business as adults.[64] However, the majority of jurisdictions do not make an exception for merchant minors, despite the level of sophistication demonstrated by the very act of operating a

---

58. *See, e.g.*, UTAH CODE ANN. § 15-2-1 (WEST 2007); State *ex rel.* Scott v. Lowell, 80 N.W. 877, 878 (Minn. 1899).

59. *See Mitchell*, 963 S.W.2d at 223.

60. *Id.*

61. FARNSWORTH, *supra* note 4, § 4.4.

62. *See, e.g.*, Bobby Floars Toyota, Inc. v. Smith, 269 S.E.2d 320, 323 (N.C. Ct. App. 1980).

63. *See* FARNSWORTH, *supra* note 4, § 4.4; *see also* Cassella v. Tiberio, 80 N.E.2d 426 (Ohio 1948) (finding that an 11-year delay in seeking disaffirmance did not amount to a ratification).

64. FARNSWORTH, *supra* note 4, § 4.3; *see, e.g.*, GA. CODE ANN. §13-3-21 (West 2007); KAN. STAT. ANN. § 38-103 (2006).

commercial enterprise.[65] Failing to create an exception for minors who engage in business as adults is especially problematic in the world of electronic commerce since a contracting party may not realize that an online business might be operated by a merchant minor with the power to disaffirm contractual obligations.

5. Misrepresentation of Age by a Minor

One exception that has failed to gain any sense of consensus involves contract situations where the minor misrepresented his age in entering into the contract. Some states treat this as an exception in which the minor can be estopped from asserting his status as a minor.[66] Of the states that recognize this exception, some require the misrepresentation be in writing in order to prevent the minor from disaffirming.[67] However, not all states take the position that a minor is stripped of his ability to disaffirm a contract he induced by misrepresenting his age, irrespective of how the misrepresentation was made.[68]

6. Miscellaneous Statutory Basis

In addition to the generally-recognized exceptions discussed above, various states have enacted statutes that carve out exceptions for certain transactions on policy grounds that outweigh the perceived need for protecting minors from themselves and others. For example, educational loans are commonly statutorily exempt from the minor's power to disaffirm,[69] as are contracts for insurance.[70]

Interestingly enough, in regarding these transactions as fully enforceable despite the minor's age, there is no consideration given to either the general notion that minors are incapable of contracting or the actual capacity of the individual minor to understand the nature of his actions. Once again, social policies dictate the need to enforce such contracts at the expense of the minor's need for protection.

C. *Policies Supporting the Incapacity Doctrine*

Immaturity is commonly viewed as a defect in formation that allows the immature party to avoid the contract in order to protect him from his own "improvident acts and from imposition by others."[71] Minors are relegated to a special

65. *See, e.g.*, Valencia v. White, 654 P.2d 287 (Ariz. Ct. App. 1982).

66. *See* IOWA CODE ANN. § 599.3 (West 2007); KAN. STAT. ANN. § 38-103 (2006); UTAH CODE ANN. § 15-2-3 (West 2007); WASH. REV. CODE ANN. § 26.28.040 (West 2007).

67. *See, e.g.*, Martin v. Stewart Motor Sales, 73 N.W.2d 1, 4 (Iowa 1955).

68. *See, e.g.*, Sternlieb v. Normandie Nat'l Sec. Corp., 188 N.E. 726, 726, 728 (N.Y. 1934).

69. *E.g*, N.Y. EDUC. LAW § 281 (McKinney 2007).

70. *E.g.*, ALA. CODE § 27-14-5(b) (2007).

71. FARNSWORTH, *supra* note 4, § 4.2.

status because they are generally viewed as vulnerable and believed to lack the required ability to evaluate their choices thoroughly and competently.[72]

Instead of attempting to determine whether the minor is competent to contract, common law takes a hard-line approach to the matter, determining all minors to be legally incapable of consenting to a contract. The lack of a case-by-case inquiry into whether the minor actually possesses the degree of maturity and sophistication necessary to appreciate the significance of his acts is attributed to the perceived high costs and low reliability of such an approach.[73] However, it is worth noting that the determination of whether certain exceptions apply naturally entails a case-by-case inquiry.[74] Thus, such an individualized approach to the issue does not seem to pose any additional burdens.

III. COGNITIVE DEVELOPMENT OF MINORS IN LEGAL UNDERSTANDINGS

Cognitive development reflects a person's capacity for legal reasoning as demonstrated by the ability to engage in basic problem solving, as well as to understand and appreciate one's legal rights and responsibilities.[75] As one scholar notes, "legal reasoning involves perceiving, appraising, interpreting, evaluating, and ultimately choosing among 'legal truths.'"[76] Cognitive development has also been described as a conceptual framework within which a person interprets and defines rules affecting his societal rights and obligations.[77]

Closely related to legal reasoning is legal socialization,[78] the goal of which "is to stimulate the efficient, accommodative, and principled legal development of both the individual and systems of law."[79] To this end, legal socializers encourage giving individuals as much autonomy as possible in order to spur development of their comprehensive reasoning and problem-solving skills.[80]

The minority incapacity doctrine is premised on the ancient belief that minors lack cognitive decision-making capacity and are thus not able to comprehend the

---

72. *See* FED. TRADE COMM'N, PRIVACY ONLINE: A REPORT TO CONGRESS 12 (1998), *available at* http://www.ftc.gov/reports/privacy3/priv-23a.pdf.

73. *See* FARNSWORTH, *supra* note 4, § 4.2.

74. *See, e.g.*, Valencia v. White, 654 P.2d 287, 289 (Ariz. Ct. App. 1982) (stating that the determination of whether a minor contracted for necessities is a question of fact to be determined on a case-by-case basis).

75. *See* June Louin Tapp & Felice J. Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1, 2 (1974).

76. *Id.* at 1 n.1.

77. *Id.* at 19.

78. *Id.* at 4 ("The term 'legal socialization' refers to the development of values, attitudes, and behaviors toward law. It focuses on the individual's standards for making sociological judgments and for resolving conflicts, pressing claims, and settling disputes.").

79. *Id.*

80. *Id.*

extent of their rights and responsibilities in a commercial setting.[81] However, social science tells a different story.

A. *Cognitive Decision-Making*

The nature of a bargained-for-exchange assumes that contracting parties engage in rational deliberation about a contemplated transaction and choose to act or not act in order to maximize their personal gain.[82] The rational-choice model presumes that decision makers are aware of all relevant information about the choices they must make, including all feasible alternatives, and based on such information, will make the decision that yields the best outcome or an "optimal substantive decision."[83]

Unfortunately, the empirical data does not support this basic assumption. According to recent studies, parties routinely deviate from the rational-choice or expected utility model based on various limits of cognition.[84] At one end of the cognitive spectrum is a transaction in which at least one actor's ability to make rational choices is impaired because the actor lacks cognitive capacity.[85] Lack of capacity is generally described as the inability to understand the nature and consequences of one's own acts, resulting in the lack of ability to engage in rational decision-making.[86] This includes diminished mental capacity, as well as other situations wherein the actor's cognitive abilities have not fully developed.[87] At the other end of the spectrum is a transaction in which an actor has the capacity to engage in rational decision-making, but his ability is impaired by some force outside of his immediate control.[88] This would include transactions consummated under circumstances of mistake, fraud, undue influence, duress, or unconscionability.[89] However, common law limits strict enforcement of such bargains based on various avoidance doctrines.

All of the other limits of cognition fall somewhere between the two extremes and seem to arise from the actor's failure to become a fully-informed market participant

---

81. *See* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 212 (1995).

82. *Id.*

83. *Id.* at 214; *see also* Juanda Lowder Daniel & Kevin Scott Marshall, *Avoiding Economic Waste in Contract Damages: Myths, Misunderstanding, and Malcontent*, 85 NEB. L. REV. 875, 892-93 (2007) (noting economic rationality dictates that market participants are fully apprised of all costs and benefits associated with their respective choices and only choose to engage in an activity if the benefits outweigh the costs).

84. Eisenberg, *supra* note 81, at 213.

85. The term "lack of capacity" generally describes a person who is not competent to comprehend and appreciate "the nature and consequences of his acts." *Id.* at 212.

86. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 12–15 (1979)).

87. *See* RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981).

88. *See id.* at ch.7, introductory note.

89. *See id.* §§ 174-75, 177.

by placing voluntary limits on his cognition. For example, it appears that the average contracting party makes a conscious decision not to seek out and consider all relevant information relating to the subject matter prior to entering into a contract. Instead, the contracting party informally weighs the costs associated with obtaining and processing all relevant information against the foreseeable risks of having to deal with an undesired event and chooses a *satisfactory* course of action as opposed to an *optimal* decision.[90] Thus, "actors will make decisions in a state of rational ignorance of alternatives and consequences that could have been discovered and considered if search and processing had continued."[91]

Another reason for routine deviation from the rational-choice model is that most actors simply do not fully evaluate every aspect of their respective choices even when the information is readily available to them.[92] Reasons for this failure range from the fact that people are naturally overly optimistic about the outcome of their activities even in the face of contrary information,[93] to a natural gravitation toward certain information based on the way it is presented to them.[94]

Regardless of the cause, contracting parties routinely deviate from the rational-choice scenario. However, unless the deviation rises to the level of inherent or external impairment of the ability to fully ascertain all aspects of the decision, the law does not come to the aid of the actor making a decision in a state of rational ignorance.

Ironically, the "voluntary" limits of cognition under which the majority of society operates in contracting scenarios mirrors the perception driving the minority incapacity to contract, to wit, that minors are likely to act with a lack of full knowledge concerning all available options. Thus, no apparent difference exists between the actual behavior of adults and minors to warrant a protective shield for minors.

B. *Cognitive Development in Adolescents*

As discussed above, minors are generally regarded as vulnerable. However, two divergent schools of thought emerge wherein the segment of minors falling within the adolescent classification are encouraged to exercise autonomy over their affairs. Persons within these two schools of thought are commonly referred to as "child savers" and "kiddie libbers," respectively.[95]

---

90. Eisenberg, *supra* note 81, at 214.

91. *Id.* at 215.

92. *Id.* at 216.

93. *Id.*

94. *Id.* at 218-20.

95. Mark A. Small & Susan P. Limber, *Advocacy for Children's Rights*, *in* CHILDREN, SOCIAL SCIENCE, AND THE LAW 51, 56-57 (Bette L. Bottoms et al. eds., 2002).

The "child-savers" adhere to the notion that minors not only deserve protection, but also should be afforded certain basic rights.[96] On the other hand, the "kidder libbers" advance independence and autonomy on the part of mature minors.[97] Most legal doctrines affecting children appear to reflect something of a compromise between these two competing concepts.[98] However, as discussed more fully below, few if any legal doctrines advance the nurturance right platform of the child-savers as rigidly as the minority incapacity to contract doctrine.

In line with the philosophy of the child-savers, minors are commonly regarded as too immature to be bound to contracts made while under the age of majority.[99] Alas, social science evidence demonstrating the contrary has been "eyed warily rather than wholeheartedly accepted" by the courts.[100]

In spite of the general sentiment that children are too immature to appreciate the significance of their acts, empirical data confirms that children are capable of understanding the nature of their legal rights and responsibilities considerably before reaching the age of majority.[101]

One study examined children's understanding of the law using a three-stage model of cognitive development for moral development and legal reasoning.[102] The first stage of preconventional relates to law-obeying.[103] Here, legal reasoning is manifested in terms of obeying the law purely out of fear for the consequences of disobedience.[104] Additionally, preconventional is the basis for deference to authority.[105] This stage does not reflect an appreciation of the generality of law.[106] Stage two is the conventional or maintaining law-and-order stage.[107] This stage reflects an understanding of the expectations of society and an awareness that

96. *See* Melinda G. Schmidt & N. Dickon Reppucci, *Children's Rights and Capacities*, *in* CHILDREN, SOCIAL SCIENCE, AND THE LAW, *supra* note 95, at 76, 77.

97. *See id.*

98. *See, e.g.*, Todd v. Orcutt, 183 P. 963, 964 (Cal. Dist. Ct. App.) (discussing the standard for contributing negligence as it applies to children); Johnson v. Pettigrew, 595 N.E.2d 747, 750-51 (Ind. Ct. App. 1992) (discussing the standard for premises liability as it applies to children).

99. *See* Howard Gensler, *The Competitive Market Model of Contracts*, 99 COM. L.J. 384, 387 (1994).

100. *See* Schmidt & Reppucci, *supra* note 96, at 87.

101. *See* Hartman, *supra* note 7, at 1286 (discussing a series of studies suggesting that at the age of fourteen an individual possesses "cognitive capability to reason, understand, appreciate, and articulate decisions comparable to young adults").

102. *See* Schmidt & Reppucci, *supra* note 96, at 89 (citing Tapp & Levine, *supra* note 75, at 20).

103. *See* Tapp & Levine, *supra* note 75, at 21.

104. *Id.*

105. *See id.*

106. *Id.*

107. *Id.* at 21-22.

adherence to such expectations is essential to maintain an orderly society.[108] Stage three, post-conventional, relates to law-making orientation wherein individuals display complete understanding of the need for social systems but are not constrained by the dictates of the existing system.[109] Here, individuals are capable of evaluating the system and making independent judgments about the need for refinement.[110]

This study concluded that while most individuals have the ability to reach the highest level of post-conventional development,[111] most adults operate at the conventional level.[112] The study further concluded that children transition from the preconventional law-obeying level of legal reasoning to the conventional level of law-and-order maintenance during adolescence.[113] Generally, this shift occurs between the ages of twelve and fourteen.[114] Moreover, it appears that a person's intelligence level does not advance beyond that which he attains between the ages of fourteen and sixteen, regardless of external stimuli.[115] Thus, ample evidence is present to substantiate the belief that minors attaining adolescence possess and demonstrate decision-making capacities comparable to adults.[116]

Social science seems to reflect that adolescents possess decision-making maturity on par with adults. Moreover, the legal system has begun to recognize adolescents as separate and distinct from children and adults in many areas of the law.[117] However, courts continue to grapple with whether to accord autonomy in decision-making to adolescents in recognition of their cognitive development capacities.[118]

The common law system of shielding adolescents from legal consequences in the contract arena appears to run counter to the goal of legal socialization. If this category of minors displays the capacity to appreciate the significance of their actions before reaching the age of majority, we seem to do them more harm than good by allowing them to act without regard for their actions. When we allow them to shirk

---

108. *Id.*

109. *Id.* at 22.

110. *Id.*

111. *Id.* at 26.

112. Schmidt & Reppucci, *supra* note 96, at 89 (citing Tapp & Levine, *supra* note 75, at 25-26, 31, 62).

113. *Id.* (citing Tapp & Levine, *supra* note 75, at 24-25).

114. *Id.* at 90 (citing Karen J. Saywitz, *Children's Conceptions of the Legal System: Court Is a Place to Play Basketball*, *in* PERSPECTIVES ON CHILDREN'S TESTIMONY 131, 151 (S.J. Ceci et al. eds., 1988)).

115. Edge, *supra* note 4, at 224 (quoting SUSAN ISAACS, INTELLECTUAL GROWTH IN YOUNG CHILDREN 60 (1930)).

116. *See* Hartman, *supra* note 26, at 423 (noting that the same capacity for decision making was not observed in minors under the age of fourteen).

117. *See* Schmidt & Reppucci, *supra* note 96, at 88.

118. *See id.*

responsibilities, this encourages an attitude of callousness as opposed to encouraging the development of their reasoning principles for analyzing complex problems. In turn, this sends a mixed message to minors regarding expectations for their compliance with the law.[119] As noted by a social scientists,

> Ultimately, the law's role and efficacy will be measured by its success in moving humankind to attitudes and acts of justice. If legal rules are incongruent with the "law-consciousness" of the people, modes of deviance, dissent, and distrust will prevail, and the probability of stimulating a high-order sense of legality in both individuals and institutions will be substantially reduced.[120]

IV. MINORS IN CYBERSPACE

It should be apparent that the minors of today are not the same wide-eyed, unsophisticated tots imagined by crafters of the minority incapacity doctrine. Over forty years ago, a scholar noted,

> The minor has long remained a special charge of the law. But in our fast-moving and rapidly changing society, the ancient timeworn cloak of protection thrown over him has long since lost its real need or useful purpose. The technologically oriented and knowledgeably mature youth of our hectic age is not at all comparable to the minor of even five or six decades ago who needed the solicitous attention and protection the law so thoughtfully afforded him.[121]

Since this observation was penned, society has experienced the technological revolution spurred by the proliferation of personal computers, the Internet, and MySpace. Today, a new generation of computer-savvy minors sits confidently in front of their computer screens fearlessly and effortlessly initiating a multitude of contacts in cyberspace. The fact that minors are more comfortable and proficient in navigating through cyberspace than many adults suggests that minors comprise a significant segment of the virtual world.[122] According to a 1998 Federal Trade Commission report to Congress, approximately 10 million children in America have access to the Internet.[123] Recent studies reveal that 99% of all schools have Internet access.[124] Moreover, the percentage of individuals age eighteen and under who use the Internet is approaching 100%.[125]

---

119. *See* Tapp & Levine, *supra* note 75, at 6.

120. *Id.* at 6-7.

121. Irving M. Mehler, *Infant Contractual Responsibility: A Time for Reappraisal and Realistic Adjustment?*, 11 U. KAN. L. REV. 361, 373 (1963).

122. *See* Breen, *supra* note 12, at 813.

123. FED. TRADE COMM'N, *supra* note 72, at 4.

124. *See* USC ANNENBERG SCHOOL CENTER FOR THE DIGITAL FUTURE, THE DIGITAL FUTURE REPORT: SURVEYING THE DIGITAL FUTURE, YEAR FOUR 20 (2004), *available at*

Minors are online in astronomical numbers engaging in electronic commerce. The trend that young children are buying goods and services electronically exists.[126] In fact, children comprise a significant segment of online consumers, a segment that is rapidly enlarging.[127] While the legal community may not be adapted to the rampant involvement of children in electronic contracting, merchants have not missed it. Merchants recognize that children are consumers in their own right with strong purchasing power[128] and in some cases depend on patronage by minors for their very existence.[129] However, merchants are nevertheless forced to reckon with the minority incapacity doctrine, despite the level of sophistication demonstrated by minors in their interactions in cyberspace.

Minors online are not only engaging in electronic commerce spurred by their initiation, but they are also engaging in sophisticated untoward behavior. Courts are increasingly facing matters involving sophisticated minors and their unauthorized computer-related activities.[130] Recognizing the technological sophistication of minors, law enforcement agencies are taking proactive measures to alert parents of the potential that their children may be engaging in online criminal activity.[131] In light of technological advancements and the sophistication of minors, it is befitting that the need for continued adherence to the long-standing minority incapacity doctrine be closely scrutinized against the backdrop of social science demonstrating the cognitive abilities and decision-making capacities of adolescents.

In spite of the increased sophistication of minors in perpetrating electronic misdeeds, minors continue to enjoy significant legislative protection. There is still a general recognition that minors deserve protection from their online escapades. Legislators have come to the aid of minors in this area. In 1998, the federal

---

http://www.digitalcenter.org/downloads/DigitalFutureReport-Year4-2004.pdf.

125. USC ANNENBERG SCHOOL CENTER FOR THE DIGITAL FUTURE, THE 2007 DIGITAL FUTURE REPORT: SURVEYING THE DIGITAL FUTURE, YEAR SIX 31 (2007).

126. *See, e.g.*, Lisa M. Byerly, Comment, *Look and Feel Protection of Web Site User Interfaces: Copyright or Trade Dress?*, 14 SANTA CLARA COMPUTER & HIGH TECH. L.J. 221, 263 (1998).

127. RONALD J. MANN & JANE K. WINN, ELECTRONIC COMMERCE 202 (2d ed. 2005).

128. FED. TRADE COMM'N, *supra* note 72, at 4.

129. *See* FARNSWORTH, *supra* note 4, § 4.3; Edge, *supra* note 4, at 230-31.

130. *See, e.g.*, Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 822-23 (7th Cir. 1998) (involving a high school junior who published an article in an underground school newspaper detailing how to hack into the school's computer system and ascertain passwords for accessing information on the computer system); *see also* A.B. v. State, 863 N.E.2d 1212, 1214-15 (Ind. Ct. App. 2007) (involving a middle school student who created a derogatory webpage under the principal's identity), *vacated*, petition to transfer granted by Indiana Supreme Court.

131. *See* Ventura County District Attorney, Juvenile Crime Online, http://da.countyofventura.org/internet_safety/Juvenile_Crime_Online.htm (last visited Dec. 11, 2007); County of Los Angeles District Attorney, Protecting Our Kids, Juvenile Crime Online, http://da.co.la.ca.us/pok/juvcrime.htm (last visited Dec. 11, 2007).

government enacted the Children's Online Privacy Act,[132] which requires operators of commercial websites targeted at minors to obtain parental consent prior to obtaining any personal information from children under the age of thirteen.[133] However, online merchants need not obtain parental consent to collect information from minors over the age of thirteen. It is telling that even federal legislators recognize the need to distinguish between young children and adolescents in terms of the need for protection from the threat of overreaching by others.[134]

V. PROBLEMS WITH CURRENT LAW IN A TECHNOLOGICALLY-SAVVY WORLD

The root of the problem with the current minority incapacity doctrine is the classification of all persons under the age of eighteen as "infants." This label alone carries an unsupported perception that such "infants" are incapable of engaging in cognitive decision-making, and are thus in need of protection from themselves, as well as from others. Referring to a seventeen-year-old as an infant is just as preposterous as the notion that the cognitive decision-making ability mystically appears on his eighteenth birthday. The all or nothing classification fails to recognize the process by which minors develop into autonomous individuals with appreciation of their societal rights and responsibilities. This failure is especially crippling given the technological sophistication of minors and the relative ease with which minors contract with unsuspecting merchants in cyberspace.

In addition to the one-size-fits-all classification of "infant," the minority incapacity doctrine runs afoul of the goal of legal socialization and counteracts the maturation process whereby minors are encouraged to be accountable and accept responsibility for their actions. Although the minority incapacity doctrine was initially intended to be used only as a shield and not as a sword,[135] in many cases this is a distinction without a difference. Generally, it is acknowledged that a minor may institute an action to disaffirm a contract and is not relegated to using his minority status as a defense.[136] However, some states go even further by allowing the minor to recover the money paid on the contract without having to account for damages to the other party.[137]

---

132. 15 U.S.C. §§ 6501-6506 (2000).

133. *See* Anita L Allen, *Minor Distractions: Children, Privacy and E-Commerce*, 38 HOUS. L. REV. 751, 758 (2001) (providing an in-depth discussion of the Children Online Privacy Protection Act).

134. *See id.* at 759 (stating that the Federal Trade Commission uses the age of thirteen as the cutoff distinguishing between adolescents and children for affording special protection under COPPA).

135. *See* Rice v. Butler, 55 N.E. 275, 276 (N.Y. 1899) (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 240 (3d ed. 1836)).

136. *See, e.g.*, Valencia v. White, 654 P.2d 287 (Ariz. Ct. App. 1982) (holding that a minor must return the property entrusted to him as a result of his disaffirmance).

137. *See* Halbman v. Lemke, 298 N.W.2d 562, 567 (Wis. 1980) (holding that the disaffirming

Surely, it is not by happenstance that the majority of instances wherein minors seek disaffirmance have involved contracts entered into by minors near the age of majority.[138] Rare is the case that a young child enters into a contract and later seeks to be relieved from his contractual obligations. Thus, the goal of protecting the vulnerable unsophisticated child from overreaching by others, as well as his own improvident acts, is not being fulfilled. Instead, the present doctrine has the effect of providing adolescents with weapons for shirking responsibilities undertaken with full understanding and appreciation of their acts. Thus, the situations in which the minority incapacity doctrine has been applied present a compelling case for recognizing the contractual capacity of adolescents. More than anything, the current doctrine appears to provide conniving adolescents with a free pass, effectively discouraging any sense of accountability.

Even before the proliferation of electronic transactions, merchants faced an almost insurmountable task in attempting to ascertain whether the party with whom they were dealing was actually of the age of majority. Many courts have declined to allow the merchant to rely on a simple statement attesting that the other party was of a suitable age.[139] Instead, courts have considered whether the merchant took all possible steps, including requesting that the contracting party provide proof of his age.[140]

Due to the dramatic increase in electronic business transactions, it is generally perceived that businesses are taking more precautions to guard against risks of faulty transactions.[141] However, at some point we must recognize that a merchant can only do so much in the electronic commerce setting to assure that he is dealing with an adult on the other end of the transaction. Moreover, how is a merchant in e-commerce to determine whether the items contracted for are necessities that would strip the minor's power to disaffirm the contract? Necessities are determined as a question of fact in light of the circumstances surrounding the making of the contract and the minor's particular situation.[142] If merchants see the risk of contracting with minors and their unfettered ability to disaffirm the transaction as outweighing the

---

minor was not required to make restitution even if capable of doing so); Weisbrook v. Clyde C. Netzley, Inc., 374 N.E.2d 1102, 1107 (Ill. App. Ct. 1978).

138. *E.g.*, *White*, 654 P.2d at 288-89 (minor sought to disaffirm a contract he made within a year of attaining the age of majority); Byers v. Lemay Bank & Trust Co., 282 S.W.2d 512 (Mo. 1955) (minor sought to disaffirm a contract executed within the six month period prior to reaching the age of majority).

139. *See, e.g.*, Kiefer v. Fred Howe Motors, Inc., 158 N.W.2d 288, 293 (Wis. 1968) (discussing the merchant's failure to ask for identification in connection with liability for tortious misrepresentation even after the minor signed a statement attesting that he was over the age of majority).

140. *See, e.g.*, *id.*

141. *See* Jared Sommer, Comment, *Electronic Signatures and the UETA: E-Commerce in an Insecure E-World*, 37 IDAHO L. REV. 507, 507 (2001).

142. *See, e.g.*, *White*, 654 P.2d at 289.

benefits of readily engaging in e-commerce, they will have little incentive to fully immerse in the electronic transaction setting. Thus, society will lose the convenience of this technology.[143]

Lastly, continued adherence to the general notion that minors lack the capacity to contract simply ignores the fact that minors make up a significant segment of the consumer pool and are contracting on a grand scale.[144] Moreover, it overlooks the fact that merchants welcome and depend on this major consumer segment.[145] Instead of ignoring the elephant in the room, it seems wise for lawmakers to recognize the current state of things and craft rules to facilitate the orderly transaction of commerce involving minors in the electronic arena in an efficient and equitable fashion.

As currently applied, the minority incapacity doctrine poses a seemingly insurmountable dilemma for merchants desiring to afford customers the convenience of electronic transactions, while simultaneously taking all reasonable steps to ensure that such transactions will be deemed valid and enforceable. Without changing the way minors are viewed under the current law, society will likely bear the burdens of being denied access to an expanding world of e-commerce.

VI. AVOIDANCE DOCTRINES AS SUFFICIENT PROTECTION

One of the policies driving the current view of minority incapacity to contract stems from the perceived need to protect minors from overreaching by adults. This view presumes adults will engage in improper behavior in the course of the bargaining process, thereby preventing minors from making informed choices. While the policy is sound, the current minority incapacity doctrine seems to lose sight of the fact that all contracting parties, including minors, have at their disposal long-standing avoidance doctrines to address situations wherein reprehensible overreaching by the other party is present. Such doctrines operate to prevent unfair exploitation where the parties may not be on equal footing at the time of contracting. It is worthwhile to highlight a few avoidance doctrines well suited to achieve the same purpose.

A. *Misrepresentation*

When a person is induced to enter into a contract by a representation later discovered to be untrue, he may avoid the contract by demonstrating the assent to the contract was induced by a false representation. The false representation may be either

143. This is likely to be more of an issue for small businesses that do not have the luxury of writing off the disaffirmed transactions as a cost of doing business. Thus, the advantage is given to big businesses.

144. *See* Edge, *supra* note 4, at 228.

145. *See id.* at 230-31.

material[146] to the transaction or made with knowledge of its falsity and the intent to deceive, and the person to whom the misrepresentation was made must actually and justifiably rely on the assertion in assenting to the contract.[147]

This doctrine serves to ensure that minors and non-minors alike are not forced to fulfill contracts procured based on false information rendered by the other party.[148] Where a minor does not have the same level of experience or sophistication that would alert him to the probable falsity of the information, he is permitted to disaffirm the contract.[149] Thus, the threat of a minor, or anyone, finding himself helplessly bound to a contract to which he objectively assented based on false information is already accounted for by the doctrine of misrepresentation.

B. *Undue Influence*

Undue influence, as opposed to legitimate persuasion, provides another justification for avoiding a contract. This doctrine seeks to protect a party from the effects of an unfair transaction procured by improper persuasion.[150] Where the complaining party can establish that the improper persuasion occurred in the course of a relationship of trust between the dominant and weaker party, or in a context where the weaker party was susceptible to undue influence because of some physical or mental infirmity or age, he is permitted to avoid the contract.[151]

Currently, the doctrine of undue influence serves as an effective tool to shield a minor from overreaching by a more sophisticated party. Where the other party engages in conduct rising to the level of improper persuasion and the resulting contract proves unfair to the minor, the minor is allowed to demonstrate that he was susceptible to over persuasion due to the disparity in bargaining power between the parties.[152] At this point, claims of lack of maturity, experience, and sophistication are evaluated to determine if the minor's lack of knowledge and experience subjected him to the unfettered will of the other party.[153] Moreover, where the improper persuasion was perpetrated by someone in a relationship of trust and confidence, the minor is permitted to avoid the resulting contract.[154] Thus, the goal of protecting

146. Materiality is present when the misrepresentation is likely to induce a reasonable person to enter into the contract, as well as when the speaker knew that the person to whom the misrepresentation was made was likely to enter into the contract based upon such assertions. *See* FARNSWORTH, *supra* note 4, § 4.12.

147. *Id.* § 4.10.

148. *See id.*

149. *Id.* § 4.9.

150. *Id.* § 4.20.

151. *See id.*

152. *See id.*

153. *See id.*

154. *See id.*

unsuspecting minors from the ill effects of overreaching is adequately served by the doctrine of undue influence.

C. *Duress*

The doctrine of duress serves as yet another vehicle to reinforce the basic premise that assent to a contractual undertaking must be freely and voluntarily given. Thus, where a person's ability to exercise free will is compromised by a wrongful act, the resulting transaction is likewise compromised.[155]

Any person coerced into a contract under fear or threat of personal or economic injury may avoid a contract based on duress.[156] In order to be accorded relief based on duress, one must establish that he was justifiably induced to manifest assent to the transaction by an improper threat of infliction of loss or harm[157] and that no other reasonable alternative was available.[158]

Where a minor was coerced into assenting to a transaction under such circumstances, he will not be legally bound to fulfill the contract. Thus, the policy of protecting minors and others from a wrongful act that compromises his free will is adequately served by this doctrine.

D. *Unconscionability*

Even in the absence of false information, improper persuasion, and threats, American contract law has long recognized that a one-sided contract resulting from unfair bargaining should not be enforced. This concept is embedded in the doctrine of unconscionability.[159] The doctrine further recognizes, "if a contract is fair when made, enforcement cannot be unfair."[160]

Here, the concern is allowing a party with superior bargaining power to exploit the lack of sophistication and knowledge of the other party, thereby resulting in a contract with terms extremely advantageous to the exploiting party.[161] The widely-accepted definition of unconscionability has been stated as the "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[162] In making a determination of

155. *See* 7 JOSEPH M. PERILLO, CORBIN ON CONTRACTS: AVOIDANCE AND REFORMATION § 28.2 (rev. ed. 2002).

156. *See* Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Service Co., 584 P.2d 15, 21 (Alaska 1978).

157. *See* FARNSWORTH, *supra* note 4, § 4.16.

158. *See id.* § 4.18.

159. *See* Eisenberg, *supra* note 81, at 212.

160. *Id.* at 257.

161. *See id.* at 256-57.

162. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

unconscionability as a matter of law,[163] a court considers such factors as the inability of the complaining party to discover or comprehend the terms unreasonably favoring the other party and the disparity in maturity, experience, and sophistication between the parties.[164]

In light of the equitable underpinnings of unconscionability, a minor who finds himself in a one-sided contract procured through unfair bargaining can avail himself of the opportunity to avoid the contract. Thus, this modern doctrine seems to address the very concerns behind the ancient doctrine of minority incapacity to contract.[165]

In light of the plethora of tools available to relieve a party from contractual undertakings procured by overreaching, the minority incapacity doctrine can safely be revamped to reflect modern realities without fear of helplessly subjecting minors to the binding effects of unfair commercial practices.

VII. TREATMENT OF MINORITY ISSUES IN OTHER AREAS OF THE LAW

As discussed above, the minority incapacity doctrine generally adheres to the notion that all persons under the age of majority are presumptively incapable of understanding the significance of their legal actions, and that all resulting contracts are either products of their youthful follies or overreaching by the other party. Nevertheless, other areas of American law recognize that minors are capable of understanding and appreciating their legal actions and thus afford minors more autonomy in their affairs. However, even when a minor is deemed competent to make decisions in one area of the law, he may still be deemed incompetent to make decisions regarding his closely connected contractual affairs.[166] As aptly noted by a jurist, "[a] stranger must think it strange that a minor in certain cases may be liable for his torts and responsible for his crimes and yet is not bound by his contracts."[167] Moreover, where these other areas of law draw from or intersect with contract law, it is difficult to reconcile the different treatment of minors arising from the same set of operative facts. To illustrate the confusion, the treatment of minors' capacity in a few areas that cross over into contract law is briefly explained.

---

163. *See* U.C.C. § 2-302 (2003); FARNSWORTH, *supra* note 4, § 4.28.

164. *See* FARNSWORTH, *supra* note 4, § 4.28.

165. *See* Navin, *supra* note 11, at 546-47 (discussing how the age and business experience of a contracting party are taken into consideration in determining whether a person is entitled to relief under the doctrine of unconscionability).

166. *See* Schmidt & Reppucci, *supra* note 96, at 94.

167. Porter v. Wilson, 209 A.2d 730, 731 (N.H. 1965).

A. *Torts*

A minor is generally liable for his torts.[168] Under tort law, adolescents have the requisite capacity to be held liable for intentional torts, as well as negligence.[169] Tort law takes the position that adolescents are presumptively capable of making decisions and appreciating the significance of their actions.[170]

Despite this general presumption of capacity, there are a few situations in which the child's age and experience are examined in order to determine whether the conduct was tortious. When faced with an intentional tort, the court must determine whether the child was of sufficient age, experience, and intelligence to satisfy the required intent level for such torts.[171] Likewise, the particular age and experience of the child is taken into account in determining liability based on negligence.[172] In some jurisdictions, there is a rebuttable presumption that minors below the age of adolescence are incapable of acting negligently.[173] However, evidence that the child is of sufficient intelligence and discretion can generally be offered to rebut such a presumption and establish the requisite capacity.[174] Moreover, the majority of jurisdictions do not have a fixed age below which a child is conclusively presumed incapable of negligence.[175] Instead, it is a question of fact generally reserved for the jury.[176]

The stark difference between the treatment of minors in tort and contract law, when the minor's conduct implicates issues of liability in both tort and contract, presents an interesting juxtaposition. In some states, a minor who has entered into a contract by misrepresenting his age is allowed to disaffirm the contract, but he still may be liable in tort for misrepresentation.[177] However, because of the blanket treatment of minors as incapacitated under contract law, where the minor's failure to

---

168. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 134 (W. Page Keeton ed., 5th ed. 1984). It should be noted that a few states categorically exempt children under the age of seven from liability in tort. *See, e.g.*, DeLuca v. Bowden, 329 N.E.2d 109, 111-12 (Ohio 1975).

169. *See* Hartman, *supra* note 7, at 1304-05.

170. *Id.* at 1304.

171. *See* KEETON ET AL., *supra* note 168, § 134.

172. *Id.*

173. TORT LAW DESK REFERENCE: A FIFTY-STATE COMPENDIUM 2 (Morton F. Daller ed., 2005) (discussing Alabama's law deeming "[c]hildren between the ages of seven and fourteen . . . *prima facie* incapable of negligence," subject to proof to the contrary).

174. *Id.*

175. *See* Quillian v. Mathews, 467 P.2d 111, 113 (Nev. 1970) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 158-59 (3d ed. 1964)).

176. *See e.g.*, *id.*

177. *See, e.g.*, Kiefer v. Fred Howe Motors, Inc., 158 N.W.2d 288, 291-92 (Wis. 1968) (acknowledging that the minor may be liable in tort, but finding that the elements of tortuous misrepresentation was not be established by the evidence).

adhere to the required standard of care under a tort analysis would also create liability for breach of contract, he cannot be held liable in tort because he has the unqualified ability to disaffirm the contract.[178] To hold otherwise would allow the tort theory to circumvent contract law.[179] It should be noted that this has nothing to do with the actual capacity of the minor to understand his rights and obligations. This is purely a result of applying public policy in order to avoid rendering contract law meaningless in this context.

The interplay between these two areas of law creates additional quandaries. While a minor cannot be sued for tortious conduct arising out of a contract,[180] he may be sued for tortious interference with the very contract he is allowed to disaffirm.[181] Likewise, where a minor induces another to contract with by misrepresenting his true age, regardless of whether he is allowed to disaffirm the contract, he may still be liable in tort for deceit.[182]

Presently, no rational basis exists for treating minors differently under these two areas of law, especially when the same conduct can spur different theories of liability but yield different results based purely on long-standing doctrine.

B. *Crimes*

Like the law of torts, it is commonly accepted that a minor above a specified age is capable of committing a crime.[183] Generally, between the ages of seven and fourteen, there is a rebuttable presumption that the minor lacks the requisite capacity to commit certain crimes.[184] In rebutting the presumption of incapacity, it must be shown that the minor understood that his conduct was wrong.[185] Generally, such a determination is made after considering the following factors:

(1) the nature of the crime;
(2) the child's age and maturity;
(3) whether the child showed a desire for secrecy;
(4) whether the child admonished the victim not to tell;

---

178. KEETON ET AL., *supra* note 168, § 134.

179. *See id.*

180. *See* 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, 350 n.364 (2006) (citing Faces, Inc. v. Kennedy, 447 A.2d 592, 594 (N.J. Super. Ct. Law. Div. 1981) (noting that minors are only liable in tort if the tort is not connected to a contract)).

181. *See* Hartman, *supra* note 7, at 1304.

182. *See* KEETON ET AL., *supra* note 168, § 134.

183. *See, e.g.*, State v. J.P.S., 954 P.2d 894, 896 (Wash. 1998).

184. *See, e.g.*, State v. Pittman, 647 S.E.2d 144, 153-54 (S.C. 2007) (quoting State v. Blanden, 180 S.E. 681, 689-90 (S.C. 1935)).

185. *See J.P.S.*, 954 P.2d at 896.

(5) prior conduct similar to that charged;
(6) any consequences that attached to the conduct; and
(7) acknowledgment that the behavior was wrong and could lead to detention.[186]

Beyond fourteen years of age, the presumption is that the minor has the requisite capacity to commit a crime.[187]

Most jurisdictions have altered the common law treatment of minors who commit crimes by statutorily creating a juvenile offense scheme.[188] Nevertheless, such jurisdictions make provisions for trying the minor as an adult when it is deemed appropriate to do so.[189] Where the jurisdiction specifically excludes the minor's conduct from the jurisdiction of the juvenile court and relegates it to criminal court, the minor bears the burden of establishing that transfer to juvenile court is warranted.[190] Otherwise, it is presumed that the criminal court has proper jurisdiction over the minor.[191]

Like tort law, the treatment of minors under criminal law presents a quandary when it intersects with contract law. For example, a minor can be charged and convicted of conspiracy to commit a crime.[192] Conspiracy is defined as an agreement between two or more persons to commit or achieve an objective in and of itself unlawful or by unlawful means.[193] While in contract law the term "agreement" generally means a meeting of the minds or a manifestation of mutual assent,[194] criminal law does not seem to have any recognizable standard for evaluating this term.[195] Thus, a minor finds himself incapable of making a valid and binding agreement for the exchange of goods, services, or money in the contractual setting, yet subject to criminal prosecution for agreeing or conspiring to commit a criminal act.

---

186. *Id.* at 897.

187. *See, e.g.,* State v. Williams, 153 P.3d 520, 522 (Kan. 2007).

188. *See* Cunningham, *supra* note 180, at 311-12.

189. *See, e.g.,* 42 PA. CONS. STAT. ANN. § 6355 (West 2007) (allowing the court to transfer an otherwise proper juvenile proceeding to the criminal court upon finding that, *inter alia*, the child was at least fourteen years old at the time of the conduct, and that the conduct would constitute a felony if committed by an adult); Commonwealth v. Ramos, 920 A.2d 1253 (Pa. Super. Ct. 2007) (applying Pennsylvania's Juvenile Act).

190. *See, e.g.,* 42 PA. CONS. STAT. ANN. § 6322.

191. *See, e.g., Ramos*, 920 A.2d at 1258.

192. *See generally* State v. Monteiro, 924 A.2d 784 (R.I. 2007) (upholding the sentence imposed on defendant, seventeen years old at the time of the acts, following his conviction of first-degree murder and conspiracy to commit murder); *Ramos,* 920 A.2d 1253 (upholding the sentence imposed on defendant for crimes of robbery and conspiracy to commit robbery committed while he was seventeen years old).

193. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 12.2 (4th ed. 2003).

194. *See* BLACK'S LAW DICTIONARY 74 (8th ed. 2004).

195. *See* LAFAVE, *supra* note 193, § 12.2(a).

Another area of conflict between criminal law and contract law concerns plea agreements. Apparently, most jurisdictions recognize the validity and enforceability of plea agreements between juvenile offenders and the government.[196] Although the plea bargain agreement context involves oversight by the court to ensure the minor entered the agreement knowingly and voluntarily, it is worth noting that the process of court oversight of plea agreements is the same for adults and minors.[197]

C. *Medical Treatment*

The legal capacity of minors to give effective consent for medical treatment involves a myriad of considerations, mainly steeped in public policy.[198] What is clear is that the issue does not turn solely on age or perceived maturity. Although the baseline for statutorily dividing minors from adults is generally set at eighteen years of age,[199] a few states permit minors of fifteen years of age to give effective consent for "routine medical care."[200] Nevertheless, the issue is generally determined on a case-by-case basis in light of the nature of the procedure[201] and the actual maturity of the minor.[202]

When legislation sets an arbitrary age for determining a person's capacity to consent to medical treatment, oftentimes provisions will also be made for a minor to be deemed capable of giving such consent without parental involvement.[203] Generally, this exception applies to those classified as adolescents.[204] Statutory exceptions are often made for a minor who is married, has a child, or is pregnant.[205] The exceptions are based purely on social circumstances and do not evaluate whether the minor has the cognitive ability to understand and appreciate the significance of his actions.[206]

---

196. *See, e.g., In re* J.H., No. 04-07-00208-CV, 2007 WL 1481997, at *2 (Tex Crim. App. May 23, 2007); *see also* TEX. FAM. CODE ANN. § 54.03(j) (Vernon 2007).

197. *See, e.g.,* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(2) (Vernon 2007); Perkins v. Ct. of App. for the Third Supreme Judicial Dist. of Tex., 738 S.W.2d 276, 283-84 (Tex. Crim. App. 1987) (en banc).

198. *See* Cunningham, *supra* note 180, at 325.

199. *See* Hartman, *supra* note 26, at 414.

200. *Id.* at 421 (quoting R.I. GEN. LAWS § 23-4.6-1 (2001)).

201. For example, the capacity of minors seeking abortions, birth control, and treatment for sexually transmitted diseases are subjected to different analysis in light of constitutional issues and concerns for public health and welfare. *See* Cunningham, *supra* note 180, at 325-31; Hartman, *supra* note 26, at 416.

202. *See* Cunningham, *supra* note 180, at 325.

203. *See id.* at 324.

204. *See id.* at 325.

205. *See* Hartman, *supra* note 26, at 421.

206. *See, e.g.,* VA. CODE. ANN. § 54.1-2969(E)-(G) (West 2007).

The "mature minors" doctrine provides that minors have the capacity to give effective consent to medical treatment without parental consent where it can be demonstrated that the minor's consent was informed, voluntary, and competent. While the second criterion clearly requires that the consent be free from coercion, both the first and third criteria require demonstration of the minor's ability to understand and appreciate the risks, benefits, and alternatives available.[207] However, the determination of whether a minor should be classified as a mature minor for the purpose of being able to exercise autonomy in health care decisions generally turns on whether the minor demonstrates the capacity for factual understanding as opposed to reasoning.[208] In this regard, the cognitive capacities of minors are assessed in the same light as those of adults in that in spite of the presumed capacity to make rational choices with full knowledge of all relevant information, most adults do not strive to obtain all relevant information concerning their available courses of action. Instead, they are content to make substantive decisions based on less than full information.[209]

In the area of informed consent for medical treatment, studies have revealed that minors of at least fifteen years of age are capable of giving informed consent.[210] Such studies also provide the basis for treating the age category of eleven to fourteen years of age as a transition stage for providing informed consent, such that determinations should be made on a case-by-case basis.[211]

The interesting juxtaposition created between the treatment of minors regarding medical procedures and their treatment under contract law is that minors may be deemed competent to give informed consent for such medical procedures, but the minors will not be bound by any resulting contracts for the performance of such medical procedures. In light of this conflict, some states have drafted yet another statutory exception to the minority incapacity doctrine whereby mature minors deemed capable of giving effective consent for medical treatment are prevented from disaffirming the agreement for such medical treatment based on their minority status.[212]

At least two things can be gleaned from the general approach to minors' capacity to consent to medical treatment. First, it is possible to approach the minority contractual capacity issue on an individualized basis for the purpose of determining whether the minor truly lacked such capacity. Second, the law is not always concerned with whether the minor truly understands the nature of his actions when creating categorical exemptions based on social circumstances. Since true capacity is not the sole concern in consent to medical treatment, likewise we should not allow

207. Schmidt & Reppucci, *supra* note 96, at 95.

208. *Id.* at 96.

209. Eisenberg, *supra* note 81, at 213; *see supra* Part III.A (discussing cognitive decision making).

210. Schmidt & Reppucci, *supra* note 96, at 96.

211. *Id.*

212. *See* Hartman, *supra* note 26, at 419.

unfounded concerns of lack of capacity in a commercial setting to hamstring the advancement of electronic commerce purely based on outdated perceptions.

VIII. PROPOSAL FOR CHANGE IN MINORITY INCAPACITY DOCTRINE

On the issue of capacity, it is telling that the other areas of law discussed above do not have conclusive presumptions of incapacity based solely on one's status as a minor. Instead, those areas of law distinguish between young children and adolescents and operate under a system of rebuttable presumptions of capacity, while allowing inquiry into whether the minor truly understood the nature and consequences of his actions. Such an approach would seem to serve contract law as well.

First, contract law should shed the ancient classification that treats all minors as infants. As demonstrated by other areas of the law, the cognitive development of adolescents warrants their treatment as a group separate from other minors with substantially more autonomy in their legal affairs. Moreover, adolescents should be regarded as presumptively capable of contracting in the same way as adults. In the event that an adolescent claims inability to appreciate the significance of his legal actions, that minor should bear the burden of establishing that incapacity. As one scholar observed,

> A clear, straightforward rule recognizing adolescent decisional ability to contract would be commensurate with the diligence, efficiency, and economic hallmarks of contract law and, perhaps more potently, cultivate its mainstream moral component—that promises ought to be kept. Promotion of this moral component shapes a sense of responsibility and accountability of the emerging adult within the adolescent, whose temptation to renege unjustly on a promise may be quelled.[213]

In addition, a presumption of incapacity to contract seems appropriate for minors not yet classified as adolescents. For this age group, an adult seeking to establish that the minor did have the requisite capacity to contract would have the burden of establishing such capacity. It may be appropriate to establish a minimum age for application of this rebuttable presumption of incapacity, below which applies an irrebuttable presumption of incapacity. After all, there is something unsettling about the thought of having to subject a three-year-old to a competency hearing to determine if he truly understood the probable consequences of engaging in the objective manifestation of assent resulting in the purchase of an automobile on Ebay.[214]

---

213. Hartman, *supra* note 7, at 1304.

214. *See 3-year-old Buys $16,000 Car Online*, ST. LOUIS POST-DISPATCH, Sept. 27, 2006, at A9.

Previously, it was thought difficult, if not impossible, to evaluate the actual capacity of minors to engage in cognitive and reasoning functions to adequately protect their interests.[215] Thus, the law seemed to err on the side of caution in adopting and adhering to the conclusive presumption that minors lack capacity to contract. However, modern research demonstrates that social science disproves this fallacy, providing a plethora of information to demonstrate that adolescents do possess the cognitive functions allowing them to exercise autonomy over their legal affairs. Moreover, since an individualized approach is used in tort law, criminal law, and medical treatment decisions, it can certainly be done in contract law.[216] Accordingly, it is befitting that the minority incapacity doctrine undergo a transformation to recognize the importance of the contributions of social science and simultaneously provide merchants more freedom to engage in electronic transactions without concerns that sophisticated minors will wreak havoc on their business operations under the protection of the minority incapacity doctrine.

IX. CONCLUSION

It has been suggested that the concept of incapacity be reserved for situations involving actual imposition upon vulnerable and susceptible persons.[217] In light of the sophistication of today's adolescent minors and the other readily available avoidance doctrines, such a reservation is long overdue.

Minors attaining adolescence have established a strong presence in the consumer pool, particularly in cyberspace. The sophistication demonstrated by this group in maneuvering through cyberspace is likely unmatched by few, if any, other segments of the population. Moreover, the demonstrated cognitive maturity of adolescents establishes the capacity to understand and appreciate the significance of their contractual undertakings. It is time to modernize the minority incapacity doctrine to reflect the realities of today.

Some time ago, the perception that minors should be accorded absolute immunity from the consequences of their acts in the contractual realm was softened. Thus, we advanced from the day of treating such a contract as absolutely void to the present time when some of these contracts will be enforced.[218] However, it is time to move even further toward implementation of a system that recognizes the cognitive development of minors, encourages them to take responsibility for their acts, and clears the way for merchants to open up the world of electronic commerce to society without the constraints imposed by the minority incapacity doctrine. If electronic

---

215. *See* Edge, *supra* note 4, at 223.

216. *See* DiMatteo, *supra* note 14, at 508 (noting that the case-by-case approach is already used to determine actual capacity for mentally ill and intoxicated persons).

217. Navin, *supra* note 11, at 518.

218. *See* DiMatteo, *supra* note 14, at 486.

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